S. HRG. 110–640

CONFIRMATION HEARING ON THE NOMINATION OF MARK R. FILIP TO BE DEPUTY ATTORNEY GENERAL

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

DECEMBER 19, 2007

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WEDNESDAY, DECEMBER 19, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, Pursuant to notice, at 10:11 a.m., in room 226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Kennedy, Durbin, Cardin, Whitehouse, Specter, Hatch, and Sessions.

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

Chairman LEAHY. Good morning, and I appreciate everybody being here. I am sorry to say I am a little bit late, and it is my fault. Everybody else, Senator Kennedy, Senator Cardin, Senator Specter, and Senator Hatch, were already here. We were running a tad late last night, but I apologize to you. But we also had a chance, several of us, to meet the judge and his wonderful family.

The reason this position is so important and I wanted to be here is that in the absence of the Attorney General, of course, as we all know, the Deputy acts as the Attorney General, and we have to restore the Department's independence and credibility that has been deterred by some in the administration, unfortunately.

The administration has known since at least May 14 of this year, when Mr. McNulty announced that he was resigning, and should have known for weeks before, that there was going to be a vacancy in the position we are going to fill.

I welcome Senator Whitehouse here, too.

But even after the former Deputy announced his resignation and resigned months later, I had hoped that the administration would work with the Senate to fill this position. They did not.

Now, Paul McNulty was one of many high-ranking Department officials, along with former Attorney General Gonzales, who resigned during the Committee's investigation into the firing of well-performing United States Attorneys who were fired for apparently partisan and political reasons. Those firings and our investigation point to political operatives from the White House interfering with and corrupting the Department's law enforcement functions for partisan and political purposes. So the nomination of Judge Filip comes during a crisis of leadership that has done more than take

a heavy toll on the Department's morale and tradition of independence—a morale and tradition of independence, I might say, that has always in my experience existed with both Republican and Democratic administrations. But because of what happened, it has shaken the confidence of the American people and the Congress that the Department will uphold the bedrock principle—deeply embedded in our laws and our values—that no one, not even the President, is above the law.

I announced that we would hold this hearing today, before Congress adjourns for the year immediately upon receiving this nomination from the White House and the necessary background materials and would move as expeditiously as possible. We will want to know whether this appointment will help restore the independence of the Department of Justice and strengthen the rule of law.

Before we came in here, when I was a young law student I was recruited by a former Attorney General who told me how the Criminal Division and the various Divisions are kept free of any interference from the White House, and he would not allow any interference from the White House. And I fully believed him. I wanted to go back home to Vermont to practice, so I declined the invitation from then-Attorney General Robert Kennedy.

But every time we seem to reach a new low in this administration's flaunting of the rule of law and constitutional limits on executive power, we learn some startling new revelations about the extent to which some will go to avoid accountability and undermine oversight and stonewall the truth.

Two weeks ago, we learned that the CIA destroyed videotapes of detainee interrogations. Just this morning, in a regrettably familiar pattern, we learned that the involvement of senior administration officials seems to have been much more significant than it appeared from their initial denials. The revelations are leading to additional investigations by Congress and the courts and have raised questions by both Republicans and Democrats in the House and the Senate.

Now, as the Ranking Member of this Committee from 2001 through 2006, I was not informed of the existence of the videotapes or of their destruction. I do not believe the Republican Chairmen at that time were either. I have repeatedly sought information about the administration's interrogations of detainees, including during the consideration of the Mukasey nomination to be Attorney General and in my October 25, 2007, letter to the White House counsel. And, without objection, those will be made part of the record.

Early last week I sent a bipartisan letter with Senator Specter to the Attorney General seeking information about the involvement of the Department of Justice with those matters before the public revelation of the tapes' destruction and how the Attorney General intended to determine whether to appoint a special counsel to conduct the investigation and potential prosecutions for obstruction of justice and obstruction of Congress. Regrettably, the reply we received evidences none of the commitment to work with this Committee that we heard during the Attorney General's recent confirmation hearing. The response actually showed no appreciation

for the oversight role of the Congress, and, without objection, those letters will be made part of the record.

Since then I have seen that the Department has also demanded that the Intelligence Committees of the Congress cease their independent investigations announced by Democrats and Republicans and that the courts not proceed to determine whether this administration has violated court orders or been less than candid in court proceedings. They told the courts, don't inquire about this, told the Congress not to inquire about this. Well, that does not restore the Department's credibility. It appears to be an effort to prevent accountability and undermine checks and balances.

U.S. District Judge Henry Kennedy yesterday rejected the administration's demands, ordering the administration to appear in court this week to determine whether it violated a court order, the 2005 order that it was to preserve all evidence.

Now, Senator Specter and I are former prosecutors. There are other former prosecutors on this Committee in both parties. We were not asking the Attorney General to prejudice a criminal investigation. We were not asking to intervene in it. Rather, we and this Committee have constitutional responsibilities we need to fulfill. I think those duties are entitled to respect, as well.

My fear is that the pattern of unaccountability and excuse will continue. The administration has shown a proclivity to paper over misconduct with legal opinions from the Department of Justice. We know about the infamous withdrawn Bybee memo on torture. It turned out to be wrong.

In the words of Jack Goldsmith, a former head of the Office of Legal Counsel, who discovered this legal mess of extreme opinion, they have an "unusual lack of care and sobriety in their legal analysis," they rest on "cursory and one-sided legal arguments that failed to consider Congress' competing wartime constitutional authorities, or the many Supreme Court decisions potentially in tension," and "could be interpreted as if they were designed to confer immunity for bad acts." That was from a conservative Republican.

As we recently learned not from the administration but from the New York Times, where we get most of our information when the—fortunately, there are some in the administration who continue to leak to the press and give them the information the administration will not give to the proper committees in Congress.

The Department of Justice, soon after the last Attorney General—not the current one but the former one—took over, the Department of Justice secretly endorsed and reinstated combinations of the harshest interrogation tactics as legal. They apparently gave legal approval to brutal interrogation techniques, including waterboarding. Former Deputy Attorney General James Comey predicted that the Department would end up being "ashamed" of such actions when the public learned of them. Boy, was he right.

Now, whether Judge Mark Filip will follow the example of integrity and independence of others like Elliot Richardson and William Ruckelshaus, who resigned or were fired rather than interfere with the investigation of wrongdoing of the Nixon administration, is a critical question. Law enforcement officials have to enforce the law without fear or favor from whoever is in the White House, whether it is a Democratic President or a Republican President. And we

have been reminded all too recently by the Gonzales Justice Department what happens when the rule of law plays second fiddle to a President's policy agenda or the partisan desires of political operatives.

I want to be confident that this Deputy Attorney General will be independent in enforcing the rule of law on crucial issues like the destruction of the CIA tapes and the legal cover given to torture. A newly independent Justice Department has to reexamine these issues. I want to be assured that he does not envision a system where a President's overbroad and invalid claims of executive privilege cannot be tested in a court of law.

I hope that he reassures us he understands that the duty of the Deputy Attorney General is to uphold the Constitution and the rule of law—not to work to circumvent it. Both the President and our great Nation are best served by a Justice Department that provides sound advice and takes responsible action, without regard to political considerations—not one that develops legalistic loopholes to serve the ends of a particular administration.

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

I yield to the distinguished Ranking Member, and then we will hear from Congressman Kirk, who is from the judge's congressional district.

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

Senator SPECTER. There is no doubt that the Department of Justice is an agency of great importance to the United States, second only to the Department of Defense. And there is no doubt that there is an urgent need to have that office reorganized from what has been the practice for the past several years.

I am pleased to see the President submit the name of Judge Mark Filip to this Committee. He comes to this Committee with an extraordinary record: magna cum laude—summa cum laude from the University of Illinois; Phi Beta Kappa; Harvard Law School magna cum laude; Harvard Law Review, and Oxford scholar. So there is no doubt with that academic background and his professional qualities including a long stint as an Assistant U.S. Attorney, he is very well qualified.

The focus of my inquiries will be on Judge Filip's recognition of the role of Congress on oversight and his commitment to follow the rules and permit Congress to exercise its constitutional authority.

The backbone of this country is separation of powers, and, regrettably, Congress has not been effective in oversight because of the response of the executive branch. The Terrorist Surveillance Program was in existence for 5 years before the disclosure was made—not by the Department but by the New York Times.

And notwithstanding very strenuous efforts to find out about that program, it took months to find anything with the administration flatly violating the law in failing to inform the Intelligence Committees, as they were obligated to do, about the existence of the program, and in failing to follow the time-honored practice of notifying the Chairmen and Ranking Members of the Judiciary Committees.

Finally, the Intelligence Committees were told about it. We still are not sure they were told all about it. We are still not sure that the Chairman and Ranking Member of Judiciary have been told all about it. But they were told only in the face of the confirmation of General Hayden to be CIA Director, and it was only under that pressure that they made the disclosure.

And then we have the Executive expansion on so-called signing statements, where the Executive cherry picks the provisions of law that they will agree to follow. The Constitution is explicit. Congress submits legislation to the President, and he signs it or vetoes it. But we have had a practice now of signing statements on cherry picking and in a context of very specific negotiations where this Committee, in passing the PATRIOT Act giving the executive branch extensive new authority did so because of the need to fight terrorism.

And there is agreement that additional powers are needed by the executive branch under the PATRIOT Act and on the issue of electronic surveillance and legislation now pending before the Congress. But when we negotiate specific oversight, then the President says he may not have to follow that because of his Article II powers.

On the celebrated negotiations between the President and Senator McCain on the torture issue, the Senate voted 90–9. Again, when the signing statement comes, the President has some limitations. There may be Article II powers, he says, where he will not have to follow that.

And then we have had the—only the courts really have been able to exercise oversight. The Congress has not done it on detention and Guantanamo, and only the Supreme Court in the Rasul case has limited the executive sweep of power. And those issues are now pending before the Supreme Court of the United States again. And the President follows the mandates of the Supreme Court. There is really no other choice. But the executive branch has not followed the law on the express statutory provisions that I have referred to.

And we are now locked again in a very tough battle on the revision of the Foreign Intelligence Surveillance Act with what the telephone companies are doing. And Congress has been asked to grant retroactive immunity to the telephone companies in a context where we have never been sure exactly what we are being asked to grant immunity from. And I believe the telephone companies have been good citizens, and I do not believe they ought to be on the spot.

But there is litigation pending in the courts, and the only effective oversight has been provided by the courts. And that is why I am unwilling to give my vote for retroactive immunity, but have suggested an alternative of having the Government substituted as a party defendant with the same defenses that the telephone companies would have.

I have talked to Judge Filip earlier. I appreciated his coming by for a courtesy call, and I have written to him, as I write to every nominee for the Attorney General's job or the Deputy or subordinate but ranking officials. And these are the issues which I consider most important in this hearing. And I have made them explicit to Judge Filip so he knows what my focus of interest will be.

But the law on the subject has been summarized by CRS, and it is as follows: A review of congressional investigations that have implicated Department of Justice investigations over the past 70 years demonstrates that the Department has been consistently obliged to submit to congressional oversight regardless of whether litigation is pending so that Congress is able to pursue its investigations. And that includes testimony of subordinate Department of Justice employees such as line attorneys and FBI field agents. Investigating committees have been provided with documents respecting open or closed cases.

Now, Chairman Leahy has just referred to the efforts which we are making to try to find out about the CIA tapes, and in a rather peremptory manner, we have been advised by the Attorney General that we are not going to have an opportunity to do that, as he puts it, at least at this time.

But the law is plain that Congress has preeminence and precedent over the Department of Justice on these investigations because the Congress is legislating for all matters, whereas the Department is dealing with criminal prosecutions in a specific matter. And the cases are overwhelming on it, running from the Palmer Raids to Teapot Dome, to the white-collar crimes in the oil industry, to Iran-contra, Rocky Flats, Ruby Ridge, the campaign finance investigations, the U.S. Attorney removals, and border guard prosecutions, just to mention a few.

In discussing this with the Attorney General, it is my hope we will find an accommodation. Congress does have preeminence, but if there is some sensitive matter, some witness who ought not to be called in an open hearing, we can accommodate to that. This Committee is filled with former—

Chairman LEAHY. And we have.

Senator SPECTER. And we have. This Committee is filled with former prosecutors who have some knowledge of the issues. And when we are told, well, Congress fouled up Iran-contra with Colonel North and Admiral Poindexter, when you get involved in immunity, it is a very touchy subject.

And sometimes U.S. Attorneys make mistakes on the grant of immunity, and that was a mistake. But it was much more important to expose what went on in Iran-contra and the violation of congressional law and the Boland amendment than it was on those prosecutions, important as they were.

So I think it is really vital that this Committee and the Intelligence Committees keep pushing hard on congressional oversight, and I want to have flat assurances from Judge Filip that he understands what the law is and he will follow it.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you very much.

I understand Senator Cardin wanted to make a unanimous consent request.

Senator CARDIN. Thank you very much, Mr. Chairman. I would ask unanimous consent that a letter I received from Loren Taylor, who is the President and CEO of the University of Illinois Alumni Association, be made part of our record. I have known Loren Taylor for many years. I respect greatly his views and judgments. And it is a strong letter in support of Judge Filip, pointing out that he is

masterful in building consensus and can be counted on to represent the association in a skillful, informed manner, which are certainly skills that are important for the Deputy Attorney General.

I also should point out that his father-in-law is the Majority Leader of the House of Representatives, Congressman Steny Hoyer.

I would ask unanimous consent that this be made part of the record.

Chairman LEAHY. I have a feeling that the judge would not in any way object to that being part of the record, and it will be part of the record.

We also have Congressman Mark Kirk who is here. He has waited patiently, and if he has had the same lack of sleep this week as we have on this side—and, Congressman, I appreciate your coming over. It is very kind of you to take the time. We will put your full statement in the record, but please go ahead and say whatever you would like.

PRESENTATION OF MARK R. FILIP, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, BY HON. MARK STEVEN KIRK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Representative KIRK. Thank you very much, Mr. Chairman. I want to give a word of thanks to your staff, Luke Albee, who was a classmate when I came to Washington.

Judge Filip comes from my congressional district, also represented by Judge Mikva before me, and I am very happy to be here because he represents the tradition, unfortunately well needed in my city, of fighting public corruption. We are not only home to Al Capone, but also Elliot Ness, Patrick Fitzgerald now, and Judge Filip fits in that tradition of service in my community.

I am also happy that Beth is here, his wife, with Matthew, Charlie, Tommy, and Joe. We are complying with the attendance laws of Illinois because their principal from Greeley School is also here in the audience.

[Laughter.]

Representative KIRK. I will note the Senate confirmed Judge Filip 96–0 on February 4, 2004, and it reflected his strong record as Phi Beta Kappa from the U of I, a Marshall scholar at Oxford, a magna cum laude graduate of the Harvard Law School, a clerk of the U.S. Court of Appeals for the D.C. Circuit and for Justice Scalia.

It is because of his work against public corruption that we know him best. Mark worked as Assistant U.S. Attorney in Chicago prosecuting a group of corrupt Chicago police officers on charges of racketeering, bribery, narcotics trafficking, and extortion. He received the Justice Department's Director's Award for superior performance on this work.

He also prosecuted a number of public corruption cases involving the appeal of a bribery case involving a Cook County criminal judge, involved with the El Rukn street gang, and a racketeering case involving corrupt Illinois Department of Transportation employees, and a corruption case involving several State and local officials. Judge Filip also participated in a major and complex heroin-

trafficking case across the United States, Thailand, Nigeria, and the United Kingdom.

He has performed a number of good works on the pro bono side, including work for communities who are seeking to notify people of convicted sex offenders within their boundaries, known as Megan's law, and is on the Board of Advisers for Catholic Charities of Chicago and is very active in his home parish in Winnetka.

His nomination gives us great pride here. I note that Senator Durbin could not be here at the beginning of the hearing, but we all support him very greatly. He is one of our stars, especially on the public corruption side, and I wholeheartedly endorse him. And thank you for the opportunity, Mr. Chairman, of introducing him to you today.

[The prepared statement of Representative Kirk appears as a submission for the record.]

Chairman LEAHY. Congressman, thank you very much.

I also will tell Luke Albee, who is, of course, a dear friend, and thank you for coming by, and have a good Christmas. Enjoy your break.

Judge, would you, while you are still standing, do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge FILIP. I do.

Chairman LEAHY. Thank you.

Judge, before you begin any opening statement, would you introduce for the record your family and anybody else you wish to here, because someday when somebody digs out the Filip archives, it will be nice that they can see their names there. We will also make sure with the recorder that the names are all spelled correctly. But would you do that, please?

Judge FILIP. Thank you very much, sir. I would be very proud to.

My wife, Beth, is sitting right there. I had the great fortune to meet my wife when she was very young and much too young to realize that she could do infinitely better in life than me. And so I did not give her a chance to figure things out better than that. She has been my partner in life for many years, and I couldn't ask for a better spouse. She has made enormous sacrifices on my behalf, and I probably shouldn't go any further because, like a lot of Italian-American men, I will just get emotional. So I am very, very grateful to have her as a partner.

Chairman LEAHY. We Italian-American men know what that is like.

[Laughter.]

Judge FILIP. So I am very, very fortunate to have her as a spouse and as a partner in life.

To my left here, four sons: Tommy Filip, who is age 7; Charlie Filip, who is age 9; Joe Filip, who is age 5, and coloring actively; and Matthew Filip, who is age 11. They are great kids, and Beth and I are very, very proud of them.

My in-laws, Terry and Carol Moritz, are here from Illinois, and I am very grateful they have put up with me for over 20 years, and they are wonderful grandparents.

My Mom and Dad couldn't be here, but they are back home in Chicago listening, and I would like to say hello to them.

Then also I am very flattered and very honored to have a tremendous number of friends and neighbors here, mostly from Illinois. I think their kids pushed them to come because they wanted to roll it into an extended vacation before Christmas. But the principal of the school is here, Susan Hugebeck. So there has got to be some legitimacy to them being here, and I am very, very honored and very flattered that they would come. And thank you very much for giving me the chance to introduce them.

Chairman LEAHY. Well, thank you. Thank you very much, and I had the privilege of meeting your wife and your four children before. You have a wonderful family. And so please go ahead with your opening statement.

STATEMENT OF MARK R. FILIP, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Judge FILIP. Thank you very much, sir.

Mr. Chairman, it is a privilege to be here this morning to be considered for the position of Deputy Attorney General, and I want to thank you and Ranking Member Specter and the other members of the Committee, including Senator Durbin from my home State of Illinois for the many courtesies that you have all extended to me and my family in this past series of weeks leading up to this hearing.

I would also like to thank the members for the opportunity to meet with some of you privately in advance of this hearing. It was enormously helpful to me to hear about some of the concerns of the Committee members and also to begin what I hope will be a constructive and cooperative dialog about many issues that face our Nation that I know we all care about a great deal, and a constructive dialog that I would endeavor mightily to maintain and foster if I were fortunate enough to be confirmed.

I would also like to express my gratitude to Representative Kirk for coming here today and also to Chairman Leahy and everyone on the Committee for having this hearing so quickly after my papers arrived here. I appreciate that it is an enormously busy time of the year, not just for everyone but also for you, and that people have been here very late at night and your staffs have been here very late at night. And I am very grateful for you all to be here today and to show me that courtesy of having this hearing so quickly.

I would like to express my gratitude to the President and to Attorney General Mukasey for the opportunity they have given me to be considered for this position. I became a lawyer in Chicago because I hoped to join the Department of Justice and to join people who were prosecuting the Graylord corruption cases, which were a series of cases in Chicago directed at corruption in the State courts there. And I had the fortune of being able to join that office. Actually, the first case I worked on was the last case that came out of the so-called Graylord grand juries. And so to be here today to be considered for the position of Deputy Attorney General is truly humbling for me.

Since I was nominated, I have been asked on occasion why I would consider coming to the District of Columbia and leaving our home in Chicago, a place I love very much. And it is a fair question. I enjoy being a district judge very much in Chicago. I have wonderful colleagues there. It is a place I consider home. My wife and I have lifelong friends there, and it is where my parents live and my in-laws live, and it is a place my whole family considers home, and we have wonderful neighbors there. And the simple reason as to why I would consider coming here and asking my family to join me here is because of the regard and respect I have for the Justice Department.

I was raised as a lawyer in the Justice Department. I worked there during summers in law school. First, I had the great fortune to be at the U.S. Attorney's Office in Chicago. I then spent part of another summer in the Public Integrity Section of the Criminal Division at Main Justice. After graduating, I returned to work in the Solicitor General's office at Main Justice.

And then after I finished clerking, I was fortunate enough, a hiring freeze lifted, and I was quickly able to go to the Chicago office of the United States Attorney's Office where I was able to join many of the people who I had read about growing up and to learn from them, I believe, the finest traditions of the Department—traditions about independence and following the facts where they lead without regard to what that means, and traditions that have been established and maintained by all sorts of people, legal luminaries, people like Attorney General Robert Jackson and Attorney General Edward Levi, another person from my home city; Attorney General Robert Kennedy; but also traditions that have been established and maintained by really countless career people there who work very, very hard and make great sacrifices to try to make our country a better place; and traditions that are established and maintained by many, many brave men and women who serve as Federal law enforcement agents and who often make great sacrifices to try to make our country a better place that we can all be proud to be a part of.

So if I get a chance to serve, I would hope to serve consistent with those traditions because that is really the only reason why I am here.

I would like to thank you again for the opportunity to have this hearing and to do it at a very busy time of year. I am very grateful for that, and I hope to work with this Committee if I am fortunate enough to be confirmed, and I very much look forward to answering any questions you may have.

[The biographical information of Judge Filip follows:]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name**: Full name (include any former names used).

   Mark Robert Filip.

2. **Position**: State the position for which you have been nominated.

   Deputy Attorney General, U.S. Department of Justice.

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   United States District Court for the Northern District of Illinois
   219 S. Dearborn, 19th Floor, Chicago, Illinois 60604.

4. **Birthplace**: State year and place of birth.

   1966; Chicago, Illinois.

5. **Marital Status**: (include name of spouse, and name of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Bethann Frances Moritz Filip (nee Moritz). My wife is not employed outside the home. We have four dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Harvard Law School, Cambridge, MA (September 1990 to June 1992), J.D., *magna cum laude*, June 1992.

   University of Oxford, Christ Church College, Oxford, England (September 1988 to June 1990), Honors B.A. in Law, First Class Honors, June 1990.

   University of Illinois, Urbana-Champaign, IL (August 1984 to June 1988), B.A. in Economics and B.A. in History, *summa cum laude*, June 1988.

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Employment (all dates approximate):

United States District Court for the Northern District of Illinois
219 S. Dearborn, 19th Floor
Chicago, Illinois 60604
United States District Judge, March 2004 to the present.

University of Chicago Law School
1111 E. 60th Street
Chicago, Illinois 60657
Lecturer in Law, March 1999 to present.

Skadden Arps Slate Meagher and Flom (Illinois)
333 W. Wacker Drive, Suite 2100
Chicago, Illinois 60606
Partner, April 2001 to March 2004.
Counsel, May 2000 to March 2001.
Associate, September 1999 to May 2000.

United States Attorney's Office
219 S. Dearborn, 5th Floor
Chicago, Illinois 60604
Assistant United States Attorney,
Criminal Division, February 1995 to August 1999.

Northwestern University School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
Adjunct Professor, 1998-99.

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
Litigation Associate, August 1994 to February 1995.

Chambers of Hon. Antonin Scalia
United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543
Judicial Law Clerk, August 1993 to July 1994.

Chambers of Hon. Stephen F. Williams
United States Court of Appeals, D.C. Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Judicial Law Clerk, August 1992 to August 1993.

Sidley & Austin
10 S. Dearborn
Chicago, Illinois 60603
Returning Summer Associate, August 1992.

United States Department of Justice
Office of the Solicitor General
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Intern, June 1992 to August 1992.

United States Department of Justice
Criminal Division, Public Integrity Unit
1400 New York Avenue, N.W. (Bond Building)
Washington, D.C. 20005
Summer Intern, July 1991 to August 1991.

Wachtell Lipton Rosen & Katz
51 W. 52nd Street
New York, New York 10019
Summer Associate, June 1991 to July 1991.

United States Attorney's Office
219 S. Dearborn
Chicago, Illinois 60604
Summer Intern, June 1990 to August 1990.

Professor Charles Fried
Harvard Law School
Cambridge, Massachusetts 02138
Research Assistant, Fall 1990 to Spring 1992.

Sidley & Austin
10 S. Dearborn
Chicago, Illinois 60603
Summer Associate, June 1989 to September 1989.

Michael J. Curry Internship Program
Office of Governor James R. Thompson
100 W. Randolph
Chicago, Illinois 60601
Summer Intern (Curry Program), June 1988 to August 1988.

Non-Paid Organizations/Positions

University of Illinois Alumni Association
University of Illinois – Alice Campbell Alumni Center
Urbana, IL 61801

During virtually all of the last ten years, I have been active as a member of the University of Illinois Alumni Association. I served as a board member of the University of Illinois Urbana-Champaign Alumni Council starting in 1996, and served as chair of that group from 2000-2002. I have also served, starting in 2000, as a board member of the University of Illinois Alumni Association, and have served as a member of various committees of the Board. The University of Illinois Alumni Association is a group that attempts, on behalf of the 550,000 alumni of the University of Illinois, to work with the University Administration to promote the welfare and future of the University.

Marshall Scholarship Selection Committee
Midwest Region, Chicago, Illinois

Since 2001, I have served as a member of the Marshall Scholarship Selection Committee, which evaluates applicants from the Midwestern part of the United States.

Catholic Charities of the Archdiocese of Chicago
Chicago, Illinois

Since 2006, I have served as one of several hundred members of the Board of Advisors to the Catholic Charities of the Archdiocese of Chicago, which is an organization that has been providing charitable assistance to the needy in and around Chicago, without regard to religion, race, or ethnicity, since 1917. Catholic Charities of the Archdiocese of Chicago is, as I understand it, the largest private charitable social service organization in the Midwest, and each year it provides assistance to some 875,000 needy people in and around Northern Illinois. Since joining in 2006, I have been a member of the advisory committee looking in particular at the social service needs of the elderly.

Harvard Law Society of Illinois

In 1996, I was asked to join the board of the Harvard Law Society, which is the local chapter of the Harvard Law School alumni group. I served as president of the Society in 2000-01, and previously served as vice-president (1999-2000) and secretary (1998-99).

Office of the Middlesex County, Massachusetts, District Attorney
Cambridge, Massachusetts 02141

During my final year of law school (1991-92), I worked without pay and for academic credit at the Office of the Middlesex County, Massachusetts, District Attorney. I worked as a "student district attorney" helping to prosecute and process small criminal cases.

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

I have never served in the military.

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

Post-Graduate Scholarship: George C. Marshall Scholarship, United Kingdom Marshall Aid Commemoration Trust (for post-graduate studies after college)

College Scholarships: I received various scholarships and fellowships in college, including: a National Merit Scholarship (paid for by Jewel Food Corporation); academic and amateur athletic scholarship, University of Illinois, Avery Brundage Scholarship & Trust; Phi Beta Kappa Outstanding Student Fellowship; and the Class of 1941 Scholarship (awarded to two juniors at the University of Illinois at Champaign). I was also named to Bronze Tablet, the University of Illinois's highest academic honor, and was a member of various other honorary societies (*e.g.*, Phi Beta Kappa).

Harvard Law School: At Harvard, I received a Joseph A. Sears prize after finishing the 1990-91 academic year as one of the two students with the highest grade point averages. I also was named to the *Harvard Law Review* for 1991-92, and served as one of its editors.

U.S. Attorney's Office in Chicago: I received various commendations from various law enforcement authorities while serving as an Assistant United States Attorney. These included the U.S. Department of Justice's "Director's Award" for superior performance as an Assistant United States Attorney. I also received the Chicagoland Chamber of Commerce's 1999 Excellence in Law Enforcement Award, along with fellow prosecutors

and law enforcement officers, in connection with the *United States v. Edward Jackson, et al.*, prosecution discussed in response to Question 16, *infra*.

United States District Judge: In a 2005 survey of some 1,000 attorneys who actively practice in the federal courts in Chicago—as conducted by the Chicago Council of Lawyers, a non-partisan public interest bar association dedicated to the improvement of the bench and bar—I tied for first, among some twenty judges, in response to the question of whether the individual was a good district judge. Based on the Council's investigations and interviews with those practicing attorneys, I also was noted for being "impartial" and "open-minded."

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

Federal Advisory Committee on Civil Rules, as convened by the United States Judicial Conference: member since September 2007.

Member, Planning Committee of the Seventh Circuit Bar Association for the 2008 Annual Meeting in Chicago: Since September 2007, I have been one of several members of the Seventh Circuit Bar Association's Planning Committee for the Association's 2008 Annual Meeting in Chicago. I was appointed to the Committee by Chief Judge Frank Easterbrook of the Seventh Circuit, along with other judicial colleagues from various federal courts within the Seventh Circuit. Several practicing attorneys also are on the committee. The Annual Meeting each year hosts various academic, judicial, and professional leaders, who discuss various issues, often in a panel format. There also typically is a keynote address by Associate Justice John Paul Stevens, who is the Circuit Justice for the Seventh Circuit.

Magistrate Judge Selection Committee, Northern District of Illinois: Each district judge in the Northern District of Illinois is a member of the Magistrate Judge Selection Committee. I have been a member of this group, which meets when there is a vacancy, since March 2004.

Rules Committee, Northern District of Illinois: Since approximately the Summer of 2006, I have been a member of the Rules Committee of the United States District Court for the Northern District of Illinois. There are approximately eight members—various district judges and magistrate judges. The Committee makes recommendations to the judges of the Northern District of Illinois concerning any possible amendments or revisions to the local rules or internal operating procedures of the Northern District of Illinois, in consultation with members of the local bar.

Harvard Law Society of Illinois: As discussed above in response to Question 7.

Chicago Inn of Court: member, approximately 1997 to present (professional bar society in Chicago, comprised of several hundred practicing attorneys and state and federal judges). The Chicago Inn of Court is a group dedicated to promoting civility, ongoing legal education, and dialogue between the bench and bar.

White Collar Criminal Law Committee, ABA: I served, along with one of my former colleagues from the United States Attorney's Office who is now in private practice, as one of the midwest co-chairs of this committee in 2003-04. (*See also* response to Question 13.d, discussing appearance on ABA-sponsored panel on criminal law developments.)

Harvard Law School Chapter, Federalist Society: While in law school, I was a member of the Harvard Chapter of the Federalist Society, and served as one of the chapter's vice-presidents my final year (1991-92).

11. **Bar and Court Admission**:

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

Bar Member, State of Illinois — February 1995 to present.

Bar Member, State of Pennsylvania — May 1993 to present. Voluntary inactive status, June 1993 to present (never practiced there; never subject to any allegation of misconduct or impropriety there).

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

United States District Court, Northern District of Illinois, General & Trial Bars — February 2000 to present.

United States Court of Appeals, Seventh Circuit — December 1995 to present.

United States Court of Appeals, Eleventh Circuit — February 2001 to present.

12. **Memberships**

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 and 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Please provide dates of

membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Saints Faith Hope and Charity Roman Catholic Church: My family and I are parishioners at Saints Faith Hope and Charity Roman Catholic Church in Illinois, and have been since approximately 1998. We also have variously been involved over the years in charitable activities that the church sponsors, such as food drives, clothing drives, tuition fundraisers, etc., for sister parishes and food pantries in other parts of the Chicago Archdiocese.

Economics Club of Chicago (civic group): I was one of several hundred, if not thousands, of members of the Economics Club of Chicago from 2000 to 2004. It is a non-partisan group that brings speakers to Chicago to discuss current events and economic matters. The group has hosted, for example, Omar Bradley, Joseph Califano, Bill Gates, Newt Gingrich, Katharine Graham, Alan Greenspan, Vernon Jordan, John F. Kennedy, and Ronald Reagan, among many others, during its eighty year history.

To the extent any of the activities listed in response to Question 9 are covered here, as opposed to simply items listed in response to Questions 10 and 11, those activities, as described in detail above, are respectfully incorporated by reference herein.

Finally, to the extent this qualifies, please know that I have been involved in various community activities relating to my children. By far and away, the greatest of these activities in terms of frequency and time commitment has been service as a youth athletic coach (football, lacrosse, and baseball) on numerous different teams over the last several years. I have also assisted, as possible, in various other capacities (PTO school clean-up/service project volunteer, volunteer helper for the scouting "pinewood derby," etc.), with my wife and neighbors for community youth/school activities.

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

To the best of my knowledge, none of the organizations listed above does or has so discriminated.

13. **Published Works and Public Statements**

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

published material to the Committee.

In April 2007, I signed a "letter to the editor" of a local paper, along with several other fathers of children in the local schools, in support of a local tax referendum designed to provide funding for capital projects at local elementary schools. The requested copies are attached.

Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005 (1992). The requested copies are attached.

Case Comment, The Supreme Court 1990 Term: *Chambers v. Nasco*, 105 Harv. L. Rev. 349 (1991). The requested copies are attached.

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

I have not been involved in the preparation of any such report, memoranda, etc.

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

I have not provided any such testimony, issued such official statements, etc.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please indicate the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

I do not generally give "speeches," in the sense that the term is typically used. Nonetheless, listed below are public speaking engagements of mine, as that term appears to be broadly defined above.

In November 2007, I spoke at a local elementary school in connection with its "Readers

are Leaders Day," which is an event in which adults of diverse professions variously speak to school children about why reading is important in their professional and personal lives. I did not use any prepared remarks or notes. The general subject was how people in the judicial system, legal system, and criminal justice system all use reading and writing to communicate and to perform their jobs. I also participated in a similar event, at a different elementary school in a neighboring town, during the Fall of 2006, at the invitation of one of my judicial colleagues.

In November 2007, I spoke as part of a panel in Chicago, along with various other attorneys and judges, for a criminal law class from Notre Dame Law School. The panel was organized by a former AUSA in Chicago and present partner at Sidley Austin who is an adjunct faculty member at Notre Dame. The panel members addressed how they became interested in the law, and also generally discussed various topics concerning criminal law and law enforcement administration. To the extent my comments were substantive, my principal statement was that, in my view at least, the area of sentencing in the federal courts has been the subject of the most change in recent years, and that it will be important for students to pay particular attention to such issues if they serve as either prosecutors or defense attorneys. I did not use any transcript or outline for the remarks.

In September 2007, I spoke with incoming law clerks in the Northern District of Illinois at the request of Chief Judge Holderman. The talk addressed, *inter alia*: the judge-law clerk relationship and some of the Local Rules of the District Court for the Northern District of Illinois. I did not have any prepared speech; I believe I had a one-page set of handwritten notes, which I did not retain. Chief Judge Holderman also had an outline traditionally presented to new law clerks in the district which covers some of the more common issues faced by new law clerks and collects some precedent that may be helpful in analyzing those issues. My staff and I reviewed the outline, added to and revised it as appropriate in light of the issuance of new precedent, and gave out copies to this year's clerks. Copies are attached.

In June 2007, I spoke with a group of attorneys from Israel (prosecutors, defense attorneys, and government attorneys) who were in Chicago as part of, as I understand it, a graduate legal education program sponsored by Northwestern Law School and Tel Aviv University. Two Assistant U.S. Attorneys from Chicago (one of whom was a graduate of Northwestern) also spoke. I did not have a prepared text or outline. We discussed the basic processes of the American criminal justice system, including the grand jury, the Fifth Amendment, and the *Brady/Giglio* doctrines.

In May 2007, I spoke informally with a group of lawyers and government officials from Pakistan who were hosted by a consumer rights attorney in Chicago in connection with, as I understand it, a trip sponsored by the U.S. government. Various other attorneys and a state judge also participated. I did not have a prepared text or outline. The general tenor of the discussion was that an adversarial format in which consumer rights issues could be aired—via government enforcement mechanisms, private lawsuits, and private defense

attorneys—seemed to be doing a reasonably good job of reaching fair outcomes in the United States. The Pakistani officials and attorneys listened to our presentations and thought that some of our respective ideas might be worth considering for their country.

In May 2007, I spoke at a "bench/bar luncheon" sponsored by the Chicago Chapter of the Federal Bar Association at the request of one of my judicial colleagues who is a board member for the FBA. I did not use a prepared text or notes. About fifteen attorneys came to the luncheon, and we discussed "nuts-and-bolts" sorts of litigation issues such as the difficulty of deciding what discovery is appropriate and productive in a case.

In May 2007, I appeared on a judicial panel at the 2007 Convention of the International Trademark Association in Chicago, along with two of my judicial colleagues on the district court. We spoke about how trademark issues are best presented in courtrooms and we answered a few questions from the attorneys in the audience (there were several hundred lawyers in attendance) about trademark litigation in America. I had no prepared text; I may have had a one-page handwritten outline, but if I did, I did not keep it.

In April 2007, I spoke at a dinner hosted by the Loyola Law School of Chicago for its students participating in advocacy programs and legal clinics. I did not have prepared remarks, but I had a fairly detailed outline—I believe because I was asked to speak relatively shortly before the event itself. The requested copies of the outline are attached. The remarks focused on the opportunities lawyers have to make a positive impact on the world though their work. The talk also included a few brief practice pointers. Copies of the outline are attached.

In May 2006, I spoke to a group of corporate litigation counsel who were in town for a professional association meeting, after one of my colleagues, who used to work as a counsel for a local corporation, could not speak to the group as planned. I did not have a prepared speech, and, to the extent I used brief notes, I did not retain them. The speech addressed the general topic of whether there were any issues that corporate counsel needed to be particularly mindful of in litigating in federal courts. As best I can recall, I stated that there were no particular issues or pitfalls unique to the federal courts, but that typical rules of thumb for any litigant (try to retain counsel who is broadly respected in the local bar and courthouse; make sure your arguments are well-grounded, so as to establish and maintain credibility; make sure you consider any overtures about settlement in good faith, etc.) applied. I also believe I discussed the broader topic of settlement of civil cases in the federal courts, and how the vast majority of such civil cases do not go to trial. In this regard, I believe I discussed how alternative dispute resolution classes, and classes in settlement and negotiation, are now quite popular at most law schools, and how the recognition of the importance of such subjects is a notable change in law school curriculums over the last couple of decades.

In January 2006, I moderated a panel sponsored by the Chicago Chapter of the Federalist Society held in honor of the late Chief Justice of the United States, William H. Rehnquist.

The panel included the Solicitors General of the States of Illinois and Texas, who both had clerked at the Supreme Court and who were serving, respectively, under a Democratic and a Republican Attorney General in their States. The panel also included a former law clerk to Chief Justice Rehnquist who was a law professor at Notre Dame Law School. I typed a one-page outline of the introduction/biography of the late Chief Justice Rehnquist that I used that evening. Copies are attached.

In the Winter of 2005 (I believe), I appeared on a panel sponsored by the Illinois Association of Criminal Defense Lawyers, along with one of my judicial colleagues and a law professor from The Ohio State University. I did not have a prepared text; if I had any hand-written notes, I did not retain them. As best I can recall, we discussed the recent Supreme Court developments concerning sentencing in federal courts, and we discussed how the area of sentencing is one in which defense attorneys often can make substantial gains on behalf of their clients.

In the summer of 2005 (I believe it was August), I appeared on a panel at an ABA conference in Chicago about recent Supreme Court decisions concerning criminal law. The panel was assembled by a professor from the University of California at Hastings Law School, and it also included a federal prosecutor and a criminal defense attorney. I did not have prepared remarks; I believe I had some notes written on print-outs of some Supreme Court cases, which I did not retain.

Finally, on a handful of occasions over the years since taking the bench, the specific dates for which I cannot recall, I have agreed, typically at the request of the Chief Judge or an officer of a local bar association, to "swear in" new attorneys to the local bar for the Northern District of Illinois or to speak with groups of young attorneys. On those occasions, I have typically been asked to offer brief words of advice. I have not used prepared texts; to the extent I have made brief notes or one-page handwritten outlines, I have not retained them. The remarks typically address the same concerns: the need for young attorneys to work hard and appreciate that cases typically do not turn on nuanced intellectual issues but rather on the basis of hard work and dedication to one's task as an attorney. Relatedly, I always try to emphasize that while the professional demands on young lawyers are heavy and often compelling, young attorneys also need to draw lines so that the attorneys do not cease to be the sorts of spouses, parents, children, and community members that they want to be.

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

In the Fall of 2004, I was interviewed for *The University of Chicago Law School Record.* I do not have a copy of the publication as it ran, but the law student/reporter sent me a final copy of his article in typewritten form. Copies are attached.

In June 2004, I was interviewed by the Chicago Bar Association for the *CBA Journal*, as is the CBA's practice when a new district judge takes the bench. I do not have a copy of the publication as it ran, but the attorney/reporter sent me a copy of the questions and answers in final draft form. Copies are attached.

In May 2004, I was interviewed by the *Chicago Lawyer*, upon taking the bench. Copies of the article are attached.

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

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

I have served as a federal district judge in the Northern District of Illinois since March 2004. I was nominated to this position by President George W. Bush, and thereafter confirmed by the Senate 96-0.

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

I worked for a few days in November 2000 as a Republican volunteer during the Florida recount at the conclusion of the 2000 Presidential election. I was sent to Broward County, Florida, and I worked with local officials and with Democratic volunteer counterparts in the effort to manually recount ballots there.

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

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

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

I served as a judicial law clerk from 1992-93 for the Honorable Stephen F. Williams, Circuit Court Judge, United States Court of Appeals for the D.C. Circuit. I served as a judicial law clerk from 1993-94 for the Honorable Antonin Scalia, Associate Justice, United States Supreme Court.

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

I never practiced alone.

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

Law Firms:

From September 1999 to March 2004, I was with Skadden Arps Slate Meagher & Flom (Illinois), 333 W. Wacker Drive, Suite 2100, Chicago, Illinois 60606. I was an associate from September 1999 to May 2000, a counsel from May 2000 to March 2001, and a partner from April 2001 to March 2004.

From August 1994 to February 1995, I was a litigation associate at Kirkland & Ellis, 200 E. Randolph, Chicago, Illinois 60601.

For a week or two in August 1992, I worked as a "returning summer associate" at Sidley & Austin in Chicago, 10 S. Dearborn, Chicago, Illinois 60603. I had previously worked as a summer associate at the firm during the summer of 1989 when I was in law school.

Judicial Service:

From March 2004 to the present, I have served as an United States District Court Judge, United States District Court for the Northern District of Illinois, 219 S. Dearborn Street, Chicago, Illinois 60604.

Government Offices:

From February 1995 to August 1999, I worked at the U.S. Attorney's Office in Chicago, 219 S. Dearborn, 5th Floor, Chicago, Illinois 60604. I was an Assistant United States Attorney in the Criminal Division.

I was a summer intern at the United States Department of Justice, Office of the Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, from approximately June 1992 to August 1992.

b. Describe:

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

At Skadden Arps, I principally represented American publicly held companies in

commercial litigation. I also performed internal investigations for corporations, and I did some criminal defense work. At Kirkland & Ellis, I was a young attorney helping to represent American publicly held companies in commercial litigation.

At the United States Attorney's Office, I spent virtually 100% of my time prosecuting federal criminal offenses on trial and on appeal in the federal courts in Chicago.

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

As mentioned, at law firms, I typically worked for American corporations and their subsidiaries in commercial litigation. My work involved representations in both the trial and appellate courts. At the United States Attorney's Office, I specialized in the prosecution of white collar and violent crimes; I also spent a significant amount of time representing the United States in appellate litigation in the United States Court of Appeals for the Seventh Circuit.

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

I have been involved in litigation my entire career, whether as a trial judge, trial lawyer or law firm litigator.

During the time I worked at Kirkland & Ellis (1994-95), I rarely appeared in court, if at all. When serving as an Assistant United States Attorney (1995-99), I appeared in court frequently—typically on multiple occasions each week and often daily. I was in court for many reasons—trials, appellate arguments, motion hearings, etc. At Skadden Arps (1999 to 2004), I appeared in court occasionally, given the relative infrequency in which commercial litigation matters require court hearings.

i. Indicate the percentage of your practice in:

1. federal courts;
2. state courts of record;
3. other courts.

Virtually 100% of my work at each stage of my legal career has been in the federal courts. I rarely, if ever, appeared in a state court (except when serving as a "student assistant district attorney" during law school—see response to Question 7, above), and I do not believe I ever appeared in another type of court.

ii. Indicate the percentage of your practice in

1. civil proceedings;

2. criminal proceedings.

While working in law firms, virtually 100% of my court appearances related to civil matters (*i.e.*, every court appearance other than those made in connection with *pro bono* criminal cases). At the United States Attorney's Office, virtually 100% of my court appearances related to criminal matters (*i.e.*, every court appearance other than those made in *habeas corpus* proceedings or extradition cases, which are civil matters).

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

i. What percentage of these trials were:

1. jury;
2. non-jury.

I tried approximately twelve jury trials at the U.S. Attorney's Office. All cases at the U.S. Attorney's Office in Chicago (at least at that time) were tried by at least two prosecutors (large cases sometimes had three prosecutors), who divided up the witness examinations and arguments equally. I also participated in numerous contested evidentiary proceedings and sentencings in the U.S. District Courts as an Assistant United States Attorney. At Skadden Arps, I had various contested evidentiary and legal hearings in civil matters —principally in connection with breach of trust litigation, bankruptcy confirmation litigation, and other civil litigation relating to Washington Group International, Inc.—a large engineering and construction company headquartered in Boise, Idaho, in 2001-02. There were many attorneys from Skadden Arps who worked on Washington Group's reorganization and related litigation; I was the lead litigation partner and, along with some of my other partners, handled the company's litigation in court.

At Skadden Arps, I also appeared in court on occasion in connection with *pro bono* criminal representations.

All of the trials in which I participated were jury trials. In the civil litigation for Washington Group discussed immediately above, a United States Bankruptcy Court was the factfinder.

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

I have never argued a case before the Supreme Court of the United States. In a pro bono capacity while working in private practice, colleagues from Skadden Arps and I drafted

an amicus brief in *Connecticut Dept. of Public Safety, et al. v. Doe, et al.* (No. 01-1231). That case examined (and rejected certain challenges to) the constitutionality of so-called "Megan's Laws," which are laws designed to protect children against convicted sex-offenders through community notification. *See Connecticut Dept. of Public Safety, et al. v. Doe*, 538 U.S. 1 (2003). We assisted the Center for the Community Interest, a non-profit group headquartered in New York City, in the preparation of the brief, which argued in support of the viability of such "Megan's Laws." Copies of the brief are attached as requested.

16. **Litigation**

Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case: (a) the date of the representation; (b) the name of the court and the name of the judge or judges before whom the case was litigated; and (c) the individual name, addresses, and telephone numbers of co-counsel and principal counsel for each of the other parties.

United States v. James E. Washington, et al.: James E. Washington was the first defendant in the Northern District of Illinois against whom the government elected to invoke 18 U.S.C. 3559(c), which provides for a mandatory life sentence for violent felons who have previously been convicted of two serious violent felonies. Mr. Washington had previously murdered a teenage robbery victim, and, after his release from prison, Mr. Washington was convicted of the attempted murder and robbery of his own father. Mr. Washington became involved in the federal criminal justice system after he started recruiting homeless men to commit bank robberies at his direction. Mr. Washington was convicted by jury of involvement in three bank robberies. On appeal, Mr. Washington alleged that 18 U.S.C. 3559 was unconstitutional on various grounds. I represented the United States on appeal before the United States Court of Appeals for the Seventh Circuit, which rejected the constitutional challenges to the statute.

I initiated the case and oversaw the investigation, and then served as one of the two Assistant United States Attorneys who tried the case for the federal government. My co-counsel was Sheila Finnegan, now a partner at Mayer Brown LLP, 71 S. Wacker Drive, Chicago, IL 60606, (312) 782-0600. Mr. Washington was represented by Frank Lipuma, 33 N. Dearborn, Suite 600, Chicago, IL 60602, (312) 551-9112. I worked on the case from the Spring of 1995 through the Spring of 1997, and worked on it again during *habeas corpus* proceedings in the Fall of 1998. The case was tried before the Hon. Charles P. Kocoras, District Judge, United States District Court for the Northern District of Illinois.

Opinions in the Case: *United States v. Washington*, 109 F.3d 335 (7th Cir. 1997) (Judges

Easterbrook, Ripple, and Manion affirming conviction and sentence and rejecting various constitutional challenges to 18 U.S.C. 3559); *United States v. Washington*, No. 98 C 5062, No. 95 CR 302, 1999 WL 59974 (N.D. Ill. Feb. 3, 1999) (Kocoras, J.).

United States v. Phillip Ishola, et al.: Phillip Ishola and eighteen codefendants were charged with various offenses in connection with a large-scale international heroin importation conspiracy that operated in Thailand, Nigeria, England, and the United States. All of the defendants who were apprehended (a couple remained fugitives) were convicted by guilty plea or trial. I joined the prosecution team shortly after the initial arrests, and assisted Assistant United States Attorneys Patrick Layng and George Jackson (who were the prosecutors during the investigation stage). I assisted in the government's defense of the lawfulness of the wiretaps, search warrants, and arrests, which were subjected to various statutory and constitutional challenges. I also was involved in negotiating various plea agreements. Patrick Layng and I prepared the case for trial—which ultimately, after numerous guilty pleas—involved only one defendant. U.S. District Judge Harry Leinenweber of the Northern District of Illinois presided over the jury trial.

Patrick Layng now serves as the Regional Coordinator of the Criminal Enforcement Unit, Office of the United States Trustee for the Northern District of Illinois, 227 W. Monroe Street, Suite 3350, Chicago, IL 60606, (312) 353-9257; George Jackson is now at Bryan Cave LLP and can be reached at 161 N. Clark St., Suite 4300, Chicago, IL 60601, (312) 602-5000. There were numerous defense attorneys in the case, including Scott Frankel, Frankel & Cohen, 77 W. Washington, Suite 1720, Chicago, IL 60602, (312) 759-9600; and Jim Graham, 53 W. Jackson Blvd., Suite 703, Chicago, IL 60604, (312) 922-3777. I worked on the case from the Fall of 1996 through the Summer of 1997.

Opinions in the Case: *United States v. Phillip Ishola, et al.*, No. 96 CR 523, 1996 WL 197461 (N.D. Ill. Apr. 19, 1996) (Leinenweber, J.); *United States v. Akanni Hamzat, et al.*, 217 F.3d 494 (7th Cir. 2000) (Judges Diane Wood, Posner, and Bauer affirming convictions and sentences).

United States v. Thomas J. Maloney, et al.: Thomas Maloney and his codefendant were variously convicted of racketeering, extortion, and obstruction of justice in connection with a series of judicial bribes. Mr. Maloney was a criminal judge in the Circuit Court of Cook County who was convicted of accepting bribes to fix various types of cases, including murder cases. I served as the lead attorney on appeal after joining the U.S. Attorney's Office in 1995, after Mr. Maloney's trial took place. The appeal was complicated by allegations of serious prosecutorial misconduct leveled against one of the trial attorneys. The allegations related to purportedly undisclosed benefits given to members of the El Rukn street gang who were cooperating witnesses in this and other cases, and the allegations had previously resulted in reversals of numerous convictions of

other defendants in various narcotics and gang-related prosecutions. The appeal raised the disclosure/misconduct allegations, as well as various other claims of error concerning jury instructions, evidentiary rulings, and RICO issues.

I argued the case on appeal in the United States Court of Appeals for the Seventh Circuit, which affirmed the conviction 2-1. I also helped to write the government's response to Mr. Maloney's petition for certiorari that he filed in the U.S. Supreme Court.

The prosecutor most familiar with my work is Barry Rand Elden, 219 S. Dearborn, Chicago, IL 60604, (312) 353-5300. Scott Mendeloff, now at Sidley Austin LLP, 1 S. Dearborn, Chicago, IL 60603, (312) 853-7000, also was extensively involved in the preparation of the government's brief on appeal. Opposing counsel were Jeffrey Cole, who is now one of my judicial colleagues, 219 S. Dearborn, 18th Floor, Chicago, Illinois 60604, (312) 435-5601; and Mr. Andrews Staes, of Staes & Scallan, P.C., 111 W. Washington, Suite 1310, Chicago, IL 60602, (312) 201-8969. I worked on the case from April 1995 through the Summer of 1996.

Relevant Opinions in the Case: *United States v. Thomas Maloney*, 71 F.3d 645 (7th Cir. 1995) (Judges Cummings and Eschbach affirming convictions, and Judge Ripple dissenting); *Thomas Maloney v. United States*, 519 U.S. 927 (1996) (denying certiorari).

United States v. Edward Jackson, et al.: Edward Jackson and six other Chicago police officers from the Austin Police District were variously convicted of racketeering, extortion, bribery, narcotics trafficking, and firearms offenses relating to acts of police corruption. The defendants released police intelligence to members of street gangs, protected narcotics operations and purported narcotics operations being run by undercover law enforcement agents, and robbed homes and drug houses. Members of Chicago street gangs who conspired with the officers also were prosecuted and convicted.

I was involved in the case from its early stages. Along with Assistant United States Attorney Brian Netols, the senior prosecutor on the case, we supervised and helped to plan the investigation, which included undercover FBI operations and numerous court-approved wiretaps. We also conducted plea negotiations and interviews of defendants and numerous civilian witnesses, some of whom were immunized pursuant to court order and forced to testify before the grand jury. Along with our colleague Ryan Stoll, we presented the case to the jury at trial. The lead undercover officer in the case received the FBI's highest award for bravery in the line of duty, and each of the prosecutors received the U.S. Department of Justice's "Director's Award" for Superior Performance as an Assistant United States Attorney.

The case was tried before U.S. District Judge Ann Williams in Chicago; after Judge Williams was elevated to the Seventh Circuit, District Judge Charles Kocoras assumed responsibility for the case. Co-counsel were Assistant United States Attorney Brian

Netols, 219 S. Dearborn, Chicago, IL 60604, (312) 353-5300; and Ryan Stoll, now a partner at Skadden, Arps, Slate, Meagher & Flom LLP (Illinois), 333 W. Wacker Drive, Suite 2100, Chicago, IL 60606, (312) 407-0700. There were numerous defense lawyers involved in the case, including: Robert Clarke, 30 W. Monroe, Suite 710, Chicago, IL 60603, (312) 332-3101; and Stan Hill, 10 S. La Salle St., Suite 1301, Chicago, IL 60603, (312) 917-8888. I worked on the prosecution of this case from the Spring of 1996 to the Summer of 1999, when I left the U.S. Attorney's Office.

Relevant Opinions in the Case: *United States v. Young*, No. 96 CR 815, 1997 WL 321754 (N.D. Ill. June 10, 1997) (Williams, J.) (bail ruling); *United States v. Crittleton*, No. 96 CR 815, 1997 WL 797661 (N.D. Ill. Dec. 24, 1997) (Williams, J.) (bail ruling); *United States v. Jackson, et al.*, No. 96 CR 815, 1998 WL 149582 (N.D. Ill. March 23, 1998) (Williams, J.) (denying severance and suppression motions); *United States v. Jackson, et al.*, No. 96 CR 815, 1998 WL 149586 (N.D. Ill. March 24, 1998) (Williams, J.) (ruling on pretrial motions); *United States v. Ramos*, No. 96 CR 815, 1998 WL 155932 (N.D. Ill. April 3, 1998) (Williams, J.) (ruling on pretrial motions); *United States v. Jackson, et al.*, No. 96 CR 815, 1998 WL 187285 (N.D. Ill. April 15, 1998) (Williams, J.) (ruling on pretrial motions); *United States v. Ramos*, No. 96 CR 815, 1998 WL 214737 (N.D. Ill. April 27, 1998) (Williams, J.) (denying defendant's motion to revoke proffer agreement); *United States v. Moore & Young*, No. 96 CR 815, 1998 WL 265077 (N.D. Ill. May 15, 1998) (Williams, J.) (pretrial rulings); *United States v. Jackson*, 2000 WL 174284 (N.D. Ill. Nov. 28, 2000) (Williams, J.) (denying defendant's motions for new trial and/or judgment of acquittal); *United States v. Moore, et al.*, 363 F.3d 631 (7th Cir. 2004) (affirming convictions and sentences); *United States v. Young*, 160 Fed. Appx. 518 (7th Cir. Dec. 22, 2005) (further affirming certain sentences after consideration of potential issues under *United States v. Booker*, 543 U.S. 220 (2005), following remand for that purpose, 543 U.S. 1100 (2005)).

United States v. Shawntell Curry, et al.: Shawntell Curry and four co-conspirators committed a series of armed robberies of banks and motels in the Chicago suburbs during 1996 and 1997. I was involved in this case throughout the investigation and trial phases, and was the lead prosecutor during the investigation and plea negotiations. Along with my colleague, Assistant United States Attorney Bennett Kaplan, I tried the case before U.S. District Judge Charles Norgle of the Northern District of Illinois. Defendant Shawntell Curry, the only defendant who went to trial, was convicted of all but one charge, and he received a sentence of some twenty-five years' imprisonment. The investigation also led to the prosecution of related crack cocaine dealing in the south suburbs of Chicago.

Bennett Kaplan can be reached at Axium Consulting, 180 N. LaSalle Street, Chicago, IL 60601, (312) 606-3020. Mr. Washington was represented at trial by Frank Lipuma, 33 N. Dearborn, Suite 600, Chicago, IL 60602, (312) 551-9112. I worked on the case from February 1997 to August 1999, although I was not particularly involved in the case at the

appellate level.

Opinion in the Case: *United States v. Shawntell Curry*, 187 F.3d 762 (7th Cir. 1999) (Judges Posner, Easterbrook, and Diane Wood affirming conviction).

United States v. Palumbo Bros., Inc., et al.: Palumbo Bros., Inc., and related corporate defendants were road construction companies owned and controlled by the Palumbo family. These corporations, along with various Palumbo family members, their employees, and an Illinois Department of Transportation inspector, were indicted for racketeering and acts of fraud directed against state and local governments, trade unions and company employees.

I joined the prosecution team after the indictment issued and, along with Assistant United States Attorneys John Podliska and John Newman, who had led the investigation for many years, worked on the government's pretrial motions and responses to the defendant's pretrial motions. United States District Judge Elaine Bucklo of the Northern District of Illinois subsequently dismissed approximately 70% of the indictment after concluding that, as a matter of law, the racketeering and labor fraud charges were preempted by other federal legal regimes, including federal labor laws.

I was appointed to be the government's lead appellate counsel, and argued the government's appeal of the indictment dismissal in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit reversed the District Court's ruling and reinstated the indictment. Subsequent to the reversal, the defendants pleaded guilty to various charges. I was not extensively involved in plea discussions, principally because I was working on the *Jackson* prosecution described above.

Co-counsel in the case included: Assistant United States Attorney Barry Rand Elden, John Newman, and John Podliska. Mr. Newman has since retired, and Messrs. Podliska and Elden can be reached at 219 S. Dearborn, 5th Floor, Chicago IL 60604, (312) 353-5300. There were numerous defense attorneys involved in the case, including James Streicker, Cotsirilos Tighe & Streicker, Ltd., 33 N. Dearborn, Suite 600, Chicago, IL 60602, (312) 263-0345; and Robert Michels, Winston & Strawn, 35 W. Wacker Drive, Chicago, IL 60601, (312) 558-5255. I also worked and interacted with Professor Robert Blakey, Notre Dame Law School, Notre Dame, Indiana 46556, (574) 631-5717; and with Marc Martin, 53 W. Jackson Blvd., Suite 1420, Chicago, IL 60604, (312) 408-1111. Professor Blakey and Mr. Martin briefed and argued the case for various defendants on appeal. I worked on the *Palumbo* case from the Spring of 1997 through the Spring of 1998.

Relevant Opinions in the Case: *United States v. Palumbo Bros., Inc. et al.*, No. 96 CR 613, Docket Entry 172, Mem. Op. (Aug. 21, 1997) (Bucklo, J.) (dismissing most of the

indictment); *United States v. Palumbo Bros., Inc., et al.*, No. 96 CR 613, 1997 WL 643618 (Oct. 9, 1997) (Bucklo, J.) (denying government's motion for reconsideration of dismissal order); *United States v. Palumbo Bros., Inc., et al.*, 145 F.3d 850 (7th Cir. 1998) (Judges Bauer, Coffey, and Rovner reversing the District Court and reinstating the indictment in the entirety).

United States v. Bruce Farley, et al.: Illinois State Senator Bruce Farley, Illinois State Representative Miguel Santiago, and officials at the Cook County Treasurer's Office were variously charged with fraud, tax offenses, and obstruction of justice in connection with an alleged ghost-payrolling scheme. All but Representative Santiago pleaded guilty to various offenses, and Representative Santiago was acquitted following a jury trial. One of the defendants, then-Cook Country Treasurer Edward Rosewell, died prior to his conviction becoming final. As I understand it, his conviction therefore was vacated as a matter of law upon his death.

I joined the prosecution team after the case was investigated and indicted. I participated, along with fellow Assistant United States Attorneys John Bunge and Bennett Kaplan, in the pretrial phases of the case and took the guilty plea from Mr. Farley. Messrs. Kaplan, Bunge, and I tried the case against Representative Santiago before U.S. District Judge Joan Gottschall of the Northern District of Illinois.

Co-counsel were Bennett Kaplan, Axium Consulting, 180 N. LaSalle Street, Chicago, IL 60601, (312) 606-3020; and John Bunge, Kirkland & Ellis, 200 E. Randolph Drive, Chicago, IL 60601, (312) 861-2256. There were several defense attorneys in the case, but the lead trial attorneys for Representative Santiago were Edward Genson, Genson & Gillespie, 53 W. Jackson Blvd., Suite 1420, Chicago, IL 60604, (312) 726-9015; and Marc Martin, 53 W. Jackson Blvd., Suite 1420, Chicago, IL 60604, (312) 408-1111. Senator Farley, who pleaded guilty shortly before trial, was represented by Thomas M. Breen, Thomas M. Breen & Assocs., 53 W. Jackson Blvd., Suite 1460, Chicago, IL 60604, (312) 360-1001. I worked on the case from the Summer of 1998 to the Spring of 1999.

Opinions in the Case: *United States v. Bruce Farley, et al.*, No. 97 CR 441, 1997 WL 695680 (N.D. Ill. Oct. 31, 1997) (Gottschall, J.); *United States v. Bruce Farley, et al.*, No. 97 CR 441, 1998 WL 684220 (N.D. Ill. Sept. 11, 1998) (Gottschall, J.)

United States v. Jesse Evans: Mr. Evans was a Chicago alderman who was convicted in 1997 of racketeering (including acts of extortion, bribery, mail fraud, and official misconduct), filing false tax returns, and obstruction of justice. I was asked by the lead trial attorney, Assistant United States Attorney David Rosenbloom, to handle the case on appeal. I served as lead attorney on appeal and argued the case in the Seventh Circuit, where Mr. Evans unsuccessfully alleged that his constitutional rights were violated during

jury selection. David Rosenbloom is the person most familiar with the case as co-counsel: Mr. Rosenbloom is currently a partner at McDermott, Will & Emery, 227 W. Monroe Street, Chicago, IL 60606, (312) 984-7759. Mr. Evans was represented on appeal by Professor Richard Kling of the Chicago-Kent College of Law, 565 W. Adams Street, Chicago, IL 60661, (312) 906-5050. I worked on the case during the Summer and Fall of 1998.

Relevant Opinion: *United States v. Jesse Evans*, 192 F.3d 698 (7th Cir. 1999) (Judges Coffey, Easterbrook, and Diane Wood affirming conviction).

Washington Group International Litigation: Along with a team of other attorneys from Skadden Arps, I represented Washington Group International, Inc., in litigation regarding its corporate reorganization and issues that related to the corporate reorganization. The litigation occurred in federal bankruptcy court in Nevada as well as in the U.S. District Court in Nevada.

There were various parts to the litigation. The first involved a suit filed by Mitsubishi and Mitsubishi Heavy Industries of America (collectively, Mitsubishi) against Washington Group, in which Mitsubishi alleged that Washington Group had violated provisions of the New York Lien Law as well as various trust doctrines in its handling of various monies relating to two large power plant projects in Massachusetts; Mitsubishi alleged that Washington Group owed it approximately $190 million as a result of the claimed violations. I led the litigation effort on behalf of Washington Group and argued the summary judgment motion that led to dismissal of the case by the Hon. Gregg Zive, United States Bankruptcy Judge, District of Nevada. Mitsubishi appealed Judge Zive's ruling to the Hon. Roger L. Hunt, United States District Judge, District of Nevada. The appeal was withdrawn as part of a broad, global settlement, discussed below.

The other main parts of the litigation concerned Washington Group's corporate reorganization and related disputes that stemmed from Washington Group's corporate acquisition in 2000 of Raytheon Engineers & Constructors, International, from Raytheon Company. Washington Group contended that it was the victim of fraud in connection with this acquisition, a charge Raytheon vigorously disputed. The two parties (Washington Group and Raytheon) claimed hundreds of millions and billions of dollars in recoveries from each other. These disputes were eventually resolved following litigation before Judge Zive as part of a global settlement that was part of Washington Group's reorganization. I served as the lead litigation partner from Skadden Arps in connection with that litigation. The litigation relating to Washington Group's reorganization confirmation also involved various objectors and objections to the reorganization plan — the most significant being M.D. Sass Corporate Resurgence Partners, L.P., and Durham Asset Management Corporation, (collectively, Resurgence), two secured creditors of Washington Group. Judge Zive rejected all of the various objections to confirmation, and Resurgence as well as another unsecured creditor took appeals from Judge Zive's

Confirmation Order, both of which were rejected on appeal by Hon. Roger L. Hunt, United States District Judge, District of Nevada. I worked on the case from May of 2000 to January of 2003.

There were hundreds of attorneys involved in the cases and in the corporate reorganization. Principle co-counsel were Jennifer A. Smith, Lionel Sawyer & Collins, 1100 Bank of America Plaza, 50 W. Liberty Street, Reno, NV 89501, (775) 788-8666; Timothy Pohl, Skadden Arps Slate Meagher & Flom (Illinois), 333 W. Wacker Drive, Chicago, IL 60606, (312) 407-0700; and David Kurtz, now a managing director with Lazard Freres & Co. Investment Bank, 200 W. Madison Street, Suite 2200, Chicago, IL 60606, (312) 407-6615. The opposing counsel with whom I interacted most included: Patrick Murphy (lead counsel for the unsecured creditors committee), now at Winston & Strawn LLP, 101 California Street, San Francisco, CA 94111, (415) 591-1000; Julia Frost-Davis (counsel for Raytheon), Bingham McCutchen LLP, 150 Federal Street, Boston, MA 02110, (617) 951-8422; P. Sabin Willett (counsel for Raytheon), Bingham McCutchen LLP, 150 Federal Street, Boston, MA 02110, (617) 951-8775; Richard H. Epstein (counsel for Mitsubishi), Sills Cummis & Gross, One Riverfront Plaza, Newark, NJ, (973) 643-5372; and David M. Stern (counsel for Resurgence), Klee Tuchin Bogdanoff & Stern LLP, 1999 Avenue of the Stars, Thirty-Ninth Floor, Los Angeles, California 90067, (310) 407-4025.

Relevant Opinions in the Case: *In re Washington Group International, et al.*, BK-N-01-3167 (Bankr. D. Nev.) (Zive, J.) (Docket No. 693, June 20, 2001) (granting summary judgment to Washington Group on Mitsubishi claims); *In re Washington Group International, et al.*, BK-N-01-31627 (Bankr. D. Nev.) (Zive, J.) (Docket No. 820, June 13, 2001) (transcript of summary judgment proceeding and findings of Judge Zive relating to order listed immediately above regarding Mitsubishi claims); *In re Washington Group International, et al.*, BK-N-01-31627 (Bankr. D. Nev.) (Zive, J.) (Docket No. 3169, December 21, 2001) (findings of fact and conclusions of law regarding confirmation of second amended joint plan of reorganization of Washington Group International, Inc., et al., as modified); *In re Washington Group International, et al.*, BK-01-31627 (Bankr. D. Nev.) (Zive, J.) (Docket No. 3170, December 21, 2001) (order confirming second amended joint plan for reorganization of Washington Group International, Inc., et al., as modified); *Consorcio DSD/Somor v. Washington Group International, et al.*, CV-N-02-0032 & 0083 (RLH), Docket No. 76 (D. Nev., October 18, 2002 (Hunt, J.) (dismissing appeal from confirmation as equitably moot); *M.D. Sass Corporate Resurgence Partners, L.P., et al. v. Washington Group International, et al. (In re Washington Group International, et al.)*, CV-N-02-0044 (RLH) Docket No. 63 (D. Nev., October 23, 2002) (Hunt, J.) (dismissing appeal from confirmation as equitably moot); *Consorcio DSD/Somor v. Washington Group International, et al. (In re Washington Group international, et al.)*, CV-N-02-0032 & 0083 (RLH), Docket No. 85 (D. Nev., January 7, 2003) (Hunt, J.) (denying motion for reconsideration).

In re Managed Care Multidistrict Litigation, MDL No. 1334 (S.D. Fla., Moreno, J.): I was one of the three partners from Skadden Arps who represented Health Net, Inc. (f/k/a Foundation Health, Inc.) and various of its subsidiaries in a series of cases that were filed against Health Net and most of the other members of the managed care industry (Aetna, United HealthCare, etc.). The Judicial Panel on Multidistrict Litigation consolidated the cases for coordinated pretrial proceedings in the United States District Court for the Southern District of Florida. The cases alleged that the delivery and operation of managed health care in the United States violated many state and federal statutes, both as to the physicians who practiced under managed care arrangements and as to those persons insured under managed care programs such as PPOs and HMOs.

I was involved principally in the briefing in the cases—at the motion to dismiss stage, and also in relation to the class certification issues. I also was involved in two interlocutory appeals that the case generated—the first relating to arbitration issues, and the second relating to the propriety of class certification of a nationwide class of physician-plaintiffs. I argued the latter of those two appeals. I also was involved, with my colleagues from Skadden Arps and other counsel for Health Net, in advising our client and in developing the client's overall legal strategy. I worked on the litigation from the Spring of 2000 to February 2004.

There were several dozen, if not hundreds, of attorneys involved in the case. The plaintiffs and defendants typically dealt with each other through liaison counsel that the court appointed to speak on behalf of the groups, so I did not communicate with any of the dozens of lawyers representing the plaintiffs. There also were dozens, if not hundreds, of attorneys who were representing the defendant companies. The co-counsel I interacted with most included: Edward Soto (counsel for United HealthCare), Weil Gotshal & Manges, 1395 Brickell Avenue, Miami, FL 33131, (305) 577-3177; Richard J. Doren (counsel for Aetna), Gibson, Dunn & Crutcher, 333 S. Grand Avenue, Los Angeles, CA 90071, (213) 229-7038; and William E. Grauer (counsel for Pacificare), Cooley, Godward Kronish LLP, 4401 Eastgate, San Diego, CA 92121, (858) 550-6050.

Relevant Opinions in the Case: *In re Managed Care Litigation*, MDL No. 1334, 132 F. Supp. 2d 989 (S.D. Fla. 2000) (granting motions to compel arbitration in part, and denying motions in part), *aff'd sub nom., In re Humana Inc. Managed Care Litigation*, 285 F.3d 971 (11th Cir. 2002) (Barkett, Fay, and Winter, JJ.), *cert granted in part sub nom., Pacificare Health Systems, Inc. v. Book*, 123 S.Ct. 409 (U.S. Oct. 15, 2002), and *rev'd in part sub nom., Pacificare Health Systems, Inc. v. Book*, 123 S.Ct. 1531 (U.S. April 7, 2003); *In re Managed Care Litigation*, MDL No. 1334, 135 F. Supp. 2d 1253 (S.D. Fla. 2001) (granting in part and denying in part motions to dismiss); *In re Managed Care Litigation*, MDL No. 1334, 143 F. Supp. 2d 1371 (S.D. Fla. 2001) (granting in part motion to compel arbitration and modifying in part prior order); *In re Managed Care Litigation*, MDL No. 1334, 2001 WL 1400245 (S.D. Fla. May 9, 2001) (order lifting stay of discovery); *In re Managed Care Litigation*, MDL No. 1334, 150 F. Supp. 2d 1330 (S.D. Fla. 2001) (granting in part and denying in part motions to dismiss); *In re Managed*

Care Litigation, MDL No. 1334, 2001 WL 664391 (S.D. Fla. June 12, 2001) (order staying certain discovery); *In re Managed Care Litigation*, MDL No. 1334, 185 F. Supp. 2d 1310 (S.D. Fla. 2002) (granting in part and denying in part motions to dismiss); *In re Managed Care Litigation*, MDL No. 1334, 2002 WL 1359736 (S.D. Fla. March 25, 2002) (order certifying question for interlocutory review petition); *In re Managed Care Litigation*, MDL No. 1334, 2002 WL 1359734 (S.D. Fla. June 11, 2002) (order denying plaintiffs' and defendants' motions for reconsideration); *In re Managed Care Litigation*, MDL No. 1334, 209 F.R.D. 678 (granting class certification as to physicians; denying class certification as to subscribers) (S.D. Fla. 2002), *interlocutory review granted sub nom. Aetna, Inc. et al. v. Klay, et al.*, No. 02-90032-B (11th Cir. November 20, 2002), *aff'd Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (Tjoflat, Birch, Goodwin, JJ.). Finally, please know that this litigation continued on for multiple years after I took the bench, even for the client of Skadden Arps alone; in that regard, I have not included opinion(s) concerning developments after I left the bench (*e.g.*, any opinions approving the eventual settlements in the case).

17. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Because I worked in the litigation area both while serving as an Assistant United States Attorney and while in private practice, most of my legal efforts related to filed cases—whether on behalf of the federal government, law firm clients, or *pro bono* clients. Those activities are discussed extensively in other responses, so I will focus my answer on non-litigation activities and/or matters that did not progress to trial.

From time to time in private practice, I advised corporations concerning general legal issues—for example, issues relating to potential corporate mergers, acquisitions or transactions, such as questions about how a transaction might be structured to best protect the client against litigation risks. I also conducted internal investigations for clients. In addition, I did criminal defense work for an individual associated with a corporate client which did not result in any public action on the case. I also was one of dozens of attorneys from Skadden Arps who represented Enron and its subsidiaries in connection with various governmental investigations of Enron's conduct after Enron had declared bankruptcy. At that time, I principally worked on issues relating to pension and ERISA matters. I never worked on any matters concerning any of the underlying substantive actions or conduct of Enron which was the subject of later investigation and review; I became involved in the representation only after the underlying actions had been completed and were the subject of governmental investigation.

While serving as a practicing attorney—whether as an Assistant United States Attorney or partner at Skadden, Arps—I also was called upon, as appropriate, to manage large groups of attorneys and non-attorneys who were involved in the efforts on a case. These

responsibilities also required appropriate reporting and communication with clients and superiors or supervisory personnel. In these situations, as an Assistant United States Attorney, I worked cooperatively with a wide variety of law enforcement agencies, including the FBI, DEA, U.S. Customs Service, Chicago Police Department, and other state and local law enforcement agencies, as well as with appropriate arms of the U.S. Department of Justice in Washington, D.C. While serving as a district judge, I also have actively managed a full docket of criminal and civil cases.

I have taught at the University of Chicago Law School and at the Northwestern University School of Law over the past several years. During this time, I have taught (at times with a colleague) a seminar that looked at legal issues raised by the prosecution and defense of complex federal criminal cases. For the past four years, I have also taught a first-year civil procedure class at the University of Chicago. It is entitled Civil Procedure II, and it covers a traditional array of civil procedure topics taught at an American law school.

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

During the Spring Quarter each year from 2004 to 2007, I taught a first-year course called Civil Procedure II at the University of Chicago Law School. Civil Procedure II at the University of Chicago addresses topics such as: subject matter jurisdiction of courts, including, in particular, the diversity of citizenship and federal question jurisdiction of the federal courts; personal jurisdiction; choice of law questions under *Erie R.R.Co. v. Tompkins*, 304 U.S. 64 (1938); collateral estoppel and res judicata doctrines; and certain procedural questions typically arising in multi-party litigation contexts. The most recent syllabus is attached, as requested.

From 1999 to 2007, I taught a seminar each year at the University of Chicago Law School that examines legal issues involved in the prosecution and defense of complex criminal cases. The seminar looks at various procedural issues (*e.g.*, joinder and severance), various substantive issues (*e.g.*, the law concerning the federal criminal RICO statute), various evidentiary doctrines (*e.g.*, the *Bruton* doctrine), and issues of prosecutorial discretion and sentencing. I also taught this seminar from 1998 to 1999 at the Northwestern University School of Law. A copy of the most recent syllabus is attached.

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

I will have no such arrangements or expected future income of the sort listed above. I have an interest in the Skadden Arps Meagher & Flom Retirement Plan. I have no access to any such monies until I am at least 55 years old, I have no knowledge of the composition of the holdings of the Retirement Plan, and I have no control over the Plan or its assets.

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

No.

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

Please see SF-278 filed in connection with my nomination.

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

See attached Net Worth Statement.

23. **Potential Conflicts of Interest:**

a. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you are nominated. Explain how you would address any such conflict if it were to arise.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In the event of a potential conflict of interest, I would consult with personnel at the Department of Justice (and/or the Office of Government Ethics, as appropriate), who are experts on such issues, and I will follow their advice.

24. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an

attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

I was actively involved in pro bono work throughout the time I was in practice at Skadden Arps, as are most attorneys there. In 2000, my first full year at the firm, I devoted approximately 141 hours to pro bono work; in 2001, approximately 148 hours; in 2002, approximately 260 hours; and in 2003 and the first two months of 2004 (as I left in early 2004 to become a judge), approximately 185 hours.

My pro bono work was focused in three main areas: indigent criminal defense work; a pro bono Supreme Court brief that argued in favor of the constitutionality of "Megan's Laws," which allow for community notification regarding convicted sex offenders; and the representation of a state inmate in Illinois who alleged that Cook County law enforcement officers subjected him to unlawful use of force and thereby violated his constitutional rights.

My pro bono criminal defense work was principally done through the Federal Defender Office in Chicago, which represents indigent criminal defendants, subjects, and witnesses in federal criminal cases in Chicago. Although the office has several full-time attorney-employees, outside attorneys (often, but not always, former Assistant United States Attorneys from Chicago) also respectively serve certain days of the month as the "duty attorney" taking on representation of new clients who contact the office to seek legal representation on that particular day. As a "duty day attorney," I took on representation of a variety of indigent individuals accused of diverse crimes, including financial frauds, narcotics offenses, and other crimes. When I first started working with the Federal Defender program, I involved more junior attorneys at Skadden Arps in the cases, to help with research and to help prepare briefs. As those attorneys gained experience, I encouraged and allowed them to take more central roles in the representations and to appear in court on behalf of our clients.

The second area of pro bono representation involved the drafting of an amicus brief, along with other colleagues at Skadden Arps, in *Connecticut Dept. of Public Safety, et al. v. Doe, et al.* (No. 01-1231). In that case, as explained above in response to Question 15.e, the Supreme Court examined (and rejected certain challenges to) the constitutionality of so-called "Megan's Laws." *See Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160 (2003). The amicus brief, along with others, urged such a ruling.

My third area of pro bono involvement concerned the representation of a state inmate, James T. Lockhart, who alleged that he was unlawfully beaten by Cook County law enforcement officers in a racial incident. I received this representation as the result of a court appointment by the Hon. Elaine Bucklo of the United States District Court for the Northern District of Illinois. I was involved supervising junior attorneys who took a number of depositions in the case, and also oversaw the preparation of various court filings. I also was involved in the negotiation of the settlement of the case.

1. **Supplement to Questionnaire for Non-Judicial Nominees**

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

I believe I have presided over approximately seventeen cases that were resolved via trial or contested evidentiary hearing.

i. Of these, approximately what percent were:

jury trials: 53%
bench trials: 47%

civil proceedings: 76%
criminal proceedings: 24%

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

***United States v. National Association of Realtors*, No. 05 C 5140 (N.D. Ill.):** In this Sherman Act antitrust case, the government alleged that the National Association of Realtors adopted two policies that unreasonably restrained competition in real estate brokerage service markets throughout the United States. I denied the National Association of Realtors's motion to dismiss for lack of subject matter jurisdiction and failure to state claims upon which relief could be granted. I held that the government had adequately established standing with regard to the two policies in question and that the government had sufficiently pleaded a Sherman Act claim for purposes of Fed. R. Civ. P. 12(b). *See United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140, 2006 WL 3434263 (N.D. Ill. Nov. 27, 2006). The case is ongoing; it was reassigned to Judge Matthew Kennelly when the President indicated his intent to nominate me for the position of Deputy Attorney General.

Government's counsel:

Craig W. Conrath (for the United States)
U.S. Department of Justice, Antitrust Division
325 Seventh Street, NW, Suite 300
Washington, DC 20530
(202) 307-5779

Defendant's counsel:

Jack R. Bierig (for National Association of Realtors)
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7614

***Crosby v. Bowater Inc. Retirement Plan for Employees of Great Northern Paper, Inc.*, No. 05 C 3478 (N.D. Ill.):** In this case, Plaintiff Frank Crosby, on behalf of himself and others similarly situated, sued Bowater, Inc., and Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc., under the Employee Retirement Income Security Act of 1974 ("ERISA"). Mr. Crosby alleged that the defendants incorrectly applied a "pre-retirement mortality discount" when he elected to receive a lump sum pre-retirement benefit from the Plan. I denied the defendants' motion to dismiss on *res judicata* and estoppel grounds. *See Crosby v. Bowater Incorporated Retirement Plan for Employees of Great Northern Paper, Inc.*, No. 05 C 3478, 2006 WL 2578928 (N.D. Ill. Sept. 1, 2006). I also orally denied a motion by the defendants to have that ruling be the subject of a certification for an interlocutory appeal. The case was later settled. I entered an order approving class certification, designating the class representative, appointing class counsel, and, ultimately, approving the class settlement agreement.

Plaintiff's counsel:

Eva T. Cantarella (for Crosby individually and on behalf of all others similarly situated)
Hertz, Schram & Saretsky, P.C.
1760 Telegraph Rd., Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000

Defendant's counsel:

Ian H. Morrison (for the Bowater Entities)
Seyfarth Shaw LLP
131 S. Dearborn Street, Suite 2400
Chicago, IL 60603
(312) 460-5000

***United States v. Stratievsky*, No. 05 CR 483 (N.D. Ill.):** Defendants Boris Stratievsky, Lev Stratievsky, and Alex Shlosberg were indicted on several criminal charges involving money laundering and furnishing false passports. I denied Boris and Lev Stratievsky's

motion to dismiss Counts One and Two of the pending criminal indictment, concluding that the Government had sufficiently alleged the elements of violations of 18 U.S.C. § 1956(h) (conspiracy to commit money laundering) and 18 U.S.C. § 1956(a)(3)(B) (attempt to commit money laundering within the scope of the conspiracy). *See United States v. Stratievsky*, 430 F. Supp. 2d 819 (N.D. Ill. 2006). I accepted a plea agreement from Mr. Alex Shlosberg and sentenced him after hearing arguments from the prosecution and his counsel. Presently, counsel for Mr. Boris Stratievsky are attempting to arrange the deposition of various putative defense witnesses located in the Russian Federation, and I have granted defense motions to attempt to procure such evidence. The case was reassigned to Judge Ruben Castillo when the President indicated his intent to nominate me for the position of Deputy Attorney General.

Government's counsel:

Charles E. Ex (for the United States)
United States Attorney's Office
219 S. Dearborn St., Suite 500
Chicago, IL 60604
(312) 353-5300

Defendant's counsel:

Edward M. Genson (for Mr. Boris Stratievsky)
Genson & Gillespie
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 726-9015

Marc W. Martin (for Mr. Lev Stratievsky)
Marc W. Martin, Ltd.
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

Cynthia L. Giacchetti (for Mr. Alex Shlosberg)
Law Office of Cynthia Giacchetti
53 W. Jackson Blvd., Suite 1460
Chicago, IL 60604
(312) 939-6440

***REP MCR Realty, L.L.C. v. Lynch*, No. 02 C 399 (N.D. Ill.):** In this case, the plaintiffs alleged that the defendant, an entrepreneur who had engaged in hundreds of millions of dollars in business transactions, was liable under a personal guaranty he made on behalf

of a limited liability company that later defaulted on its loan obligations. The case was first brought before Judge Robert Gettleman; I inherited the case on March 3, 2004, upon taking the bench. In 2005, after holding an evidentiary hearing, I issued a published opinion dismissing with prejudice a third-party complaint filed by the defendant and finding that the defendant engaged in sanctionable conduct by fabricating three critical documents related to the litigation and by repeatedly perjuring himself in connection with the investigation of the authenticity *vel non* of those three documents. *See REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984 (N.D. Ill. 2005), *aff'd*, 200 Fed. App'x 592 (7th Cir. Aug. 3, 2006). In that opinion, I granted summary judgment for the plaintiffs. *See* 363 F. Supp. 2d 984 (N.D. Ill. 2005), *aff'd*, 200 Fed. App'x 592 (7th Cir. Aug. 3, 2006).

Plaintiff's Counsel:

C. Vincent Maloney (for REP MCR Realty L.L.C.)
Perkins Coie LLP
131 South Dearborn Street, Suite 1700
Chicago, IL 60603
(312) 324-8400

Defendant's Counsel

Eugene Murphy, Jr. (for Mr. Lynch)
Murphy & Hourihane LLC
77 W. Wacker Dr., Suite 4800
Chicago, IL 60601
(312) 606-9300

Third Party Defendant's Counsel

Stephen Novack (for Seyfarth Shaw and Edward J. Karlin)
Novack and Macey LLP
100 North Riverside Plaza
Chicago, IL 60606
(312) 419-6900

***Talton v. Unisource Network Services, Inc.*, No. 00 C 7967 (N.D. Ill.):** In this case, Sheila Talton, the founder and former CEO of a corporation sued the corporation and various individual defendants, alleging securities fraud violations and other claims. In September 2004, I issued an opinion denying in part and granting in part the defendants' motions for summary judgment. *See Talton v. Unisource Network Servs., Inc., et al.*, No. 00 C 7967, 2004 WL 2191605 (N.D. Ill. Sept. 27, 2004). In December 2004, I issued an opinion denying the defendants' motion for leave to amend their answer and add new

affirmative defenses. *See Talton v. Unisource Network Servs., Inc., et al.*, No. 00 C 7967, 2004 WL 3119007 (N.D. Ill. Dec. 21, 2004). Thereafter, the parties and court prepared extensively for trial; at the same time, the parties engaged in extensive settlement discussions, some of which my colleague, Magistrate Judge Michael Mason, and I, variously moderated. Eventually the case settled shortly before trial.

Plaintiff's Counsel:

Kathleen H. Klaus (for Ms. Talton)
Maddin, Hauser, Wartell, Roth & Heller, P.C.
28400 Northwestern Highway, Third Floor
Southfield, Michigan 48034
(248) 354-4030

Defendant's Counsel:

Michael A. Reiter (for Unisource Network Services, Inc.)
Duane Morris LLC
227 West Monroe Street, Suite 3400
Chicago, IL 60606
(312) 499-6700

Catherine E. Isley (for Polestar Capital, Inc.; Polestar Capital Fund II, L.P.; Polestar Capital Fund III, L.P.; Atlantic Coastal Investors, L.P.)
Butler Rubin Saltarelli & Boyd LLP
70 West Madison Street, Suite 1800
Chicago, IL 60602
(312) 444-9660

***Cortez ex rel. Cortez v. Calumet Pub. Sch. Dist. # 132*, No. 01 C 8201 (N.D. Ill.):** This case was transferred to me on June 7, 2004, after pending before one of my colleagues. The case was a class action, in which the plaintiffs challenged the manner in which Calumet Public School District #132, various local school officials, and the Superintendent of the Illinois State Board of Education and the Members of the Illinois State Board of Education had administered bilingual education programs. Specifically, the plaintiffs alleged that the defendants variously violated their rights under the Equal Protection Clause, Title VI, and the Equal Education Opportunities Act. After receiving the case, I moderated over extensive settlement negotiations between the parties and their counsel. These ultimately culminated in a settlement agreement between the parties. *See Christian Cortez, et al. v. Calumet Public School District #132, et al.*, No. 01 C 8201, D.E. 74 (Jan. 9, 2006) (order of final approval of settlement, certification and approval of MALDEF as class counsel, and certification of class). Pursuant to the settlement agreement, the defendants implemented various measures designed to help ensure that

bilingual education would be administered properly in the school district.

Plaintiff's Counsel:

Alonzo Rivas, now at:
Jacobs Burns Orlove Stanton & Hernandez
122 South Michigan Avenue, Suite 1720
Chicago, IL 60603
(312) 327-3450; (773) 415-3955

Defendant's Counsel

Darcy L. Proctor (for Calumet Public School District #132 and individual defendants)
Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C.
140 South Dearborn Street, 6th Floor
Chicago, IL 60603
(312) 782-7606

***Miller v. Lewis*, No. 03 C 297 (N.D. Ill.):** In this § 1983 action, a patron of Harrah's Casino sued the casino and Chris Lewis, a special agent of the Illinois Gaming Board, for alleged violations of the patron's constitutional rights after he was detained in the casino and forced to return money to the casino. I denied Mr. Lewis's motion for summary judgment on the false arrest claim and held that Mr. Lewis was not entitled to qualified immunity on the evidentiary record assembled. I granted Mr. Lewis's motion for summary judgment on the excessive force claim, and granted summary judgment for Harrah's on claims of false imprisonment, fraud, and extortion. *See Miller v. Lewis*, 381 F. Supp. 2d 773 (N.D. Ill. 2005). The false arrest claim proceeded to a jury trial, and the jury issued a verdict in favor of special agent Lewis.

Plaintiff's counsel:

Gregory E. Kulis
Gregory E. Kulis and Associates, Ltd.
30 North LaSalle Street Suite 2140
Chicago, IL 60602
(312) 580-1830

Defendant's counsel:

Rachel Jana Fleischmann (for Mr. Lewis)
Illinois Attorney General's Office
100 West Randolph Street
Chicago, IL 60601, (312) 814-6122

***Walden v. City of Chicago*, No. 04 C 47 (N.D. Ill.):** In 1952, Oscar Walden, Jr., was arrested, prosecuted, and convicted of rape in the Illinois courts. He served approximately fourteen years in prison, was paroled, and was eventually granted a general pardon in 1978 by then-Illinois Governor James R. Thompson and an innocence pardon in 2003 from then-Illinois Governor George Ryan. In 2004, Mr. Walden brought numerous federal and state law claims against individual defendants and the City of Chicago, including claims of false arrest, torture and physical abuse, wrongful conviction, and violation of the Equal Protection Clause. I denied in part and granted in part a defense motion to dismiss. *See Walden v. City of Chicago*, 391 F. Supp. 2d 660 (N.D. Ill. 2005). The parties have since engaged in various unsuccessful settlement discussions while also pursuing discovery. The parties are presently involved in various expert discovery, and if the case does not settle, it likely will need to be resolved via a trial.

Plaintiff's counsel:

John L. Stainthorp (for Mr. Walden)
People's Law Offices
1180 North Milwaukee Avenue
Chicago, IL 60622
(312) 235-0070

Defendant's counsel:

Penelope M. George (for the City of Chicago)
City of Chicago, Department of Law
30 North LaSalle Street, Suite 900
Chicago, IL 60602
(312) 744-9010

***Fields v. Maram*, No. 04 C 174 (N.D. Ill.):** Several residents of Illinois nursing homes brought suit under 42 U.S.C. § 1983, the ADA, and the Rehabilitation Act, alleging that the Illinois Department of Healthcare and Family Services had an unlawful policy of refusing medically necessary motorized wheelchairs to disabled nursing home residents who received Medicaid. I initially granted plaintiffs' motion to certify the case as a class action. *See Fields v. Maram*, No. 04 C 0174, 2004 WL 1879997 (N.D. Ill. Aug. 17, 2004). I also moderated extensive settlement discussions, which culminated in a consent decree, under which the Department agreed to adopt various procedures to evaluate and ensure that all nursing home residents who receive Medicaid and who have a medical need for a motorized wheelchair will, in fact, receive such a wheelchair. *See Jackson, et al. v. Maram*, No. 04 C 174, D.E. 65 (consent decree).

Plaintiff's counsel:

Max P. Lapertosa (for Mr. Fields and other plaintiffs)
Access Living
614 West Roosevelt Road
Chicago, IL 60607
(312) 253-7000

Stephen F. Gold (for Mr. Fields and other plaintiffs)
Attorney at Law
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

Defendant's counsel:

Karen E. Konieczny (for Mr. Maram, in his official capacity as the Director of the Illinois Department of Public Aid)
Illinois Attorney General's Office
160 North LaSalle Street, Suite N-1000
Chicago, IL 60601
(312) 793-2380

***Ramos v. Ashcroft*, No. 02 C 8266 (N.D. Ill.):** I inherited this case from Judge David Coar on March 3, 2004, upon taking the bench. Plaintiffs challenged the manner in which the Chicago District Office of the Immigration and Nationality Service handled thousands of applications for adjustment of status from 1997 to 2001, arguing that the Office violated the Immigration and Nationality Act, the applicable regulations, national policy, and the Constitution. After receiving the case, I moderated an extensive series of negotiations, which ultimately culminated in a comprehensive settlement agreement. *See Ramos, et al. v. Ashcroft*, et *al.*, No. 02 C 8266, D.E. 65 (parties' agreed motion for preliminary approval of settlement agreement).

Plaintiff's counsel:

Mary Meg McCarthy (for the plaintiffs)
Director, National Immigrant and Human Rights Center
208 South LaSalle Street, Suite 1818
Chicago, IL 60604
(312) 660-1351

Steven I. Saltzman (for the plaintiffs)
Attorney at Law

122 South Michigan Avenue, Suite 1850
Chicago, IL 60603
(312) 427-4500

Defendant's counsel:

Craig Oswald (for Attorney General Ashcroft, in his official capacity)
United States Attorney's Office
219 South Dearborn Street, Suite 500
Chicago, IL 60604
(312) 886-9080

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

1. *United States v. National Association of Realtors*, No. 05 C 5140, 2006 WL 3434263 (N.D. Ill. Nov. 27, 2006)—counsel as listed immediately above in response to Question 14.b.

2. *Crosby v. Bowater Inc. Retirement Plan for Employees of Great Northern Paper, Inc.*, No. 05 C 3478, 2006 WL 2578928 (N.D. Ill. Sept. 1, 2006)—counsel as listed immediately above in response to Question 14.b.

3. *Miller v. Lewis*, 381 F. Supp. 2d 773 (N.D. Ill. 2005)—counsel as listed immediately above in response to Question 14.b.

4. *Walden v. City of Chicago*, 391 F. Supp. 2d 660 (N.D. Ill. 2005)—counsel as listed immediately above in response to Question 14.b.

5. *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984 (N.D. Ill. 2005)—counsel as listed immediately above in response to Question 14.b.

6. *Talton v. Unisource Network Services, Inc.*, No. 00 C 7967, 2004 WL 2191605 (N.D. Ill. Sept. 27, 2004)—counsel as listed immediately above in response to Question 14.b.

7. *Fields v. Maram*, No. 04 C 0174, 2004 WL 1879997 (N.D. Ill. Aug. 17, 2004)—counsel as listed immediately above in response to Question 14.b.

8. *Holden v. Deloitte and Touche LLP*, 390 F. Supp. 2d 752 (N.D. Ill. 2005)

Plaintiff's counsel:

Harvey J. Barnett (for Mr. Holden)
Sperling & Slater
55 West Monroe Street, Suite 3200
Chicago, IL 60603
(312) 641-3200

Defendant's counsel:

Linton Childs and Charles W. Douglas (for Deloitte & Touche)
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

9. *O'Reily v. Ashcroft*, No. 04 C 3610, 2004 WL 2877321 (N.D. Ill. Dec. 13, 2004)

Plaintiff:

Vasallo S. O'Reily (pro se litigant)
formerly at:
Tri-County Detention Center
1026 Shawnee College Road
Ulin, IL 62992

Since released on grant of habeas relief; whereabouts unknown.

Defendant's Counsel

Sheila McNulty
United States Attorney's Office
219 South Dearborn Street, Suite 500
Chicago, IL 60604
(312) 353-5300

10. *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.*, 03 C 6508, 2006 WL 695467 (N.D. Ill. Mar. 13, 2006)

Plaintiff's counsel:

Dennis A. Dressler (for Freedom Mortgage Corporation)
Dressler & Peters, LLC
111 West Washington Street, Suite 1900

Chicago, IL 60602
(312) 637-9378

Defendant's counsel:

Daniel M. Purdom
Hinshaw & Culbertson
222 N. LaSalle Street
Chicago, IL 60601
(312) 704-3000

Thomas B. Underwood (for Exeter Title Company)
Purcell & Wardrope, Chtd.
10 South LaSalle Street, Suite 1200
Chicago, IL 60603
(312) 427-3900

Gregory R. Meeder (for Ticor Title Insurance Company)
Holland & Knight LLP
131 South Dearborn, 30th Floor
Chicago, IL 60603
(312) 928-6022

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

As of the date of completing this Questionnaire, I have not had an opinion or decision that was reversed on appeal.

In *Williams Electronics Games, Inc. v. Garrity*, No. 97 C 3743, 2005 WL 2284280 (Sept. 15, 2005), I relinquished jurisdiction, and thus effectively sent to Illinois state court, a civil suit in which all of the federal claims had dropped out of the case. That decision was affirmed on appeal. *See Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904 (7th Cir. 2007). In the course of affirming, the Seventh Circuit stated: "We are troubled . . . by the judge's invocation of a 'presumption' in favor of relinquishing supplemental jurisdiction." *Id.* at 907; *compare Williams* 2005 WL 2284280 at *1 (discussing presumption issue). The Seventh Circuit proceeded to affirm, stating: "But it is clear from the district judge's detailed discussion that he would have reached the same result on proper grounds without reference to the presumption, instead relying on section 1367(c)(1) [of Title 28 of the United States Code] ("the claim raises a

novel or complex issue of State law—in fact, issues"). Therefore his exercise of discretion, which was otherwise reasonable, was not fatally contaminated by the reference. This dismissal of the suit is therefore affirmed." *Williams*, 479 F.3d at 907-08.

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

1. *O'Reily v. Ashcroft*, No. 04 C 3610, 2004 WL 2877321 (N.D. Ill. Dec. 13, 2004).

2. *Walden v. City of Chicago*, 391 F. Supp. 2d 660 (N.D. Ill. 2005).

3. *Miller v. Lewis*, 381 F. Supp. 2d 773 (N.D. Ill. 2005).

4. *Beary Landscaping, Inc. v. Ludwig*, 479 F. Supp. 2d 857 (N.D. Ill. 2007).

5. *Access 4 All, Inc. v. Chicago Grande, Inc.*, No. 06 C 5250, 2007 WL 1438167 (N.D. Ill. May 10, 2007).

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

None.

FINANCIAL STATEMENT

Mark Filip
12/2/2007

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks		5	400	Notes payable to banks-secured			0
U.S. Government securities-add schedule			0	Notes payable to banks-unsecured			0
Listed securities-add schedule		347	000	Notes payable to relatives			0
Unlisted securities--add schedule			0	Notes payable to others			0
Accounts and notes receivable:			0	Accounts and bills due			0
Due from relatives and friends			0	Unpaid income tax			0
Due from others			0	Other unpaid income and interest			0
Doubtful			0	Real estate mortgages payable-add schedule		189	800
Real estate owned-add schedule		975	000	Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts-itemize:			
Autos and other personal property		137	500	Credit Card		7	800
Cash value-life insurance			0	Car Loan		27	200
Other assets itemize:							
Retirement Account		97	500				
Children Trust Accounts		2	000				
				Total liabilities		224	800
				Net Worth	1	339	600
Total Assets	1	564	400	Total liabilities and net worth	1	564	400
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			0	Are any assets pledged? (Add schedule)			No
On leases or contracts			0	Are you defendant in any suits or legal actions?			No
Legal Claims			0	Have you ever taken bankruptcy?			No
Provision for Federal Income Tax			0				
Other special debt			0				

Listed Securities
Mutual Funds – Mark Filip

Northern Fixed Income Fund	$	50,900
Northern High Yield Fixed Income Fund	$	27,800
Northern Small Cap Index Fund	$	13,000
Northern Stock Index Fund	$	251,300
Northern Money Market Fund	$	4,000

Itemized Asset One is a retirement account at the law firm at which I was formerly a partner – Skadden Arps Slate Meagher & Flom. I have no control over such funds; I am unaware of how they are invested; and I do not have any access to such funds until I am at least 55 years of age.

Itemized Asset Two lists two children's trust accounts. They hold Northern Stock Index and Northern Money Market Fund shares.

Real Estate Owned

Residence in Illinois	$	975,000

Real Estate Mortgages Payable

First Mortgage on Residence	$	189,800

Chairman LEAHY. Well, thank you very much, Judge. We did want to move quickly because I think the Department needs as much leadership as it can get—and I told Judge Mukasey and I told the President that we would be willing to do that once the names got up here.

I appreciate what you said about the people who work at the Department of Justice. There are so many people there, men and women who neither you nor I, if we spent a week with them, would have any idea what political leanings they had, but we would know and respect their competence. And I worry that morale has been hurt enough that some of those people whom we need, this country needs, who have been there in both Republican and Democratic administrations, that they may leave. And your job would be to restore much of that credibility.

Assuming you were the Deputy Attorney General in 2005 and the Director of the CIA informed you that the CIA intended to destroy the videotapes showing the use of cruel interrogation techniques such as waterboarding, techniques which had already been at the center of a congressional debate, actually had been in cases in the U.S. Supreme Court and other courts about torture and our Government's treatment of detainees, and they said we are going to destroy those videotapes, what kind of advice would you have given them?

Judge FILIP. I would have given them—I would have first tried to look at the applicable legal orders that were in place and give them advice as a lawyer as to what their legal responsibilities were. I also would have considered giving them broader, more prudential sort of advice about whether or not, strictly speaking, things were within the corners of orders or not. It might be the better practice to keep those in any event given the nature of the interests at stake in terms of the subject matter that was on the tapes.

Chairman LEAHY. A subject matter that was before the Congress and the courts.

Judge FILIP. Yes, sir.

Chairman LEAHY. And, alternatively, assume you were the Deputy Attorney General on December 6th this year and you woke up to see this story in the New York Times revealing—or December 7th, rather, revealing that the CIA destroyed two tapes showing interrogations. The videos were not provided to the 9/11 panel, even though they had asked for them, or the court during the terrorism trial. So they had a request from a Federal judge for this information, from the 9/11 Commission, plus, of course, the congressional ones.

Now, assume the Attorney General is out of the country and unavailable so you are Attorney General, what would you do?

Judge FILIP. I think you'd have to open up two lines of inquiry. One of them would be an inquiry as to any representations that the Department had made in court, whether or not those representations had to be corrected. You would need to begin to look to see whether or not corrective action needed to be taken in that regard. You would also want, I suspect, to at least begin the process of making inquiries about whether or not obstruction of justice or

other more serious civil or criminal statutes were implicated. And you would want to begin an investigation in that regard.

Chairman LEAHY. Judge, if this contradicted statements that were made in court, is it safe to say that if they did, it would be the duty of the Department of Justice to immediately notify whatever court that was, "We did actions that contradict what we have told you"? I mean, just as an officer of the court, wouldn't they have to do that?

Judge FILIP. Yes, sir.

Chairman LEAHY. Thank you. You would expect that as a Federal judge, district judge, if the Government had given you a statement they then found to be erroneous, you would expect them to be in your court very quickly to point that out.

Judge FILIP. I would expect them to notify me as a judge. I would expect to have done it as a Federal prosecutor, yes.

Chairman LEAHY. Thank you.

Now, congressional investigations have run concurrently with executive branch investigations, certainly during the 33 years I have been here, and Congress and the Justice Department have usually found ways to go forward without undermining or interfering with ongoing criminal investigations. Senator Specter mentioned Ruby Ridge. That was a case where Senator Specter, his leadership, and Senator Kohl and I worked in a bipartisan fashion to hold a hearing at the same time being well aware and conscious of the fact that there was an investigation underway by the executive branch.

Now, in the case of the destroyed videotapes, I think it is very important to us to find out what the Justice Department's role was in providing any legal opinions about the techniques shown on these videotapes and their destruction as part of our oversight.

What commitment can you provide that you will work with the Senate Judiciary Committee and other relevant congressional committees to provide us with information responsive to our oversight requests?

Judge FILIP. Senator, I acknowledge that the oversight authority of this Committee and other committees in Congress is broad and it is rooted in case law and acknowledged. And I am not a Washington person. I do not have extensive experience in trying to work with Congress in that regard. But I would direct the people who are involved in that, whom I understand largely to be career people, to appreciate that oversight is important, that it is not a victory for the Department when Congress is denied things that it can legitimately be provided, consistent with our responsibility as a law enforcement entity—or the Department's. I shouldn't say "our." I apologize. With the Department's responsibilities as a law enforcement entity.

And so I would ask them to try to work cooperatively to try to find common ground to allow Congress to exercise its oversight authorities.

Chairman LEAHY. You know, in this job, I am privileged to spend a lot of time traveling, some of it pleasurable. You and I discussed the fact I was visiting my relatives, family in Italy here recently, but a lot of them are in business around the world, and I find the concerns expressed by many of our allies and friends around the world about where America is going. And one of the greatest prob-

lems has been the Bush administration's equivocation on America's stand against torture.

Last week, we saw another manifestation of the contortions when a senior military officer testified he couldn't say whether a foreign agent waterboarding an American was illegal or not, even though I suspect if we heard about such a thing, there would probably be a resolution that would go through both bodies unanimously condemning it.

I criticized the State Department when its legal adviser took this stance. I found the testimony by a senior member of our military to be not only wrong but damaging. And we find in the Department of Justice the infamous 2002 Bybee memo to try to provide legal justification for this. And there, the Department of Justice's Office of Legal Counsel concluded that the President has the authority as Commander-in-Chief to override both domestic and international laws prohibiting torture and to immunize from prosecution anyone who committed torture under his order even if it was contrary to our laws.

Does the President have the authority to exercise a so-called Commander-in-Chief override and immunize acts of torture, as the Bybee memo argued?

Judge FILIP. I think torture is prohibited by the Constitution, and the President is bound by the Constitution as well. So the answer to that, sir, would be no.

Chairman LEAHY. Thank you. My time is up. I will be coming back.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Judge Filip, I have referred to a letter which I have sent to you. Did you receive the letter?

Judge FILIP. Yes, sir, I did. Thank you.

Senator SPECTER. Do you agree with the statement of law summarized by the Congressional Research Service?

Judge FILIP. I have no basis to quarrel with it, and I acknowledge that the oversight authority of this Committee is very broad. And I think that in the oversight area it is essential for the Department to work with this Committee to try to accommodate its oversight needs consistent with our responsibilities as a law enforcement agency.

Senator SPECTER. Do you acknowledge the decisions of the Supreme Court in *McGrain* v. *Daugherty* in 1927 and *Berenblatt* v. *United States* in 1959 concerning the primacy of congressional oversight over Department of Justice criminal investigations?

Judge FILIP. I acknowledge all the Supreme Court decisions, so certainly, yes.

Senator SPECTER. Well, it is an obvious matter that the Supreme Court makes the decisions, but I think it is important to set the parameters. And I went through the long list, and I would ask unanimous consent that this document be made a part of the record summarizing the investigations on the Palmer Raids, Teapot Dome, the white-collar criminal prosecutions in the oil industry, Iran-contra, Rocky Flats, Ruby Ridge, campaign finance investigations, the U.S. Attorney removals, the border guard prosecutions as all being instances where the congressional supremacy has been ac-

knowledged. You do not have any doubt about those precedents being applicable on the overall question of congressional oversight?

Judge FILIP. I have no firsthand knowledge of those incidents, sir. I have no basis to quarrel with the fact that those instances are instances where there have been parallel investigations. I think that both branches need to be mindful and need to work cooperatively to try to allow that oversight to occur, and also at the same time to make sure that the possibility of criminal prosecutions are not jeopardized, and that perhaps that might relate to the timing of inquiries or what specific form information might be provided in. But I do not quarrel with the proposition that parallel investigations have occurred in the past and can occur.

Senator SPECTER. Well, Judge Filip, when you talk about criminal prosecutions being jeopardized, let's talk about the relative roles of Congress versus the Department of Justice. In discussions with the Attorney General, reference is made to the prosecutions of Colonel North and Admiral Poindexter which were jeopardized because immunity was not granted properly. Those are errors which are not unheard of, whether the matters are handled by the United States Attorneys or by district attorneys or by Congress.

But that case brings into sharp focus the primacy issue on the greater importance to the public to have Congress deal with Iran-contra on investigating whether congressional laws have been violated, specifically the Boland amendment, with what was done by the executive branch. Wouldn't you agree that even if criminal prosecutions are jeopardized that it is more important, as acknowledged by the courts, that Congress have primacy to proceed as Congress ultimately concludes the public interest requires?

Judge FILIP. I would hope, Senator, to not have to pick between the two. I would hope to be able to try to work with Congress such that Congress could perform its oversight missions, and criminal prosecutions, if they were there to be made, could be preserved.

Senator SPECTER. Well, Judge Filip, I agree with you totally, and when we are looking toward congressional inquiries into the destruction of the CIA tapes, we are looking at broader matters than simply the prosecutions. We are looking at the appropriate range of interrogation tactics. Now the House of Representatives has passed legislation saying that the CIA should be bound by the Army Field Manual. And we have questions as to the Geneva Convention, and we have questions as to congressional legislation on whether habeas corpus—as the statutory part of habeas corpus, not constitutional—ought to be revised.

Now, those are issues of greater breadth and greater depth than the criminal prosecution against someone who may have destroyed the tapes. Now, it is my hope that we can work out an accommodation, and that the conversation I had yesterday with Attorney General Mukasey will be the beginning. And he referenced that he was going to have his Deputies call my assistants, and I hope we can work it out. And if the Department of Justice has some witness that the Department thinks should not be called in a public hearing, we would give great deference to that, probably would agree with it.

But if it comes to a conflict and you have to make a choice, is there any doubt that the broader issues that we are facing, which

I have enumerated for you, whether we are going to bind the CIA to the Army Field Manual, what we are going to do on interrogation practices generally, how we are going to deal with our Geneva Convention obligations, international matters, all beyond the scope of the Department of Justice—if you have to choose, doesn't congressional primacy prevail?

Judge FILIP. Sir, I wasn't privy to the discussion you had with the Attorney General—

Senator SPECTER. Well, strike that part. Just deal with the litany of issues I have given you above and beyond a criminal prosecution, whether congressional primary isn't pretty clear-cut there?

Judge FILIP. Sir, I think you and I very much share the view that Congress has broad oversight authority, and we very much share the view that hopefully that broad oversight authority can be accommodated, while at the same time not jeopardizing criminal prosecutions.

As to picking between the two of them, I would work very hard to try to find common ground so we wouldn't have to make that choice.

Senator SPECTER. Well, on the second round, I am going to come back to a number of subjects, but I want to broach one more with you, and that is the steroids issue, before I yield. We are waiting for Major League Baseball to do something effective on dealing with the issue, and it is complicated because they have to get the agreement of players on testing. And one very substantial power which Congress has would be to change the law on the antitrust exemption to condition some effective action by Baseball to deal with the problem. And I will get into this more deeply in the second round.

But I would like you to give some thought to that question as to—the executive branch obviously weighs in on legislation, and I would like you to give some thought to whether the exercise of that power to evoke the antitrust exemption might not be an effective tool and an appropriate way if Baseball does not act on its own. We would rather not interfere. But if we have to, would you think that a good way to go?

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Well, I am one who feels that exemption should have been lifted a long time ago, along with the insurance companies. That is not a question, Judge. That is an observation by one member of this Committee.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge, nice to see you. I appreciated the chance to talk with you in my office, and also to go over some of the areas that we will be talking about this morning. I will come to those in just a moment.

I just wanted to clarify an earlier response that you gave to Chairman Leahy, and that was on the torture issue. I heard you say to the Chairman that torture is unconstitutional, so it is always prohibited. Judge Mukasey said the same thing to us. Everyone agrees with that point. The key question is, what constitutes torture? Judge Mukasey would say nothing at all on that question. So, the same question to you. Do you consider waterboarding torture?

Judge FILIP. Senator, speaking personally, I consider waterboarding to be repugnant, as it has been reported in any of its various iterations. The Attorney General—and I also think it's important for us to all be mindful that we have service members around the world oftentimes in precarious places. And I don't view that as some sort of abstract platitude. I had a grandfather who was in a German prisoner of war camp.

That said, the Attorney General of the United States is presently reviewing that legal question. He determined that he wanted to have access to classified information, some memos about it. I don't think I can, or anyone who could potentially considered for his deputy, could get out in front of him on that question while it's under review.

But I will tell you that if I am confirmed, at a time such that that review is ongoing or he otherwise sought my advice on it, I would view it like any other legal question and take a long, hard look at it, and if I had a view on it different from his, I would tell him so.

Senator KENNEDY. Well, you've been a judge. You know what this issue is. This shouldn't be something that's going to take a lot more study about. I mean, you know what we're talking about. Not only are you familiar with the concept, but you know the arguments of it. You know what the debate has been about and you know what the Geneva Convention—I mean, we ought to get—"repugnant" is not, I think, the answer that meets the requirement in terms of the various statutes.

You're not prepared to tell us, in your own words, whether you believe that waterboarding is torture, the same kind of techniques that the United States prosecuted the Japanese for doing to Americans in World War II?

Judge FILIP. I think, Senator, that I ought to await having access to that information and await an opportunity, if confirmed, to give candid advice to the Attorney General on that before I answer a question he presently has under review.

Senator KENNEDY. Well, others will come, I am sure, back to that. But I must say, everyone is familiar with the challenges that were out there for Mr. Mukasey when he refused to give an answer on that. We thought that you would be able to give a response to this. You have been a judge. You made the decisions, you know what the issues are. It is not a complicated issue and question on it. It seems to me that you ought to be able to respond to it.

Let me just go back to the issues about the Department, and generally torture. You're familiar with the old Bybee memoranda issue in question, and I'm sure you've gone through that in some detail.

Judge FILIP. Yes, sir.

Senator KENNEDY. The Nation was aroused by it. It was in effect for a period of time. Attorney General Gonzales basically withdrew it and issued another resolution, but he'd been very much involved when he had been in the White House, talking to OLC, the Office of Legal Counsel, in the shaping of the Bybee memoranda. We never got into exactly what advice he gave or didn't give, but nonetheless he was very much involved in it.

Now we see the revelation that the CIA tapes were destroyed, is sort of the latest revelation in the administration's attempt to cover

up what has been out there. Today in the New York Times it says that conversations took place about the destruction of tapes and it names Mr. Gonzales, Harriet Miers, David Addington, and John Bellinger as being involved. It doesn't give the time when that was.

Attorney General Gonzales was confirmed on February 3, 2005. Then in November of 2005, the tapes were destroyed, some 9 months after Mr. Gonzales became Attorney General. It is, I think, unrealistic to assume that Mr. Gonzales did not have any further conversations about the tapes during the 9 months that he was Attorney General.

The Department of Justice has refused to answer questions about its own involvement in the decision to destroy the tapes. Between the time Attorney General Gonzales and the destruction of the tapes, we know OLC was deeply involved in reviewing the legality of interrogation techniques and it issued two secret opinions approving harsh interrogations during this very period of time.

Now, the Department of Justice has been involved in the litigation opposing the claims of detainees and has resisted the production of evidence regarding the treatment of detainees. This coming Friday, Judge Kennedy will hold a hearing to determine whether the Department of Justice violated a preservation order by the destroying of the various tapes. So, the involvement of the Department of Justice appears to be deep and widespread.

Now, what has been the response of the Department? The Department, and under the Attorney General, has appointed Kenneth Wainstein, the head of the National Security Division, to conduct a joint investigation with the CIA's Inspector General. That is hardly an independent investigation. It sounds like the fox is guarding the henhouse. The National Security Division works closely with the CIA, and I'm not aware that it has a track record of investigating criminal misconduct of public officials.

Mr. Wainstein was U.S. Attorney in the District of Columbia in 2005, so there may be a question about the involvement of his office in the preservation orders that had been issued for the interrogation tapes. Also, according to General Hayden, the CIA's Inspector General actually viewed the destruction of tapes, so the Inspector General may be someone the investigators should be questioning, not one who should be doing the questioning.

Now, there is a strong possibility of the White House and Department of Justice being involved in the decision to destroy the tapes that greatly increases my doubt about whether the Department of Justice can lead the investigation in a way that will assure the Congress and the American people that it is independent and uncompromised. Appointing a special prosecutor is the safest way to make sure the investigation meets the standard.

Now, will you consider appointment or recommending a special prosecutor?

Judge FILIP. I think it is imperative that the investigation be done in a way that it can be conducted with integrity. I'm not at the Department now so I don't know the specifics of it, but if the facts warranted any particular course of action, including putting particular individuals on, taking particular individuals off, up through and including a special prosecutor, if that's what I thought that the law and justice required, yes, I would do that.

Senator KENNEDY. Should the FBI have a role? They have experience in conducting criminal investigations.

Judge FILIP. Again, I'm not at the Department. If it would be appropriate for them to get involved, I have the greatest, you know, respect for the FBI and would certainly consider bringing them onto the team.

Senator KENNEDY. The Public Integrity section. They have the experience and expertise in prosecuting crimes of cover-ups. Should they be involved?

Judge FILIP. If it were appropriate to include them. You're absolutely right. There are some very talented people there and I would consider that as well, yes.

Senator KENNEDY. Well, Mr. Chairman, my time is up. But I don't know what, quite, the word "appropriate" means on this. So we have these on the record. This is a time bomb. This is on the record. I've tried to lay out what the facts are about the difficulties of Wainstein's on there. It is just mystifying to me why the Attorney General wouldn't involve the FBI, why they wouldn't have the Office of Public Integrity, which has under the Criminal Division, you're telling me now today that you will just—if it's appropriate, it will? But you're not—I don't get much sense of urgency about the importance of it and about your role and about your deep concern about this issue.

Judge FILIP. Senator, I think—

Senator KENNEDY. I want to be fair to you in listening to your response.

Judge FILIP. May I respond?

Chairman LEAHY. Sure.

Judge FILIP. I think it's a very, very important issue and I would hope that my record as a prosecutor would give you comfort that I will do whatever is appropriate to make sure that it's handled fairly. I'm not at the Department now. If there's one thing learn as a District judge, it's that facts matter and that you have to get in and roll up your sleeves and try to understand what all the particulars are.

I understand I am not the first person to take a look at this, but if I thought that for any reason it was appropriate to put particular people on, to take particular people off, or to have the matter removed from the Justice Department in its entirety, I wouldn't hesitate to say so, sir.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman LEAHY. I should note that Congressman Kirk was here earlier to introduce you, and at that time his duties were keeping him away. But Senator Durbin also, from Illinois, is here.

Senator Durbin, you are going to have time for questioning later. But did you want to add anything to the introduction that the Congressman made earlier?

PRESENTATION OF MARK R. FILIP, NOMINEE TO BE DEPUTY ATTORNEY, DEPARTMENT OF JUSTICE, BY HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Just very briefly. I apologize for not being here, Judge Filip, when you were initially introduced. I welcome you and your family in coming here today.

Mr. Chairman, it was my good fortune several years ago when Senator Peter Fitzgerald nominated Mark Filip for the Federal bench, to meet him and to support his nomination. He squeaked by the U.S. Senate with a confirmation vote of 96 to nothing. I have to tell you that his 3 years on the Federal bench in Chicago have confirmed the feelings of the Senate that you were ready for that job.

In the almanac of the Federal Judiciary, there were comments, anonymous comments, by Chicago attorneys which any judge would love to read. They said of your service on that bench: "His legal ability is a perfect 10 out of 10." "He's an exceedingly smart man." "He's the nicest judge in the courthouse, never loses his temper, never embarrasses lawyers." "You always feel as if you're going to get a fair shake in his courtroom." That is high praise from men and women who could have said other things more negative.

So I thank you for your great service on the Federal bench, and I hope today that in the course of the questioning we can justify your ambition to move from that bench to this high level in the Department of Justice. Again, I want to thank you and your family, all of you, for the sacrifice you have made to public service. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

I talked earlier with Senator Specter, and he can speak for himself in this, and I've raised this with the representative from the Justice Department yesterday. Obviously we are going to be in session more pro forma today than I had hoped. The normal mark-up that we would have tomorrow will not occur. I would just urge the Department of Justice that your nomination and others—we've really been trying to push these quickly—that we work out maybe an accomodation with Senator Specter and myself to name, in about a 2-month period, as acting these various people, yourself included, which would allow us, as is the regular process, to have our mark-up in committee and a vote on the floor.

The Deputy Leader is here. I think he would concur with me that mark-ups or a floor vote would go very quickly. I throw that out. That's not a question to Judge Filip, but I throw it out as just something to suggest to the Department of Justice. In the years I've been here, there has been ample precedent for this when Congress is going to be out rather than try to do some kind of a recess appointment which just angers everybody when it's done without concurrence of both the Chairman and the Ranking Member.

In this case, Senator Specter and I would be willing to consider something where a number of these nominees could be named on an acting basis for a couple of months, with the understanding we're going to be completing all of our process—certainly within that period of time.

Senator Specter, does that fairly state our conversation?

Senator SPECTER. Mr. Chairman, I think it does. We were talking on the floor late last night. We have irregular hours and there are lots of conversations that go on, and occasionally we say something constructive. Senator Leahy broached the subject of trying to get you on the job, and he and I are in agreement that it would

be very useful if you were on the job. We can't work through the confirmation at the moment, but I think that Senator Leahy has made a very generous suggestion to the administration, one that I concur in totally, to have you take on acting, which is not customarily done.

When somebody is nominated for a position, people stand aside and don't answer any questions, and don't talk to the press, and talk to hardly anyone so as not to impede the ultimate confirmation. But with our concurrence—and there are other members present, if anybody objects to that. I don't think people will—it would be very helpful to the Department and we want to help the President and the Department move ahead.

Chairman LEAHY. Thank you. With that, the next in order we have Senator Hatch, Senator Cardin, Senator Sessions, Senator Whitehouse, Senator Durbin on questions, and then back to the two leaders of the committee.

Senator Hatch?

Senator HATCH. Well, thank you, Mr. Chairman. If I could make a suggestion, this is such an important position and needs to be filled. He is a sitting Federal judge. Personally, I believe this side would waive needing unanimous consent to get him on the job and get him confirmed before we actually go out this year. That might be something we want to do.

Chairman LEAHY. Well, I think we're getting into a discussion that we should probably be having among members privately.

Senator HATCH. Well, I just—

Chairman LEAHY. And what we have done—Senator Specter and I have done something that takes care of the problem. I think what the Senator from Utah is about to suggest is something that would require both Leaders and everything else, and I'm not in a position I can speak for them, nor is the Senator from Utah. So I think we should go ahead with the questions.

Senator HATCH. If I could just add to that one comment, that that is a solution that probably could be done. I can't imagine a sitting Federal judge wanting to take a recess appointment. I think that he would—and we all know how qualified and competent he is. So let's think about it anyway, Mr. Chairman. I know that you have great intentions here. It's just a suggestion. I hope we can get him on the job, is what I'm saying, full-time.

Well, I want to thank you, Mr. Chairman, for holding this hearing. I want to welcome you, Judge Filip, your wonderful wife, these fine young men that you have as sons, and your friends, and principal, and all here. I'm grateful. I enjoyed meeting in our office a couple of weeks ago. I expect great things from you at the Department. I think all of us do.

You have accomplished some amazing things in your legal career. I understand you were nominated to the bench. When you were, the Chicago Council of Lawyers endorsed your appointment and praised your legal ability, temperament, and professionalism.

Now, the Senate, of course, unanimously confirmed you to the U.S. District Court, the Federal District Court, almost 4 years ago and you've served in a distinguished fashion there. Then last year, the Chicago Council of Lawyers surveyed practitioners about judges and you again received rave reviews. They say you're impar-

tial, open-minded, smart and hardworking, professional, and easy-going, and your integrity is absolutely unquestioned. So, I would think we might be able to hopefully get you on the job.

Now, let me quote from a recent posting on a popular legal blog by a criminal defense attorney who practices before you: "He is outstanding and is one of the best judges we have in the Northern District. What I know is what I see in court. He is bright, thoughtful, and well-prepared on the cases. He is respectful of the parties and attorneys and conducts himself in complete professionalism." Now, that's from a criminal defense attorney about a judge and former prosecutor. That is high praise, indeed.

Now, it seems like you have more than fulfilled people's high expectations on the bench, and I expect you to do the same at the Department of Justice. As I told Attorney General Mukasey when he was before this committee, I think your experience as a Federal judge is an important addition to the leadership team at the Department. We all respect the Federal bench and we certainly respect you.

More and more issues confronting the Justice Department, especially in the war on terrorism, end up challenged in court. Having not just smart lawyers, but experienced judges over there making these decisions, adds something very unique and valuable. I think you can add a lot.

Now, in the controversy over destruction of videotapes allegedly recording CIA interrogation of terrorists, Attorney General Mukasey has said that Congress should wait for him to investigate before launching its own probe. In other words, let the prosecutors do their work before the politicians join the fray.

Today, the Washington Post editorialized that the Attorney General was right. Yesterday, the Chicago Tribune said the same thing, that politicians should not throw a wrench in the works. I find it a little ironic that some who most loudly demand that the Attorney General be independent from the President appear to want him to be dependent upon Congress. I think we've got to be careful there.

Mr. Chairman, I ask consent to include these two editorials in the record.

Chairman LEAHY. Without objection.

Senator HATCH. Judge Filip, what is your view of that issue? Should the Congress hold off and let the Justice Department probe proceed first? If so, explain why.

Judge FILIP. Senator, I would hope that both bodies could pursue their investigations. At this early stage it may make some sense to give some breathing room to the Department so that they can try to see what the landscape looks like and see if it looks as though a criminal investigation is going to go forward. But I would hope that both aims can be pursued and that folks can work cooperatively in that regard.

Senator HATCH. Well, thank you.

During his confirmation, Attorney General Mukasey promised personally to reexamine the Justice Department's strategy for enforcing the anti-obscenity laws. Now, I think the Department has been wrong to prosecute only the most extreme fringe material and leave the more common, equally obscene, equally illegal material

alone. That narrow approach, to me, does not impact the obscenity industry and does not curb the poison of obscenity in our communities. So will you personally examine this policy and consider changing it, if you will?

Judge FILIP. Yes, sir.

Senator HATCH. Well, those are two things that I feel pretty darn deeply about, and there are a lot of other things, too. But I noticed that—well, let me just ask one other question if I can.

Some have questioned whether you have the management experience to lead the Department with more than 100,000 employees, hundreds and hundreds of lawyers in operations spread across the country. Now, the hearing we had yesterday included nominees to Justice Department components as varied as the Tax Division, the Violence Against Women Office, and the Community Relations Service. The Deputy Attorney General is like the chief operating officer. On the one hand, I do not know how anyone nominated for this position could have comparable prior experience unless they led a massive multinational corporation, and that isn't generally where we go to get people in your position.

So let me ask you, how do you size up the management challenges ahead and what prepares you to tackle such a monstrous task?

Judge FILIP. Sir, I hope I am humble enough to realize that there's 110,000 very talented people there, and I would seek to draw upon their talents. I have managed in a legal setting. I have managed law enforcement people and teams of attorneys both as a prosecutor and in the private sector, but not 110,000 people. I doubt many folks have ever done that. But I do think, and work very hard to try to be fair and to try to be a good listener. I would seek to draw upon the talents of the people who are there.

I would seek to try—as I understand it, a big part of the job is resolving disputes within the Department, tough disputes that can't be resolved anywhere else, and I would hope that my experience as a judge and my record as a judge would give people comfort that I'll give people a fair hearing and hear them out, and then be decisive and try to do things in the best interests of the Department.

Senator HATCH. Well, Judge, I mentioned a minute ago I think your judicial experience is particularly important. Some have questioned whether you are sufficiently independent to help lead the Justice Department. Now, different people mean different things about words like "independent". Some will not think you are independent unless you actually oppose the very President who appoints you on certain issues. Some say you will simply kowtow to the President because you volunteered on his 2000 campaign and contributed to his reelection campaign. To me, that's crazy. No one cited these connections or questioned your independence when the Senate unanimously confirmed you to the Federal bench.

Now, we easily confirmed to the Judiciary and Justice Department scores of President Clinton's nominees, who were tied much more closely to him. No one questioned their independence or their commitment to the rule of law.

But let me ask you how especially your service as a judge has given you the kind of independence, the kind of commitment to the

rule of law that you will need in order to help lead this Justice Department.

Judge FILIP. Senator, commitment to the rule of law is fundamental as a prosecutor, as a member of the Justice Department, as a District Court judge, and I would hope my record reflects that. I try to figure out what the law is and apply it to the facts at hand fairly without regard to where that leads you.

Senator HATCH. Well, thank you. I appreciate it.

Mr. Chairman, thank you for this time.

Chairman LEAHY. Thank you. I found it somewhat interesting, what Senator Hatch was saying: some people say this, some people say that. He apparently has better sources than I have. I hadn't heard anybody say either of those things that may make good debating. But I think everybody has been extraordinarily objective in talking—both Republicans and Democrats, in talking about your nomination. Certainly Senator Durbin, who is the Deputy Majority Leader, has been.

Senator Whitehouse?

Senator WHITEHOUSE. I yield to Senator Durbin.

Senator DURBIN. Thank you, Senator Whitehouse, for doing that.

Judge Filip, let me explain to you what I consider to be my personal moral dilemma with your nomination. I felt that Judge Mukasey offered a clear break from former Attorney General Gonzales and that his time on the Federal bench and the wisdom of his years and his responses to questions on our first day indicated to me that he was prepared to stake his personal reputation on standing up for the Constitution, for legal principles, and walk away from the job if he felt he was asked to compromise.

Then came the second day, and that's when things fell apart. I asked him a question about waterboarding, followed through by Chairman Leahy and Senator Whitehouse. At the end of the day, I concluded I could not support his nomination for Attorney General. It was a stark reversal because my friend and colleague, Senator Schumer, wanted to entrust the job to him and I felt that this issue was so important and so primal in terms of the rule of law and the image of the United States, that until we were given clear, unequivocal answers, I could not go forward.

Now you find yourself in a compromising position because you are aspiring to be his Deputy, and your answers earlier to questions about waterboarding showed deference to the fact that Judge Mukasey is going through a process of evaluating this issue of waterboarding, which leads me to believe that you are not going to provide any more satisfactory answers on the issue than he did.

So let me try to take this to a point—I hope we can take it to a point where we can make some progress on this. I have already said, and I believe, you did a fabulous job, and have done a great job as a Federal judge. I'm glad I associated my name with your nomination. You've not disappointed. In fact, you've confirmed our best hopes in terms of your public service.

Here's the point. I think the definition of waterboarding is very basic. If I understand it—and I tried to just jot it down—it is an interrogation tactic which simulates drowning. It is designed to put the detainee in fear of his life. I think that is a fair conclusion to what waterboarding is.

And it appears that we have prosecuted Japanese who performed this tactic on American soldiers. We even prosecuted an American soldier guilty of that conduct against Filipinos. It seems to me to be, on its face, an obvious and simple definition that has been applied by our government, prosecuting those who did it to others or did it to our own.

Now when I ask Judge Mukasey, is this torture, he said he can't answer that question. Under what circumstances would waterboarding not be torture?

Judge FILIP. Senator, I do not have access to those confidential memoranda and I have not had a dialog with the Attorney General about the question he has presently under review at all. I don't believe, as someone who would be his putative deputy, I can get out in front of him and answer the question he specifically has under review.

Senator DURBIN. Do you understand the problem that creates from this side of the table?

Judge FILIP. I understand the seriousness of the issue. I understand your frustration. I would ask, respectfully, that you look at my record and see whether I've had hesitation looking at issues independently and in an intellectually honest way, and speaking up for what I thought the law required. That's what I would do if I were confirmed.

Senator DURBIN. I don't have any question about that. I think you're a man of principle. I recall that when you sought the nomination there was one issue involving something you'd written as a law student, if I'm not mistaken. You took the time to give me a lengthy, and I thought very comprehensive, explanation about your thoughts then and your feelings at the time. I thought it was a very honest admission that perhaps what you said earlier was something you didn't feel today.

This is so fundamental. Since Judge Mukasey took this job as Attorney General, it appears—at least now we know—there's been a public disclosure that evidence was destroyed. It raises a serious question. Should this come up in a criminal prosecution that the government or either side had destroyed evidence, you know the obvious conclusion that could be drawn, that that evidence, in and of itself, was at least troubling, if not incriminating.

We continue to be haunted by this administration's refusal to make their actions match their rhetoric. The President has said repeatedly, torture is not our policy. We do not engage in torture. Yet when we go to the most fundamental and basic definition of torture, waterboarding, we can't elicit an answer from the Attorney General or his Deputy Attorney General, a clear, unequivocal answer in this.

That is my dilemma. That is what I am going to be faced with. I happen to believe this is not just another issue. I think this may be the defining issue for the war on terror and America's reputation when it comes to human rights. That's why I'm going to continue to struggle with this. I don't know if there's any more guidance you can give. You've been consistent in your answer and I understand it, but it doesn't leave me in a place where I feel satisfied. I cannot believe that we are going to walk away from decades of

adherence to Geneva Conventions from a human rights reputation which led us to be the critic of the world.

You know, we publish an annual human rights report card on the rest of the world. Our State Department does it, continues to do that. So it really puts us in a special position of responsibility when it comes to these issues, and that's why I struggle with this issue and I struggle with your response. I think it is a response consistent with Attorney General Mukasey, but consistent with Attorney General Mukasey's response to this committee he received the lowest confirmation vote of any Attorney General nominee in the last 50 years. That's where you find yourself at this moment over the same issue.

Is there something more you want to say or add to our thinking on this issue before I move to another topic?

Judge FILIP. Sir, the issues you identified about our country's perception in the world and our relationships with our allies and our adversaries and our historical allies are very legitimate ones for people to consider. I share those views. But to go further than that, I think that is what I ought to add.

Senator DURBIN. Let me ask you one last question. I guess my time is up.

Chairman LEAHY. That is all right.

Senator DURBIN. If I might ask one last question. This really relates to something close to home. Just last year, or earlier this year, I attended the funeral of a 13-year-old in the Logan Square neighborhood of Chicago. Her name was Shayna Gayden, playing at school and caught in the crossfire of a gang shooting. She was killed. It was a sad moment, attending that funeral service, memorial service. I think it's imperative that we deny violent criminal gangs access to deadly weapons. After-the-fact prosecution is vital, but prevention is essential.

If you're confirmed, I want to know if you will make it a priority of the Department of Justice to, number one, ensure that violent criminal gangs cannot obtain deadly weapons, and number two, to make certain that those Federal firearms licensees who knowingly supply guns to gang members and other criminals are identified and stopped.

Judge FILIP. Senator, I have been to those funerals and I have been in hospital waiting rooms with the families of law enforcement officers and children who have been killed, and at times almost worse than killed in terms of being put in comas that they—one friend of mine is still in years after that event happened.

I think violent crime is a scourge on this country. It has horrible human consequences. Anybody who has ever been a violent crimes prosecutor, anybody who has ever been an emergency room doctor, particularly in places like Chicago, but anyone in the world knows that, I would give violent crime an absolute priority and do whatever I could to try to prevent those crimes.

Senator DURBIN. And the Federal firearms licensees?

Judge FILIP. They need to adhere to the law as well. Yes. I would try to help you on that issue.

Senator DURBIN. It turns out a very small percentage of them are generating the weaponry that is killing these innocent people. There is a mindless crusade by some gun lobbies to keep that infor-

mation from the hands of prosecutors. I cannot understand how anyone could, in good conscience, adhere to that. I hope, if you are approved for this spot, that you will have a different view.

Judge FILIP. Thank you.

Senator DURBIN. Thank you.

Chairman LEAHY. Senator Sessions?

Senator SESSIONS. Thank you.

Well, you are, of course, right, Judge Filip, that the Attorney General has undertaken to do this and it would be really—we would have to question your judgment if you were to start opening from this table on matters that the Attorney General, your boss-to-be, hopefully, is undertaking a review on. That's just not appropriate and I'm sorry you were asked to answer those questions. You answered very, very well.

I would just say to anyone that might be listening, we have had a very limited number, it appears, of incidents of waterboarding being conducted. There's no evidence that it's been used in the last several years. It was right after 9/11 and it was something that is under review today, and should be. I would note that American soldiers have had that technique utilized against them in order to prepare them for the things they might face if they're captured.

I would also note, and we need to make this very clear, that the U.S. military does not use these kinds of techniques. The U.S. military complies with the laws of war with regard to lawful combatants, and even beyond that to unlawful combatants. So it's not our policy, it's not being done. This repeated talk, and talk, and talk, I believe, has had a tendency to really damage the reputation of our military because they are so careful about these kinds of things.

I would note that torture—the definition of torture is not waterboarding. The definition of torture, according to the U.S. Congress, and we passed title 18, section 2340—it says "an act committed under color of law that imposes severe"—severe—"physical or mental pain or suffering on someone." That can't be done to a captured, lawful soldier either. We have to comply with the Geneva Conventions.

You have been asked a good bit about the right of congressional oversight, and we do have great powers in that regard. But having spent 15 years in the Department of Justice as a U.S. Attorney and Assistant U.S. Attorney, I served on the Advisory Committee of the U.S. Attorneys, came to Washington regularly, and I understand that there are legitimate executive branch powers, just as there are legitimate congressional powers. Are you prepared, if you take this office, to defend the legitimate powers of the executive branch, even if you have to deal with some of these fine Senators here?

Judge FILIP. Yes, sir.

Senator SESSIONS. You'll have to say "no" sometimes.

Judge FILIP. Yes, sir. I—

Senator SESSIONS. Are you prepared to do that?

Judge FILIP. I understand.

Senator SESSIONS. The office of President is not President Bush. He'll soon be out of office and cannot be reelected. Someone else will be President. The office of the presidency, the office, the execu-

tive branch itself, does have legitimate powers and they should be rightfully defended.

Now, let me ask you this. You've heard a lot of these questions about some arcane matters that are relatively important. Some of them are very small in real impact, the number of people impacted. Let me raise something to you that is not a small matter, and that is the question of creating a lawful system of immigration in America. We got so many phone calls, the entire switchboard system shut down here. That is not nativist talk, those were legitimate concerns by Americans that our government has not created a lawful system of immigration.

We probably, according to estimates, had at least 500,000 enter our country last year illegally. We have arrested one million at the border. Would you say that those numbers and other things we've read about failures in the area of immigration enforcement, would you say that indicates that we have a failure of the rule of law in an important matter relative to the sovereignty of the United States of America?

Judge FILIP. I think enforcing the immigration laws is essential, sir. Every one of my grandparents was an immigrant. I understand why people want to come to this country. It is an extraordinary place where someone like me, who has four grandparents who didn't even really speak English a great deal in their home, can be sitting before you here today for the position of Deputy Attorney General.

So, I understand why people want to come here. But this country doesn't have an open borders policy. I appreciate that. There are laws. There are balances that have to be struck. This Congress strikes them. Part of the important mission of the Justice Department is enforcing those laws, and I agree with you. I think it is important.

Senator SESSIONS. You would accept the statement then that the Department of Justice has a key role in seeing that these laws are enforced?

Judge FILIP. Yes, sir.

Senator SESSIONS. And as the Deputy Attorney General, will you commit to us that you will take steps to end the lawlessness and to lead us into a lawful system of immigration according to the best of your ability?

Judge FILIP. I would seek to enforce all the laws, including, certainly, the immigration laws. Yes, sir.

Senator SESSIONS. I would just say parenthetically, the reason we haven't had a lawful system of immigration for the last 40 years, maybe, is because the executive branch hasn't wanted it. Congress has pushed it on any number of occasions, fitfully and not consistently, but no President has taken it upon himself, no Department of Justice, no Customs, Immigration agencies have taken it upon themselves to actually do what needs to be done and seek from Congress the assistance they need to make it happen. Will you call on Congress for help if you believe you need additional laws or additional funding to achieve this goal?

Judge FILIP. Yes, sir.

Senator SESSIONS. Tell me how you see the Department of Justice to be organized and your responsibility in it. What is going to

be the role of the Deputy in Attorney General Mukasey's Department?

Judge FILIP. The Deputy, as I understand it, sir, is the chief operating officer, or as you might say in Chicago, the guy who works the boiler room. It's somebody who tries to keep things operating, all the divisions functioning within their lanes, trying to responsibly handle their areas of assignment and to resolve disputes within the Department between those branches, those units that are difficult disputes that otherwise can't be resolved, and to try to ensure some issues are going to be important, sufficiently important, that they get directed to the Attorney General, and also to try to get those issues that can be resolved without bothering him, get those resolved short of—

Senator SESSIONS. Well, I agree, having been in the Department and seen issues come up for the 12 years I was there, the very same ones every single year between the very same departments. Do you think you're capable of making a firm and clear decision in deciding some of those issues?

Judge FILIP. I think I've learned to do that as a judge. I would hope so. Yes, sir.

Senator SESSIONS. Well, you should try. I won't hold it against you if you haven't been successful in all those things. Somehow they just continue to go on for years and years.

With regard to immigration, there's the project that the Department of Justice has done that does seem to be working, Operation Streamline, which takes—my time is up, I see, Mr. Chairman. Are you familiar with that operation and will you continue to support it, which basically says that if someone enters our border illegally, they will in fact be prosecuted?

Judge FILIP. I'm somewhat familiar with it, sir. My understanding of it is that it's been very successful. If that's the case, I would certainly try to make sure that the Department is engaging in the most successful practices. Yes, sir.

Senator SESSIONS. It's working, apparently, dramatically well in the areas it's being used. It's not being used throughout the whole border. I hope you will consider employing those procedures throughout the border.

Judge FILIP. Thank you, sir.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Welcome, Judge Filip. Thank you for coming to my office the other day. I appreciated our discussion very much.

Just one final word on the question of waterboarding, which has come up a great deal today. As important as the substantive question of waterboarding is, to those of us who find it self-evident that waterboarding is torture, the failure on the part of the Attorney General to, if I would say from my point of view, recognize the obvious, raises a couple of flags. One explanation is that it is lawyerly caution that is behind that, and that is understandable and legitimate, if substantively different from my conclusion.

The other concern, of course, is that somebody got to him and he was told that this is an issue that you're just going to have to play ball on. After what this Department has been through, we are

hyper-sensitive here to that concern, so I hope you appreciate where these questions are coming from.

What I see before me is a man who loves and respects the Department of Justice, a man who served as an Assistant U.S. Attorney with considerable distinction, who served under both Republican and Democratic administrations, who was willing to move his family and give up a lifetime Federal judicial appointment, which is something that, as we know, many of our lawyer colleagues yearn for all their lives, in order to come back to Washington, in order to rally to this Department in its hour of need, even if there is only a year and change available. Am I mistaken in any of that?

Judge FILIP. No, sir. I think the Department of Justice is unique in its role within the country in terms of trying to adhere to the rule of law and I think—I like being a judge a tremendous amount. I have wonderful colleagues. I was torn at the idea of leaving the bench, very much so.

But if there is an opportunity to serve the Department and to make a contribution, notwithstanding the minuses on the scales, at the end of the day that's what won out for me. If I get the chance to serve, I will try to add my name in a small place, on a very long list of people, many who are quite famous and many, many more who aren't, who have tried to serve the country honorably in that role. That's the only reason I'm here.

Senator WHITEHOUSE. And could you comment just a little further, because I think we share this view but I'd like to have you share it here in this public forum, on what the role is of the Department of Justice as an institution in our country's architecture of government?

Judge FILIP. It's elemental. You know, it's an outdated phrase or an outdated phrase in terms of the language it chooses, but we are a Nation of laws and not of men. The Justice Department is fundamentally dedicated to that. I had the opportunity to serve as an Assistant U.S. Attorney in a place where people, without regard to any politics or any personal predilections about anything, joined arms and tried to make sure that the rule of law is observed and that people try to do the right thing.

Doing "the right thing" is not a self-executing phrase. It takes people rolling up their sleeves and thinking hard about what that means in any particular instance, but it's a great flag for the ship to fly under. In terms of the role of the Department, it's to protect the civil rights of every individual, it's to try to defend the law or apply criminal laws vigorously, while at the same time respecting the rights of the accused and taking appropriate respect for victims.

The Department's role is fundamental and it would be my singular privilege to help serve the people in what fundamentally is a family of people and law enforcement agents who try to make this country a better place, and I appreciate that.

The people on the streets are the backbone of the Department, and the people who sit in suits and aren't in a position where they're going to get shot on a raid are not the most important people in the Department, but if I get a chance to be the person who would be the Deputy, I would try to be there for the people who

are the backbone and to try to serve consistent with those principles, because that's what's going to endure over time.

Senator WHITEHOUSE. Let me suggest to you that one of the things that helps those principles endure over time is a battery of institutional safeguards that have been developed within the Department over many years for the specific purpose of protecting the extraordinary power that it has. We know the power that it has. There is no power like it within the continental United States, within the geographic United States. It is the power to break through someone's door. It is the power to remove them from their homes and throw them behind bars. It is ultimately the power to put them to death. It is clearly the power to destroy reputations.

The idea that that power would be infiltrated by political considerations is anathema to America, and yet we stand at a point where we look back at a Department where many of us believe that is precisely what has happened, and moreover that those very institutional safeguards that were built to protect from that were disassembled in order to allow it to happen.

I would like to ask you to comment on some of these institutional safeguards generally, and then specifically I understand that the Attorney General will be, today, announcing that the fire wall between the White House and the Department of Justice that preexisted the Gonzales and Ashcroft administrations has been reestablished. I hope that is the case. If that is the case, thank God, it's about time.

The other specific one, in addition to the general question about the institutional safeguards, is the manual. Senator Feinstein, whose seat I am sitting in right now, noticed that in the earlier edition, this 1995 edition, it was stated quite clearly that Federal prosecutors and investigators should be extremely careful to not conduct overt investigations during the preelection period or while an election is under way, that most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates, and that the Justice Department generally does not favor prosecution of isolated fraudulent voting transactions.

In the new version, May 2007, all three of those written guidelines for prosecuting attorneys around the country were removed. I think they were caught doing it, and rather than fix it they took the offending language, took down the institutional safeguard, out of the manual. I would like to see that put back, because what the removal of that language does is to allow an ambitious U.S. Attorney to prosecute a case of an isolated, fraudulent voting transaction during the preelection period as an overt investigation in order to influence the outcome of that election.

So that's just one example. I would urge you to really do a thorough, like a ship captain would when you've had a wreck or a fire. You go back and you do a damage report. I would hope that it would be part of your tasking to yourself to say, what were these institutional safeguards, which ones were broken, and how do we put them back? To you.

Judge FILIP. The traditions of the Department and the safeguards of the Department are essential and I would ensure to appreciate them and to apply them, both in fact and in word. I

worked in an office and in an area of prosecution in great part where any whiff or fact of partisanship would have fundamentally wrecked the mission and its integrity. If I am confirmed, on my watch there will be none of it, period. You have identified one important area to look at. There are others. The Honors Program hiring. That sort of partisan consideration that you alluded to, it won't happen.

Senator WHITEHOUSE. Let me ask you about one other thing.

I just want to express my appreciation to the Chairman for letting me go on over my time. I'm grateful.

I've recently had the chance, as a member of the Intelligence Committee, to review a variety of Office of Legal Counsel opinions. After considerable discussion with the DNI and with the Department, I've been able to have three legal propositions from those OLC opinions declassified so that I can discuss them publicly.

I find them to be pretty dangerous propositions and out of kilter with what my understanding is of the basic principles of American law. One of them, I'd like to show right here: "The Department of Justice is bound by the President's legal determinations." It's an interesting theory. If you applied it in a company, I suspect the general counsel who said that to the board of directors about the president would likely be run out of the shop. That's probably malpractice, might even be unethical, to not be willing to stand by your well- considered and sincerely held legal determination as Attorney General of what the law, indeed, is.

It hearkens back to that unfortunate interview of President Nixon with David Frost some years ago, where he said, "Well, when the President does it, that means it is not illegal." That was no exactly a high moment for the rule of law in America.

Would you care to comment on to what extent the Department of Justice, as an independent institution, must yield its view as to the law where the President has instructed it to go otherwise and whether your opinion changes if the question of the rule of law would potentially involve peril to the President or his or her administration?

Judge FILIP. My assessment of the law would be my assessment of the law without regard to where it let me—led me. And if the administration or anyone, including the Attorney General, were not able to be persuaded and were to engage in something or direct upon a course that I believed to be inconsistent with the Constitution, I would resign and I wouldn't hesitate to do that.

Senator WHITEHOUSE. I will just say, it made me sick to my stomach when I was sitting there and that phrase jumped off the page at me. I think it is the job of the Department of Justice to tell the President what the law is, and not vice versa.

The last question that I have for you, I'm asking at the behest of my colleague from Florida, Senator Bill Nelson. He is not on this committee, but he has a matter that concerns him very greatly because he has a constituent, Jamie Lee Jones. Well, actually she's from Texas. There's another constituent. His constituent and Ms. Jones from Texas share a story. As Americans, they traveled abroad. They were paid—what's the word I'm looking for? Not consultants, but contractors in Iraq.

They were working for Halliburton KBR, or Halliburton KBR subsidiaries. They were subjected to rape, in some cases gang rape. The rape kit, which was in the custody of the company, has evidently disappeared and the women are concerned that there appears to be no considerable effort of any kind to follow this to its proper prosecutive conclusion.

I was wondering if you have any thoughts on where the Department would go. Are you familiar with the allegations involving illegal abuse against Americans by contractors in Iraq, and how would you expect to handle this as Deputy Attorney General?

Judge FILIP. I'm not familiar with it. Obviously, any crime of that nature is of the utmost gravity. I don't know. The judge in me would want to sort out the jurisdictional area, but if there was a rape within the purview of the Justice Department, it would have appropriate high priority to be prosecuted, absolutely.

Senator WHITEHOUSE. And I hope you would come quickly back to us if you felt that there was a jurisdictional problem and that the United States' writ did not lie with respect to an American overseas, where employees of an American company, who are also Americans, had apparently drugged and raped—allegedly drugged and repeatedly raped—this individual and actually held her in a container for 24 hours, according to her allegations, before she was allowed to be released back to the United States, which happened only because she was able to get her hands on a cell phone and call her Congressman, who was able to break through. It's a pretty sordid story. If the writ of the Department of Justice does not run in that situation for any reason, we would like to know about that right away.

Judge FILIP. Of course. Of course.

Senator WHITEHOUSE. Of course, the fact that Halliburton is an enormous contractor to the government and has been closely engaged with significant political figures obviously raises some additional hackles when evidence appears to have disappeared and an American appears to have been abused, when there appears to have been literally no effort to get to the bottom of it.

Judge FILIP. I understand. And if there's been any incidents of a rape allegation anywhere, it's a very serious allegation and should be pursued vigorously.

Senator WHITEHOUSE. I know Senator Nelson would appreciate that. I'm asking these questions on his behalf because of his really deep concern about this problem for his constituent.

Mr. Chairman, thank you very much. I want to just close briefly by telling the judge that I truly wish you well, like I think all of my colleagues, who are very concerned about the present state of the Department, and we are here, available to listen and to work with you to do anything necessary to put the Department back on its feet.

My compliments to you for having come to this position and being willing to assume these responsibilities. My compliments to your wife. Beth, for being willing to undertake all of the upheaval that this move will require, and my remarkable compliments, as the father of a 14-year-old boy, to Matthew, Tommy, Charlie, and Joe for having sat quietly and still through this long, and from

their point of view very tedious, proceeding. But it has been very important for all of us and I appreciate you being here.

Judge FILIP. Thank you very much for those kind words.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

We'll take a 5-minute break. I'm just going to make sure that there are not other Senators who want to ask questions. Then within a few minutes we'll be wrapped up. We'll take a 5-minute break, during which your four sons can run hollering up and down the halls if they want. Thank you.

Judge FILIP. Thank you, Chairman.

[Whereupon, at 12:05 p.m. the hearing was recessed.]

AFTER RECESS [12:12 p.m.]

Chairman LEAHY. I think we're going to wrap up fairly soon. I know Senator Whitehouse had a couple of more questions. Why don't I yield to you, and then I have a final question.

Senator WHITEHOUSE. I thank the Chairman.

Judge Filip, these are not so much questions as they are, I just want to make a request to you and make a record in these proceedings. In addition to the proposition that the Department of Justice is bound by the President's legal determinations, there were two other legal statements that leaped off the page of those OLC opinions at me that I considered to be inconsistent with American law and constitutional structure, and I just want to mention them to you so you know what they are. I'd like to have you take a look at them once you become the Deputy Attorney General.

My sense is that for a while the inmates were allowed to take over the asylum at OLC, and it may be time to go back and take a look at some of the statements that were left in these opinions, because as you know, OLC has a tradition of precedent of its own and I wouldn't want these to become the evil seed that grows into a true constitutional problem down the road.

One, is this: "An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it."

In my view, what that allows is for there to be a public executive order that purports to control a particular program or activity and a program or activity that is operating in flagrant and complete violation of that executive order at the same time without any disclosure ever, without going back to the executive order and amending it nunc pro tunc without anything. I don't think that is what executive orders are for. I don't think that's the way the American government should work. I think it creates an opportunity to use executive orders not to control government, but to mislead the American people. I'd like you to take a look at that one.

The other is this one. We know there's been a mania about Article 2 recently. This one says, "The President exercising his constitutional authority under Article 2 can—the President's authority under Article 2." You've heard the phrase, trying to pull yourself up by your own bootstraps? That seems to be an exercise in trying to lift yourself by your own bootstraps and it seems to fly very di-

rectly in the face of *Marbury* v. *Madison*, which is a fairly core decision in our jurisprudence.

It is emphatically—that's the word in the case, "emphatically"—the province and the duty of the judicial department to state what the law is. So the idea that a President has Article 2 authority to make his own determination as to what his own Article 2 authority is, is a proposition I would like to see reexamined with cooler heads in place.

I appreciate your attention to those two things. I'm not going to call you on it now, but I wanted to take this opportunity to put them out there as markers, because I think it is important to pull back from what I consider to be some rather extreme points of view.

I appreciate it and I thank the Chairman for the additional time.

Chairman LEAHY. Thank you.

Judge, thinking back on all the questions you've been asked today and the answers you have given, sort of in the area of torture and others, are there any answers you wish to change or elaborate on?

Judge FILIP. Nothing I would change. I would just say [off mic]—

Chairman LEAHY. I'm sorry. Could you start again?

Judge FILIP. I'm sorry. I apologize, sir.

Chairman LEAHY. That's all right.

Judge FILIP. Nothing I'd wish to change. I'd just like to say that I appreciate very much that we have service members around the world, oftentimes in very vulnerable positions. I understand that what we do, to use a midwestern phrase, what goes around comes around, and that we have to be very mindful of that. I also acknowledge that what we do as a Nation has serious consequences in terms of how we interact with other nations in the world, including our enemies, including our friends, including our historical allies, and I think that is a very important consideration in this area.

And to underscore that if I am confirmed, I certainly would offer as frank and candid of legal advice to the Attorney General if he asked my views on this as I have throughout my career on anything else without regard to what that answer was, whether I thought it was something that he would find pleasing or not, and I would engage him in a thoughtful manner to try to convey my views to him.

Chairman LEAHY. I would hope, also, you would think about the fact that our Nation, our great Nation, has gone through civil war, two world wars, has tried to come out stronger and better each time. It's a Nation that certainly attracted my grandparents when they came here from Italy, and my great-grandparents when they came from Ireland, and my wife's parents when they immigrated to this country.

These ideals have allowed us a lot of slack around the world, and justifiably so. During the Cuban missile crisis, the story is told where President Kennedy wanted President Charles de Gaulle to be briefed on what was happening. He sent Dean Acheson to Paris to meet with de Gaulle. Acheson said, "I have these aerial photographs that we've taken to demonstrate what President Kennedy has said, that the Soviet Union has placed missiles in Cuba. I am here to show them to you."

He was stopped by de Gaulle who said, "The President of the United States has said that's what has happened. His word is good enough for me." That is not the reaction we would have today in many parts of the world. We want to get back to that. We also wanted to work with a lot of countries that are becoming democracies and to demonstrate to them, this has worked for the wealthiest, most powerful Nation on earth, these values, you do them, too.

We see in the news the situation in Nicaragua, where an appeals court has said that they should release a prisoner that probably was falsely convicted of a heinous crime, and the lower court judge, because it would be unpopular, won't sign the orders to release him. First, the court judge said, I didn't get to court because I had a flat tire. Then the papers were miscollated, and on and on.

It's easy for us to say, well, of course the lower court would have to follow such an order from their supreme judicial court, but we have got to be able to, in holding when our American ambassador or consulate goes to that government and says, obey your law, we don't want them to say, well, do you obey yours? This is a matter that is—and I don't say this as a partisan. I've been very proud to serve in this Senate for 33 years. But I am very, very concerned of what I am seeing in this lack of trust in the United States around the world.

I want to see it reinstated. Whether we elect a Republican or Democratic President next year, I hope that whoever it is will reintroduce this to America. You, the Justice Department, the Congress, all our institutions are going to have to work at restoring that trust. Trust, once lost, takes a long time to regain.

With that, I will keep the record open should there be further questions, unless you have something else you want to say, Judge?

Judge FILIP. I'm very grateful. I appreciate that a lot of people here have been up very, very late and that they have loved ones and family members who want them home for the holidays. I'm very grateful for you giving me this opportunity. Thank you. God bless you all. Thank you very much.

Chairman LEAHY. Thank you.

We stand in recess.

[Whereupon, at 12:20 p.m. the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

January 18, 2008

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 hearing. If I can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

Mark Filip

Mark Filip

cc: The Honorable Arlen Specter
Ranking MinorityMember
Committee on the Judiciary

Enclosures

Responses to
Senator Edward M. Kennedy
Questions for the Record
Senate Judiciary Committee Hearing on the Nomination of Mark R. Filip to be Deputy Attorney General

1. Investigation into the Destroyed CIA Interrogation Tapes

The CIA's destruction of interrogation videotapes is the latest major torture scandal by the Bush Administration to shock the nation.

The destruction of these tapes raises serious questions about violations of our laws against torture and obstruction of justice—questions that reach beyond the CIA to the White House and the Justice Department itself. The American public's confidence in its government has been shaken again. A thorough, independent investigation is essential.

The investigation into the destroyed tapes is the first real test of the new leadership at the Department of Justice. I'm troubled by the Attorney General's decision to appoint Kenneth Wainstein, the head of the Department's National Security Division, to conduct a "joint" investigation with the CIA's Inspector General.

The National Security Division works closely with the CIA, and I'm not aware that it has a track record of investigating criminal misconduct by public officials. Also, Mr. Wainstein was U.S. Attorney for the District of Columbia in 2005, so there may be a question about the involvement of his office in preservation orders that had been issued for the tapes. Moreover, according to General Hayden, the CIA's Inspector General actually viewed the destroyed tapes. So the Inspector General may be someone the investigators should question, not the one who should be helping lead the investigation.

On the morning of your confirmation hearing, the *New York Times* reported that at least four White House officials—Alberto Gonzales, Harriet Miers, David Addington and John Bellinger—discussed whether the tapes should be destroyed.

As of this writing, the White House has not denied the allegation. Therefore, contrary to earlier suggestions, it appears there may have been support in the White House for destroying the tapes.

The Department of Justice has refused to discuss its own involvement in the decision to destroy the tapes. But it's by no means clear that it had no involvement—especially since Alberto Gonzales had become Attorney General by the time the tapes were destroyed.

The realistic possibility of White House and Department of Justice involvement in the decision to destroy the tapes greatly increases my doubts on whether the Department can lead this investigation in a way that will assure Congress and the American people that it is independent and uncompromising.

Questions:

A. What assurances can you give that you will do everything in your power, if confirmed, to see that the investigation into the destroyed CIA tapes is as thorough and independent as possible?

My record as a federal prosecutor and as a district judge is the best assurance I can give—in deed, and not merely in word—that if confirmed, I will work diligently to ensure that any investigation in which I am involved is vigorous, independent, and fair. As an Assistant United States Attorney, I prosecuted significant cases in many areas, including in the area of obstruction of justice. I believe my record demonstrates a deep commitment to aggressive investigation and, if appropriate, prosecution of alleged federal crimes.

B. If the investigation stays in the Department of Justice, who exactly do you think should be investigating the case from the Department, and what process should they follow?

I understand that the Attorney General has appointed John Durham, a career prosecutor who presently serves as the First Assistant United States Attorney in the District of Connecticut, to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter. I also understand that he has directed the FBI to assist in the investigation. In pursuing any investigation (and,

if appropriate, any prosecution), I would expect Mr. Durham to lead and to work with a team of people who have earned reputations as being aggressive, thorough, fair, and ethical prosecutors and investigators, and who have relevant experience in the area. I would expect the team to follow traditional legal and ethical practices of federal law enforcement officers, including guidance reflected in the U.S. Attorney's Manual. Any investigation team also must be independent, in the sense of being free from any political or partisan influence.

C. Shouldn't the Justice Department have a process in place to determine whether a special prosecutor will be necessary? If confirmed, will you ensure that there is such a process and report back to this Committee?

It is my understanding that the Department has procedures in place that address issues concerning special prosecutors. At present, I am not privy to any facts that would indicate that suitable individuals within the Department of Justice cannot fairly investigate the allegations and, if appropriate, prosecute any resulting cases. If confirmed, if it appeared appropriate to appoint a special prosecutor under applicable procedures, I would not hesitate to raise the issue with the Attorney General.

D. Shouldn't the Department have a process in place to ensure that no investigators have any conflict of interest? If you are confirmed and no such process exists, will you establish one and report back to this Committee?

I believe federal law enforcement agencies have policies in place to ensure that investigators are mindful of conflict of interest issues and needs. I will expect those policies to be observed and abided by in this investigation and any other.

E. Shouldn't the Public Integrity Section have a role? They have experience and expertise in prosecuting crimes of cover-up.

I have great respect for the attorneys in the Public Integrity Section—where I worked one summer during law school and met and worked with many fine individuals. At the same time, I also have great respect for the many other excellent Assistant United States Attorneys around the country who have experience prosecuting crimes that also fall within the portfolio of the Public

Integrity Section. Any investigative and, if appropriate, prosecutive team will need aggressive, fair-minded, and experienced attorneys and agents to perform its role.

F. Shouldn't the FBI have a role? They have experience and expertise in conducting criminal investigations.

It is my understanding that the FBI will be involved.

2. <u>Bybee "Torture Memo" and the President's Power to Torture</u>

As you know, the nation is engaged in an intense debate about torture. In 2002, the Justice Department's Office of Legal Counsel issued the Bybee "torture memorandum," a legal opinion that redefined torture in such a narrow way that almost nothing would be covered. 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. CIA interrogators called the 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 against torture. The memo further stated that government officials can avoid prosecution for torture by invoking the defenses of "necessity" or "self-defense"—even though the Convention Against Torture, ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.

In 2004, we learned that American soldiers had engaged in sadistic acts in the Abu Ghraib prison in Iraq. Shocking photos of such acts created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come.

In October this year, Attorney General Mukasey caused a major controversy by declining to answer this Committee's questions on torture. He refused to say whether waterboarding is illegal, or to state his views on other interrogation

techniques. He could not even bring himself to reject the legal reasoning behind the infamous Bybee memo. The nominee to be the nation's top law enforcement officer refused to say anything at all about torture, except for vague and empty platitudes.

Also in October, we learned from the media that just months after withdrawing the Bybee memorandum, the Office of Legal Counsel issued two new secret legal opinions in 2005 approving the use of severe interrogation techniques.

Just weeks ago, we learned the CIA had destroyed videotapes of its employees in the act of torturing detainees. Those tapes were never shown to Congress or any court. They were never shown to the bipartisan 9-11 Commission. Instead, they were destroyed.

If you are confirmed as Deputy Attorney General, you'll obviously be part of the debate on torture. You'll have a chance to bring America back to the rule of law and the ideals we hold dear—and say "no" to interrogation techniques that are cruel, inhuman, and degrading.

Questions:

A. Dean Harold Koh of 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?

I believe the Bybee Memo was a flawed legal document and that the Department was correct to withdraw it.

B. Do you agree or disagree with the Bybee memo's claim that "necessity" can justify the use of torture?

If an act is "torture," as defined by federal statute (e.g., the Anti-Torture statute), neither the President nor the Department of Justice can exclude it from the prohibition against torture because of necessity considerations.

C. Do you agree or disagree with the Bybee memo's claim that "self-defense" can justify the use of torture?

If an act is "torture," as defined by federal statute (e.g., the Anti-Torture statute), neither the President nor the Department of Justice can exclude it from the prohibition against torture because of self-defense considerations.

D. Do you agree or disagree with the theory—which this Administration has never repudiated—that laws banning torture do not always bind the Executive Branch, because of the President's inherent powers as commander-in-chief?

I do not believe the President has inherent authority to disregard laws banning torture.

E. Do you believe that the President has any reservoir of Article II authority that allows him to disregard laws that Congress passes on torture?

I am unaware of any authority that supports the argument that the President can disregard a Congressional prohibition against torture. As I stated at my hearing, I believe the President is bound by such a congressional enactment.

3. Secret 2005 Office of Legal Counsel "Torture Memos"

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, in order 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:

A. Despite our repeated requests for Office of Legal Counsel opinions relating to interrogation, Congress has not been given these documents. We had to learn about the 2005 opinions from the *New York Times*. If you are confirmed, will you do everything in your power to produce these opinions for this Committee?

As I understand it, those OLC opinions are classified and reflect internal legal advice and deliberations. If confirmed, I would endeavor to ensure that the Department appropriately shares its views on legal matters of interest to the Judiciary Committee while concurrently respecting the Executive Branch's interest in preserving the confidentiality of attorney-client deliberations and communications.

4. Waterboarding

As you know, waterboarding has become the worldwide symbol for America's debate over torture. It became the centerpiece of Attorney General Mukasey's confirmation hearings. It was the technique apparently shown on the videotapes that the CIA destroyed. Waterboarding, however, is not by any means the only interrogation technique sanctioned by the Bush Administration that Congress and legal experts believe to be torture. It's just the most infamous.

In fact, waterboarding is hardly new. It's an ancient, notorious, barbaric technique. In the fifteenth and sixteenth centuries, it was used in the Spanish Inquisition. In the nineteenth century, it was used against slaves in this country. In World War II, it was used against our own soldiers by Japan. In the 1970s, it was used by the Khmer Rouge and the military dictatorships in Chile and Argentina. It's being used today against pro-democracy activists in Burma. That's the company the Bush Administration is keeping when it refuses to give up waterboarding.

Top military lawyers and legal experts across the political spectrum have condemned it as a violation of U.S. law and a crime against humanity. After World War II, the United States helped organize the International Military Tribunal for the Far East, and it prosecuted Japanese soldiers for waterboarding Allied prisoners of war. At one trial, an Army Lieutenant testified that the experience "felt more or less like I was drowning, just gasping between life and death." We sentenced Japanese officers to years of hard labor for using waterboarding.

Like many of my colleagues and many American citizens, I was very troubled by Attorney General Mukasey's evasive answers about waterboarding. He repeatedly refused to acknowledge that waterboarding is torture. Yet as the record makes clear, courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture.

I understand that, if confirmed, you would report to the Attorney General, and that therefore you don't want to "get out ahead of him," as you said in your confirmation hearing when I asked you whether waterboarding is torture. Now that you've had more time to study this issue and to speak with the Attorney General, however, I would like to put my question to you again.

As I said at your hearing, the question is not whether torture is unlawful—everyone knows that it is. Nor is the question whether torture is repugnant—everyone agrees on that too. The question is what constitutes torture. I am not asking you for an official pronouncement on the legality of waterboarding or any other interrogation technique, so the fact that the Attorney General is still conducting his review and that you have not yet been "read into" the CIA program is irrelevant. I am asking for your personal views on this legal question.

Questions:

A. Is waterboarding torture, as defined by domestic and international law?

As I indicated at the hearing, I personally believe that waterboarding, as it has been described in any of its iterations, is repugnant and morally distasteful. As I also stated, in assessing any course of action concerning the putative use of waterboarding, it is relevant and important to consider how America's actions affect both: (1) the safety of American servicemen and servicewomen abroad; and (2) America's diplomatic efforts with respect to our allies and other nations in the world.

As I understand it, the Attorney General of the United States is presently reviewing whether interrogation techniques used by the United States comply with the law, and he is doing so while considering documents and information to which I am not privy. I respectfully submit that neither I, nor anyone else who could be considered for the position of Deputy Attorney General, could opine about the legal question you present under such circumstances. I respectfully submit that my record as a federal judge and as an Assistant United States Attorney reflect that, if I were confirmed as Deputy Attorney General, and if I were asked to assist the Attorney General in his analysis, I would roll up my sleeves, study all relevant materials carefully, and attempt to provide thorough and candid views about the legal question presented. Since I am not currently part of the Department of Justice, I have not been privy to the Attorney General's analyses of relevant legal issues and materials, nor am I part of that analytical process. Finally, please know that, while I appreciate the gravity of this subject-matter, I also appreciate that any statements (including a potentially uninformed or partially informed statement on my part) might be construed or misconstrued in a manner that would present

American interrogators in the field, who perform their duties under the most pressured and stressful conditions, with a representation or signal that would affect their actions in a manner incompatible with the lawful limits of any interrogation program they are conducting.

B. Is waterboarding illegal under United States law?

The question of whether waterboarding is illegal under American law first requires analysis of whether waterboarding is torture under 18 U.S.C. § 2340, which proscribes actions under color of law that are specifically intended (1) to inflict severe physical pain or suffering; or (2) to cause prolonged mental harm through certain threats or acts. *See* 18 U.S.C. § 2340(1) & (2).

Second, one would need to look at whether waterboarding fell under the prohibition against cruel, inhuman, or degrading treatment enacted under the Detainee Treatment Act and the Military Commissions Act. The legislative proscriptions against "cruel, inhuman, or degrading" mistreatment teach that the Fifth, Eighth, and Fourteenth Amendments define the parameters of such prohibited misconduct. *See* 42 U.S.C. § 2000dd(d). Under Supreme Court teaching concerning the Fifth Amendment, for example, which likely would provide the most salient teaching in most instances, the relevant question is whether, under all of the facts and circumstances presented, the conduct at issue "shocks the conscience." *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (collecting extensive Supreme Court precedent and stating that this has been the applicable test "for half a century now"). This analytical framework looks at traditional limits on executive behavior, and actions that shock the contemporary conscience, and under this test, there are some acts that are prohibited irrespective of surrounding circumstances.

Third, one would need to determine whether waterboarding is prohibited under the Geneva Conventions, including the issue of whether waterboarding is prohibited under Common Article 3, which applies to unlawful combatants or terrorists fighting outside the ordinary laws of war and outside of the forces of a Geneva Convention signatory nation. When Congress passed the Military Commissions Act, it prohibited grave breaches of Common Article 3. *See* 18 U.S.C. § 2441. That statute forbids various actions, including murder, mutilation, sexual assaults, torture, and cruel or inhuman treatment. See 18 U.S.C. § 2441(d).

Torture, for these purposes, is defined as an act specifically intended to inflict severe physical or mental pain or suffering. *See* 18 U.S.C. § 2441(d)(1)(A). Cruel or inhuman treatment is defined as an act intended to inflict severe or serious physical or mental pain and suffering. *See* 18 U.S.C. § 2441(d)(1)(B) & (d)(2)(D) & (E).

Fourth, one would need to determine whether any violation were presented under Executive Order 13440, which prohibits willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading a detainee. Finally, it is important to note that if a detainee were a regular soldier (*i.e.*, a soldier from a signatory nation to the Geneva Conventions, fighting in accordance with the laws of war), then that detainee would have various other enhanced protections available under the Geneva Conventions. The standards identified above under Common Article 3 apply as to any combatant, including even an Al Queda terrorist fighting in contravention of the laws of war (e.g., purposefully intending to harm or kill civilians, including children).

If waterboarding fell under the prohibitions of any one or more of the tests identified above, it would be unlawful.

C. Would it be lawful for another country to use waterboarding against an American?

Please see my answer to subsection B above. In addition, I would respectfully underscore that an American soldier would be entitled to the full protections that the Geneva Conventions ensure for lawful prisoners of war, which go beyond the threshold guarantees of Common Article 3. Nonetheless, as I stated at the hearing, I believe it is important, when analyzing the potential use of any interrogation technique, to appreciate whether and how use of any particular technique potentially affects the safety of American servicemen and servicewomen abroad.

D. Where do you draw the line if you cannot say that waterboarding, a classic method of torture throughout the ages, is never permissible? If you feel you cannot say whether waterboarding is torture and illegal, what about the rack and the screw? Can we bring them back?

The extensive set of legal principles and rules identified above would govern and limit the use of any particular interrogation technique. They provide meaningful limits, as defined by Congress and Supreme Court precedent, that cabin executive action in this area of law.

5. Army Field Manual Legislation

In the Detainee Treatment Act passed in 2005, Congress attempted to restore confidence in America's treatment of detainees and affirm our commitment to the basic rights in the Geneva Conventions. But by not explicitly applying the Army Field Manual's standards to all government agencies, we left a loophole that an Administration determined to use abusive interrogation techniques might exploit.

The Bush Administration drove a Mack truck through that loophole. The CIA's so-called "enhanced interrogation program," carried out at secret sites, became an international scandal and a new stain on America in the eyes of the world. The Administration issued an Executive Order last year to minimize the outcry, but the Order failed to provide meaningful guidelines for civilian interrogators or to renounce abuses such as waterboarding, mock executions, use of attack dogs, beatings, and electric shocks. The recent disclosure of secret opinions by the Office of Legal Counsel is evidence that the Administration still intended to use such techniques. Attorney General Mukasey's refusal to say whether waterboarding is illegal and the destruction of CIA videotapes have now given us even greater reason for concern.

All of these disgraceful episodes leave no doubt that the only solution is for Congress to apply the Army Field Manual's standards across the board. That's why I introduced the Torture Prevention and Effective Interrogation Act in August, to do just that. The Intelligence Authorization Bill currently before the Senate incorporates this reform.

The Field Manual clearly states that "[u]se 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 still leaves great flexibility for interrogators, but it makes clear that torture is illegal and forbidden.

Applying the Field Manual's standards throughout the government will help repair the damage to our international reputation. It will also improve the quality of our intelligence gathering, and help protect our own personnel from torture anywhere in the world. It will make America safer and stronger.

Questions:

A. Shouldn't we require all interrogations to comply with the standards of the Army Field Manual, no matter who conducts them?

Any interrogations conducted by Americans must be both: (a) lawful; and (b) as effective as possible to protect American lives and the lives of other innocent people whom terrorists have repeatedly injured and murdered both here and abroad. In addition, I believe it is relevant to consider how any interrogations might impact on the ability of our Nation to engage in diplomatic efforts with our allies and other nations. I also believe it is relevant to consider whether any interrogation technique(s) employed affect the safety of American servicemembers abroad.

Whether to require all interrogations conducted by United States personnel (including non-military personnel) to conform to the Army Field Manual is a policy question that is left to the informed judgment of Congress and the President. I would think any review of the desirability of a revised approach (i.e., an Army Field Manual-only approach) would look at considerations such as: whether the techniques reflected in the Army Field Manual are effective in all situations; whether any putative additional interrogation techniques are lawful; whether any putative additional lawful interrogation techniques have been successful or not in the past, and the circumstances under which they were successful or unsuccessful; and whether the effectiveness of techniques reflected in the Army Field Manual would be feared to be compromised, given the availability of that document on the Internet to anyone around the world, including leaders and members of Al Qaeda

and other terrorist groups. The other factors identified in the paragraph immediately above (safety of American servicemembers abroad, and diplomatic/foreign relations considerations) also would be germane.

B. If not, which specific techniques disallowed by the Field Manual do you believe the CIA should be allowed to use—even though the Department of Defense has rejected them as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas?

I am not privy to what interrogation techniques the CIA might be allowed to use, and I am not an expert on interrogations. As stated, I believe that it is imperative that any interrogation technique—whether employed by traditional police officers, military personnel, or CIA personnel—be lawful. As the question suggests, it also is relevant to consider whether the use of any technique compromises the safety of our servicemen and servicewomen when evaluating the desirability of using any technique within the universe of lawful ones.

C. If you're confirmed and the Field Manual legislation is passed, will you do everything in your power as Deputy Attorney General to ensure that every interrogation conducted by the U.S. government complies with the law?

Yes.

D. As Deputy Attorney General, would you advise the President that he is bound by this law?

Yes.

E. The standards we apply to detainees set the standard for other nations' treatment of Americans they take into custody. If we decide it is lawful for us to use sleep deprivation, waterboarding, and stress positions, then we increase the likelihood that other countries will use the same practices on us. Do you agree that we shouldn't subject anyone to interrogation practices that we'd consider unlawful if used against an American?

It is relevant to consider reciprocity issues, with regard to lawful or unlawful interrogation techniques, as they potentially bear on the safety of American servicemembers.

6. FISA and Executive Power

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 because of them. The President's own head of the Office of Legal Counsel, Jack Goldsmith, testified that 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 described 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 said that 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 the temporary changes made by the Protect America Act permanent, and that we amend FISA in other ways as well. At the same time, the Administration refuses to acknowledge it is bound by FISA. So we have a bizarre situation: the Administration is demanding that Congress pass a new law, but it is simultaneously insisting that no such law is necessary and that it will not be bound by it.

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 famous opinion in the Steel Seizure Cases half a century ago, the President's authority is at its weakest when he acts contrary to a congressional statute. Yet President Bush apparently intends to defy clear statutory language.

Questions:

A. I was concerned that in Attorney General Mukasey's confirmations hearings, he 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 Branch can conduct foreign intelligence surveillance. Do you agree that the Executive Branch is bound to conduct all foreign intelligence surveillance according to FISA?

FISA has been and is the appropriate legislative framework for regulating America's foreign surveillance efforts. Foreign intelligence surveillance must be conducted in accordance with the Constitution and laws of the United States.

Precedent teaches that judges and lawyers should not strive to attempt to resolve unsettled constitutional issues. Concommitantly, at least in my view, the branches of our federal government—including, of particular relevance here, the Executive and Legislative branches—have a solemn obligation to work together and to work diligently to reach sensible common-ground solutions in areas where such unsettled constitutional issues exist. Put differently, I believe the branches have a solemn obligation to work cooperatively so as to avoid creating constitutional crises (or "constitutional moments") if at all possible. As a result, if confirmed, I would encourage relevant individuals within the Executive branch who were involved in the present FISA-reauthorization dialogue to participate in that dialogue with due appreciation for the solemn obligation identified above. This spirit, as I understand it, substantially informed the dialogue in which Attorney General Edward Levi participated on behalf of the Justice Department years ago.

In the unlikely event that a common-ground solution could not be reached, then the Nation would be faced with one of the aforementioned and unfortunate "constitutional moments." There is significant federal judicial authority (albeit not from the Supreme Court) recognizing that the President has constitutional authority to conduct foreign intelligence. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002) (stating that the court in *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980), "as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and further stating

that, "[w]e take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's [residuum of] constitutional power."); *accord, e.g., United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc). Nonetheless, if the Executive Branch were to attempt any foreign intelligence surveillance outside the scope of FISA, its authority would be at its nadir, as analyzed under Justice Jackson's test from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In this regard, it is noteworthy that several respected constitutional scholars have written that, in their view, there is no authority for the Executive branch to operate outside of FISA's limitations. *See January 9, 2006 Letter to Congressional Leaders from, among others, Professors Walter Dellinger, Ronald Dworkin, Richard Epstein, Harold Hongku Koh, Philip Heymann, Beth Nolan, Geoffrey R. Stone, Kathleen M. Sullivan, and Laurence Tribe.* I agree with Senator Schumer's admonition at Attorney General Mukasey's hearing that Department officials should not twist or distort FISA to claim that it authorizes any interception that it does not permit. I also believe that the Executive and Legislative branches must—as a matter of duty and in order to place American counter-terrorism efforts on as secure of footing as possible—make every reasonable effort to work together to reach legislative solutions and not to force the unsettled constitutional question referenced above.

B. When if ever, in your view, would the President be authorized to disregard or violate FISA?

As explained above, the authority on this question is subject to debate. For example, former Attorney General Griffin Bell, who served as Attorney General for President Carter, took the position at the time of FISA's passage that the limits of FISA did not reach to the limits of Presidential authority. On the other hand, there are several well-respected scholars, as noted above, who strenuously disagree.

Any effort to act outside of FISA would be limited by the fact that the Executive authority, if any, to do so would draw upon only the residuum of Executive authority at the epicenter of Article II. Supreme Court precedent makes clear that each branch—including the Legislature—has certain core authority and functions that cannot be evaded or infringed. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 957-58 (1983) ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect

enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve these checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."). However, and critically, as Justice Jackson's *Steel Seizures* analysis makes clear, much more typically each branch's authority—including the President's Article II authority—can be limited by the exercise of other branches' authority, including Congress's Article I authority. In the end, I fundamentally believe that the Executive and the Legislature should and must work cooperatively in this area to ensure that the constitutional conflict discussed above is not created, so as to best provide for the safety of the American people and to preserve critical civil liberty protections.

C. 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?

Please see my answers to subparts A and B above. I respectfully submit that it is difficult to imagine that America's leaders cannot find common ground so as both to protect the safety of America's civilians, children, and military personnel from foreign enemies and terrorists, while at the same time safeguarding the safety of our Nation by protecting fundamental civil liberties. In the tragic event that such a solution could not be found, I would insist that the Administration act within statutory and constitutional limits.

D. Do you agree that any new legislation should reaffirm that FISA is the "exclusive" means by which the executive can conduct foreign intelligence surveillance?

I believe this is a policy issue best left to the informed view of Congress. As stated, I believe the Executive and Legislative Branches share a solemn obligation to attempt to reconcile competing issues and to come up with a legislative solution that will fully authorize the surveillance necessary to protect American lives against foreign enemies and terrorist groups—who have, among other things, shown a willingness and desire to murder innocent Americans, including civilians—while at the same time respecting fundamental and essential civil liberties. If confirmed, I will urge relevant individuals within the Department of

Justice and the Executive Branch to participate in the legislative dialogue in that manner, and I will do so myself if called to participate in that dialogue.

E. In an Administration that has shown little respect for FISA, it will obviously take courage to insist that the law must be followed. No matter what pressures you face, will you insist that government surveillance must comply with FISA?

I will insist that the Administration act lawfully within the context of foreign intelligence surveillance or any other context.

F. Will you take the necessary steps to ensure that all Justice Department employees are also committed to obeying FISA?

Yes; please also see answer immediately above as to subpart E.

7. Death Penalty Regulations

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.

But 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 severely 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 new public outrage, and will 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:

A. These regulations concern an extremely complicated and highly sensitive area of law. Thousands of pages of comments have explained the many problems they create. As Deputy Attorney General, would you give careful review to the entire comment record before making any decision on whether to implement the regulations?

I share your conviction that any regulations concerning the death penalty must be well-considered and must be faithful to the legal dictates that attend this area of the law. If confirmed, I would give careful consideration to the comment record before making any decision on whether to implement the regulations.

B. If your review shows that the proposed regulations are deficient, would you make the fundamental revisions necessary for such regulations to be consistent with Congress's intent?

If I determined that the proposed regulations were deficient in whole or in part, I would endeavor to work within established procedures concerning the promulgation of Department regulations to ensure that appropriate revisions were made.

8. Oversight of Federal Election Laws

As Deputy Attorney General, one of your duties will be to oversee the Department's role in enforcing the federal election laws. Details are still coming out about how this responsibility was improperly politicized under Attorney General Gonzales. But it's already been established that 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, however, 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:

A. What assurances can you give to 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?

I agree that the Department must be a non-partisan guardian of fair and open elections. I believe my record as a federal prosecutor and as a district judge is the best assurance I can give—in deed, and not just in word—that if confirmed, I will do my best to ensure that the Department of Justice serves the public in this fashion. I worked very hard to be a fair, aggressive, and non-partisan prosecutor, and I have worked very hard to decide cases fairly under applicable precedent as a district judge. If confirmed as Deputy Attorney General, I would endeavor to see that the Department served as a non-partisan entity that worked to ensure that everyone had the chance to participate in fair and open elections.

B. Restoring the 1995 guidelines on election-related prosecutions 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 confirmed, and after having an opportunity to review the issue more thoroughly and after hearing from the career attorneys involved in the drafting of the guidelines, I would be open to considering changes to the manual, including the revisions suggested above.

C. If you will not commit to do this, do you at least agree that the changes recently made in the manual to give prosecutors and investigators new freedom to influence election outcomes were dangerous and inappropriate?

Please see response immediately above.

9. <u>Poor Record on Race and National Origin Discrimination</u>

I'm concerned about the Department's priorities on civil rights. Throughout this Administration, the Department seems to have downgraded its long-standing commitment to vigorous enforcement of the nation's civil rights laws. In particular, the number of cases alleging discrimination against African Americans and Latinos has declined.

For seven years under the Bush Administration, the Civil Rights Division has filed only two voting rights cases alleging race discrimination against African Americans and relatively few national origin cases on behalf of Latinos under the Voting Rights Act. By comparison, the Clinton Administration filed at least 18 under the Voting Rights Act alleging race discrimination against African Americans alone.

On job discrimination, the Department's own data show that the Division has filed and resolved fewer cases than in the Clinton Administration, despite an increase in the number of Division attorneys handling such cases. In fact, the Division has filed nearly as many cases alleging national origin or race

discrimination against whites as against African Americans and Latinos combined.

Questions:

A. Clearly, no one should suffer discrimination, regardless of their race or national origin. However, the Department's civil rights enforcement should also reflect the cases of greatest need. Do you have any reason to believe that vigorous enforcement of the nation's laws against discrimination based on race or national origin is needed any less today than it was in the late 1990s?

It is always imperative to vigorously enforce laws against discrimination based on race or national origin, as well as discrimination on any of the other bases prohibited by federal anti-discrimination laws (e.g., religion, age, status under the A.D.A.).

B. If you are confirmed, will you commit to work with the Attorney General, the next Associate Attorney General and Assistant Attorney General for Civil Rights, to find out why the Department has shifted resources away from pursuing race and national origin discrimination?

If confirmed, I would work with the Attorney General, Associate Attorney General, and Assistant Attorney General for Civil Rights to ensure that the Department was vigorously enforcing all federal anti-discrimination laws—including, specifically, laws prohibiting discrimination based on race or national origin.

C. If you conclude that the decline in enforcement in these areas is due to a lack of resources, will you promptly inform Congress of that fact? It would surprise me if that were the case, but if so, we'd want to know immediately.

Yes. I would endeavor to work within appropriate frameworks, including the OMB process, to ensure that the Department has the resources necessary to prosecute all cases, including civil rights cases.

10. Role of Politics in Voting Cases

One of the most disturbing parts of the U.S. Attorney scandal is the evidence that some of the U.S. Attorneys were fired for failing to bring politically motivated prosecutions on the issue of voter fraud.

The U.S. Attorney in New Mexico was fired after he refused to prosecute Democrats for election crimes because he believed there was insufficient evidence. The U.S. Attorney in Washington was let go after refusing to bring election fraud cases against Democrats in that state's 2004 Governor's race. There is also evidence that political advisors in the White House were involved in a systematic effort to press U.S. Attorneys to bring election-related cases to benefit Republicans.

This is enormously significant, because if it's true, it undermines public confidence that the Department can be trusted to protect one of Americans' most fundamental rights – the right to vote and to have their votes fairly counted.

Questions:

A. The public is entitled to assurance that with new leadership in the Department, partisan concerns will not affect voter fraud prosecutions in the next election. Will you commit that if confirmed, partisan politics will have no role in your enforcement of voting laws?

Yes.

B. If confirmed, will you issue a written statement to the Justice Department attorneys who enforce laws on election fraud and on these election issues, reminding them that no prosecution can ever be brought for partisan reasons?

As I understand it, upon taking office, Attorney General Mukasey sent an introductory communication to Department personnel (such as AUSAs around the country). If confirmed, I would personally anticipate sending an introductory communication to all Department attorneys, in which I would make clear, among other things, that the prosecution or litigation of any criminal or civil case cannot

be influenced by partisan political consideration or other inappropriate motivation or consideration.

11. Political Personnel Practices

Federal law and civil service rules prohibit discrimination against career Justice Department personnel based on political affiliation. Yet in recent months, we've seen many troubling reports of partisanship in personnel decisions at the Department.

--Monica Goodling, a former aide to the Attorney General, admitted that she probably crossed a line in considering candidates for civil service positions.

--Bradley Schlozman, a former high ranking official in the Civil Rights Division, testified before this Committee that he had bragged about hiring Republicans, and the Washington Post has published other reports of his politically motivated personnel decisions.

--In July 2006, the Boston Globe reported that the number of attorneys with civil rights experience being hired in three key sections of the Civil Rights Division had declined sharply, while the number of such attorneys hired who had ties to the Republican National Lawyers Association and conservative groups such as the Federalist Society increased.

--The head of the Division's Voting Section has been the subject of repeated reports of politically motivated decision making on both personnel and law enforcement matters, and just this week he was removed from his position.

The appearance of unlawful political considerations in the hiring process has done enormous damage to the Department's reputation and the morale of its attorneys.

Questions:

A. As you know, these allegations are also part of an internal investigation. Will you commit to take seriously the findings of the Inspector General

and the Office of Professional Responsibility, and to take whatever steps are needed to correct any problems they reveal?

Yes.

B. Will you personally ensure that if confirmed as Deputy Attorney General, you will insist that hiring decisions be based on merit, not politics?

Yes.

12. Jena Six

The nation has been shocked by the appearance of racially motivated prosecutions of African American students in Jena, Louisiana, and the tensions caused by the nooses in the local schoolyard. In recent months, there have been disturbing reports of a sharp increase in the number of nooses sighted around the nation.

The Department's slow reaction to the civil rights issues in Jena, Louisiana, and to the threatening appearance of nooses on campuses and in workplaces around the country, have created significant concern in the civil rights community.
Questions:

A. The Department has said it is still considering what action to take in the case, if any. I received a letter from the Department which indicates that–although other Sections of the Civil Rights Division are investigating events in Jena–the Special Litigation Section is not. The Special Litigation Section has authority to investigate a pattern or practice of racially motivated prosecutions, and would be the proper Section to examine whether the prosecutor in Jena is acting with racial bias in the case. If confirmed, will you look into this issue and let the Committee know of what the Department intends to do to bring the Jena Six matter to closure?

As a former prosecutor, my understanding is that civil litigating divisions within the Department of Justice, such as the Civil Rights Division, typically report in the first instance to the Associate Attorney General. At times, the Deputy Attorney General may appropriately become involved in a matter being handled by the Civil Rights Division. If confirmed, I would endeavor to learn what my role might be with respect to the many aspects of the Jena case, and to contribute appropriately to the Department's efforts to bring the Jena case to a fair and timely closure.

13. Indefinite Detention of Criminal Aliens

In *O'Reily v. Ashcroft*, an unpublished decision regarding a challenge to the practice of indefinite detention of criminal aliens, you deferred ruling on whether a Mariel Cuban who was inadmissible to the United States was subject to indefinite detention under Section 241 of the Immigration and Nationality Act, as the very issue was pending before the Supreme Court at the time. Subsequently, in Clark v. Martinez, 543 U.S. 371 (2005), the Court ruled that the statute did not authorize indefinite detention, regardless of the immigration status of an individual. Both the Department of Homeland Security and the Department of Justice have actively sought to revise Section 241 to permit such indefinite detention with virtually unlimited discretion given to the Secretary of DHS and little ability for review of any decisions to detain. While I have supported a fair and balanced approach to the continued detention of truly dangerous individuals, provided that there is a fair and impartial review process, the DHS and DOJ proposals go too far.

Question:

A. As Deputy Attorney General, how will you ensure that sufficient due process is provided to any individual whom the government seeks to detain indefinitely? If the Department of Justice proposes revisions to current law, do we have your promise that you will actively seek fair review of any decisions to detain, including appropriate review by the Immigration Courts?

The government must provide due process in the immigration context to individuals who are detained in our country, including individuals detained

indefinitely. I would seek to ensure that due process is provided by faithfully applying Supreme Court and other appropriate precedent concerning the demands of due process in this context. I am unaware of the history concerning any dialogue between the Department of Justice and Department of Homeland Security, on the one hand, and other groups, on the other, concerning the appropriate balance to strike concerning review of individuals who are believed or alleged to be dangerous. If confirmed, I would endeavor to participate in any dialogue concerning this subject with an open mind and with due regard for Supreme Court and other due process teaching in this area.

14. Conflict between Criminal and Immigration Legal Policy

The Department of Justice is charged with enforcing federal law, including numerous laws relating to terrorism. In that regard, the Department has vigorously pursued cases in which individuals have been charged with providing material support to Al Qaeda and other terrorist organizations. At the same time, in the immigration context, the question of material support has consistently posed problems for refugees who were forced under coercion or duress to give "material support" to rebel groups and others who have taken up weapons against the government. This "material support" often was nothing more than washing clothes or tending to wounds, and yet more than 12,000 refugees were barred from admission to the United States based on their involuntary actions. Although the Administration had the power to grant waivers in many of these cases, the Departments of State, Homeland Security, and Justice were unjustifiably slow to act.

It is my understanding that the Department of Justice's Office of Legal Policy played a major role in impeding the material support waiver policy. Similarly, I am told that the Office of Immigration Litigation frequently disregards the explicit policy determinations of the DHS immigration agencies in order to pursue its own policy agenda on immigration. There has been the suggestion that the Department's criminal and domestic policy objectives are interfering with its ability to fairly interpret immigration laws.

Question:

A. As Deputy Attorney General, what will you do to ensure that criminal enforcement and/or domestic policy objectives do not influence immigration decisions or immigration outcomes? Will you pledge to undertake a review of the actions of the Office of Immigration Litigation and the Office of Legal Policy to ensure that these offices are not exercising undue influence on immigration outcomes?

As Deputy Attorney General, I would make clear that immigration decisions and outcomes should be reached under applicable legal principles under the specific facts of any given case. With respect to the material support waiver policy, as I understand it, the Department of Justice has supported a legislative measure that would broaden the ability of the Executive Branch to waive material support bars. If confirmed, I would work to ensure that the Department exercised only appropriate influence in the immigration process.

B. Given the inherent tension between law enforcement and benefits determinations—a tension which led to the dissolution of INS and the creation of separate immigration agencies for enforcement and benefits— should we take the next step and create an independent agency to house the immigration court, an agency that is truly insulated from political objectives?

I agree that political objectives should not influence the adjudication of individual immigration cases, and that each case must be decided on the applicable legal principles and facts of the case presented. I suspect that creating a separate government agency is not necessary to fairly adjudicate immigration cases, as opposed to the traditional method of adjudicating such disputes. However, I would raise the issue with appropriate individuals, including members of the Judiciary Committee, if I came to believe differently.

15. <u>Politicization of Immigration Judge Selection</u>

I am gravely concerned about the politicization of the immigration judge hiring process. Testimony before this Committee clearly demonstrates that the

Office of the Attorney General was actively involved in the selection of immigration judges between 2004 and 2006. It is my understanding that some of these appointments were made without benefit of any civil service notification or job posting.

Immigration judges are civil servants charged with the important task of determining whether an individual should be deported from the United States, or be allowed to remain in this country on the basis of a claim for asylum, withholding of removal or other form of relief, such as protection under the Convention Against Torture. Despite the life or death consequences, the former Attorney General allowed this process to devolve to political cronyism, irrespective of talent, training, or judicial temperament.

Questions:

A. What assurance can you give this committee that you will thoroughly review all immigration judge appointments made between 2004 and 2006? In your review, you should consider to what extent impermissible political considerations were taken into account during the hiring process, the number of positions filled without benefit of posted job announcements or without interviews, and immigration law expertise of those hired. If you find deficiencies in these areas, what will you do to correct this problem?

As I stated at the hearing, partisan and political considerations can have no place in hiring, promotion, or retention decisions concerning the vast majority of Department employees, who are subject to the protections of the Civil Service Act. If anyone acts in such a manner, I will act appropriately to rectify the problem. As for individuals who have been previously hired into Civil Service Act positions, I am uncertain what employment protections are conferred under that Act as to present employees. However, if any such individual acts in a manner that is influenced by improper political or partisan considerations, or is otherwise not competent or is acting inappropriately, I will not hesitate to discipline that individual as is just, including potentially seeking to terminate the employment of that individual if circumstances warrant.

B. Given the irregularities in hiring, what steps will you take to reassure the public and the individuals who appear before the immigration courts that the system is fair, balanced, and not subject to political influence or pressure?

If confirmed, if I see any evidence that immigration decisions are being made on the basis of political or partisan considerations, or that the courts are deciding cases on the basis of such considerations as opposed to the law and facts applicable to any specific case, I will work to eliminate such considerations and appropriately discipline any offending individual(s).

16. Hate Crimes

Hate crimes violate everything our country stands for. They send the poisonous message that some members of our society deserve to be victimized because of who they are. Last month, the FBI reported that nearly 10,000 Americans were victims of hate crimes last year – up 8% since 2005. We know that these statistics show only a small part of the problem, because hate crimes routinely go unreported.

Current law covers only hate crimes based on race, color, religion, or national origin. We've been trying to pass stronger legislation on this issue for the past ten years. We came close this year to extending protection to victims of hate crimes based on gender, sexual orientation, disability or gender identity. The bill also would have updated current law by removing the outdated requirement that a victim be engaging in one of a limited number of federal activities, such as traveling in interstate commerce, before the federal government can intervene.

Despite the fact that such a large number of hate crimes occur every year, there has been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the department charged 45 individuals with hate crimes and convicted 38. In 2006, the Department charged 20 individuals with hate crimes and convicted 19. This trend is disturbing, particularly in light of the increase in hate crimes. It's obvious that hate crimes are a national problem, and should be a higher priority of the Department.

Questions:

A. What is your opinion of these trends in hate crimes and race-related incidents?

I believe hate crimes are pernicious and should be aggressively prosecuted. I am uncertain whether the two years of data (i.e., data concerning 1999 and 2006) reflect a broader trend, or whether they might represent data points within a more generally consistent set of numbers that vary somewhat over time. In any event, if confirmed, I would seek to ensure that all hate crime allegations were appropriately investigated and that prosecutable cases were aggressively pursued.

B. What role does the Department have in assisting states in dealing with hate crimes?

Allegations of hate crime incidents might be the subject of joint investigations comprised of both state and/or municipal officers, on the one hand, and federal law enforcement officers such as FBI agents, on the other. In addition, although most hate crimes are prosecuted in state courts, where appropriate and consistent with the U.S. Attorney's Manual, the federal government may take the lead and prosecute a case that might otherwise be pursued in state court.

C. Do you support efforts to expand current law to protect more victims of such crimes?

I have not had the chance to study present legislative proposals or the Administration's position concerning those proposals. As a general matter, I support the vigorous prosecution of any hate crimes within the purview of federal jurisdiction.

17. Rising Crime Rates and Federal Funding for Law Enforcement

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 previously been falling steadily since the mid-1990s. Clearly, we need to provide greater federal support to state and local law enforcement. At a recent hearing chaired by Senator Biden,

the witnesses identified a number of reasons for the increase. Most of them agreed that the increase is related to the reduction in funds for federal crime prevention programs and the greater reliance on local law enforcement for combating terrorism.

Two important federal anti-crime programs have been steadily losing funds: the community policing program known as "COPS," and the anti-gang program known as Byrne Grants. The COPS program was created in 1994 to improve community policing across the country by providing federal grants to state and local law enforcement to hire and train more police, purchase new crime-fighting technologies, and develop more effective policing strategies. It was a remarkable success. It put more police on the street in 13,000 communities across the country, and was a key factor in reducing violent crime by 26% between 1994 and 2001.

In Massachusetts during the late 80's and early 90's, Boston suffered serious increases in gang violence and gun violence. We had the highest-ever homicide total of 152 in 1990. Significant investment by the COPS Program -- $17 Million from 1994-2000 – gave major assistance to the Boston Police and helped to reduce gang, gun and youth violence. The number of homicides fell to the lowest level ever in 1991 - only 31 homicides - and was only 39 in 2000. But beginning in 2001, youth, gun and gang violence began to increase and COPS grants fell. Boston only received $3 million in such grants during this period.

Questions:

A. Would you support increased federal funds for state and local law enforcement?

State and local law enforcement agencies must be funded appropriately and well, so they can recruit, train, and equip the best possible police forces so as to protect our citizenry. Demands for funding of law enforcement agencies compete with many other worthy needs with regard to federal, state, and municipal funds: health care and medical research funding, educational funding, assistance for low-income senior citizens and infants, among many others. Reconciling these competing demands requires difficult and often unpleasant budgetary decisions, and the Justice Department and other law enforcement officials are not always ideally positioned to reconcile the competing demands presented across the

budgetary waterfront. If confirmed, I will work to ensure that resources are leveraged and utilized as best possible, and work to see that the critical partnerships the Department has with state and local law enforcement entities continue to flourish. I also would work to see that the Department contributes to the efforts of state and local law enforcement in additional ways—for example, by assisting in training efforts and in helping those law enforcement entities to learn about best-practices and inprovements that have been developed in other parts of the criminal justice system in America.

B. What actions can the Department of Justice take to help state and local governments deal with rising crime rates and fewer funds?

The Department can help identify best-practices so that state and local police forces are most effectively utilizing their resources to deter and detect criminal activity. In this regard, federal law enforcement agencies often can help to train local and state law enforcement officers as part of joint task forces—where the state and local officers, of course, also share insights and expertise with federal law enforcement colleagues. Those state and local task force members often return to their respective agencies, where they serve as well-trained leaders whose expertise is shared with their colleagues. This collaborative process helps everyone, including state and local law enforcement agencies.

18. Crime Prevention Programs

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."

Questions:

A. What role do you believe the Department of Justice has in encouraging such prevention programs?

I agree that we, as a Nation, must attempt to prevent youths from becoming enmeshed in a life of crime, and that it is essential to offer positive alternatives to crime, violence, and gang membership. The Department can play a valuable role in trying to help States, counties, and cities appreciate what crime prevention programs are most effective. This effort can contribute, along with efforts of educational institutions, families, private businesses, civic, charitable, and religious groups, and other federal and state agencies to provide alternative positive opportunities for youth who otherwise might be tempted to join violent criminal gangs or other criminal groups.

19. Sentencing and Crack Powder

The U.S. Sentencing Commission recently found that 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 soared 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 clearly contributed to the enormous increase in prison population.

A major part of the problem is the disparity in sentences for offenses involving crack and powder cocaine. 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. It's the only drug with a mandatory prison sentence for a first-time possession offense.

To address these disparities and target the most serious dealers and traffickers, Senator Hatch and I introduced legislation this year to reduce the ratio from 100:1 to 20:1 and to eliminate the mandatory minimum sentence of 5 years for first-time possession.

The Sentencing Commission recently approved new guidelines to reduce the disparity, and applied them retroactively, and the Supreme Court has just ruled that the Federal Guidelines are advisory, not mandatory.

Unfortunately, the Department of Justice proposed legislation in June that would make the guidelines mandatory again, but leave the maximum sentences advisory. So the Department's punishment philosophy seems out of step and out of touch with the both the Supreme Court and the Sentencing Commission.

Questions:

A. What is your view on sentences for crack cocaine and powder cocaine?

I have stated on many occasions while teaching in an academic setting that reasonable people can disagree regarding the question of what ratio is appropriate to address the increased problems and violence that often accompany crack cocaine trafficking. In this regard, I believe the present 100-1 ratio was developed in good faith, and further believe that people can discuss in good faith whether a revision is or is not appropriate. I understand the Department has stated its support for the maintenance of the 100-1 ratio; if confirmed, I would attempt to participate in any review of legislative proposals to modify the ratio with an open mind and with recognition of the legitimacy of concerns on both sides of the debate.

B. What is your view of the Department of Justice proposal to impose mandatory minimum sentences for all federal crimes?

I have not studied this proposal in detail. If adopted, it would institute a substantial shift in contemporary criminal sentencing practices.

With respect to the issue of mandatory minimum sentences generally, federal judges, criminal law practitioners, and scholars have long discussed how enactment of mandatory minimum sentences can produce both negative and positive effects. *See, e.g.*, Honorable Paul Cassell, *Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Committee*, 19 Fed. Sent. R. 344 (2007) (offering various criticisms of mandatory minimum sentences, and quoting, among others, Chief Justice William H. Rehnquist and Justice Stephen Breyer); John C. Jeffries, Jr. and Honorable John Gleeson, *The*

Federalization of Organized Crime: Advantages of Federal Prosecution, 46 Hastings L.J. 1095 (1995) (discussing how mandatory minimums can prompt cooperation from defendants who otherwise would not cooperate); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993) (discussing various positives and negatives concerning mandatory minimum sentences). Any move to an across-the-board system of mandatory minimum sentences would, I respectfully submit, require a careful assessment of whether positives of a mandatory minimum sentencing structure would justify the attendant negative consequences (such as elimination of the chance to make tempered adjustments based on the particular circumstances of any given case) in any and every case.

As this question notes, there have been substantial recent developments in the area of federal sentencing—including recent Supreme Court teaching and recent actions by the U.S. Sentencing Commission. It may be prudent to see what changes in sentencing practice eventuate in the wake of these recent developments before considering legislative enactments that would further change the landscape in this area of the law. Many people believe that the Supreme Court decisions and revisions to the advisory Guidelines will prompt substantial changes in sentencing outcomes in the federal courts. These changes can be difficult to accurately predict and often are only revealed over time.

C. 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?

It is always legitimate and appropriate to consider the impact that mandatory minimums likely will have on society generally and on poor and minority communities in particular.

20. <u>Juvenile Justice</u>

One of the most disturbing trends in our criminal justice system today is the irresponsible transfer of more and more juveniles to adult courts. On any given day, 7,500 youth are confined in adult jails in the United States. Incarcerating youths in adult facilities obviously increases risks to their safety. We know that

when placed in adult jails, they are at increased risk of physical and sexual assault. In 2005, 20 percent of the victims of inmate sexual violence in such jails were under the age of 18, even though juveniles account for less than 1 percent of the total inmate population in these jails. Youths confined in adult jails also have a higher risk of committing suicide than those confined in juvenile detention facilities.

In fact, CDC's Task Force on Community Preventive Services recently reported that youths transferred to the adult system are at a higher risk of being re-arrested for a subsequent violent crime than youths who remain in the juvenile system. The Task Force also found that trying juveniles as adults has no deterrent effect on later delinquent behavior. In other words, transferring youths to adult courts is counter-productive for both the community and for the juveniles.

Questions:

A. What is your view of the practice of transferring youths to adult courts?

Transfer of youth defendants to adult courts is, in my experience, a phenomenon much more common in state and local criminal justice systems than in the federal system. I believe certain crimes committed by youths (e.g., certain homicides or sexual offenses) can appropriately warrant transfer to adult courts. Such treatment, however, should be the exception to the general rule. Moreover, it is important to endeavor to ensure that such youths are protected from mistreatment, including sexual mistreatment, while incarcerated in adult facilities.

B. What alternatives can be put into place to keep youths out of the adult criminal justice system?

Society's goal should be to keep youths out of any criminal justice system—juvenile *or* adult. Keeping youths away from a life of crime is a complex problem that requires extensive contributions from many sectors of society, including schools, private businesses, charitable, civic, and religious groups, and parents and families. Government programs also can play a role—for example, in terms of providing quality public educational opportunities, appropriate tax incentives, and job training. As for the question of keeping youths who engage in criminal misconduct in the juvenile justice system as opposed to the adult system,

it is important to appreciate that serving time in an adult penal environment may expose a young offender to substantial training for a life of future crime; as a result, transfer of youths to the adult system should be reserved for only the most serious youth offenders.

21. Prison Rape Elimination Act

Sexual violence in detention is a significant human rights issue. 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. Every U.S. jurisdiction has a law criminalizing custodial sexual misconduct. The federal government began addressing this problem through in 2003 Prison Rape Elimination Act, which calls for an analysis of the incidence and effects of prison rape and adequate funds to protect detainees from sexual abuse.

The results of the first national survey of sexual victimization of inmates in state and federal prisons were released this week, and they confirm our worst fears about sexual violence behind bars. The survey was mandated by the Prison Rape Elimination Commission. According to the survey, 4.5 percent of inmates who participated in the survey reported being sexually victimized, and estimates suggest that more than 60,000 inmates are sexually assaulted each year.

Questions:

A. Are you familiar with the work of the Prison Rape Elimination Commission?

Yes, generally. I am familiar with the fact that the Prison Rape Elimination Act was passed in 2003, and that under that enactment, a bi-partisan commission was convened to address the serious problem of sexual violence and rape in American detention and prison facilities. Since its creation, as I understand it, the Commission has begun a comprehensive study of prison sexual assaults. It is my

understanding that the Commission will develop zero-tolerance standards concerning sexual attacks in American prisons.

B. What steps need to be taken to convince federal inmates to feel comfortable in reporting their victimization to prison officials?

It is important to try to eliminate barriers to the collection of accurate data about this serious crime problem; in that regard, if inmates are reluctant to report incidents of sexual assaults, that is an issue that must be responsibly addressed. As I understand it, the Commission—whose members include experts with extensive academic and research credentials in this subject area, as well as decades of practical experience—has attempted to promote accurate reporting by designing a survey system that allows for anonymous reporting, so as to alleviate victims' fear of retribution and to address any embarrassment victims might feel.

I acknowledge that I am not an expert in this area, and further appreciate that the Commissioners appear to be attempting to address disincentives to the reporting of these crimes. That said, to the extent it has not been done already, it might be prudent to suggest that the Commissioners consider drawing upon research insights and techniques developed over the past few decades to help promote accurate reporting of sexual assaults and rapes of non-prisoner victims in general society. In addition, it might be prudent to encourage members of the Commission to consider whether additional training of prison medical personnel might facilitate the accurate reporting and detection of prison rapes.

22. DC Gun Ban

For almost three decades, the District of Columbia's handgun and assault weapon ban has helped reduce the risk of deadly gun violence. City residents and public officials overwhelmingly support the handgun ban, and until the recent *Parker* decision, courts have upheld it. In the *Parker* decision, the D.C. Circuit held the D.C.'s gun ban unconstitutional under Second Amendment. The Supreme Court has not yet decided whether to review the ruling, so the District of Columbia is still waiting to see whether the current gun ban will be repealed or upheld.

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." But we have gone 200 years without construing the Second Amendment that broadly. It's difficult to believe that increased availability of handguns and assault weapons in the nation's Capital will make residents and visitors safer. Introducing more guns onto the streets and into the community will only increase the level of violence, including homicides, suicides and accidental shootings, and deadly gun violence will be more likely to erupt in schools, offices, public buildings, and public spaces.

Questions

A. What are your views of the Second Amendment?

I have never had occasion to study the extensive materials that would be necessary to respond to the question of the precise nature of the right(s) conferred under the Second Amendment. As I understand it, this issue is presently before the Supreme Court, whose teaching I would respect and endeavor to implement if confirmed.

B. Do you share former Attorney General Ashcroft's individual-rights view of the Second Amendment, or do you think that the Amendment should continue to have its long standing interpretation of applying only to militias or that the District of Columbia has the right to regulate guns as it sees fit?

Please see response immediately above.

Responses to
Senator Dick Durbin to
Written Questions for Deputy Attorney General Nominee Mark Filip

1. At your hearing, Chairman Leahy asked you whether the President has "authority to exercise a so-called Commander-in-Chief override and immunize acts of torture." You responded, "I think torture is prohibited by the Constitution, and the President is bound by the Constitution as well. So the answer to that, sir, would be no." Some have also suggested that the President might have the authority to override the Detainee Treatment Act, also known as the McCain Torture Amendment, which prohibits the United States from engaging in cruel, inhuman, or degrading treatment in all circumstances.

a. Is it illegal in all circumstances for the United States to subject detainees to cruel, inhuman or degrading treatment?

Yes. The Detainee Treatment Act provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location," can be subjected to "cruel, inhuman, or degrading treatment or punishment," and that prohibition applies without regard to geography or geographic limitation. *See* 42 U.S.C. § 2000dd(a) & (b).

b. Do you believe the President has the authority to override the McCain Torture Amendment?

No. The President is bound by the law.

c. If confirmed, will you pledge to uphold the McCain Torture Amendment in all circumstances?

Yes.

2. Prior to your confirmation hearing, we met in my office to discuss your nomination. During our meeting, we discussed the form of torture known as waterboarding. You told me that you found waterboarding to be "morally repugnant and distasteful." You also told me that your grandfather was a POW in a German camp during World War II so you understand that, in your words, "what comes around goes around."

In light of your grandfather's experience, are you concerned that the failure to speak clearly about the legality of techniques like waterboarding places Americans at greater risk of being abused by enemy forces?

Yes, I believe it is relevant to consider how American interrogation practices and rules concerning them may affect the safety of American servicemen and servicewomen in the

hands of enemy forces. (In the interests of clarity, please know that my grandfather was an Allied prisoner in a German prison camp in World War I, not World War II; please excuse me if I did not make that clear during our meeting.)

3. 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. For each of these five techniques, please respond to the following question:

Would it be legal for enemy forces to use this technique on an American detainee?

America is a signatory to the Geneva Conventions, and American soldiers fight in accordance with the laws of war. As a result, a captured American soldier generally would be entitled to the full protections of the Geneva Conventions. Under those protections, enemy forces would not be able to lawfully employ techniques barred by the Geneva Conventions against American prisoners of war or detainees—at least if those enemy forces were from a signatory nation to the Geneva Conventions or otherwise were abiding by the Geneva Conventions.

In so saying, I appreciate that terrorist organizations typically do not operate as military forces of Geneva signatory nations, and they often do not abide by the laws of war or the Geneva Convention rules; instead, they often exploit advantages derived by acting in contravention to those laws of war. Nonetheless, as I stated at my hearing, I believe it is important to consider how any interrogation techniques Americans employ might affect the safety of American servicemen and servicewomen abroad, even if we cannot guarantee that others will live by the same rules that we do.

4. 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 [of the Geneva Conventions] 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?

Yes, *Hamdan* so holds as I read the opinion. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796

(2006). The Supreme Court's ruling controls.

b. Do you agree that all interrogation techniques used by U.S. personnel must comply with Common Article 3?

Yes, that is a holding of *Hamdan* as I read the opinion. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796 (2006). The Supreme Court's ruling controls.

5. Last year, the President issued an Executive Order interpreting Common Article 3 of the Geneva Conventions as applied to CIA detention and interrogation. 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?

I have no basis to conclude that the Executive Order is not consistent with America's legal obligations under Common Article 3. I was not privy to the circumstances that led to the drafting of the Executive Order; however, to the extent the Order references a reasonable-person standard, I suspect the standard was included to give some objectivity (and protection to both detainees and others) with respect to the issue of whether certain treatment or behavior might be deemed humiliating or degrading. Such reasonable-person standards are sometimes applied in such circumstances to try to make the law more objective, even-handed, and fair for all concerned. *See, e.g., Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam) (collecting Supreme Court precedent and holding that, when determining whether a suspect is in custody for purposes of the *Miranda* warning requirement, the subjective views of the interrogating officers and the suspect do not govern, but the issue is instead evaluated by reference to a reasonable-person standard). By virtue of the reasonable-person standard, an interrogator could not assert that objectively degrading misconduct was not so, simply because the interrogator did not regard it as such; similarly, a detainee who subjectively harbored an unreasonable belief—e.g., that a woman properly could be killed for attempting to teach a girl to read, or that a person could be properly killed because he practiced a particular different religion—could not claim that simply being questioned by a woman or adherent of that different religion was itself "degrading" and thereby illegal.

6. When we met in my office, we discussed Guantanamo Bay. You told me about the time you spent in England and said that you understood that Guantanamo has become, in your words, "a source of negativity around the world" that has "made it more difficult for us to build coalitions." You said, "We should try to get it closed as soon as possible."

General Colin Powell recently said, "If it were up to me I would close Guantanamo not tomorrow but this afternoon. Essentially, we have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission."

Do you agree with General Powell's statement?

I certainly agree with General Powell in that he argues that we should close Guantanamo as quickly as we responsibly can do so. I would respectfully submit that we need to ensure that anyone presently at Guantanamo, who is properly detained, can be transferred to another appropriate location, and that any transfer will not endanger Americans' lives, whether here in the United States or abroad, or subject the detainee to inappropriate conditions of confinement in any new location. Consistent with those concerns, we should close Guantanamo as quickly as possible.

7. Under the Bush Administration, the CIA has reportedly transferred detainees to countries that routinely engage in torture so that these detainees can be interrogated using interrogation techniques that would not be permissible under U.S. law. The Torture Convention, which the United States has ratified, makes it illegal to transfer individuals to countries where they are likely to be tortured. The Administration has said that it stands by this legal prohibition.

a. Do you believe rendition for the purposes of interrogation is legal?

As I understand it, the term "rendition" refers to the transfer of a person from one country to another outside the framework of a formal extradition proceeding. Whether a given rendition were lawful or not would depend on the facts and circumstances of the particular case, including whether the initial seizure and detention were lawful in the first instance.

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?

It seems very unlikely that a foreign intelligence service ever could lawfully detain an American within the United States, or, by extension, to thereafter transfer the American to another country for purposes of interrogation.

8. The Administration has said that it relies on so-called "diplomatic assurances" as the legal basis for concluding that a detainee will not be tortured when he is rendered to a foreign country. It is difficult to understand how the Administration can rely on promises from countries like Egypt, Saudi Arabia and Libya that routinely violate their legal obligations not to use torture.

a. Do you believe relying on non-binding diplomatic assurances from countries like Libya, Saudi Arabia and Tunisia satisfies the United States' legal obligations not to transfer an individual to a country where he is at risk of torture?

I believe the propriety of relying on another nation's promise would depend on the facts and circumstances presented in a specific case—including, for example, whether the country involved had a record of being honest or dishonest when making such representations. In this regard, for example, as I understand it, European nations often require America to represent that we will not seek the death penalty against a person being turned over on a murder charge, for example, of an American citizen. If America has abided by such representations, I do not believe the European nation would be acting irresponsibly in turning over an individual for prosecution in the United States for the murder of an American.

b. Would it be legal for a foreign country to send an American detainee to a country like Libya, Saudi Arabia or Tunisia on the basis of diplomatic assurances?

Please see answer immediately above. In addition, the propriety of transfer of any American would require that the initial detention and seizure was legitimate in the first place.

9. The recent killing of 17 Iraqis in a shooting involving U.S. security firm Blackwater has highlighted the need to examine the activities of contractors in Iraq more closely and to hold them to the same standards to which we hold our military personnel. 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 have not been any indictments in any of these cases. During the same time period, the Defense Department has prosecuted numerous military personnel for detainee abuses. What troubles me most is the appearance that our brave men and women in uniform are being held to a higher standard than others when it comes to fighting the war on terrorism.

a. Does it concern you that so many military personnel have been prosecuted while none of the contractors implicated in these cases have been?

As a former prosecutor and former defense attorney, and as someone who presently serves as a district judge, I hope our law enforcement personnel are vigorously investigating any allegations within the scope of federal jurisdiction so as to assemble prosecutable cases against anyone who is believed to be guilty, and concommitantly to vindicate any such accused individual against whom there is not such evidence. To the extent there is proof beyond a reasonable doubt that can be assembled against any of the private contractors on a case within federal jurisdiction, those individuals should be prosecuted.

b. If you are confirmed, what will you do to improve the Justice Department's oversight of private security contractors in Iraq and Afghanistan?

If confirmed, I would work vigorously, as I respectfully submit my career as both an Assistant United States Attorney and as a district judge reflects, to see that private security contractors in Iraq, Afghanistan, and elsewhere were accountable under the rule of law, while at the same time respecting the constitutional rights of any accused individuals. A prosecutor or law enforcement official must simultaneously respect both of these demands.

10. Do you believe it would be appropriate for the Senate to confirm a Justice Department nominee who is under investigation by the Department's Office of Professional Responsibility?

I believe it would depend on the facts and circumstances presented in any given case. It is easy for anyone to make an allegation—and a steadfast prohibition against confirming anyone under such a circumstance could give an inappropriate incentive for someone to make an allegation simply to preclude confirmation. However, such an issue could be considered, in my view, by someone in deciding how to cast his or her vote or otherwise to act concerning a potential confirmation, as circumstances warranted.

11. American Enterprise Institute scholar Norman Ornstein has written: "the core of the U.S. Attorney scandal is not just the federal prosecutors who were fired or targeted for dismissal, but those who were not targeted because they did the bidding of their political superiors at the Justice Department."

Former Attorney General Dick Thornburgh, who served under President George H.W. Bush, offered startling testimony before the House Judiciary Committee in October on this issue. He testified that a U.S. Attorney in his home state of Pennsylvania brought several political prosecutions last year in order to hurt Democrats at the polls.

You are probably familiar with a Wisconsin case in which the 7th Circuit earlier this year ordered the immediate release from prison of a Democratic state government employee who had been unfairly prosecuted by the U.S. Attorney in Milwaukee on corruption charges. And there have been recent allegations that Karl Rove pushed a U.S. Attorney in Alabama to prosecute a former Democratic governor for partisan gain.

In his testimony to Congress, Attorney General Thornburgh said: "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."

a. Are you concerned about the disturbing pattern of selective prosecution by this Administration? What does it say about the rule of law in America?

As I stated at my hearing, partisan considerations—or any of the other bases on which selective prosecution claims or concerns are typically based, such as, for example, race or ethnicity—have no place in the prosecution of any criminal case. If confirmed, I will not permit anyone to act on such bases, nor will I do so myself.

b. What are the appropriate sanctions that should be taken against U.S. Attorneys who have engaged in selective prosecution?

Attempting to assess appropriate employment sanctions against any Department employee, in any scenario, would require a thorough assessment of all facts relevant to the specific situation. As a federal judge, I have learned that it is not optimal, and often even counterproductive, to attempt such analyses in the abstract before relevant facts are all on the table and everyone has had a fair chance to be heard. I believe my record demonstrates that I would act fairly to address a problem if any such situation were to occur.

c. If confirmed, what efforts would you undertake to investigate and remedy past instances of selective prosecution in Alabama, Pennsylvania, Wisconsin, and other states in which this practice has allegedly taken place in recent years?

Selective prosecution claims are typically evaluated—at least in the first instance—in the trial court and upon appropriate motion of the individual making the allegation. Such an allegation potentially also might be raised in an appeal or in other court filings in the jurisdiction where a case was prosecuted. I would be inclined to allow those established, independent, and neutral mechanisms to run their course before contemplating any other methods to address potential allegations.

12. In response to a written question I sent him in October, Attorney General Mukasey pledged that "selective prosecution of anyone for political purposes will not be tolerated. If confirmed, I will communicate additional clear guidance through appropriate channels."

a. **Having once worked in a U.S. Attorney's office, what advice would you give the Attorney General on how to communicate "additional clear guidance" to U.S. Attorneys' offices on this issue and which "appropriate channels" should be used to do so?**

In my experience, federal prosecutors and United States Attorneys are aware of this bedrock principle. If confirmed, I would personally anticipate sending an introductory communication to all Department employees, in which I would make clear, among other things, that the prosecution or litigation of any criminal or civil case cannot be influenced by partisan political consideration or other inappropriate motivation or consideration.

b. **This is a presidential election year. If confirmed, what steps would you take to ensure that U.S. Attorneys around the country will not target Democrats in order to seek partisan advantage in 2008?**

If confirmed, I will make clear, in word and deed, that I will not allow partisan political considerations to affect any litigation decision in a criminal prosecution or civil case, and that the resolution of such cases should turn on the facts of the particular case and the law applicable to those facts.

13. The Justice Department's image as an impartial and independent law enforcement agency has been severely tarnished in recent years due, in part, to a number of troubling trends: the selective prosecution of Democratic Party officials; the firing of U.S. Attorneys who would not engage in such selective prosecution; changes in the Honors Program and experienced attorney hiring programs in an apparent attempt to pack the career attorney ranks with partisan ideologues; and the use of voting rights laws to restrict the voting rights of traditional Democratic Party constituencies such as minorities and the poor.

The Justice Department's Inspector General and Office of Professional Responsibility are conducting an unprecedented joint investigation into whether the politicization of the Justice Department involved violations of federal laws and policies.

I had hoped that Attorney General Mukasey would take steps to end the politicization of the Justice Department, but I have been thus far disappointed. On December 10, the Justice Department filed an amicus brief with the Supreme Court to defend a restrictive Indiana photo ID law that has a discriminatory impact against minorities, the poor, and the elderly. The Solicitor General is even asking for oral argument time in this case (*Crawford v. Marion County Election Board*). You are probably familiar with the *Crawford* case – it arose in the 7th Circuit. It is one of

the most significant voting rights cases to come before the Supreme Court in years. In a brief filed with the court, the Lawyers' Committee for Civil Rights stated that the Indiana photo ID law contained "the most restrictive voter ID provisions in the Nation" with burdens that "raise heightened concerns because they fall disproportionately on certain segments of the electorate, including less affluent and minority voters."

The Department of Justice is not a party in the *Crawford* case. It was under no obligation to file anything with the Supreme Court. It could have stayed out of this case altogether. Or it could have filed an amicus brief on the side of minority voters and in opposition to the Indiana law. Yet, it chose neither of these options, instead choosing to offer an aggressive defense of the law and of a legal doctrine that restricts voting rights.

In light of the many concerns that have been raised recently regarding the politicization of the Justice Department and its efforts to use federal laws to pursue a partisan agenda, don't you think it would have been preferable for the Department not to file an amicus brief on behalf of the restrictive Indiana photo ID law? Please explain.

From my experience clerking at the Supreme Court, my sense is that the Justices at the Supreme Court all typically welcome briefs filed by the Solicitor General because the Department's briefs are of high quality and assist the Court in attempting to identify relevant precedents and to fairly apply the precedents to the case at hand. I am unaware of the specific circumstances that led to the Department's decision to file an amicus brief in the case. Given that the Supreme Court has accepted the case for argument, I understand why one might conclude that the Justices would likely expect an amicus brief from the United States in this sort of case.

14. The 50th anniversary of the Justice Department's Civil Rights Division was marked in 2007. This office was established during the civil rights era primarily to safeguard the civil rights of African Americans.

In recent years, the original mission of the Civil Rights Division has been neglected. At Attorney General Mukasey's nomination hearing, the president of the NAACP Legal Defense Fund, Theodore Shaw, offered testimony in which he accused the Civil Rights Division of "a retreat from its longstanding commitment to eliminate racial discrimination against African Americans."

Indeed, serious concerns have been raised about the Civil Rights Division's lack of enforcement on behalf of African Americans during this Administration. The Civil Rights Division brought the first Voting Rights Act lawsuit in history on behalf of whites but failed to bring a single Voting Rights Act case on behalf of African Americans during a five-year period between 2001 and 2006.

Three Justice Department officials – Hans von Spakovsky, Bradley Schlozman, and John Tanner – have made controversial decisions that weakened minority voting rights. Mr. Tanner, who was recently removed as chief of the Division's Voting Rights Section, publicly defended voter ID laws by stating "minorities don't become elderly the way white people do: they die first."

In the area of employment discrimination law, it took this Administration over six years to file its first disparate impact case on behalf of African Americans. Eight former career attorneys wrote a letter to Congress complaining about the leadership of the Division's Employment Litigation Section. They wrote: "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."

Are you concerned about the Justice Department's retreat in attempting to eliminate discrimination against African Americans? If so, what specific steps would you take to reverse this retreat?

I share your conviction that the Justice Department must vigorously enforce laws prohibiting discrimination against African-Americans, as well as laws prohibiting discrimination on the basis of national origin, religion, status under the A.D.A., and all other bases prohibited by federal law. In that regard, I believe that my record as a district judge and as a practicing attorney, both inside and outside the Department of Justice, reflects my belief. As an Assistant United States Attorney, I vigorously prosecuted criminal civil rights violations. In private practice, I represented an inmate *pro bono* in a civil rights case, who alleged that he was unlawfully beaten by Cook County law enforcement officers in a racial incident, and which representation culminated in the successful settlement of the case. As a district judge, I have worked hard to ensure that all litigants, including civil rights plaintiffs, were afforded fair treatment under the facts of their respective cases and the precedent governing those cases. In that capacity, I have also worked hard to help parties to reach successful settlements in cases involving allegations of racial and other forms of discrimination, and I have seen the positive impact such cases can have on the lives of individuals who have been discriminated against. If confirmed, I will continue to work diligently—both individually and in conjunction with the efforts of the Attorney General, the Associate Attorney General, and the Assistant Attorney General for the Civil Rights Division—to vigorously and fairly apply the civil rights laws.

SUBMISSIONS FOR THE RECORD

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Editorial

Preserving justice

December 18, 2007

A few weeks ago, the Senate confirmed Michael Mukasey as attorney general in the hope that he would restore the Justice Department's reputation for carrying out its duties in a strong, independent manner, without regard to political pressures. So here's a suggestion to Congress: How about giving him a chance to do exactly that?

In the brouhaha over the CIA's destruction of videotaped interrogations of terrorist suspects, the department has opened a preliminary inquiry that should determine, among other things, if laws were broken and if indictments should be sought. The revelation about the tapes became public this month, prompting demands from Senate Democratic Whip Dick Durbin of Illinois, among others, that Justice investigate. Within days, it was on the case, instructing the CIA to preserve all relevant evidence.

But already, some members of Congress are threatening to throw a wrench in the works by launching their own investigations -- complete with public testimony by people allegedly instrumental in getting rid of the tapes. So last week the department asked the House Intelligence Committee to postpone its probe, on the ground that "actions responsive to your requests would present significant risks to our preliminary inquiry."

The top Democrat and Republican on the committee said they were "stunned that the Justice Department would move to block our investigation." They shouldn't be. If their committee expects pivotal figures to appear, it will almost certainly have to grant them immunity from having their testimony used against them in court. And once that immunity is granted, it is very hard for the government to prosecute them, no matter how guilty they may be.

Consider the case of Reagan White House aide Oliver North, who testified when Congress investigated the Iran-contra scandal. His three felony convictions were overturned after an appeals court found that his trial was tainted by the publicity surrounding his testimony. To preserve the guilty verdicts, the government would have had to prove that none of the witnesses who appeared in his trial was influenced by what he told Congress -- a burden the prosecutor concluded was impossible to meet.

The lesson is that a prosecution is unlikely once a potential defendant has told his story in a Capitol Hill hearing. The effect of such testimony on any criminal investigation, says Northwestern University law professor Ronald Allen, is "all bad. There is nothing to be gained." The only way the department can

preserve the option of prosecuting in this case is to persuade Congress to hold off for now.

That does not mean it should hold off indefinitely. A reasonable response from the relevant committees would be to give Justice a reasonable period to dig into the matter -- say, three months. If no action is forthcoming or if evidence emerges that the attorney general is trying to protect the administration, there will be ample time for Congress to try to uncover the truth on its own.

If people committed crimes in the destruction of the tapes, you can bet they hope lawmakers will plunge in and derail any chance of prosecution. Everyone else should hope Congress will stay its hand.

Statement of Representative Mark Steven Kirk
Nomination Hearing of Judge Mark Filip
to be Deputy Attorney General
December 19, 2007

Mr. Chairman, it is an honor to be able to introduce a great citizen of Illinois to you this morning. Judge Mark Filip's credentials are impressive and he is well qualified to serve as Deputy Attorney General. I want to recognize Mark's family, who made the trip from snowy Winnetka, Illinois to be here today. His wife, Beth, and his sons, Matthew, Charlie, Tommy, and Joe are all here today.

Since his unanimous confirmation to the federal bench by the Senate on February 4, 2004, Mark earned a reputation as an outstanding judge with an exceptionally sharp legal mind. He graduated *phi beta kappa* from the University of Illinois, earned a Marshall Scholarship to study at Oxford, and graduated *magna cum laude* from Harvard Law School. After law school, he clerked at the U.S. Court of Appeals for the D.C. Circuit and later for Justice Antonin Scalia on the Supreme Court.

Mark's work as an Assistant U.S. Attorney in Chicago won him widespread praise. He successfully prosecuted a group of corrupt Chicago police officers on charges of racketeering, bribery, narcotics trafficking, and extortion. For this case, he received the Justice Department's Director's Award for Superior Performance as an Assistant U.S. Attorney.

Mark prosecuted a number of public corruption cases including the appeal of a bribery case involving a Cook County criminal judge involved with the El Rukn street gang, a racketeering case against a corrupt Illinois Department of Transportation employee, and a corruption case against several state and local elected officials. He also participated in a major international heroin trafficking case that stretched from the United States to Thailand, Nigeria, and England.

I am impressed by Mark's long list of pro bono work, including his work on behalf of indigent defendants and an amicus brief in defense of laws designed to notify communities of convicted sex offenders living within their boundaries, commonly knows as "Megan's Laws." He serves on the Board of Advisors for Catholic Charities in Chicago and is active in his home parish of Saints Faith Hope and Charity in Winnetka.

Mark Filip is uniquely qualified to serve as Deputy Attorney General, and I want to commend him for his commitment to public service. In his four years as a federal judge, not one of his decisions has been overturned on appeal. His nomination gives all of us from Illinois a great sense of pride, and we know he will excel at this very important job. It speaks volumes about Mark's character that he would voluntarily leave a lifetime appointment to the federal bench to leap "out of the frying pan and into the fire" as the number two man at the Justice Department.

It is my great honor to introduce Judge Mark Filip to the committee today.

U.S. SENATOR PATRICK LEAHY

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Statement of Chairman Patrick Leahy
Senate Judiciary Committee
Hearing on the Nomination of Mark Filip to be Deputy Attorney General
December 19, 2007

The Committee today will hear from the Administration's nominee to be the Deputy Attorney General, the number two position at the Department of Justice. Indeed, in the absence of the Attorney General, the Deputy acts as the Attorney General.

The critical work of restoring the Department's independence and credibility has been deterred by the Administration. This Administration has known since at least May 14, 2007, when Mr. McNulty announced that he was resigning, and should have known for weeks before, that there was to be a vacancy in the important position we consider today. Yet even after the former Deputy announced his resignation and proceeded to resign months later, the Administration failed to work with the Senate to fill this vital position.

Paul McNulty was one of many high-ranking Department officials, along with former Attorney General Gonzales, who resigned during this Committee's investigation into the firing of well-performing United States Attorneys for partisan, political purposes. Those firings and our investigation point to political operatives from the White House interfering with and corrupting the Department's law enforcement functions for partisan, political purposes. This nomination comes during a crisis of leadership that has done more than take a heavy toll on the Department's morale and tradition of independence. It has also shaken the confidence of the American people and Congress that the Department will uphold the bedrock principle – deeply embedded in our laws and our values – that no one, not even the President, is above the law.

I announced that we would hold this hearing today, before Congress adjourns for the year, immediately upon receiving this nomination from the White House and the necessary background materials. The Committee will seek to move as expeditiously as possible. We will want to know whether this appointment will help restore the independence of the Department of Justice and strengthen the rule of law.

Every time we seem to reach a new low in this Administration's arrogant flaunting of the rule of law and constitutional limits on Executive Power, we learn startling new revelations about the extent to which some will go to avoid accountability, undermine oversight and stonewall the truth. Two weeks ago, we learned that the CIA destroyed videotapes of detainee interrogations. And just this morning, in a regrettably familiar pattern, we learned that the involvement of senior Administration officials seems to have

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been much more significant than it appeared from their initial denials. These revelations are leading to additional investigations by Congress and the courts.

As the Ranking Member on this Committee from 2001 through 2006, I was not informed of the existence of the videotapes or of their destruction. I do not believe the Republican Chairmen were either. I have repeatedly sought information about the Administration's interrogations of detainees, including during the consideration of the Mukasey nomination to be Attorney General and in my October 25, 2007, letter to the White House counsel, which I ask be made part of the record.

Early last week I sent a bipartisan letter with Senator Specter to the Attorney General seeking information about the involvement of the Department of Justice with those matters before the public revelation of the tapes' destruction and how the Attorney General intended to determine whether to appoint a special counsel to conduct the investigation and potential prosecutions for obstruction of justice and obstruction of Congress. Regrettably, the reply we received evidences none of the commitment to work with this Committee that we heard during the Attorney General's recent confirmation hearing. The response showed no appreciation for the oversight role of the Congress. I will make that exchange of letters part of the record. Since then I have seen that the Department has also demanded that the Intelligence Committees of the Congress cease their independent investigations and that the courts not proceed to determine whether this Administration has violated court orders or been less than candid in court proceedings. That is not the way to restore the Department's credibility. That all appears to be an effort to prevent accountability and to undermine checks and balances.

U.S. District Judge Henry Kennedy yesterday rejected the Administration's demands, ordering the Administration to appear in court this week to determine whether it violated his 2005 order that it was to preserve all evidence related to the mistreatment of detainees.

Senator Specter and I are both former prosecutors. We were not asking the Attorney General to prejudice a criminal investigation and were not seeking to intervene in it. Rather we and this Committee have constitutional responsibilities that we need to fulfill. Those duties are entitled to respect, as well.

My fear is that the pattern of unaccountability and excuse by this Administration will continue. They have shown a proclivity to paper over misconduct with legal opinions from the Department of Justice. These legal opinions, like the infamous, withdrawn Bybee memo on torture, are wrong. In the words of Jack Goldsmith, a former head of the Office of Legal Counsel, who discovered this legal mess of extreme opinion, they have an "unusual lack of care and sobriety in their legal analysis," they rest on "cursory and one-sided legal arguments that failed to consider Congress's competing wartime constitutional authorities, or the many Supreme Court decisions potentially in tension with the conclusion," and "could be interpreted as if they were designed to confer immunity for bad acts."

As we recently learned not from the Administration but from *The New York Times*, soon after the last Attorney General took over, the Department of Justice secretly endorsed and reinstated combinations of the harshest interrogation tactics as legal. They apparently gave legal approval to brutal interrogation techniques, including waterboarding. Former Deputy Attorney General James Comey predicted that the Department would end up being "ashamed" of such actions when the public learned of them.

Whether Mark Filip will follow the example of integrity and independence of others like Elliot Richardson and William Ruckelshaus, who resigned or were fired rather than interfere with the investigation of wrongdoing of the Nixon Administration, is a critical question. We are reminded by those examples that law enforcement officials must enforce the law without fear or favor to their benefactors at the White House or their political party. We have been reminded all too recently by the Gonzales Justice Department what happens when the rule of law plays second fiddle to a President's policy agenda and the partisan desires of political operatives.

In light of this Administration's troubling record of thwarting checks and balances, I want to be confident that this Deputy Attorney General will be independent in enforcing the rule of law on crucial issues like the destruction of the CIA tapes and the legal cover given to torture. A newly independent Justice Department must reexamine these issues guided only by the law and by our American values, not by the flawed policies and past acts of this Administration. I want to be assured that this Deputy Attorney General does not envision a system where a President's overbroad and invalid claims of executive privilege cannot be tested in a court of law.

I hope that Mark Filip reassures us that he understands that the duty of the Deputy Attorney General is to uphold the Constitution and the rule of law — not to work to circumvent it. Both the President and the nation are best served by a Justice Department that provides sound advice and takes responsible action, without regard to political considerations — not one that develops legalistic loopholes to serve the ends of a particular Administration.

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

October 25, 2007

Mr. Fred Fielding, Esq.
Counsel to the President
Office of the Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Fielding:

I appreciate your providing Senator Specter and me several of the documents we have requested relevant to the treatment and interrogation of detainees. The release of these documents restarts the incremental process of providing necessary information to Congress and to the American people about the Administration's legal justifications and policies with regard to torture and interrogation. I have long called for full disclosure of the Administration's legal opinions in this area and have been frustrated by continued stonewalling. This release represents a step in the right direction.

This is only a first step, however. I remain deeply troubled by the Administration's attempts to justify the use of harsh interrogation techniques and even torture, and I intend to get to the bottom of what this Administration's legal policy has been on this issue, and what it is today. One of the documents you provided this week, per your unclassified cover letter, is a classified March 13, 2003, Memorandum for William J. Haynes, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel. This memorandum should also be provided in non-classified form as completely as possible consistent with national security requirements. To the extent possible, this document should become part of a frank and public discussion on these crucial issues.

Further, the Committee does not yet have a complete picture of the Administration's historic position on the legal basis and standards for detention, transfer, and interrogation in connection with counter-terrorism efforts. It is important that you share with the Senate Judiciary Committee all other legal opinions on these issues from the Office of Legal Counsel and elsewhere in the Department of Justice and the Administration.

Finally, and most importantly, these documents aid our understanding only as to the Administration's policy until the beginning of Attorney General Gonzales' tenure in February 2005. You have provided to us some documents demonstrating the Administration's expansive and disturbing position on torture and related issues in 2002 and 2003, as well as documents from 2004 and very early 2005 withdrawing and minimizing those previous positions. However, we have not yet seen the 2005 memoranda recently reported in the *New York Times*, which apparently authorize the use by the Central Intelligence Agency of combinations of cruel and extreme interrogation techniques and indicate that enumerated harsh techniques do not constitute cruel, inhuman, and degrading treatment of detainees. These documents fall squarely within the scope of requests that I and other Senators have made, including my November 15, 2006, request to Attorney General Gonzales for "any and all Department of Justice directives, memoranda, and/or guidance ... regarding CIA detention and/or interrogation methods."

I would ask that you promptly respond to the following questions and document requests, many of which I and others have made on numerous previous occasions:

1. Please produce any and all Department of Justice directives, memoranda, and/or guidance, including any and all attachments to such documents, regarding detention and/or interrogation methods by the Central Intelligence Agency, the military, or any other component of the United States government, including but not limited to the two memoranda identified by the *New York Times* on October 4, 2007, as well as the August 2002 Memorandum from the Department of Justice's Office of Legal Counsel to the CIA General Counsel regarding CIA interrogation methods (the "2nd Bybee memo").

2. Please provide a non-classified version of the March 13, 2003, Memorandum for William J. Haynes, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the extent possible consistent with national security requirements.

3. Please produce any and all documents produced by the Department of Justice regarding the legality of specific interrogation tactics, and the legal basis for detention and transfer of terrorism suspects, and the applicability of federal criminal prohibitions on torture and abuse.

4. Please produce any and all Department of Justice documents that interpret, or advise on, the scope of interrogation practices permitted and prohibited by the Detainee Treatment Act or the Military Commissions Act.

5. Please state which of the documents produced in accordance with the above requests remain in effect and which have been withdrawn, replaced or modified. Please produce any and all revisions or modifications.

6. Please produce an index of any and all documents relating to investigations and/or reviews conducted by the Department of Justice into detainee abuse by U.S. military or civilian personnel in Guantanamo Bay, Abu Ghraib prison, or elsewhere.

I look forward to your responses.

Sincerely,

PATRICK LEAHY
Chairman

Thank you - enjoyed chatting with you today

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

December 10, 2007

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20510

Dear Attorney General Mukasey:

We write on behalf of the Senate Judiciary Committee to request important information about the reported destruction by the Central Intelligence Agency of videotapes showing interrogations of detainees and about the Department of Justice review of this matter. We were alarmed to learn of the existence of these videotapes only after they were destroyed, and to learn of the destruction of the tapes so long after the fact.

This weekend, the Department announced that the National Security Division will conduct a preliminary inquiry in conjunction with the CIA's Office of Inspector General. Notwithstanding this inquiry, we request a complete account of the Justice Department's own knowledge of and involvement with these matters. When and how did Department officials or attorneys first become aware of the existence of videotapes of detainee interrogations? Did Department officials or attorneys ever view the tapes? Did the Department evaluate the legality of the interrogation techniques used in the interrogations that were videotaped? When and how did Department officials or attorneys become aware of any plan to destroy videotapes of interrogations of detainees? Were Department officials or attorneys asked about the advisability or legality of destroying the tapes? Did Department officials or attorneys communicate views on the advisability or legality of destroying the tapes? When and how did Department officials or attorneys become aware that videotapes were destroyed? What communication has the Department had with the White House about the existence, plan to destroy, and destruction of the videotapes? With whom, how, and when were there any communications between the Department and the White House about these matters?

We would also like to know whether the Department or others in the Administration advised Members of Congress of the existence of these tapes or of their destruction. We learned yesterday through a *Washington Post* report that a small group of Congressional leaders was advised of the CIA's secret detention and interrogation program as early as September 2002. Was this group or a similar group informed of the videotaping of interrogations or of the destruction of the videotapes? If so, when did this occur and what was the rationale for not advising the Chairmen and Ranking Members of the Senate and House Judiciary Committees?

In addition, please describe the review that the National Security Division now intends to conduct. Who will conduct the review? How do they intend to proceed? What is the scope of the review? What specific facts and issues are involved? Senator Biden has suggested that a special counsel be appointed to conduct the investigation. How are you determining whether to proceed by way of a special counsel?

Thank you for your prompt attention to this matter.

Sincerely,

PATRICK LEAHY
Chairman

ARLEN SPECTER
Ranking Member

Office of the Attorney General
Washington, D.C.

December 14, 2007

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

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Specter:

Thank you for your letter of December 10, 2007, regarding your concerns about the reported destruction by the Central Intelligence Agency (CIA) of videotapes showing interrogations of detainees and the Department's review of this matter.

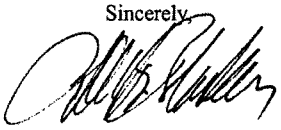
As you note, the Department's National Security Division is conducting a preliminary inquiry in conjunction with the CIA's Office of Inspector General. Enclosed please find a letter from Assistant Attorney General Kenneth L. Wainstein to CIA Acting General Counsel John A. Rizzo which provides some further detail regarding this inquiry, and which was released to the public on December 8th.

As to your remaining questions, the Department has a long-standing policy of declining to provide non-public information about pending matters. This policy is based in part on our interest in avoiding any perception that our law enforcement decisions are subject to political influence. Accordingly, I will not at this time provide further information in response to your letter, but appreciate the Committee's interests in this matter. At my confirmation hearing, I testified that I would act independently, resist political pressure and ensure that politics plays no role in cases brought by the Department of Justice. Consistent with that testimony, the facts will be followed wherever they lead in this inquiry, and the relevant law applied.

Finally, with regard to the suggestion that I appoint a special counsel, I am aware of no facts at present to suggest that Department attorneys cannot conduct this inquiry in an impartial manner. If I become aware of information that leads me to a different conclusion, I will act on it.

I hope that this information is helpful.

Sincerely,



Michael B. Mukasey
Attorney General

Specific Investigations by Congress Over DOJ on Pending Matters

Palmer Raids: From 1920-21, the House and Senate convened Committees to investigate Attorney General Palmer's order to arrest and deport thousands of suspected Communists. Palmer and his assistant, J. Edgar Hoover, were called to testify for three days at which they discussed and provided documents regarding the specific details of numerous cases, including cases that were pending on appeal.

Teapot Dome: In the mid-20's, the Senate convened a select Committee to investigate "charges of misfeasance and nonfeasance in the Department of Justice" relating to its lack of action to address the corrupt sale of mineral leases by Harding Administration officials. In the investigation, which related specifically to whether Attorney General Harry Daugherty interfered with the investigation, the Select Committee heard from attorneys and agents of the Department of Justice and Bureau of Investigation regarding specific instances of the Department's failure to prosecute meritorious cases. Some of the cases were open at the time of the investigation and one of the goals of the Committee was to identify prosecutable cases for which the statute of limitations had not run.

- The Senate investigation proceeded while Special Counsels, including future Attorney General and Supreme Court Justice Harlan Stone, investigated whether there was criminal wrongdoing at the Department.
- When Stone became Attorney General, the Committee's chairman praised his cooperation with the Committee on oversight: "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked."
- In one of two cases the Supreme Court heard about the Senate's investigation, *Sinclar v. United States,* 279 U.S. 263 (1929), the Court rejected a contemptuous witness's claim that ongoing cases limited the Senate's power of inquiry:

> It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.

White Collar Crime in the Oil Industry: In 1979, two House Subcommittees held joint hearings on fraudulent fuel pricing in the oil industry. During the hearings, the joint committees received testimony and evidence in closed session regarding open cases in which indictments were pending. The arrangement and cooperation were praised by the Deputy Attorney General at the time.

Iran-Contra: The House and Senate Iran-Contra hearings investigated Attorney General Meese's investigation of the NSC's activities and obtained DOJ documents in 1987 – after the FBI began to investigate and after Lawrence Walsh was appointed to serve as Independent Counsel.

Rocky Flats: In 1992, a House subcommittee investigated the plea bargain DOJ negotiated against Rockwell International for environmental crimes at DOE's Rocky Flats nuclear weapons facility. The subcommittee specifically wanted to investigate the small size of the fine and the lack of charges against individuals at Rockwell or DOE. The Subcommittee held ten days of hearings, seven in executive session, and heard from a US Attorney, an AUSA, line DOJ attorneys, and an FBI agent. Although DOJ resisted discussion of "internal deliberations," a deal was reached where deliberations were revealed.

Ruby Ridge: During the 1995 Senate Judiciary Subcommittee investigation into government misconduct at Ruby Ridge, Idaho, the Subcommittee heard from 62 witnesses, including line DOJ attorneys and FBI agents. This testimony was received, along with documents, even though DOJ initially expressed reluctance that the Subcommittee's inquiry could affect an ongoing investigation.

Campaign Finance Investigations: From 1997-99, the Senate Government Affairs Committee investigated campaign donations by Chinese donors and looked into DOJ's handling of its own investigation. This investigation took place while defendants were facing charges. For example, Charlie Trie did not plead guilty until May 1999. During its investigation, the Committee heard from four FBI agents, saw investigative notes, search warrant affidavits, and other materials.

U.S. Attorney Removals: The Senate and House Judiciary Committees this year investigated the removal of U.S. Attorneys and political hiring of career personnel while the Office of Inspector General and Office of Professional Responsibility (OPR) conducted a contemporaneous investigation of wrongdoing. Despite the parallel inquiries, DOJ provided over 8,500 pages of documents, 20 witnesses, including for staff level depositions, and letters from the Inspector General and head of OPR notifying the Committees of any expansion of their investigations. During this process, Committee staff has been asked if Committee transcripts could be used by the Department in the OIG-OPR investigation. Such requests from DOJ have never been refused.

Ramos and Compean Border Guard Prosecution: U.S. Attorney Johnny Sutton testified in public session before the Senate Judiciary Committee in July 2007 in defense of the prosecution and conviction of two border guards – Ramos and Compean – despite the fact that their appeal was still pending before the Fifth Circuit Court of Appeals.

United States Senate

December 17, 2007

The Honorable Mark Filip
United States District Judge for the Northern District of Illinois
Everett McKinley Dirksen Building, Room 1978
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Filip:

In addition to the subjects we discussed last week relating to your confirmation hearing, I would appreciate it if you would review the applicable law and precedent and be in a position to comment on the extensive authority of the Senate Committee on the Judiciary to conduct oversight on the Department of Justice, including regarding pending matters. Specifically, I would like for you to consider the Judiciary Committee's authority to inquire into the Department's current probe of the Central Intelligence Agency's destruction of interrogation videotapes.

To assist your review, below is an excerpt from a 1995 Congressional Research Service report on Congress's broad oversight authority regarding the Department of Justice:

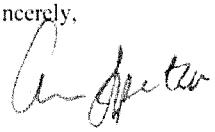
> [A] review of congressional investigations that have implicated DOJ or DOJ investigations over the past 70 years from the Palmer Raids and Teapot Dome to Watergate and through Iran-Contra and Rocky Flats, demonstrates that DOJ has been consistently obliged to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance, malfeasance, or maladministration in DOJ or elsewhere. A number of these inquiries spawned seminal Supreme Court rulings that today provide the legal foundation for the broad congressional power of inquiry. All were contentious and involved Executive claims that committee demands for agency documents and testimony were precluded on the basis of constitutional or common law privilege or policy.
>
> In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda,

> FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of suspects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials.

Congressional Research Service Report for Congress, "Investigative Oversight: An Introduction to the Practice and Procedure of Congressional Inquiry," 23-24 (Apr. 7, 1995).

Thank you in advance for your attention to this request. I look forward to discussing this matter at your hearing.

Sincerely,



UNIVERSITY OF ILLINOIS ALUMNI ASSOCIATION
Building Relationships for Life

URBANA-CHAMPAIGN
CHICAGO
SPRINGFIELD

December 12, 2007

The Honorable Benjamin L. Cardin
United States Senate
509 Hart Senate Office Building
Washington, D.C. 20510-2003

Dear Senator Cardin:

Season's greetings from Illinois! I am writing to support President Bush's nomination of Judge Mark Filip for Deputy Attorney General of the United States. I have known Mark since my arrival at the University of Illinois Alumni Association in 1998.

Mark has and continues to distinguish himself in a variety of ways—as a well-respected judge, as a reliable and effective volunteer, as a consummate family man, and as a personal friend. The Chicago Council of Lawyers, in a non-partisan survey of 1000 lawyers, describes his judicial temperament as "unflappable, approachable, professional and easy-going." Further, the survey reports he is impartial and open-minded, and that his decisions are well-reasoned and well-written.

Mark's service to the Alumni Association is of inestimable value. He is a constant voice of reason, is masterful at building consensus, and can be counted on to represent the association in a skillful, informed manner—and always without seeking the spotlight. His continued service was so important to the association that, after a year's hiatus from the Board of Directors (as required by term limits), he was invited to serve another term—and accepted.

I greatly value Mark's personal friendship. His devotion to his family is readily apparent, he interacts well with persons from all walks of life, and one can always count on him for words of encouragement and support. He is as thoughtful and approachable as a friend as he is on the bench.

I urge you to support Mark's nomination. As I suggested in an October 2003 letter to Senator Dick Durbin supporting Mark's nomination for U.S. District Court Judge (copy enclosed), he has represented his university, his state and the nation exceedingly well and I know he will continue to do so. Thank you for your consideration and I hope we will see each other soon.

Best regards,

Loren R. Taylor
President & CEO

cc: The Honorable Steny Hoyer
The Honorable Tim Johnson

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U.S. Department of Justice

National Security Division

Assistant Attorney General *Washington, D.C. 20530*

December 8, 2007

John A. Rizzo
Acting General Counsel
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Rizzo:

I am writing this letter to confirm our discussions over the past several days regarding the destruction of videotapes of interrogations conducted by the Central Intelligence Agency (CIA). Consistent with these discussions, the Department of Justice will conduct a preliminary inquiry into the facts to determine whether further investigation is warranted. I understand that you have undertaken to preserve any records or other documentation that would facilitate this inquiry. The Department will conduct this inquiry in conjunction with the CIA's Office of Inspector General (OIG).

My colleagues and I would like to meet with your Office and OIG early next week regarding this inquiry. Based on our recent discussions, I understand that your Office has already reviewed the circumstances surrounding the destruction of the videotapes, as well as the existence of any pending relevant investigations or other preservation obligations at the time the destruction occurred. As a first step in our inquiry, I ask that you provide us the substance of that review at the meeting.

Thank you for your cooperation with the Department in this matter. Please feel free to contact me if you have any questions.

Sincerely,

Kenneth L. Wainstein
Assistant Attorney General
National Security Division

cc: John L. Helgerson
Inspector General
Central Intelligence Agency

washingtonpost.com

A Job for Justice

Congress has legitimate questions in the CIA tapes case, but any criminality needs to be dealt with first.

Wednesday, December 19, 2007; A18

LAST WEEK, Attorney General Michael B. Mukasey all but insisted that the House Intelligence Committee shut down plans to investigate the destruction of CIA tapes allegedly depicting a terror detainee being waterboarded. Mr. Mukasey also rebuffed a request by Senate Judiciary Chairman Patrick J. Leahy (D-Vt.) and ranking member Arlen Specter (R-Pa.) for information about the Justice Department's involvement in the tapes matter. Mr. Mukasey explained that the Justice Department, which had opened a preliminary inquiry, "has a long-standing policy of declining to provide non-public information about pending matters."

Lawmakers complained bitterly. Given the administration's track record of subterfuge and obfuscation, they understandably worried that Mr. Mukasey's declaration was an attempt by the Bush administration to circumvent legitimate congressional oversight. The burden is on Mr. Mukasey to prove them wrong.

Yet Mr. Mukasey was right, even if not as emphatic as he should have been in recognizing lawmakers' legitimate interests, in insisting that the Justice Department be allowed to proceed first -- and at arm's length from Congress. It is far too early to tell, but the destruction of the tapes could under certain circumstances constitute a crime, and only the Justice Department can ensure that those responsible are held legally accountable. A congressional misstep could undermine that effort.

While a typical criminal investigation proceeds from the ground up, with prosecutors combing through documents and interviewing lesser players first, congressional hearings are more likely to immediately call "star" witnesses. For example, the House Intelligence Committee was originally hoping to hear this week from Jose A. Rodriguez Jr., the CIA official who was identified in news reports as ordering the destruction of the tapes. Such testimony could have damaged a fledgling criminal investigation, allowing other players to align their stories. Plus, few, if any witnesses, are likely to testify without grants of immunity, which would seriously complicate the Justice Department's ability to bring charges against them. Remember Oliver North?

In their letter last week to Mr. Mukasey, Mr. Leahy and Mr. Specter asked entirely legitimate questions: "Did Department officials or attorneys communicate views on the advisability or legality of destroying the tapes? What communication has the Department had with the White House about the existence, plan to destroy, and destruction of the videotapes?" But each of these questions goes to the core of the Justice Department's probe. If a grand jury is empaneled, Mr. Mukasey and the Justice Department would be legally constrained from disclosing such information. Mr. Mukasey, however, should keep lawmakers informed generally about the progress of the investigation and report back quickly if he concludes that no laws were broken. There is still an important debate to be had about how the tapes were handled -- and what they allegedly depicted -- even if their destruction does not meet the legal definition of a crime.

Mr. Mukasey should be given some, but not unfettered, leeway. He should reconsider whether the department's Criminal Division or Public Integrity Section may be better suited than the National Security Division, which deals regularly with the intelligence agencies, to handle this investigation. The attorney general must also tread carefully when examining the Justice Department's possible role in the matter. Mr. Mukasey was right to reject calls for the immediate appointment of a special prosecutor, but he should think again if preliminary inquiries suggest the department was more deeply involved than first suspected.