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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

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BEFORE THE

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UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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WEDNESDAY, JULY 9, 2008

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

The Committee met, Pursuant to notice, at 9:32 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, and Kyl.

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

Chairman LEAHY. Today we welcome Michael Mukasey back to the Committee for his second appearance as Attorney General. The Attorney General has been on the job for 8 months since succeeding Alberto Gonzales. He is now more than halfway through his term as Attorney General. And as I have told him privately and publicly, his tenure is going to be judged by how much he has done to restore the Department of Justice, an agency, I believe, whose mission and objectives were severely undercut by scandals under the Bush administration. The Attorney General will also be judged by what the Department has done—and not done—to reaffirm the checks and balances that are the fulcrum for our democracy and a key to protecting the rights and liberties of all Americans.

When this Committee began its oversight efforts at the start of this Congress, we exposed a crisis of leadership and partisan political influence that had taken a heavy toll on the well-deserved tradition of independence that has long guided the United States Department of Justice. Senators on this Committee from both sides of the aisle joined together to press for accountability. What followed was a change in leadership at the Department, with the resignations of Attorney General Gonzales, the Deputy Attorney General, the Associate Attorney General, their chiefs of staff, the White House liaison, and the resignations of Karl Rove, his political deputies, the White House Counsel, and others.

We have seen what happens when the rule of law plays second fiddle to a President's agenda and the partisan desires of political operatives. It becomes a disaster for the American people. Both the President and the Nation are best served by a Justice Department that provides sound advice and takes responsible action, not one that develops legalistic loopholes and ideological litmus tests to

serve the ends of a particular administration, whether it is a Democratic administration or a Republican administration.

The recent report from the Department's Inspector General confirms what our oversight efforts have uncovered about the politicization of hiring practices at the Department. It confirms our findings and our fears that the same Bush Justice Department officials involved in the firing of United States Attorneys were injecting partisanship into the hiring of young attorneys. I expect further reports from the Inspector General will shed additional light on the extent to which the Bush administration has allowed politics to affect—and infect—the Department's priorities, from law enforcement to the operation of the Civil Rights Division to the Department's hiring practices.

As I have said many times, and I have said this in the six administrations since I have been here, the Department of Justice is not the President's legal defense team any more than the Attorney General is his lawyer. The Attorney General is not the White House Counsel and should not act as one. The Department of Justice is a law enforcement agency, not a partisan political operation. The Attorney General is the Attorney General of the United States, not the Attorney General of the President or anything else. He is the Attorney General of the United States, all of us. And these are the truths that have been overridden in the last 7 years.

So this hearing is for the Attorney General to show us what he has done on each of these fronts. For example, what he has done to restore the independence of the Department of Justice? What has he done to push back against the overreaching from the Bush-Cheney White House, including its claims to unfettered power at the expense of the principles of judicial review and congressional oversight?

On issue after issue, from the warrantless wiretapping of American citizens, to the descent into torture thinly veiled by the use of the Orwellian-term "enhanced interrogation techniques"; from undercutting laws meant to protect clean air and clean water to the untoward political influence of the White House at the Nation's top law enforcement agency; from the destruction of CIA tapes showing detainee interrogations to grandiose claims of immunity and executive privilege from congressional oversight—it makes the Watergate era look like child's play.

The conservative Supreme Court's recent decision in Boumediene v. Bush reaffirmed our core American values as a stinging rebuke to the Bush administration's excesses. They said, "Security subsists, too, in fidelity to freedom's first principles. Chief among those are freedom from arbitrary and unlawful restraint..."

These principles of checks and balances and of the rule of law are what this administration and a previously complicit Justice Department have ignored—that our fundamental adherence to our Constitution and the rule of law is a strength. And no one—not even the President—is above the law. The Justice Department owes loyalty to the law.

The Attorney General repeatedly assured us during his confirmation hearing that he would take a fresh look at the secret memos. He committed to this Committee that he would review them. These are the secret legal memoranda that sought to define torture down

to meaninglessness and excuse warrantless spying and justify absolute immunity of White House employees from congressional subpoenas without reference to a single legal precedent. The Attorney General committed to this Committee to review them and withdraw or modify those that were unjustified or unwise. Even Attorney General Gonzales did that. He withdrew the August 2001 Bybee memo justifying torture when it came to light, coincidentally just before his confirmation hearing in 2005.

So we look forward finally to obtaining these memos—to obtaining even the index of these memoranda—that we have been denied for years. Today we look forward to learning which aspects of what memos that have formed the legal framework for the Bush administration's policies have been modified or withdrawn by the Attorney General.

This Committee has a special stewardship role to protect our most cherished rights and liberties as Americans, and to make sure that our fundamental freedoms are preserved for future generations. I believe the path taken during the last 7–1/2 years has been one that has disregarded basic rights and turned us from a Nation devoted to the rule of law to one ruled by secret pronouncements of the executive.

I will put my full statement in the record and yield to Senator Specter.

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

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

Senator SPECTER. Thank you, Mr. Chairman.

I join the Chairman in welcoming you here, Attorney General Mukasey, and in noting the significant improvements in the Department of Justice since you have taken over. We are considering of the Senate floor today the Foreign Intelligence Surveillance Act, and it is an opportunity for Congress to finally assert some authority and try to move for separation of powers to try to check the unparalleled expansion of executive authority, which we have noticed since 9/11. I believe that historians will look back at this period as the greatest expansion of executive authority that has gone unchecked by Congress and significantly unchecked by the courts.

We have had a challenge to the constitutionality of the Foreign Intelligence Surveillance Act. A Detroit Federal court held it unconstitutional. The Sixth Circuit reversed on standing grounds in a 2–1 decision, and the Supreme Court in effect ducked the case, denied certiorari, when there were ample grounds to take it up, as noted in the very persuasive dissenting opinion on standing. And now the Congress is being asked to strip the Federal courts of some 40 cases which are pending for determination of the constitutional rights of people who have been allegedly wiretapped by the telephone companies without court order.

As I have argued on the floor—and I have an amendment pending—it is especially unfortunate because we could keep both the surveillance program and have judicial review if we substituted the Government as a party defendant. But the Attorney General has

a significant role to play in this overall issue in terms of advice to the President.

I was very much impressed when you said in your confirmation hearing that if the President did not follow your advice on constitutional issues, the matter of resignation would be foremost in your mind. The President violated the National Security Act of 1947 in not notifying the Intelligence Committees of the Terrorist Surveillance Program, a firm statutory duty. He could have used some good advice on that point. He did not notify the Chairman or Ranking Member of the Judiciary Committee, longstanding protocol. I was Chairman at the time in arguing for the PATRIOT Act on a Friday in mid-June of 2005 when the New York Times story dominated all of the substantive arguments, and we could not get the Act passed. Senators said that had they known about this Terrorist Surveillance Program, they would not have been for the bill. So there are very important issues on separation of powers.

There are a number of matters that I will be discussing with you during the question-and-answer session, as I told you in our telephone conversation earlier this week. The matter of the attorney-client privilege is very, very significant. I have a bill pending which would change what the Department of Justice is doing because of two very fundamental constitutional privileges: one is the attorney-client privilege, which necessarily involves confidentiality; and the second is the burden of the Commonwealth or the State to prove its case.

When I was a prosecutor, I would not have thought of asking someone to waive their privilege, and yet that is being done here. And it may be in the corporation's interest to waive the privilege to have a reduction in charges or a reduction on sentencing. But there are individuals who have that privilege within the corporation who ought not to be coerced into waiving the privilege.

And let me say to you candidly, Mr. Attorney General, that the discussions have gone on too long—the Thompson memo, the McNulty memo, now the Deputy Attorney General is preparing a new memo. I talked to him 2 weeks ago. It is vague as to when it is to be completed, and I hope that the Chairman will bring this matter before the Committee so we can move ahead on the legislative channel.

Similarly, we need to bring the discussions to a head on reporter's privilege. We find that there is a decisive chilling effect on newspaper reporters across the country for what happened with Judith Miller and what is happening with other reporters—still an enigma to me as to why she spent 85 days in jail. It was not a very pleasant stay she had there. I know because I visited her in December of 2005. Why was she held in contempt when we knew that Deputy Secretary of State Armitage was the source of the leaks? That still has not been answered.

But rather than looking backward, I think we need to look forward and see to it that there is an appropriate balance. And the legislation has national security exceptions, and if there are other matters which need to be resolved, let's sit down and try to get them worked out because in our society we do not have to talk about the importance of the media. Jefferson's statement still rings true. If he had to choose between Government without newspapers

or newspapers without Government, he would choose the newspapers. It may be a close call these days, but I feel the newspapers are still in the lead considering what is happening with the expansion of executive authority.

One final point, and that is on a matter that I raised with the Director of the Federal Bureau of Investigation about a leak in the case involving Congressman Curt Weldon, which occurred a few days before the 2006 election, which was the direct defeat of a very distinguished Congressman who had held office for some 20 years. They had a search and seizure on his daughter's home, and there was a leak. Newspaper reporters were there in advance. And I asked Director Mueller about that back in December of 2006, and I did not get an answer, and it was buried in the FBI's written responses to written questions. Well, there is a difference when there is a question posed in a hearing by a Senator than when its staff work in written questions.

And then at another hearing, I raised it on March 5th of 2008, and I heard nothing more until I got a reply from a subordinate on June 13th of this year that it had been punted over to the Department of Justice. And I wrote a pretty hot letter to Director Mueller, which I ask unanimous consent be included in the record.

Chairman LEAHY. Without objection.

Senator SPECTER. And the ball is now in your court, Mr. Attorney General. But leaks are intolerable. When leaks are made, they frequently involve national security, and those leaks are investigated and the culprits are found. And if the leak was in the FBI, the investigation ought to be just as intense. And this Committee expects a briefing, and this Committee expects action. And Congressman Weldon does not have any rights any higher than anybody else, but his rights are no lower than anybody else's. And we are entitled to an answer.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Mr. Attorney General, please stand and raise your right hand and repeat after me. Do you solemnly swear the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Attorney General MUKASEY. I so swear.

Chairman LEAHY. Thank you. Please go ahead, sir, and, again, we welcome you from both sides of the aisle. We are glad you are here.

STATEMENT OF HON. MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General MUKASEY. Good morning, Chairman Leahy, Senator Specter, and members of the Committee. Thank you for the opportunity to testify today.

Since I appeared before the Committee six months ago, I have become even better acquainted with the talented and dedicated professionals at the Justice Department and with the work that they do. And I have come to appreciate that much more deeply their service to the Nation.

I have now been Attorney General, as you pointed out, for eight months and there are slightly less than seven months remaining

in this Administration. I would like to outline briefly two areas that I intend to focus on during that time.

First, as everyone knows, the election season is upon us. Although State and local governments have primary responsibility for administering elections, the Department must make every effort to help assure that those elections run as smoothly as possible and, equally important, that the American people have confidence in the electoral process. The Department will maintain a significant presence throughout the election season through both outreach and monitoring. We are going to work closely with civil rights groups and State and local elections officials to identify and to solve problems. We are going to publicize telephone numbers and websites through which people can bring potential issues to our attention. And on Election Day, we are going to deploy hundreds of observers and monitors around the country.

Those steps will supplement our ongoing enforcement efforts. Using the Voting Rights Act and other laws, as the Department has done and will continue to do, it will do its part to guarantee access of all Americans to the ballot.

The Department will also continue its efforts to safeguard the integrity of elections by combating campaign finance abuse and voter fraud. All of these efforts are essential in ensuring that the elections reflect the will of the people and in maintaining the confidence of all Americans in our system of Government. In all of this, we will be driven by what the law and the facts require, and only by that.

Earlier this year, I issued a memorandum to remind all Justice Department employees of policies regarding election year sensitivities. The message of that memorandum, which I reiterated in a speech to our lawyers and agents involved in election cases last week, was simple: Politics must play no role in our efforts.

Second, once the November elections are over, there will be the vitally important task of making an orderly and safe transition to a new Administration. As part of that transition, we will take every step to transfer smoothly custody and responsibility for our Nation's security to a new set of caretakers. We must ensure that all of our country's security measures are attuned to the increased risk we face during this time of transition and that we respond and adjust appropriately.

It is also important that we do everything we can to give our national security professionals who will be confronting the al Qaeda threat well after this Administration is over the tools they need to help keep us safe, and it is my sincere hope that the Senate will take a vital step today by passing the bipartisan FISA compromise that passed the House by a wide margin before the 4th of July recess.

I am also working closely with the Director of the FBI to continue the transformation of the Bureau into a world-class intelligence agency. That goal involves developing new ways to recruit, train, and provide career paths for those who wish to devote their careers in the Bureau to intelligence collection and analysis. I am also reviewing the guidelines governing the FBI's conduct of criminal and national security investigations with the objective of harmonizing them in a way that gives the Bureau's professionals clear

and consistent rules for conducting investigations while maintaining vital civil liberties protections.

Before I end, let me briefly address a topic that several of you raised with me in advance of this hearing, namely, allegations that have been made about the politicization of the Justice Department.

I take those allegations with utmost seriousness. As I have said many times to members of the public and to Department employees, it is crucial that we pursue our cases based solely on what the law and the facts require and that we hire career people without regard to improper political considerations. It is equally crucial that the American people have complete confidence in the propriety of what we do. My promise to you is that I have done and I will continue to do what I can to ensure that politics is kept out of decisions about cases and out of decisions about career hiring at the Department of Justice.

Mr. Chairman and members of the Committee, I look forward to your questions, and, again, I thank you for allowing me to make this opening statement.

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

Chairman LEAHY. Thank you, Mr. Attorney General.

Among the most disturbing aspects of these last 8 years has been the Justice Department's role in enabling some of the worst of the Bush administration's executive power overreaching. They have enabled it by using secret memos from the Department's Office of Legal Counsel, the so-called OLC.

Now, in my years here in the Senate, we have always seen the OLC as a place to provide impartial, independent interpretations of the law that bind the executive that affect people's lives. So along the lines of when I was a young law student and along with others being recruited by the then Attorney General Robert Kennedy, who told us all very intently that nobody, not even the President, could interfere with the independent analysis of the law done by the Department of Justice.

But often in recent years, we have seen issued from defining torture down to meaninglessness or excusing warrantless wiretapping to absolute immunity of White House employees, all these legalistic loopholes that come from OLC. A few that we have seen are disturbing in their disregard of the rule of law. They basically say that the President stands above the law.

Now, at your confirmation hearing, you committed to this Committee, to a number of us, in answering questions from Senator Kohl, Senator Schumer, Senator Durbin, and me, that you would review these OLC opinions and you would withdraw those you considered without legal justification. You said you would do a review on warrantless wiretapping, interrogation policies, executive privilege. You said this without any reservation or limitation. And we thought that you were going to step forward and do just that.

But in your answers to my written questions—and these were answers we got 6 months after the hearing, and only as this hearing was schedule—you said that you have only reviewed opinions regarding currently authorized CIA interrogation programs. You do not find it necessary to review any others. That appears that you have gone back on the commitment you made to this Committee to

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conduct a review of all these OLC opinions. Why have you done that?

Attorney General MUKASEY. Respectfully, I don't think I went back on my word. I think I went back—I think what I said I would do was to review OLC opinions that related to then current interrogation programs. I did, and I came back and said that those programs were in line with the law as I saw it, as it was explained in those OLC memos, and I stand by that.

I have since reviewed all significant OLC memos that were issued subsequently with a view toward assuring that they are consistent with the law. This Committee—I am sorry.

Chairman LEAHY. No, no. Go ahead.

Attorney General MUKASEY. This Committee has received, I think, unprecedented review of OLC memoranda relating to both interrogation and electronic surveillance. It has received an opportunity to review the entirety, as I understand it, of the OLC memoranda with regard to electronic surveillance. And it has also received—in redacted form, to be sure—OLC memoranda relating to interrogation techniques, at the same time that the Intelligence Committees of both Houses have received unredacted copies of those memoranda.

Chairman LEAHY. Well, I beg to differ with you a little bit on that, because when we asked the questions—and Senator Kohl and Senator Schumer and others can speak for themselves. But when we asked the questions, it was not with the limitation of just current ones. We were asking what led us to this, because for 7 years OLC opinions were allowing wiretapping, which has now been found not to be legal, allowing torture, which was found not to be allowed. All of these things, and it is not just the current ones, because these other OLC opinions are still there. There are a lot of OLC opinions that guide everyday activities of the administration, that will guide not only this administration but the next administration. To the effect that they have been referenced by the administration, they speak of an overreaching power of the President, something I am not willing to give to any President, Democratic or Republican.

So just simply reviewing the current ones I do not think is enough. Can you make then—if you are not going to review those that were used in the past, such as those on waterboarding, will you make them available to this Committee so that we can make our own review as to their legal basis?

Attorney General MUKASEY. I think that OLC opinions relating to wiretapping, to the extent that they may speak to a program that has already been brought within the Protect America Act, don't have a current bearing. I can't make a commitment simply to open the drawers of OLC and expose them to this Committee, nor do I think it would be responsible for me to do that. One of the things—

Chairman LEAHY. Mr. Attorney General, my point is it is the—I am not talking about operational things, and Senator Specter and I have been briefed on the operational aspects. We are not going to go into that here. What I am talking about are the opinions and the legal reasoning that basically said the President could ignore laws, could step above the law, or had some inherent authority not

to follow the law. And the operational parts will change, of course, and I expect the operational things will be—as we have been briefed, are going on now.

What I am concerned about are those parts of the memoranda that there is this inherent ability of a President not to obey the law. Would you give us at least a listing of the OLC memoranda that you have decided not to review and a list of the OLC memoranda and opinions that remain in force?

Attorney General MUKASEY. I think I have an obligation to assure that decisionmakers continue to come forward and ask for advice without fear that if they come forward and ask for advice, all of their requests are going to become the subject of examination later on, just as I have an obligation to make sure that the people who give the advice can give it candidly. For me to give an index of all OLC opinions, regardless of whether I have reviewed them or not, I don't know would serve anybody's interest.

As I said, I have reviewed all—

Chairman LEAHY. So your answer is no.

Attorney General MUKASEY. My answer is qualified.

Chairman LEAHY. When the qualification is no, that is an answer. My time is up. I am going to try to keep to the time, and I will come back to the subject.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Mukasey, the National Security Act of 1947 mandates that the President inform the Intelligence Committees of both Houses on a program like the Terrorist Surveillance Program. The President did not follow that law for years, then finally, piecemeal, told some of the Intelligence Committee members and then others when he needed confirmation of General Hayden as Director of the CIA.

Did the President's powers as Commander in Chief under Article II justify his violating the National Security Act in not appropriately informing the Intelligence Committees?

Attorney General MUKASEY. Senator, the Terrorist Surveillance Program, as you know, was brought under the Protect America Act. It is now—the President has said he has all the authority that he needs. And—

Senator SPECTER. Well, I am not talking about now. I am talking about what happened after 9/11 when the President disregarded the statute.

Attorney General MUKASEY. I think what happened after 9/11 was a matter of debate between the branches. The President took the view that Congress could not, by statute, limit the inherent authority of Article II. This Committee—

Senator SPECTER. So the President was right in not notifying the Intelligence Committees?

Attorney General MUKASEY. I am not a court. What I am qualified to—

Senator SPECTER. Now, wait a minute. You are not a court. I know that. You are the Attorney General. You give opinions on constitutional law. You are the man who sat there and said if he "didn't follow my advice, I wouldn't serve him."

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Attorney General MUKASEY. My advice did not pertain to matters that preceded my arrival. After my arrival, the Terrorist Surveillance Program was brought within the Protect America Act. We are trying to get FISA passed today. What we are trying to do is give the intelligence-gathering authorities what they need in order to gather intelligence and at the same time give necessary—

Senator SPECTER. Attorney General Mukasey, rather than fence for several minutes, with very limited time, would you give some study to the issue and give us a considered response on whether the President's authority extended that far?

Let me move on to the question of the attorney-client privilege. Where you have the constitutional right to counsel, which we all agree involves confidentiality, and where you have a clear-cut, historic obligation of the Government to prove its case, what is the justification for coercing a waiver of the attorney-client privilege? That is what happens in real life. In the KMG case where the Federal court in the Southern District of New York has found excesses by the Government, where you have a clear-cut conflict of interest between the corporation which is being asked for a waiver and the individual employee who may have contractual rights to counsel, what is the justification? Can you parse it, as the Thompson memo does and the McNulty memo, that if it is a fact question, it is decided by the Assistant Attorney General; if it is an opinion or judgment question, it is decided by the Deputy Attorney General? Isn't the attorney-client privilege so valuable that we should not tamper with it by what has worked out to be coercive waivers of the privilege?

Attorney General MUKASEY. Well, I think we share the belief as former prosecutors and me as a former judge that the attorney-client privilege is vital to clients getting advice from their lawyers. I think also we share the view that it should not be tampered with or coerced out of existence. And I understand that you visited with the Deputy Attorney General and that he is going to be sending you a letter that will include real significant proposed changes.

Senator SPECTER. How soon?

Attorney General MUKASEY. Within a day or so.

Senator SPECTER. Will we have a memo that we can work from to get your position? Because I know—

Attorney General MUKASEY. Yes.

Senator SPECTER. Your public statement was that you are satisfied with the McNulty memo. Are you satisfied with the McNulty memo?

Attorney General MUKASEY. I think my public statement was that the McNulty memo could be used in a proper way. There is no such thing as a memo that achieves perfection. And there are adjustments in the McNulty memo that can and will be made, and the Deputy proposes to make them. In particular, we will no longer measure cooperation by waiver of the attorney-client privilege.

Senator SPECTER. Well, are we going to get more than a letter? Are we going to get a memo that we can work from to try to see if we could resolve this on a compromise and accommodation? Or are we going to have to move forward to legislate?

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Attorney General MUKASEY. I think what is going to happen is a letter that is going to be used, that can be used to prepare a memorandum, that can—

Senator SPECTER. Well, when will we get the memorandum?

Attorney General MUKASEY. You will get the letter within a couple of days. The letter can be the subject of discussions that may very well produce a memorandum in short order.

Senator SPECTER. Well, the shorter the order, the better, because it is a matter percolating and affecting a lot of people.

Attorney General MUKASEY. It does, and I do not minimize it. I think that we have tried to strike the balance with the McNulty memo. If we haven't and there are ways to improve it, then we are bound and determined to improve it. And I think that letter will show that we are.

Senator SPECTER. Moving to reporter's privilege in the limited time left, Attorney General Mukasey, what was the justification for keeping reporter Judith Stern in jail for 85 days when the source of the leak was known to be Deputy Attorney General Richard Armitage?

Attorney General MUKASEY. Well, as you know, I was not on duty when that case came to the fore, and it is my own view that that case may very well be a better argument against a Special Counsel than it is in favor of legislation of the sort that has been proposed.

I think that—

Senator SPECTER. Well, I am not prepared to deal with the Special Counsel because he is not here. If I had Senator Leahy's gavel, I would have brought him in here a while ago, once the case was finished. But it is very germane in evaluating public policy on whether the Department of Justice ought to have the authority to issue a subpoena in the context and move for a contempt citation and hold a reporter in jail for 85 days under very unpleasant circumstances. I can attest to that firsthand. I went to visit her.

Attorney General MUKASEY. There is no such thing as jail under pleasant circumstances. It is an inherent contradiction. And it is something that, therefore, we use as a last resort and will continue to use as a last resort.

Senator SPECTER. Well, why do you need a resort when you know the leak? When you know who the leaker is, why go after a reporter and keep her in jail?

Attorney General MUKASEY. As I said, that was not—

Senator SPECTER. I know that would be better addressed to the Special Counsel.

Attorney General MUKASEY. It would.

Senator SPECTER. Someday we may have an opportunity to do that, but right now you are all we have got, Attorney General Mukasey, and you are the guy who is pushing the policy. So I think it is a fair question to say to you, Why maintain a policy which gives whoever the prosecutor is the power to do that when you know who the leaker is?

Attorney General MUKASEY. We do not give that power to a prosecutor for precisely that reason. We require a clearance up through and including the Attorney General of the United States.

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Senator SPECTER. The Attorney General of the United States is a prosecutor.

My time is up and I will desist. We will revisit these issues, doubtless. I just want to say I have to excuse myself. We have the Foreign Intelligence Surveillance Act on the floor, and I have an amendment pending. So I am going to have to excuse myself.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, and I will be coming over to speak on the amendment, too. I am going to yield next to Senator Biden. At one point I will be stepping out, too, but we will keep the hearing going when I go out.

Senator Biden.

Senator BIDEN. General, I saw your shoulders sag when the Senator said he had to leave. I am sure it disappoints you. He has to go to the floor.

[Laughter.]

Attorney General MUKASEY. It does.

Senator BIDEN. Well, let me tell you, I think he is the best questioner here. I would like him to have an hour with you. I think we would learn a lot. I would like to ask a few questions. I will try to be as crisp as I can. If your answers could be as crisp as they are fair, I would appreciate it.

You indicated that you have worked to see to it that the Department is not politicized any longer—you did not say "any longer"—that it is not politicized. I have one simple question. Did you find it had been politicized when you arrived? You do not have to give me an explanation. Just yes or no.

Attorney General MUKASEY. Did I find it?

Senator BIDEN. Yes, did you. You said you came in, took a look—

Attorney General MUKASEY. The IG found it.

Senator BIDEN. Yes, but what did you think? It is amazing. You act like you float above up in the ether somewhere.

Attorney General MUKASEY. I don't float above the ether.

Senator BIDEN. Well, what did you find?

Attorney General MUKASEY. What I found—

Senator BIDEN. What did you, the Attorney General, find?

Attorney General MUKASEY. What I found were enormously dedicated people who were very committed to my succeeding.

Senator BIDEN. That is not my question. Did you find that some of those enormously dedicated people engaged in politicizing the administration of justice?

Attorney General MUKASEY. No.

Senator BIDEN. That was my question.

Attorney General MUKASEY. No. Otherwise, I would not characterize them as "enormously dedicated."

Senator BIDEN. Well, that is amazing. So you disagree with the IG report?

Attorney General MUKASEY. I do not disagree with the IG report. The IG report criticized a number of people, two of whom are no longer there, two of whom are there having endured criticism.

Senator BIDEN. But did you think the criticism was justified?

Attorney General MUKASEY. Yes.

Senator BIDEN. You know, you belong in the State Department, man. We could use you up in, you know, the Foreign Relations

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Committee. You sound like a State Department guy. You would make a heck of a diplomat, because I—so you would—and the answer is you did find that it had been politicized and that you, in fact, have changed that?

Attorney General MUKASEY. No. I found that the IG report reflected that two people currently employed by the Department, one of whom is no longer in the job that he was in, had failed to respond with sufficient alacrity to charges of politicization. That is very different from saying that I found a politicized Department.

Senator BIDEN. I did not say politicized. I said had there been—at any rate, I am just trying to get a sense of how you think. I mean, you really are an enigma to me, and I do not mean that as a compliment or an insult. I just find it very difficult to understand you. And like I said, I am used to talking to a lot of diplomats. You know, they are really hard to understand.

Well, let me get right to it. Are you supportive of restoring the Byrne grants and the JAG grants and the cuts that have occurred to local law enforcement? Or do you think they are unnecessary programs?

Attorney General MUKASEY. I don't think that any program that achieves results is unnecessary. What I do favor is, particularly in the budgetary times that we are in, focusing our energies and our assets where they can do the most good, and that is what we have tried to do.

Senator BIDEN. And you think the Byrne grants are not at the top of that list?

Attorney General MUKASEY. There are Byrne grants. There are other grants. Putting one thing at the top of the list as opposed to another is not generally my way.

Senator BIDEN. Well, that is a requirement. It is called prioritization. That is what Attorney Generals do.

Attorney General MUKASEY. Prioritization is in terms of results.

Senator BIDEN. Well, let me ask you then: Do you think Byrne grants do not product the results?

Attorney General MUKASEY. I think that what produces results are task force programs that we have had in place to lower gang and gun crime, of which grants to State and local agencies are a part. Our own—

Senator BIDEN. But they are not Byrne grants, and you have eliminated the Violent Crime Task Forces—necessarily, I would argue. The FBI is overstretched. The FBI had to reallocate a significant portion, roughly 10 percent, maybe a little more, of its entire personnel to deal with security issues. The administration did not replace those agents. I have been pushing to add 1,000 FBI agents, total number, because of the necessary requirement that they be taken off State and local cooperation in these task forces, and there has been resistance to that. Also, then you come along—not you personally, but the administration comes along and cuts programs that have been universally viewed through administrations Democratic and Republican as vital to helping local law enforcement, particularly the Byrne grants and the JAG grants. You have eliminated those.

Here is my question: Is it based upon the lack of efficacy, or is it based upon what if—my friend and I from Arizona once had a

discussion about the COPS program. He is one of the smartest guys I know in the Senate, and he like many argued—and I mean this sincerely—that it is not the role of the Federal Government to assist local law enforcement, that it is about devolution of power, that local law enforcement is local, and there is a philosophic objection to the Biden—to the crime bill that says that we are going to provide billions of dollars to local law enforcement because it is essentially a local responsibility and we should not do it.

So is the objection that they are not efficacious? Or is the objection they are not high enough a priority? Or is the objection philosophical?

Attorney General MUKASEY. The objection—there is no philosophical objection to helping local law enforcement because local law enforcement is part of solving the same problem we solve.

Senator BIDEN. But you understand there is a giant debate in this town, in this country about that issue, so I am glad to hear you do not think it is philosophical. A lot of people do.

Attorney General MUKASEY. Not for me.

Senator BIDEN. Good. Okay.

Attorney General MUKASEY. Not for me. We have $200 million for the fiscal year 2009 budget in violent crime reduction—violent crime reduction partnership. We have $200 million in Byrne grants. We have $2 million in child safety and juvenile justice and $200 million in violence against women programs. Those are going to be allocated in the most effective way that we can through what might be termed a "competition system," but the competition is going to be based not simply on people's ability to write grant applications but, rather, on their ability to use those funds in conjunction with our own efforts to have an effect.

Senator BIDEN. Well, I was under the impression, because I have followed this longer than you have, or anyone here, and I have found them to be very efficacious. I have never heard anybody argue that they are being allocated not based on results, they are being allocated based on some system that needs to be fixed.

But my time is almost up. Maybe we will get a chance to come back to this.

The Senator from Illinois and I have slightly different bills, but we both have been very concerned about this notion of fugitives. There are between 800,000 and 1.6 million outstanding felony warrants out there out of 1.9 to 2.7 million State felony warrants that are not in the FBI's national data base. And in addition to that, States, as you know, your Justice Department is reporting to you, have refused to extradite fugitives across State lines because they do not have the money. And so slightly different approaches, but the Senator and I each have separate bills coming along saying that we want to provide additional moneys for the U.S. Marshals Service and moneys for the State and local agencies to be able to pick up these fugitives. I mean, I will not—I do not have the time, and there is no need to go through the detail, but the bottom line is there are rapists who are not being sent back across State lines because they do not have the money, people are being let go, et cetera.

Do you subscribe to the notion that this is something that, if we can come up with the dollars, this is something that the U.S. Marshals Service needs additional resources to be able to assist in?

Attorney General MUKASEY. I think that additional resources—that resources are needed to help update the database that allows warrants to be put into the database to be used for round-ups. I think the Marshals Service has conducted sweeps that have resulted in the pick-up of enormous numbers of fugitives, and I favor anything that can help them.

Senator BIDEN. Well, great, because I—I realize my time is up, Mr. Chairman. The U.S. Marshals Service indicates to us that they are really strapped. They just do not have enough personnel. But I will come back to that. I thank you for your time.

Thank you, Mr. Chairman.

Chairman LEAHY. We will come back. Thank you.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Welcome, General. We appreciate having you here before the Committee.

Your prepared statement noted that some of the positions in your leadership team have been filled, and I am one sure glad for that. It is hard to run the Department if you cannot get people to serve with you in the Department. And you and the Department need a complete leadership team, and that need does not change according to the election cycles or the political calendar.

Some of my colleagues on the other side once insisted not only that the Department needs new leadership, but it needs Senate-confirmed leadership. However, some important positions still remain vacant, and in my judgment, there is really no excuse for that, and I want to highlight one of them. Grace Becker was nominated last November to head the Civil Rights Division, and this Committee held a hearing 4 months ago. Then she was given hundreds of written questions. In my opinion, I think she was treated outrageously for someone who served right here on the Judiciary Committee itself and everybody knows is a decent, honorable, good person.

Now, this is a nominee we all know well, someone we all know to be a person of integrity, diligence, intelligence, and compassion. And I know that she is today heading the Civil Rights Division in an acting capacity, but she should have been confirmed unanimously a long time ago. And I just wanted to get that on the record.

Now, General Mukasey, let me start my—

Chairman LEAHY. If the Senator would yield on my time, we are still waiting for her to answer her followup questions, and—

Senator HATCH. Well, we will encourage her to get those in, and I hope that you will call her up and give her the—

Chairman LEAHY. It would help if she would answer the questions.

Senator HATCH. Well, I think asking 200 questions the way they did is not exactly kosher, either. But they have a right to do it, and I will acknowledge that.

General Mukasey, let me start my questions by following up on a topic I raised at your confirmation hearing last October. At that time, I described the concern of many that in enforcing the obscen-

ity laws, the Justice Department is targeting too narrow a range of obscene material. The most extreme material may make a conviction more likely, but that conviction has little impact on the overall obscenity industry. And as I said then, I believe that the strategy is misguided.

Now, you agreed personally to review and consider changing this strategy. I hope you have had an opportunity to conduct that review and that you will share your conclusions with the Committee, if you can.

Attorney General MUKASEY. I think what we try to do is to bring those cases that we can win and those cases that are going to have the greatest impact on removing obscene materials which degrade our society and depict behavior that we think is disgraceful. We have done that. We have had a recent conviction in Tampa of a large-scale producer of this kind of material. We want to do it in a targeted efficient way, and we want to do it in a way that will have the most effect.

What we don't want to do is—as you know, there is a tolerance for this in the courts. We don't want to bring prosecutions that will have the effect essentially of making more tolerated the kind of material that we think ought to be stamped out. So we pick our targets carefully. We pick them so as to have the greatest effect. And we bring vigorous prosecutions.

Senator HATCH. I appreciate that.

Attorney General MUKASEY. The Child Exploitation and Obscenity Section is involved in that, and the Criminal Division is involved in that.

Senator HATCH. Okay. The Department's Inspector General recently issued a report looking at hiring practices in the Department's honors and summer law intern programs, and one thing that stands out in that report is that Peter Keisler strongly objected to even the appearance that politics might enter into hiring decisions. Now, I highlight this because Mr. Keisler has been waiting for more than 2 years for this Committee to act on his nomination to the U.S. Court of Appeals for the D.C. Circuit, and by anybody's measure, he is a highly qualified person for that job. Even the New York Times and Washington Post praise him and endorse his nomination.

Now, he was serving as Acting Attorney General when you took over last November. He had served in the Department of Justice since June of 2002 as a Principal Deputy and Acting Associate Attorney General and as Assistant Attorney General for the Civil Division.

Please give the Committee your insight, your perspective on Mr. Keisler's service at the Department and his overall fitness for the Federal bench.

Attorney General MUKASEY. I have to tell you that my only regret about Peter Keisler is that his tenure and mine overlapped for only 13 days. I worked with him closely before confirmation. I worked with him after confirmation. I have spoken to him since. I have met a lot of people in my time who are suited to be Federal judges. I don't think there is anybody that I could name who has more intellectual and personal qualities that suit him for the Federal bench than Peter Keisler. He is one of nature's noblemen, and

I say that without diminishing the quality of the other people that I have met, both people who serve on the bench and people who are candidates for the bench. He is in a separate category. He is absolutely outstanding. He is in the same—you delivered a speech after the retirement of Paul Clement. He is a person in that category, if the category can include more than one person.

Senator HATCH. Well, thank you.

As you know, the Supreme Court recently recognized that the Second Amendment to the Constitution protects an individual's right to possess firearms for self-defense in the home. Now, it never ceases to amaze me how some people claim to see all sorts of unwritten rights in the Constitution but apparently cannot see the ones that are expressly written there as plain as day. They want to read between the lines, but refuse to read the lines themselves.

Now, I for one am glad the Supreme Court finally recognized this fundamental right, and I want to ask you about how the decision will be implemented. The Court rejected the administration's argument that the case should be remanded to the lower court for application of the lower standard of review. But the Court did say that its decision does not necessarily cast doubt on longstanding prohibitions on certain types of firearms or possession of firearms by certain individuals.

I assume you and others at the Department have been studying that decision, and I would welcome your thoughts on how you think it impacts current Justice Department policy or Federal statutes that are currently on the books.

Attorney General MUKASEY. We have been studying the decision. I think the decision is consistent with the Department's express view that the right is a personal one. It is also consistent with the Department's view that it should not and does not interfere with the ability of the Federal Government to enforce existing firearms laws, including restrictions on the nature of certain firearms, including restrictions on the possession of firearms by felons and people who are otherwise unsuited to carry them, and including restrictions on where they can be carried. That decision explicitly in some instances is entirely consistent with the continued enforcement of Federal firearms statutes, and we have no hesitation in saying that, and we have no trepidation in that regard.

Senator HATCH. Well, thank you. My time is up.

Chairman LEAHY. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, a report in the Los Angeles Times last week highlighted the fact that the Office of Professional Responsibility has been conducting investigations into allegations of improper conduct by lawyers in the Justice Department. One concern raised by the article is that the investigations are being kept secret, which is contrary to OPR's usual practice. The Department under this administration has the reputation of using excessive secrecy to keep misconduct from the public. Keeping this policy in place simply reinforces Americans' worst fears.

As you said earlier, you were put in place in great part to restore the reputation of the Justice Department. In a democratic society, the people have a right to know whether investigations show mis-

conduct by Government officials, and I think you would agree with that. So why has the administration changed the OPR policy of making its findings public? Will you commit today to making public the summaries of any OPR investigations that do find misconduct?

Attorney General MUKASEY. I certainly agree with the Senator's view that Government has to be as transparent as it can possibly be. OPR conducts investigations of lawyers, not simply across the board of Justice Department employees. Lawyers have particular obligations under the rules of the bar to which they are admitted and under professional standards. Virtually anything can result in the opening of an OPR investigation. Many of those investigations are opened and closed without incident. Those that are opened as to which reason for criticism is found can be referred to bar associations, and often are. They are in a particular category.

Some OPR investigations are carried on along with the Office of the Inspector General, and those are made public. Some OPR investigations are made public on their own. I think it varies from case to case. But one has to be, I think, very careful in whether one is going to ruin the professional career of a lawyer based on unsubstantiated allegations that simply result in an OPR investigation.

I am very wary about making blanket commitments with regard to OPR investigations, notwithstanding that I am firmly committed to publicizing those things that should be publicized, publicizing joint OPR–OIG investigations, as they have been in the past and will be in the future.

Senator KOHL. When OPR investigations do find misconduct, are you committed to making that public?

Attorney General MUKASEY. If OPR investigations find serious misconduct that necessitate the dismissal of an employee, I think that is probably something that should be publicized. OPR investigations that simply say that somebody should receive a private admonition or an admonition under the standards applicable to a bar, again, may be referred to the bar association for its disposition. Bar associations often get charges that result in private admonitions. Sometimes they get charges that result in public admonitions. And the same is true of OPR investigations.

Senator KOHL. Mr. Attorney General, the Justice Department has spent enormous time and effort prosecuting price-fixing cartels, and yet the worst and the biggest cartel in the world is the OPEC oil cartel, and we have not taken any action against them. The actions of OPEC are one of the main reasons that gas prices are now more than $4 a gallon. I have introduced—and we have had positive response from both Houses—the NOPEC bill which would permit antitrust actions against the OPEC cartel.

Would you support the Justice Department having the authority to bring antitrust lawsuits against OPEC member nations?

Attorney General MUKASEY. I think the Justice Department is committed to competition. I think we have proved that time and time again. OPEC presents a very special problem. We don't want to be in the position of—forgive me for the comical illustration—a dog chasing a car. What do we do when we catch up with it? Let's assume that we get a verdict against OPEC. OPEC can, as a cartel, essentially cease to do business with us and make things worse

rather than better. So we need to be very, very careful about how we approach any sort of antitrust proceeding that could result in a great deal of damage to this country.

Senator KOHL. I do not disagree with that. I am asking whether you would like for the Department to have the authority to take action in a case that it decided it was the right thing to do?

Attorney General MUKASEY. I would like to be able to look into the issue further than I have, but I think the need for caution is, as you acknowledged, apparent and, that is, we can't bring actions in a way that could result in doing more harm than good.

Senator KOHL. I do not disagree. But the question is would you—which is what the bill would allow the Justice Department—not that they would be required to take action, but that they would have the authority if in the good judgment of the Department the authority was to be used judiciously. Would you support having the authority, which is what the bill is set up to do?

Attorney General MUKASEY. I haven't seen the bill. I think how that authority is phrased and what—

Senator KOHL. It does not require the Justice Department to take action. It gives them the authority.

Attorney General MUKASEY. I understand that, but the circumstances in which that authority is to be exercised, the elements to be considered, and the matters to be considered are all matters of moment. And we have to look very carefully at the consequences, also at how the American people would receive news that the Justice Department is now empowered to go after OPEC. I think we need to be very, very careful about that. I want to look at the bill. I want to look at the language. I don't want to give an off-the-cuff answer before I have seen it.

Senator KOHL. So you do not have an answer to the question?

Attorney General MUKASEY. I don't because I have very much concern—very great concern with the consequences, and I want to see the bill before I respond in blanket fashion one way or another that we would welcome having the authority. It is always nice to have authority. I think how it is to be exercised, how discretion is to be exercised is—

Senator KOHL. Could you take a look at the bill and give me an opinion?

Attorney General MUKASEY. I will certainly look at the bill. I will certainly look at the bill because it is a very important issue.

Senator KOHL. I thank you. I would like to get your opinion on it.

Finally, one of the very few industries, Mr. Attorney General, to enjoy an exemption from antitrust law is the freight railroad industry. Because of this exemption, rail shippers have been victimized by the conduct of dominant railroads, and they have no antitrust remedies. Higher rail shipping costs are passed along to consumers, resulting in higher electricity bills, higher food prices, and higher prices for manufactured goods.

I have introduced a bill to abolish this obsolete antitrust exemption for railroads. Do you agree that this antitrust exemption should be repealed so that railroads are subject to the same antitrust laws as virtually every other industry in our economy?

Attorney General MUKASEY. I think any antitrust exemption that is out of date or counterproductive should be re-examined, and I will examine that bill, just as I would the other bill that you mentioned. I haven't seen it, but certainly the Antitrust Division tries to ensure competition across the board in every industry, be it that one, be it others.

Senator KOHL. Thank you very much.

Senator FEINSTEIN. [Presiding.] Senator Kyl is next.

Senator KYL. Thank you, Madam Chairman. I want to thank Senator Grassley for graciously switching with me here since I will have to leave, and I am sorry that I will have to leave after I have questioned.

Because of Senator Biden's characterization of my views, slightly inaccurately—and I know he did not mean it intentionally—I need to take a couple minutes to respond to that. This has to do with Byrne grants, and Senator Biden acknowledged that he and I have had a lot of conversations about how to utilize the money that heretofore has been available for Byrne grants.

It is not my opinion that there is no role for the Federal Government to assist local law enforcement; rather, my view is that it is a matter of priority and that, to the extent that funds are available, we should first focus those funds on areas where there is a Federal nexus. For example, on border enforcement, we have a horrible situation in Pima County and Cochise County and Yuma County, Arizona, where we need far more Federal resources to assist our local sheriffs and county attorneys and so on because of the drug smuggling and illegal immigration. That is a place where these funds can very efficaciously be applied.

Reservations, both Indian reservations and military reservations, especially Indian reservations, are in desperate need of more funding. That is a trust responsibility for the United States, and my view has always been that if we have money available, better to put it there than to help the city of Scottsdale hire more police officers, for example.

And then, finally, in areas of expertise, I mentioned drug prosecutions, but also things like FBI agents who can work on things like bank fraud, that is of very big assistance to local governments, which frequently do not have that kind of capability. So that is the actual view that I have, and I certainly will support more funding in those areas where we have a Federal nexus.

Now, Attorney General Mukasey, Senator Specter made the point—and I agree with him, and I will quote him directly—that "leaks are intolerable." He mentioned the Curt Weldon case. I did not look it up in the dictionary, but to me "intolerable" means either that action has to be taken to prevent them and/or to remediate the situation that they occur, which could also mean prosecution if laws are violated. This, of course, brings up the so-called media shield bill, which Senator Specter alluded to as well.

Some of the supporters of this bill argue that the national security concerns that you have raised, the intelligence community has raised, that I am concerned with, are addressed in the bill by an exception that the bill provides to prevent terrorist activity or harm to national security. What is your view about the exceptions in the bill that purportedly address this issue?

Attorney General MUKASEY. My view is that those are simply not adequate. The exemption for national security would require the Government to show that the harm to be done by a publication outweighs the good to be achieved by a publication with no standard but that in mind. A judge would have no standard other than his own predilection. Also, the Government would be put to the burden of coming to court to show even more than has already been disclosed or that may already be disclosed for the purpose of proving the possible harm.

In addition, the bill, although it may be useful on September 10, isn't useful on September 12. In the case of investigating prior acts, in the case of investigating material that has already been leaked, the burden that is imposed on the Government is even higher than the one that is imposed before. The bill would require the Government to prove that information was properly classified, that the person who leaked it, who they already have to know about, leaked it rather than having—was in authorized possession of it, which would enable that person to simply transfer the information to somebody else for the purpose of having it leaked.

It would require the Government, when it was conducting a perfectly valid FISA interception, if a reporter called a target of that FISA interception, whether it was a foreign power or not, to give the reporter notice of the existence of a FISA interception regardless of whether anybody was trying to get confidential information or not. There are just numerous, numerous things that are defective in the protections that that bill affords.

Senator KYL. Thank you, and let me see if I understand one of the first points you made about September 10th but not September 12th, I think, and I don't have the entire wording in front of me, but that refers to the wording in the so-called national security exception that provides that it only—that the Government would have to show by a preponderance of the evidence that the information the Government seeks would assist in preventing an act of terrorism.

Attorney General MUKASEY. Correct.

Senator KYL. So after the fact, the national security exception does not provide you any solace.

Attorney General MUKASEY. None.

Senator KYL. And I think the point here about the only evidence of the leak being the leak itself has to do with one of the requirements, which is that there be other evidence of the crime—

Attorney General MUKASEY. Often the only evidence available to the Government is the leak itself.

Senator KYL. Is the leak itself. So—

Attorney General MUKASEY. We can't use that as the only evidence.

Senator KYL. So the bottom line here is that there are serious national security concerns that the exception that purportedly addresses these concerns will need to have additional work before it could at least achieve the purpose of that exception, I gather, in your view.

Attorney General MUKASEY. At the very least.

Senator KYL. Now, would you also—and just in the last 40 seconds here, my understanding is that the concerns with this so-

called reporter shield bill are not just the Department of Justice, but that it also concerns the Director of National Intelligence, the Secretary of Defense, the Secretary of Homeland Security, the Secretary of the Treasury, the Secretary of Energy, and the heads of 16 component agencies of the intelligence community, all of whom have expressed their opposition to the bill. Is that correct, to your knowledge?

Attorney General MUKASEY. It is correct. I think it is fair to say that every head of an entity that has equities in national security has signed onto opposition to that bill, and not for no reason.

Senator KYL. Thank you very much. Obviously, my view is that bill needs a lot more work.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator.

Senator KYL. And, again, thank you, Senator Grassley.

Senator FEINSTEIN. Mr. Mukasey, I am really very disappointed in your answer to Senator Biden's question, and I want to point out how I looked at the politicization of the Department. I believe several United States Attorneys were fired for political reasons. I believe that the Civil Rights Division may well have been politicized. I believe, according to the Attorney General and the OPR, the honors program was politicized. The summer intern selection program was politicized. OLC opinions were politicized. The Civil and Tax Divisions may have been politicized. The voting rights case decisions were politicized, specifically Texas redistricting and the Georgia voter ID. The rules were changed in that Division to permit changes that would allow more political effort. The Red Book was changed to a Green BoOkay. The hiring of immigration judges was politicized based on testimony of Kyle Sampson before this body. And the major was an attempt by the White House to overturn Jim Comey's opinion on the Terrorist Surveillance Program to convince a very sick Attorney General to overturn it.

If that isn't politicization, I do not know what is. And when you answered Senator Biden to say effectively there was no politicization of the Department, it struck me quite badly. If you would like to respond to that, I would be happy to hear the response.

Attorney General MUKASEY. I would be happy to respond to it. Two of the items you cite, which were the firing of the U.S. Attorneys and one of the other matters you cite, are currently under investigation by the Office of the Inspector General along with OPR. And when those reports are received, they will be reviewed and they will be acted upon, just as the recent report of the Inspector General with regard to the hiring of summer interns and with regard to the hiring of lawyers in the honors program was acted upon. Indeed, actions were taken even before it was in place. That report was issued, as well as additional recommendations in that report having been embraced.

We have revised the rules with respect to contacts with the White House. We have changed those. We have revised the procedures that we use for the hiring of immigration judges. We have been hiring immigration judges on a non-political basis according to these new rules.

So those reforms, those changes have been put in place, and they are matters of ongoing concern. I am not unconcerned with that.

Senator FEINSTEIN. I am happy to hear that. When Senator Biden asked you the general question, did you find the Department politicized, you essentially said no. And what I want you to know is that in the view of many of us, the Department has lost enormous credibility because of the things that I have mentioned.

Now I would like to just move on to a question on Guantanamo. On June 20th, the Court of Appeals for the D.C. Circuit issued its first decision reviewing a case of a detainee held at Guantanamo under the review process laid out in the Detainee Treatment Act, and this, of course, is the case of Huzaifa Parhat, a Uighur who was handed over to the United States after being picked up in Pakistan following the start of coalition bombing in Afghanistan. The Combatant Status Review Tribunal, which reviewed Parhat's case, relied on classified information to conclude that Parhat was part of a Uighur movement associated with al Qaeda and the Taliban. In an unanimous opinion, the D.C. Circuit rejected this argument, concluding there was no evidence to support the assertion.

Here is the question. What are your plans, if any, for reviewing the case files of other detainees at Guantanamo to ensure that there is adequate evidence to support their detention?

Attorney General MUKASEY. As you know, Parhat is certainly not the only case before us. *Boumediene* was a substantial change in the landscape which we are reviewing and attempting to deal with in an orderly fashion with the D.C. district court that has jurisdiction over those cases.

With regard to Mr. Parhat, the D.C. Circuit found inadequacies in the CSRT proceeding to which he was subjected and in which evidence was presented. I think it is fair to say that after the decision in Boumediene, the status of CSRTs entirely is a matter that has got to change. It is going to change in the direction of having habeas proceedings. We are trying to organize an orderly way to address the situation not only of Uighurs, obviously, but of others who are detained at Guantanamo so as to assure that their case is going to be dealt with in an expeditious fashion.

I think it is fair to point out, though, that the CSRT proceeding was a result of the statute enacted by Congress in 2006 along with the President in response to a specific invitation by the court.

Senator FEINSTEIN. Thank you. My time is up.

Senator Grassley, and I will turn this over to Senator Biden. Here is the last.

Senator BIDEN. [Presiding.] Senator Grassley.

Senator GRASSLEY. General, usually before I ask questions, I try to point out some communications between your Department and me or other members of the Committee that may not be answered just to bring them to your attention because you may not know everything going on. And I do this in the same vein that, as an example, in the 14 town meetings I had last week in Iowa, "Have I answered your mail?" You have not answered all of our mail, and I would like to have you start out your meetings by asking each of us if we have answered your letters. But we have a number of outstanding requests, and some of them have even been highlighted in my mail in a letter that Chairman Leahy sent to you to high-

light it dated July 1, 2008. We have outstanding e-mails—requests for e-mails related to exigent letters, answers to questions related to Cecelia Woods, and written followup questions from FBI Director Mueller from March 5th oversight hearing, and then also to inform you that you will soon be receiving a letter from me as a member of the Finance Committee and Chairman Baucus about correspondence that we sent around 6 months ago and just recently received a non-response. It involves what we believe is misuse of District of Columbia U.S. Attorney's Office and the intervention of a hearing that we were trying to conduct. We did receive a response that was embarrassingly inadequate. So I hope that you would do attention to all of these communications.

Attorney General MUKASEY. I am going to pay attention to those communications. I know we did receive recently a letter from the Chairman referring to past correspondence. I don't recall whether it concerned yours. I believe we have dealt with the correspondence that is referred to in that letter. But obviously we try to answer the mail in more senses of that term than one.

Senator GRASSLEY. Okay.

Attorney General MUKASEY. If we haven't, I apologize for it and regret it.

Senator GRASSLEY. Okay. Before I ask questions, I think that your Department is headed in the right direction in all of these questions that I am going to ask you now in regard to the handling of potential fraud and other problems that come from natural disasters. The recent floods and tornado disasters in Iowa have taken a hard toll on thousands of my citizens, so I was pleased to see a recent press release that your Department put out warning Iowans not to become "a victim twice" and to beware of fraudsters trying to steal people's identity by asking for their FEMA registration numbers or Social Security numbers.

The Justice Department warned about scam artists preying on disaster victims, particularly contractor fraud, predatory pricing. The Justice Department also warned about charity scams. Unfortunately, in every disaster situation, we have these low lifes come out of the woodwork to prey on people.

General, have you seen any of these kinds of problems—well, three questions. Have you seen any kinds of these problems so far in Iowa? What has the Justice Department done to get the word out and make sure that Iowa's citizens are not victimized by scam and con artists? And is the Justice Department working with law enforcement officials in Iowa to protect citizens from these things?

Attorney General MUKASEY. The U.S. Attorney for the Northern District of Iowa has met with local and State authorities, including the Iowa Attorney General's office, as well as other Federal authorities to make sure that claims of fraud are coordinated and dealt with quickly and appropriately. I am happy to say that, as far as I know, so far we have not found any instances of Federal fraud, although I understand that there are some State fraud allegations, at least, that have been made.

We do have available to us the task force that was set up in connection with Katrina, which we could use, at least in part, to address any possible fraud claims that we get here. So far, as I said,

we haven't gotten any at the Federal level, but we are well prepared, I hope, to deal with them when as and if they come.

Senator GRASSLEY. Well, I think you partly answered my next question. I did send a letter to the Governing Council of Inspectors General asking that they establish a working group that will coordinate Government oversight of moneys appropriated for disaster recovery in the Midwest. We have a duty to ensure that the money appropriated is spent for its purpose and not going to opportunists. We have learned a lesson that stopping contractor fraud is up front cheaper than chasing money. The Inspectors General responded and informed me of this disaster working group—I think it is the same one you are referring to—that they met on July the 2nd to coordinate oversight efforts.

So I would have these questions in regard to that. Is that the same oversight group you were referring to?

Attorney General MUKASEY. It may not have been, although the FBI does work closely with Inspectors General, and the Justice Department is going to pursue, obviously, any cases that are uncovered by the IGs.

Senator GRASSLEY. So then I think you answered my first question, that the Justice Department will lend resources to help ensure that those dollars are protected from fraud.

Has the Department taken any other proactive steps on its own too coordinate with various Federal agencies that will provide disaster relief funds?

Attorney General MUKASEY. The Office of Justice Programs, Bureau of Justice Assistance, has developed an Emergency Incident Response Plan to help give technical assistance and to address questions about grant programs, problems accessing funds and to rebuild program files that might have been damaged so as to make sure that people can meet deadlines and get their applications in on time. And, obviously, where we can provide accommodations, we are going to do so. And we are actively looking at other programs and options to help the people of Iowa recover.

Senator GRASSLEY. Now, last, it was about 2 weeks ago I led the Iowa delegation in a letter to you requesting that special consideration be given to applications from law enforcement agencies impacted by flooding situations for both COPS and Byrne/JAG grant programs administered by your Department. They provide vital funding for State and local law enforcement agencies. They help buy equipment, pay training, fund multi-jurisdictional task forces, and help hunt down fugitives, et cetera. In a time of need following a disaster, these funds can help small rural police and sheriff's departments get back on their feet and replace equipment destroyed by flooding. The deadlines for these programs are fast approaching. They may have to be, some applications, amended.

Will the Department of Justice give special consideration to these requests to ensure that law enforcement agencies impacted by flooding are not forgotten?

Attorney General MUKASEY. We are certainly going to give whatever consideration we can, and we are going to help them so that they can meet deadlines even where we cannot extend them. So, yes, we are going to give consideration to those, and, obviously, to

the extent they have more pressing needs, they are going to go ahead on the list.

Senator GRASSLEY. And that is directly related to the flooding?

Attorney General MUKASEY. It is.

Senator GRASSLEY. Okay. Thank you, Mr. Chairman.

Senator BIDEN. Thank you.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General.

Attorney General MUKASEY. Thank you.

Senator FEINGOLD. Let me start by commenting on the Inspector General's and Office of Professional Responsibility's recent report on politicized hiring in the Department's honors program. The report notes that one of the candidates who was almost certainly rejected for political reasons was a young man who was first in his class at Georgetown Law Center, clerked for a district judge, and also on the Second Circuit. But he also made a mistake, and that was working as a law clerk for my Judiciary Committee staff, which apparently played a part in disqualifying him for an honors program position. He now works for the Solicitor General of the State of New York, so he has done fine. But for the most petty and inappropriate of reasons, the Department of Justice lost out on a very talented young lawyer. The people responsible not only intentionally interfered with the careers of fine young lawyers, but they damaged the Department and the Nation. I want you to know that I find this conduct unacceptable and truly hope that the promises you made to end this kind of behavior at the Department are being kept.

My question to you now, however, is more specific. In light of the report, what specific actions have you taken and what further actions do you intend to take to hold those who broke the law here accountable?

Attorney General MUKASEY. We have put in place a system that assures that all hiring with regard to the honors program and with regard to the summer internship program is entirely in the hands of career lawyers, and obviously anyone who is qualified to serve in the Department of Justice is welcome to submit his or her application and to be evaluated on the merits.

Senator FEINGOLD. But what about accountability for those who did this?

Attorney General MUKASEY. I think that to the extent that there is to be accountability, that was covered in the OIG report. People who were deficient were—some of them are no longer at the Department. Others came in for criticism.

Senator FEINGOLD. Well, I will want to review exactly—excuse me, sir.

Attorney General MUKASEY. No. If you can point to any criminal laws that were violated, obviously those—

Senator FEINGOLD. Well, we will take this up more later, but thank you for that initial response. I am very concerned that the message be clear that this is unacceptable and that requires real accountability.

In 2007, the Justice Department issued draft regulations to implement a law that gives the Attorney General, rather than the

courts of appeals, the authority to allow States to opt into procedural rules in Federal habeas corpus actions that favor the Government, and I think disadvantage the inmate habeas petitioner. And to get this benefit, States are supposed to prove that they provide competent counsel in post-conviction proceedings, but some serious concerns have been raised about the clarity and completeness of DOJ's proposed implementing regulations. Even the Judicial Conference has asked DOJ to reconsider the regulations, stating that the regulations provide "no guidance about the criteria to be considered by the decisionmaker" in assessing whether a State has provided competent counsel.

I asked you some questions for the record about these regulations after the last DOJ oversight hearing, and your responses were a little more cavalier than I expected given the gravity of this issue and the significant change in habeas procedure that these regulations would implement.

Now, before the final regulations go into effect, I want to understand fully the Justice Department's justifications for them. So I am going to have a number of detailed written questions that I will provide you after the hearing. I would like your commitment today to answer my questions fully and give your personal attention to them before these regulations are finalized. Will you commit to that?

Attorney General MUKASEY. Yes.

Senator FEINGOLD. All right. You mentioned in your testimony that you are trying to determine whether the Attorney General guidelines governing the FBI's investigative activities can be "consolidated and harmonized." According to a report by AP last week, the Department will put in place revised guidelines later this summer that will permit the FBI to open preliminary inquiries about Americans "without any evidence of wrongdoing, relying instead on a terrorist profile that can single out Muslims, Arabs, or other racial and ethnic groups."

Now, according to the article, "Among the factors that could make someone the subject of an investigation is travel to regions of the world known for terrorist activity, access to weapons or military training, along with a person's race or ethnicity."

So let me ask you first: Under these new guidelines, will the fact that a person is of a certain ethnicity or national origin be enough without any evidence of wrongdoing to justify a preliminary inquiry?

Attorney General MUKASEY. No. And that is—that represents no change from prior rules that say that we do not use that as the basis alone for predicating an investigation into anyone. These new regulations are a part of a process—I don't mean to be more expansive than you want, and please cut me off if I—

Senator FEINGOLD. Well, let me just do a followup question to get to specifics. Thank you for that clear answer. But let me try this one: What about if a person is a U.S. citizen of Pakistani descent who has traveled frequently to Pakistan? Now, would that be enough to potentially trigger an investigation?

Attorney General MUKASEY. I think the circumstances of a person's travel would be one element or maybe one element in determining whether a person is appropriate for conducting an inquiry.

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But I think it is useful to point out that this is part of an ongoing process that has gone on really since right after September 11, and it has gone on with the urging of bipartisan commissions, including the 9/11 Commission, including the Silberman-Robb Commission, that the FBI not only be a crime-solving organization but be an intelligence-gathering organization.

Senator FEINGOLD. And I respect that. I am a member of the Intelligence Committee. But my specific question was whether the frequency of travel by a U.S. citizen of Pakistani descent to Pakistan in and of itself would be sufficient to potentially trigger an investigation?

Attorney General MUKASEY. I think the regulations, before they come out, will be made known to this Committee, will be reviewed with this Committee, and certainly before they are effective they will be reviewed with this Committee. And I am not prepared to discuss today particular hypotheticals one way or the other, particularly unmoored from any other evidence that is in the hands of investigators.

What I do want to point out, though, is that the investigations take regulations that apply to the opening of criminal investigations and regulations that may apply to the opening of intelligence investigations and try to harmonize them so we do not have cross-cutting regulations—

Senator FEINGOLD. Let me just ask one more question before my time ends. And I appreciate your responsiveness.

What about if such a person also owns a gun—which, by the way, the Supreme Court has just definitively held is an individual constitutional right, a decision I agree with. Might that person be investigated by the FBI based on that information alone?

Attorney General MUKASEY. Senator, again, I don't want to get into "what if" before the regulations go into place. I should point out that when I was a judge, I presided over a case in which First Amendment expression was proved as part of the case in which otherwise confidential conversations were proved as part of the case because, along with other evidence, they were relevant in determining whether the defendants in that case were guilty. So I think it is very important to consider all of these matters in context. And I think the regulations will assure that the nature of evidence to be gathered and the way that it is gathered is subject to review, and also so that it becomes apparent that not only have the ways in which the FBI goes about gathering evidence changed, but also the oversight both within the FBI and within the Justice Department, and NSD has been enhanced to keep track with and to keep pace with the increased authority of the FBI to gather intelligence. And I think—

Senator FEINGOLD. I will be following this very closely—

Attorney General MUKASEY [continuing]. Will reflect that.

Senator FEINGOLD. I look forward to working with you on this matter as it evolves.

Thank you, Mr. Chairman.

Senator BIDEN. Thank you, Senator.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. And thank you for being here, Attorney General.

Now, Judge Mukasey, at your confirmation hearing, I told you how troubled I was about the allegations of politicization in some of the Department's prosecutions. We talked about hiring, but these are prosecutions. In particular, I urged you to get to the bottom of deeply disturbing allegations about the case of Don Siegelman, the former Governor of Alabama. I pointed out at the time, although Siegelman was convicted of several counts, witnesses have credibly contended his case was politically motivated and selectively prosecuted. Some of the specific allegations include: that Karl Rove asked Jill Simpson, a life-long Republican and practicing lawyer in Alabama, to try and take pictures of Siegelman cheating on his wife or in compromising positions; that Rove personally contacted the Department of Justice and pushed for a second prosecution of Don Siegelman after a Federal judge dismissed the first case against him. Karl Rove, of course, has refused to appear before Congress and testify under oath about his involvement in the Siegelman case.

When I asked you to take a thorough and personal look at the Siegelman case, you were reluctant. You said the case was on appeal. And I must say that I think it is time you get to the bottom of this because there have been some startling new developments in the case since.

First, in a highly unusual decision, the Eleventh Circuit Court released Siegelman on bail pending his appeal, finding that, "There was substantial question of law or fact likely to result in reversal." Not only that, but in connection with that appeal, 54 State Attorneys General, Democrats and Republicans, filed a brief supporting the appeal. That is an astonishing bipartisan act, knowing that prosecutors are very reluctant to take issue once a jury has convicted somebody from the Justice Department. I think it underscores the flimsiness of the case and the concern about selective prosecution. And I have to tell you, nothing, I think, has troubled me more than this. This is almost like if the allegations are true—obviously, that is a big "if"—it is like making the Justice Department the Justice Department in a banana republic. You do not like someone; you go after them; you prosecute them on flimsy evidence. It is really troubling.

So I want to ask you some questions about this because I am deeply troubled about this, and it is the kind of thing that I believe that you, when you testified before us, would want to get to the bottom of and eliminate even the appearance that something like this happened.

So, first, there is, in fact, an OPR investigation underway in the Siegelman case. Is that correct?

Attorney General MUKASEY. Yes.

Senator SCHUMER. Okay. Do you know when it began?

Attorney General MUKASEY. No.

Senator SCHUMER. Could you find out for us?

Attorney General MUKASEY. I suppose I could find out when it began.

Senator SCHUMER. OK, good. Do you know when it will be complete or how far along it is?

Attorney General MUKASEY. I meet regularly with the head of OPR, and I do not want to get into those particular meetings. Obvi-

ously, they are working on it, as they are on other matters, along with OIG, when there are joint OIG investigations. And I have no reason to believe that anybody is slow-rolling that or dragging—

Senator SCHUMER. Well, do you ask questions and make sure that that is occurring, that this is given—this one is different than lots of other cases. When 54 Attorneys General write a letter, when the Eleventh Circuit calls into question the conviction on the basis of some fact or law, and the allegations are—you would admit if the allegations are true, it would be stunning. Isn't that correct?

Attorney General MUKASEY. If the allegations are true, it would be stunning. I think it is fair to point out that the Eleventh Circuit's decision had to do with issues raised on appeal—

Senator SCHUMER. I understand.

Attorney General MUKASEY [continuing]. By Mr. Siegelman that went to particular counts of the indictment and that did not go to the matters that you discussed. But I certainly agree that if the allegations you make are true, that would be stunning.

Senator SCHUMER. Okay. So shouldn't this get a high priority from OPR?

Attorney General MUKASEY. I think it has substantial priority.

Senator SCHUMER. Okay. That is what I want to make sure of.

Attorney General MUKASEY. But I am not—

Senator SCHUMER. When you said before, well, there are a whole lot of things they investigate—

Attorney General MUKASEY. No, no, no. I am not suggesting that this is down on the list at all.

Senator SCHUMER. Okay. Can you assure us it will come to a conclusion before this administration's end?

Attorney General MUKASEY. I have every reason to believe that it will.

Senator SCHUMER. Good. Do you know how many lawyers or investigators are working on it?

Attorney General MUKASEY. No. And I don't know that with respect to any investigation.

Senator SCHUMER. Right. But OPR, this is not like the IG. You appoint the head of OPR. He serves at your pleasure.

Attorney General MUKASEY. I did not appoint this head of—

Senator SCHUMER. I understand. You have the authority to appoint.

Attorney General MUKASEY. And Marshall Jarrett is a superb, qualified person.

Senator SCHUMER. Okay.

Attorney General MUKASEY. I don't know of anybody who has ever—

Senator SCHUMER. And do you believe there are enough resources—

Attorney General MUKASEY. Yes.

Senator SCHUMER [continuing]. Being used on this case?

Attorney General MUKASEY. There certainly is.

Senator SCHUMER. Okay. Now, next question, and this one is pretty serious. Will you make the OPR findings public when the investigation is complete? I know you had a general discussion with Senator Kohl.

Attorney General MUKASEY. That depends on what they are, and for the same reasons as concerned my discussion with Senator Kohl, the same reasons apply to this. I don't know in advance what OPR is going to find.

Senator SCHUMER. But don't you think either way, no matter what they find, given the seriousness of these allegations, calling into question the very fundamentals of neither fear nor favor before the law, that these should be made public? If they say there is nothing wrong, I would want to know, and if they say there is something wrong. What would be a reason not to make this public?

Attorney General MUKASEY. I think there are various avenues open for exploring those allegations, including exploring their source and having testimony on the subject. OPR is not the only avenue.

Senator SCHUMER. Well, I understand that, but why wouldn't you commit to making this public?

Attorney General MUKASEY. For the simple reason that I don't know what the conclusions are going to be.

Senator SCHUMER. Well, give me a reason, just give me a hypothetical reason why they shouldn't be made public?

Attorney General MUKASEY. If OPR determines that somebody did nothing wrong or that a lawyer neglected to attend to a detail in a way that under State law would warrant only a private admonition, for me to make those public—

Senator SCHUMER. Okay. Well, let me ask you this: If—and this is a big "if." If OPR finds that there were political interference in the case, will you make that part of it public if it is not a lawyer making some kind of—

Attorney General MUKASEY. I think—cases are brought for all kinds of reasons, and we have all—I have had the experience of having a divorced wife walk in, having had the goods on her ex-husband, and deliver them and bring a case for that reason, because she would like to see him suffer. That is not a noble reason. But that is not—

Senator SCHUMER. OK, but that is not what we are discussing here.

Attorney General MUKASEY [continuing]. A reason for not bringing the case.

Senator SCHUMER. That is not what we are discussing here. I asked you if the allegations that are made are true that there was political interference, is there any reason not to make that public?

Attorney General MUKASEY. If there is interference with the course of a case, that is a matter of a whole different—

Senator SCHUMER. Well, how about if Karl Rove did suggest a second prosecution for Siegelman after the first?

Attorney General MUKASEY. That is the kind of "if" that depends on the underlying evidence. I think we ought to await—

Senator SCHUMER. Well, why shouldn't it be public regardless whatever the underlying evidence is? He may have come across some new fact.

Attorney General MUKASEY. He may indeed.

Senator SCHUMER. Okay. But why shouldn't that be made public? You are not giving me a very good reason, sir.

Attorney General MUKASEY. I don't see publicizing the source of an allegation if the allegation turns out to be true.

Senator SCHUMER. Let me ask you one more question with the Chair's indulgence. Should Karl Rove be interviewed in this case?

Attorney General MUKASEY. That is a matter for OPR to—

Senator SCHUMER. What do you think? You are the ultimate authority here.

Attorney General MUKASEY. I am not the ultimate authority here. I have not supplanted—I have not supplanted OPR, and I do not intend to. I intend to look at their report, and if it is in any way deficient, I—

Senator SCHUMER. You do not think that given the allegations that have been made, serious allegations that have gotten scores of Democratic and Republican Attorneys General to ask that this case be re-examined, that Karl Rove should maybe not be interviewed here?

Attorney General MUKASEY. I think there are avenues for conducting examinations other than the OPR investigation and other than my suggestion. And—

Senator SCHUMER. Do you think someone in the Justice Department should ask Karl Rove whether he was involved, whether he did the things that are alleged, someone, somewhere? Or is there a possibility no one should ever ask him?

Attorney General MUKASEY. I think that very much depends on what the facts are that are found by OPR, and I don't know what they are going to be.

Senator SCHUMER. I find these answers very disappointing.

Chairman LEAHY. I think Senator Schumer's concerns reflect some of the same concerns you have heard from—the same nature as the concerns you have heard from Senator Specter and myself, and they are concerns that have been expressed by a lot of people on this Committee.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Welcome, Attorney General Mukasey.

Attorney General MUKASEY. Thank you.

Senator WHITEHOUSE. In the 8 months you have been in office, have you had occasion to determine yet whether waterboarding is torture?

Attorney General MUKASEY. No, because as I said, it has not been proposed to be returned to the program and it is not part of the program.

Senator WHITEHOUSE. In that answer and answers you have given to Chairman Leahy and answers you have given to Senator Feinstein and answers you have recently given to Senator Schumer, I detect a very pronounced reluctance to look backward into the problems at the Department of Justice. You have assured us, for instance, that politics will be kept out of prosecutions under your watch going forward. But the effects of prosecutions of politics on past prosecutions are still very much alive and well for the subjects of those prosecutions.

You have assured us that you have reviewed the OLC opinions regarding current programs. But past OLC opinions done in the po-

liticized atmosphere of OLC at that time continue on the books as precedent to be counted in the future and now.

You have stated that you have changed and remedied the politicized hiring policies of the Department of Justice, but people who were hired pursuant to the politicized hiring policies are still there.

So for many of us on this Committee who care very deeply and, I hope you understand, sincerely about the integrity of the Department of Justice, it is highly inadequate to have this "only look going forward" approach that I detect. It is very important, I think, that we also be prepared to look backward, find out exactly what went wrong, and clean it up. Because if we cannot be assured that you are looking backward, we cannot be assured that it has been cleaned up. And if we cannot be assured that it has been cleaned up, we cannot be satisfied that the Department of Justice is back where it needs to be.

Attorney General MUKASEY. You have raised a variety of subjects. I think with regard to interrogations, it is important to point out that the law has changed very much since the original memos were written. You have access to—and you, in particular, because your membership overlaps, as I understand it, with both the Intelligence Committee and this Committee. You have access to unredacted copies of the operative memoranda. So you know what was decided in the past, and you know what was decided today.

Senator WHITEHOUSE. And I will tell you what I have seen. I have seen what I consider to be exaggerated and unreasonable claims of executive authority far beyond what reasonable debate would permit. I have seen dramatic lapses of very basic scholarship. These are not the subject of OPR investigation. There are public reports that Department leaders have said, "When people see these opinions, they will be ashamed of them." And, repeatedly, we have seen opinions of OLC retracted as wrong or ill-advised, which is highly unusual. When you put all that stuff together, it is hard not to look back at OLC as, what I have said on the Senate floor, "George Bush's Little Shop of Legal Horrors." It is just not adequate to say, OK, well, it is going to be fine going forward and not look back and assure us that there has been a hard look back and that we are cleaning up OLC. It is a vitally important thing, and it is not just—Mr. Attorney General, it is not just about your personal integrity. I am not here to challenge that. I don't challenge that. I have confidence that under your watch things will be done right. But as Jack Goldsmith pointed out in his book, there are, to use his phrase, "a number of practices OLC has developed over the years to help it avoid errors and to compensate for the fact that its opinions are not subject to the same critical scrutiny of adversary process and dissent that characterized the judiciary." He goes on to say that OLC has not always followed these norms and practices during the past 6 years. It seems clear that had these norms and practices been followed, OLC would have avoided some and perhaps most of the mistakes that it has made.

And I really think that we need to join on that issue because OLC is far too important to be allowed to continue with any question about its integrity.

Attorney General MUKASEY. I think the fact that OLC opinions have been withdrawn is itself evidence that OLC is not simply op-

erating as somebody's Shop of Horrors, and that when matters have to be re-examined, they are re-examined.

Senator WHITEHOUSE. But what it does not answer is the question what went wrong at the time that allowed opinions that are so embarrassing that they do not meet basic standards of legal scholarship, that have to be withdrawn, that are described as a cause for shame to the Department, what went wrong to cause that to happen? That I think is a matter of legitimate inquiry, and I am concerned that you do not seem curious about that.

Attorney General MUKASEY. I think one of the things that went wrong—I was not there at the time, but I think one of the things that went wrong at the time is the phenomenon described in the book that you mentioned, and that is what the author of that book described as a "cycle of aggressiveness and timidity" in the intelligence community in responding to requests for information. We have people demanding that people push the law to the limit, and then we have people saying don't push the law to the limit and that you are subject to criticism and prosecution afterward, that that is a very unwise cycle.

After September 11, there was an enormous amount of pressure to find the maximum that could be done. There were opinions prepared that were not up to the standard of OLC that were later withdrawn. But it is fair to say that the conclusions, the ultimate bottom-line conclusions of those opinions were unchanged, that is, that practices that were permitted under the laws that then existed were, in fact, permissible, although not for the reasons outlined in those opinions. And as to some of those matters, it is fair to say that things were explored and the subject of commentary and of consideration that were never adopted. And I think it is important to make sure that at a time like that, people come forward with whatever ideas they have, both good ideas and, perforce, bad ideas. The bad ideas hopefully do not get adopted.

Senator WHITEHOUSE. But when they do, to me it is a signal that something is wrong. And when—

Attorney General MUKASEY. I think the—

Senator WHITEHOUSE. Let me give you my favorite example because it just drives me nuts. There is a Fifth Circuit Court of Appeals opinion called *United States* v. *Lee* in which the Fifth Circuit Court of Appeals reviewed conduct by a Texas sheriff and described it as "water torture." I think they used the phrase "torture" seven times. And if you look back into the record of that case, you see that the water torture they are describing is waterboarding. There is just no ifs, ands, or buts about it. It is absolutely clear.

It is a case that was prosecuted by the Department of Justice itself. The person who prosecuted it I understand is still in the Department. It is on the books of the United States Court of Appeals for the Fifth Circuit. It is a significant case.

If this matter were being briefed to you as a judge and a party had missed that case, I think you would be justifiably angry and disappointed at the failure of legal scholarship that did not find the case.

What concerns me is not that the OLC disagreed with that case. It is that in a 50-plus-page opinion they never found it; or they did find it and did not bother to discuss it. And they discussed very

similar cases where they could find an exception. Here where I do not think the exceptions they found in the other cases existed, something went badly, badly wrong over at OLC, not just people being a little energetic. And it can recur if we do not figure out what happened and prevent it from happening again.

Attorney General MUKASEY. Senator, respectfully, I agree with your interest in thoroughness. I agree with your interest in balanced consideration. But the case to which you refer was prosecuted under the civil rights laws. It was not a case that dealt with whether a technique is or is not torture under the torture statutes. That case was properly prosecuted under the civil rights laws. It would be prosecuted today under any standard under the civil rights laws. That was not the issue. Indeed, the issue on appeal did not even concern the civil rights laws—

Senator WHITEHOUSE. No, but when a United States Court of Appeals described a specific technique at issue as "torture," isn't that relevant to a decision? Do you really mean to come before this Committee and say that a court of appeals decision that describes the specific technique at issue before the Office of Legal Counsel as "torture" is not relevant to a discussion of whether it is torture under a different statute?

Attorney General MUKASEY. In fairness, I don't think that was the court of appeals' choice of words. It was quoting from an indictment. It was quoting from the way the matter had been referred to below.

Senator WHITEHOUSE. No, that is not accurate.

Attorney General MUKASEY. I think it is. The—

Senator WHITEHOUSE. My time is up. I apologize. I have gone over.

Chairman LEAHY. That is all right. We will have a chance to go back.

What I am going to do is recognize Senator Cardin now, and then we are going to take a 10-minute break as soon as Senator Cardin's questions are completed.

Senator CARDIN. Thank you, Mr. Chairman.

Attorney General MUKASEY. Good morning.

Senator CARDIN. Mr. Attorney General, it is nice to see you.

Attorney General MUKASEY. Nice to see you.

Senator CARDIN. I certainly want to concur in the comments of my colleagues about the prior problems within the Department of Justice and dealing with those in the most transparent way possible. A lot of the problems in the Department of Justice were basically as a result of failure to provide a public explanation. And I think the more transparent it is done, the better it will be for the Department of Justice. And I just want to urge you to do that.

I want to talk about the issue you and I have talked about on many occasions, and that is the traditional role of the Department of Justice as it relates to civil rights issues. And we have had, I think, some very positive discussions about that.

I was pleased to see in your written comments about your commitment in regards to the election process and to, as you put it, "guarantee the integrity of our elections." And I agree with you that protecting voting rights and combating fraud are two sides of the same coin, and I was pleased to hear your comments on that.

I want to ask you about your plans for the 2008 elections. There are some issues that can be anticipated that by an active Department of Justice we can avoid problems in 2008—issues such as having adequate voting machines and taking precautions to make sure that people know about the rights of voting. That can be done in advance. Some of the issues are more difficult when you have 11th-hour types of material that we saw in Maryland and other States which are aimed at minority communities and give them fraudulent information are a little more difficult to try to avoid through your preliminary work, but by putting a spotlight on this concern, you can, I hope, discourage that type of conduct by certainly our major parties.

So I want to ask you what specific programs are you planning to put in place so that we can try to have the widest possible participation in the 2008 elections and avoid any type of fraudulent activities.

Attorney General MUKASEY. Every single district, every single district in this country, is going to have a specific designated Assistant U.S. Attorney and an investigator schooled in voting laws and enforcement of the voter access laws and other laws and is going to be alert to precisely the kind of practice that you identified, namely, misinformation, which as I have said in our private conversations is just as much fraud as any other kind of fraud.

We also have monitors and inspectors who are going to focus on particular districts, districts that are the subject of consent decrees, districts that have been historically districts where problems have been encountered. And we are prepared to go into those districts to head off precisely the kind of practice that you have talked about. That is what we are going to do, and that is what we are training people to do at the National Advocacy Center and elsewhere.

Senator CARDIN. I have read in your written testimony about the monitors, that they have already been—some have already been placed. I think that is an extremely important part of your strategy. I would just encourage you in your involvement in placing monitors to take a look at previous activities. I know you need to deal with the areas that are under court supervision, but also to take a look at using the monitors in areas that have recently shown some challenges, but also to share that information afterwards so that we can have a better understanding of the problems they are confronting to try to put in place the institutional protections against the newer types of frauds.

Attorney General MUKASEY. I agree that we ought to publicize that information afterwards, and we are going to—we will have people looking for precisely the kind of conduct that you mentioned.

Senator CARDIN. Let me just mention some of the issues that I think we will be confronted with in this election. If the primaries are any indication, there has been an unusually large number of young people who have gotten involved in this political process. When our college campuses return in September, my guess is that you are going to see more political activity than we have seen in prior elections.

What steps are you taking to make sure that students are able to fully participate in the political process, knowing full well that it may challenge some of our local election boards?

Attorney General MUKASEY. We have tried to make sure that the statutes that require all State laws that provide services to people to permit or to encourage voter registration at the same time. The most famous of those is the motor-voter registration law, but there are other related statutes. And we are making sure in reaching out to State and locals that we make certain that they are doing that.

Senator CARDIN. I would encourage you to put some attention to this, knowing that we could expect some significant increases in participation by students who may very well be eligible to participate in a particular State and may find some difficulty or obstacles that are placed in their way.

Attorney General MUKASEY. We are also trying to make known telephone numbers and websites—students are particularly adept at use of the Internet and websites—that people can contact to make them aware of what their rights are and how to get access to the ballot.

Senator CARDIN. And let me point out that, as you know, the management of our election system is such a hodgepodge nationally. It is a Federalist system so you have States and counties.

Attorney General MUKASEY. The States are principally in charge.

Senator CARDIN. Right. And the political oversight is different throughout the country. It really cries out for the Department of Justice to pay a little attention to this as it relates to legitimate Federal interest in protecting the right of people to vote. So I would just urge you to get a little bit more involved in that.

There are other issues, obviously, involved in civil rights and housing and employment, and I will give you just the last 30 seconds I have if you wish to comment further as to the activities in the Civil Rights Division.

Attorney General MUKASEY. I think we have been very active in the two areas you mentioned—housing and employment. We have tried to bring the kinds of actions that have the maximum amount of impact under Title VII. The Housing Division, which I recently visited, brings something on the order of 21 pattern and practice cases a year, has numerous test teams out protecting housing rights. We enforce these across the board, and I have made that particular Division—which has become really a defining Division for the Justice Department; it was created within the last 50 years, but it is probably the defining Division of the Justice Department—my particular focus.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

We will take a 5-minute break, and then a vote is coming up soon. We are going to have to figure out what to do from there, but let's take that break.

[Recess 11:29 a.m. to 11:35 a.m.]

Chairman LEAHY. Thank you, Mr. Attorney General. As you know, we are keeping one eye on the clock because of the series of votes on FISA.

Attorney General MUKASEY. I understand you have other things to do.

Chairman LEAHY. You will certainly want some of us to be there voting.

Attorney General MUKASEY. Yes, please.

Chairman LEAHY. Some of us. I am sure you agree with me that whichever way we vote, we should all be there to vote.

Attorney General MUKASEY. I do.

Chairman LEAHY. I know that, which kind of leads into my question. It sort of follows on what Senator Cardin was saying, and he has told me the horror stories of what went on in his own election in Maryland, one of the more progressive States. And you have talked about the—you mentioned the phone lines ready to handle calls. But receiving complaints is not quite enough to protect the right to vote. Once a complaint is received, what does the Department do to dispel erroneous information? We reported an important bill, the Deceptive Practices And Voter Intimidation Prevention Act of 2007, some months ago that would require everybody to be more proactive from the Department of Justice. The bill's principal sponsor is Senator Obama. Obviously, I am concerned that his supporters not be precluded from voting, just as I am concerned that Senator McCain's supporters not be precluded. There are 20 cosponsors on it, ranging from, I think it would be fair to say, from the most conservative Members of the Senate to the most liberal.

So let me ask you this: If you have a place where photo identification is not required by State law, for example, in my State, how would the Justice Department correct the rumor that photo ID is required to vote in that jurisdiction? You know, these rumors start in jurisdictions that do not require it that you have to have photo identification. If such things start—and they have in the past—how do you respond to that?

Attorney General MUKASEY. Senator, you correct that lie the same way that you correct any other lie, and that is, by pouring truth on it. If people are giving misinformation about what it takes to vote, about where the vote is, and about when the vote is, then you make absolutely certain that the State authorities are dispelling that rumor. There are public service announcements that could be made. There are all kinds of ways of dispelling information. Newspapers can be used. Announcements can be made.

Chairman LEAHY. Let's take something that is a little bit—gives you a little bit more of a heads-up. Latino American voters were sent letters in some precincts last time that they could not vote because they are immigrants. And these are citizens. Are you proactive enough that you can get letters out to those same people and—

Attorney General MUKASEY. I cannot tell you as I sit here that we can get a letter to absolutely every one of those people. We can certainly work with organizations that are active in the Latino community, and would, to make certain that they could tell people in that community that what they were being told was absolutely false and that they had it on the word of the U.S. Government that it was false. That is fraudulent conduct.

Chairman LEAHY. We are seeing in so many States during the primary season an unprecedented turnout. Even my little State of

Vermont on our town meeting day, which people do not vote that much unless there is a major bond issue or a local race, we had the highest number we have ever had. We have an excellent Secretary of State, Deb Markowitz, and we use paper ballots in most of the State, and she anticipated this and had ballots printed up. But we saw a number of places during the primary season where people ran out of ballots.

Is there any kind of a proactive step to make sure that does not happen?

Attorney General MUKASEY. Well, certainly people who are denied access to a ballot for any improper reason have the remedy under Federal law of a provisional ballot. We are trying to make sure, in consultation with State and local authorities, that they have got enough in the way of equipment and the proper equipment that that does not happen. Can I guarantee you in advance that it won't? No. I can guarantee you that we are doing whatever we can to prevent or mitigate it.

Chairman LEAHY. Well, as I look at, for example, another thing that happened last time—and I am using the past as prologue. Again, to use the example of my State, when 7 o'clock comes, the polls close. If there is a line out into the street, they usually put a sawhorse or a cone or something behind the last person. But how do we make sure that States allow that? We had instances of States where, whenever the polls closed, say 8 o'clock, the time comes, and they say, "OK, we are closed." There might be 500 people in line. That would be a violation, would it not?

Attorney General MUKASEY. As I sit here, I cannot tell you precisely, but if that is a violation of Federal law, then somebody ought to get a Federal judge to mandate the continued operation of that polling place. And I am sure that the corps of Assistant United States Attorneys who are being trained at the NAC would be available to do precisely that.

Chairman LEAHY. Let me go to a different subject that is going to be the subject of a hearing here. We found in March that the passport files of Presidential candidates were breached by the State Department, a matter of some concern to everybody, whether a breach in IRS or the State Department or anything else. Senator Specter and I sent you a letter and asked you to take immediate action. It was Senator McCain's, Senator Obama's, and Senator Clinton's passport files. Who knows who else. And we asked what preliminary steps you are taking to make sure whether these violated Federal laws, such as the Privacy Act. We wanted to make sure—you had said in your briefing you were waiting for a box of evidence. We sent this letter in March. Yesterday we received an answer. The matter has now been referred by the State Department's IG; it is being handled by prosecutors in the Criminal Division. They found that—they did a sample of 150 high-profile Americans. They found that they had been searched a total of more than 4,100 times in the past 5–1/2 years. And, of course, these have name, date, place of birth, Social Security numbers, and so on. We have widespread abuse in electronic records, 28,000 Government workers and contractors have access to it.

What specific steps are you taking to make sure this stops? We are always asking Americans to give more and more of their per-

sonal data. You have to. I do. But we are told, don't worry, it is being kept safely. Is somebody going to go to jail for this, is what I am leading up to.

Attorney General MUKASEY. Senator, as you point out, we received yesterday a referral from the IG's office at the State Department. That was referred to the Criminal Division. That case is going to be followed up on. And if somebody committed a crime, we are going to do our level best to make sure that somebody goes to jail, because that is a deterrent. It is the ultimate deterrent. It is one of the better deterrents.

Chairman LEAHY. Well, we will keep in touch with that, and—

Attorney General MUKASEY. We are going to follow and prosecute that case. It is a prosecutable case.

Chairman LEAHY. Good. I mean, I want someone to go to jail. If they are snooping on Senator McCain's passport or Senator Obama's passport, I do not care who it is. The fact that they are doing this—or they are snooping on John Jones' passport—they should not be allowed to do it.

Senator Durbin.

Senator DURBIN. Attorney General, thank you for being here. I am not going to replow the ground about Steven Bradbury's memos. He has been lauded in this Committee, and yet there seems to be a reluctance to even review things that he has written. He is not going to be appointed, if that is still the administration's intent, to a permanent position with the OLC. But I would like to ask you to help me understand what your plans are for the next few months.

In less than 4 months, the American people will make an important decision in an election. In less than 6 months, there will be a new President. And I think that there are two courses available to you as you close out the remaining 6 months of your tenure as Attorney General: under one course, that you will initiate no major investigations, raise no important questions about the conduct of the Bush administration relative to the treatment of detainees; the other possibility is that you will follow what I think is the clear standard of the law within your own Department and initiate those investigations.

Under the Attorney General Guidelines, which were signed by John Ashcroft in 2002 and remain in effect, a preliminary inquiry should be undertaken when there is information or an allegation which indicates the possibility of criminal activity and whose responsibility requires some further scrutiny beyond checking initial leads. This is a pretty low standard.

Now, we have had reports, a variety of reports. Major General Antonio Taguba, who led the United States Army's official investigation of Abu Ghraib, had this to say recently, and I quote: "The Commander in Chief and those under him authorized a systematic regime of torture." These are Major General Taguba's words, not mine. "There is no longer any doubt as to whether the current administration has committed war crimes," the general said. "The only question that remains is whether those who ordered the use of torture will be held accountable."

And then, of course, the Justice Department's Inspector General issued a troubling report about the FBI's involvement in detainee

abuse and concluded, and I quote, "We found that the FBI did not respond to repeated requests from its agents in the military zones for guidance regarding detainee treatment."

I have written several letters—Senator Whitehouse joined me in those letters—to you and to others asking if you were going to investigate whether there was any criminal wrongdoing by members of this administration relative to the establishment of standards for the treatment of detainees and the use of torture. And the responses which I received have not been satisfying. You have said that no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice.

That was not what we suggested. Rather, we suggested that the Justice Department investigate and explore whether waterboarding was authorized and whether those who authorized it violated the law.

Now, we have written to the Office of Professional Responsibility and asked them what are they doing, what are they looking into. And in February, they wrote back to us and said that they have a pending investigation, to be released—or at least a report to be released, depending on your approval of its release.

I would like to give you this opportunity at this hearing to tell us: Will you follow Attorney General Ashcroft's standard, which he signed and is still in effect, to investigate any wrongdoing relative to the treatment of detainees? Will you authorize the release of this Office of Professional Responsibility report? Can we expect in the last 6 months of this administration that you will step away from some of the things that have occurred in the past and make a clear break and initiate this investigation?

Attorney General MUKASEY. You have asked a variety of questions and made a variety of statements about a variety of situations, and it is hard to sit and unpack them all. But the treatment of detainees was the subject of at least a dozen or more investigations at the Department of Defense, which has principal custody of them, as you know. Many of those investigations resulted in not only discipline but in a prosecution by court-martial of people who were involved in that activity.

So far as the OIG report with respect to the conduct of the FBI, it recommended no criminal reference with regard to anything that any FBI agent did and, indeed, pointed out that one of the investigations that was conducted by the Department of Defense came in response to reports received from the FBI.

The FBI's role there, as I read the report, was a positive one, not a negative one. There were people who responded and who did what they should have done. And that is what I took away from that report.

Senator DURBIN. What about the CIA or civilian or political appointees who authorized the conduct?

Attorney General MUKASEY. Any CIA agent who acted in good-faith reliance on an opinion by the Department of Justice that his or her conduct was lawful cannot and should not be prosecuted for the very simple reason that if they are, then any opinion by the Department of Justice to anybody on the front lines is totally and completely useless.

Senator DURBIN. So let's take it to the next step. What about those at the Department who authorized that conduct, which has now been found to be wrong?

Attorney General MUKASEY. It is in essence the same answer. It refers back—

Senator DURBIN. Who is in charge if it is the same answer? At some point someone has to be held accountable.

Attorney General MUKASEY. It is the same answer. It is the answer that was really given in Jack Goldsmith's book, and that is that there is a cycle of demand for aggressive opinions and then a reaction to that. I think what lawyers have to do is adhere to the law and not concern themselves with what might be politically acceptable later on. And if we go after them and prosecute them, then that is exactly what they are going to be concerned with. They ought to—

Senator DURBIN. May I suggest the standard is legally acceptable. Isn't that what Attorney General Ashcroft's standard is here, legally not politically acceptable?

Attorney General MUKASEY. That remains the standard. That always was the standard.

Senator DURBIN. And isn't that your responsibility to enforce?

Attorney General MUKASEY. It was, and it is, and I do.

Senator DURBIN. And do you believe that—well, let me ask you this: Are you going to release this report, which Mr. Jarrett has referred to in February, the results of their investigation of the Office of Professional Responsibility? Will you approve the release of that report?

Attorney General MUKASEY. I am not going to approve the release of an OPR report with respect to the conduct of professionals. If professionals have to be disciplined, they can be disciplined in a way that is either private or public, depending on the nature of their violation. Again—

Senator DURBIN. Mr. Chairman, I would like to ask that this letter be part of the record, and I would like to quote from it.

Chairman LEAHY. Without objection.

Senator DURBIN. Marshall Jarrett, counsel from the Office of Professional Responsibility, February 18, 2008, and I quote: "Upon completion of our investigation, we will provide you with our results." This is directed to Senator Whitehouse and myself. "Moreover, because of the significant public interest in this matter, OPR will consider releasing to Congress and the public a non-classified summary of our final report."

Are you saying that you will not approve the release of that report?

Attorney General MUKASEY. If OPR wants it released, it will be released.

Senator DURBIN. So you give your approval of that release?

Attorney General MUKASEY. If OPR wants it released, it will be released.

Senator DURBIN. That is progress.

I yield. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Biden.

Senator BIDEN. Thank you very much.

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General, let's say in the general territory here, obviously, the Supreme Court's decision several weeks ago on Guantanamo Bay and habeas corpus received a great deal of coverage and publicity and conversation and debate. What steps has the Department made to respond to and implement the Court's decision?

Attorney General MUKASEY. I am sorry. I did not hear the—

Senator BIDEN. I beg your pardon. I will speak more clearly. The Supreme Court's decision of several weeks ago relating to the right of habeas corpus of those detained at Guantanamo Bay, what steps has the Department made to respond to and implement the Court's decision?

Attorney General MUKASEY. The Department has been working with the district court in the District of Columbia to arrange an orderly way of determining when habeas petitions will be heard, how they will be heard, what evidence will be received, and how it will be received. All of—

Senator BIDEN. Is that in the form of a negotiation with the court or—not negotiation. I mean, I am not trying to be confrontational. I am just trying to understand. Is it in a sense a mechanical thing, trying to figure out how to manage this?

Attorney General MUKASEY. I am not certain what you mean by "mechanical," but, yes, it is figuring out how to manage it. It is figuring out what evidence can be received, what the practical considerations are. That word appeared throughout the Boumediene decision; that is, that the decision was to be made practically given what was possible.

Senator BIDEN. Right, yes.

Attorney General MUKASEY. Given what evidence was available.

Senator BIDEN. All I am trying to get at is in—

Attorney General MUKASEY. We are in—

Senator BIDEN [continuing]. Implementing the decision, when do you anticipate you will come up with, for lack of a better phrase, your regime-implemented decision?

Attorney General MUKASEY. We are in discussions with the court and with opposing counsel. That depends on two people who are not us.

Senator BIDEN. Okay. Let me switch areas here and go back to aid to local law enforcement, if I may, and I realize, you know, we are bouncing you all over the place. It is a big Department, so maybe you need to call on—you do not necessarily have to, but if you need to call on staff for any of the detail here, I understand.

The Violent Crime Task Force, as DOJ currently uses that phrase, is a repackaging of the funding that used to go to State and local governments under the Byrne grants, the JAG grants, and the COPS program. That was where the Violent Crime Task Forces were. That was where, you know, the Byrne grants and the JAG grants were all—so you have repackaged the funding to State and locals under those three programs.

DOJ requested in the President's 2009 budget $200 million for Violent Crime Task Forces—and I am not using the word "repackaging" in a value judgment, but reordering how you help—repackaging how you help local law enforcement. They have requested in the 2009 budget $200 million for the Violent Crime task Forces, and you also requested $200 million for another repackaging which

you call "The Byrne Public Safety and Protection Program." The bottom line is that direct support, as I read your budget, to State and local law enforcement is about $400 million under what used to be Byrne, COPS, and JAG.

Now, when—and this is not—this is a little history here. When the administration came into office, the total amount of support from the Federal Government to State and local law enforcement was about $2.1 billion. That was under the COPS program, the Byrne grants, and the JAG programs. Under the successor DOJ programs, you calling the Violent Crime Task Forces and the Byrne Public Safety and Protection rubric, the Department has requested a total of $404 million this year. Now, that is a 81-percent cut under this administration. And it is a cut of, less than that, but about $500 million just from your last year's budget. Last year overall funding for State and local law enforcement was $908 million for Byrne, JAG, and COPS. Now it is $404 million.

Is that because you think—I mean, can you give me the reason why you have cut in half in a year the amount of local law enforcement funding that is going—that you are proposing go to the States?

Attorney General MUKASEY. Senator, your numbers, first of all, don't count grants for child safety and juvenile justice. They don't count grants for violence against women.

Senator BIDEN. Well, I did not count those either. I did not count those in the numbers. The $908 million did not include violence against women or juvenile justice funding. They have always been separate. They have been a separate account. They have never been part of Byrne. They have never been part of JAG. They have never been part of the COPS program. I am comparing apples and apples.

Attorney General MUKASEY. What we found is that targeted grants that are targeted not only at particular areas where crime has spiked, but also at areas where we can focus our own activities in conjunction with State and locals are the most effective. And that is the way—

Senator BIDEN. But you need half—well, Byrne grants were targeted, the COPS program was targeted, as well as the JAG program was targeted. And last year, your targeting amounted to $908 million. This year, under a slightly different targeting system, you are $404 million.

Attorney General MUKASEY. The COPS program was never meant to be a permanent support program. What it was meant to do was to give temporary grants to State and local authorities to enhance their police forces.

Senator BIDEN. Wrong. I wrote the COPS program with my own little paw. The COPS program was intended to kick-start a community policing program nationwide, and the intention was, if it worked, it would be reauthorized, which it was on two occasions. The decision of this administration was to no longer reauthorize that program. I understand that. That is their judgment. But it was not—and look at the language when I wrote the bill and when it passed on the floor—that if it worked, which it did, the intention of the Congress was that it would be reauthorized. It was reauthorized twice.

Attorney General MUKASEY. Obviously, I take your correction. You wrote the legislation. My information was that that was supposed to attract further State and local funding for local police—

Senator BIDEN. It was.

Attorney General MUKASEY [continuing]. That had been initially funded federally.

Senator BIDEN. It was, and then it was, if it worked, it would continue because, you know, that old expression Ronald Reagan used to use: "If it ain't broke, don't fix it." It was not broke. Violent crime came down under this Act. I do not want to argue the COPS program per se. I am trying to get at the rationale—and my time is up here—the rationale why in 1 year the targeted programs, however you characterize them, comparing apples and apples, those programs targeted to Violent Crime Task Force was done under the COPS bill. The JAG program—anyway, so why is there—why the cut in 1 year of about $500 million?

Attorney General MUKASEY. The fact is that we have had a 1.7-percent reduction in violent crime. We have a slightly more than 2-percent reduction in property crime. We have had spikes in particular areas. We have tried to focus our activities in those particular areas where—

Senator BIDEN. So you just don't think that much is needed. Is that the honest answer?

Attorney General MUKASEY. We have tried to target the funds that we have.

Senator BIDEN. Well, fund—Okay. Well, Okay. There are still about 17,000 murders a year. You know, I find that—you know, we have really dumbed down the definition of "success." Crime is down, that is true, 1.6 percent, I think. But, anyway, my time is up. I yield. There is about 10 minutes left in the vote, so what I suggest is you use the rest of the time, adjourn, by that time, Senator Leahy will be back.

Senator WHITEHOUSE. We may recess briefly.

Senator BIDEN. Yes, you may have to recess, but it will only be a minute or two, General, if there was a hiatus here.

I yield to my colleague.

Senator WHITEHOUSE [presiding]. I appreciate it. Thank you, Chairman.

Attorney General, I would like to talk a little bit with you about executive orders. Executive orders very often govern particularly important matters. In my role on the Intelligence and Judiciary Committees, I have been obviously exposed to Executive Order 12333, which is the one that purported to protect Americans when they traveled overseas from being wiretapped by their Government. That one is about to be overtaken by the FISA bill whose vote, again, is very shortly.

Another one is 13440, which is the executive order that is intended to establish minimum standards for the appropriate and lawful treatment of alien detainees consistent with the Geneva Conventions. This executive order has been criticized by the Judge Advocates General for all branches of the armed services, but it is the executive order on which the administration relies in indicating that it has "clear rules," I think is the administration's phrase, for detainee treatment. And the White House has said that interroga-

tions must be done "with safeguards and under the rule of law," which I view as being in part this executive order.

Now, you and I have had an exchange about executive orders in your nomination. You indicated should an executive order apply to the President and he determines that the order should be modified, the appropriate course would be for him to issue a new order or amend the prior order. And I think that is an accurate statement. I happen to agree with that.

What concerns me, to take us back to our favorite place, OLC again, is that during my course of my review of the OLC opinions, I came across the following opinion of the Department of Justice by OLC: 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.

Is that rule still in force at the Department? And if that is the case, can the President disregard Executive Order 13440 governing the treatment of detainees without amendment or information to Congress or the American people?

Attorney General MUKASEY. I think it is important or at least useful to analyze what the nature is of an executive order. An executive order is a direction by the President that the executive conduct itself in a certain way. The President is free to change that order at his view of how the executive should behave and direct that it—

Senator WHITEHOUSE. Anytime he wants, and there is a procedure for doing so.

Attorney General MUKASEY. And direct that it behave differently. There are—

Senator WHITEHOUSE. The question is: Can he leave an executive order in place and act in violation or derogation of it without ever going back and changing it just because he is the President?

Attorney General MUKASEY. It is not a violation of it. It is his order or an executive order to start with. I can imagine circumstances in which it would be not only possible but advisable for a President not to change an executive order when he finds out information that directs the Government should go in another direction. For example, if an executive order directed that a particular country be treated as not violative of certain norms and, therefore, eligible for certain privileges, and he came by classified information that told him otherwise, he would be obligated, it seems to me, to reimpose those restrictions on that country. It would be inadvisable for him to file an amended executive order and put them on notice that he had come into possession of that classified information.

Senator WHITEHOUSE. Ever?

Attorney General MUKASEY. Beg your pardon?

Senator WHITEHOUSE. Ever.

Attorney General MUKASEY. You say "ever?"

Senator WHITEHOUSE. Ever.

Attorney General MUKASEY. It would certainly be inadvisable for—

Senator WHITEHOUSE. I can understand there are timing considerations involved here. Something could happen rather suddenly, and you would have to go through the process—

Attorney General MUKASEY. If there comes a time—if there comes a time—

Senator WHITEHOUSE. Ultimately—

Attorney General MUKASEY [continuing.] When it is advisable and possible, then it is advisable and possible. It may never be possible.

Senator WHITEHOUSE. So I conclude from your answer that the existence of Executive Order 13440 can give us no assurance that the President is actually complying with it.

Attorney General MUKASEY. I think the existence of Executive Order 13440 suggests that the President is complying with it.

Senator WHITEHOUSE. Suggests, but can give us no assurance.

Attorney General MUKASEY. The President is—having issued an order, is free to issue contrary directions.

Senator WHITEHOUSE. So the answer to my question is yes, it can give us no assurance that the President is following it.

Attorney General MUKASEY. I think your question suggests a level of uncertainty that, with due respect, I think is unwarranted in the situation that you mention.

Senator WHITEHOUSE. Well, a lot of things that we were concerned were unwarranted appear to have become true. So here we are. But I think it is important to pin it down because the question of how we treat detainees is significant, and if 13440 does not, in fact, protect us, then it is important for us to know in Congress. It is one of the reasons I think the FISA statute is so important, that it repairs the limit of 12333.

There are 3 minutes left on the vote, so I have to go so I can get there. I know that Chairman Leahy is on his way back and wishes to be here, so I apologize for this interruption, Attorney General, but the Committee will stand in recess until the return of the Chairman, which should only be a few moments. We are in recess.

[Recess at 12:07 p.m., to 12:14 p.m.]

Chairman LEAHY. Only because of the time when the Attorney General is walking back to his seat, I would just note that whether somebody is for or against the war in Iraq, maybe we should all agree that the history of contractor abuse in Iraq has been a disgrace for this Nation. We saw the degrading and inhumane techniques used by contract interrogators on detainees at Abu Ghraib prison, something that hurt us throughout the world; the unjustified killings of 17 unarmed civilians by contract security guards in Nisour Square in Baghdad; sexual assault by contractors of U.S. women working in Iraq. This worries me a great deal, but I have not found any of them held accountable under the law by the Justice Department. There have been 25 cases of detainee abuse in Iraq that have been referred for prosecution. The Justice Department has not brought charges in a single case. Ten months since the Nisour Square killings, no action, even though the FBI concluded the shootings were unjustified.

Several women working in Iraq have testified before Congress that they were raped or assaulted by U.S. contractors, but nobody has done anything. And there have been no criminal prosecutions

in U.S. courts on these cases from Iraq of Americans breaking the law.

Why has the Justice Department not taken stronger action to hold contractors in Iraq accountable under U.S. law?

Attorney General MUKASEY. I think the Justice Department has taken and is taking action with respect to contractor abuse in Iraq.

Chairman LEAHY. Has anybody been convicted?

Attorney General MUKASEY. Can I get my notes?

Chairman LEAHY. Sure.

Attorney General MUKASEY. Thanks.

[Pause.]

Chairman LEAHY. I am not aware of anybody who has been convicted.

Attorney General MUKASEY. It is my understanding that there have been 13 prosecutions and 8 convictions. That said, there have been—

Chairman LEAHY. Contractor abuses?

Attorney General MUKASEY. Alleged crimes by employees of contract personnel in Iraq based on referrals from the Department of Defense or the Department of State.

Chairman LEAHY. Can you give me a list of those?

Attorney General MUKASEY. I will provide you with a list of those.

Chairman LEAHY. Thank you.

Attorney General MUKASEY. As far as particular cases that you referred to, we generally do not acknowledge the existence of pending investigations, but we have acknowledged that the September 16, 2007, shooting in Nisour Square is the subject of an investigation—

Chairman LEAHY. And you will let us know of which ones have actually had convictions?

Attorney General MUKASEY. Yes. Yes, I will. And I just want to point out one other thing, if I may. It is enormously difficult, particularly when we rely on initial investigations by the Department of State and by the Department of Defense and we have FBI agents trying to conduct investigations in a war zone, to bring criminal prosecutions that pass the test of an American court.

Chairman LEAHY. I understand it is always difficult, but this country has always been able to do it. In fact, Senator Grassley and I introduced a bill to extend the statute of limitations for criminal fraud in war zones like Iraq, something we have done in every other war. Do you support that bill?

Attorney General MUKASEY. If statutes of limitation are what are interfering with our ability to bring prosecutable cases, I am in favor of extending them. And, again, we have brought successful prosecutions. Some cases involve allegations that do not wash out, and there is nothing we can do.

Chairman LEAHY. Well, I understand that. I spent enough years as a prosecutor to know that not every accusation is going to be a criminal matter. But we should expand the Military Extraterritorial Jurisdiction Act, MEJA. I hope you would support that.

I also wrote to you several months ago—and here is something that can be done easily—with other Senators about a Board of Im-

migration Appeals matter of A.T. It is a woman seeking asylum in this country based on a fear of continuing persecution arising from the brutal practice of female genital mutilation, FGM. I thought we had understood, had an understanding years ago, that this country would stand on the rights of human rights on this. I got your reply yesterday. The BIA denied the asylum seeker's claim, said she had already been mutilated, so how could she be further persecuted? That rationale has been criticized by the Second Circuit and others.

You have the authority to overrule the Board of Immigration Appeals. Female genital mutilation is widely regarded as a serious human rights violation. Why not just use your authority and overrule them on this issue? Most people cannot understand what the heck they were thinking.

Attorney General MUKASEY. That is a ghastly practice. That is an absolutely ghastly practice. I am going to take a look at that case. I cannot promise you now that I am going to certify it, but I am going to take a look at that case.

Chairman LEAHY. But you could, because of your authority, you could once and for all make it very clear where we are on this, and I would urge you to.

Attorney General MUKASEY. I promise you that I will consider it, and I promise you that I view that practice as ghastly.

Chairman LEAHY. Thank you. And let me know—

Attorney General MUKASEY. And that is going to inform that consideration.

Chairman LEAHY. I almost hate to get into the question of Steven Hatfill. I have refrained from discussing this. I have refused to discuss it with the press. I have told them that some aspects of it I was aware of were classified, so, of course, I could not discuss it. But also considering the fact that my life was threatened by an anthrax letter, two people died who touched the letter addressed to me that I was supposed to open, I am somewhat concerned. What happened? We are paying millions of dollars, the indication being that the guy who committed the crime went free.

Attorney General MUKASEY. Well, I don't understand "the guy who committed the crime" to have gone free. What I do understand is that—

Chairman LEAHY. Nobody has been convicted.

Attorney General MUKASEY. Not yet.

Chairman LEAHY. And five people are dead.

Attorney General MUKASEY. Yes.

Chairman LEAHY. Hundreds of millions of dollars have been spent.

Attorney General MUKASEY. That case is under active investigation, and I need to be very careful about what I say.

Chairman LEAHY. We will not go any further. As I say, I feel some reluctance because I was one of the targets. But I got to tell you what the families of the people who died went through, what the families of the people who were crippled went through, even what my family went through, a lot of people are concerned. And I will not say more because we are in open session, but I think you and I should probably have a private talk about this sometime.

Attorney General MUKASEY. That is fine.

Chairman LEAHY. And we will adjourn with that. I will put my final statement in the record.

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

Chairman LEAHY. I am concerned about the answers on waterboarding and secret memos when you say it is not necessarily before you now. I am concerned that OLC opinions, whether you are relying on them today or not, serve as precedent in the future. You said, when Senator Durbin and I asked you on January 30th, "I think those opinions would be considered principally in light of whether they relate to things that are current or not, but I will review them." Today you said you have not and will not. I would hope you might reconsider that.

You have, I think, one of the most important jobs in all of Government. Just because you are the one person—the one person—who has the final say that the laws are going to apply to everybody in this Nation, and I appreciate that you went from a very comfortable life to an around-the-clock life to do that. But this whole Nation relies on you. It is not a Democratic or Republican issue. So I would hope that after the hearing today, if there are some things you may want to reconsider, please let us know.

Attorney General MUKASEY. I understand that, and I want to tell you, as I told you yesterday, that I am grateful for the opportunity to be here, notwithstanding that we might have some disagreements about some things, and make sure that I take the responsibilities that you eloquently describe seriously, and that it brings me up to the standard that I ought to adhere to, or as close to it as I can get. Thank you very much for that chance.

Chairman LEAHY. And I appreciate the private conversations you and I have had, and I appreciate your availability always to be there for those.

Attorney General MUKASEY. Thank you.

Chairman LEAHY. With that, we will stand in recess.

[Whereupon, at 12:24 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

December 22, 2008

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

Dear Mr. Chairman:

Please find enclosed responses to questions for the record posed to Attorney General Michael Mukasey following his appearance before the Committee on July 9, 2008. The hearing concerned Department of Justice Oversight. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to U.S. Attorney General Michael B. Mukasey Senate Committee on the Judiciary DOJ Oversight Hearing on July 9, 2008 Part One

QUESTIONS FROM SENATOR KENNEDY

Kennedy 1. At your confirmation hearing, you said that if waterboarding is torture, it is unconstitutional, and therefore unlawful. That statement was unresponsive and inadequate and nearly prevented your confirmation as Attorney General. During your recent testimony, Sen. Whitehouse asked you about U.S. v. Lee, a Fifth Circuit case decided in 1983, in which a sheriff and his deputies were sentenced to prison for waterboarding suspects to force them to talk. Specifically, Sen. Whitehouse asked whether it would have been negligent or worse for OLC to fail to cite that opinion in its discussion of the lawfulness of waterboarding as an interrogation technique. You sought to distinguish the case by saying that it involved convictions for violations of the civil rights laws. The Department charged the defendants with violations of 18 U.S.C. 241 and 242, which make it a crime to deprive an individual of constitutional rights-in this case, the right embodied in the Due Process Clause of the Fourteenth Amendment not to be subjected to excessive force by law enforcement officers. In other words, it was the view of the Department of Justice that the waterboarding of these detainees was unconstitutional and the jury agreed.

Would you care to revise or elaborate on your answer to Sen. Whitehouse?

ANSWER: Because waterboarding is not part of the current CIA program, the Attorney General has not reached any legal conclusion concerning the lawfulness of the technique. Prior to his confirmation, the Attorney General made clear that if waterboarding were torture, it would be unlawful both under the Anti-Torture Statute and the Constitution. He subsequently reviewed the applicable opinions of the Office of Legal Counsel (OLC) as they apply to current techniques and found the opinions to be correct and sound. Although we cannot discuss the content of classified OLC opinions, nothing in those opinions conflicts with the Department's position in the *United States v. Lee* prosecution.

In his recent testimony, the Attorney General made clear that the Fifth Circuit's decision in *Lee* has no bearing on the lawfulness of the CIA's past use of "waterboarding." The Fifth Circuit's short opinion addressed only a criminal procedure matter; it sheds no light on the lawfulness of the CIA's practices, and thus, it would neither be surprising nor significant that OLC's analysis did not discuss the *Lee* case.

Kennedy 2. Since you believe that waterboarding is unconstitutional if it is torture, does it affect your analysis that the Department has taken the position in the past that waterboarding is unconstitutional?

ANSWER: Please see the response to question 1.

Kennedy 3. You told Sen. Leahy that it would not "serve anybody's interest" to provide the Committee with an index of OLC opinions that remain in effect. You also, of course, have declined to provide the opinions. Yet, because OLC provides definitive legal interpretations of the law that are binding within the Executive Branch, it is enormously important for this Committee and the public to have the fullest accounting possible of those opinions. A democracy under the rule of law can only function when the legislature and the public know what the law is. We all understand that there are matters that must be kept secret, such as identities and operational details, but rarely should a legal opinion fall into that category. As we have seen from opinions that have been leaked or belatedly made public, there is little, if anything, in those opinions that warrants classification, and certainly nothing that could not be protected through limited redactions. It seems obvious that the reason the Department has fought so hard to keep these opinions secret is to protect itself from criticism.

Do you agree that it is important for the law to be a matter of public knowledge to the fullest extent possible in a society committed to the rule of law?

ANSWER: OLC assists the Attorney General in his role as legal adviser to the President and to executive departments and agencies. In connection with that function, OLC provides advice and prepares documents addressing a wide range of difficult and unsettled legal questions involving Executive Branch operations, often in connection with complex and sensitive operations that implicate national security interests. OLC's advice reflects the attorney-client relationship that exists between OLC and other executive offices, and, as in other attorney-client relationships, that advice is confidential. Protecting the confidentiality of OLC opinions helps ensure that decision-makers will be willing to seek legal advice before they act. Indeed, without confidentiality, officials may be reluctant to seek advice at precisely those critical times when it is most needed. Confidentiality also helps to ensure that the legal advice that policymakers receive will be completely candid.

OLC does not "make law" in the same sense that Congress or the courts do. It is true that OLC opinions ordinarily are controlling within the Executive Branch on questions of law. While OLC's legal advice may inform its clients' policy decisions, its legal advice rarely, if ever, compels the adoption of any particular policy; rather, it remains up to policymakers to decide whether and how to act. OLC thus lacks the ability of Congress or the courts to affect private parties directly. Its legal views are not binding on the Legislative Branch, the courts, or the general public. If executive officials choose to adopt a policy that OLC has determined to be legally permissible, the policy will be

public unless it is classified, and appropriate officials can rightly be called upon to explain the basis for their decision, including their legal rationale. (Classified activities are subject to review by the congressional Intelligence Committees.) However, effective policymaking is not possible if the discussions of officials are inhibited by concerns that the advice they receive or their other internal, pre-decisional deliberations will be made public.

Nevertheless, OLC recognizes that many of its opinions address issues of interest to the government or to the public. It is therefore OLC's policy to publish such opinions whenever doing so is consistent with the legitimate confidentiality interests of the President and the Executive Branch. This publication policy is sensitive to Congress's interests in understanding the legal reasoning relied upon by executive agencies. There has historically been a time lag between when an opinion is signed and when it is considered for publication, which reflects the need for confidentiality in the course of ongoing decision-making. Moreover, before publishing an opinion, OLC seeks approval from the office that requested the opinion and generally solicits the views of other agencies and entities within the Executive Branch whose work may be affected by the opinion, a process that can take several months. OLC's current criteria and procedures for publication are consistent with historical practice.

Kennedy 4. Should there be a presumption in favor of disclosing legal opinions of OLC?

ANSWER: Many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusions reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of OLC to publish its opinions. In effect, OLC has a presumption in favor of publishing opinions that are believed to be of interest to a broader circle of government lawyers, to Congress, and to the public at large. This approach to publication is consistent with the approach of prior Administrations of both parties.

As of November 10, 2008, OLC has published 96 of its opinions on its Web site since the beginning of 2005. *See* http://www.usdoj.gov/olc/whatsnew.htm. In all, OLC has made approximately 102 of its opinions public in some form since 2005, more than 90 percent of which were signed during this Administration.

Kennedy 5. Are you personally satisfied that every secret OLC opinion that you have reviewed is properly classified or properly withheld from the public on other grounds?

ANSWER: OLC opinions undergo several levels of review to determine their suitability for publication. This process reflects the fundamental continuity that has existed from one Administration to the next in the criteria and procedures that OLC employs to make publication decisions. The Department is confident that publication decisions are based on the legitimate confidentiality interests of the Executive Branch. We are also confident that OLC's classification practices are appropriate.

Kennedy 6. It would be very useful for this Committee in performing its oversight responsibilities to know what OLC opinions exist. Will you reconsider your response to the Chairman and at least provide an index of those opinions? If not, why not?

ANSWER: The Department continues to believe that providing the Committee with such an index would compromise significant Executive Branch confidentiality interests. Policymakers in the Executive Branch need to be able to obtain confidential and deliberative legal advice from OLC, particularly about some of the most sensitive matters of national security. Providing a list of the opinions that OLC has issued to executive departments and agencies, together with a description of the subject matter discussed, would reveal information about the attorney-client deliberative processes throughout the Executive Branch and compromise the confidentiality that is essential to attorney-client relationships. Such a disclosure would discourage future policymakers from requesting advice on difficult or controversial legal subjects.

Kennedy 7. You became Attorney General at a time when the status and reputation of the Department of Justice had been badly tarnished by the actions of your predecessor. Many of us felt that you had an opportunity to exercise bold leadership by beginning the process of rebuilding the Department. To your credit, you have issued directives stating that hiring decisions must be based on merit and restricting communications between the White House and the Department. But you have remained disappointingly passive in responding to the growing body of evidence that the Department has been severely politicized in both its personnel practices and its law enforcement decisions. You have resisted launching your own management-driven investigations to determine what abuses were committed and what effects remain to be remedied. You have not, insofar as you have informed this Committee, undertaken any systematic effort to review management practices, the adequacy of complaint mechanisms for aggrieved employees, the continuing service of individuals who may have participated in or benefited from politicized practices, inquire into allegations that ongoing law enforcement matters may have been undertaken for partisan purposes, or a number of other steps that a manager who assumed personal responsibility for the effective and lawful functioning of his

agency should have launched. Instead, you seem content simply to respond that these matters are under investigation by the IG or OPR. Both of these organizations make valuable contributions, but it is not effective or acceptable management to refer difficult matters to them and wait for their recommendations before acting. The majority of your tenure as Attorney General has now passed while you waited for the IG and OPR to complete investigations into the Department's management failures.

Please describe for the Committee the steps you intend to take to address the following matters:

The likelihood that scores, if not hundreds, of applicants for career attorney and law clerk positions were improperly rejected because of political affiliation or perceived ideology. The first lawsuit following the first IG/OPR report on the matter has now been filed and more can be expected. Is it your intention simply to wait to be sued and pass this problem to your successor?

ANSWER: Contrary to one of the premises of your question, the Attorney General has not waited for OIG and OPR to complete their joint investigations before taking action. The Department has taken a number of affirmative steps to improve Department processes and policies to ensure that these practices do not recur. Many of those steps were taken before OIG and OPR issued their joint reports. In fact, the OIG and OPR Reports recognize many of these improvements. The joint reports also make additional institutional recommendations, which the Attorney General has agreed to implement.

The Department's institutional changes are many, but with respect to the Honors Program and Summer Law Intern Program (SLIP), as the Committee is aware, in April 2007, the Department revised the hiring process for Honors Program candidates and summer law interns. The revisions institutionalized the role of career attorneys in the selection and decision-making process. In July 2008, at the Attorney General's direction and in response to the OIG/OPR report regarding Honors Program and SLIP hiring, the Department strengthened the revised process to clarify that candidates must be reviewed pursuant to merit system principles, and that discrimination based on political affiliation is impermissible.

In September, the Attorney General sent a letter to all of the deselected 2006 Honors Program candidates and offered them the opportunity to interview for the 2008 Honors Program with the component that originally recommended them. Each of the candidates who accept the Department's offer will be evaluated strictly based on merit-system principles.

In short, the Attorney General has been anything but "passive" in his efforts to respond to the allegations of politicization at the Department. We are confident that with the institutional structure now in place, there will not be a recurrence of the problems identified in the joint reports.

Kennedy 8. The related problem that large numbers of career attorneys now working in the Department were selected based on political affiliation and ideology, rather than merit.

ANSWER: It is not correct that a "large number" of career attorneys were selected based on political affiliation. The Inspector General has testified that there are currently approximately 20-30 Immigration Judges which were hired under the flawed system, yet he did not suggest that they should be fired. To the contrary, as recently as October 3, 2008, he testified that the appropriate action regarding the Immigration Judges is to supervise them and take action if they prove incapable of successfully performing their jobs.

With respect to the Honors Program, the individuals selected in 2006 were not selected because of their political affiliation. The report by the Office of Inspector General and the Office of Professional Responsibility examined only the deselection of candidates prior to the interview stage of the hiring process. The Inspector General has likewise testified that those individuals who were approved by the 2006 screening committee were qualified applicants. Furthermore, the selection rate for the approved applicants was about 1 in 4. The Report identified only 16 applicants who were identifiable as Republican and 23 applicants who were identifiable as conservative whom the screening committee forwarded to the components for interviews. Again, all of these candidates had been selected for interviews by the components based on their merit, and there is no evidence to suggest that their ultimate selection was based on anything other than merit. The final hiring decisions were made by the hiring components.

Thus, although the selection process was flawed and problematic, the Department does not agree with the assertion that candidates were selected based only on political affiliation and ideology rather than merit. The career attorneys hired through the flawed process, however, like all Department attorneys, are subject to a period of probation during which their performance is rigorously evaluated. In the case of the Honors Program, for example, political considerations resulted in the deselection of a limited number of candidates from the interview process (and as discussed in the response to question 7, the Department has sought to remedy that situation). However, those attorneys selected for interviews and ultimately offered a position in the Honors Program had been recommended by individual components based solely on their merit. Furthermore, employees undergo regular evaluations even after the probationary period has ended. If anyone – whether Democrat or Republican, whether appointed through a flawed process or a flawless one – is found to be handling or deciding cases based on politics, and not based on what the law and facts require, they will be subject to and will receive appropriate discipline. As the Inspector General himself told the Senate Judiciary Committee, however, the people hired through the flawed process did not, themselves, do anything wrong. It therefore would be unfair – and quite possibly illegal given civil service protections for Schedule A appointees – to fire them or to reassign them without individual cause.

This response should not be read as a defense of the hiring practices because it is not. However, it is important not to overstate the actual impact that the process had on the Department's outstanding career attorney workforce.

Kennedy 9. The possibility that criminal prosecutions, including for vote fraud and of politicians, may have been pursued for partisan purposes.

ANSWER: It is critical to the fair, impartial, and effective enforcement of federal criminal law – and to maintaining public confidence in the Department's criminal enforcement efforts – that all investigations brought and charging decisions made by the Department are handled in a nonpartisan manner. This is especially true for prosecutions involving public officials and other political figures. Accordingly, the Attorney General has repeatedly emphasized, both to Department personnel and publicly, that the selective prosecution of anyone for political purposes will not be tolerated and that cases are to be brought only on the facts and the law.

In February, the Attorney General reiterated this message to all United States Attorneys. In addition, on March 5, 2008, the Attorney General sent a memorandum to all employees reminding them that the Department is entrusted to enforce the law in an impartial and neutral manner and that each employee must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality, and nonpartisanship. A copy of this memorandum is attached. In July, the Attorney General reiterated this same message to over 160 Assistant United States Attorneys and FBI Special Agents attending the Department's 7th annual Ballot Access and Voting Integrity Initiative. More recently, the Attorney General gave a lengthy public speech on public corruption, in which he stated the following:

> When the Department of Justice pursues [public corruption] cases . . . on behalf of the United States, the Department bears a solemn responsibility. Like the public officials we sometimes investigate and prosecute, we too are public servants, invested with a public trust that we are sworn to uphold. We thus have a duty to ensure that the Department's investigations of public corruption are conducted without fear or favor, and utterly without regard to the political affiliation of a particular public official. After all, a corruption investigation that is motivated by partisan politics is just corruption by another name.
>
> Let me be perfectly clear: Politics has no role in the investigation or prosecution of political corruption or any other criminal offense, and I have seen absolutely no evidence of any such impropriety in my time at the Department, and would not tolerate it.
>
> I consider it one of my paramount responsibilities to ensure that the Department continues to handle its public corruption investigations and prosecutions in a consistent, nonpartisan, and appropriate manner throughout the nation.

The Department's Office of Professional Responsibility is currently investigating several allegations of politically motivated prosecutions, including the prosecutions: (1) in the Middle and Northern Districts of Alabama of former Democratic Governor Donald Siegelman; (2) in the Eastern District of Wisconsin, Georgia Thompson, a state official accused of giving politically motivated preferential treatment to contractors to curry favor

with her Democratic superiors; and (3) in the Southern District of Mississippi of State Supreme Court Justice Oliver Diaz and Paul Minor, a contributor to the Democratic Party. In addition, OPR is inquiring into the denial of a defense motion alleging improper political motivation in the prosecution of Democratic contributor Geoffrey Fieger in the Eastern District of Michigan. We do not believe that any prosecution brought by the Justice Department between 2001 and 2007 was brought for political purposes.

Kennedy 10. The likelihood that civil voting enforcement decisions have been made for partisan political purposes.

ANSWER: In March 2008, the Attorney General issued a memorandum to all Department employees on election year sensitivities. He emphasized that the Department must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality and nonpartisanship. He stated that politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges; that law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election; and that we must not do anything for the purpose of giving an advantage or disadvantage to any candidate or political party. These principles apply with equal force to criminal investigations as well as civil voting enforcement decisions. The Attorney General reiterated these principles when he spoke to hundreds of Department employees at the Ballot Access and Voting Integrity Symposium in July 2008 and when he visited the Voting Section of the Civil Rights Division in September 2008. The Acting Assistant Attorney General for the Civil Rights Division has repeated the same message at the July 2008 Symposium as well as in other conversations with the Voting Section. She has emphasized that any decisions must be made after a thorough and careful investigation of the facts and analysis of the law. She directed all employees to follow the facts and the law wherever they may lead and let the chips fall where they may.

The Department is committed to the vigorous and even-handed enforcement of the federal civil voting law and making enforcement decisions that do not turn on partisan considerations. Career staff is involved in the recommendation and decision-making process of every enforcement action brought by the Division and their opinions are highly valued. In every matter, we carefully analyze the strengths and weaknesses of arguments on both sides and include all relevant information. In sum, the Department encourages a robust discussion of diverse viewpoints before we come to final enforcement decisions based on the applicable law and the facts before us.

Kennedy 11. Allegations that career attorneys have been transferred, and denied promotions, raises and assignments because of partisan affiliation or perceived ideology.

ANSWER: The Department is in the process of contacting those who may have been improperly denied temporary details to jobs at Main Justice to see if they are interested in any new opportunities that are or may become available. Some of those contacted are no longer interested in the position that may have been improperly denied them. For those interested in a similar opportunity, the dialogue is ongoing, and the Department will seek to match the needs of the Department with the potential detailee's interest as comparable positions become available.

Kennedy 12. The failure of The Department's internal management and complaint systems to prevent the systematic politicization of the Department's personnel practices.

ANSWER: Although the reports revealed problems, the Department does not agree with the assertion that there was a "systematic politicization of the Department's personnel practices." The vast majority of the Department's over 100,000 employees were hired through systematic hiring procedures devoid of any allegations of improper political influence. Nevertheless, the Department has taken affirmative steps to ensure that the personnel practices are understood and followed by all. It has instituted mandatory training for all political appointees regarding Merit System Principles and Prohibited Personnel Practices. It has also instituted a pilot professionalism training requirement for most attorneys, and the Attorney General has made clear, in both private meetings with Department employees and in public appearances, that it is neither permissible nor acceptable to consider political affiliation in the hiring of career Department employees. The Attorney General has expressed confidence that the supervisors working for him know that they are expected to live up to their titles – to supervise – and that they have primary responsibility to ensure that hiring in their divisions and other units is lawful and is proper. We are confident that, if problems were to recur and anyone in the Department became aware of them, those people would promptly alert more senior officials in the Department, up to and including the Attorney General as necessary.

Kennedy 14. Will you commit to sharing with this Committee all of OPR's major reports that have been or will be issued during your tenure as Attorney General?

ANSWER: See response to question 13.

Kennedy 15. OPR has fallen far behind in issuing its annual reports. It only recently issued its annual report for 2005. Will you take steps to improve the timeliness of its reports?

ANSWER: OPR is currently working on annual reports for FY 2006 and 2007 and will issue those reports as soon as it completes them.

Kennedy 16. OPR is severely understaffed for the tasks it has been assigned or has undertaken. Will you reexamine whether all of OPR's current investigations should continue to be conducted by OPR, rather than the IG? Will you ensure that OPR has the resources necessary to complete thorough investigations in a timely fashion?

ANSWER: The Department will take your concerns into consideration as it continues to evaluate whether additional resources and personnel should be committed to OPR. The Attorney General is aware of the matters which OPR has under investigation, each of which is properly within the jurisdiction of OPR, not OIG. The Department is confident that OPR has the experience and expertise to thoroughly investigate these matters.

Kennedy 17. Since 2002, the Department of Justice has made investigation of alleged voter fraud a priority. In Crawford v. Marion County Board of Electors, the Department defended the constitutionality of Indiana's strict in-person voter photo ID law, despite the law's burden on some citizens' right to vote, based on the law's supposed prevention of in-person voter fraud. Nonetheless, the nominee for Assistant Attorney General for Civil Rights has stated that the Criminal Division "is not aware of any individuals prosecuted federally since 2002 for 'in-person voter fraud."

To your knowledge, has the Department of Justice ever prosecuted anyone for in-person voter fraud at the polls? If so, please provide:

- **a. The number and dates of prosecutions, if any, brought by the Department alleging in-person voter fraud at a polling place;**
- **b. The number of convictions, if any, involving in-person voter fraud at a polling place;**
- **c. The number of cases identified in response to question b. in which the in-person fraud was intentional rather than the result of a mistake; and**
- **d. The name and case numbers for any criminal cases identified in response to question B.**

ANSWER: Our response to this question must be limited to the period commencing with the creation of the Ballot Access and Voting Integrity Initiative in October 2002, as the Criminal Division did not compile records relating to the Department's prosecution of election fraud and voter fraud offenses prior to that date. Since October 2002, we are not aware of any federal prosecutions of individuals for "in-person voter fraud at the polls." The lack of such prosecutions does not, of course, mean that this sort of offense does not occur. Indeed, in-person voter impersonation is very difficult to detect, particularly in those states that do not have a voter identification requirement. Thus, voter fraud is not always reported to law enforcement authorities. Moreover, over the years, the Criminal

Division has been careful to weed out cases where the evidence demonstrated that the prospective offender had, for whatever reason, a good faith belief that he or she was entitled to vote under the circumstances in question, and where prosecution would therefore be unjustified.

Kennedy 18. Please provide any other information the Department has about the number and nature of the Department's voter fraud prosecutions since 2001, including the number of such prosecutions that have resulted in conviction. In addition, please explain how the Department defines voter fraud for purposes of its enforcement activities.

ANSWER: (a) As noted above, the Department began maintaining data regarding its prosecutions of vote fraud after the establishment of the Ballot Access and Voting Integrity Initiative in October 2002. Since that date, 150 persons have been charged with various vote fraud offenses and 115 persons have been convicted of these crimes.

(b) Under federal law, vote fraud generally involves corruption of one of the three basic components of the voting process: the registration of voters, the obtaining and marking of ballots, or the counting and certification of election results. Common examples of vote fraud include vote buying, multiple voting, ballot-box stuffing, providing false names or other qualifying data to election officials, marking voters' ballots without their knowledge and consent, making false claims of citizenship to register or vote, and conspiring to prevent prospective voters from voting.

Kennedy 23. News accounts suggested that the Federal Bureau of Investigation opened an investigation of the above complaints on deceptive telephone calls to Virginia voters in 2006. If so, please state whether that investigation is ongoing, and whether it has given rise to any prosecution?

ANSWER: The FBI conducted a preliminary investigation of allegedly deceptive telephone calls to Virginia voters in 2006. The investigation has been closed. There were no prosecutions.

Kennedy 24. Has the Department investigated any of the other alleged deceptive practices described above? If so, please state whether those investigations are ongoing and whether they have resulted in any prosecution.

ANSWER: Yes, the FBI conducted a preliminary investigation of an allegedly deceptive flier sent to voters in Allegheny County, Pennsylvania, in connection with the 2004 general elections. The investigation has been closed. There were no prosecutions.

Kennedy 25. The Small Business Administration recently published a proposed rule for implementing the Women's Procurement Program, 72 Fed. Reg. 73,295. The proposed rule states that it was developed with SBA after "discussions with the Department of Justice."

The proposed rule contradicts Congress' intent that the Women's Procurement Program should be used to help level the playing field for women-owned businesses by providing them with significant federal contracting opportunities. The SBA rule restricts the program to just four of the thousands of business industries in which federal contracting dollars are spent. It also requires that before any federal agency may implement the program, the agency must establish that the agency itself has engaged in discrimination against women. The rule also embraces a flawed legal interpretation that suggests that these restrictions on the program – i.e., implementation only in four industries and by agencies that have made agency-specific findings of discrimination – somehow are constitutionally required.

Gender-conscious government programs such as the Women's Procurement Program must be supported by an "exceedingly persuasive justification," i.e., substantially related to an important government interest. Yet the SBA's proposed rule adopts a standard that far exceeds this constitutional requirement. The rule imposes restrictions that exceed even the requirements established by the Supreme Court in reviewing race-conscious government action subject to strict scrutiny, the highest level of constitutional review.

Given that nothing in the Constitution or the women's procurement statute, Section 8(m) of the Small Business Act, mandates such an overly restrictive rule, does the Department contend that the SBA's proposed rule is consistent with legal requirements? If so, please explain in detail.

ANSWER: The Department does not agree that the proposed rule characterizes any aspect of its approach as "constitutionally required." The Department also notes that the proposed rule implements a statutory authorization, not a "mandate." *See* 15 U.S.C. § 637(m)(2). The Department believes the rule is consistent with relevant law, namely the Constitution and the express terms of the authorizing statute (making due allowance for the drafting error contained in 15 U.S.C. § 637(m)(2)(C)), because the proposed rule acts on the statute's authorization to restrict procurement opportunities to women-owned small businesses based on the results of a study the SBA commissioned as required by the statute, and it prescribes a procurement approach that is consistent with the constitutional requirement that gender-based preferences must be substantially related to an important government interest, *see United States v. Virginia*, 518 U.S. 515, 533 (1996); specifically, the interest in remedying discrimination in the economic sphere that will be affected by the gender-based government preference.

Kennedy 26. Do you agree that the SBA rule restricts implementation of the Women's Procurement Program more narrowly than the Constitution requires? If not, please explain in detail the reasons for your answer.

ANSWER: The only thing the Constitution "requires" with regard to implementation of the Women-Owned Small Business Contract Assistance Procedures is that the government implement the gender-based preferences authorized by the statute in a manner consistent with the equal protection component of the Fifth Amendment's Due Process Clause. The Department believes that the proposed rule is consistent with constitutional equal protection as defined by the courts because the proposed rule requires government agencies to award the gender-based preferences authorized by the proposed rule only in circumstances where the preferences are substantially related to the important government interest in remedying gender discrimination in the economic sphere that will be affected by the preference. The fact that the rule may require agency preference programs to be based on more than the bare minimum some courts would consider necessary for a gender-based preference to survive a constitutional challenge does not render the proposed rule "inconsistent" with constitutional or other legal requirements.

Kennedy 27. As I made clear in comments to the SBA, I believe that the proposed rule contradicts Congressional intent and should be withdrawn or substantially revised. Given the inconsistency between the SBA rule and the requirements of current law, do you agree that SBA should withdraw the proposed rule? If not, please identify any judicial decision that you believe supports the SBA's contention that Congress may enact a remedial program only to address discrimination by a federal government agency.

ANSWER: The Department takes no position on whether SBA should withdraw the proposed rule.

Kennedy 45. The federal government has contracted with private companies to house inmates and immigrant detainees. Recently, media reports have raised questions about the treatment of inmates and detainees in facilities administered by the Corrections Corporation of America (CCA).

Has the Department brought any enforcement actions against CCA or entered into any settlements or agreements involving CCA?

ANSWER: The responsibility for housing immigrant detainees lies with the Department of Homeland Security. The Bureau of Prisons has contracts with CCA for the operation of some prisons that house offenders convicted and sentenced in U.S. District Court. The Bureau of Prisons has not brought any enforcement actions against or entered into any settlements or agreements involving Corrections Corporation of America.

Kennedy 46. Does the Department of Justice currently have any open investigations into conditions at CCA facilities?

ANSWER: No. Please note that the Civil Rights Division is not authorized to conduct investigations of privately-run facilities such as those managed by CCA. Pursuant to the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), 42 U.S.C. § 1997, and the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Civil Rights Division protects the constitutional and federal statutory rights of persons confined in facilities for individuals who are mentally ill or developmentally disabled, nursing homes, juvenile correctional facilities, and adult jails and prisons owned or operated by state and local governments.

Kennedy 47. For each open or resolved investigation, including closed investigations, involving potential civil rights violations or other abuse, please provide a brief summary of the subject matter of the investigation and identify the agency within the Department that responsible for the investigation.

ANSWER: Please see the response to question 46.

Kennedy 48. Please provide the same information for matters that have been investigated and closed involving CCA.

ANSWER: There are no open or closed investigations initiated by the Bureau of Prisons into conditions at any CCA facility.

Kennedy 49. What steps has the Department taken to ensure that CCA and other private contractors comply with the Constitution and federal statutes that protect the rights of institutionalized persons?

ANSWER: Please see the response to question 50.

QUESTIONS FROM SENATOR KOHL

Kohl 51. At the hearing, I asked you whether you would support the Justice Department possessing the authority to bring antitrust lawsuits against OPEC member nations. In response, you stated that you would need to study the text of my NOPEC bill (The No Oil Producing and Exporting Cartels Act, S. 879), and the conditions in the bill under which the Department would have such authority, before answering the question. In addition, your answer focused on the consequences of bringing an action against OPEC member nations. But the question I asked you was merely whether it would be desirable for the Justice

Department to possess the authority to enforce antitrust law against OPEC member nations.

My legislation does not contain any conditions or limitations on the Justice Department's exercise of authority to bring either a criminal or civil action against OPEC member nations for violating U.S. antitrust law. My legislation simply removes the protections of sovereign immunity or the act of state doctrine from nations participating in oil cartels to limit the supply or fix the price of oil or petroleum products. Whether to bring a case would be entirely within the prosecutorial discretion of the Justice Department. In this regard, an action permitted under the NOPEC legislation would be no different than any other antitrust enforcement action taken against cartels undertaken by the Justice Department – such antitrust actions are undertaken at the sole discretion of the Justice Department.

With this in mind, would you support giving the Justice Department the authority to bring an antitrust action against members of the OPEC cartel when they engage in price fixing or supply limitations designed to raise price, keeping in mind that the decision to bring such an action would be within the sole discretion of the Department?

ANSWER: The Administration believes the appropriate means for achieving a market-based international energy trade and investment system lie in diplomatic efforts by the United States with the countries involved in that trade, rather than lawsuits against those countries in U.S. courts. As the Attorney General mentioned during his appearance before the committee on July 9, 2008, suing foreign sovereign nations under the antitrust laws raises a number of sensitive diplomatic and security considerations with implications far beyond antitrust. Many of these concerns also apply to creating the authority to bring such a suit. For this reason, the current and past Administrations have elected to pursue concerns about OPEC through diplomatic avenues rather than through the courts. Therefore, we do not support legislation giving the Department such authority.

Kohl 52. If you do not support giving the Justice Department such authority, please explain why it would not be desirable to merely grant this authority to the Department when it is the Department's discretion as whether to exercise it?

ANSWER: Enacting such legislation is likely to raise sensitive diplomatic and security considerations. This Administration, as have past Administrations, believes that the appropriate policy is to pursue concerns with OPEC through diplomatic avenues rather than through legislation and the courts.

Kohl 53. Isn't it in the public interest to give the Department this authority to take action against the OPEC cartel, like any other cartel?

ANSWER: No. While cartel enforcement is the Department's top antitrust enforcement priority, as the Attorney General mentioned during the July 9 hearing, suing foreign sovereign nations under the antitrust laws raises a number of sensitive diplomatic and security considerations with implications far beyond antitrust. For this reason, the current and past Administrations have elected to pursue concerns about OPEC through diplomatic avenues rather than through the courts.

QUESTIONS FROM SENATOR SCHUMER

Schumer 54. You testified in the hearing that you regularly meet with the head of the Office of Professional Responsibility (OPR). Are these meetings routine or are they scheduled when you or the Director of OPR determine that there is a need for you to meet?

ANSWER: The Attorney General and the head of the Office of Professional Responsibility meet on a regularly scheduled basis. In addition, they meet on an as needed basis if either OPR's Counsel or the Attorney General determines that a meeting is required.

Schumer 55. Who attends these meetings?

ANSWER: The Attorney General, Deputy Attorney General, head of the Office of Professional Responsibility and certain staff members.

Schumer 56. Is it only Director H. Marshall Garrett [sic] and yourself or do other OPR staff members attend?

ANSWER: Generally, OPR's Counsel and Deputy Counsel attend the regularly scheduled meetings.

Schumer 57. In these meetings, do you discuss particular ongoing investigations?

ANSWER: The Department does not disclose the specifics of what is discussed between the Attorney General and a Department component head. In general, however, the head of the Office of Professional Responsibility sets the agenda and on occasion may notify the Attorney General of the initiation of a significant or high-profile investigation or discuss the results of such an investigation. However, OPR conducts its investigations independently, and the Attorney General is usually not apprised of specific investigative steps or strategies OPR takes in the course of the investigations it conducts.

Schumer 58. If so, are there specific investigations about which you are more regularly briefed than others?

ANSWER: Please see the response to question 57.

Schumer 59. Which investigations?

ANSWER: Please see the response to question 57.

Schumer 60. Have you ever directed OPR to take a different strategy than the investigators originally proposed?

ANSWER: The Department does not disclose the substance of internal discussions between the Attorney General and the head of one of the Department's Components. However, as noted, OPR conducts its investigations independently. In general, the Attorney General is not kept apprised of specific investigative steps or strategies OPR takes in the course of the investigations it conducts. Consistent with the Department's long standing practice, OPR is free to take whatever investigative steps it believes are necessary.

Schumer 61. Have you ever directed OPR investigators to expand their lists of interviewees?

ANSWER: Please see the response to question 60.

Schumer 62. Do you ever disagree with the decisions OPR makes regarding continuing or ending an investigation?

ANSWER: Please see the response to question 60.

Schumer 63. Has OPR interviewed Karl Rove?

ANSWER: Please see the response to question 60.

Schumer 64. If they have not, will you direct them to interview Karl Rove about the Don Siegelman case?

ANSWER: Please see the response to question 60.

Schumer 65. A recent LA Times article on the OPR suggested that the office had been "operating under a growing shroud of secrecy." It also says that in 2001, the Department of Justice (DOJ), "reversed a decade-old policy of publicly disclosing detailed summaries of OPR investigations."

Will you re-examine the policy of not disclosing summaries of OPR investigations, even in significant and high profile cases?

ANSWER: Please see response to question 13.

Schumer 66. In a time when there is increased public concern about the DOJ, do you believe that we should we have more public summaries?

ANSWER: Please see the response to question 13.

Schumer 67. If, as some have suggested, there is a resource problem, what additional resources would be required to allow greater transparency through, among other things, more frequent public releases of information?

ANSWER: The Department believes that OPR has sufficient resources to carry out its mission effectively.

Schumer 68. J. William Leonard, the top government official in charge of classification from 2002 until his retirement this year, has expressed his complete dismay at the Office of Legal Counsel's (OLC) classification practices. He says that the so-called March 2003 "Yoo Memo" on interrogation techniques should never have been classified because it contained "purely legal analysis."

Are you prepared to say that every word of every currently secret legal opinion would harm national security if made public?

ANSWER: No officials within OLC have original classification authority, and any classified memoranda produced by the Office of Legal Counsel are either classified by another office or agency with original classification authority or are derivatively classified based on the classification of the documents and information from which they are derived. OLC has taken and will continue to take appropriate steps to ensure that its classification practices comply with appropriate classification procedures, including Executive Order 12958 and its implementing directive, 32 C.F.R. Part 2001.

The March 2003 memorandum was classified under the authority of the Department of Defense ("DoD"), using that agency's classification authority because the memorandum related to the guidance of a DoD working group charged with developing recommendations for the Secretary of Defense concerning a range of possible

interrogation techniques for use with alien unlawful combatants detained at Guantanamo Bay. The subject matter addressed by that working group project was classified at that time because it related to the conduct of current intelligence collection activities and other military operations the public disclosure of which, including to al Qaeda and other adversaries of the United States, reasonably could have been expected to cause serious damage to national security and foreign relations interests of the United States.

Schumer 69. Will you commit to reviewing DOJ's policy on classification of OLC opinions?

ANSWER: The Department will ensure that OLC's classification practices comply with all applicable classification procedures.

Schumer 70. Will you commit reviewing all the OLC's classified opinions and ensure that any non-sensitive information, such as "purely legal analysis," is released?

ANSWER: The Department will ensure that OLC's classification practices comply with all applicable classification procedures. Note that even "purely legal analysis," if it concerns highly classified programs and information, may itself legitimately be classified.

Schumer 71. What criteria does DOJ use to determine whether such memos from previous administrations can be released?

ANSWER: Requests for the release of classified OLC opinions occur most often under the Freedom of Information Act, 5 U.S.C. § 552. When the Department receives such a request, it generally refers the classified opinion to the original classifying authority for a declassification review. If the original classifying authority concludes that the information in the opinion is no longer classified, the Department will release the opinion, provided that the release is consistent with other legitimate Executive Branch confidentiality interests.

Schumer 73. As you know, some department documents are the subject of disputed subpoenas or requests for information from Congress. In particular, Congress has requested from the DOJ documents relating to the Valerie Plame investigation, interrogation policies, detention policies, the U.S. Attorneys firings, and attorney hiring practices. Of course, the Administration has claimed executive privilege or various other privileges to avoid disclosing much of the information requested, and these claims are still being disputed and negotiated.

Will you make a commitment to personally see to it that all documents requested by Congress from the DOJ at any point during the Bush Administration – including documents you have so far refused to release – will be preserved for the next Administration?

ANSWER: The Department has preserved, and will continue to preserve, documents formally requested or subpoenaed by congressional committees and will continue to maintain documents pursuant to its record retention requirements.

Schumer 74. As you know, last month, the Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment protects an individual's right to possess a firearm. While the court identifies a number firearms laws and regulations that will probably not be affected by the decision, it can be argued that the court's opinion is significant in the questions it *does not* answer. I am concerned that the decision may open the door to challenges to reasonable existing federal laws aimed at the transfer, possession, or use of illegal firearms.

In your, or the Justice Department's view, does anything in the Supreme Court's decision in *Heller* call into question the constitutionality of any provision in the United States Code?

ANSWER: No. The Court's ruling is in accordance with the text of the Second Amendment, historical practice, and the Attorney General's 2001 guidance on the scope of the Second Amendment. As was made clear in that 2001 guidance, the Department "will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws."

Schumer 75. Does anything in the decision call into question the constitutionality of the federal background check system for firearms purchases?

ANSWER: No.

Schumer 76: How might the Justice Department's strategy or approach to prosecuting firearm offenses (be) any different in light of *Heller*?

ANSWER: Please see the response to question 77. *Heller* does not change the Department's present strategy or approach in the prosecution of federal firearms offenses.

Schumer 77: What assurances can you give about the Justice Department's commitment to continuing to prosecute firearms offenses, in light of *Heller*?

ANSWER: The Department of Justice's commitment to prosecuting firearms offenses is not impacted by *Heller*. *Heller* made clear that an individual's right to "keep and bear arms" under the Constitution is not a right without restrictions. The Court cited a non-exhaustive list of permissible restrictions regarding firearms possession and ownership, to include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. ____ (2008), at 54. Often-used statutes, such as Title 18 U.S.C. §§ 922(g) and 924(c), remain effective tools in the Department's efforts to combat gun violence and illegal gun possession.

QUESTIONS FROM SENATOR DURBIN

Durbin 84. The DOJ Inspector General and Office of Professional Responsibility recently issued a scathing report about unlawful hiring practices used by the Justice Department from 2002 to 2006 in hiring career attorneys, and even summer interns. The report indicates at least 359 applicants who had worked for Democrats or liberal public interest groups were denied interviews and jobs at DOJ. For example:

- **One applicant graduated #1 in his class from my alma mater, Georgetown Law School, but was rejected because he had served as a summer intern for Senator Feingold and for the group Human Rights Watch**

- **Another applicant was a Rhodes Scholar and member of the law review at Yale Law School – but she was rejected because she had been a research assistant to a liberal law professor and had interned at the Minnesota Advocates for Human Rights and at a legal services organization**

- **A Harvard Law School student with an A- average was rejected because he had written an essay expressing regret that he had not participated in the 1999 World Trade Organization protest in Seattle**

- **Another applicant was denied consideration because she was clerking for a Clinton-appointed federal judge and had written an article on gender discrimination in the military**

I appreciate the statement you released in response to this IG/OPR report and your willingness to implement its recommendations. But the chief culprits – Michael Elston and Esther McDonald – have not been subject to discipline by DOJ because they left their jobs before the report came out and are no longer employed by DOJ. At last week's hearing, Senators Feinstein and Feingold asked you about this matter and you expressed little interest in punishing the violators.

What punishment – other than public criticism contained in the IG/OPR report -- do you think should be meted out to individuals like Mr. Elston and Ms. McDonald who violated civil service laws and DOJ policies but who are no longer employed by DOJ?

ANSWER: As the question notes, because Mr. Elston and Ms. McDonald are no longer employed by the Department, they can not be subject to disciplinary action by the Department. Furthermore, as the Attorney General recently stated, not every wrong, or even every violation of the law, is a crime. With respect to Mr. Elston and Ms. McDonald, the joint report found violations of the civil service laws, but not violations of criminal law. The conduct of Mr. Elston and Ms. McDonald has now been laid bare by the Justice Department for all to see, and we will follow the recommendation in the Report that we consider the findings should either Ms. McDonald or Mr. Elston apply in the future for another position with the Department. As a general matter in such cases, where disciplinary referrals are appropriate, they are made. But, as this Committee is well aware, the Justice Department cannot bring any type of prosecution where there is no violation of the criminal laws.

Durbin 85. What punishment would be appropriate for individuals who violated civil service laws and DOJ policies and who continue to work at DOJ?

ANSWER: It would be inappropriate for the Department to speculate as to what discipline might be appropriate in the situation described above. The Department evaluates discipline on a case-by-case basis, after examining all of the facts and circumstances, as required by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

Durbin 86. A recent article in *Legal Times* indicates that D.C. and Virginia bar officials are reviewing the IG/OPR report. Do you believe Mr. Elston and Ms. McDonald should be disbarred as a result of their infractions?

ANSWER: It would be inappropriate for the Attorney General to comment on what action, if any, the D.C. and Virginia Bar Associations should take with respect to such referrals

Durbin 88. What remedies will you provide to the hundreds of applicants who were discriminated against over the past seven years based on their partisan affiliations?

ANSWER: Please see response to question 7.

Durbin 89. In your testimony, you indicated that voting rights enforcement was one of your highest priorities. In recent years, there have been many press reports

about the mistreatment and demoralization of career employees in the Civil Rights Division's Voting Section. Career attorneys have been second-guessed, overruled, and driven out by political appointees and their hand-picked managers. The most recent allegations concern career employees in the Voting Section's "Section 5" unit.

According to a June 2, 2008 article in *Legal Times* entitled "Civil Rights Division Employee Sues DOJ, Alleges Discrimination," a recent lawsuit was filed against the Justice Department alleging that your managers in the Voting Section circumvented regular hiring procedures in order to avoid giving African-American employees in that section an opportunity to apply for Section 5 analyst positions. The complaint also alleges that three male attorneys in the Voting Section made racially and sexually derogatory remarks about female analysts in the section.

What steps have you taken to investigate these allegations of discrimination and harassment in the Civil Rights Division's Voting Section, and to remedy the problem?

ANSWER: The Department takes allegations of discrimination very seriously. There are well-established Equal Employment Opportunity complaint procedures in place at the Department of Justice to investigate and address allegations of discrimination. The Voting Section's management and Civil Rights Division leadership are in regular contact and are available to address any problems that arise. Additionally, last year all employees of the Civil Rights Division were required to receive training on harassment in the workplace. The Division also has an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. Finally, the Division's leadership has issued a memorandum to all employees as a reminder that "there will be no discrimination based on race, color, national origin, gender, age, political affiliation (including using ideological affiliation as a proxy for determining political affiliation), disability, marital status, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism." As for the specific allegations referenced in the question, the parties have reached a settlement agreement that resolves the matter.

Durbin 90. Did the Voting Section, in fact, discontinue its practice of advertising Section 5 analyst positions in 2006? If so, please explain why.

ANSWER: Between 2006 and 2007, four (4) Voting Section analysts were hired directly from the Department's Intern Program rather than through advertised job postings. However, since December 2007, all analyst positions have been filled through advertised job postings and the Department ended any earlier practice of filling analyst positions without first posting them.

Durbin 92. Please provide information about which Civil Rights Division employees, if any, are required to attend racial and sexual harassment training and please provide information about the nature and length of any such training.

ANSWER: In 2007-2008, the Civil Rights Division required all Division employees, interns, and contract employees to attend 90 minutes of live training in non-discrimination issues, including sexual and racial harassment. Managers were provided training separately from non-managers. The Civil Rights Division has continued to provide No Fear Act training to all incoming employees during their administrative orientation, which includes information regarding employees' rights and remedies under anti-discrimination and whistleblower protection laws. Because the No Fear Act training is required biannually, the Civil Rights Division plans to require every employee to receive an hour of No Fear Act training by the end of 2008.

Durbin 93. Hans von Spakovsky, whose nomination to the Federal Election Commission was rejected by the U.S. Senate due to his efforts while at the Justice Department to advance a partisan agenda at the expense of minority voting rights, wrote a recent article for the Heritage Foundation entitled "The Threat of Non-Citizen Voting." In this article, he made the following recommendation: "The DOJ should file enforcement actions against all states that allow an individual to register to vote when he or she has not answered the citizenship question on the voter registration form required by HAVA."

This is a troubling recommendation. Many eligible citizens make mistakes when filling out voter registration forms for which they should not be disenfranchised. For example, the federal mail-in registration form has a "check box" for citizenship and an additional requirement to sign an oath stating that you are a citizen. Some voters, assuming they need to affirm their citizenship only once, either don't sign the card or don't check the box. Mr. von Spakovsky's recommendation is that states that grant voting rights to such individuals – who are voter-eligible U.S. citizens – should be sued.

Will you assure this committee that the Justice Department will not follow this misguided recommendation of Mr. von Spakovsky?

ANSWER: Section 303(b)(4) of the Help America Vote Act of 2002, 42 U.S.C. § 15483(b)(4), requires the citizenship question and checkbox to be included on the mail voter registration form developed under Section 6(a) of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-4(a). Although the Civil Rights Division has not filed any lawsuits against any states for their failure to enforce completion of the citizenship checkbox by voter registration applicants, the question of whether the Civil Rights Division would file such a lawsuit would depend upon the evidence surrounding the practices of the state in question.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 95. After Hurricane Katrina, the Executive Office for the United States Trustees provided guidance for bankruptcy cases during natural disasters, including allowing for flexibility of bankruptcy deadlines and other bankruptcy filing requirements, as well as extending waivers of credit counseling and debtor education requirements.

I understand that those guidelines and waivers worked well during Hurricane Katrina, is that correct?

ANSWER: Yes, the guidelines did work well in the aftermath of Hurricane Katrina, and the Executive Office for United States Trustees reissued its guidance on enforcement discretion after the beginning of the Midwest floods.

Grassley 96. Do those guidelines apply to folks filing for bankruptcy in areas of Iowa and other states impacted by the recent flooding disaster?

ANSWER: Yes, the guidelines apply to all natural disaster victims, including those affected by the Midwest floods.

Grassley 97. Have you seen any problems with respect to bankruptcy filings in Iowa?

ANSWER: The bankruptcy system is fully operational in Iowa, and debtors in need of relief are able to file their bankruptcy petitions. The United States Trustee acted quickly to assess the situation and has worked closely with the courts and the debtor bar to address issues. After careful consideration of many factors, the United States Trustee did determine that a waiver of the credit counseling and debtor education requirements in Iowa's two judicial districts was not warranted. To date, there have been no reported instances of debtors not being able to obtain these services.

Grassley 98. What kind of flexibility do the U.S. Trustee Program enforcement guidelines provide for?

ANSWER: Among other things, the guidelines provide that United States Trustee Program attorneys will deem financial hardships caused by the floods to be a "special circumstance" for purposes of applying the statutory means test governing eligibility for chapter 7 relief. The guidelines also provide for flexibility in the United States Trustees' enforcement of various Bankruptcy Code provisions, including deadlines for the production of financial documents by debtors whose personal papers may have been destroyed by the floods.

Grassley 102. During confirmation hearings I asked Attorney General Mukasey about the False Claims Act and how important this statute is for recovering money lost to fraud against the Government. On July 2, 2008, the Washington Post reported that there are nearly 900 False Claims Act cases under seal at the Department of Justice.

What the article did not point out was that in responses to written questions from a January hearing, the Justice Department noted that of the 900 cases, 540 have been under seal longer than 13 months, and more astonishingly, 130 have been under seal for more than 36 months. FCA cases are complex and often involve significant resources, but I'm worried that such a large volume of cases being held under seal causes problems.

Specifically, I'm concerned that holding these cases under seal may harm *qui tam* whistleblowers that are often at risk of retaliation when cooperating with the government and it may also allow known frauds to continue against the American taxpayer.

On average, how many FCA cases does the Department dispose of, either through settlement, declination, or via trial, per year?

ANSWER: The 900 cases referenced in the July 2, 2008 *Washington Post* article represents the active cases under investigation by the Justice Department's Civil Division and U.S. Attorney's Offices. Contrary to the implication of the article, a new case does not wait in a queue for earlier cases to be completed. The investigation of a *qui tam* case begins immediately upon filing. The number of cases under investigation has remained essentially constant since at least FY 2004, and according to current data, during that period, the average length of time from the Civil Division's receipt of a *qui tam* case until the Department notifies the court of its election decision is approximately 15 months.

During that same period, on average, the number of *qui tam* cases that were disposed of by settlements, judgments, declinations, or dismissals has exceeded 300 annually. The number of *qui tam* cases disposed of each year has roughly equaled the number of new *qui tam* cases filed.

Grassley 103. Does the Department need additional resources in the Civil Division to clear this extensive backlog of FCA cases?

ANSWER: As explained in the preceding response, the 900 cases under seal represent the current active docket under investigation by the Justice Department's Civil Division and U.S. Attorney's Offices. Thus, there is no "backlog" of FCA cases.

As previously explained, the major sources of funds available to support the Department's enforcement efforts include the Health Care Fraud and Abuse Control account ("HCFAC") and the Three Percent Fund. The HCFAC was established by the

Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Three Percent Fund was established as part of the fiscal year 1994 appropriation for the Departments of Commerce, Justice, and State. The fiscal year 1994 appropriation allowed the Attorney General to use up to three percent of all amounts recovered by the Department's civil debt collection activities. False Claims Act litigation comprises the vast majority of the recoveries contributing to the Three Percent Fund.

The Department's base budget for the Civil Division is devoted almost exclusively to defensive litigation – cases that *require* representation to ensure that the government does not lose hundreds of billions of dollars in adverse judgments and settlements. As the number of defensive cases has outpaced the availability of appropriated funds, funding for affirmative cases has increasingly relied on non-appropriated sources such as the HCFAC and the Three Percent Fund.

The President's budget this year requested an additional $18.967 million for the Department to handle health care fraud matters. A significant way that Congress can support the Department's ability vigorously to pursue fraud cases is to support the President's budget.

Grassley 104. Does the Department of Justice anticipate that the current statute of limitations for False Claims Act cases will force the Department to settle cases prematurely in order to reach a resolution before the statute of limitations runs?

ANSWER: The Department is mindful of statute of limitations considerations in all of its cases and takes appropriate measures to ensure that cases are resolved in a timely fashion. For example, we do this by prioritizing time-sensitive matters, negotiating tolling agreements, and, where supported by the evidence, filing suit.

Grassley 105. If so, how many cases does the Department believe are in jeopardy of lapsing because of the statute of limitations?

ANSWER: Please see the response to question 104.

Grassley 106. Just a few weeks ago, the Supreme Court issued a decision interpreting portions of the False Claims Act in *Allison Engine Company*. This opinion created a new intent requirement for the Government and *qui tam* relators to prove before liability can attach to certain claims. I'm afraid that this new requirement will hinder the ability of the Government to recover Government money lost to fraud.

My concerns were heightened when a Judge in my home state of Iowa recently dismissed a False Claims Act case on his own motion despite objections from the

Justice Department. I'm alarmed that this case, *U.S. v. Hawley*, represents the beginning of a series of case dismissals that may occur.

In fact, the decision is very damaging to the FCA because the Judge said that a false statement can never be "material to the Government's decision to pay" when a private entity pays the claim and then seeks reimbursement from the Government.

Does the Department of Justice agree that the decision in Allison Engine is a set back for the Federal Government in prosecuting FCA cases?

ANSWER: To date, only a handful of district courts have had an opportunity to consider the Supreme Court's decision in *Allison Engine*. Moreover, only the *Hawley* court has relied upon *Allison Engine* to dismiss claims brought by the government. The government has appealed the decision in that case, and recently filed its opening brief. Accordingly, in the Department's view, it is too early to determine the impact of *Allison Engine* and how it will be interpreted and applied by the lower courts.

Grassley 107. My staff has contacted the Department to see if a legislative fix is necessary, but hasn't heard any substantive feedback yet. Has the Department of Justice determined what the full impact of *Allison Engine* will be?

ANSWER: With respect to your question whether the Department has determined what the full impact of *Allison Engine* will be, please see the answer to question 106. Given the uncertainty about the impact of this decision, the Department has not yet formulated a position on the necessity of a legislative fix.

Grassley 108. When can my staff expect to hear some substantive feedback from the Department on this?

ANSWER: As noted in the preceding response, the Department has not yet formulated a position on the need for a legislative response to the *Allison Engine* decision. The Department would be happy to review any proposals that the committee may have, however, and looks forward to working with the committee on this issue.

Grassley 116. As you know, Americans are being pinched by outrageously high gasoline prices at the pump. Some say that this is the result of speculation and manipulation of crude oil in the marketplace. I've written to the Commodities Futures Trading Commission (CFTC) to look into the speculative trading of energy commodities, and to pursue policies to guarantee the integrity of energy future markets.

Mr. Attorney General, what role does the Justice Department play in making sure that illegal activity is not going on with respect to energy trading?

ANSWER: The Department of Justice has made the protection and safeguarding of our markets a priority. Manipulation of the commodity markets will not be tolerated.

We have worked closely with the Commodity Futures Trading Commission and our other financial and regulatory partners when potential criminal matters have been brought to our attention, just as we have done historically with respect to efforts to manipulate trade settlement prices in the natural gas and propane markets.

The Department also plays an instrumental role in several multi-agency working groups, through which we identify and discuss investigative and prospective trends, strategies, issues and matters. The Criminal Division's Fraud Section regularly convenes meetings of the inter-agency Securities and Commodities Fraud Working Group ("SCFWG"). The SCFWG provides a forum for the enforcement community to exchange information on developing trends, new laws and regulations, and law enforcement issues and techniques. Participants include representatives from federal law enforcement agencies, securities and commodities regulatory agencies (including the Securities and Exchange Commission and the Commodity Futures Trading Commission), and securities and commodities exchange self-regulatory organizations.

We continue to maintain a proactive role in this area.

Grassley 117. I understand that the CFTC is in charge of ensuring proper oversight of the commodities market and investigating illegal activity, and that it refers cases to the Justice Department to prosecute, is that accurate?

ANSWER: Yes. The Department of Justice, including the Criminal Division's Fraud Section and the 94 U.S. Attorney's Offices, works closely with the Commodity Futures Trading Commission and our other financial and regulatory partners when potential criminal matters have been brought to our attention. This has been the case historically with respect to efforts to manipulate trade settlement prices in the natural gas and propane markets.

Grassley 118. Can you tell me about the Justice Department's role in this area? For example, have there been many referrals specifically with respect to the crude oil market, and has the Department brought any cases?

ANSWER: The Department has pursued several investigations of natural gas traders working for large energy companies and their subsidiaries. These cases have involved individuals who were alleged to have provided false information about speculative trades to commercial publications who published settlement indices. Several investigations have resulted in large fines and Deferred Prosecution Agreements with American Electric Power (Ohio), Mirant (Atlanta), and Williams (Oklahoma). Each company also settled enforcement actions with the CFTC. Nine traders from these three companies have

entered guilty pleas, and one trader is currently under indictment and pending trial in Washington, D.C. The U.S. Attorney's Office for the Southern District of Texas has also been prosecuting matters involving traders working for El Paso, Dynegy and other companies, resulting in several guilty pleas and trial convictions.

In addition, in an agreement with the Fraud Section of the Criminal Division, British Petroleum ("BP") entered into a Deferred Prosecution Agreement and simultaneous settlements with regulatory agencies arising from its efforts to corner and manipulate prices in the propane market. One trader has entered a guilty plea and three others are under indictment for conspiracy to manipulate and "squeeze" the Texas Eastern Transmission propane markets in February 2004.

Grassley 119. How many?

ANSWER: There are several other cases that are currently under investigation. We are still working to determine whether criminal charges are appropriate in any of these matters.

Grassley 120. Have you seen widespread problems in this area?

ANSWER: The dramatic increases in the price of crude oil earlier this year demands greater attention by law enforcement and regulators. Thus, we are monitoring the situation very closely. We are working with our partners to ensure that the U.S. energy futures markets function properly and operate free from manipulation and abuse, and that there is transparency and integrity in the accounting and financial statements of publicly traded companies.

Grassley 122. The St. Louis Post-Dispatch published a series of articles earlier this year regarding the serious shortcomings of the National Criminal Information Center (NCIC) managed by the FBI. The article reported that dangerous fugitives from justice can roam freely in our country committing more crimes or evading law enforcement because states don't enter these warrants into NCIC and/or refuse to pay for extraditing criminal back to their jurisdictions. NCIC is a crucial tool for both police officers and for public safety.

The DOJ has recently spent $78 million on a new experimental computer program called Law Enforcement National Data Exchange or N-DEx. I have been informed N-DEx will allow all law enforcement to share information about ongoing criminal investigations. N-DEx will require millions of dollars (if not billions) more and years to be implemented by all local, state, and federal law enforcement agencies. Instead of branching out on N-DEx, do you believe it would have been more prudent to invest DOJ funds on improving state compliance in the existing NCIC system?

ANSWER: The Department believes that diverting N-DEx funding to NCIC improvements at the local level would not be a wise decision. The Department is primed for a success with the initial launch of N-DEx, and the system has received endorsement from all four major police associations. N-DEx shares data about current and past investigations (incident data), which is a very different data set from that which is shared via NCIC. Many large cities and jurisdictions are already doing the programming necessary to share data with N-DEx, and changing these commitments at this time would not be well received in the local law enforcement community. Congress and the President have clearly instructed agencies to share more data, and N-DEx is the Department's flagship information-sharing program to help protect this country from criminal enterprises and terrorists. N-DEx will dismantle walls that previously existed among federal, state, local, and tribal agencies in the law enforcement arena.

Both systems serve a distinct purpose, and both systems have different sets of users. NCIC is operationally oriented and built for the officer on the street to inform him or her of potentially dangerous situations. N-DEx serves the "big picture" needs of analysts and detectives to link criminal activity within and across jurisdictions and is more analytic in nature. The problems identified in the article are local process challenges and are not related to the federal systems.

Grassley 123. I also understand that the FBI has established a taskforce to determine how to fix the gaps in information that states input into the NCIC system. Do you think it would be prudent to delay any additional spending on N-DEx before the taskforce has a chance to issue findings on how to fix the gaps in NCIC?

ANSWER: The Department does not believe spending for N-DEx should be delayed based on activities involving NCIC because NCIC and N-DEx are entirely separate systems, serving completely different segments of the criminal justice process. NCIC contains information on stolen property and identifying/descriptive information on wanted felons, missing persons, terrorists, and other individuals of interest to law enforcement. NCIC information represents the culmination of the investigative process. N-DEx will be a comprehensive national repository of police incident/investigative reports and is a compilation of information from the earlier stages of an investigation. The typical users of NCIC are patrol officers on the street, whereas the typical users of N-DEx will be investigators and information analysts. NCIC warrant information originates from the courts, ideally from automated warrant systems. N-DEx information is primarily derived from police departments' records management systems. This diversity in both information origin and use make NCIC and N-DEx distinctively separate systems.

The FBI's Criminal Justice Information Services Division is working with the Advisory Policy Board and its Warrant Task Force to develop means of increasing the number of warrants entered into the NCIC system. Although participation in and entry of records into the NCIC system are voluntary, law enforcement agencies across the country make extensive use of the system. An average of 167,000 records are entered each month, with the highest concentration being in extraditable felony warrants. While

warrant record entry and removal are highly dynamic, at any given time NCIC contains records for approximately 1.4 million subjects. Approximately 1,000 fugitives are apprehended each day through law enforcement use of the NCIC system.

Grassley 124. It was recently reported that the ATF and FBI have been involved in a jurisdictional squabble over domestic bombing investigations since ATF merged into DOJ in 2002. In 2004, then AG Ashcroft wrote a memo in an attempt to tackle the coordination of explosives investigations. To date, this dispute which involves every aspect of a bombing investigation remains unresolved.

The FBI has fought very hard not to relinquish any jurisdiction over bombing cases. The DOJ has not taken any steps to delegate all bombing investigations or data collection to the ATF. The FBI's reluctance to allow the ATF to investigate domestic bombing cases stems from the belief that FBI serves as the lead law enforcement for the analysis of terrorism intelligence and information.

What steps have you taken as U.S. Attorney General to resolve these troubles between the ATF and FBI?

ANSWER: The Department, under the leadership of the Deputy Attorney General, has made great progress coordinating ATF's and FBI's explosives programs within the Department. Officials at the Deputy Director level within each agency have been personally tasked with ensuring a unified departmental effort in this regard. As a result, the two agencies have signed a Memorandum of Understanding to coordinate response, incident management, and investigation of explosive attacks; developed a plan to integrate the Department's bomb databases to allow for a seamless user experience, including for our federal, state and local partners as well as for users within the Department; agreed on unified canine training protocols; collaborated on joint interagency training; and collaborated, along with our interagency partners, in developing the overarching national strategy to combat terrorist use of explosives.

The Department has deep expertise in preventing, responding to, investigating and prosecuting crimes related to the use of explosive devices, as a result of, among other things, its exclusive jurisdiction over terrorist acts. The Department employs world-renowned technical experts and has demonstrated years of experience in designing and implementing explosives and forensic-related programs. These include the FBI's Hazardous Devices School, the National Center for Explosives Research and Training, FBI's Critical Incident Response Group, ATF's Arson and Explosives National Response Team, the Terrorist Explosive Device Analytical Center, ATF's Canine Training Facility and the forensic and research capabilities of the Department's laboratories. The goal is to be able to utilize and coordinate this world-class expertise so that the best of both agencies is dedicated to the effort.

These efforts have led to much greater coordination in the field. The successful investigation and arrest of the individuals responsible for the May 2008 bombing of the

federal courthouse in San Diego is one recent example of this coordination. As a result of the close cooperation between FBI and ATF during the investigation, three defendants were indicted on a variety of terrorism and firearms violations just three months after the crime and are currently awaiting trial.

Grassley 125. Given that less than 2 percent of domestic bombing incidents in the U.S. are ever linked to terrorism, until a terrorism nexus is identified, can you give details as to why the ATF is not the primary investigative agency for all domestic bombing cases?

ANSWER: In light of the new levels of cooperation and coordination between FBI and ATF as outlined above, the Department does not believe a blanket rule regarding a division of labor needs to be imposed on the field at this time. We will monitor the situation and should facts warrant it, we will revisit the issue.

Grassley 132. The DOJ has settled the case United Ex rel. [UNDER SEAL] v. Medtronic Inc et al., Civil Action No. 02-2709 (W.D. Tenn.). The case currently remains under seal.

Please explain why the case was placed under seal and why it remains under seal after settlement.

ANSWER: By order of the district court, this matter was placed under seal and remains under seal. We are not at liberty to disclose the reasons for the district court's order, which are also subject to the seal in this case.

Grassley 133. Please provide the Committee with a copy of the settlement agreement and an unredacted copy of the complaint.

ANSWER: A copy of the settlement agreement is attached. We are unable to provide an unredacted copy of the complaint because it is under seal.

Grassley 134. Describe in detail how the Department determined the monetary value of the settlement?

ANSWER: As in every case, in arriving at a settlement value in this matter, the Department evaluated a number of factors, including the amount of the government's loss and the degree of litigation risk the Department would face at trial. Further details about how the Department applied those factors in this case could potentially jeopardize the Department's and relators' ability to pursue, and settle, future matters.

QUESTIONS FROM SENATOR SESSIONS

Sessions 135. An audit report by the Office of Inspector General found that the COPS Office substantially failed to close grants after those grants expired. ***The Department of Justice's Grant Closeout Procedures, OIG Audit Report 07-05, p.16 (December 2006).*** **The report found that 10,603 COPS grants expired, but were never closed.** ***Id.*** **Has COPS implemented any new procedures to ensure that grants are closed once they expire; and if so, what are these new procedures, and how successful have they been?**

ANSWER: In December 2006, the Office of the Inspector General released a final audit report entitled "The Department of Justice's Grant Closeout Processes," which examined the grant closeout activities of the COPS Office, the Office of Justice Programs ("OJP"), and the Office on Violence Against Women ("OVW"). The critical areas reviewed included the timeliness of grant closeouts, drawdowns on expired grants, and unused funds on expired grants.

In response to the audit, the COPS Office implemented procedural changes to address OIG's recommendation that the COPS Office adopt and adhere to the six-month closeout timeframe. COPS has also revised the drawdown process to ensure that grantees are restricted to drawing down funds within the 90-day period immediately following grant expiration (unless an extension is formally requested). As a result of these two new processes, the COPS Office is now de-obligating unused funds expeditiously, and thereby addressing the OIG's concern with respect to the timeline for recouping unused funds.

Based on the success of the new procedures implemented by the COPS Office, the OIG officially closed the COPS-related portion of the closeout process audit report on January 2, 2008.

Sessions 136. An audit report by the Office of Inspector General studied the COPS Management System ("CMS"), the "database that the COPS Office uses to manage and track grants." ***The Office of Community Oriented Policing Services Methamphetamine Initiative, OIG Audit Report 06-16, p.14 (March, 2006).*** **The report found significant "weaknesses in this system related to security and data accuracy and reliability."** ***Id.*** **For example, the OIG requested the COPS Office to provide a list of all "Meth Initiative grants awarded from the inception of the program in Fiscal Year 1998 through Fiscal Year 2004," and the COPS Office provided a list generated from the CMS."** ***Id.*** **The report by OIG revealed that the CMS "omitted at least six grants from the list" and that the list "contained numerous [other] errors and omissions."** ***Id.*** **The report found, "(1) a lack of standardization in data entry, (2) a CMS user manual that was relatively unknown and out-of-date, and (3) a lack of policy requiring periodic review of grant data for accuracy and completeness."** ***Id.***

Does the COPS Office still rely on the CMS as a source of information about grants and if so, has the COPS Office improved the CMS so that it provides accurate and reliable information?

ANSWER: In response to the recommendations made by the OIG in its March 2006 audit report of the Methamphetamine Initiative, the COPS Office made significant improvements to the accuracy and reliability of the COPS Management System (CMS) database. To address the need for the periodic review of grant data, appropriate maintenance and quality control procedures were implemented to ensure that the data is accurate and complete. To address the audit findings related to both the standardization of data entry and the need for an updated CMS user manual, a program-specific "COPS Methamphetamine Training Manual" was designed and introduced for these purposes. This stand-alone document was both distributed to COPS staff in hard copy and uploaded to the COPS Intranet.

Based on the success of the management actions taken by COPS, the OIG closed these recommendations related to database management on August 17, 2006. The OIG officially closed the entire audit of the COPS Methamphetamine Initiative on July 30, 2008.

Sessions 137. An audit report by the Office of Inspector General found that the COPS Office did "not provide consistent training or guidance" to grant specialists responsible for the administration of awards. *The Office of Community Oriented Policing Services Methamphetamine Initiative, OIG Audit Report 06-16 p.9 (March, 2006).* The report stated that COPS' "ad-hoc approach to the training of new staff relies heavily on the knowledge and competency levels of current staff . . . As a result, the information passed on to new staff may be inconsistent and could be inaccurate." *Id.* at 27. Please explain in detail whether COPS has developed any type of training or guidance program for its incoming grant specialists so that they can efficiently administer COPS grant awards?

ANSWER: In response to this recommendation made by the OIG in its March 2006 audit report of the Methamphetamine Initiative, the COPS Office made significant enhancements to the training provided to new Grant Program Specialist staff. In addition to the implementation of the use of a mentor checklist during on-the-job training for staff, a "Methamphetamine Initiative Team Training Guide" was developed to provide employees with detailed information regarding guidelines for the administration of the program, starting with an overview of the grant life cycle and continuing through to the closeout process. Database "screenshots" are included as part of this training documentation, as are attachments providing the user with standard forms and documents. The purpose of this manual is to ensure that all staff and grant-making divisions within COPS follow standardized procedures in administering the Methamphetamine Initiative.

Based on the success of the management actions taken by COPS, the OIG closed this recommendation related to Grant Program Specialist training on May 30, 2007. The OIG officially closed the entire audit of the COPS Methamphetamine Initiative on July 30, 2008.

Sessions 138. An audit report by the Office of the Inspector General found that the COPS Office and OJP issued duplicative grants. ***Streamlining of Administrative Activities and Federal Financial Assistance Functions In the Office of Justice Programs and the Office of Community Oriented Policing Services, OIG Audit Report 03-27 p.14 (August, 2003).*** **In written answers submitted to the Judiciary Committee on June 27, 2008 Attorney General Mukasey stated that "in FY 2007, OAAM began an aggressive program to improve the monitoring efforts of OJP and COPS grant managers, beginning with the creation of an OJP/COPS-wide programmatic and fiscal monitoring plan, which included all planned on-site monitoring activity for the year." Please explain in detail whether this program reduced the amount of duplicative grants awarded by COPS and OJP?**

ANSWER: In response to this recommendation made by the OIG in its August 2003 audit report regarding the streamlining of administrative activities, the COPS Office and the Office of Justice Programs established formal procedures to address the OIG's finding that the offices should develop and implement a method of coordination to identify proposed programs and grants that have similar purposes and eliminate any duplication of effort to ensure that awards are not made to the same grantee for similar purposes.

In March 2005, an agreement entitled "Method of Coordination between the Office of Community Oriented Policing Services and the Office of Justice Programs for Avoiding Duplication by Coordinating on Relevant Grants and Grant Programs" was issued. This document, established to formalize processes for avoiding duplication in grants awarded and grant programs administered, detailed the procedures to be jointly followed by both COPS and OJP at key stages of the budget formulation process and after the enactment of the annual appropriation for DOJ, including the following:

- Reviewing any new guidance in conjunction with the relevant statutory provisions affecting the grants or grant programs in question and identifying the potential for duplication in the allowable uses of said grants and grant programs;
- Including, as a grant condition for both COPS and OJP awardees, the requirement that grantees not use COPS and OJP grant funds for the same costs, inconsistent with the unallowable costs under each grant;
- To monitor compliance with this condition, incorporating appropriate procedures into on-site program and financial monitoring visits. [In FY2007, this process was further formalized and coordinated through the establishment of the OJP/COPS-wide programmatic and fiscal monitoring plan developed by the Office of Audit, Assessment, and Management (OAAM).]

Based on the success of these management actions, the OIG officially closed the COPS-related portion of the "Streamlining of Administrative Activities" audit report on June 16, 2005.

Sessions 139. An audit report by the Office of the Inspector General found that the COPS Office did not provide potential grantees the option to submit grant applications online. ***Streamlining of Administrative Activities and Federal Financial Assistance Functions In the Office of Justice Programs and the Office of Community Oriented Policing Services, OIG Audit Report 03-27 p.16 (August, 2003).*** **The report found, "potential grantees must mail, fax, or e-mail the applications to the COPS Office and the COPS Office must then manually enter the application data into the [COPS Management System], a database used to manage grants.** ***Id.*** **The report recommended that the COPS Office develop a program that allows applicants to apply for grants online and records the application data into a COPS database.** ***Id.*** **Such action should make the application data available to COPS grant managers more quickly and speed up the grant approval and award process."** ***Id.*** **Has the COPS Office developed a program that allows applicants to apply online; and if so, please explain in detail the results of that program.**

ANSWER: Since FY 2004, the COPS Office has posted and accepted submissions of grant application materials on-line through the Grants.gov website. Grants.gov was established as a governmental resource named the E-Grants Initiative, part of the President's 2002 Fiscal Year Management Agenda to improve government services to the public. The website serves as a central storehouse for information on over 1,000 grant programs across the government and provides access to approximately $400 billion in annual awards. Based on the initial success of the availability of COPS program applications through Grants.gov, the OIG officially closed the COPS-related portion of the "Streamlining of Administrative Activities" audit report on June 16, 2005.

Agency participation has steadily increased in the years since COPS application materials were first made available through Grants.gov, and in FY 2007, 74% of all COPS applications were submitted through the Grants.gov website. Please note that potential grantee agencies without Internet access, or those which prefer not to utilize the on-line system, still maintain the option of submitting application materials via mail.

QUESTIONS FROM SENATOR COBURN

Coburn 140. On June 19, 2008, the Project on Government Oversight (POGO) released a report on the Byrne Discretionary Grant Program administered by the Office of Justice Program's (OJP) Bureau of Justice Assistance (BJA), which awards grants to crime-fighting organizations. BJA claims the grant process is competitive, but POGO found that "in FY2007, at lease thirteen Byrne grant applicants were given special treatment: they did not go through a peer review process, but were awarded grants anyway."

What will you do to ensure OJP/BJA's problems are resolved – or at least improved – during the remainder of your tenure at DOJ?

ANSWER: The Department is committed to supporting innovative and effective approaches to law enforcement, preventing violent crime and protecting America's youth from crime and delinquency. The Department has a long-standing history in awarding grants through formula, competitive and invited solicitation processes. All grants, including those awarded in FY 2007, are awarded in accordance with the law and within Department guidelines to address the needs of the criminal justice community.

Transparency and oversight are among the Department's highest priorities. The Office of Justice Programs (OJP) is committed to issuing grant awards in an unbiased and transparent manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. Each fiscal year the grant making procedures are reviewed and updated as necessary.

As a result of the Department of Justice Reauthorization Act of 2005, OJP established the Office of Audit, Assessment, and Management (OAAM). This Office works in support of OJP to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse. Among its accomplishments, OAAM has evaluated OJP's monitoring efforts to determine where improvements were needed, published a standard set of peer review policies and procedures that will be used in making awards in FY 2009 and beyond.

Additionally, in FY 2008, OJP moved its peer review management services under one umbrella to ensure that peer reviews are conducted consistently and in a transparent manner across program offices. Also, any grant award decisions that vary from peer reviewers' recommendations must be fully documented, including the reasons why such a decision was made.

Coburn 141. Prior to FY2007, Byrne Grants had been increasingly allocated through congressional earmarks. With the continuing resolution in FY2007, OJP/BJA had an opportunity to show it could award grants based on merit. Given the claims of the POGO report, do you believe that OJP/BJA is capable of establishing a legitimate, unbiased, competitive process for awarding Byrne grants? Why or why not?

ANSWER: Yes. The Office of Justice Programs (OJP) is committed to issuing grant awards in an unbiased, transparent and competitive manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. OJP continues to strengthen the grant making process to ensure

all decisions are properly documented and justified. Each fiscal year, the Department will continue to review our grant making procedures and update them as necessary.

Coburn 142. What was the process used to evaluate applicants in FY2007?

ANSWER: In FY 2007, in the absence of earmarks, OJP administered discretionary funding in two ways: 1) interested applicants could submit proposals via competitive grant solicitations; or 2) projects that were determined by OJP to have national significance were invited to apply for funds. In the Bureau of Justice Assistance (BJA), attention was given to programs that help local communities improve the capacity of local justice systems, projects of national significance and training and technical assistance programs that were strategically targeted to address local needs. Funds were awarded to demonstration, replication, expansion, enhancement, training, and/or technical assistance programs.

Coburn 143. Who made up the team of OJP/BJA employees reviewing the applications?

ANSWER: Programs determined to be of national significance were identified and reviewed by OJP and BJA subject matter expert staff. The remaining grants were reviewed by outside expert peer review panels.

Coburn 144. How was that structure determined?

ANSWER: The structure of the review process was determined by the Director of BJA in consultation with the then-Assistant Attorney General for the Office of Justice Programs. The peer review process was used to identify proposals that addressed a broad array of needs. Experts reviewed applications to determine whether the proposals met the requirements set forth in the funding solicitation. Each applicant received a score measured against the solicitation.

Coburn 145. Is this methodology made public to applicants?

ANSWER: In their grant writing workshops sponsored throughout the nation, BJA makes public to applicants the review process for grant making decisions as well as essential elements of grantsmanship.

Coburn 146. Do oversight mechanisms currently exist within OJP and/or BJA that evaluate the grant awarding process?

ANSWER: Yes.

Coburn 147. If so, what are those standards?

ANSWER: Grant applications for programs are reviewed, scored and evaluated for funding based upon a variety of factors including funding availability, geographical distribution, grantee history and audit issues, as well as departmental priorities. Recommendations are made by subject matter expert staff through the Director of the bureau/office to the Assistant Attorney General for OJP. All grants are made in full accordance with the procedures outlined in the OJP Grant Manager's Manual.

In FY 2007, OJP established the Office of Audit, Assessment and Management (OAAM) to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse and to conduct programmatic assessments of grant programs.

Coburn 148. If so, how did they fail to catch the grants identified in the POGO report?

ANSWER: Please see the response to question 142, which describes the process.

The grants identified by POGO represent programs that were invited to apply for funding based on their national significance, geographic importance and Departmental priorities.

Coburn 149. Does the public have access to information detailing the recipients who receive Byrne grants and/or the value of the grant awarded each year?

ANSWER: The public has access to information detailing the recipients who received Byrne grant awards and the value of the grant initiatives. The Office of Management and Budget (OMB) posts all of OJP's grant awards on its transparency website (www.usaspending.gov). Additionally, BJA publishes grant awards on its website (www.ojp.gov/BJA).

Coburn 150. On June 19th and 20th, *The Washington Post*, published two articles detailing the newly opened criminal investigation of J. Robert Flores, head of the Office of Juvenile Justice & Delinquency Prevention (OJJDP). He was called to the House Oversight and Government Reform Committee to testify regarding why he "brushed aside recommendations from career staff members to hand out more than $8 million in awards last year." According to the House Oversight Committee staff memo, "Mr. Flores decided to fund only five of the 18 recommended programs, awarding them $3.88 million in funding. He also chose to fund five programs that were not recommended, awarding them $4.32 million in funding. Concerns about

Mr. Flores' selections have been raised by *Youth Today* and the ABC *Nightline* program.

What will you do to ensure OJJDP's problems are resolved – or at least improved – during the remainder of your tenure at DOJ?

ANSWER: Transparency and oversight are among the Department's highest priorities. The Office of Justice Programs (OJP), of which the Office of Juvenile Justice and Delinquency Prevention is a component, is committed to issuing grant awards in an unbiased and transparent manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. Each fiscal year the grant making procedures are reviewed and updated as necessary.

As a result of the Department of Justice Reauthorization Act of 2005, OJP established the Office of Audit, Assessment, and Management (OAAM). This Office works in support of OJP to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse. Among its accomplishments, OAAM has evaluated OJP's monitoring efforts to determine where improvements were needed, published a standard set of peer review policies and procedures that will be used in making awards in FY 2009 and beyond.

Additionally, in FY 2008, OJP moved its peer review management services under one umbrella to ensure that peer reviews are conducted consistently and in a transparent manner across program offices. Also, any grant award decisions that vary from peer reviewers' recommendations must be fully documented, including the reasons why such a decision was made.

Coburn 151. What is the process of review for awarding grants at OJJDP?

ANSWER: OJJDP's application review process generally consists of four steps: 1) application review, 2) programmatic review, 3) financial review, and 4) award notification. Every grant application received by OJP, including Congressionally mandated awards, passes through this multi-stage process to ensure that all applicable requirements are satisfied.

Coburn 152. What are the selection criteria for awarding OJJDP grants?

ANSWER: The selection criteria may vary according to solicitation and program goals. In general, however, criteria include ensuring applicants met basic minimum requirements, potential geographic considerations, funding availability, past performance, peer review scores, and Administration, Department, and OJP policy priorities.

Coburn 153. Is all available grant money awarded, even if there is a lack of qualified applicants in a given year?

ANSWER: OJP is committed to selecting quality grant applications to fund and developing ways to measure the effectiveness of the programs to ensure the wise investment of taxpayer dollars. Every effort is made to award all grant funds in a given year.

Coburn 154. In FY2007, due to the continuing resolution, OJJDP had the opportunity to distribute awards in a truly competitive process. Do you feel applicants were evaluated solely based on merit?

ANSWER: The FY 2007 applicants were evaluated based on many criteria. In FY 2007, discretionary funding was administered in two ways: 1) interested applicants submitted proposals via competitive grant solicitations or 2) projects that were determined by OJP to have national significance were invited to apply for funds.

Every grant application received by OJP, including Congressionally mandated awards, passes through a multi-stage process, including application review, programmatic review, financial review, and award notification. This process ensures that all applicable requirements are satisfied and awards are made to best serve the public's interest. Additionally, a peer review process was used to identify proposals that addressed a broad array of needs. Experts reviewed applications to determine whether the proposals met the requirements set forth in the funding solicitation.

Solicitations stated information and requirements applicants needed to include for a strong application, and explained the role of peer review scores in the decision process as advisory only. Solicitations also stated that consideration to geographic distribution and regional balance may also be given. The selection criteria included the review process as well as potential geographic considerations, funding availability, past performance, peer review scores, and Administration, Department, and OJP policy priorities. Applicants were evaluated by combining all of these factors.

Coburn 155. Do you believe DOJ is capable of managing a truly competitive grant awarding process?

ANSWER: Yes. The Department has a longstanding history in awarding grants through formula, competitive and invited solicitation processes. We are committed to issuing grant awards in an unbiased, transparent and competitive manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, provides clear benefit to public safety and the criminal justice community throughout the country. DOJ maintains this high level of commitment and will review grant processes each year to ensure that this standard is consistently met.

Coburn 156. Are there any oversight mechanisms to review the actions of subdivision heads, such as Mr. Flores?

ANSWER: Yes.

Coburn 157. If so, please explain this process.

ANSWER: In addition to the oversight mechanisms mentioned in the response to question 147, the Assistant Attorney General (AAG) for the Office of Justice Programs has ultimate authority to award discretionary grants based on recommendations made by bureau and office heads, such as Mr. Flores.

When reviewing those recommendations, the AAG may request further information or make alternate selections. The AAG recognizes that the bureau and program office heads are most familiar with the issues affecting their respective offices and with the application review process and makes every effort to concur with the recommendations.

Additionally, the Department has implemented a new policy that any grant award decisions that vary from peer reviewers' recommendations be fully documented, including the reasons why such a decision was made.

Coburn 158. If so, how did it fail in this case?

ANSWER: The selection process, including AAG review, did not fail with respect to the awarding of FY 2007 discretionary grants.

Coburn 159. Were there OJJDP employees evaluating the grant applicants who may have had connections to any of the final grantees?

ANSWER: The Department does not believe that any OJJDP employees conducting peer review of grant applications had connections to any of the final grantees. All OJP employees receive ethics training after entering on duty. Additionally, under the Office of Government Ethics regulations, every three years OJP employees involved in "grant or contract administration" are required to receive formal ethics training.

Coburn 160. Does the public have access to information detailing the recipients who receive OJJDP grants and/or the value of the grant awarded each year?

ANSWER: Yes. The public has access to information detailing the recipients who received grant awards. OJJDP publishes grant awards on its website. Additionally, the

Office of Management and Budget posts all of OJP's grant awards on its transparency website (www.usaspending.gov).

Office of the Attorney General
Washington, D.C.

March 5, 2008

TO: ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

RE: ELECTION YEAR SENSITIVITIES

Department of Justice employees are entrusted with the authority to enforce the laws of the United States and with the responsibility to do so in a neutral and impartial manner. This is particularly important in an election year. Now that the election season is upon us, I want to remind you of the Department's existing policies with respect to political activities.

I. INVESTIGATION AND PROSECUTION OF ELECTION CRIMES

The Department of Justice has a strong interest in the prosecution of election fraud and other election-related crimes, such as those involving federal and state campaign finance laws, federal patronage laws, and corruption of the election process. As Department employees, however, we must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality and nonpartisanship.

Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution.

If you are faced with a question regarding the timing of charges or overt investigative steps near the time of a primary or general election, please contact the Public Integrity Section of the Criminal Division for further guidance. Please remember also that consultation with the Public Integrity Section of the Criminal Division is required at various stages of all criminal matters that focus on violations of federal and state campaign-finance law, federal patronage crimes, and corruption of the election process. More detailed guidance is available in sections 1-4 and 9-85 of the United States Attorneys' Manual, which can be accessed on line at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>.

II. HATCH ACT

As you are aware, the Hatch Act generally prohibits Department employees from engaging in partisan political activity while on duty, in a federal facility or using federal property. Please note that this prohibition includes using the internet at work for any political

activities. The Act also prohibits us from using our authority for the purpose of affecting election results; soliciting (or discouraging) political participation; soliciting, accepting or receiving political contributions; and generally from running as a candidate in a partisan election.

In addition to restrictions on what Department employees may and may not do while on duty, using government property, and in off-duty activities, certain employees are further restricted from engaging in certain political activity even while not on duty. The degree to which an employee is restricted in his or her off-duty activities depends on his or her position, *i.e.* career, further restricted, or noncareer appointee. Further restricted employees are members of the career SES, administrative law judges, employees of the Criminal Division, National Security Division and the Federal Bureau of Investigation, Criminal Investigators and Explosives Enforcement Officers of the Bureau of Alcohol, Tobacco and Firearms, and noncareer appointees in the Department. If you are unclear on these restrictions or the classification of your position, please consult with your component's designated ethics official about the limits of permissible activity *prior* to engaging in any political activity. You can also visit the Justice Management Division's Ethics page at <www.usdoj.gov/jmd/ethics/politic.html> for more detailed information.

It is critical that each one of us comply with this Act. For one, it contributes to maintaining a work environment free of political pressure and ensures the public retains its confidence that we are adhering to our responsibility to administer justice in a neutral manner. For another, violations of the Act carry strict penalties, including presumptive removal from federal service.

Thank you.

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement is entered into between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD"), on the other hand, through their authorized representatives.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. Medtronic and MSD have been named as defendants in two *qui tam* actions, United States ex rel. [UNDER SEAL] v. Medtronic, Inc., et al., Civil Action No. 02-2709 (W. D. Tenn.), and United States ex rel. Poteet v. Medtronic, Inc., et al., Civil Action No. 03-2979 (W. D. Tenn.) (the "Qui Tam Lawsuits"), both of which allege that Medtronic and MSD violated the False Claims Act, 31 U.S.C. 3729, *et seq.*, by paying illegal kickbacks to certain physicians which resulted in the submission of false or fraudulent claims to federal health care programs.

B. The United States contends that between January 1, 1998 and April 30, 2003, MSD made payments and provided other remuneration to a number of physicians and entities in connection with its spinal products in the form of (1) payments and other remuneration for physicians' attendance and expenses at medical education events, think tanks, VIP/MVP events, and meetings at resort locations; (2) services and payments for services to physicians through MSD's Healthcare Economic Services and eBusiness Departments (formerly called the Physician

Provider Services or "PPS" Department); and (3) payments made pursuant to consulting, royalty, fellowship and research agreements with the physicians and entities listed as defendants in the Qui Tam Lawsuits ("the Covered Conduct"). Notwithstanding clause (3) of the preceding sentence and with respect only to that clause, the Covered Conduct does not include any payments or remuneration that MSD provided to individuals who were associated with the entities named as defendants in the Qui Tam Lawsuits, but were not named individually as defendants in the Qui Tam Lawsuits.

C. Based on its investigation, the United States contends that certain of the payments, services, and remuneration discussed above were improper, resulted in the submission of false or fraudulent claims, and give rise to certain legal claims, as described in paragraph 4 below. Medtronic and MSD deny that they engaged in any wrongdoing, and specifically deny that any of the payments, services or remuneration were illegal or improper or resulted in any false or fraudulent claims. Inclusion of or reference to a particular physician or entity in the Covered Conduct does not necessarily constitute a finding by the United States that any payments, services or remuneration provided to that particular doctor or entity was illegal or improper in any way.

D. To avoid the delay, uncertainty, inconvenience and expense of protracted litigation of these claims, the Parties reach a full and final settlement as set forth below. This Agreement is neither an admission of liability by Medtronic or MSD nor a concession by the United States that its claims are not well founded.

E. Medtronic and MSD have entered into a Corporate Integrity Agreement ("CIA") with the Department of Health and Human Services Office of Inspector General ("OIG-HHS"),

attached hereto as Attachment 1, which is incorporated into this Agreement by reference.

F. Medtronic and MSD are in negotiations with representatives of the National Association of Medicaid Fraud Control Units to reach an agreement that provides for distribution of certain sums to the several states with which Medtronic and MSD agree to a settlement concerning the Covered Conduct (the "Participating States").

III. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). Within fourteen days after this Agreement has been executed, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. If the courts refuse to issue Orders of Dismissal in the Qui Tam Lawsuits or if an appellate court reverses either Order, this agreement shall be null and void at the option of either

the United States or Medtronic and MSD upon notice to all Parties through counsel in writing within five business days of the Court's denial of a motion to dismiss either *qui tam* or of an appellate court's reversal of an Order of Dismissal in either suit. If this agreement is rescinded, all funds in the Escrow Account shall be returned to Medtronic. In that event, Medtronic and MSD will not plead, argue or otherwise raise any defense under theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions or proceedings which are brought by the United States (including by means of intervening in the Qui Tam Lawsuits) within 90 calendar days of notification to all parties of that rescission, except to the extent that such defenses were available on September 11, 2002.

3. In the event that Medtronic and MSD do not reach a final settlement agreement or agreements with the Participating States, Medtronic and MSD shall be entitled to withdraw some or all of the $2,900,000 allocated to the Participating States, plus any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, from the Escrow Account.

4. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of Medtronic and MSD set forth in this Agreement, conditioned upon timely payment in full of the Settlement Amount, the United States (on behalf of itself, its officers, agents, agencies and departments) agrees to release Medtronic, MSD and all current employees thereof from any civil or administrative monetary claim or cause of action the United States has or may have against Medtronic or MSD under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 - 3812; or under the common law or equitable theories of payment by mistake, unjust

enrichment, conversion, fraud, breach of contract, and recoupment, for the Covered Conduct. In addition, the United States agrees to petition the district court to dismiss both of the Qui Tam Lawsuits with prejudice to the relators.

5. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of Medtronic and MSD set forth in this Agreement and in the attached CIA, conditioned upon timely payment in full of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative claim or any action seeking exclusion from the Medicare, Medicaid and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Medtronic or MSD under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities), for the Covered Conduct, except as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Medtronic and MSD from the Medicare, Medicaid and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 6, below.

6. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Medtronic and MSD) are any and all of the following:

a. Any claims of any kind whatsoever arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs pursuant to 42 U.S.C. § 1320a-7(a);

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

f. Any claims against individuals or entities other than Medtronic, MSD or the current employees thereof; and

g. Any claims based upon such obligations as are created by this Agreement.

7. Medtronic and MSD release the United States and its agencies, officers, agents, employees, and contractors and their employees, from any and all claims, causes of action, adjustments, and set-offs of any kind arising out of or pertaining to the Covered Conduct, including the investigation of the Covered Conduct.

8. Medtronic and MSD waive and will not assert any defenses they may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on the Double Jeopardy or Excessive Fines Clause of the Constitution or the holding or principles set forth in *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 509 U.S. 602 (1993), and agrees that the Settlement Amount is not punitive in nature or effect for purposes of such criminal prosecution or administrative action. Nothing in this

Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue Laws, Title 26 of the United States Code.

9. Medtronic and MSD agree to the following:

a. Unallowable Costs Defined: That all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47 and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Medtronic, MSD, or their current and former parent corporations, subsidiaries, division, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, in connection with the following are unallowable costs on government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, Veterans Affairs Program ("VA"), and FEHBP (Federal Employee Health Benefits Program):

(1) the matters covered by this Agreement,

(2) the Government's audit(s), civil and criminal investigation(s), and litigation of the matters covered by this Agreement,

(3) Medtronic's and MSD's investigation, defense, and corrective actions undertaken in response to the Government's audit(s), civil and criminal investigation(s), and litigation in connection with the matters covered by this Agreement (including attorneys' fees),

(4) the negotiation and performance of the Settlement Agreement,

(5) the payments made pursuant or ancillary to this Settlement Agreement,

including any costs and attorneys' fees, and any payments Medtronic or MSD may make to relators, including costs and attorneys' fees, and

(6) the negotiation of, and obligations undertaken pursuant to the Corporate Integrity Agreement to:

(i) Retain independent review organizations to perform annual reviews as described in Section III. of the CIA; and

(ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph 7(a)(6) that may apply to the obligations undertaken pursuant to the Corporate Integrity Agreement affects the status of costs that are not allowable based on any other authority applicable to Medtronic or MSD. (All costs described or set forth in this Paragraph 7(a) are hereafter, "unallowable costs").

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for in non-reimbursable cost centers by Medtronic and MSD, and Medtronic and MSD will not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement or payment request submitted by Medtronic, MSD, or any of their current and former parent corporations, subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, to the Medicare, Medicaid, TRICARE, VA or FEHBP programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Medtronic and MSD further agree that within 90 days of the Effective Date of this Agreement, they shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Medtronic, MSD, or any of their current and former parent corporations, subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, and shall request, and agree, that such cost reports, cost statements, information reports or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Medtronic and MSD agree that the United States, at a minimum, will be entitled to recoup from Medtronic and MSD any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously submitted cost reports, information reports, cost statements, or requests for payment. If Medtronic or MSD fails to identify such costs in past filed cost reports in conformity with this Paragraph, the United States may seek an appropriate penalty or other sanction in addition to the recouped amount.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Medtronic or MSD on the effect of inclusion of unallowable costs (as defined in this Paragraph) on the cost reports, cost

statement, or information reports of Medtronic or MSD.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Medtronic's or MSD's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

10. Medtronic and MSD agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Medtronic and MSD will make reasonable efforts to facilitate access to, and encourage the cooperation of, their directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals, and will furnish to the United States, upon reasonable request, all non-privileged documents and records in its possession, custody, or control relating to the Covered Conduct.

11. This Agreement is intended to be for the benefit of the Parties only, including their current and former parent corporations, subsidiaries, predecessors, successors, and assigns, and by this instrument the Parties do not release any claims against any other person or entity.

12. Medtronic and MSD agree that they waive and will not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as the Covered Conduct. Medtronic and MSD represent that they have no direct billing relationship with health care beneficiaries, their insurers or any federal health care program.

13. Except as expressly provided to the contrary in this Agreement, each Party shall

bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

14. Medtronic and MSD represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever and they have been advised with respect hereto by counsel prior to entering into this Settlement Agreement.

15. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between the United States and Medtronic or MSD under this Agreement will be the United States District Court for the Western District of Tennessee, except that disputes arising under the attached Corporate Integrity Agreement shall be resolved exclusively under the dispute resolution provisions of that agreement.

16. This Agreement and the Corporate Integrity Agreement among Medtronic, MSD, and OIG-HHS constitute the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties, except that only OIG-HHS and Medtronic and MSD must agree in writing to modification of the Corporate Integrity Agreement.

17. The individuals signing this Agreement on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

19. All parties consent to the United States' disclosure of this Agreement, and

information about this Agreement, to the public.

20. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: July 13, 2006 BY: _____
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: July 18 2006 BY: _____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____ BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

information about this Agreement, to the public.

20. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED:_____ BY: _____
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED:_____ BY: _____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 7/17/06 BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: 7-14-06 BY: _____
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 7/14/06 BY: _____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor Danek USA, Inc.

AMENDMENT TO SETTLEMENT AGREEMENT

This AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 31st day of July, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement ("Agreement") on July 18, 2006, and

WHEREAS, the Parties desire to amend the Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement dated July 18, 2006 among the Parties (the "Settlement Agreement"), Paragraph 1 of the Settlement Agreement is amended effective as of the date hereof and re-stated in its entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). By September 1, 2006, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

3. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

4. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

5. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

6. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 8/1/06 BY: DK/David T. Cohen
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 8/1/06 BY: David T. Cohen
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 8/1/06 BY: GED/David T. Cohen
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: July 28, 2006 BY: _____
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED:_____ BY: _____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

DATED: _____ BY: _____
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 8/1/06 BY: _____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

SECOND AMENDMENT TO SETTLEMENT AGREEMENT

This SECOND AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 31st day of August, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement on July 18, 2006 and an Amendment to the Settlement Agreement on July 31, 2006 (collectively referred to herein as the "Agreement") and

WHEREAS, the Parties desire to amend the Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement dated July 18, 2006 among the Parties (the "Settlement Agreement"), Paragraph 1 of the Settlement Agreement is amended effective as of the date hereof and re-stated in its entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). By September 15, 2006, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

3. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

4. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

5. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

6. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 8/31/06 BY: DK /David T. Cohen
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 8/31/06 BY: David T. Cohen
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 8/31/06 BY: GED /David T Cohen
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: 8/31/06 BY: for JMS

JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 8/31/06 BY: for TC

TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

THIRD AMENDMENT TO SETTLEMENT AGREEMENT

This THIRD AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 15th day of September, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement on July 18, 2006 and Amendments to the Settlement Agreement on August 1, 2006 and August 31, 2006 (collectively referred to herein as the "Settlement Agreement"), and

WHEREAS, the Parties desire to amend the Settlement Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement, Paragraphs 1, 2 and 3 of the Settlement Agreement are amended effective as of the date hereof and re-stated in their entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million, plus interest at the average rate of 5.25% per annum compounded annually ($5,753.42 per day for the first year) from August 1, 2006 and continuing until and including the day before complete payment is made ("the Settlement Amount"). The Settlement Amount shall constitute a debt due and owing to the United States and the Participating States forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal. This debt is to be discharged by payments to the United States and the Participating States under the following terms and conditions:
>
> A. Medtronic shall pay to the United States the sum of $37.1 million, plus interest accrued thereon at the rate of 5.25% per annum compounded annually ($5,336.30 per day for the first year) from August 1, 2006 continuing until and including the day before complete payment is made (the "Federal Settlement Amount"). The Federal Settlement Amount shall be paid by electronic funds transfer no later than ten (10) business days after the debt becomes due and owing and Medtronic receives written payment instructions from the United States.
>
> B. Medtronic shall pay to the Participating States the sum of $2,900,000, plus interest accrued thereon at the rate of 5.25% per annum

compounded annually ($417.12 per day for the first year) from August 1, 2006 continuing until and including the day before complete payment is made (the "State Settlement Amount"). The State Settlement Amount shall be paid no later than ten (10) business days after the debt becomes due and owing, Medtronic and MSD reach an agreement with the Participating States that provides for distribution of the State Settlement Amount, and Medtronic receives written payment instructions from the Participating States.

2. If the courts refuse to issue Orders of Dismissal in the Qui Tam Lawsuits or if an appellate court reverses either Order, this agreement shall be null and void at the option of either the United States or Medtronic and MSD upon notice to all Parties through counsel in writing within five business days of the Court's denial of a motion to dismiss either *qui tam* or of an appellate court's reversal of an Order of Dismissal in either suit. In that event, Medtronic and MSD will not plead, argue or otherwise raise any defense under theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims, actions or proceedings which are brought by the United States (including by means of intervening in the Qui Tam Lawsuits) within 90 calendar days of notification to all parties of that rescission, except to the extent that such defenses were available on September 11, 2002.

3. In the event that Medtronic and MSD do not reach a final settlement agreement or agreements with the Participating States, Medtronic and MSD shall be entitled to retain some or all of the $2,900,000 allocated to the Participating States.

2. Pursuant to Paragraph 16 of the Settlement Agreement, Paragraphs 21, 22, 23 and 24 as stated in their entirety below are hereby added to the Settlement Agreement effective as of the date hereof:

21. Medtronic and MSD expressly warrant that they have reviewed their financial situations and that they are currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I) and will remain solvent following payment to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (a) have intended that the mutual promises, covenants and obligations set forth herein constitute a contemporaneous exchange for new value given to Medtronic and MSD, within the meaning of 11 U.S.C. § 547(c)(1), and (b) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange. Further, Medtronic and MSD warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Medtronic or MSD were or became indebted, on or after the date of the transfer of the Federal Settlement

Amount and State Settlement Amount, all within the meaning of 11 U.S.C. § 548(a)(1).

22. In the event Medtronic or MSD commences, or another party commences, before complete payment of the Settlement Amount, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, (a) seeking to have any order for relief of Medtronic's or MSD's debts or seeking to adjudicate Medtronic or MSD as bankrupt or insolvent, or (b) seeking appointment of a receiver, trustee, custodian or other similar official for Medtronic or MSD or for all or any substantial part of their assets, Medtronic and MSD respectively agree that:

A. Medtronic's and MSD's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547 or 548, and neither Medtronic nor MSD will argue or otherwise take the position in any such case, proceeding or action that: (i) Medtronic's or MSD's obligations under this Agreement may be avoided under 11 U.S.C. § 547 or 548; (ii) Medtronic or MSD was insolvent at the time this Agreement was entered into or became insolvent as a result of the payment made to the United States hereunder; or (iii) the mutual promises, covenants and obligation set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Medtronic and MSD;

B. In the event that Medtronic's or MSD's obligations hereunder are avoided for any reason, including but not limited to the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action or proceeding against Medtronic and MSD for the claims that would otherwise be covered by the releases provided in this Agreement. If the United States chooses to do so, Medtronic and MSD agree that, for purposes only of any case, action or proceeding referenced in the first clause of this Paragraph, (i) any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Medtronic or MSD from participation in Medicare, Medicaid or other federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case or proceeding described in the first clause of this Paragraph, and neither Medtronic nor MSD will argue or otherwise contend that the United States' claims, actions or proceedings are subject to an automatic stay; (ii) neither Medtronic nor MSD will plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions or proceedings that are brought by the United States within 30 calendar days of written notification to Medtronic that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on September 11, 2002; and (iii) the United States and the Participating States have valid claims against Medtronic and MSD in the amount of at least $40 million, and they may pursue their claims, inter alia,

in the case, action or proceeding referenced in the first clause of this Paragraph, as well as in any other, case, action, or proceeding; and

C. Medtronic and MSD acknowledge that their agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

23. Default. In the event that Medtronic fails to pay any amount as provided in Paragraph 1 within ten (10) business days of the date upon which such payment is due, Medtronic shall be in Default of its payment obligations ("Default"). The United States will provide written notice of the Default, and Medtronic shall have an opportunity to cure such Default within ten (10) business days from the date of receipt of the notice. Notice of Default will be delivered to Janice M. Symchych, Vice President and Deputy General Counsel, or to such other representative as Medtronic shall designate in advance in writing. If Medtronic fails to cure the Default within ten (10) business days of receiving the Notice of Default, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of Default on the remaining unpaid total (principal and interest balance). Medtronic shall consent to a Consent Judgment in the amount of the unpaid balance, and the United States, at its sole option, may: (a) offset the remaining unpaid balance from any amounts due and owing to Medtronic by any department, agency, or agent of the United States at the time of the Default; or (b) exercise any other rights granted by law or in equity, including the option of referring such matters for private collection. Medtronic agrees not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this Paragraph, either administratively or in any state or federal court. Medtronic shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

24. Exclusion. In the event of Default as defined in Paragraph 23, above, OIG-HHS may exclude Medtronic or MSD from participating in all Federal health care programs until Medtronic pays the Settlement Amount. OIG-HHS will provide notice of any such exclusion by letter to Janice M. Symchych, Vice President and Deputy General Counsel, or to such other representative as Medtronic shall designate in advance in writing. Medtronic and MSD waive any other notice of the exclusion. In the event of default, Medtronic and MSD agree not to contest such exclusion either administratively or in any state or federal court. The scope and effect of such exclusion is defined by 42 C.F.R. § 1001.1901. Medtronic or MSD will not be reinstated unless and until the OIG-HHS approves a request for reinstatement pursuant to 42 U.S.C. §§ 1001.3001-.3005.

3. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

4. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

5. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

6. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

7. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 9/15/06 BY: DK/by David E. Cole
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 9/15/06 BY: David T. Cohen
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED:_____ BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

Health and Human Services

DATED: 9-15-06 BY:
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 9/15/06 BY: for TC
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

DATED:_____ BY:_____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 9/14/06 BY:_____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED:_____ BY:_____
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED:_____ BY:_____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

January 16, 2009

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

Dear Mr. Chairman:

Please find enclosed responses to questions for the record, which were posed to Attorney General Michael B. Mukasey following his appearance before the Committee on July 9, 2008. This submission supplements our transmittal, dated December 22, 2008. The hearing concerned Department of Justice Oversight.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to the submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to U.S. Attorney General Michael B. Mukasey Senate Committee on the Judiciary DOJ Oversight Hearing on July 9, 2008 Part Two

QUESTIONS FROM SENATOR KENNEDY

Kennedy 19. In many recent federal elections, credible reports have surfaced of deliberate efforts to prevent voters – particularly minorities, the elderly, and persons with disabilities – from going to the polls. Last year, the Senate Judiciary Committee received testimony that shortly before the 2006 election, some Virginia voters received automated phone messages falsely warning them that the `Virginia Elections Commission' had determined they were ineligible to vote and that they would face severe criminal penalties if they tried to cast a ballot. Also in 2006 in Virginia, voters received phone calls stating that because they were such regular voters they could vote this time by telephone, by simply pressing a number at that time for the candidate of their choice. The call ended by repeating that they had now voted and did not need to go to the polls.

In the 2006 midterm election, 14,000 Latino voters in Orange County, California received mailings from the California Coalition for Immigration Reform, warning them in Spanish that "if you are an immigrant, voting in a federal election is a crime that can result in incarceration...". In fact, an immigrant who is a naturalized citizen of the United States has the same right to vote as any other citizen. In the 2004 general election, voters in Franklin County, Ohio, received fliers stating that due to "confusion caused by unexpected heavy voter registrations" Republicans should vote on Tuesday and Democrats should vote on Wednesday. A similar deceptive flier was distributed that year in Allegheny County, Pennsylvania, asking Republicans to vote on Tuesday and Democrats to vote on Wednesday, and concluding by thanking voters for "cooperating with us in this endeavor to create a peaceful voting environment." In 2002, fliers stating that voters could cast their ballots three days after the election "if the weather is bad" were distributed in New Orleans public housing locations. There have been many other examples of attempts to deceive voters. Does the Department have any systematic, proactive plan for addressing such deceptive practices if they recur this November?

ANSWER: Throughout the 2008 election season, the Department shared your commitment to ensuring that all eligible voters had a meaningful opportunity to participate in the elections to select our nation's leaders. The Department took a number of proactive steps to ensure that this goal was achieved in the November general election. In the months leading up to the election, representatives of the Justice Department frequently met with Members of Congress,

congressional staff, with state and local governments, and members of non-governmental organizations, including civil rights advocacy groups, to discuss concerns and questions about the upcoming election and to address the Department's efforts to prepare for this election cycle. Additionally, the Attorney General and the Acting Assistant Attorney General for the Civil Rights Division met with dozens of civil rights organizations as well as the National Association of Secretaries of State, the National Association of Attorneys General, the National Conference of State Legislators, and the National Governors'Association to address concerns and answer questions regarding the Justice Department's role in the upcoming elections. Through these and other actions, the Department ensured the effective exchange of information related to the operation of the election as well as the commitment of the federal government to vigorously enforce all relevant laws.

In addition to these efforts, in July 2008 the Department organized the seventh Ballot Access and Voting Integrity Symposium to train federal law enforcement officials on voting and election laws in preparation for the upcoming election. Over two hundred federal law enforcement officials attended this two day training conference, including Assistant United States Attorneys who have been designated as District Election Officers from the 94 United States Attorneys' Offices, FBI Agents, and members of the Community Relations Service. During this conference, voting and election law experts from the Criminal Division and the Civil Rights Division gave presentations on the enforcement of the federal election laws and outlined the process by which complaints of voting irregularities should be reported, processed, and investigated.

In 2008, as in previous years, the Civil Rights Division implemented a comprehensive Election Day program for the general election to ensure access to the ballot. In every election cycle, the Civil Rights Division sends out hundreds of federal observers from the Office of Personnel Management as well as attorneys and staff from the Department of Justice to monitor elections in counties, cities, and towns across the country to ensure access to the polls and compliance with Federal voting rights laws. The Voting Section of the Civil Rights Division, which enforces the Voting Rights Act, the Help America Vote Act, the National Voter Registration Act, and the Uniformed and Overseas Citizen Absentee Voting Act, identified the locations that the Division monitored. As it has done during other general elections, the Section chose jurisdictions where we have existing court orders, consent decrees, and settlement agreements authorizing federal observers or monitors and locations where other factors generated a heightened risk of potential civil rights violations.

On November 4, 2008, the Division deployed 822 monitors and observers to 59 jurisdictions in 23 states. Earlier in 2008, the Civil Rights Division sent 555 monitors and observers to 17 states, for a total number of 1,377 federal monitors and observers deployed in 2008. Additionally, the Civil Rights Division received information and complaints from voters on Election Day through a well-publicized toll-free telephone number and Internet complaint form on our Web site. Both of these resources were fully available to individuals who are hearing impaired or have limited English proficiency.

Kennedy 28. On May 12, 2008, U.S. Immigration and Customs Enforcement officials conducted a worksite enforcement raid on the Agriprocessors, Inc. meatpacking plant in Postville, Iowa, arresting 390 immigrant workers, reportedly the largest single-site enforcement operation to date. The immigrants were held at the National Cattle Congress in Waterloo, Iowa. Unlike similar operations in the past, ICE did not directly pursue removal of these undocumented workers. Instead, ICE and the Department of Justice threatened to prosecute them for aggravated identity theft, which carries a minimum sentence of two years' imprisonment. The immigrants who were arrested had allegedly procured false Social Security numbers to obtain employment with Agriprocessors. Only 5 of the 390 immigrant workers arrested had a prior criminal record. It has been reported that DOJ prosecutors—using a standard plea agreement requiring the individuals to accept a lesser charge of identity theft, five months' imprisonment, and removal following completion of the sentence—leveraged guilty pleas in an extraordinary, fast-track judicial process in which defendants were processed in large groups and had limited access to defense counsel and counsel with sufficient expertise in immigration law.

Please describe the Department of Justice's role, both at the headquarters level and in the U.S. Attorney's Office for the Northern District of Iowa, in planning and conducting the raid and the plan for mass prosecutions of the workers. Which office(s) of DOJ were involved in and cleared the planning and execution of the raid, including the use of the aggravated identity theft charge, the preparation of the standardized plea agreement, and the prosecution strategy?

ANSWER: The United States Attorney's Office for the Northern District of Iowa, in conjunction with ICE, planned the May worksite enforcement action. The charging decisions in each case were made by the United States Attorney's Office pursuant to a fast-track prosecution plan proposed by the United States Attorney's Office and approved by the Deputy Attorney General's Office. In the months preceding the enforcement action, the United States Attorney's Office consulted with numerous offices and components of the Department of Justice, as appropriate. The U.S. Marshals Service and the Office of the Federal Detention Trustee helped arrange and coordinate with ICE plans for the housing of those apprehended and those criminally charged in the course of the operation.

The U.S. Attorney's Office for the Northern District of Iowa did not "threaten" to prosecute a large number of defendants with aggravated identity theft charges. Rather, prosecutors in fact filed charges of aggravated identity theft where they in good faith believed the facts warranted such charges. In each such case of charged aggravated identity theft, a federal judge found probable cause to support the charges and authorized an arrest warrant for each defendant. In short, the charges were based on strong evidence which was provided to each charged defendant. In fact, of the 304 defendants convicted, over 90 percent admitted to facts constituting the elements of aggravated identity theft, including the use of the means of identification belonging to another person.

Kennedy 29. Were you personally briefed on the planned raid and prosecution strategy? If so, when?

ANSWER: Please see the response to question 28.

Kennedy 30. Were the Assistant U.S. Attorneys handling these cases authorized to modify the standardized plea agreement on a case-by-case basis as a matter of prosecutorial discretion, in recognition of unique circumstances of the various immigrant defendants? If not, why not?

ANSWER: Yes, except for certain binding provisions of the fast-track authority. For example, AUSAs were authorized to drop the judicial removal provision or extend the deadline for accepting plea offers in appropriate cases. On the other hand, AUSAs were generally not authorized under the terms of the fast-track authority to offer sentences less than those set out in the approved fast-track authority absent extraordinary justifications not contemplated in the fast-track proposal. In actual practice, in some cases AUSAs modified some of the terms of the proposed plea agreements and extended the time for acceptance of the plea offer.

Kennedy 31. If so, why did the AUSAs refuse to depart from the standardized plea agreement?

ANSWER: In some cases AUSAs modified some of the terms of the proposed plea agreements and extended the deadline for acceptance of the plea offer. That said, the decisions were vested with the United States Attorney's Office in the Northern District of Iowa, which made those decisions on a case-by-case basis.

Kennedy 32. Do you believe that such mass prosecutions of unauthorized immigrant workers without prior criminal records constitute an effective use of DOJ's prosecutorial resources? Please explain why DOJ and ICE pursued prosecution of these individuals instead of pursuing deportation proceedings.

ANSWER: We believe that the prosecution of persons who commit aggravated identity theft and other document fraud crimes, including the prosecutions in this enforcement action, is an effective use of DOJ prosecutorial resources. The U.S. Attorney's Office for the Northern District of Iowa, in conjunction with Immigration and Customs Enforcement, discovered during the course of their criminal investigation that nearly 700 employees of Agriprocessors, Inc., in Postville, Iowa, had illegally used Social Security numbers belonging to other persons. These are not victimless crimes. In fact, of the 304 defendants convicted, over 90 percent admitted to using the means of identification of another person. The means of identification included both social security numbers and alien registration numbers belonging to other persons.

Kennedy 33. Will DOJ's approach to the Postville raid serve as a model for handling immigrants arrested by ICE in future worksite enforcement operations?

ANSWER: As in virtually all types of criminal cases, the approach taken in future worksite enforcement operations will be determined on a case-by-case basis by individual U.S. Attorneys' Offices in coordination with our law enforcement partners. Those decisions will be based on available resources, strength of the evidence, and other appropriate factors.

While nearly all of the 304 defendants were convicted and sentenced for misuse of identity documents, the investigation has not ended there. Each of those defendants was questioned concerning their knowledge of criminal activity at the plant. Others in the community have come forward or been questioned concerning a range of alleged criminal activity. Criminal investigations continue to date. However, had those who violated criminal laws to work at the plant simply been removed from the country, they would not have been available to investigators as they have been for the past months.

Three supervisors at the plant have been charged in federal court; two have pleaded guilty to charges relating to their harboring of unlawful alien workers in the plant. One of the managers is a fugitive. Two Human Resources Department staff were charged in federal court; one has pleaded guilty to harboring illegal workers and to aggravated identity theft. The plant manager has been indicted along with the former CEO for conspiring to harbor illegal workers. The former CEO has been indicted for bank fraud. Finally, the corporation has also recently been indicted. The State of Iowa has filed more than 9300 criminal charges against the former CEO, the plant manager, Human Resources Manager, the plant owner, and others for alleged violations of the State of Iowa child labor laws. The Iowa labor commissioner has assessed nearly $10 million in civil penalties for repeated violations of Iowa wage laws over the past two years.

In late October 2008, First Bank Business Capital, Inc., of St. Louis sought to have a receiver appointed to take over Agriprocessors because of concerns about possible fraud by Agriprocessors in relation to its $33 million line of credit. About one week later, Agriprocessors filed for bankruptcy protection. The complaint filed by First Bank and other public documents also disclose that Agriprocessors has failed to timely pay cattle suppliers, in violation of the federal Packers and Stockyards Act.

Although the company is now reportedly operating at greatly reduced production, since the Postville raid, public reports indicate working conditions in the plant have greatly improved; the company claims to have undertaken an immigration compliance program; and starting wages have nearly doubled. Defendants sentenced to short terms of imprisonment have been available in this country to investigators conducting continuing investigations and to the subjects of those investigations. Several material witnesses have been offered work authorization documents and ICE has deferred action on their removal to allow them to remain in the country lawfully and to be available to testify.

In short, the criminal investigation and resulting prosecutions of Agriprocessors and its employees have been thorough, with charges to date having been brought against the company, its highest officials, managers, and others. Investigations and prosecutions of this sort are complex. The correct approach in any case should depend upon the facts, including the pervasiveness of any alleged criminal conduct.

Kennedy 34. Following the raid, the Iowa Commissioner of Labor stated that an investigation by his office of violations of child labor and wage and hour laws was already underway at Agriprocessors before the immigration raid. According to the Commissioner, the raid (including the prosecution and removal of the workers and seizure of documents) frustrated his investigation. In collaborating with ICE with respect to the Postville raid, were senior Department of Justice attorneys aware of the pending labor violations investigation?

ANSWER: To the extent the question is based on a public statement by the Iowa Commissioner of Labor, we do not believe that the Commissioner stated that the state investigation was "frustrated." It is the understanding of the United States Attorney's Office that the temporary stoppage of any active investigatory efforts by the Iowa Commissioner of Labor due to the criminal enforcement action did not significantly disrupt the labor investigation. Rather, it is our understanding and belief that the criminal enforcement action had a significant beneficial effect on the state's labor investigation. The *Waterloo Courier* reported on July 18, 2008, that:

> "State Labor officials, conducting their own inquiry into Agriprocessors, said the raid helped their investigation. Iowa Labor Commissioner Dave Neil of LaPorte City said even though the raid interrupted their investigation into child labor and wage violations, it emboldened workers to speak to investigators. 'As a result of the raid, more people were willing to come forward and talk. Quite frankly, it just made things come to light a lot quicker,' he said."

[2008 WLNR 13473688].

In addition, state labor investigators were given access to evidence gathered in the course of the federal immigration and document fraud investigation. In early August 2008, State Labor investigators referred the results of their child labor investigation to the Iowa Attorney General's Office. On September 9, 2008, the Iowa Attorney General's Office charged Agriprocessors, Inc., its owner, plant manager, human resources manager, and others with 9311 counts of misdemeanor child labor violations. The Iowa Labor Commissioner has also assessed nearly $10 million in civil penalties against Agriprocessors for repeated violations of Iowa wage laws over the past two years.

Kennedy 35. Prior to the raid, were any efforts made to communicate with the Iowa Labor Services Division or the Department of Labor? If not, please explain why DOJ did not inquire with ICE, the Department of Labor, or the Iowa authorities whether there were any labor disputes or ongoing labor investigations at Agriprocessors.

ANSWER: Prior to the May 12, 2008, criminal enforcement operation, the U.S. Attorney's Office and ICE were aware of ongoing labor investigations of Agriprocessors, Inc., by the Iowa Commissioner of Labor and U.S. Department of Labor. Efforts were made consistent with operational security to ensure that civil investigators were not in harm's way during the criminal enforcement operation. Criminal agents from the U.S. Department of Labor were present during the criminal enforcement operation on May 12, 2008. The Iowa Department of Public Safety assisted with the criminal enforcement operation and was advised of operational details in order to assist in the criminal enforcement operation and to deconflict with state agencies, including the Iowa Commissioner of Labor.

Kennedy 36. In the course of its prosecutorial efforts since the raid, has DOJ cooperated with the Iowa Labor Services Division or the Department of Labor or taken any other steps to ensure the continued availability of witnesses and evidence in ongoing federal and state labor law investigations?

ANSWER: Yes, the Department of Justice has cooperated with both investigations as appropriate. Because of the ongoing nature of the investigations, details about those communications are not being provided. We have also coordinated with the Iowa Attorney General's Office as they are leading the state's investigation and prosecution. Moreover, each of the more than 270 defendants convicted of criminal offenses (fraudulently using a social security number or alien registration number or illegally reentering the U.S.) who are serving a federal sentence has signed a cooperation plea agreement and been available to federal and state labor investigators in their ongoing investigations. As noted above by the Iowa Commissioner of Labor, not only were the witnesses available to labor investigators as a result of the federal criminal enforcement operation, but they were more willing to "come forward and talk."

Kennedy 37. Please describe DOJ's communications with Chief Judge Reade of the U.S. District Court for the Northern District of Iowa with regard to planning for criminal proceedings for the Agriprocessors workers. Is it common for DOJ officials to engage in ex parte communications with judges on how to accommodate the cases that will arise from such large-scale enforcement actions?

ANSWER: The use of the term "*ex parte*" contact in this question appears to presuppose that something inappropriate or unusual occurred. That would be an inaccurate assumption. Any time a criminal or civil search warrant is obtained or a criminal complaint is filed and a warrant is obtained prosecutors and investigators meet with judicial officials. In instances where larger

than normal numbers of arrests are expected to be generated as a result of an enforcement operation it is not only common but necessary for prosecutors and enforcement personnel to engage in communications with judges and other court officials such as the United States Marshals Service, Pretrial Services, Probation Officers, and others. The purpose for such coordination is to ensure that all facets of the federal criminal justice system are prepared to appropriately handle large volumes of criminal cases in a timely and appropriate manner. That is what occurred in this instance.

Kennedy 38. Was the Department of Justice involved in coordinating the Postville operation with state and local law enforcement agencies or social service agencies? If so, please provide a list of those agencies and describe the Department of Justice's role and the nature and timing of those communications.

ANSWER: While Immigration and Customs Enforcement (ICE) was responsible for the actual operational coordination with state and local agencies, the U.S. Attorney's Office played a supporting role in that process. The U.S. Attorney's Office is responsible for the prosecution of the criminal cases which arose out of the May 12, 2008, enforcement operation. The agencies that were contacted included the Iowa Department of Public Safety (consisting of the Iowa State Patrol, Division of Criminal Investigation, Intelligence Bureau, Division of Narcotics Enforcement, State Fire Marshal), Iowa Commissioner of Labor's Office, LEIN Region 3, Allamakee County Sheriff's Office, Allamakee County Attorney's Office, Fayette County Sheriff's Office, Clayton County Sheriff's Office, Winneshiek County Sheriff's Office, Postville Police Department, West Union Police Department, Waterloo Police Department, Blackhawk County Sheriff's Office, Blackhawk County Attorney's Office, Iowa Department of Natural Resources, Iowa Governor's Office, Iowa Attorney General's Office, Iowa Lt. Governor/Homeland Security Advisor to Governor, Iowa Department of Human Services, and Iowa Department of Transportation.

Kennedy 39. Did the Department of Justice or, to the best of your knowledge, ICE coordinate or communicate with any religious or social services entity at the local level after the raid was initiated? If so, please describe the nature and timing of those communications. If there was no such communication, please explain why not.

ANSWER: As noted in our response to Question 38, the U.S. Attorney's Office was responsible for the criminal prosecution of cases that arose from the May 12, 2008, enforcement operation. We understand that ICE was responsible for contacting non-governmental organizations (NGOs). The United States Attorney's Office did respond to inquiries from NGOs, but was only able to confirm the information that was already part of the public record in this case as required by the applicable disciplinary rules of the jurisdiction in the State of Iowa. The U.S. Attorney's Office is aware that ICE officials personally met with the mayors of Postville and Waterloo and the superintendent of the Postville school on the day of the enforcement operation to inform

them of the operation and to answer their questions. We believe that ICE also contacted or communicated with the following agencies or organizations on the day of the operation: the Department of Social Services in Allamakee County; the Department of Social Services in Dubuque, the Iowa Department of Human Services, Catholic Charities in Cedar Rapids, Lutheran Social Services in Waterloo, the University of Iowa Law College clinical law program, the Hispanic Ministry in Cedar Rapids, and "Justice for our Neighbors" in Cedar Rapids.

Kennedy 40. Immigration attorneys have reported that they were barred from gaining meaningful access to the immigrant detainees to provide pro bono legal services. There were also reports that court-appointed defense counsel, who were asked to represent 17 defendants on average, were afforded limited opportunity to consult with their clients and that many defendants did not fully understand the charges against them or consequences of their plea agreements. How do these facts comport with the requirement that DOJ attorneys act not only as prosecutors, but ministers of justice to ensure that guarantees of fairness and due process are met?

ANSWER: At the outset, it is vital to be specific as to which "immigration" counsel the question is referring to. Some, but not all, of the aliens who were administratively arrested on May 12, 2008, had counsel representing them in various stages of the administrative immigration process (administrative immigration counsel). Others of the aliens who were administratively arrested on May 12, 2008, later had administrative immigration counsel claim to represent them - though the list of clients provided by the administrative immigration counsel did not always match the names provided by the arrested aliens. When the criminal charges were filed all of the criminally prosecuted aliens had criminal defense counsel appointed to represent them in connection with the criminal charges.

Every detainee held at the temporary processing facility in Waterloo who claimed to be represented by administrative immigration counsel was permitted to talk to their counsel. While the terms of payment for any such representation are unknown to the government, it is believed these immigration attorneys provided pro bono services. None of the counsel who sought to represent aliens concerning administrative matters also sought or claimed to represent their client in connection with any criminal case. In virtually every case the administrative immigration attorneys requested, and were granted permission, to speak to their clients prior to their client,-ever appearing in court for an initial appearance on criminal charges.

The arrested aliens began to arrive at the Waterloo facility Monday afternoon and by Tuesday evening some had contact with their administrative immigration counsel. Other administrative immigration counsel began to meet with their clients on Wednesday. In some instances, ICE agreed to make detainees available to administrative immigration counsel later in the day on Tuesday and Wednesday morning, but counsel failed to appear as scheduled. Extraordinary steps were taken to arrange for immediate representation of each defendant charged with a criminal offense by a qualified criminal defense attorney.

Representatives from foreign consulates had the opportunity to tour the temporary detention facilities, as documented in the local newspaper:

> Gustavo Lopez, a consul general, toured the facilities this week. About 75 percent of detainees captured in the raid at Agriprocessors in Postville are Guatemalan. In a Spanish-language interview, he said the strong show of force, combined with the name of the detention facility -- National Cattle Congress -- has left many of his country's people scared. He said they often ask if loved ones are sleeping among livestock as they await legal proceedings. "The name 'National Cattle Congress' sounds very dramatic," he said. "But we were satisfied by the conditions of the facility. They know we are watching." After touring the grounds and speaking with detainees, he said he found no evidence of human or civil rights violations. He called the tour encouraging, particularly because he expects more raids around the country. Attorneys have complained they weren't allowed access to the detention center until Tuesday evening. But Lopez said he verified detainees had access to legal representation on Wednesday, as well as showers, bathrooms, phones and clothing. "We ate the same food as the detainees," he said.

[5/16/08 WATERLOO COURIER, IOWA, 2008 WLNR 9299747].

As soon as criminal charges were made public, each defendant was provided with court-appointed defense counsel. In addition, defense counsel was simultaneously provided resource materials, discovery information, and other information concerning the defendants they represented. In most cases, defense counsel had the opportunity to meet with their clients immediately before or after the defendant's initial appearance, and in many cases both times. Consulate officials from Guatemala and Mexico were given access to and visited with their citizens being temporarily held in Waterloo. Initial appearances for those aliens who were being criminally prosecuted were held in Waterloo from Tuesday, May 13, 2008, through Thursday, May 15, 2008.

At the conclusion of each initial appearance, and after the criminal defense counsel was finished meeting with their client, each criminal defendant was immediately taken to a local jail. At those local jails, defense attorneys and civil immigration attorneys could meet with their clients as many times and for as long as they deemed necessary consistent with local jail rules. In addition, civil immigration attorneys who represented clients held at the temporary processing facility in Waterloo were given access to their clients while they were still being detained at the Waterloo facility. The first such request for access by a civil immigration attorney with a client was received on Tuesday, May 13. Access was granted later in the day on Tuesday. Indeed, civil immigration attorneys met with their clients at the Waterloo processing facility beginning as early as Tuesday, May 13, 2008, and continuing through Wednesday, May 14, 2008.

No guilty pleas were taken by any federal judges until Monday, May 19, 2008. Each defendant who pled guilty stated in open court on the record that they understood the charges against them and the consequences of pleading guilty. Each defense counsel representing the defendants stated in open court on the record that their clients understood the charges against them and the consequences of pleading guilty. No criminal defense counsel indicated they did not have enough time to consult with their clients. Each of the judges who accepted guilty pleas found that each defendant was afforded due process and made the plea knowingly, voluntarily, and with a sufficient factual basis to support the charge. These steps helped ensure that fairness and due process were observed.

Kennedy 41. What are your suggestions for improving defendants' access to immigration and defense counsel and for improving safeguards for the defendants' due process rights in such large-scale immigration enforcement operations?

ANSWER: The prosecutors involved in this operation worked very hard to ensure that the constitutional rights of these defendants were fully protected. We believe that the defendants' due process rights and their access to criminal defense and administrative immigration counsel were fully safeguarded and exercised in this operation.

Kennedy 42. Do you agree that additional raids like that in Postville should not be conducted unless and until ICE and DOJ develop effective measures for ensuring meaningful access to counsel and safeguards for due process rights of the immigrant workers arrested?

ANSWER: Prosecutors in the Department of Justice and in the United States Attorney's Offices around the country are obligated by statutes and bar rules to ensure that the constitutional rights of all accused and convicted persons are fully protected. As noted in response to question 40, the criminal defendants in the Postville case were not denied due process of law.

Kennedy 43. Please provide a detailed accounting of DOJ's total actual costs relating to this enforcement action, including the costs associated with the planning and full execution of the prosecutions, all DOJ and AUSA travel expenses that were paid, the interpreters' travel expenses, salary and fees, rental fees for any facilities occupied or used by DOJ, any payments for detention center(s), and overtime paid to any DOJ employee, contractor or subcontractor.

ANSWER: U.S. Attorney's Office for the Northern District of Iowa non-salary costs associated with the May enforcement action include the following (expenses for ongoing investigation and prosecutions arising out of and after the May enforcement action are not included):

Travel and Per Diem Expenses:	
	$24,150.28
Copier Rental	$2,000.00
Litigation Expenses	$ 47.97
Office Supplies	$ 876.55
Overtime	$ 7,255.61
Library	$ 198.00
Subtotal	$34,528.41
Executive Office for United States Attorneys:	
Travel	$ 1,025.45

In FY 2008, the United States Marshals Service (USMS) incurred $481,000 in costs associated with this enforcement action. The costs break down into the following areas:

Cost Type	FY 2008 Obligations ($000)
Salaries and Benefits	$249
Contract Guards	30
Overtime and Other Premium Pay	83
Travel	85
Supplies	17
Equipment	17
Total	**481**

The USMS is also incurring costs related to this action in FY 2009. As of October 4, 2008, 25 of those arrested are still in USMS custody, which requires the USMS to house, transport, and produce the prisoners for court proceedings as needed. Approximately 16 of the 25 detainees are being held as material witnesses.

Based on USMS data through October 4, 2008, the total cost of the Postville, Iowa, immigration enforcement operation (i.e., persons arrested for an immigration offense on May 12, 2008, in the Northern District of Iowa) for detention was $1,532,590.

However, 25 of those arrested as part of that operation remain in USMS custody as of October 4, 2008. Of those remaining in USMS custody, 16 are currently being held as material witnesses, 8 are awaiting movement (presumably to a BOP facility), and 1 is awaiting sentencing. Accordingly, the total detention cost of this enforcement operation will continue to increase until these 25 prisoners are released. These costs do not include any imprisonment costs incurred by the BOP.

Total U.S. Department of Justice Costs:

U.S. Attorney's Office - Northern District of Iowa:	$	34,528.41
Executive Office for United States Attorneys:	$	1,025.45
U.S. Marshals Service (Non Detention)	$	481,000.00
U.S. Marshals Service/Federal Detention Trustee (Detention Costs)	$	1,532,590.00
Total:	$	2,049,143.86

Kennedy 44. Please provide the number of DOJ officials (including AUSAs), contractors or subcontractors, who were in any way involved in this raid, including the number of AUSAs, interpreters, and judges and judicial staff involved.

ANSWER: With respect to the U.S. Attorney's Office for the Northern District of Iowa, the United States Attorney, approximately 14 Assistant United States Attorneys (AUSAs), one Special Assistant United States Attorney (SAUSA), and several support staff personnel participated in some fashion in the criminal enforcement action. ICE provided four additional SAUSAs to assist with this operation. One support staff person from another DOJ component volunteered and assisted in Waterloo. One attorney from the Executive Office for United States Attorneys was present during part of the criminal enforcement operation. The U.S. Marshals Service (USMS) had 56 employees involved in the operation. USMS also deputized 325 ICE agents to help them in performing their core mission of court security and prisoner transport. With respect to persons involved in the criminal enforcement operation from outside of the Department of Justice, five federal judges, including three district court judges and two magistrate judges, participated in hearings. We do not know the number of judicial staff involved. There were 36 federally certified interpreters involved during the course of the criminal proceedings.

Schumer 72. During Administrative transitions there are serious concerns that vital records and documents may become lost in the shuffle forever. This could be due to simple carelessness as people clean out their offices, to ignorance of record preservation rules, or even due to a willful desire to hide unflattering facts from the gaze of history. I imagine that a number of personnel – especially political appointees – will be leaving the DOJ over the course of the next six or seven months. What steps have you taken to ensure that personnel are aware of their legal obligations with respect to document preservation and are complying fully?

ANSWER: The Department of Justice assures that documents and records are properly handled and protected upon employee departure as follows:

1. Department of Justice Order DOJ 2710.8c provides that departing staff may not remove Departmental documents or information except in accordance with this Order. Under no circumstances may a departing staff member remove originals, the only copy, or information that is otherwise protected by law. In addition, the Order provides that departing staff may request copies of documents in advance of their departure. Upon request, appropriate Departmental officials review the request and the documents and may grant or deny the request wholly or in part and may impose limitations or conditions for removal of the copies.

2. In September 2008, the Department began to conduct outbriefings for political appointees and will continue to do so as more staff depart. The outbriefings include a presentation on recordkeeping responsibilities, cite to the above Order and the Federal Records Act, and provide instruction on how to handle Departmental information upon departure. Attendees are also provided with information on contacts for further questions and assistance.

QUESTIONS FROM SENATOR DURBIN

Durbin 78. At last week's hearing, Senator Feingold asked you about the FBI's proposed guidelines that would allow agents to engage in racial and ethnic profiling in opening terrorism investigations. This is disturbing news to those of us who believe profiling is counterproductive -- terrorists can evade a profile once they learn about it. Profiling won't help us catch the Theodore Kaczynskis and Timothy McVeighs of the world.

In a speech you gave in March at the Commonwealth Club of California, you were asked about the Justice Department's use of profiling with regard to Muslim and Arab-Americans. You said: "We investigate where the threat is coming from. The threat is coming from Islamist extremism. It's not coming from Calvinism." That comment suggests you may discount the possibility of terrorist acts by non-Muslims.

Is it your belief that Islam produces more extremists than other religions?

ANSWER: The new guidelines do not allow agents to engage in racial or ethnic profiling in opening terrorism investigations or in any other context. In particular, they "do not authorize any conduct prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." Attorney General's Guidelines for Domestic FBI Operations I.C.3, p. 13. That Guidance, in turn, was promulgated to "ensure an end to racial profiling in law enforcement."

That said, the most significant international terrorist threat currently derives from Islamist extremism. This threat is not based on ethnic or religion-based profiling but on sound intelligence reporting, known acts of terrorism, existing cases, and other similar, traditional bases of investigation. We do not discount the possibility of threats to the national security and to the safety of Americans from other individuals and groups outside and within the United States regardless of nationality or motivation and will continue to evaluate and investigate such threats as they arise.

Durbin 79. If not, why did you single out Islam in your speech?

ANSWER: Please see the response to question 78. The existence of Islamist extremism as the source or motivation of the primary terrorist threats against the United States is a well documented phenomenon. As the Nation's lead agency for the investigation of threats of terrorism on American soil, it is the Department's responsibility to recognize and respond to this threat. As stated in question 78, the Department does not and will not discount or ignore the potential of a national security or criminal threat from anywhere.

Durbin 80. Isn't it possible the new FBI guidelines will result in agents taking their eye off the ball when it comes to investigating non-Muslim domestic terrorists like Theodore Kaczynski and Timothy McVeigh?

ANSWER: We do not believe that the consolidated guidelines will result in FBI agents "taking their eye off the ball." The new guidelines provide the ability to proactively investigate all threats to national security, including domestic terrorism, and do not rank or prioritize which threats should be investigated.

Durbin 81. Won't the new FBI guidelines result in your investigating Americans without any evidence of misconduct?

ANSWER: No. A preliminary or full investigation requires some fact-based indication of crime or a national security threat. An assessment, which requires a proper purpose but not a factual predicate, does not investigate subjects in the traditional sense—it is intended to use relatively less intrusive techniques to evaluate the validity of an allegation or the existence or absence of a threat or vulnerability. If an assessment reveals the existence of factual support of a violation of federal law or threat to national security by an individual or group, then that individual or group will be investigated using all applicable and appropriate investigative tools available to the Department within the bounds of the law.

The new guidelines do not confine the FBI to a purely reactive role of following up on investigative leads brought to the FBI's attention by others, but rather allow the FBI to seek information concerning terrorism and other criminal activities proactively. For example, authorized proactive activities under the guidelines include "surfing the Internet to find publicly accessible websites and services through which recruitment by terrorist organizations and promotion of terrorist crimes is openly taking place; through which child pornography is advertised and traded; through which efforts are made by sexual predators to lure children for purposes of sexual abuse; or through which fraudulent schemes are perpetrated against the public." Attorney General's Guidelines for Domestic FBI Operations, p. 17.

These proactive informational activities do not constitute "investigating Americans without any evidence of misconduct" and do not involve any new sphere of activity for the FBI. Rather, the predecessor guidelines on which the new guidelines are based similarly recognized that proactive information collection is a valid and important element in the FBI's discharge of its responsibilities to protect the public from terrorism and other crimes in violation of federal law. *See, e.g.*, Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, p. 3 ("To carry out its central mission of preventing the commission of terrorist acts against the United States and its people, the FBI must proactively draw on available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of

acts of terrorism before they occur."); Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, p. 6 (authorization of "surfing the Internet as any member of the public might do to identify, e.g., public websites, bulletin boards, and chat rooms in which bomb making instructions, child pornography, or stolen credit card information is openly traded or disseminated, and observing information open to public view in such forums to detect terrorist activities and other criminal activities.").

The standard for opening a preliminary investigation remains the same in the consolidated guidelines as it was in the national security guidelines and in the general crimes guidelines: a preliminary investigation may be initiated on the basis of "information or an allegation" indicating criminal activity or a threat to the national security.

Durbin 82. Will you agree to show the proposed FBI guidelines to Arab and Muslim-American organizations and allow them to provide feedback before the guidelines are finalized?

ANSWER: On September 12, 2008, representatives from the Department, including the FBI, met with a wide range of outside organizations. During the meeting, Department representatives provided an overview of the consolidation project, allowed the groups to review the draft guidelines, and then answered questions about the draft consolidated guidelines. Confirmed attendees of the meeting included representatives of the following groups: American Civil Liberties Union, American-Arab Anti Discrimination Committee, Hindu American Foundation, Pakistani American Public Affairs Committee, Pakistani American Leadership Center, Sikh American Legal Defense and Education Fund, United Sikhs, Arab American Institute, National Association of Muslim Lawyers, Muslim Public Affairs Council, Center for Democracy and Technology, and Electronic Privacy Information Center.

Durbin 83. In May 2007, Assistant FBI Director John Miller gave the following testimony before the Senate: "We now have partners in the Arab-American and Muslim communities. Some have become publicly declared allies in our efforts to condemn terrorism. They have become our bridge to many who viewed the FBI with either contempt, or worse, fear. They now come through the doors of the FBI and feel free to share their views on sensitive issues." Are you at all concerned the new FBI guidelines will burn this bridge between the FBI and the Arab and Muslim-American communities?

ANSWER: We take very seriously the concerns raised by our partners in the Arab-American and Muslim communities. In fact, we have briefed some representatives from those communities already and intend to follow up further. In those briefings, we have explained why the new guidelines do not permit ethnic profiling as well as the safeguards that will be built into the FBI's internal policy guidance that will prevent investigative

activity based on ethnicity or the exercise of First Amendment rights. The FBI continues to deliver this message and to seek feedback from these communities now that the guidelines have become effective (as of December 1, 2008). We believe that the consolidated guidelines, which maintain the status quo as to the permissible use of race, ethnicity, or religion by the FBI in its domestic investigative activities, continue to strike the appropriate balance.

Durbin 87. A class action lawsuit was recently filed by applicants who were denied positions at DOJ based on political motivations. Do you intend to defend the Justice Department against this lawsuit and, if so, on what basis?

ANSWER: The Federal Programs Branch of the Department of Justice's Civil Division is representing the Department in the class action filed against it by past applicants to the Department's Honors Program. On December 2, 2008, the Department filed a Motion to dismiss the complaint. The bases for that Motion are set forth in the brief, which is attached.

Durbin 94. In late April, Senator Obama and I sent a letter to you and to Deputy Attorney General Mark Filip alerting you to an alarming increase in gang violence in the Chicago area and urging you to immediately focus additional Justice Department resources on the problem. You have committed to hold an anti-gang training session in Chicago this month for hundreds of law enforcement and prosecutors. This is a positive step, and I appreciate it, but more needs to be done.

In May, I met with Mr. Filip to ask him in person to include Chicago in the Department's Comprehensive Anti-Gang Initiative. This is a program that has provided 10 cities with $2.5 million dollars each for gang prevention, enforcement, and prisoner re-entry efforts. I told Mr. Filip that when you look at the criteria the Department has used for selecting cities for the Initiative - criteria like the "severity of the gang problem" and the existence of "established infrastructure to support the envisioned prevention, enforcement and re-entry components"- it is hard to believe that Chicago has not been selected for the program. Mr. Filip pledged to see what he could do to expand the Comprehensive Anti-Gang Initiative to include more cities, and to strongly consider Chicago for inclusion.

Please provide me with an update on the Comprehensive Anti-Gang Initiative and whether Chicago will be included in the Initiative.

ANSWER: The Department announced in August 2008 its intent to expand its Comprehensive Anti-Gang Initiative to include Chicago and Detroit. With the addition of these cities, the initiative reached a total of twelve communities with awards of $2.5 million to support anti-gang strategies, including prevention, enforcement, and prisoner reentry.

Chicago and Detroit were selected to receive grant funds based on a variety of factors, including the need for concentrated anti-gang resources, the existence of established infrastructure to support the envisioned prevention, enforcement and re-entry components, and the existing partnerships that are prepared to focus intensely on the gang problem.

The Comprehensive Anti-Gang Initiative complements existing Department of Justice programs to combat gangs and reduce gun-related crime throughout the country, including Project Safe Neighborhoods (PSN). Since 2001, the Department has allocated over $2 billion to PSN to combat violent crime at the federal, state and local levels.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 99. A few months ago I wrote to the Justice Department's Antitrust Division to express my serious concerns with the proposed JBS acquisition of National Beef Packing and the Smithfield Beef Group, and to urge a careful review of the proposed merger. You may be aware that Senator Kohl recently chaired a hearing in the Judiciary Antitrust Subcommittee on the JBS merger, and we heard from a number of experts who also voiced concerns with this proposed transaction. Mr. Attorney General, will you make sure that the Justice Department takes into account my concerns about the JBS transaction?

ANSWER: The Department conducted a thorough investigation of the proposed transactions' effect on competition, and filed a civil antitrust lawsuit on October 20, 2008, in U.S. District Court in Chicago to block JBS's proposed acquisition of National Beef Packing Company. The Department is not challenging JBS's acquisition of Smithfield Beef Group Inc. As part of its investigation of these acquisitions, the Department considered each transaction's impact on all relevant markets, including the effects of any potential reduction in production capacity or in the number of competitors in each relevant market.

Grassley 100. In addition, will you make sure that the Justice Department considers the testimony and other materials provided to the Subcommittee as it reviews the JBS merger?

ANSWER: For its investigation of these transactions, the Department considered all available qualitative and quantitative evidence to evaluate the transactions' likely competitive effects, including the testimony and other materials provided to the Subcommittee. As a regular part of its investigations, the Department obtains evidence from any relevant source, including the merging parties, their competitors, their customers, consumer groups, and third party experts. In the case of agriculture mergers, it also consults with the Department of Agriculture to take advantage of its extensive experience in this area.

Grassley 101. How soon do you expect the Justice Department to make a determination on the JBS transaction?

ANSWER: The Department filed a civil antitrust lawsuit on October 20, 2008, in U.S. District Court in Chicago to block the proposed acquisition of National Beef Packing Company by JBS, but determined not to challenge JBS's acquisition of Smithfield Beef Group Inc. The Department determined that the JBS/National Beef transaction would combine two of the top four U.S. beef packers, substantially restructuring the beef packing industry by eliminating a competitively significant packer and placing more than 80 percent of domestic fed cattle packing capacity in the hands of three firms: JBS,

Tyson Foods Inc., and Cargill Inc. The Department concluded that the acquisition would lessen competition among packers in the production and sale of USDA-graded boxed beef nationwide. The Department also concluded that JBS's acquisition of National would lessen competition among packers for the purchase of fed cattle (cattle ready for slaughter) in the High Plains, centered in Colorado, western Iowa, Kansas, Nebraska, Oklahoma and Texas, and the Southwest, resulting in lower prices paid to cattle suppliers and higher beef prices for consumers.

Grassley 108. When can my staff expect to hear some substantive feedback from the Department on this?

ANSWER: As noted in the preceding response, the Department has not yet formulated a position on the need for a legislative response to the *Allison Engine* decision. The Department would be happy to review any proposals that the Committee may have and we are willing to work with the Committee on this issue.

Grassley 109. When FBI and Justice Department officials publicly identified Dr. Stephen Hatfill as a "person of interest" in the investigation of the anthrax attacks and removed him from a federally funded teaching position, I raised questions about how the case was being handled. After the 5th anniversary of the attacks passed in 2006 and there were still no arrests or indictments, I sought information about the progress of the case. I was disturbed by the credible allegations in Dr. Hatfill's lawsuit that the government had violated the Privacy Act by leaking his name to the press and implying that he was the anthrax killer. Now, just a few months before the 7th anniversary of the attacks, the Justice Department has agreed to pay Dr. Hatfill $5.8 million of taxpayer money. I know that, technically, the Department did not admit any wrongdoing, but actions speak louder than words. This case would not have been settled if the Justice Department thought it could win in court. So, the inference is that there is a $5.8 million apology of government misconduct here. If there was no misconduct, then the government should not be paying out millions of dollars. My concerns are: (1) the taxpayer is on the hook for paying Dr. Hatfill, (2) the FBI and DOJ officials who caused this mess by leaking Hatfill's name may escape without any consequences, and (3) nearly seven years have gone by without an arrest or indictment. In addition to the $5.8 million settlement, how much did the Justice Department spend defending the Hatfill lawsuit?

ANSWER: The settlement of *Hatfill v. Mukasey, et al.* (D.D.C.) resolved complex litigation that had been pending since 2003. The lawsuit included constitutional tort claims against federal officials in their personal capacity and Privacy Act claims against the Department and the FBI. The constitutional tort claims were dismissed in 2005 (including the claim against former Attorney General Ashcroft based on his having publicly referred to Dr. Hatfill as a "person of interest"). The Privacy Act claims (which alleged improper leaks, among other things) remained pending at the time of the

settlement. The settlement cost $4.6 million, not $5.8 million as was commonly reported in the media. The terms of the settlement called for the government to pay Dr. Hatfill and his attorneys $2.825 million, and to provide Dr. Hatfill an annuity that would pay out $3 million over time and that the government purchased for $1.78 million. The cost to the government thus was $4.6 million. While the gross payout over time to Dr. Hatfill will be approximately $5.8 million, that figure does not represent either the cost to the government or the present value of the settlement. The $2.825 million cash payment included a substantial amount of legal fees, with the precise amount to be determined between Dr. Hatfill and his attorneys. Under the Privacy Act, 5 U.S.C. § 552a, attorney's fees are recoverable against the United States. In addition to the cost of the settlement, the Department spent $158,091 on expert witnesses and approximately $62,137 on depositions in the course of the civil litigation.

The Department shares your concern over the cost of this matter to the taxpayers. It was only after extensive mediation and a careful analysis of the factual and legal issues in the case that the Department concluded that, considering the risks of further litigation, this settlement was in the best interests of the United States. The Department similarly shares your concerns over the disclosure of sensitive information to the media. As the Department stated to the presiding judge in Dr. Hatfill's case, the unauthorized disclosure of law enforcement-sensitive information can harm ongoing criminal investigations and can harm uncharged individuals, and the Department strongly condemns it. To the extent that evidence discovered in the case suggested potential improper conduct by government employees, that evidence was referred to the appropriate offices within the Department for investigation.

Grassley 110. Would you provide this Committee with a full accounting of those costs, as well as an estimate of how much it would have cost to continue through a trial?

ANSWER: The litigation costs for discovery-related expenses are detailed above. It would be speculative to estimate the additional expenses that the government would have incurred had the case gone to trial. If judgment had been entered against the government under the Privacy Act, however, the attorney fees for which the government would have been liable would have increased substantially, because of the extensive work that Dr. Hatfill's attorneys would have done to prepare for and conduct a trial.

Grassley 111. How much did the Justice Department spend on internal investigations to determine which government officials leaked information to the press?

ANSWER: The Office of Professional Responsibility does not maintain an accounting of the costs that it incurred in investigating who was responsible for the alleged leaks in this case. The Department does not currently have records on costs that may have been incurred by other components.

Grassley 112. Do you think it was more or less than the amount it spent defending the lawsuit?

ANSWER: Please see the response to question 111.

Grassley 113. Would you provide this Committee with a full accounting of internal investigation costs?

ANSWER: As noted in response to question 111, no such accounting was maintained.

Grassley 114. Has anyone been disciplined for leaking information about this case to the press?

ANSWER: No individual has been disciplined for allegedly leaking information to the press about Dr. Hatfill.

Grassley 115. Now that the case is settled, will there be any further internal inquiry to determine who was responsible for the leaks? If not, then what is going to deter an inappropriate leak of information to the press the next time if the only one who faces consequences is the U.S. taxpayer?

ANSWER: As the Department stated to the presiding judge in Dr. Hatfill's case, the unauthorized disclosure of law enforcement-sensitive information can harm ongoing criminal investigations and can harm uncharged individuals, and the Department strongly condemns it. Several offices within the Department of Justice have the authority to review such matters for potential violations of the criminal law and internal regulations and policies, including the Office of Professional Responsibility, the Office of the Inspector General, and the Criminal Division. We assure you that the Department takes such matters very seriously.

Grassley 126. I received a copy of a complaint filed with your office on June 20, 2008 by the attorney for former FBI Agent Jane Turner. The complaint alleges, among other things, that the FBI provided false and misleading information to Congress in response to my inquiries about the Turner case. As you may recall, Turner won a $565,000 verdict against the FBI from a federal jury in Minnesota. The jury found that her supervisors had made false and misleading statements in her performance reviews in retaliation for her for filing an Equal Employment Opportunity claim. I asked Director Mueller what steps the FBI was taking to discipline the FBI supervisors that the jury found had engaged in retaliation. In response, the FBI said that two of the FBI personnel involved had recently retired. In regard to a third, James Casey, the FBI promoted him to Special Agent in Charge (SAC) of the

Jacksonville, Florida field office and made to following claim in response to my inquiries:"Some media accounts have incorrectly identified James Casey as one of the FBI supervisors who retaliated against Ms. Turner. Mr. Casey was not assigned to the Minneapolis Division and his only involvement arose from his participation in the October 1999 inspection of the Minneapolis Division, which included the Minot Resident Agency (RA), Ms. Turner's office of assignment. That inspection resulted in Ms. Turner's "loss of effectiveness" transfer from the Minot RA back to the Minneapolis headquarters office, which the jury specifically found did not constitute retaliation." According to the complaint filed with your office, this response from the FBI is false and misleading. According to the complaint, "Mr. Casey not only participated in the downgrade of Ms. Turner's [Performance Appraisal Report (PAR)], he is the one who recommended that the downgrade take place, as well as the one who provided the factual findings that supported it." Moreover, the complaint alleges that Casey "not only made the recommendation that Ms. Turner's supervisors issue her the PAR, he also made the false assertions upon which the PAR relied. In fact, recommendations made to line-management by inspectors such as Mr. Casey must be acted on as part of the FBI's internal operating procedures. Casey's findings and recommendations compelled the Minneapolis Division to issue the retaliatory PAR, and actively encouraged and promoted the increasing retaliation Ms. Turner was facing[.]" What steps have you taken since you received them on June 20, 2008 to address these serious allegations that the FBI misled Congress on this matter?

ANSWER: The matters raised in the June 20, 2008, communication from Ms. Turner's attorney are currently under review. Mr. Stephen M. Kohn, her attorney, has been advised by letter that he would receive a further response once that review is completed and any appropriate action is taken on the issues raised.

Grassley 127. The complaint also alleges that (1) the promotion of James Casey was improper given the record of his conduct in the Turner case, (2) that the FBI violated Equal Employment Opportunity ("EEO") Regulations by failing to discipline employees for retaliating against Turner, and (3) that the FBI's inspectors and oversight bodies failed to respond to Jane Turner's complaints that the FBI mishandled major child crime cases, including making false representations about those cases in a formal inspection report. What steps, if any, have you taken to address these allegations?

ANSWER: Please see the response to question 126.

Grassley 128. Have you charged any independent authority to review the record in the Turner case to determine whether it, in fact, establishes that Casey participated in the retaliation against Turner? If not, why not?

ANSWER: Please see the response to question 126.

Grassley 129. If the record in the Turner case establishes that Casey retaliated against Turner for filing an EEO complaint, would that behavior be consistent with the qualities of someone who should be promoted to a SAC?

ANSWER: The FBI's Offense Table and Penalty Guidelines specifically address retaliation. If a finding of retaliation is made and aggravating factors are involved, an employee may be subject to dismissal. "Retaliation against whistleblowing or other protected activity" is specifically identified as an aggravating factor that may result in an employee's dismissal.

In this case, a review of SA Turner's performance revealed that she was not carrying out her responsibilities in a manner commensurate with her grade level and experience. The FBI's Inspection Division conducted an inspection of the Minot Resident Agency (MRA), and this inspection, led by James Casey, determined SA Turner's performance deficiencies had negatively impacted the ability of the MRA to perform its mission. As a result, the Inspection Division's recommendations included a recommendation that SA Turner be transferred to an entity that would afford her closer supervision and a re-evaluation of her performance based on the inspection findings. The jury expressly determined in its February 2007 verdict that neither the Special Agent in Charge (SAC) at the time of the December 1999 transfer nor any other FBI employee retaliated against Turner by transferring her from Minot, North Dakota, to the Division headquarters office in Minneapolis.

Grassley 130. Has the FBI ever disciplined an employee for retaliating against another? If so, please provide a description of the facts and circumstances as well as a description of the discipline imposed.

ANSWER: In February 2005, the FBI's OPR imposed a 3-day suspension on an Assistant Special Agent in Charge (ASAC) for attempting to reassign a subordinate Agent who had made a protected disclosure. On appeal, the Appellate Unit vacated the 3-day suspension based on an incorrect understanding of DOJ's whistleblower regulation. Thereafter, the FBI's General Counsel forwarded a letter to DOJ advising that the Appellate Unit had erred in its analysis of the Department's whistleblower regulation and would not make the same mistake in the future.

In September 2006, the FBI's OPR dismissed a supervisor who engaged in a number of infractions, including retaliation. The retaliation in this case was not whistleblower retaliation. In January 2007, the FBI's OPR proposed the dismissal of a SAC for retaliating against a subordinate Agent who had made a protected disclosure. The SAC retired after being served with OPR's proposed termination letter. In December 2007, the FBI's OPR issued a letter of censure to an FBI official who advised a subordinate that he would sue her if she followed through on her threat to file what he viewed as baseless allegations against him. As DOJ concluded during its investigation of the matter, OPR found that the subordinate's allegations were, in fact, baseless, but that the supervisor should nevertheless not have threatened suit.

SUBMISSIONS FOR THE RECORD

United States Senate

WASHINGTON, DC 20510

February 12, 2008

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Inspector General Fine and Counsel Jarrett:

We request that you investigate the role of Justice Department officials in authorizing and/or overseeing the use of waterboarding by the Central Intelligence Agency.

Attorney General Michael Mukasey refuses to investigate the Administration's authorization and use of waterboarding. CIA Director Michael Hayden has testified that the CIA waterboarded three detainees, and Attorney General Mukasey has testified that, "There are circumstances where waterboarding is clearly unlawful." Nonetheless, the Attorney General refused Senator Durbin's request to investigate because he does "not believe such an investigation is necessary, appropriate, or legally sustainable."

Attorney General Mukasey admitted that, "the CIA sought advice from the Department of Justice, and the Department informed the CIA that [waterboarding's] use would be lawful under the circumstances and within the limits and the safeguards of the program." The Attorney General's justification for refusing to open an investigation is that, "no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice." However, this does not address Senator Durbin's request that "a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law" (our emphasis).

Waterboarding has a sordid history in the annals of torture by repressive regimes, from the Spanish Inquisition to the Khmer Rouge. The United States has always repudiated waterboarding as a form of torture and prosecuted it as a war crime. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, have stated unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions.

Yet, despite the virtually unanimous consensus of legal scholars and the overwhelming weight of legal precedent that waterboarding is illegal, certain Justice Department officials, operating behind a veil of secrecy, concluded that the use of waterboarding is lawful. We believe it is

appropriate for you to investigate the conduct of these Justice Department officials. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful.

To restore the faith of our intelligence professionals and the American people in the Justice Department's ability to provide accurate and honest legal advice, we request that you make your findings public.

We ask that you explore, among other things:

- Did Justice Department officials who advised the CIA that waterboarding is lawful perform legal work that meets applicable standards of professional responsibility and internal Justice Department policies and standards? For example, did these officials consider all relevant legal precedents, including those that appear to contradict directly their conclusion that waterboarding is lawful? Did these officials consult with government attorneys who are experts in the relevant legal standards, e.g. Judge Advocates General who are experts in the Geneva Conventions? Was it reasonable to rely on standards found in areas such as health care reimbursement law in evaluating interrogation techniques?

- Were Justice Department officials who advised the CIA that waterboarding is lawful insulated from outside pressure to reach a particular conclusion? What role did White House and/or CIA officials play in deliberations about the lawfulness of waterboarding?

We agree with Attorney General Mukasey that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. However, if CIA agents or contractors have been put in jeopardy by misguided counsel from the Justice Department, including legal opinions that the Administration has been forced to repudiate, and as a result they risk war crimes prosecution overseas, this is a serious matter. It also places CIA agents at risk of receiving similarly flawed advice in the future. Moreover, the Justice Department's continued refusal to repudiate waterboarding does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. We believe it merits investigation to determine if these grievous results were the product of legal theories violating the Department's professional standards, or improper influence violating the Department's standards for independent legal advice.

We respectfully request that you inform us whether you plan to initiate a review as soon as possible, and no later than February 19, 2008. We also request that you inform us whether the results of your review will be provided to Congress and made public. Thank you for your time and consideration.

Sincerely,

Richard J. Durbin

Sheldon Whitehouse

Statement
United States Senate Committee on the Judiciary
Oversight of the U.S. Department of Justice
July 9, 2008

The Honorable Charles Grassley
United States Senator , Iowa

Prepared Statement of Senator Chuck Grassley of Iowa
Senate Committee on the Judiciary
Department of Justice Oversight Hearing
Attorney General Michael Mukasey
Wednesday, July 9, 2008

Chairman Leahy, thank you for calling this hearing today on Department of Justice oversight. I appreciate Attorney General Mukasey appearing for another oversight hearing. These hearings go a long way to strengthen accountability in our federal government. I plan to ask a number of questions of the Attorney General and ask for his cooperation in securing documents and information that I have previously requested that remain outstanding; some of them have been for more than a year.

First off, I would like to discuss with the Attorney General some issues that are directly impacting my home state of Iowa following the devastating tornadoes and catastrophic flooding. I am concerned that as we start to repair vast parts of my state and the entire Midwest, unscrupulous individuals and government contractors may try to prey upon innocent individuals trying to rebuild. I am also concerned that given the large amount of relief that will be needed to bring things back to normal, we need to set up an effective umbrella of government oversight to ensure that monies appropriated go to those in need, not line the pockets of greedy contractors or be wasted by government bureaucracy.

I was glad to see that the Department of Justice issued some warnings via a press release that Iowans pay attention so they don't become "a victim twice" because of predatory pricing and/or contractor fraud. I want to ask the Attorney General what problems he sees, what role the Department can play in preventing this, and what the Department has done to work cooperatively with the plethora of federal agencies and various Inspectors General that will be providing and overseeing relief funding. I also want to follow-up with the Attorney General regarding a letter I sent with the Iowa Delegation asking for special consideration for law enforcement grant applications that may come in after the required deadlines or need amendment following the disasters in Iowa.

I also want to ask Attorney General Mukasey about the JBS merger that the Department of Justice is currently reviewing. A few months ago, I wrote to the Justice Department's Antitrust Division to express my serious concerns with the proposed JBS acquisition of National Beef Packing and the Smithfield Beef Group, and to urge a careful review of the merger. I'm worried that the JBS transaction could severely reduce the already limited number of buyers for the commodities of small, independent beef producers. The transaction could leave producers minimal selling options throughout large geographic regions. It would allow JBS to control the largest share of the beef market – approximately 32 percent of the beef processing market share - and potentially decrease product choice and increase product prices for the American consumer. With rising costs of food world-wide, I'm particularly concerned about the impact on shoppers in the grocery aisle.

Small independent producers, family farmers and other agricultural groups share my concerns about the merger and increased agribusiness consolidation. So do many antitrust experts, who expressed these concerns during a recent Judiciary Committee Antitrust Subcommittee hearing. The bottom line

is the more I look at this proposed JBS transaction, the more I have problems with it, and I'm going to make sure the Justice Department knows.

Next, I plan on discussing the False Claims Act with the Attorney General and the impact a recent decision by the Supreme Court will have on fraud recoveries across the country. In Allison Engine Co. v. United States ex rel. Sanders, the Supreme Court dealt yet another blow to the False Claims Act and those who are seeking to root out fraud and abuse in Government programs. I want to hear from the Attorney General about some emerging decisions by District Courts that have rejected cases filed by the Justice Department based upon the Supreme Court ruling in Allison Engine—one of which is from my home state of Iowa. I know that the Department of Justice supported the whistleblower in Allison Engine and filed a brief similar to one I filed with the Supreme Court. I want to hear how the Department views the Allison Engine decision and whether a legislative fix is necessary to ensure that subcontractors who commit fraud against the government aren't given a free pass by ripping off contractors who ultimately stiff the American taxpayer with the bill.

I also want to check in with the Attorney General regarding new statistics that show a significant backlog of False Claims Act cases outstanding at the Department of Justice. Specifically, the Attorney General responded to questions from our last oversight hearing that over 900 False Claims Act cases are currently outstanding at the Department with more than 130 of those cases under judicial seal for more than 36 months. I want to find out what the delay is in these cases, if the Department needs additional resources to pursue these cases, and how long the Department believes it will take to adequately address these cases.

Finally, I would like to discuss the investigation into the 2001 Anthrax attacks. The Justice Department recently agreed to pay Dr. Stephen Hatfill $5.8 million to settle his Privacy Act lawsuit. Although the government admitted no wrongdoing, the evidence points to Justice Department and FBI personnel as the sources of the leaks implying that Dr. Hatfill was the anthrax killer. Now, taxpayers are on the hook for the misconduct of anonymous government officials who have apparently faced no consequences for what they did. I'd like to know how much money the government spent fighting this lawsuit and whether there will ever be any serious attempt to hold any of the leakers accountable.

I hope the Attorney General will provide answers to these important questions and work to provide the Committee with the outstanding document and information requests I have.

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

FEB 18 2008

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Senators Durbin and Whitehouse:

In your February 12, 2008 letter to this Office (OPR) and to the Office of the Inspector General, you requested an investigation into the role of Department of Justice officials in authorizing and overseeing the use of waterboarding by the Central Intelligence Agency. I am writing to advise you that the issues raised in your letter are included in a pending OPR investigation into the circumstances surrounding the drafting of the August 1, 2002 memorandum from the Department's Office of Legal Counsel to Alberto R. Gonzales, then Counsel to the President, captioned "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," and related, subsequent OLC memoranda. Among other issues, we are examining whether the legal advice contained in those memoranda was consistent with the professional standards that apply to Department of Justice attorneys.

Upon completion of our investigation, we will provide you with our results. Moreover, because of the significant public interest in this matter, OPR will consider releasing to Congress and the public a non-classified summary of our final report.

Thank you for bringing your concerns to our attention. We hope you will find this information useful.

Sincerely,

H. Marshall Jarrett
Counsel

Statement
United States Senate Committee on the Judiciary
Oversight of the U.S. Department of Justice
July 9, 2008

The Honorable Patrick Leahy
United States Senator , Vermont

STATEMENT OF CHAIRMAN PATRICK LEAHY
CHAIRMAN, SENATE JUDICIARY COMMITTEE
ON DEPARTMENT OF JUSTICE OVERSIGHT
JULY 9, 2008

Today we welcome Michael Mukasey back to the Committee for his second appearance as Attorney General. Mr. Mukasey has been on the job for eight months since succeeding Alberto Gonzales. He is now more than halfway through his term as Attorney General. His tenure will be judged by how much he has done to restore the Department of Justice, an agency whose mission and objectives were severely undercut by scandals under the Bush administration. Mr. Mukasey will also be judged by what the Department has done – and not done – to reaffirm the checks and balances that are the fulcrum for our democracy, and a key to protecting the rights and liberties of all Americans.

When this Committee began its oversight efforts at the start of this Congress, we exposed a crisis of leadership and partisan political influence that had taken a heavy toll on the tradition of independence that has long guided the United States Department of Justice. Senators on this Committee from both sides of the aisle joined together to press for accountability. What followed was a change in leadership at the Department, with the resignations of Attorney General Gonzales, the Deputy Attorney General, the Associate Attorney General, their chiefs of staff, the White House liaison, and the resignations of Karl Rove, his political deputies, the White House Counsel, and others.

We have seen what happens when the rule of law plays second fiddle to a President's agenda and the partisan desires of political operatives. It is a disaster for the American people.
Both the President and the nation are best served by a Justice Department that provides sound advice and takes responsible action, not one that develops legalistic loopholes and ideological litmus tests to serve the ends of a particular administration.

The recent report from the Department's Inspector General confirms what our oversight efforts have uncovered about the politicizing of hiring practices at the Department. It confirms our findings and our fears that the same Bush Justice Department officials involved with the firing of United States Attorneys were injecting partisanship into the hiring of young attorneys. I expect further reports from the Inspector General will shed additional light on the extent to which the Bush administration has allowed politics to affect – and infect – the Department's priorities, from law enforcement to the operation of the Civil Rights Division to the Department's hiring practices.

The Department of Justice is not the President's legal defense team any more than the Attorney General is his lawyer. The Attorney General is not the White House counsel and should not act as one. The Department of Justice is a law enforcement agency, not a partisan political operation. These are the truths that have been overridden in the last seven years.

This hearing is Attorney General Mukasey's opportunity to show us what he has done on each of these fronts. What he has done to restore the independence of the Department of Justice? What he has done to push back against the overreaching from the Bush-Cheney White House, including its claims

to unfettered power at the expense of the principles of judicial review and congressional oversight?

On issue after issue, from the warrantless wiretapping of American citizens, to the descent into torture thinly veiled by the use of the Orwellian-term "enhanced interrogation techniques;" from undercutting laws meant to protect clean air and clean water, to the untoward political influence of the White House at the nation's top law enforcement agency; from the destruction of CIA tapes showing detainee interrogations, to grandiose claims of immunity and executive privilege from congressional oversight – this administration makes the Watergate era look like child's play.

The conservative Supreme Court's recent decision in Boumediene v. Bush reaffirmed our core American values and serves as a stinging rebuke to the Bush administration's excesses. The Court's opinion not only rejected the administration's detention practices as unconstitutional, it also reminded us of the dangers posed to the Constitution by a runaway executive: "Security subsists, too, in fidelity to freedom's first principles. Chief among those are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." Justice Kennedy wisely counsels that we do not have a system in which this or any administration "may switch the Constitution on and off at will." He writes: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."

These principles of checks and balances and of the rule of law are what this administration, and a complicit Justice Department, have ignored—that our fundamental adherence to our Constitution and the rule of law is a strength. No one—not even a President—is above the law. The Justice Department owes its loyalty to the law.

How different would these last seven and a half years have looked if the Justice Department had served as a bulwark against the administration's overreaching? Instead, the Department of Justice provided "cover" for some of the administration's worst excesses. One of the most disturbing aspects of these years has been the Department's secret legal memoranda that have sought to define torture down to meaninglessness, sought to excuse warrantless spying on Americans contrary to our laws; and sought to justify absolute immunity of White House employees from congressional subpoenas without reference to a single legal precedent.

Attorney General Mukasey repeatedly assured us during his confirmation hearing that he would take a fresh look at these secret legal memos. He committed to this Committee that he would review them and withdraw or modify those that were unjustified or unwise. Even Attorney General Gonzales did that – he withdrew the August 2001 Bybee memo justifying torture when it came to light just before his own confirmation hearing in 2005.

We look forward finally to obtaining these memos-- to obtaining even the index of these memoranda-- that we have been denied over the years. Today we look forward to learning which aspects of what memos that have formed the legal framework for the Bush administration's policies have been modified or withdrawn by Attorney General Mukasey.

This Committee has a special stewardship role to protect our most cherished rights and liberties as Americans, and to make sure that our fundamental freedoms are preserved for future generations. The path taken during the last seven and a half years has been one that has disregarded basic rights, turned us from a nation devoted to the rule of law to one ruled by secret pronouncements of the executive.

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CLOSING STATEMENT OF CHAIRMAN PATRICK LEAHY
CHAIRMAN, SENATE JUDICIARY COMMITTEE
ON DEPARTMENT OF JUSTICE OVERSIGHT
JULY 9, 2008

I thank you, Mr. Attorney General, for appearing before the Committee today. I am grateful that, at least for today, we did not see a repeat of the anonymous Republican objections that blocked us from holding and completing many important hearings before the July Fourth recess.

We might have made more progress today had we received timely responses from you to questions we sent following our last hearing in January. We received the Department's responses only late last week, and responses to letters we sent months ago started pouring in on the eve of this hearing. I wish it did not take scheduling a hearing to start to get answers from you and the Department.

In your testimony, Mr. Attorney General, you focused on the upcoming election and on the transition to the next administration and next Attorney General. That is good. But with so little time left for this administration and in your tenure at the Department, I wish you were more focused on restoring the Department's role as protector of the rule of law. Instead, you seem content to serve as a caretaker for the regime of excessive executive power established by the Bush Administration.

On issues central to the rule of law and American ideals such as the legality of waterboarding and controversial secret memos justifying all manner of excesses, Mr. Attorney General, time and time again, you have avoided answering the Committee's questions and fulfilling commitments because, in your view, the issue is not "currently before" you. You have done so again today, finding it not "necessary" to review the controversial and flawed legal opinions written by John Yoo and others at OLC, turning a blind eye to the excesses they have allowed and may continue to allow if they are not withdrawn.

When this Committee last spoke to you on January 30, Senator Durbin asked if you had a chance to read various opinions from OLC. You said, and I quote, "I think those opinions would be considered principally in light of whether they relate to things that are current or not. But I will review them." That was a commitment to review them. Today, you have said you have not – and will not.

The job of the Attorney General is not to make decisions on individual cases or controversies like a judge, but to set policy for the Justice Department and the Nation. You have been given an opportunity to start setting things right at the Department after nearly eight years of erosion of our most basic civil rights and civil liberties and restore the rule of law to its place of prominence in American life. I urge you to make the most of your opportunity in your remaining time in office and will work with you to be successful.
# # # # #

Department of Justice

STATEMENT OF

THE HONORABLE MICHAEL B. MUKASEY
ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"

PRESENTED

July 9, 2008

I appreciate the opportunity to come before you today to talk about the work of the men and women of the Department of Justice.

I have now been Attorney General for almost eight months, and there is slightly less than seven months remaining in this Administration. As I move into the second half of my service, I would like to outline my priorities during the time I have left, and to review our progress in the five areas on which I have primarily focused so far.

As I indicated six months ago to this Committee, I am confident in relying on the talented, committed, and dedicated professionals at the Justice Department and I take great pride in them. During the last six months, I have been privileged to become better acquainted with these fine men and women and with the great work that they do. I deeply appreciate their resolute service to our Nation.

Mr. Chairman, I also appreciate the steps the Committee has taken in the past months to confirm several of the Department's officials, including Judge Mark Filip and Kevin O'Connor, who have been serving as Deputy Attorney General and Associate Attorney General, respectively; Beth Cook, our Assistant Attorney General for Legal Policy; and Greg Katsas, Assistant Attorney General for the Civil Division.

At the outset, I would like to outline two areas where I plan to focus my attention during my remaining time at the Department of Justice. First, the election season is upon us, and it is critical that the Department make every effort to assist state and local

governments in ensuring that the November elections run as smoothly as possible and that the American people have the utmost confidence in our electoral process. The Department is providing training to the lawyers and investigators who will be most responsible for those efforts. Just last week, for example, the Department held its seventh annual Ballot Access and Voting Integrity conference at the National Advocacy Center in Columbia, South Carolina. I spoke to the lawyers and agents in attendance about the importance of their work – of safeguarding the voting rights of all who are entitled to vote and of ensuring that those votes are not undermined or diluted by fraud or corruption. And I stressed the necessity of pursuing these cases according to what the law and facts require, and not based on partisan or political considerations.

The Department has primary responsibility for safeguarding the voting rights of all who are entitled to participate in elections. Through vigorous enforcement of the Voting Rights Act—one of the most important and most successful pieces of civil rights legislation in our history—the Department ensures that Americans of all races and colors as well as language minorities are able to participate effectively in the political process. Through other statutes—like the Uniformed and Overseas Citizens Absentee Voting Act, the Help America Vote Act and the National Voter Registration Act—the Department protects the vote of others in our society whose needs deserve particular attention.

The Department also helps guarantee the integrity of our elections through criminal laws combating voter fraud. In recent years, some have tried to suggest a conflict between protecting voting rights and combating voter fraud. But those are really

two sides of the same coin. If some of our citizens are denied their right to vote, that is a form of voter fraud, in the sense that the outcome of the election will not accurately reflect the popular will. If some voters engage in fraud, and either vote when they are not entitled to, or vote more than once, that dilutes the voting rights of all legitimate voters. Both protecting voting rights and combating voter fraud are essential to maintaining the confidence of all Americans in our system of government.

Through outreach and monitoring, the Department intends to maintain a significant presence throughout the election season. We will work closely with civil rights groups and state and local elections officials to identify and solve problems in a timely and appropriate fashion. We will publicize telephone numbers, websites and other means through which interested citizens can bring potential issues to our attention. The Department, in conjunction with the Office of Personnel Management, has already deployed hundreds of federal observers and monitors to locations around the country in 2008 and we will continue our monitoring efforts on Election Day, focusing on areas where there are potential civil rights violations and jurisdictions where we have ongoing consent decrees. Our goal is to make sure that any complaints are dealt with promptly and appropriately, and to make our presence felt so that the American people can continue to have confidence in our system of government.

Second, once the November elections are over, there will be the vitally important task of ensuring an orderly and safe transition to a new Administration. As part of that transition, we will take every step to ensure a smooth transfer of custody and

responsibility for our Nation's security to a new set of caretakers. One of my most solemn duties is to turn over responsibility for running the Department of Justice to the next Attorney General and to be able to say to him or to her that we have in place the tools necessary to keep the country safe.

This will be the first transition to a new Administration since September 11, 2001, and we know that those who helped perpetrate the outrage committed against us that day, and those who support and sympathize with their cause, will be watching for division within our country and for opportunities to attack. In the same way that some of the hijackers took practice flights prior to September 11th to assess airline security measures, so too others will be evaluating the strength of our national security during the transition to a new Administration. I am committed to making sure that, on January 20th, their analysis will be that our system is too strong to give them reason for hope.

This commitment will take effort and focus by everyone at the Department of Justice. Ensuring a smooth transition will require not only serious thought about the big picture, but also a serious focus on the details that make up that big picture. We must ensure that all of our country's security measures are attuned to the increased risk we face during this time of transition, and that we respond and adjust appropriately. We also must emphasize to the Department's employees that, although these months are a time of great anticipation, all of their considerable talents must be focused on the task at hand. And finally, we will have to make sure that the right personnel are in the right positions at the right times. In short, we must focus on every task, no matter how large or how small,

if we are going to show that, although we have a two-party political system in the United States, we are one nation. And that this nation stands together when needed, especially in times of transition or times of crisis.

It is also important that we do everything we can to give our national security professionals, who will be confronting the Al Qaeda threat in this Administration and the next, the tools they need to keep us safe. Nothing is more important in that regard than the effort to reform and update the Foreign Intelligence Surveillance Act. The ability to intercept and to analyze the electronic communications of our country's enemies is the best defensive weapon we have, and I appreciate all the efforts of the members of this Committee and your colleagues in the Senate in this regard.

We are also working to complete the post-September 11th transformation of the Department's institutional structure. After the September 11th attacks, and on the recommendation of two commissions that looked into the matter, the Department undertook two major reorganizations. One was the creation of the National Security Division, which placed within one division, and in a single chain of command, the Department's counterterrorism and counterespionage prosecutors and the intelligence lawyers who represent the government before the Foreign Intelligence Surveillance Court. The second was the establishment of the National Security Branch within the Federal Bureau of Investigation, which was created to provide an organizational structure to help manage the Bureau's transformation from solely an elite law enforcement agency, into an agency with a principal mission to detect and prevent terrorist attacks.

The National Security Division and the National Security Branch are each less than three years old, and, as you would expect, the transformation of the Department's national security structure requires more than a change on an organizational chart; it requires sustained commitment to developing the management, personnel, and processes necessary to make these reorganizations successful. This effort is particularly important at the Federal Bureau of Investigation, which has worked hard to become a world-class intelligence agency. That goal involves developing new ways to recruit, train, and provide career paths for those who wish to devote their careers in the Bureau to intelligence collection and analysis, as opposed to the Bureau's more traditional law enforcement activities. The Director is committed to continuing this progress, and I have been doing what I can to support him in this effort. One topic that I am exploring is whether the various sets of Attorney General guidelines governing the FBI's investigative activities can be consolidated and harmonized, so that the Bureau's operators have clearer and more consistent rules governing how they conduct national security and criminal investigations.

I would like to devote the remainder of my statement to providing updates on the Department's efforts and accomplishments in the last six months in the five critical areas I identified in January 2008: national security, violent crime, civil rights, public corruption, and immigration and border security.

National Security

Although I believe we have made progress in each of these areas, national security stands apart as an area of particular focus for me. Continuing to work to improve the effectiveness of our national security capabilities—particularly as we approach our Nation's first post-9/11 transition—will be one of the most important tasks I have going forward.

Each morning, I receive a classified briefing on all of the terrorist threats our Nation faces around the globe. These briefings are simultaneously sobering and alarming, and the plots we hear about each day are both creative and deadly. We face an enemy with a presence, literally, in every part of the globe; yet an enemy who, in many places, is virtually undetectable. Because of that, it is critical that we get timely intelligence of our adversaries' capabilities and intentions.

The Department has had important national security successes in recent months. For example, on June 13, 2008, a jury in the Northern District of Ohio convicted three Ohio residents, Mohammad Amawi, Marwan El-Hindi and Wassim Mazloum, of conspiracy to provide material support to terrorists and conspiracy to commit terrorist acts against Americans overseas, including U.S. soldiers in Iraq. On June 3, 2008, another Ohio resident, Christopher Paul, pleaded guilty in the Southern District of Ohio to conspiracy to use explosive devices against targets in the United States and Europe. At his plea hearing, Paul admitted that he joined al-Qaeda in the early 1990s, later fought in Afghanistan and Bosnia, and ultimately conspired with a German terror cell to bomb

targets in the United States and abroad. These prosecutions highlight the important role that the material support statutes play in the Department's effort to address terrorism and preparation for terrorist attacks across the spectrum of threats.

In recent months, I have spent considerable time maintaining and building upon our law enforcement and counterterrorism relationships with our overseas partners and allies. Because these efforts are of great importance, I would like to elaborate on what the Department has been doing in this area. In March 2008, I participated in the Justice and Home Affairs Ministerial between officials from the European Union and the United States. We discussed issues ranging from terrorist recruitment and radicalization, to plans to share information to combat terrorists, to an increased focus on international organized crime. We also discussed ways to share best practices and further benefit from the work of our respective law enforcement and disaster response agencies, by, for example, exchanging information on how we might respond to potential chemical or biological attacks.

Also in March 2008, I met with German officials in Berlin for the initialing of a bilateral agreement between Germany and the United States that permits access to biometric data and spontaneous sharing of data about known and suspected terrorists. This is a great achievement, both for its practical benefits and for what it symbolizes. This agreement gives us an important new tool to combat terrorism and to fight transnational crime. Each of our countries will have access to the criminal fingerprint databases of the other—in the first instance simply to determine on a yes or no basis if

there is evidence in those databases that could be helpful in criminal investigations and prosecutions. If such evidence is located, the agreement also sets forth procedures for obtaining it through lawful processes that also ensure appropriate protection for personal data. In addition, the agreement provides a mechanism for sharing information about known and suspected terrorists, so we can prevent them from entering our countries and attacking our people. But beyond the important practical value of this agreement, it symbolizes the joint resolve of Germany and the United States to fight terrorism and transnational crime.

In addition to building on established law enforcement relationships, the Department has focused on our efforts to build the law enforcement capacity of emerging overseas partners. Recently I was in Asia—Thailand, Indonesia, and finally in Japan, which hosted the G8 Justice and Home Affairs Ministerial—meeting with representatives of law enforcement and with the American officials working to maintain the cooperation between our countries on legal matters. I had the opportunity to see first-hand the highly successful capacity-building programs the Justice Department has underway in Indonesia. With vital funding and programmatic and policy support from the State Department, and with the active cooperation of State Department personnel, we have placed an experienced U.S. federal prosecutor in Jakarta to work with the Indonesian Attorney General's Terrorism and Transnational Crime Task Force, and to develop a new Anti-Corruption Task Force; and we have in place a Senior Law Enforcement Advisor, who—with 44 staff members—leads more than a dozen law enforcement programs with the Indonesian National Police, on topics ranging from national training reform, to forensic

analysis, to specialized investigative techniques for combating human trafficking, intellectual property violations, and maritime crime.

The results of this law enforcement partnership with Indonesia have been remarkable: among other accomplishments, the units we have worked with have secured more than 40 convictions of terrorists, made one of the largest single seizures of counterfeit pharmaceuticals ever, and helped secure the strategic waters surrounding Indonesia, which were plagued by piracy and smuggling.

Indonesia is only one of more than 60 countries in which the Department of Justice is engaged in overseas rule of law work. We are working with foreign governments around the world to develop professional and accountable law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism. We do this both through the overseas work of our law enforcement agencies – including the FBI, DEA, USMS, and ATF – and through our specialized international prosecutorial and police development offices, the Office of Overseas Prosecutorial Development, Assistance and Training, known by its acronym OPDAT, and the International Criminal Investigative Training Assistance Program, known as ICITAP.

With funding from and in coordination with the State Department, those two programs place federal prosecutorial and police experts in host countries for long-term assignments designed to focus on the comprehensive development of all pillars of the

criminal justice system. Having had the chance myself to see these programs in action in Indonesia, Iraq, Turkey, and Thailand, and having met with my counterparts from Colombia and other countries where these programs are in place, I can tell you that this is some of the most important work that the Department does. By building the capacity of our overseas law enforcement partners to fight terrorism and transnational crime within the rule of law, we increase the safety not only of their citizens, but of our own as well.

Let me now address the Supreme Court's recent decision in *Boumediene,* which represents a quite significant challenge that the Department will have to manage over the remainder of my tenure as Attorney General. We are disappointed with the outcome of the case. In the Detainee Treatment Act, Congress and the President had established quite reasonable procedures to allow the U.S. Court of Appeals for the D.C. Circuit to review the detention of the enemy combatants at Guantanamo Bay, and those procedures went well beyond what the United States had provided to its enemies in any past conflict. The majority opinion in *Boumediene* conceded that aliens detained outside the country had never received the benefit of a writ of habeas corpus, yet the Court concluded that the unique circumstances prevailing at Guantanamo Bay justified an extension of the writ to aliens detained at that facility. The Court's decision adds substantially to the burdens that the Department of Justice—and others—will face in defending potentially hundreds of lawsuits in federal district court, and I think that it is fair to say that the decision raises far more questions about that litigation than it answers. Right now, we are studying those questions, and I hope that we will be able to help the courts, and/or Congress, provide some of the answers in the coming months.

Violent Crime

Violent crime remains near historic lows in the United States, in large part because of the hard work of our state and local partners, but also as a result of federal, state and local law enforcement partnerships developed through initiatives such as Project Safe Neighborhoods. Under Project Safe Neighborhoods, federal prosecutors and law enforcement focus their resources on the most serious violent offenders, taking them off the streets and placing them behind bars where they cannot re-offend.

At the end of January 2008, the Department launched the Project Safe Neighborhoods Anti-Gang Training in Chapel Hill, North Carolina. The training program was attended by more than 550 participants from North Carolina and South Carolina, including law enforcement officers, prosecutors, and prevention and re-entry representatives. The goal of the program is to increase the level of knowledge, communication, and collaboration involved in addressing the criminal gangs preying upon communities throughout the nation.

The training program's courses are comprehensive and include gang-related prevention, enforcement, prison re-entry programs, and an executive session designed for law enforcement executives. The training assists state and local jurisdictions in the collection, analysis, and exchange of information on gang-related demographics, legislation, literature, research, and promising program strategies. The training helps

state and local law enforcement and criminal justice agencies learn how to recognize and identify gang presence in a community.

This training will be offered regionally throughout the United States in 2008 and 2009. Besides Chapel Hill, the program has been held thus far in Nashville, Tennessee; Oklahoma City, Oklahoma; Birmingham, Alabama; and Salt Lake City, Utah. Future training sites include Chicago, Illinois; Spokane, Washington; Rochester, New York; Sacramento, California; and Mesa, Arizona.

The Department is also making great strides in combating gangs with international operations. In June 2008, a federal grand jury in Charlotte, North Carolina, indicted 26 members of the violent gang known as MS-13 on charges of federal racketeering and related crimes in the United States and El Salvador. The indictment alleges, among other things, that the gang members formed a drug trafficking conspiracy, distributed narcotics, committed robberies, illegally possessed firearms, committed acts of violence and extortion, and intimidated witnesses and obstructed justice.

This indictment results, in part, from a series of comprehensive anti-gang initiatives undertaken jointly by the Justice Department and national police of El Salvador, known as the PNC. For example, last year we created a joint FBI and PNC Transnational Anti-Gang center – the so-called "TAG" center – posting experienced anti-gang FBI agents in El Salvador alongside PNC officers, analysts and prosecutors to combat transnational gang activity.

Supplementing the TAG center, the FBI's Central American Fingerprint Exchange initiative operates to assist El Salvador and other Central American countries in identifying, tracking, and apprehending gang members. And through the International Law Enforcement Academy in El Salvador, we have provided crucial anti-gang training to law enforcement officers and prosecutors from El Salvador and from other countries throughout the region.

This high level international commitment to fighting back against transnational gangs was also evident in the meeting I presided at two months ago in Washington, D.C., of the justice ministers of Central America and Mexico. Combating gangs was a significant focus of that meeting. And following on that meeting, we are looking for ways to expand further our partnerships and efforts throughout the region.

These international initiatives benefit from the efforts of our Criminal Division's Gang Squad, federal prosecutors in our U.S. Attorneys' offices, and the FBI's MS-13 National Gang Task Force. They also benefit from the pair of anti-gang centers that recently opened their new joint headquarters in Virginia: the National Gang Intelligence Center and the National Gang Targeting, Enforcement & Coordination Center, the task force known as "GangTECC."

The Department is also responding to the threat of international organized crime, a hybrid criminal problem that implicates three of the Department's national priorities:

national security, violent crime, and public corruption. It needs a coordinated response and an openness to new ways of doing business. It also demands that we work closely with our foreign colleagues in order to dismantle global criminal syndicates. In short, this is about more than the Department of Justice. It involves our law enforcement and non-law enforcement colleagues at the Departments of Homeland Security, State, Treasury, and Labor, the U.S. Postal Service, as well as the intelligence community.

The Attorney General's Organized Crime Council, which met in March 2008 for the first time since 1993, will have a leading role in coordinating that effort. It is actively engaged in identifying the most serious threats, and in developing strategies to combat them. In April, I met with the Council and approved a Law Enforcement Strategy to Combat International Organized Crime. The strategy is an important part of this Administration's ongoing coordinated commitment to safeguard our national security from transnational threats. The strategy places its highest priority on those groups that threaten our national security, the stability of our economy, and the integrity of government institutions, infrastructure, and systems in the United States. Let me describe the strategy, which we've already begun to implement; the threats we face; and some of the recent successes we have had against international organized crime outfits.

First, we have to target the biggest organized crime threats, just as we've done successfully in targeting the worst transnational drug cartels. We will develop a high-priority list of people and organizations that pose the greatest threat, and then focus our resources on them.

Second, we have to marshal information from all available sources—law enforcement, the intelligence community, foreign partners, and the private sector—so we can identify and draw connections among the groups.

Third, we have to use every means and agency at our disposal—whether it is the Secret Service to identify counterfeit currency, the IRS to locate financial assets, or the Bureau of Alcohol, Tobacco, Firearms and Explosives to find contraband weapons. That means we will be increasing the information we provide to the State Department to support their programs to deny visas to criminals, and to the Treasury Department to support their sanctions programs that target money laundering. It also means we will step up what we are already doing with our international partners to get these criminals wherever they hide. Criminals have no regard for international borders, so we're making sure those borders do not pose an obstacle to effective enforcement.

Fourth, we have to develop aggressive strategies for dismantling entire criminal organizations and removing their leadership. We have more than 120 prosecutors, and the FBI has more than 500 agents and analysts, dedicated to fighting organized crime. These professionals are skilled in using techniques originally developed to fight La Cosa Nostra and other domestic threats. We're going to capitalize on that expertise in our global fight.

As I said earlier, the assessment contained in the Law Enforcement Strategy describes the most important threats in the global battle against organized crime. The first threat we identified was that international organized criminals control significant positions in the global energy and strategic materials markets. They are expanding their holdings in these sectors, which corrupts the normal functioning of these markets and may have a destabilizing effect on U.S. geopolitical interests. A prime example of an international organized criminal in this area is Semion Mogilevich—also known as the "Brainy Don"—and several members of his criminal organization whom the United States charged in a 45-count racketeering indictment in 2003. According to published reports, even after the indictment, Mogilevich continued to expand his criminal empire in a new direction. He was said to exert influence over large portions of the natural gas industry in parts of what used to be the Soviet Union. The arrest of Mogilevich by Russian police in January 2008 is a positive sign. But we continue to monitor the growth of organized crime and its penetration into some of these markets with great concern.

When I use the term "international organized criminal," I do not mean to suggest that these are only foreign citizens, or to place blame for the problem on other nations. I am referring to the globalization of crime and to groups with members and associates around the world, including here in the United States.

A second threat we identified was the logistical and other support that organized crime provides to terrorists, foreign intelligence services, and foreign governments that may be targeting the United States or otherwise acting against our interests. In March

2008, a complaint was unsealed against Viktor Bout, a notorious international arms trafficker. Bout, who has since been indicted, is charged with conspiring to sell millions of dollars worth of weapons to the Revolutionary Armed Forces of Colombia, known as FARC -- a designated foreign terrorist organization. The complaint alleges that Bout, along with an accomplice, agreed to sell the FARC 100 surface-to-air missiles, as well as launchers for armor-piercing rockets. Luckily, in this instance, the individuals holding themselves out to be members of the FARC were actually confidential sources working with the Justice Department. As this example makes clear, although these criminals are not motivated by ideology, when the price is right, they are more than willing to help the people who are motivated by ideology.

Another set of recent cases illustrates a third threat—from international organized criminals who smuggle and traffic people and contraband into the country. Together, Operation Royal Charm in New Jersey and Operation Smoking Dragon in Los Angeles uncovered an extensive Asian criminal enterprise that was smuggling nearly every form of contraband imaginable. These investigations resulted in the indictment of 87 people who smuggled goods into the United States by using shipping containers with bills of lading that falsely identified the contents as toys and furniture from China. Instead of toys, the smugglers were bringing in millions of dollars worth of high quality counterfeit $100 bills as well as counterfeit pharmaceuticals and cigarettes, and illicit drugs including ecstasy and methamphetamine. Two of the defendants entered into a deal with undercover agents to provide various weapons, including hundreds of shoulder-fired rockets capable of shooting down airplanes.

A fourth threat involves the ways organized crime exploits the U.S. and international financial systems to move illicit funds. These groups are run like global corporations; they use sophisticated financial operations. They may exploit legitimate banking systems here and abroad to launder money, or engage in other financial crimes like insurance fraud. And over the past several years we have seen cases where U.S. shell companies were established and used for global money laundering schemes in Russia, Latvia, the U.S., and other countries. The criminals operating these schemes are willing to move money for anyone who needs to hide the source, ownership, or destination of the funds—no questions asked. They utilize corrupt banking officials and exploit lax anti-money-laundering protections around the world to inject illicit funds into the global money stream. By all estimates, such schemes move billions of dollars every year through U.S. financial institutions.

A good example is the case of Garri Grigorian, a Russian national living in the United States who helped launder more than $130 million on behalf of the Moscow-based Intellect Bank and its customers, through bank accounts in Sandy, Utah. Grigorian and his co-conspirators set up three U.S. shell companies, and then set up bank accounts for those companies in Utah and New York. The companies never did any business; they existed only to create the illusion that transactions to and from their bank accounts were legitimate trade. Once those accounts were set up, Intellect Bank could use them for U.S. dollar wire transfers on behalf of their clients. In total there were more than 5,000 of

these wire transfers in a little more than two years. For his crimes, Grigorian was sentenced to 51 months in prison and ordered to pay $17 million in restitution.

As we tighten up our banking regulations to fight this type of crime, criminals have developed more complex schemes and turned increasingly to offshore jurisdictions with less rigorous requirements, but with the same access to our banking systems. Identifying the danger is crucial. Yet another threat is the way international organized criminals use cyberspace to target U.S. victims and infrastructure. The internet is a boon to organized crime--it's anonymous, largely untraceable, and can provide instant communication for a far-flung network of crooks.

Criminals need only sit back and wait for entrepreneurs to come up with legitimate new uses for the internet, which they can then corrupt. For instance, technology in the past few years has created brand new avenues for money laundering with the proliferation of so-called "virtual-world" games like Second Life, and with mobile payment systems.

A number of recent cyber investigations in the United States--involving everything from fraudulent eBay auctions to so-called phishing schemes responsible for large-scale identity theft--have traced the perpetrators back to Romania, long considered to be a main source of electronic crime. Close cooperation between the Department, the FBI, and Romanian authorities has revealed a troubling phenomenon.

Traditional Romanian organized crime figures--who previously were involved in offenses like drug smuggling, human trafficking, and extortion--have joined forces with other criminals to bring some young computer hackers under their control, and have organized them into cells based on their cyber-crime specialty.

Fortunately, Romanian officials are taking these developments seriously, and last November they arrested eleven of their citizens who were part of a ring that perpetrated these phishing schemes. The criminals got personal data from computer users, imprinted credit and debit card information onto counterfeit cards, and then used those cards to obtain cash from ATMs and Western Union locations. Romanian police executed 21 search warrants and seized computers, card reading and writing devices, blank cards, and other equipment.

Other threats identified in our assessment include manipulation of securities markets; corruption of public officials, globally; and use of violence as a basis for power. These are the hallmarks of international organized crime in the 21st century. That is what we are up against. As you can see, organized crime has become a lot more complex and diversified since the days of Robert Kennedy.

The Department has likewise made great strides to combat the online abuse and exploitation of children, especially child pornography, through Project Safe Childhood. Let there be no mistake, child pornography—an inapt term to describe images of child sexual abuse—is a violent crime. This crime violates not just the bodies of children, it

takes a piece of their soul; even where the abuse has ended, the images continue to be exchanged like trading cards among those who harbor sexual interest in children. Through PSC, the Department has effectively marshaled federal law enforcement and our state and local partners, with the assistance of non-governmental organizations like the National Center for Missing and Exploited Children, to dramatically increase the number of investigations and prosecutions.

In early May 2008, Deputy Attorney General Filip announced the distribution of $5 million in new funds to support Project Safe Childhood. The money was used to fund 43 new Assistant U.S. Attorney positions across the nation to prosecute these offenses. The positions were awarded on a competitive basis among the many districts with demonstrated records of successfully prosecuting sexual crimes against children, with no district awarded more than one new position. With these new prosecutors, we expect to continue building on our successes in this area.

Preventing crimes against children and convicting those who commit them are not sufficient without also managing and monitoring sex offenders in free society. Through the Adam Walsh Act the Department has been give new authorities and responsibilities to shore up this final piece of the effort to keep our children safe. The just-released Sex Offender Registration and Notification Act (SORNA) guidelines, which establish a baseline for states and tribes to maintain and share information about sex offenders, is a giant step forward. The creation of the failure to register violation at 18 U.S.C. Section 2250, and the expanded jurisdiction of the U.S. Marshals to enforce it, likewise add to

public safety. We appreciate the additional resources Congress has provided to combat this crime with more prosecutors and support for the U.S. Marshals to enforce the Adam Walsh Act.

Civil Rights

In this very important election year, the Civil Rights Division has been vigorous in its enforcement efforts. The Justice Department, through the Civil Rights Division, has primary responsibility for safeguarding the voting rights of all who are entitled to vote. Congress has given us various tools with which to do that work, and we are using all of them. Chief among them, of course, is the Voting Rights Act of 1965, one of the most important and most successful pieces of civil rights legislation in our country's history. Little more than a month ago, the Department won a major victory in court defending the constitutionality of Congress's 2006 reauthorization of that Act, which remains the basis for much of our work today.

Since I have last appeared before this Committee, the Civil Rights Division has settled two important cases under Section 2 of the Voting Rights Act. In March 2008, the Justice Department settled a lawsuit against the Georgetown County, South Carolina Board of Education. The complaint alleged that the at-large method of electing school board members violated Section 2 of the Voting Rights Act of 1965 because it diluted the voting strength of African-American voters in Georgetown County. While African-American citizens comprise approximately 38 percent of the population of Georgetown

County, the current school board is all white and no African-American candidates have won a school board election during the last three election cycles.

Under the consent decree, in three single-member districts, African American citizens will constitute a majority of the age-eligible population. The district lines under the consent decree will mirror district lines for the Georgetown County Council. Under the terms of the consent decree, all seven districts will elect a board member in November 2008. The consent decree also requires that the chairperson of the board be elected by the board itself, instead of the current county-wide method for electing the board chairperson.

In April 2008, the Justice Department settled a Section 2 lawsuit against the Osceola County, Florida, School Board. The complaint alleged that the existing districts will result in Hispanic citizens having less opportunity than other citizens to participate in the electoral process and to elect candidates of their choice to office. Although county voters approved, in January 2008, a referendum changing from at-large elections to single-member district elections, state law prevented implementation of this plan in an even numbered year. Without this consent decree, the 2008 elections would have proceeded under a district plan that denied Hispanic citizens the equal voting opportunities guaranteed by the Voting Rights Act. This settlement follows a 2006 federal court ruling against Osceola County that at-large elections for electing its Board of County Commissioners violated Section 2 of the Voting Rights Act. The federal district court in Orlando held that the at-large election system diluted Hispanic voting

strength, and ordered elections to be held, beginning with a special election in 2007, under a remedial plan of five single-member districts.

On July 2, 2008, I spoke to over 200 federal prosecutors, civil rights attorneys and FBI agents who took part in a two-day Ballot Access and Voter Integrity conference. They received a copy of a memorandum that I issued in March 2008 to remind all employees of policies regarding election-year sensitivities. I repeated the message that politics must play no role in the decisions of investigators or prosecutors as to any investigations or criminal charges; that law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election; and that we must not do anything for the purpose of giving an advantage or disadvantage to any candidate or political party. Those principles have even more weight in decisions concerning ballot access and voter integrity, and I am confident that all Department employees will follow them.

The Department's successes under the Ballot Access and Voter Integrity Initiative have been significant. For example, in late January 2008, the Civil Rights Division reached an agreement with Tennessee officials to ensure that military service members and other U.S. citizens living abroad would have the opportunity to participate in the State's federal primary election in February. The agreement established emergency procedures for Tennessee's presidential primary election to allow eligible military and overseas citizens enough time to cast and return their ballots and to have their votes counted. In February, the Department settled a lawsuit it had filed under the Help

America Vote Act against Bolivar County, Mississippi. The consent decree established procedures for county officials to follow during federal elections regarding provisional ballots. In May 2008, the Department reached an agreement with the State of Arizona to bring the State's Department of Economic Security into compliance with federal laws, including the National Voter Registration Act, requiring public assistance agencies to offer their clients the opportunity to register to vote.

For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to further the goals of the Initiative. The program is designed to help ensure ballot access, coordinating the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

The Civil Rights Division continues its enforcement in other areas as well. For example, in April 2008, the Department obtained a guilty plea for a federal hate crime in *U.S. v. Munsen*. Jeremiah Munsen drove past a group of African Americans who had participated in a civil rights rally in Jena, Louisiana while displaying two hangman's nooses from the back of his pickup truck. The Department also recently obtained a conviction in *U.S. v. Milbourn* against a defendant for his role in burning an eight-foot-tall cross in the yard of the victim's home because the victim has three bi-racial children. In June 2008, the defendant was sentenced to 121 months in prison. Since Fiscal Year 2001, the Department of Justice has charged 65 defendants in 44 cross-burning cases.

The Department's enforcement efforts in human trafficking remain strong. In the last seven years, the Department of Justice has increased, by nearly seven-fold, the number of human trafficking cases filed in court as compared to the previous seven fiscal years. In fiscal year 2007, the Department obtained a record number of convictions in human trafficking prosecutions.

The Civil Rights Division's Housing and Civil Enforcement Section is charged with ensuring nondiscriminatory access to housing, credit, and public accommodations. The Section has continued to pursue Operation Home Sweet Home, an initiative that was launched two years ago to combat hidden forms of discrimination in housing. As part of the initiative, we committed additional resources to our fair testing program and enhanced our targeting. In fiscal year 2007, we conducted more than 500 paired tests, exceeding by more than 20 percent the highest number of tests conducted in any previous year since the program's inception. The testing program also is producing new cases. We are currently litigating a case alleging a pattern or practice of discrimination against African Americans in Roseville, Michigan. Another case on behalf of African Americans based on testing evidence is in pre-suit negotiations. In addition, during fiscal year 2007, Operation Home Sweet Home resulted in the first pattern or practice discrimination case ever brought by the Civil Rights Division on behalf of Asian Americans based on evidence from our testing program. That case, *United States* v. *Pine Properties* (D. Mass.), was settled in January 2008, with the defendants agreeing to pay up to $158,000 in monetary relief. Operation Home Sweet Home also has resulted in pattern or practice discrimination cases on behalf of families with children and guide-dog users.

In addition, in May 2008, the court in *United States* v. *Henry* (E.D. Va.), entered a consent order requiring the landlord of a subsidized housing complex to pay up to $361,000 to settle the Division's lawsuit alleging that the defendant imposed more restrictive rules and regulations on African-American tenants than on other tenants; verbally harassed African-American tenants with racial slurs and epithets; and evicted tenants by enforcing a limit of two children per family. We currently are litigating several other pattern or practice cases involving race and national origin discrimination.

The Americans with Disabilities Act (ADA) is a landmark law that protects the civil rights of the more than 50 million persons with disabilities and was intended to provide individuals' "equality of opportunity, full participation, independent living, and economic self-sufficiency." The Civil Rights Division's Disability Rights Section (DRS) protects the rights of persons with disabilities under Titles I, II, and III of the ADA. Two recent settlement agreements obtained by the Section illustrate some of its wide-ranging ADA enforcement efforts.

On March 10, 2008, a federal court in Michigan entered a consent decree resolving a lawsuit that the Justice Department and the Michigan Paralyzed Veterans of America filed against the University of Michigan. The lawsuit was brought to challenge the lack of accessible seating in the University's football stadium. Under the settlement, the University will add a minimum of 248 permanent wheelchair seats and 248 companion seats to the stadium during the next two years. The majority of these seats will be along the sidelines. Currently, the stadium has 81 pairs of wheelchair and

companion seats, all located in the end zones. By the 2010 football season, the University will have at least 329 pairs of wheelchair and companion seats dispersed throughout the stadium.

Additionally, the Justice Department and the International Spy Museum recently reached a settlement agreement under the ADA. As a result of this precedent-setting agreement, which was announced on June 3, 2008, the museum agreed to work to bring the content of its exhibitions, public programs, and other offerings into full compliance with ADA requirements so that its exhibits are accessible and effectively communicated to individuals with disabilities, including individuals with hearing and vision impairments. By focusing on visitors who are blind or have low vision and who are deaf or hard of hearing, the agreement establishes a new level of access for cultural and informal educational settings. Of the 50 million Americans with disabilities, 16 million have sensory disabilities. The agreement seeks to ensure these individuals will have access to the museum's exhibitions, audiovisual presentations, and programs, as required by law.

In addition to the Division's robust ADA enforcement efforts, the Department also recently announced that it is soliciting comment on proposed amendments to its regulations implementing Titles II and III of the ADA. The proposed regulations will, for the first time, establish specific requirements for the design of accessible public facilities such as courtrooms and an array of recreation facilities including playgrounds, swimming pools, amusement parks, and golf courses, making it easier for individuals with

disabilities to travel, enjoy sports and leisure activities, play, and otherwise participate in society.

The proposed amendments are intended to implement standards consistent with revised guidelines published by the Architectural and Transportation Barriers Compliance Board (Access Board) and to adopt changes necessary to address issues that have arisen since the publication of the original regulations in 1991. The amendments, which represent more than 10 years of collaborative efforts among disability groups, the design and construction industry, state and local government entities, and building code organizations, also are intended to provide greater consistency between the ADA Standards and other federal and state accessibility requirements.

The Civil Rights Division also remains diligent in combating employment discrimination, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers. The Department continues to litigate *United States v. City of New York*, which alleges that since 1999, the City of New York has engaged in a pattern or practice of discrimination

against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York in violation of Title VII.

In June 2008, the Justice Department also announced the filing of a lawsuit against the city of Jackson, Alabama, alleging that the city violated Title VII when it discharged Virginia Savage, an African American, from her employment as a circulation clerk at the city's municipal library in retaliation for her complaints of racial discrimination and harassment by her supervisors.

Public Corruption

The investigation and prosecution of public corruption is among the highest obligations of law enforcement, and I consider it to be one of the top priorities of the Department of Justice. The Department's career prosecutors and criminal investigators are engaged in a renewed effort to pursue corruption at all levels and in all branches of government. The Department's achievements during the past year in this area show a steady commitment to fighting public corruption wherever it is found and on a non-partisan basis.

The Department's recent public corruption investigations have resulted in convictions of federal officials in all branches of government, as well as numerous state and local officials. At the federal level, in February, defense contractor Brent Wilkes was sentenced to 12 years in prison for his involvement in what the Washington Post called "the most brazen bribery conspiracy in modern congressional history." Wilkes funneled

cash, mortgage payments, cars, meals, luxury travel, and prostitutes to former Congressman Randall "Duke" Cunningham in return for the Congressman's assistance in steering contracts to Wilkes's company.

In March 2008, the Department obtained the seventh criminal conviction arising out of an ongoing investigation into public corruption among state officials in Alaska. The convictions have included three former elected members of the state house of representatives (including a former speaker of the house), a chief of staff to a former governor, and three high-ranking executives with a major Alaska oil-services company. The convicted individuals made or received thousands of dollars in corrupt payments as well as offers of employment in return for official actions—including votes in the legislature—that would benefit the company.

The Department, through its National Procurement Fraud Task Force, continues to devote significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related support efforts. For example, in April, an indictment by a federal grand jury in San Francisco was unsealed against a Canadian night vision goggles manufacturing firm and two of its executives for their participation in a scheme to defraud the U.S. military in the supply of equipment for the Iraqi army. In June 2008, a U.S. Army officer and his wife pleaded guilty for their participation in a conspiracy, bribery and money laundering scheme involving contracts awarded in support of the Iraq war. Additionally, a retired U.S. Army colonel pleaded guilty in June for her role in a scheme designed to secure a U.S. Department of Defense contract at

Camp Victory, Iraq, in 2004 and 2005. Also in June 2008, a defense contractor, Raman International, pleaded guilty for its role in a bribery scheme designed to influence the award of U.S. Department of Defense contracts at Camp Victory, Iraq.

Immigration and the Southwest Border

Enforcing the Nation's immigration laws remains an important priority for the Department. The ability to control who—and what—comes into and out of a country is a basic attribute of a sovereign government, and being able to do that is vital to our Nation's security.

In April, Deputy Attorney General Filip visited the borders of Arizona and Texas to meet with federal law enforcement officials who are on the front lines protecting our border. At that time, he announced the distribution of $7 million appropriated by Congress for the five border districts, to support security and immigration enforcement efforts. This money will fund 64 new Assistant U.S. Attorneys and 35 new contract support positions for the districts.

In an effort to make the most of those dollars, we have asked U.S. Attorneys who serve in the border districts to work with their law enforcement partners in the Departments of Justice and Homeland Security, to strategically attack criminal activity along the border.

These are targeted resources, requested by each district, and they are emblematic of the Department's comprehensive but flexible strategy. There is no one-size-fits-all solution to the problems on the border—what works in one district or sector may not work in another. Law enforcement professionals in the border districts are the experts who know their areas, and know what will work best there.

For the District of Arizona, that means an allocation of 21 new Assistant U.S. Attorneys, and about a dozen additional support positions. That is a significant increase from the current 133 Assistant U.S. Attorneys in the district. For the Southern District of Texas, that means an allocation of 13 new Assistant U.S. Attorneys, and seven additional support positions. That is a substantial increase from the current 150 Assistant U.S. Attorneys in the district. The Western District of Texas will also receive 16 new Assistant U.S. Attorney positions for work there. These new prosecutors will handle cases like drug and gun smuggling, illegal entry and reentry, worksite enforcement, and false documents.

In addition to these funds, which are available immediately and for the next two years, the Department has requested in its fiscal year 2009 budget another $100 million to help fight criminal activity along the border as part of our Southwest Border Enforcement Initiative.

The Department of Justice and these U.S. Attorney's Offices have always pursued large-scale drug smugglers on the border, along with smaller cases involving repeat

offenders and other serious violators. We remain committed to that effort. This new money, and the positions it will fund, means that we will be able to prosecute even more cases than before, targeting smugglers both large and small.

* * *

Because of the abbreviated congressional calendar this year, today's oversight hearing is likely the last time I will appear before the Senate Judiciary Committee. Throughout my tenure as Attorney General, I have appreciated the courtesies, both professional and personal, that I have received from various members of this Committee and from the Senate as a whole. Although we have not always agreed on the issues, and in some instances we have disagreed vigorously, I want each of you to know that I have the utmost respect for the role you play in our constitutional system of government. Thank you for the opportunity to appear before you to talk about the important work of the Department, and I appreciate the opportunity to answer any questions you may have.

Office of the Attorney General
Washington, D.C.

March 5, 2008

TO: ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

RE: ELECTION YEAR SENSITIVITIES

Department of Justice employees are entrusted with the authority to enforce the laws of the United States and with the responsibility to do so in a neutral and impartial manner. This is particularly important in an election year. Now that the election season is upon us, I want to remind you of the Department's existing policies with respect to political activities.

I. INVESTIGATION AND PROSECUTION OF ELECTION CRIMES

The Department of Justice has a strong interest in the prosecution of election fraud and other election-related crimes, such as those involving federal and state campaign finance laws, federal patronage laws, and corruption of the election process. As Department employees, however, we must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality and nonpartisanship.

Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpos of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution.

If you are faced with a question regarding the timing of charges or overt investigative steps near the time of a primary or general election, please contact the Public Integrity Section of the Criminal Division for further guidance. Please remember also that consultation with the Public Integrity Section of the Criminal Division is required at various stages of all criminal matters that focus on violations of federal and state campaign-finance law, federal patronage crimes, and corruption of the election process. More detailed guidance is available in sections 1-4 and 9-85 of the United States Attorneys' Manual, which can be accessed on line at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>.

II. HATCH ACT

As you are aware, the Hatch Act generally prohibits Department employees from engaging in partisan political activity while on duty, in a federal facility or using federal property. Please note that this prohibition includes using the internet at work for any political

activities. The Act also prohibits us from using our authority for the purpose of affecting election results; soliciting (or discouraging) political participation; soliciting, accepting or receiving political contributions; and generally from running as a candidate in a partisan election.

In addition to restrictions on what Department employees may and may not do while on duty, using government property, and in off-duty activities, certain employees are further restricted from engaging in certain political activity even while not on duty. The degree to which an employee is restricted in his or her off-duty activities depends on his or her position, *i.e.* career, further restricted, or noncareer appointee. Further restricted employees are members of the career SES, administrative law judges, employees of the Criminal Division, National Security Division and the Federal Bureau of Investigation, Criminal Investigators and Explosives Enforcement Officers of the Bureau of Alcohol, Tobacco and Firearms, and noncareer appointees in the Department. If you are unclear on these restrictions or the classification of your position, please consult with your component's designated ethics official about the limits of permissible activity *prior* to engaging in any political activity. You can also visit the Justice Management Division's Ethics page at <www.usdoj.gov/jmd/ethics/politic.html> for more detailed information.

It is critical that each one of us comply with this Act. For one, it contributes to maintaining a work environment free of political pressure and ensures the public retains its confidence that we are adhering to our responsibility to administer justice in a neutral manner. For another, violations of the Act carry strict penalties, including presumptive removal from federal service.

Thank you.

Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at The Commonwealth Club of San Francisco

San Franscisco, CA
Thursday, March 27, 2008 - 12:00 P.M.

It is an honor to be here with you this afternoon.

In the year 1906, which was a little more than a century ago – and three years after the Commonwealth Club was founded – San Francisco suffered the famous earthquake and fire that was one of the worst disasters in our nation's history. Hundreds, if not thousands, of lives were lost, and the landscape of this great city was changed forever.

The city that suffered and emerged from that great quake and fire in April 1906 was of course very different from the one we see today—photos of turn-of-the-century San Francisco depict a world in which gaslights and horse-drawn carriages were still common.

But the differences between San Francisco then and now go a lot beyond the physical look and feel of the city. The San Francisco of 1906, like many other American cities at the beginning of the last century, struggled with pervasive corruption. Just how pervasive it was might surprise even a hardened cynic today. An excerpt from a 1906 newspaper editorial gives some sense of the scope of the problem. This is an excerpt from the editorial:

"Nothing in the history of anarchy parallels in cool, deliberate usurpation of authority this latest exhibition of lawlessness in San Francisco. Government is seized to overthrow government. Authority is exercised in defiance of authority. The criminals, accused of felony, after inviting investigation and pretending to assist, have shown their hypocrisy by committing an act of anarchy which, while it might be tolerated for the time being in San Francisco, would result in the execution of these men in any government of Europe."

Pretty warm rhetoric even by today's internet standards.

The events that inspired this editorial were pretty astonishing. The mayor was traveling in Europe, apparently on a goodwill mission trying to convince insurance companies to honor their obligations to clients whose property had been destroyed by the quake and fire. While the mayor was out of the city, his deputy (who was acting as mayor in his absence) fired the district attorney, who was then conducting a broad-ranging investigation into corruption at the highest levels of the city government,

including the mayor's office itself.

In his place, the acting mayor had appointed a political boss who, by most accounts, was the man most responsible for the general corruption of city government. Fortunately, this power-grab failed, the district attorney held onto his post, his investigation went forward, and that resulted in what would come to be known as the "Graft Prosecutions" – but not before an assistant district attorney (and former federal prosecutor) was shot by a would-be assassin in open court, and the city itself was on the brink of civil unrest.

The ultimate results of San Francisco's Graft Prosecutions were mixed; the very fact that they were undertaken in the face of such fierce resistance marked a key milestone in the history of this city and indeed the country as a whole. San Francisco was not alone: its struggle with public corruption in the early part of the last century was mirrored in cities around the nation, and at the Federal level as well.

It was also in 1906 that President Theodore Roosevelt delivered his now-famous "Man with the Muck-Rake" speech, in which he declared: "My plea is not for immunity to, but for the most unsparing exposure of, the politician who betrays his trust, of the big business man who makes or spends his fortune in illegitimate or corrupt ways. There should be a resolute effort to hunt every such man out of the position he has disgraced."

Roosevelt spoke so forcefully about the need to fight corruption because he understood the threat that public corruption poses to representative government.

We are, as we proclaim repeatedly, a nation of laws, not men. And sometimes we preoccupy ourselves almost to the point of obsession with adjusting and changing and – as people say in Washington – tweaking procedures so that every exercise of judgment is subject to a check and a balance, or at least something that looks like a check and a balance, in an effort that at times seems intended to make government come close to what every physicist knows is impossible in the physical world – and that is a perpetual motion machine that can run itself.

And to a great extent, despite the tone of the last sentence, that is a worthy and proper effort. Our founders fought for and won independence so that we could receive the blessings that flow from that system of government, including equality before the law and freedom from arbitrary and capricious government action.

But the survival and prosperity of a government of laws depends in great measure on the integrity of the men and women who pass, enforce, and administer the laws by which we are governed. And so it is one thing to acknowledge the persistence of corruption; but it is quite another to become inured to it, to simply accept it as inherent in the nature of things or, worse still, as just another cost of doing business.

Public corruption can inflict damage that is not only costly but also profound. When a public servant at any level of government exploits his or her office for improper purposes, the damage is measured not just in dollars and cents but also in erosion of the public trust – upon which depends the survival of our system of government.

We fight, investigate and prosecute public corruption to ensure that those who hold public office live up to the public's trust, and to build the public's confidence in the very idea of government, without which the government cannot function.

The investigation and prosecution of public corruption is therefore among the highest obligations of law enforcement, and it should come as no surprise that I consider it to be one of the top priorities of the Department of Justice. In recent years, the Department's career prosecutors and criminal investigators have been engaged in a renewed effort to pursue corruption at all levels and in all branches of government.

The Department's renewed commitment to the investigation and prosecution of public corruption is reflected not so much by an increased case load – though the Department has, in fact, brought more public corruption cases in recent years – as in the quality, complexity, and profile of the cases we have successfully pursued. In investigating and prosecuting these cases, the Department works closely with the FBI – which currently has more than 600 agents dedicated to public corruption matters, up from 358 in 2002 – as well as other law enforcement partners at the federal, state, and local levels.

The Department's recent public corruption investigations have resulted in convictions of federal officials in all branches of government, as well as numerous state and local officials.

At the federal level, just last month, defense contractor Brent Wilkes was sentenced to 12 years in prison for his involvement in what the Washington Post called "the most brazen bribery conspiracy in modern congressional history." Wilkes funneled cash, mortgage payments, cars, meals, luxury travel, and even prostitutes to former Congressman Randall "Duke" Cunningham in return for the Congressman's assistance in steering contracts to Wilkes' company.

The corruption of Congressman Cunningham was so blatant that he actually had a "bribe menu" that informed contractors how much it would cost them to secure a defense contract. A $16 million defense contract, according to the menu, required payment of a $140,000 bribe and a luxury yacht, with the bribes escalating by $50,000 for each additional million dollar increment on a military contract. The former congressman pleaded guilty and has cooperated with prosecutors in their ongoing investigation. He is now serving an eight-year prison term. Wilkes' company was not the only one to benefit from a corrupt relationship with Congressman Cunningham. The Department has also secured the conviction of Mitchell Wade, whose defense contracting firm collected millions of dollars in federal contracts as a result of its ties to Cunningham – ties that were the direct result of illegal payments to the former Congressman that included more than $1 million in cash, valuable antiques, and a boat. Wade's efforts to tilt the procurement process in his company's favor extended beyond his payments to Congressman Cunningham: Wade's company hired the son of a Defense Department official charged with overseeing the company's work for that Department, and then later hired the official himself. Wade's company also sought to broaden its influence in the appropriations process by making nearly $80,000 in illegal campaign contributions – contributions that Wade hoped would lead to still more earmarks benefiting his company.

Federal corruption need not be as blatant as Cunningham's "bribe menu," however. Less overt than the straight-up, quid-pro-quo bribe, but every bit as insidious, is the kind of corruption that exchanges a steady stream of benefits in return for a favorable course of official actions. A prime example is the Department's ongoing and wide-ranging investigation into the activities of the lobbyist Jack Abramoff, which has resulted in more than 10 convictions, including those of Abramoff himself, former Congressman Robert Ney, and several former senior congressional staff members. The investigation revealed that Ney and others on his staff solicited and accepted a stream of things of value from Abramoff and others, all with the intent to be influenced and induced to take official action. The list of things Ney received, and what might be called the swag, included the following:

- international and domestic trips including a trip to play golf in Scotland in August 2002, with total trip costs exceeding $160,000, paid for by Abramoff and his clients; a trip to gamble and vacation in New Orleans in May 2003, with total trip costs of approximately $7,200, paid for by Abramoff and his clients; and a trip to vacation at Lake George, N.Y., in August 2003, with costs paid by lobbyists exceeding $3,500;

- frequent meals and drinks with total costs exceeding many thousands of dollars, primarily at Abramoff's restaurant, which was called Signatures, in Washington;

- tickets to concerts and sporting events using Abramoff's box suites at venues in the Washington and Baltimore areas, such as the MCI Center (now known as the Verizon Center), FedEx Field, and Camden Yards;

- tens of thousands of dollars of campaign contributions and in-kind campaign contributions in the form of free fundraisers.

In exchange for these benefits, Ney admitted that he agreed to take and took the following actions:

- supporting and/or opposing legislation at Abramoff's request, including attempting to insert four separate, non election-related amendments that were sought by Abramoff and his clients into election reform legislation known as the Help America Vote Act;

- supporting the application of and issuing a license to one of Abramoff's clients involving a multi-million-dollar contract to install wireless telephone infrastructure in the House of Representatives; and

- contacting personnel in federal agencies in an effort to influence the decisions of those agencies, including telling the Secretary of Housing and Urban Development that Ney's number one priority was Native American Indian Tribal housing because that was an issue important to Abramoff's clients.

In his plea agreement, Ney also admitted to charges that he had accepted thousands of dollars worth of gambling chips from a foreign businessman.

On three separate occasions, Ney and staff members accompanying him each received thousands of dollars worth of gambling chips from foreign businessman for use at private casinos in London. As a

result, Ney eventually pocketed more than $50,000.

As these facts demonstrate, although Ney had no finely calibrated "bribe menu" that set forth the various prices at which his services could be bought, his betrayal of his duty to his constituents was no less serious than Congressman Cunningham's. Both men exploited a position of trust for personal gain.

The Department's Abramoff investigation also demonstrates that no single branch of the federal government has a monopoly on public corruption. In addition to the congressional officials described above, the Department also secured the conviction of several Executive Branch officials, including Deputy Secretary of the Interior J. Stephen Griles, former chief of staff of the General Services Administration David Safavian, who lied about their ties to Abramoff or otherwise obstructed the investigation into Abramoff's activities.

The Department has had similar success in combating public corruption at the state level. Earlier this month, the Department obtained the seventh criminal conviction arising out of an ongoing investigation into public corruption in the State of Alaska. The convictions have included three former elected members of the state house of representatives (including a former speaker of the house), a chief of staff to a former governor, and three high-ranking executives with a major Alaska oil-services company. The convicted individuals made or received thousands of dollars in corrupt payments as well as offers of employment in return for official actions – including votes in the legislature – that would benefit the company.

A key part of the company's scheme to secure the legislators' services was a suite at a hotel in the state capital, close by the legislature, in which the company's senior executives would meet with legislators. Over the course of these meetings, the executives would make cash payments and openly discuss job offers to the legislators in return for the lawmakers' agreement to advance the company's legislative agenda, which included a major new pipeline. The corrupt purpose of these meetings was made explicit by one legislator who was heard to say, simply: "You'll get your pipeline . . . and I'll get my job."

Another example of the Department's success in combating corruption at the state level was the conviction of former Illinois governor George Ryan – a conviction that was recently affirmed by the Seventh Circuit Court of Appeals. Governor Ryan and members of his family received thousands of dollars worth of illegal cash payments, loans, gifts, vacations, and personal services. In return for these payments – and hundreds of thousands more paid to a close associate – Ryan knowingly took actions in his official capacity to award state contracts to benefit the personal and financial interests of his associates. Ryan also knowingly permitted his associates to participate in the governmental decision-making process and provided them with material, non-public information relating to prospective governmental decisions.

The investigation that culminated in his conviction began many years earlier, following a horrific accident on a Wisconsin expressway. A piece of a truck's undercarriage came loose on the highway and punctured the gas tank of another vehicle – a family van carrying the Willis family – which caused a fiery wreck. Six of the nine Willis children were killed in the accident. It was later learned that the

driver of the truck that caused the accident may have paid a bribe for his Illinois commercial driver's license. The driver, who spoke little English, had been unable to understand warnings from other truckers about the unsafe condition of his vehicle before the crash. The accident spawned an investigation into corruption in Illinois secretary of state's office, which oversaw the issuance of licenses, and eventually broadened out to include Ryan's conduct as both secretary of state and governor. Governor Ryan's conviction serves as an especially stark and tragic reminder of the very real costs of public corruption.

The investigation and prosecution of public corruption cases like the ones I've just described – involving public officials in every branch and at all levels of government – will continue to be a top priority for the Department. Such cases, however, do not constitute the entirety of the Department's anti-corruption efforts. The Department's efforts extend beyond our borders to include investigations and prosecutions of companies engaged in corrupt business practices abroad, as well as corruption related to the procurement process and our ongoing military operations in Afghanistan and Iraq. Corruption of this sort is especially damaging because it not only hampers our ability to effectively fight our enemies in Iraq and Afghanistan, but also frustrates our efforts to promote transparency and the rule of law in those countries.

Last fall, for example, John Allen Rivard, a former major in the Army Reserve was sentenced to 10 years in prison for conspiracy, bribery, and money laundering in connection with the fraudulent awarding and administration of U.S. government contracts in Iraq. While he was deployed to Iraq in a logistical support capacity, Rivard steered government contracts to a contractor in return for bribes equal to five percent of the value of each contract awarded. The total value of the contracts Rivard steered to the contractor was approximately $21 million and Rivard himself received approximately $220,000 – funds he attempted to launder by sending them to others for, among other things, rent on an apartment in West Hollywood, California, and a down payment on a BMW convertible.

When the Department of Justice pursues cases like these and many others on behalf of the United States, the Department bears a solemn responsibility. Like the public officials we sometimes investigate and prosecute, we too are public servants, invested with a public trust that we are sworn to uphold.

We have and we carry out a duty to ensure that the Department's investigations of public corruption are conducted without fear or favor, and utterly without regard to the political affiliation of a particular public official. After all, a corruption investigation that is motivated by partisan politics is just corruption by another name.

Let me be clear: Politics has no role in the investigation or prosecution of political corruption or any other criminal offense, and I have seen absolutely no evidence of any such impropriety in my time at the Department, and would not tolerate it.

I consider it one of my paramount responsibilities to ensure that the Department continues to handle its public corruption investigations and prosecutions in a consistent, non-partisan, and appropriate manner throughout the nation. My personal experience with the career prosecutors and investigators who pursue these corruption cases gives me every confidence that they have done so and will

continue to do so. Having once been in their shoes as an Assistant United States Attorney in charge of my office's Official Corruption Unit, I have a special appreciation for the work they do. It is a distinct honor to serve with them as Attorney General.

Prosecutors in general have a difficult job, and prosecutors in public corruption cases often have an especially difficult one. It frequently requires hundreds, if not thousands of hours of investigative and legal work, these are not easy cases to make – and the difficulty of making them is compounded by their inherently sensitive and controversial subject matter. As a result, the agents and prosecutors who investigate and prosecute these cases are often the targets of vigorous public attacks, and it is not uncommon for those attacks to include allegations that the prosecutors themselves are corrupt or have all sorts of other improper motivations in bringing these cases.

I know of one career prosecutor, for example, who has been accused of partisan motives – by both political parties: First, when he brought a case against a prominent official of one party, and later when he brought another case against a prominent official of the other party. Such attacks come with the territory, to a certain extent. But these are serious charges that erode trust in our government, and they shouldn't be thrown about recklessly. It's often in the interest of someone to charge politicization whenever a prominent public figure is investigated or prosecuted. I find it notable that they make these accusations in the media, rather than before a court. The Justice Department does not – and will not – try its cases in the media. It litigates in court, based on the evidence and the law alone.

I consider it my duty to ensure that the Department's corruption prosecutions remain free of improper political interference or motivation. Just as important, though, I also consider it my duty to ensure that the Department continues to pursue public corruption wherever we find it, regardless of such attacks.

In closing, I would like to return to where I began this evening. In the midst of San Francisco's Graft Prosecutions, when this city's effort to combat corruption seemed hopeless, President Theodore Roosevelt sent a lengthy letter to the civic leaders who were championing the anti-corruption cause. The letter concludes with this rousing admonition: "Do not be discouraged; do not flinch. You are in a fight for plain decency, for the plain democracy of the plain people, who believe in honesty and in fair dealing as between man and man. Do not become disheartened. Keep up the fight."

This city and our country have come a long way since the turn of the last century. We have a system of representative democracy that, despite its flaws, remains a model to countries that aspire to be democracies and countries undergoing the pangs of being born as democracies the world over. Even now, however – especially now – we should keep up the fight against public corruption, at home and abroad. And I am here to tell you, we will.

Thank you.

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