



U.S. Department of Justice

Office of Legislative Affairs

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Washington, D.C. 20530

January 18, 2007

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

Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on July 18, 2006. The hearing concerned Department of Justice Oversight.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

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.

Sincerely,

A handwritten signature in black ink that reads "Richard A. Hertling".

Richard A. Hertling  
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter  
Ranking Minority Member

**Questions for the Record for**  
**Attorney General Alberto Gonzales**  
**Senate Judiciary Committee**  
**DOJ Oversight Hearing on July 18, 2006**

**Senator Specter**

**Rep. Jefferson FBI Raid**

1. **On May 27, 2006, The Washington Post reported that you, Deputy Attorney General Paul McNulty, and FBI Director Robert Mueller all threatened to resign if the President compelled you to return the documents collected from Rep. Jefferson's offices. Is this report accurate and what was your motivation for considering such a drastic step? If Chief Judge Hogan's July 10th decision had ordered the documents found in the raid to remain sealed and be returned to Rep. Jefferson's office, would you have accepted that decision?**

**ANSWER:** Respectfully, it would not be appropriate to comment on internal deliberations within the Justice Department regarding steps that might have been considered or taken with respect to the seized records. It is accurate to say that it is the Department's view that the search and seizure of Congressman Jefferson's records were conducted pursuant to a lawful search warrant approved by a federal judge, and that procedures were proposed by the Department and approved by the court. The Department will, of course, abide by the final decision of the courts in this case.

It is important to note that Judge Hogan's July 10, 2006 ruling carefully considered the governing law in light of the facts of this case and fully upheld the Department's actions. If, however, Chief Judge Hogan's July 10 decision had ordered the records found in the search sealed and returned to Rep. Jefferson's office, the Department would have carefully evaluated Chief Judge Hogan's decision and reasoning in light of the governing law, and then considered a range of possible responses including an application for reconsideration as well as an appeal to the DC Circuit Court of Appeals.

2. **Despite Judge Hogan's ruling on July 10, 2006 that the FBI's search of Rep. Jefferson's office did not violate the Constitution's Speech and Debate Clause, I still question why the FBI failed to take certain actions leading up to and during the execution of the search warrant. Arguably, tensions could have been eased between Congress and the Executive had the FBI taken any of the following actions:**
  - i. **Sealing the office in question by utilizing Capitol Police or other law enforcement authorities;**

- ii. Pursuing Rep. Jefferson's cooperation through the Clerk of the House;
- iii. Allowing Rep. Jefferson's attorney to be present during the search.

**In such a high profile case, do you think any of these actions would have alleviated the tension that the raid has caused?**

**ANSWER:** As a matter of comity, and out of an abundance of caution, the Justice Department proposed, and a federal judge approved, special procedures designed to accommodate the Speech or Debate Clause privilege and the legitimate needs of a coordinate branch of Government. These procedures included the following precautionary measures:

- The search was conducted by agents and certified forensic examiners from the FBI who have no role in the investigation, and who are prohibited from revealing any non-responsive or politically sensitive information that they may have come across inadvertently during the search, and are required to attest in writing to their compliance with this procedure.
- Under the procedures proposed by the Government and adopted by the court, the responsive documents would have been transferred from the non-case agents to a "Filter Team" consisting of federal prosecutors and an FBI agent with no role in the investigation. The Filter Team would have reviewed each document seized to ensure that it was responsive and, if so, ensured that no document falling within the purview of the Speech or Debate Clause was transferred to the Prosecution Team.
- Under those procedures, any potentially privileged materials would have been logged, copies would have been provided to Rep. Jefferson's counsel, and the Filter Team would have asked the Court to review the records for a final determination about privilege.

It is clear that no authority required that Rep. Jefferson's office be sealed by the Capitol Police, that the Department first pursue Rep. Jefferson's cooperation through the Clerk of the House, or that Rep. Jefferson's counsel be permitted to be present during the search. Nevertheless, the Department did attempt to use other means to obtain the documents before seeking the court's approval of a search warrant. We cannot describe those other means because the information concerns matters that are under seal.

We can assure you that the Department has been and continues to be sensitive to what you describe as the "high-profile" nature of this case. Investigations such as this one are always "high profile," but their prominence only underscores the importance of conducting them in a fair and impartial manner. Deviations from the normal procedures followed in the execution of a search warrant in an investigation of a Member of Congress might tend to suggest that Members of Congress are above the law and could expose the Department to charges that it is giving special treatment to Members of

Congress for political reasons, thereby undermining confidence in the integrity of criminal prosecutions.

- 3. The fact that the FBI used a “filter-team” to execute the search warrant as a means to shield the information found in Jefferson’s office from the Special Agents assigned to the investigation suggests that the Department of Justice was concerned about violating the Speech and Debate Clause or, perhaps, some other aspect of the separation of powers of the two branches. How did the use of FBI employees not associated with the investigation resolve this concern with respect to the Speech and Debate Clause?**

**ANSWER:** The use of a Filter Team and other special procedures were proposed by the Department and approved by the Chief Judge as a matter of comity and out of an abundance of caution. The search warrant properly addressed issues relating to the Speech or Debate Clause or other applicable privileges (such as attorney-client communications), as well as politically sensitive materials. The Department understood that execution of the search warrant would involve the incidental and cursory review by the seizing agents and Filter Team of materials that might be potentially covered by the Speech or Debate Clause, subject to other potential privileges or politically sensitive. As a result, the Filter Team and other special procedures were included in the search warrant as a reasonable method to control the process by which the seizing agents and Filter Team would perform an incidental and cursory review of potentially privileged or politically sensitive materials in order to extract the non-privileged evidence specifically sought by the search warrant.

Moreover, as Chief Judge Hogan held in his July 10, 2006 decision, “the incidental and cursory review of documents covered by the legislative privilege, in order to extract non-privileged evidence, does not constitute an intrusion on legitimate legislative activity.”

#### **Americans with Disabilities Act**

- 4. What is the status of the proposed changes to the ADA Accessibility Guidelines? When does the DOJ plan to issue its proposed rules that will lower the wheelchair scoping for stadiums and all public assembly facilities?**

**ANSWER:** The proposal to reduce wheelchair scoping in assembly facilities is contained in the revised Americans with Disabilities Act guidelines published by the U.S. Architectural and Transportation Barriers Compliance Board (also known as the Access Board) in July 2004. The revised ADA Guidelines are the result of a multi-year effort by the Access Board to revise and amend its accessibility guidelines. The overriding goal of the project was to promote consistency among the many federal and state accessibility

requirements. To become enforceable, the guidelines must be adopted by the Department of Justice as the revised ADA Standards for Accessible Design.

The Department has initiated the process of revising its regulations implementing Titles II (public entities) and III (public accommodations and commercial facilities) of the ADA to amend the ADA Standards for Accessible Design (28 CFR part 36, appendix A) to ensure that the requirements applicable to new construction and alterations under title II are consistent with those applicable under title III, to review and update the regulations to reflect the current state of law, and to ensure the Department's compliance with section 610 of the Small Business Regulatory Enforcement Fairness Act (SBREFA).

The Department initiated the rule-making process required to make this provision enforceable by publishing an Advance Notice of Proposed Rulemaking in September 2004. We received over 900 comments on that ANPRM, which are facilitating our process of drafting a Notice of Proposed Rulemaking and developing the required regulatory impact assessments. We expect that we will publish a Notice of Proposed Rulemaking in 2007. We will, of course, take public comments and hold hearings on the proposal before completing the final regulatory assessment and publishing a final rule thereafter.

### **Inherent Authority**

5. **On May 21, 2006, you told George Stephanopoulos of ABC News that the Department was investigating the possibility of prosecuting The New York Times under the Espionage Act of 1917 for its stories publishing details of classified programs. What authority, other than Justice White's dissenting opinion in *The Pentagon Papers* case, are you citing as giving the Administration authority to pursue this course of action? Has the Department reached any conclusions regarding the feasibility of prosecuting journalists? Does the Administration support Congress's efforts to provide journalists with statutory protections through the reporters' shield legislation or the Free Flow of Information Act?**

**ANSWER:** Section 793 of title 18 of the U.S. Code prohibits, among other things, gathering and transmitting defense information; section 798 prohibits "knowingly and willfully communicat[ing] . . . or *publish[ing]*" classified information concerning the "communication intelligence activities of the United States." (emphasis added). Those provisions, on their face, do not provide an exemption for any particular profession or class of persons, including journalists. Many commentators and jurists (including Justices of the Supreme Court of the United States) have examined these statutes and reached the same conclusion. As you note, one such jurist was Justice White, who in his concurring opinion in the "Pentagon Papers" case wrote, "from the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that

section.” *New York Times v. United States*, 403 U.S. 713, 739 n.9 (1971) (White, J., concurring); *see also id.* at 730 (Stewart, J., concurring) (noting that “[u]ndoubtedly Congress has the power to enact specific and appropriate criminal laws to . . . preserve government secrets” and “several [such laws] are of very colorable relevance to the apparent circumstances of these cases”). As Justice White noted, the legislative history of these provisions indicates that “members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed.” *Id.* at 734 (White, J., concurring). As you stated during a May 2, 2006, hearing, “the White-Stewart opinions” from the Pentagon Papers case “are pretty flat out that there is authority under those statutes to prosecute a newspaper, [and] inferentially [to] prosecute reporters.”

The Fourth Circuit’s opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), also supports the conclusion that members of the press can be prosecuted for disclosing classified defense information. Morison was a military intelligence employee who had also been performing certain off-duty work for a London periodical. The court explicitly rejected a defendant’s assertion that the First Amendment barred his prosecution under section 793 for unauthorized disclosures of classified information to a publisher. The Fourth Circuit did so over the objections of numerous news organizations that had filed amicus briefs in the case to press the First Amendment defense against prosecution.

The Justice Department’s focus in leak cases has been and will continue to be investigating and prosecuting those who leak, not members of the press. The Department strongly believes that the best approach is to work cooperatively with journalists to persuade them not to publish classified information that can damage national security.

As for the proposed Free Flow of Information Act, the Department’s views on that legislation were set forth in a letter from Assistant Attorney General William Moschella to you dated June 20, 2006. As that letter makes clear, “[t]he Department opposes this legislation because it would subordinate the constitutional and law enforcement responsibilities of the Executive branch—as well as the constitutional rights of criminal defendants—to a privilege favoring selected segments of the media that is not constitutionally required.” The Department’s opposition to this legislation was further stated and explained in the testimony of Deputy Attorney General Paul J. McNulty, dated September 20, 2006, at the Senate Judiciary Committee Hearing on Reporters’ Privilege Legislation: Preserving Effective Law Enforcement. As the Deputy Attorney General stated: “The bill would significantly weaken the Department of Justice’s ability to obtain information of critical importance to protecting our nation’s security, inject the federal judiciary to an extraordinary degree into affairs reserved by the Constitution for decision within the Executive Branch, and, at bottom, encourage the leaking of classified information.”

### Hamdan decision

**6. What does *Hamdan* mean for the President's other claims of inherent executive power, such as activities of the National Security Agency that have recently come to light?**

**ANSWER:** For purposes of these questions for the record, we assume that the Terrorist Surveillance Program involves "electronic surveillance" as that term is defined in FISA.

The Terrorist Surveillance Program described by the President in December 2005 ("Terrorist Surveillance Program" or "Program") does not rest simply on "claims of inherent executive power," as your question suggests. To be sure, Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief, *see* U.S. Const. art. II, § 2, and to conduct the Nation's foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The Supreme Court has long recognized that the Constitution grants the President inherent power to protect the Nation from foreign attack. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). Accordingly, every court of appeals to reach the question has held that the President has inherent constitutional authority to conduct electronic surveillance for foreign intelligence purposes without first obtaining a court order, even during peacetime. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (noting that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and, assuming that is so, "FISA [cannot] encroach on the President's power."); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *see also Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 30-34 (Jan. 19, 2006) ("*Legal Authorities*").

Congress confirmed and supplemented this constitutional authority of the President in the armed conflict against al Qaeda in the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"). Congress both expressly acknowledged that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," Force Resolution pmb., and authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks. A majority of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that, with these words, Congress authorized the President to undertake all the "fundamental and accepted [ ] incidents to war." *Id.* at 518 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Intercepting the international communications of the Nation's declared enemies has been a fundamental incident of warfare since well before the Founding. *See Legal Authorities* at 15-17. During the Revolutionary War, George Washington directed his agents surreptitiously to open British mail to monitor enemy planning. Presidents Wilson and Franklin Roosevelt, relying on the President's constitutional powers and general congressional authorizations for use of force,

authorized the interception of *all* telephone, telegraph, and cable communications into and out of the United States during the two World Wars. Under *Hamdi*, this clear historical tradition strongly supports the President's authority to undertake the Terrorist Surveillance Program under the Force Resolution and the Constitution; indeed, the Program is much narrower than the interceptions authorized by either President Wilson or President Roosevelt.

The Department of Justice continues to consider the effect of all legal developments, including the Court's *Hamdan* decision, on its legal analysis of the Terrorist Surveillance Program. Based on its review, the Department of Justice has concluded that *Hamdan* does not undermine the legal analysis regarding the Program set forth in the *Legal Authorities* paper.

The Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), did not address the President's inherent authority to establish military commissions; it explicitly stated that it "need not address" whether Chief Justice Chase was correct in suggesting that "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'" *Id.* at 2774 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (Chase, C.J., concurring in judgment)). Rather, the Court concluded that the Force Resolution did not "expand or alter" existing authorizations for military commissions set forth in the Uniform Code of Military Justice ("UCMJ"). 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper is *not* that the Force Resolution somehow altered, amended, or repealed the Foreign Intelligence Surveillance Act of 1978. Instead, we explained that section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. Otherwise, use of pen registers and video surveillance in ordinary law enforcement investigations would have been unlawful, a result the drafters of FISA clearly did not intend. *See id.* at 22-23 & n.8 (explaining this point with respect to pen registers). And, as noted above, there is a long tradition of interpreting force resolutions to supplement the President's constitutional authority in the particular context of electronic surveillance of international communications.

Thus, the Force Resolution is best understood as an additional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. For these reasons, the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004), which held that the Force Resolution satisfies a materially identical prohibition on the detention of American citizens "except pursuant to an Act of Congress," is more relevant than the *Hamdan* decision for purposes of analyzing the Terrorist Surveillance Program. In *Hamdi*, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," even of U.S. citizens who fight for the enemy, as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides



that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Section 109 of FISA and section 4001(a) of title 18 operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department’s analysis of the Terrorist Surveillance Program in *Legal Authorities*. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the Armed Forces, even during wartime. By contrast, under FISA, Congress left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA’s declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch worked out rules applicable to the war). Accordingly, FISA was and is generally directed at foreign intelligence surveillance occurring outside the extraordinary circumstances of an armed conflict. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by sections 109 and 111 of FISA specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which, as noted, is intended to continue to apply during periods of armed conflict.

Second, in contrast to Congress’s regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to “define and punish . . . Offenses against the Law of Nations,” U.S. Const. art. I, § 8, cl. 10, and to “make Rules for the Government and Regulation of the land and naval forces,” *id.* cl. 14. Because of these explicit textual grants, Congress’s authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President’s authority to collect foreign intelligence necessary to protect the Nation. Indeed, in *Hamdan*, the Court expressly recognized the President’s *exclusive* authority to direct military campaigns and that each power vested in the President ““includes all authorities essential to its due exercise.”” *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in judgment)) (“Congress cannot direct the conduct of campaigns.”).

- 7. The Supreme Court found in *Hamdan* that the government failed to demonstrate that there were circumstances that made courts-martial rules impracticable for use in these military commissions. Could you give us some examples, generally speaking, of what might be acceptable circumstances?**

**ANSWER:** The Supreme Court in *Hamdan* held that the President’s Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001), did not explicitly address the impracticability of the

UCMJ, or court-martial rules promulgated thereunder, for use in military commissions. According to the Court, Article 36 of the UCMJ, 10 U.S.C. § 836, required a specific finding that court-martial procedures are impracticable before commissions could be used, and the Court faulted the Military Order for the absence of such findings. *See* 126 S. Ct. at 2791-92. The Court did not hold that such a finding would be insupportable—only that the *specific* findings the Court considered necessary were not in the record. *Id.* at 2792-93. The President’s order *had* been based on a review of court-martial procedures and a determination that many specific rules that had been designed primarily for the trial of our own troops charged with criminal offenses were not practicable for the trial of hardened terrorists, captured on the battlefields thousands of miles from the United States, but the Court did not consider those findings sufficiently specific to support use of military commissions.

Congress recognized in enacting the Military Commissions Act of 2006 (“MCA”) that many court-martial rules would be impracticable for military commissions. For example, because many terrorists were captured on the battlefield, application of hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. Therefore, the MCA recognizes that the limitations on hearsay for courts-martial shall not apply to military commissions. *See* 10 U.S.C. § 949a(b)(2)(E). The MCA also specifically provides that several other provisions of the UCMJ shall be inapplicable, *see id.* § 948b(d), and that the rules issued by the Secretary of Defense shall track those of courts-martial only insofar as he “considers practicable or consistent with military or intelligence activities,” *id.* 949a(a). Thus, while the MCA tracks the UCMJ in many respects, Congress correctly determined that these and other court-martial provisions could not be employed for military commissions.

8. **On June 29, 2006, while speaking at a public news conference, President Bush said he planned to work with Congress to "find a way forward" and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny. Can you provide some examples of how you would like to see legislation “revamp” the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet administration’s goals?**

**ANSWER:** True to President Bush’s state intentions, the Administration worked closely with Congress over the past several months in developing a statutory system of military commissions. The MCA reflects the product of those efforts. We are confident that the MCA will provide full and fair trials for unlawful enemy combatants and that the courts will uphold this statutory system of military commissions.

9. **How many of the detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Would you**

**provide us with a complete list of the charges pending against those detainees?**

**ANSWER:** Under the previous military commission system, ten detainees held at Guantanamo were charged with conspiracy for purposes of their trials by military commissions. Three of those detainees were also charged with other offenses. David Matthew Hicks also had been charged with attempted murder by an unprivileged belligerent and aiding the enemy. Omar Ahmed Khadr also had been charged with murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. Abdul Zahir also had been charged with attacking civilians and aiding the enemy. Now that Congress has enacted the MCA, the Department of Defense is reviewing the evidence against those individuals and others detained at Guantanamo Bay and will make new charging decisions based upon the standards and offenses detailed in the new Act.

**10. What is your opinion of the viability of conspiracy charges against al Qaeda members given that four Justices in Hamdan found that conspiracy is not a crime under international law or the law of war?**

**ANSWER:** The Constitution grants Congress the constitutional authority to “define and punish . . . Offences against the Law of Nations,” U.S. Const. art. I, § 8, cl. 10. Congress used that authority in the MCA to clarify that conspiracy is a substantive offense under the law of war. *See* 10 U.S.C. § 950v(28). Congress made clear that conspiracy is an offense “that has been traditionally triable by military commission.” *See id.* § 950p(a). We believe that this determination makes clear that conspiracy constitutes an offense under the law of war and remains properly triable by military commission. As Justice Thomas demonstrated in his opinion in *Hamdan*, that view is supported by historical practice and by authoritative commentators on the law of war. Justice Stevens’s determination that conspiracy is not an offense under the law of war did not have the support of a majority of the Justices and thus does not constitute an opinion of the Court.

**11. In his testimony before the Senate Armed Services Committee on July 15, 2005, Principal Deputy General Counsel Daniel Dell’Orto stated “after the President authorized the use of military commissions, work began within the DOD to establish, consistent with the President’s order, the procedures to be used and the rights to be afforded the accused. This process involved working to achieve certain ends, including: ensuring a full and fair trial for the accused; protecting classified and sensitive information; and protecting the safety of personnel participating in the process, including the accused.” In your opinion, can a detainee be afforded a “full and fair trial” if the DOD is depriving him of access to the classified and sensitive information being used as evidence against him? Do you believe it is the province of the**

**Executive branch to devise these commissions without Congressional action or approval?**

**ANSWER:** The MCA establishes military commission procedures that provide the accused with full and fair trials while protecting classified information from disclosure to the enemy. Under the Act, the accused will have the right to be present for all proceedings and to challenge and examine all the evidence introduced against him. *See* 10 U.S.C. § 949a(b). At the same time, however, the Government is given a robust privilege to ensure that classified sources and methods are not disclosed to the accused. *See id.* § 949d(f)(2)(B). These protections will ensure that every suspected terrorist receives a full and fair trial, consistent with the law of war, while also protecting sensitive information.

As you know, and as Mr. Dell’Orto testified, the President directed the Department of Defense to establish the original commissions by military order. At the time, the Administration made the judgment that no further legislative action was required, because the Supreme Court had held in several cases arising out of World War II that the President, acting as Commander in Chief, had the constitutional authority to establish military commissions for the trial of enemy combatants, and that Congress had endorsed the President’s authority in what is now codified as Article 21 of the UCMJ.

The Supreme Court’s decision in *Hamdan* similarly recognized the President’s authority to establish military commissions, but the Court held, by a closely divided vote, that the military commissions previously established by the President did not comply with certain provisions of the UCMJ. Congress now has enacted the MCA, which satisfies the statutory limitations identified in *Hamdan*.

**12. A January 2002 draft memorandum signed by you states that the new paradigm of the war on terror renders obsolete the Geneva Conventions' strict limitations on questioning enemy prisoners and renders quaint some of its provisions. Do you still adhere to that assertion now that the Supreme Court has spoken in *Hamdan*? Would you comment on whether you feel the Court's decision was misguided?**

**ANSWER:** The President determined in February 2002 that members of al Qaeda and the Taliban are not entitled to the protections that the Geneva Convention provides to lawful combatants. He also determined that Common Article 3, which applies to conflicts “not of an international character,” would not apply to this conflict, because the war on terror, which involves a transnational terrorist movement with global reach and a proven record of targeting United States citizens and interests in multiple countries, is decidedly a war of an international character. The President’s conclusion on that point plainly was reasonable. Indeed, it reflects a fundamental truth about the Geneva Conventions—they simply were not drafted in 1949 in anticipation of fighting a war against international terrorists.

The Supreme Court in *Hamdan* did *not* decide that the Geneva Conventions as a whole apply to our conflict with al Qaeda or that members of al Qaeda are entitled to the privileges of prisoner of war status. The Court did, however, disagree with the President's determination that Common Article 3 would not apply. We believe the MCA provides an appropriate response to *Hamdan*: Congress has clearly defined nine "grave breaches" of Common Article 3, while also buttressing the President's constitutional authority to determine whether other, non-criminal conduct also violates Common Article 3. See MCA § 6, Pub. L. No. 109-366, 120 Stat. 2600, 2632. This approach ensures that the United States will remain fully compliant with Common Article 3, while also providing our troops with clear guidance about their obligations under international law.

### **State Secrets and Renditions**

- 13. The Administration has been criticized by some organizations for its readiness to invoke the State Secrets Privilege in cases such as *Arar v. Ashcroft* and other cases involving the practice of rendition operations. Can you explain the criteria used to determine whether information that might come out in a case poses a threat to national security and thus warrants the invocation of the State Secrets Privilege?**

**ANSWER:** The state secrets privilege is a longstanding method approved by the courts to prevent disclosure in civil litigation of information important to the Nation's security. The government does not lightly assert the state secrets privilege, but because the government's paramount responsibility is to safeguard national security, the privilege is asserted on a case-by-case basis where the responsible agency head determines, after giving personal consideration to the matter, that there is a reasonable danger that disclosure of information at issue could cause harm to the national security. The case law makes clear that the privilege applies to protect against disclosure of sensitive national security information including military secrets, intelligence sources, methods, and capabilities, and information relating to the conduct of foreign affairs.

- 14. Recently, U.S. District Court Judge Marcia Cooke authorized Jose Padilla, a former enemy combatant, to review classified information, including memoranda and videotapes regarding his status and information obtained during his interrogations, for use in his defense in a separate Miami terrorism case. What prevented the Administration from invoking the State Secrets Privilege in this case?**

**ANSWER:** The Government may not invoke the state secrets privilege in criminal prosecutions. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

- 15. Was the Department of Justice consulted in the late 1990s when the practice of rendition was first used by the CIA? What sort of legal authority has been cited for this type of operation? Does the Administration have any legal concerns regarding the implication that nations that torture are usually at the receiving end of the rendition flights?**

**ANSWER:** It would not be appropriate in this context to comment on allegations of “rendition” activities by the Central Intelligence Agency. Consistent with the long-standing practice of the Executive Branch, the Administration briefs the Intelligence Committees regarding classified intelligence activities in connection with the war on terror. Any internal legal advice rendered by the Department in connection with any classified intelligence activity would be confidential legal advice, and it would not be appropriate to disclose. Maintaining the confidentiality of that advice is necessary to preserve the deliberative process of decision making within the Executive Branch and attorney-client relationships between the Department and other agencies.

“Rendition,” as we understand you to be using the term, is a vital tool in combating international terrorism; the practice brings terrorists to justice, and saves innocent lives. Some accounts of “rendition” in the popular press have erroneously suggested that the activity is unlawful. “Rendition” is an accepted and lawful practice, and for decades the United States and other countries have used it to transport criminal or terrorist suspects from the countries where they are captured to their home countries or to other countries where they can be questioned, held, or brought to justice. Both Ramzi Youssef, the mastermind of the 1993 World Trade Center bombing, and “Carlos the Jackal,” one of history’s most infamous terrorists, were brought to justice in this way. There are a number of published authorities supporting the legality of this tool. The European Commission on Human Rights specifically rejected Carlos’s claim that his “rendition” was unlawful. *See Ilich Ramirez Sanchez v. France*, Appl. No. 28780/95, Decision of 24 June 1996, Dec. & Rep. 86, at 11. In addition, the Department of Justice opined that forcible abductions of suspects overseas are lawful if officers act in accordance with authority under United States law and under the President’s constitutional authority, even if the arrest departs from international law. *See Authority of the Federal Bureau of Investigation to Override International Law In Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 183 (1989); *cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990) (holding that the Fourth Amendment does not apply to searches and seizures involving persons abroad “with no voluntary attachment to the United States,” and noting that a contrary rule “would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries”).

The President repeatedly has made clear that the United States does not condone or encourage the torture of anyone, anywhere in the world. *See, e.g.*, President’s Speech on September 6, 2006 (“I want to be absolutely clear with our people and the world: The United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it, and I will not authorize it.”); Statement on United Nations International Day in Support of Victims of Torture, Public Papers of the Presidents (July 4, 2005)

("[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. "). Consistent with U.S. reservations to the Convention Against Torture and the Senate resolution ratifying the Convention, it is the established policy of the United States not to expel, extradite or otherwise effect the involuntary return of any person to a country in which it is more likely than not that the person would be subjected to torture. See 8 U.S.C. § 1231 note (directing appropriate agencies to implement the United States' obligations under the Convention "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the [Convention]"); *see also* U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured'"). Where appropriate, the United States seeks diplomatic assurances from other nations that a person will not be tortured if returned to that country before transferring an individual to the custody of a foreign nation.

### **Signing Statements**

- 16. For the McCain Amendment or the PATRIOT Act, if the President thinks that the legislation needs a provision added to make the Act constitutional, wouldn't the President be better off if he followed the Constitution, vetoed the Bill, and then asked the Congress to pass it in accordance with what he would accept?**

**ANSWER:** We disagree with the premise that a President does not "follow[] the Constitution" when he makes signing statements construing a bill or expressing his constitutional reservations. As demonstrated by the longstanding practice of Presidents of both parties, the use of presidential signing statements is entirely consistent with the Constitution. A President need not veto an otherwise valid bill simply because of constitutional reservations about some provisions of the bill in some applications. As Assistant Attorney General Dellinger explained during the Clinton Administration, "we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 135 (1993) (available at <http://www.usdoj.gov/olc/signing.htm>); *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds").

The Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution," and directs him to "take care that the Laws be faithfully executed." U.S. Const., art. II, §§ 1, 2. When Congress passes legislation containing provisions that could be construed as contrary to well settled constitutional principles, or

that could be applied in a manner that is unconstitutional, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. Presidents, like courts, assume that Congress does not intend to legislate unconstitutionally. Using a presidential signing statement to give a potentially problematic provision in a bill a construction that avoids constitutional concerns does not represent an affront to Congress; rather, it gives greater effect to Congress's will than simply vetoing the legislation, or tacitly declining to enforce a provision (as other Presidents have done). As Assistant Attorney General Walter Dellinger explained, the practice of issuing a signing statement to construe a statutory provision to ensure its constitutionality is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." 17 Op. O.L.C. at 133. Thus, "[s]igning statements have *frequently* expressed the President's intention to construe or administer a statute in a particular manner (*often* to save the statute from unconstitutionality)." *Id.* at 132 (emphases added). "[S]igning statements of this kind can be found as early as the Jackson and Tyler administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." *Id.* at 138.

In addition, the mere fact that a President issues a signing statement about a bill does not mean he considers the measure to be unconstitutional. For example, when the President signed the PATRIOT Act reauthorization bill, he indicated that the Executive Branch would construe provisions that may involve "furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority . . . to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." The two sections of the reauthorization bill specifically mentioned in the signing statement involved audits of the use of certain business records and mechanisms for obtaining records. The constitutional reservations the President expressed in his signing statement simply echoed concerns made consistently by prior Presidents in signing statements involving similar provisions. Presidents routinely assume that when Congress passes a bill requiring the production of information, it does so against the backdrop of what President Clinton, in a signing statement, called the "President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999). In a similar context, President Eisenhower wrote:

I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.



Pub. Papers of Dwight D. Eisenhower 549 (1959).

Where an enrolled bill is constitutional on its face, there is no call for a President to ask Congress to change the bill before he signs it into law. It can be beneficial, however, for the President to use signing statements to remind the Executive Branch, the public, and Congress that information-sharing requirements do not alter the President's constitutional duty to oversee the appropriate disclosure of sensitive information.

**17. Can you please explain the process by which signing statements are prepared and drafted in the White House?**

**ANSWER:** The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill. The Department of Justice also reviews legislation to determine its constitutionality, but anyone in the Executive Branch who is participating in the legislative review process may offer comments on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

**Attorney-Client Privilege**

**18. Do you acknowledge that the announcement of an investigation by DOJ against an organization, particularly a public company or private partnership almost always does substantial harm to that company's reputation, stock price, shareholders, customer base, and employee retention? (Note that business in the financial/professional services industry have always failed after such an announcement – witness Drexel Burnham and Andersen.)**

**ANSWER:** The Department does not publicly announce the existence of a criminal investigation. Indeed, the Department generally does not confirm or deny the existence of a criminal investigation. Privately held entities, such as partnerships, usually have no obligation to disclose an ongoing investigation and do not do so. A publicly held corporation may be required to disclose to its shareholders that it is the subject of an investigation or it may restate its earnings, as occurred recently in stock option backdating matters, to ensure that it is complying with its legal obligation to make full disclosure of all material information to its shareholders. Depending on their nature, such disclosures can trigger a negative response in the market. Stock prices may decrease for an extended period upon an announcement of a restatement of earnings or may simply experience a short spike downward and then move upward again. Also depending on the nature of the disclosures, a corporation's customers and employees may choose to

disassociate from the corporation because of concerns about its long-term viability or a desire to avoid associating with criminal conduct. Any adverse consequences to the company do not result from any announcement by the government, but rather from the scope and gravity of the remedial measures (such as adverse earnings restatements in the millions of dollars) or the underlying conduct disclosed by the company.

- 19. If you were the General Counsel of an organization that had recently been named to be under investigation by the Department of Justice and your stock was tanking, you were losing customers and employees, and the very survival of your company depended on whether you could quickly reach a non-prosecution agreement with DOJ and avoid indictment, wouldn't you advise complete cooperation with DOJ including satisfaction of all of the elements outlined in the Thompson memorandum including waiver of attorney-client privilege?**

**Follow up: If the answer is that none of the 9 factors are dispositive, which do you view as "optional," and when?**

**ANSWER:** An experienced General Counsel of a corporation would never undertake to enter into an agreement with the Department of Justice if there was no evidence of wrongdoing by the corporation or its employees. There would be no need for such an agreement. On the other hand, a responsible General Counsel, whose company was obligated to publicly disclose corporate misconduct and/or restate earnings because of misconduct, would be focused on investigating the allegations as quickly as possible in order to make an informed decision about their merits and discharging management's obligations to shareholders by disclosing all material facts, correcting any misconduct, rectifying any damage done, and preventing its recurrence. Many of the steps a responsible General Counsel would take, unsurprisingly, will coincide with the factors reflected in the *Thompson* Memorandum, and the subsequent memorandum on the same topic by Deputy Attorney General Paul J. McNulty (*McNulty* Memorandum), since those memoranda are designed, among other things, to provide incentives for responsible corporate management. Most important, the guidance on when to exercise discretion to charge is not triggered unless there is sufficient evidence of criminal wrongdoing by corporate officials that the corporation can be held criminally liable.

Because the factors are guidance, rather than intended to "mandate a particular result," the importance of a factor can vary from case to case. A number of factors must be considered: the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, the corporation's timely and voluntary disclosure of wrongdoing, the existence and adequacy of the corporation's pre-existing compliance program, the corporation's remedial actions, collateral consequences, including disproportionate harm to shareholders, pension holders and employees, the adequacy of prosecuting individuals responsible, and the adequacy of remedies such as civil or regulatory enforcement actions. Some factors may or may not apply in specific cases and in some cases, one factor may override all others,

*e.g.*, the nature and seriousness of the offense. *Thompson* Memorandum IIB; *McNulty* Memorandum IIB. Whether one factor is dispositive is to be determined on a case-by-case basis. Waiver of attorney-client privilege is not one of the listed nine factors; it is a subfactor of the cooperation factor. *Thompson* Memorandum VI; *McNulty* Memorandum VII.

**20. You are still a GC: in circumstances that pose such extreme risk, would you be likely or unlikely to offer privilege waiver before it is requested, given its prominence in the Thompson Memo? Under these circumstances, would you consider this to be a “voluntary” waiver?**

**ANSWER:** If the corporation, through its employees, had engaged in criminal activity, such activity must be disclosed to the regulatory authorities, shareholders, and the investing public. Such negative news would likely have a deleterious effect on stock prices, employee morale and business operations. Responsible prosecutors are obligated to investigate this conduct to discharge their duty to investigate and prosecute criminally culpable individuals and entities. In such circumstances, responsible boards of directors, corporate management and corporate counsel would also conduct an internal investigation. Counsel could reasonably conclude that, rather than forcing the government to conduct a protracted grand jury investigation by subpoenaing employees into the grand jury and requesting documents -- a process that could take months or years -- disclosure of an internal investigation may bring the matter to quick resolution. The fact that it is in the corporation’s interest to conclude the matter quickly, however, does not mean that a decision to pursue disclosure is not voluntary. Rather, it is a consequence of the company’s desire to advance its own interests, including its interest in a prompt resolution, during the government’s investigation.

**21. If a DOJ prosecutor says to an organization under investigation: “Have you considered waiving your attorney-client privilege?” or “Are you aware of the cooperation factors outlined in the Thompson memorandum?” and the company subsequently provides attorney-client privileged material, is that a voluntary waiver?**

**ANSWER:** Yes. In the first scenario, the government is not making a request but simply asking whether waiver was considered, oftentimes in response to a corporate inquiry about what it can do to facilitate a speedy government inquiry. The second scenario does not mention waiver at all. Thus, if the corporation offers waiver under either of these scenarios, it was not at the request of the government. Finally, the Department notes the use of the term “voluntary waiver” to describe these types of negotiations is fundamentally misleading. “Voluntary” waiver assumes that there could be “involuntary” waiver. The Department has no ability to coerce or compel counsel to waive a valid privilege. Ultimately, counsel freely decides to waive privilege when the corporation decides such action is in its own best interests because it seeks to avoid indictment caused by the criminal activity of its employees.

It should be noted that the *McNulty* Memorandum establishes new process requirements for waiver requests. Prosecutors engaging in preliminary discussions regarding waivers of privilege should make clear that all comments or remarks, like those set forth in the above question, are preliminary and do not create any obligation by the company to provide privileged documents. Under the *McNulty* Memorandum, should the prosecutor request waiver for factual information, that request is subject to review and approval by the United States Attorney or Department component head. If the prosecutor requests waiver for attorney-client communications, that request must be made by the United States Attorney or Department component head, subject to review and approval by the Deputy Attorney General. Even where the company volunteers waiver, a prosecutor must notify the United States Attorney or Assistant Attorney General in the Division where the case originated and a record of the notification must be maintained.

- 22. How does the Justice Department compile information, if at all, on the behavior of its U.S. Attorneys and other prosecutors regarding privilege waiver? How is the information collected in the field offices and at DOJ main? How long has this information been collected? Do you only collect information when prosecutors self-report that they have made a privilege demand, or do you also collect information about what prosecutors term privilege waiver “requests” or other times when privilege waiver issues are raised? Do you collect information on the circumstances in which waiver is discussed: i.e., at what point is the subject raised (in early conversations or only after fact-finding/investigations are complete); or is it requested only when other avenues to discovering the probative content sought have been exhausted (is it a first or last resort)?**

**ANSWER:** The United States Attorneys’ Offices, DOJ components, and the Deputy Attorney General handle privilege waivers and maintain the investigatory files for each case. Pursuant to the *McNulty* Memorandum, prosecutors must obtain written approval from the United States Attorney or Department component head prior to requesting purely factual information that is covered by the privilege (Category I information). The Assistant Attorney General of the Criminal Division must be consulted with prior to the United States Attorney’s or component head’s decision to grant or deny the request for waiver. A copy of each waiver request and authorization must be maintained in the files of the United States Attorney or component head. Prosecutors must obtain written authorization from the Deputy Attorney General prior to requesting attorney-client communications or non-factual attorney work product (Category II information). A copy of each waiver request for this information must be maintained in the files of the Deputy Attorney General.

Pursuant to the now superseded *McCallum* Memorandum, DOJ prosecutors were required to obtain supervisory approval before requesting a waiver. The information regarding this policy would have been generated after October 2005.

The Executive Office of United States Attorneys also collected sample information on the use of privilege waivers from various offices throughout the country in 2006. The information requested encompassed recent instances when waiver was requested by the government, when waiver was volunteered by defense counsel without a request from the government, whether waiver was obtained at all, and whether waiver had any impact on the investigation and prosecution of individual or corporate targets. The Attorney General's Advisory Committee also reviews corporate charging practices, including waiver, and discusses them in its meetings.

- 23. Prior to the adoption of the Holder and Thompson memoranda, the Department had no formal policy instructing its prosecutors to demand waiver of the attorney-client privilege as a condition for cooperation credit, and yet the Department appeared to have no trouble securing convictions against organizations that violated the law. In fact, former Attorney General Dick Thornburgh testified in March of this year that he could not remember one case during his tenure at Justice where DOJ asked for or otherwise sought an organization to waive its attorney-client privilege. What is different about the prosecutions in the past few years as compared to previous decades and what significant additional information does waiver provide that cannot be revealed through non-privileged sources such as independent investigations, grand jury testimony, and proffers?**

**Are there current examples of cases that could not have been brought without privilege waiver? By could not have been brought, I mean in which information could not have been gathered pursuant to government interviews, proffers, and subpoenas, and through gathering non-privileged material from the company?**

**ANSWER:** There is nothing different about the prosecutions from earlier years, except that they may have grown in size and complexity after the corporate scandals. The Department respectfully disagrees with the suggestion that prior to the issuance of the *Thompson* Memorandum in January 2003, waiver was never discussed. Waiver was discussed in the *Thompson* Memorandum's predecessor, the *Holder* Memorandum, issued in 1999. Moreover, those memoranda did nothing more than commit to paper what prosecutors had been doing for decades. Prior to 1999, prosecutors received otherwise privileged materials, *e.g.*, internal investigations and documents prepared by opposing counsel in investigating corporate fraud. The difference between then and now is that there was no formalized guidance provided to prosecutors about how that disclosure should be considered in a comprehensive analysis of whether the corporation should be charged.

In the typical case, waiver of privilege does not provide anything that cannot be obtained through subpoena. In some cases, however, the corporation will choose to provide its internal investigation to avoid protracted grand jury investigation, including numerous employee grand jury appearances and document requests that often last for

months or years. In some cases, waiver may be necessary if the corporation argues reliance on an "advice of counsel" defense or its attorneys are implicated in efforts to conceal the crime after the fact, such as the destruction or concealment of documents, suborning the perjury of witnesses, or other obstructive conduct.

By way of example:

In *United States v. The University of Medicine and Dentistry of New Jersey*, Mag. No. 05-3134 (PS), a criminal complaint was filed on December 29, 2005 against the University of Medicine and Dentistry of New Jersey ("UMDNJ") for health care fraud in violation of Title 18, United States Code, Section 1347. On that same date, UMDNJ entered a deferred prosecution agreement with the government and agreed to the installation of a federal monitor, among other things. The institution also waived any claims of attorney-client privilege and/or attorney work product doctrine as to (1) factual internal investigations undertaken by the Institution or its counsel relating to the matters under investigation by the U.S. Attorney's Office; and (2) legal advice given contemporaneously with, and related to, such matters. The government agreed to maintain the confidentiality of those documents and promised not to disclose them to a third party unless required to do so by law or unless disclosure was necessary in order for the government to discharge its duties. The first waiver of attorney-client privilege and attorney work product doctrine was requested on September 21, 2005 and was obtained on September 30, 2005. In a letter to the government announcing its waiver, UMDNJ stated that "as a public institution of the state of New Jersey, [it]. . . decided . . . to waive these privileges to make available all of the facts so that a speedy, fair, and just resolution of the criminal investigations . . . [could] be made." Within two months of receiving the initial waiver, the U.S. Attorney's Office received key privileged documents which led to a speedy resolution of the criminal case against the corporate defendant. This clearly was a case in which waiver allowed the Department of Justice to go after wrongdoers in a significantly shorter time-frame than would have been possible had we not been able to seek such waivers. In addition, since the criminal complaint was based on privileged documents, this may very well have been a case in which the only way we could have prosecuted corporate wrongdoers was to obtain a waiver of the privilege. UMDNJ, with an annual budget of \$1.6 billion, is the largest public health institution in the nation.

In the Southern District of New York, in *United States v. Martin Armstrong* (HSBC /Republic Securities), waiver enabled the government to freeze \$80 million before the defendant could move money. In this massive ponzi scheme, the government received a waiver of work product privilege for forensic accounting analysis tracing the flow of money associated with securities trades. The waiver enabled the government to follow the money quickly enough to freeze \$80 million before Armstrong could move it. The case involved a billion dollar ponzi scheme perpetrated by an American investment adviser on a host of major Japanese corporate victims. The investment manager, Martin Armstrong, conspired with officers of Republic New York Securities Corporation ("RNYSC") to hide the fact of massive trading losses from the investor victims and to use money invested by new victims to pay off older victims. Shortly after the government investigation began in August 1999, RNYSC waived its work product privilege and

provided the government with a forensic accounting analysis conducted by its lawyers and retained accountants. This otherwise privileged analysis traced certain cash flows among accounts controlled by Armstrong both to conduct the scheme and to steal from the victims. The waiver enabled the government to follow the money quickly enough to freeze approximately \$80 million within two weeks of beginning our investigation. The government was able to secure an arrest warrant for Armstrong (based in part on the privileged work-product information) the following week. Absent this waiver, it would likely have taken at least six weeks to conduct the same analysis. In the interim, Armstrong would have been able to flee and/or transfer abroad the \$80 million in cash. Armstrong would likely have done so because he was held in contempt, shortly after his arrest, for secreting another \$10 million in gold bullion that was subject to a civil court order requiring Armstrong to relinquish it. Two RNYSC officers subsequently pleaded guilty to participating in the fraud. RNYSC pleaded guilty as well and paid a record \$600 million in restitution in 2001.

- 24. If the Justice Department believes that those under federal investigation should open their files on attorney-client confidences and reveal the details of their legal counseling when the case is important or when the information is otherwise difficult to procure, why is it that you and the President have regularly cited your firm belief that the attorney-client privilege must exist to encourage a free flow of communication and advice of counsel within the Administration? Why has Justice refused to provide a large amount of information under that privilege in very important and high profile cases? Should Congress consider the Administration to be “non-cooperative” because they do not waive their rights to confidential attorney-client counseling? Why is it the privilege enforceable and in the public’s interest when asserted by the Administration, but not for others? Isn’t this a double standard? Doesn’t privilege act to promote the public’s interest in encouraging decision-makers to seek legal counsel regardless of whether the client is the President of the United States or an employee of a company?**

**ANSWER:** The Justice Department does not require, or indeed wish to receive, unrestricted access to “files on attorney-client confidences.” The government is interested in obtaining facts relevant to whether criminal activity occurred. The Department recognizes the importance of interests served by the privilege, seeks such waivers selectively, and works with counsel to limit the scope to obtain only the information that the Department needs. We respectfully disagree with any comparison between the privilege asserted by corporations that are criminally liable for the actions of their employees and the privilege asserted by the Executive Branch. The assertion of privilege by the Executive Branch, among other things, protects highly-sensitive matters involving national security and the safety of American citizens. Moreover, when asserted in the context of a Congressional inquiry, the privilege also implicates important interests related to inter-branch comity. Thus, a comparison of the two is not valid.

25. **Does it bother you that so many of your predecessors, former AG's, Deputy AG's, Solicitor Generals from Republican and Democratic Administrations, the Courts, the Sentencing Commission, lawmakers on both sides of the aisle, and virtually every legal, business, and civil rights organization in the country disagree with current DOJ policies and practices that penalize organizations for preserving their attorney-client privilege? With all of these folks staked out against your policy, who is for it? If the answer is only your department, doesn't that give you pause and cause you to question the propriety and wisdom of your position?**

**ANSWER:** The Justice Department is in a unique position as a governmental entity tasked to enforce our nation's criminal laws. The private bar and corporate counsel play a very different role; that is, they seek to obtain the best result for their corporate client whenever possible. This not only includes vigorously opposing criminal charges, but often includes aggressive litigation in shareholder lawsuits to reduce awards to those shareholders who may have been victimized by criminal activity. While we respect the views of our colleagues, their criticisms likely reflect their roles in the process. Other corporate counsel and former DOJ officials, who have supported this guidance while in public office, have not chosen to join these critics. Moreover, other governmental agencies with enforcement responsibilities, such as the Securities and Exchange Commission, take similar approaches.

The Department supports the guidance set forth in the *McNulty* Memorandum and believes that it reflects a reasoned, time-tested approach to corporate charging decisions.

26. **We already know that the privilege does not apply when the lawyer-client relationship is being used to facilitate or promote a fraud (the crime-fraud exception), and we already know that the privilege is rather limited in the scope of what it does protect. Can the Justice Dept articulate more clearly when it is that it believes that the privilege should apply and when it is that clients should not be allowed to invoke it?**

**ANSWER:** There is a crucial distinction between circumstances in which a privilege does not exist and circumstances in which a privilege is waived. In the first instance, a privilege may not ever have existed because the lawyer-client relationship was used to facilitate a fraud (the crime fraud exception). In the second instance, a client may waive a privilege protecting confidential attorney-client communication for the purpose of seeking legal advice. Clients should not be allowed to invoke privilege when the subject communication cannot meet the definition of what is covered as an attorney-client privileged communication, when the privilege is otherwise vitiated because of an established exception under the law, or when the privilege is waived because the communication was disseminated to a third party not covered by the privilege. These issues are typically litigated in filed cases and are not part of the charging analysis covered in the *McNulty* Memorandum.



**27. How often do companies who refuse to waive privilege communications still receive complete credit for cooperation? Are you aware of any instances where a company refused to waive its privilege and still received the benefit of bargaining a settlement, was allowed to prove its non-culpability, or was offered a non-prosecution agreement?**

**ANSWER:** The charging analysis is not solely focused on privilege waiver - it is only a subpart of one of the nine factors. The analysis is dependent on all of these factors, only one of which is cooperation. In considering cooperation, the Department can consider the company's willingness to disclose wrongdoing promptly, to identify wrongdoers and to provide access to documents and witnesses, including, if necessary, waiver of attorney-client and work product protections. If an assessment of the factors as a whole weighs against charging the company, the prosecutor will decline prosecution. Decisions to forgo charging are made every day by prosecutors across the country and those decisions are not dependent on whether the company waived a privilege. Moreover, the government must prove a defendant's guilt beyond a reasonable doubt in a criminal case. This is an extremely high standard. It is not up to the corporation to prove its "non-culpability."

**28. In October 2005, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads (the "McCallum Memorandum") directing them to adopt "a written waiver review process for your district or component." Doesn't this create a worse situation whereby the DOJ is condoning the idea that each field office should be allowed to set its own policies and standards? Doesn't this lead to dozens of different policies around the country? In what way, if any, is this new directive responsive to the concerns of critics who protest the practice of considering privilege waivers as a measure of cooperation? How does the McCallum Memo help add to the certainty of confidentiality of an employee discussing a sensitive matter with a General Counsel?**

**ANSWER:** The *McCallum* Memorandum has been superseded by the more detailed requirements contained in the *McNulty* Memorandum.

The *McNulty* Memorandum promotes consistent and uniform decision-making in each district and across the country and it is responsive to critics who claimed that individual AUSAs had too much autonomy in making waiver requests. It should be noted that to date, no critic has produced empirical evidence substantiating that claim. Pursuant to the *McNulty* Memorandum, only a United States Attorney or Department component head can approve a prosecutor's waiver request for factual information, identified in the *McNulty* Memorandum as "Category I" information. Moreover, a waiver request for Category I information cannot be approved or denied prior to consultation with the Assistant Attorney General. This consultation requirement will promote consistent and uniform decision-making across the Department.

Similarly, with respect to requests for communications between attorneys and their clients, or legal advice or other factual information, known as “Category II” information in the *McNulty* Memorandum, the Deputy Attorney General must approve all waiver requests, ensuring that the policy and standards for requesting waiver of this information are uniform.

With respect to the last question, the *McNulty* Memorandum, as well as the predecessor *McCallum* Memorandum, is an internal process requirement of the Department, and does not impact a rank and file employee’s relationship with corporate counsel. Moreover, it is important to note that the scope of corporate counsel’s representation is limited to the corporation and its high-level decision-makers. In most instances, corporate counsel does not have a confidential relationship with the rank and file employee.

**29. Do you agree with the Supreme Court’s logic and insight in *Upjohn Co v. United States* (449 U.S. 383) that “an uncertain privilege is no privilege at all”? In either event, can you explain the logical relevance between a corporation’s VALID assertion of privilege, and the conclusion that the corporation is not being cooperative?**

**ANSWER:** Yes. We agree that a well-defined privilege promotes certainty and stability for those that must rely on the privilege. The *McNulty* Memorandum is consistent with this, as the corporation continues to enjoy an absolute right to assert the privilege when it believes its overall interests are being served by doing so. A corporation may assert a privilege in pre-indictment negotiations and it has a right to take that action, fight the charges, and proceed to trial. Or it may simply proceed without waiving privilege, understanding that such a decision, along with other facts and an analysis of the *McNulty* factors, may impact a prosecutor’s charging analysis. That is the corporation’s decision to make.

In exercising charging discretion, the prosecutor also has a right to decide that access to privileged information is needed to evaluate the completeness of a corporation’s voluntary disclosure and cooperation. After all, the corporation is asking that it not be charged despite the fact that its employees committed criminal acts.

So, for example, where the company urges a speedy decision, it is reasonable to ask for the results of a completed internal investigation. This allows the prosecutor to obtain information without long and cumbersome negotiation of cooperation agreements with each individual-employee witness. It prevents months-long searches through millions of pages of documents when the relevant documents have already been identified by corporate counsel. And as *United States v. Martin Armstrong* illustrates, waiver can prevent further dissipation of assets subject to government forfeiture for the benefit of fraud victims. Finally, in other circumstances, it may be important for the prosecutor to determine what contemporaneous legal advice was given at the time the fraud was occurring. Seeking waiver in these instances is good government practice.

Conversely, if the corporation decides not to waive privilege and that decision plays a part in stalling the investigation or preventing the government from obtaining necessary evidence and assets to compensate victims, the prosecutor has a right to consider that fact in assessing whether the company has fully cooperated. Certainly, a prosecutor may sensibly conclude that a corporation that has waived privilege in these circumstances may be providing greater cooperation than those that do not. But the overall importance of waiver to the *McNulty* Memorandum should not be distorted. It must be emphasized that waiver is only a small part of assessing a corporation's cooperation and it is only sought where necessary. The *McNulty* guidance is much more comprehensive, and waiver is only a subpart of one of the nine factors considered in charging, so it is not dispositive in any given situation.

### **Immigration Questions**

- 30. On January 9, 2006, you issued two memoranda to U.S. immigration judges and the Board of Immigration appeals for failing to treat aliens who appear before them with respect and for failing to produce quality work. You wrote that you “believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.” You instructed then Acting Deputy Attorney General Paul McNulty and the associate attorney general to conduct a comprehensive review of the immigration court system.**

**Subsequently, during Deputy Attorney General Paul McNulty's nomination hearing on February 2, 2006, Mr. McNulty stated that he was reviewing the way the immigration courts were operating, the quality of the work that is being done, the efficiency and effectiveness, and “whether or not we have struck the right balance.” According to Deputy Attorney General McNulty, that review was to be done quickly.**

**Then, on April 3, 2006, Deputy Assistant Attorney General Jonathan Cohn testified before this committee that “the review is shortly going to be completed”.**

- Has the review been completed?**
- What were the results of the review?**
- What efforts have you made to reform the immigration judges and the Board of Immigration Appeals?**

**ANSWER:** On August 9, 2006, the Department announced the completion of the review together with twenty-two measures that the Attorney General has directed as a result of the review that are designed to improve the performance and quality of work of the immigration courts. That day, Assistant Attorney General Moschella also sent the Committee a letter summarizing the results of the review and attaching a description of

the twenty-two measures. We believe those documents answer these questions and we are pleased to provide a copy of them for inclusion in the record of this hearing.

**31. Currently immigration judges and members of the Board of Immigration Appeals are hired subject to an undefined process that is strictly under your purview. However, traditional administrative law judges are subject to an elaborate appointment process including an examination and ranking by the Office of Personnel Management. Shouldn't Board members and immigration judges be subjected to the same independent process for hiring?**

**ANSWER:** The Attorney General also believes the criteria the Department has used in making these appointments are generally sound. At the same time, based on the recently completed review of the immigration courts, the Attorney General directed some enhancements that should further improve our approach to filling these important positions.

Because the INA specifies that immigration judges are to be attorneys, immigration judges and Board Members are appointed pursuant to Schedule A authorization under 5 C.F.R. § 213.3101, the same personnel authority used for appointing lawyers to many other important positions at the Department of Justice and throughout the government. Under this authority, an agency seeking to fill an attorney position specifies, in addition to bar membership, the qualifications most needed for the job and selects accordingly. With respect to immigration judges and members of the Board of Immigration Appeals, the Department has required citizenship and seven years of legal experience. For Board members, it has also required that one year of this experience be at the equivalent of the GS-15 level in the federal service. In addition, in making a selection, the Department generally considers a candidate's education, years of professional legal experience, knowledge of immigration law and procedure, litigation experience, experience handling complex legal issues, judicial temperament, analytical decisionmaking, writing ability, and, when appropriate, ability to conduct administrative hearings and knowledge of judicial practice and procedures. Candidates are required to submit a resume or the equivalent and, after initial selection, to undergo a full field FBI background investigation (BI) unless they have a current and adequate BI. Each appointment is subject to a favorable suitability adjudication is by the Department's Office of Attorney Recruitment and Management and the Executive Office for Immigration Review for employee suitability. Each BI is reviewed by the Security and Emergency Planning Staff of the Department's Justice Management Division for security clearance purposes.

The improvements the Attorney General has directed to this process are as follows. All immigration judges and Board members appointed after December 31, 2006, will be administered a written examination to evaluate their familiarity with key principles of immigration law. In addition, the Attorney General has directed EOIR to employ the two-year trial period of employment generally applicable to newly appointed immigration judges and Board members both to assess whether a new appointee

possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed, while fully respecting the adjudicator's role. These measures will enable the Department to retain the benefits of the current hiring process while also enhancing the professionalism of EOIR's adjudicators.

**32. There has been a flood of immigration appeals filed in the Federal Courts causing substantial delays. During a hearing on reducing immigration litigation on April 3, 2006, Assistant Deputy Attorney General Jonathan Cohn testified that one circuit takes over two years to decide the average immigration appeal. One solution to reduce the number of immigration appeals handled by the circuit courts is to consolidate immigration appeals filed in the Federal courts into one U.S. Court of Appeals. During that same hearing Judge Jon Newman suggested a centralization proposal modeled on the FISA or the old Temporary Emergency Court of Appeals in which circuit judges throughout the country are drawn together to staff a U.S. Court of Immigration Appeals.**

**A. What is your position on consolidating immigration appeals into a centralized court and do you agree with Judge Newman's proposal to draw from circuit judges nationwide in a model similar to the TECA court?**

**ANSWER:** The flood of immigration cases pending in the courts of appeals is a serious matter that cannot and should not be ignored. As explained further in our answer to question 57, the Department believes the most important change Congress could make to assist with this problem is to require an alien to obtain a certificate of reviewability from a federal judge in order to pursue his appeal. If the judge were to deny the certificate of reviewability, the government would not have to file a brief, and the alien could be removed without additional time-consuming and unnecessary proceedings. If the judge were to grant the certificate of reviewability, then the case would proceed to full briefing and consideration by a three-judge panel.

The Administration has not taken a position on centralizing review in a single existing court. We do not, however, support drawing judges from around the country to serve on a temporary basis because we do not believe this would contribute significantly to addressing the flood of litigation. Deciding immigration cases with a rotating group of judges is unlikely to improve the adjudication process, because a rotating group of judges would be less likely to develop increased subject-matter expertise and no set of judges would confront the results of failing to resolve cases promptly.

**B. As a related matter, considering the current flood of immigration appeals, what will the additional affect be on the caseload of immigration judges and the Board of Immigration Appeals? Are the additional litigation resources in S.2611 sufficient to address any increase?**

**ANSWER:** With respect to the sufficiency of resources, although the increase in litigation in the Circuit Courts has had a significant impact on the Civil Division's Office of Immigration Litigation, it has had little effect on the Board's and immigration courts' workload, because remands from the Circuit Courts to the Board and the immigration courts continue to make up a very small percentage of the Board's and the immigration courts' cases. What has had a very significant effect, however, are the enhanced immigration enforcement efforts, resources, priorities and strategies of the DHS, which have led to a dramatic growth in immigration court case receipts in recent years. As an example, immigration courts received over 70,000 more new matters in FY 2005, an increase of approximately 30 percent in that year alone. While we applaud DHS's stepped up enforcement, we must note that stepped up enforcement necessarily means that EOIR can expect to receive tens of thousands of additional cases annually. As a consequence, EOIR expects significant increases in BIA appeals as well.

On August 9, 2006, the Attorney General issued certain directives aimed at improving the quality of EOIR adjudications. Among these was a directive to seek funding increases in key areas, taking into account as well the anticipated increases in the immigration courts' and the Board's workload. According to the Department's current projections, the additional resources authorized in S. 2611 are consistent with this directive and sufficient to meet EOIR's anticipated additional personnel needs.

S. 2611 would also increase the size of the Board of Immigration Appeals from 11 to 23 and mandate three-member adjudication of almost all BIA appeals. Based on the review of the immigration courts that the Attorney General directed the Deputy Attorney General and the Associate Attorney General to conduct, the Department concluded that the size of the Board should be increased to 15 and that the Board should also continue to make use of the provisions authorizing the appointment of temporary Board Members as necessary to meet the Board's needs. On December 7, 2006, the Department published an interim rule that would effectuate these changes. Under this approach, the Board would not become so large that it would effectively lose its capacity to deliberate en banc but would still be able to obtain temporary additional help as needed. The Attorney General also directed EOIR to prepare proposed amendments to the streamlining rules that would retain the fundamentals of the current rules but make some adjustments with respect to the cases heard by three-member panels and the cases affirmed without opinion. Therefore the Department does not support the provisions in S. 2611 regarding the size of the Board or the mandatory use of three-member panels, but the Department does believe there is a need for increased resources for additional permanent and temporary Board members and is making the regulatory changes needed to facilitate the devotion of those resources as necessary. We note, moreover, that if S. 2611's mandate regarding the use of three-member panels were adopted, that would greatly reduce the BIA's current rate of adjudication. That in turn would create a substantial backlog at the Board absent significant additional resources beyond those authorized in S. 2611.

**33. I have long expressed a concern regarding the Attorney General’s authority to overrule conclusions by the immigration judges and the Board of Immigration Appeals. What is the standard the Attorney General uses to determine which cases to intervene in and the standard by which he decides to overrule these cases?**

**ANSWER:** The Immigration and Nationality Act confers upon the Attorney General the power to determine the admissibility and removability of aliens. *See* Immigration and Nationality Act (INA) § 103(g), 8 U.S.C. § 1103(g). Immigration judges exercise that authority in the first instance, *see* INA §§ 101(b)(4), 240(a)(1), 8 U.S.C. §§ 1101(b)(4), 1229(a)(1); 8 C.F.R. § 1003.10, and the Board of Immigration Appeals reviews their decisions, *see* 8 C.F.R. § 1003.1, but they all do so on behalf of and subject to the supervision of the Attorney General, INA §§ 101(b)(4), 103(g), 8 U.S.C. §§ 1101(b)(4), 1103(g); Homeland Security Act of 2002, Pub. L. No. 107-296, § 1101, 116 Stat. 2135, 2273 (codified at 6 U.S.C. § 521 (Supp. II 2002)).

Because the adjudication of immigration cases is ultimately entrusted to my office, it should come as no surprise that cases will be referred for my consideration from time to time. The regulations do not set forth a standard that the Attorney General must use in determining whether to consider a case in every instance. Instead, the regulations merely provide a mechanism for referring cases to me. Cases can be referred in three different ways: (a) the Attorney General can direct the Board to refer the case, (b) the Chairman of the Board or a majority of the Board can refer the case to the Attorney General *sua sponte*, or (c) the Secretary of Homeland Security can refer a case to the Attorney General. *See* 8 C.F.R. § 1003.1(h).

The Attorney General’s determination with respect to whether to consider a case directly will rest on a large number of factors, including the costs of a wrong decision in that case, the frequency with which the underlying issue will arise, and the national security and foreign policy implications of a decision. The Attorney General’s review is *de novo*. His decisions, like those of immigration judges and the Board, are based on the governing laws and regulations and the exercise of discretion conferred on him by law and are reviewable in federal courts to the extent provided by the INA.

There is nothing unusual about any of this. Rather, it is standard administrative law practice for Department and agency heads that assign initial decisional authority to hearing officers to retain the authority to review their decisions and for their reviewing authority to be plenary. *See, e.g.*, 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule”). Retaining such authority is particularly important in the field of immigration because immigration decisions are often discretionary and inextricably intertwined with national security and foreign policy. Decisions of this character are of necessity not reviewable in federal court. These considerations make the availability of direct review of such decisions by a member of the Cabinet with relevant expertise particularly necessary and appropriate.

## OPR Investigations

- 34. Mr. H. Marshall Jarrett, the Counsel for the Office of Professional Responsibility, wrote four memoranda in recent months in which he repeatedly requested that he and several attorneys on his staff be granted the necessary clearances to conduct an investigation into the Department of Justice's approval of the Terrorist Surveillance Program. After five months of requests, he was forced to close his investigation because the clearances were never granted. In a letter dated July 17, 2006, Assistant Attorney General Moschella stated that the clearances were not granted because of concerns over leaks. Mr. Jarrett noted in his memo that the Criminal Division, the Civil Division, and the Privacy Oversight Board were promptly granted the necessary clearances for their similar investigations. Did the Department treat reject OPR's request for clearances because OPR has only career appointees?**

**ANSWER:** No. The request of the Office of Professional Responsibility (OPR) for access to classified information about the Terrorist Surveillance Program (TSP) was not treated differently than similar requests for access by other Department components. Nor was OPR's request denied because OPR has only career appointees.

Indeed, the Department of Justice's Office of the Inspector General, which – other than the Inspector General, who was appointed by President Clinton – is made up entirely of career appointees, has been granted access to classified information about TSP. Similarly, many of the Department employees in other components who have been granted access to classified information about TSP are career, not political, employees.

Moreover, as the Attorney General mentioned in his opening statement before the Senate Judiciary Committee's hearing on February 6, 2006, career lawyers at the National Security Agency's Office of General Counsel and Office of the Inspector General have been intimately involved in the oversight of the program.

- 35. What does it say about this administration's priorities when leaks are quickly investigated and investigations into possible violations of the law are prevented?**

**ANSWER:** We strongly dispute the premise of this question: investigations into possible violations of the law have not been prevented. TSP is overseen by a rigorous oversight regime. Since its inception, TSP has been subject to several rigorous and extensive review processes within the Executive Branch. The internal review process begins with the Office of Inspector General and the Office of General Counsel of the National Security Agency (NSA), which have conducted several reviews of the Program since its inception in 2001. Attorneys from the Department of Justice and the Office of the Counsel to the President also have reviewed the Program multiple times since 2001. Finally, the President, based upon information provided by NSA, the Office of the



Director of National Intelligence, and the Department of Justice, decides approximately every 45 days whether to continue the Program. In addition to that, the Department of Justice's Inspector General recently indicated that he is conducting a review of the Program.

In addition to Executive Branch scrutiny, TSP has been subject to extensive review by Members of Congress. Congressional leaders, including the leaders of the Intelligence Committees, have been given regular, extensive briefings since the Program's early days, and all Members of both Intelligence Committees have access to the operational details of the Program. Numerous Executive Branch officials have testified before several congressional committees about the Program and have answered literally hundreds of questions for the record about the Program.

**36. Does the Department of Justice not trust OPR to conduct an impartial and secure investigation?**

**ANSWER:** To the contrary, the Department of Justice trusts OPR to conduct both impartial and secure investigations. OPR was created in 1975 by order of the Attorney General to monitor the integrity of the Department's attorneys and ensure that the highest standards of professional ethics are maintained. Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels.

However, the President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. Every additional security clearance that is granted for TSP increases the risk that national security may be compromised.

**New York Times**

**37. As you undoubtedly know, the House of Representatives recently adopted a resolution that condemned the publication of classified information regarding the Terrorist Finance Tracking Program by newspapers such as the New York Times. That resolution specifically called on the Department of Justice to investigate and prosecute those responsible. Are you confident that at least one federal employee leaked the information to the newspaper?**

**ANSWER:** Respectfully, it would be inappropriate to comment upon whether the Department is now investigating or considering a prosecution in this case. The Department remains committed to identifying, investigating, and, where appropriate, prosecuting unauthorized disclosures of classified information.

**38. Do you believe that such a federal employee committed a crime when he or she transmitted classified information without authorization?**

**ANSWER:** The Department cannot comment on whether or not we have a pending investigation into this matter, nor can we comment on whether or not a crime has been committed by a particular person or group of persons.

Without commenting on any pending investigation or prosecution, we can say that the statutes currently in place – specifically 18 U.S.C. §§ 793 and 798 – make it illegal, under certain circumstances, to disclose classified information to one who is not authorized to receive it.

**39. Given what you know at this juncture, do you have reason to believe that employees of the newspaper committed a crime?**

**ANSWER:** The Department cannot comment on whether or not we have a pending investigation into this matter, nor can we comment on whether or not a crime has been committed by a particular person or group of persons.

As always, the primary focus of our efforts in this area has been and will continue to be identifying, investigating, and prosecuting those who leak classified information in violation of our criminal laws. As noted above, however, the relevant statutes do not provide an exemption for any particular profession or class of persons, including journalists.

**40. Since the House Resolution was adopted three weeks ago, have you heeded the House's recommendation by ordering an investigation into this matter?**

**ANSWER:** Respectfully, it would be inappropriate to comment upon whether the Department is now investigating this matter. Furthermore, to answer the question as posed would be to run the risk of jeopardizing any future investigation or prosecution that may arise from this or any related matter. The Department investigates potential crimes according to the dictates of the law, as well as Department policies and procedures. Decisions regarding the course of each particular investigation – including the decision to prosecute – are made strictly on the merits.

## Senator Hatch

**QUESTION:** On June 25, 2006, the U.S. Department of Justice obtained a court order against the American Bar Association (ABA) for repeatedly violating the terms of that Court's 1996 consent order governing the law school accreditation process. The ABA acknowledged its violations and paid \$185,000 in fees and costs incurred in the Department's investigation. The Court's order came one day after the consent decree expired on June 24, 2006.

41. Given that the Antitrust Division found multiple violations of the consent decree, why did the Department not seek to extend the original decree?

**ANSWER:** In 1995, the United States brought an action against the American Bar Association (ABA) alleging that it had violated the antitrust laws by allowing its law school accreditation process to be misused by law school personnel with a direct economic interest in the outcome of the accreditation review. In 1996, the United States District Court for the District of Columbia entered a judgment prohibiting the ABA from, among other things, fixing faculty salaries and compensation, boycotting state-accredited law schools by restricting the ability of their students and graduates to enroll in ABA-approved schools, and boycotting for-profit law schools.

Subsequent investigation revealed that the ABA was not complying with all provisions of the 1996 judgment, including, for instance, requirements to provide annual briefings to certain employees regarding the judgment and the requirement to obtain written certifications from certain employees regarding compliance with the judgment. Following negotiations, the ABA and the Department of Justice presented to the Court a Proposed Order, which was entered on June 26, 2006. In its Order, the Court found that the ABA had violated provisions of the 1996 judgment and required the ABA to pay \$185,000 to the United States in compensation for attorneys' fees and costs related to the investigation of those violations.

Under some circumstances, courts have the discretion to extend the duration of their decrees. For example, courts sometimes extend the duration of a decree when changes in circumstances thwart the basic purpose and intent of the decree. In light of that precedent and in view of the particular circumstances of the matter, the Department determined that it was neither necessary nor appropriate to seek to extend the duration of the 1996 judgment. In particular, the Department found no evidence that the decree violations, though serious, had led to competitive harm related to law school accreditation.

**42. What is the Department doing to ensure that the ABA complies with the antitrust laws going forward?**

**ANSWER:** Although the 1996 judgment has expired, the Department is committed to maintaining a marketplace for legal education unencumbered by anticompetitive restraint in the ABA's accreditation process, and we continue to monitor the legal-education market. Individuals who have provided helpful information in the past and who would likely become aware of any conduct of antitrust concern in the future are aware of our continuing interest. If we become aware of evidence that antitrust violations may be recurring in this area, we will investigate.

## Senator Grassley

### Healthcare Prosecutions

43. **We understand that there are certain funds used to support, among others, health care prosecutions. We understand further that there is a funding cap that is inhibiting health care fraud prosecutions. Would you please describe the impact the funding cap in the HIPAA on DOJ prosecutions and investigations. Specifically, have you seen an erosion of the number of prosecutors or investigators dedicated to health care fraud investigations? If so would you please provide me with specific numbers. Finally, for every dollar spent by DOJ on health care fraud investigations, approximately how much is returned to the federal treasury? Can you please provide those figures for the most recent three years?**

**ANSWER:** The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 201(b), 110 Stat. 1936, 1993 (codified as amended at 42 U.S.C. § 1398i) (HIPAA) established the Health Care Fraud and Abuse Control Program (HCFAC), which operates under the joint direction of the Attorney General and the Secretary of the Department of Health and Human Services (HHS).<sup>1</sup> The Act annually appropriates monies from the Medicare Trust Fund to an expenditure account, called the HCFAC account, in amounts that the Attorney General and the Secretary of Health and Human Services must jointly certify are distributed and used in a manner consistent with the intent and purposes of HIPAA. These resources are designed to generally supplement the direct appropriations that HHS and DOJ otherwise devote to health care fraud investigation and prosecution. The Act specifies the annual maximum amounts available to HHS and DOJ for their health care fraud enforcement work, and assigns specific authorities to the HHS Office of Inspector General (OIG) and stipulates the range of funding OIG must receive each year. In fiscal year (FY) 1997, HIPAA authorized HHS and DOJ to appropriate from the HCFAC up to \$104 million, and allowed the Departments to increase that appropriated amount by up to 15% annually until FY 2003.

Since FY 2003, the maximum available for HHS and the Department of Justice (DOJ) collectively has been fixed at \$240.558 million annually. Of this total, the HHS-OIG has received the statutory maximum amount of \$160 million annually. The DOJ litigating components and other (non-OIG) HHS components have split the remaining \$80.558 million, with DOJ receiving \$49.415 million annually from FY 2003 through FY 2006.

Section 303 of the “Tax Relief and Health Care Act of 2006,” signed by President Bush on December 20, 2006, provides for annual inflation adjustments to the maximum amounts available from the HCFAC Account and for the Federal Bureau of Investigation starting in Fiscal Year (FY) 2007 for each year through FY 2010. In FY 2010, a fixed funding level or “cap” is reinstated at the 2010 level. With the increasing pressures on

the Department's discretionary funding and the resulting impact on resources for other critical priorities and responsibilities, the annual inflationary adjustments in the Tax Relief and Health Care Act of 2006 will help sustain the Department's current level of criminal and civil health care fraud enforcement activities during the period of 2007-2010. As noted below, however, we anticipate that current levels will be insufficient to address both the anticipated increase in referrals associated with increases in HHS funding and the mounting backlog in cases resulting from prior reductions in DOJ resources and funding.

While the Department welcomes the additional monies that will become available for its health care fraud enforcement efforts beginning in FY 2007, we would like to describe how inflation and other increases in the costs of investigating and prosecuting health care fraud have adversely affected DOJ's health care fraud enforcement efforts since 2003. We also want to note that the Deficit Reduction and Reconciliation Act of 2005, which provided a new stream of anti-health care fraud funding to HHS components -- primarily for combating Medicaid fraud -- but no additional funding to the Department of Justice, is expected to lead to an increasing number of health care fraud referrals from HHS agencies at a time when the Department of Justice has been unsuccessful in its efforts to negotiate an increase in our annual HCFAC allocations from HHS despite the DRA's infusion of new Medicaid anti-fraud resources for HHS agencies.

The Department of Justice's payroll and benefits costs for full-time equivalent (FTE) prosecutors and support staff assigned to health care fraud matters have increased by more than \$5 million annually since the HCFAC funding was capped in 2003. In order to retain its dedicated staffing assigned to health care fraud matters, DOJ has drastically reduced its health care fraud litigation support expenditures by a comparable amount. Restricting litigation support expenses, however, has contributed to growing numbers of pending civil and criminal health care fraud matters that are awaiting necessary case-development work due to a lack of adequate resources. The Department's pending civil health care fraud case load has risen from 607 to 778 cases between FY 2003 and FY 2005, while the number of pending civil health care fraud matters rose from 1,277 to 1,334 over the same period.<sup>2</sup> A similar trend has occurred for criminal prosecutions. The number of pending criminal health care fraud cases has increased from 551 to 645 and number of pending criminal matters has risen from 1,574 to 1,689 between fiscal years 2003 and 2005, respectively.

The impact of the HIPAA cap on the FBI's investigative agent and support resources dedicated for health care fraud enforcement has led to erosion in FBI staffing. Under HIPAA, the FBI has received the statutory maximum \$114 million annually for health care fraud enforcement since FY 2003. According to the annual HCFAC program reports to Congress, this fixed annual funding level supported 878 FTE positions (507 agents and 371 support staff) in 2003. Due to inflationary and other mandatory cost increases which the FBI could not offset, this fixed funding level supported 806 FTE positions (466 agent and 340 support staff) in 2005.

The Department generally estimates that since the inception of the HCFAC Program in 1997, every dollar spent by the HIPAA-funded law enforcement agencies on health care fraud collectively has produced an average return to the U.S. Government of approximately \$4. Cumulatively, since the Program's inception, HIPAA-funded law enforcement efforts against health care fraud have returned nearly \$10 billion to the U.S. Government, of which approximately \$8.9 billion has been returned to the Medicare Trust Fund, and another \$487 million in federal share of Medicaid recoveries. Over the past three years, the average "return on investment" per dollar spent by DOJ and FBI on health care fraud enforcement has been approximately \$8. (This figure does not include millions of dollars in state matching share recoveries to the Medicaid program that result from state litigation associated with federally initiated health care fraud cases.) Specific figures for the three most recent fiscal years 2003, 2004 and 2005 are provided in the table below:

HIPAA Funding to the Department of Justice (in Millions):

	<u>FY 2003</u>	<u>FY 2004</u>	<u>FY 2005</u>	<u>Total FYs 2003-2005</u>
FBI Investigation	\$ 114.0	\$ 114.0	\$ 114.0	\$ 342.0
DOJ Litigation	\$ 49.415	\$ 49.415	\$ 49.415	\$ 148.25
Total DOJ	\$ 163.415	\$ 163.415	\$ 163.415	\$ 490.25

HIPAA Transfers and Deposits (in Millions):

	<u>FY 2003</u>	<u>FY 2004</u>	<u>FY 2005</u>	<u>Total FYs 2003-2005</u>
Total	\$1,033.5	\$1,756.3	\$1,708.	\$4,498.7
Relators' Payments	\$ 269.6	\$ 82.9	\$ 136.8	\$ 489.3
Actual Transfers	\$ 763.9	\$1,673.5	\$1,572.1	\$4,009.5

*& Deposits to U.S. Gov't*

Average "Return on Investment" per HIPAA dollar spent by DOJ on health care fraud enforcement, Fiscal Years 2003-2005 = \$8.18.

**Document Requests**

**Jonathan Luna**

**44. On May 10, 2006, Chairman Specter, Senator Leahy, and I requested copies of the following documents from the FBI related to its internal investigation of misconduct allegations in the investigation of the death of Baltimore Assistant U.S. Attorney Jonathan Luna:**

- (1) a letter dated April 4, 2005, from FBI Agent Emily Vacher to the FBI's Internal Investigations Section (IIS) and Office of Professional Responsibility (OPR);**

- (2) a letter dated May 3,2005, from FBI Agent Jennifer Smith Love to the FBI Director, Robert Mueller;
- (3) a memorandum dated May 10,2005, from FBI Deputy Director John Pistole to the OIG; and
- (4) a memorandum dated September 19,2005, from the FBI/OPR to the Office of Inspector General (OIG).

**To date, we have not been provided copies of these documents or a commitment to provide them at a later date. A briefing was provided by the FBI/OPR and the head of that office indicated that she had no objection to producing the final report of her office (document #4). Does the Department of Justice have any objection to the production of any of these documents to the Committee? If so please explain the legal basis for your objection. If not, please explain why the documents have not yet been produced to the Committee.**

**ANSWER:** Consistent with longstanding Executive Branch policy, the goal of the Department of Justice in all cases is to satisfy legitimate oversight interests while protecting significant Executive Branch confidentiality interests. As a general matter, the disclosure of Office of Professional Responsibility (OPR) investigative files implicates significant individual privacy interests because these files discuss allegations against individuals under investigation. The Department of Justice has consistently offered to accommodate Congressional requests for information about OPR investigations through briefings, minimizing the intrusion on the privacy of Executive Branch employees.

On June 21, 2006, the FBI responded to the Committee's May 10, 2006, request for information and documents relating to the FBI's investigation of the suspected murder of Assistant United States Attorney Jonathan Luna. In its response, the FBI advised the Committee that documents concerning OPR matters raise serious privacy considerations, particularly when, as in this instance, there is no finding of misconduct. Consistent with the policy articulated above, Candice Will, Assistant Director (AD) of the FBI's OPR, provided a June 30, 2006 staff briefing that included an overview of OPR's investigation and addressed both the issues raised in the Committee's May 10, 2006, letter and all issues raised by the staff. In response to a question from staff concerning the availability of the OPR report, our records reflect that AD Will did not indicate that she had no objection to producing the report, but rather advised that privacy concerns counseled against providing that document to the Committee.



**Michael German**

- 45. On February 3, 2006, Chairman Specter, Senator Leahy and I requested copies a number of documents from the Office of Inspector General, regarding the allegations of former FBI agent Michael German. The OIG asked that we seek the following documents directly from the FBI:**
- (1) copies of all the documents produced in response to the Committee's June 10 and October 28, 2004, requests without redactions of FBI file numbers, so-called "law enforcement privilege" information, "unrelated information," or "personal privacy" information (i.e., deletion codes F, G, H, 0-1, and P-1);**
  - (2) the transcript of the January 23, 2002, tape-recorded meeting at issue between members of the foreign and domestic terrorist groups, which German provided to the OIG in February 2003;**
  - (3) any other transcription of that tape-recording referred to above;**
  - (4) a September 6, 2003, email from German to Michael S. Clemens;**
  - (5) a February 8, 2002, electronic communication ("EC") from FBI Tampa division to FBI headquarters, domestic terrorism unit (documenting the January 23, 2002, meeting at issue);**
  - (6) any Orlando terrorism undercover operation proposal submitted to the Domestic Terrorism Unit in April 2002 containing information about a confidential informant ("CI") alleging that Subject #I was involved in supporting terrorists inside the United States;**
  - (7) a Tampa Division memo to the file quoting a Tampa ASAC ordering the removal of all terrorism references from the proposal in or around May 2002; and**
  - (8) any FD-302 interview summaries dated in or around October 2002 falsely reporting that the CW did not bring a recorder into the January 23, 2002, meeting, or otherwise describing the meeting in a manner inconsistent with the transcript.**

**While the FBI has agreed in principle to providing copies of the requested documents, they have not yet been produced. Does the Department of Justice have any objection to the production of any of these documents to the Committee? If so please explain the legal basis for your objection. If not, please explain why the documents have not yet been produced to the Committee.**

**ANSWER:** The FBI provided the requested material to the Committee by letters dated April 28, 2006 and July 27, 2006.

### **Detailee Request**

**46. On May 9, 2006, I wrote to you to request that Assistant U.S. Attorney James Sheehan be detailed to the United States Senate Committee on Finance. I have yet to receive any response. When should I expect to receive a response to this request?**

**ANSWER:** The Department consulted with your office, via phone and in writing, regarding this detailee request. The Department and your staff came to an agreement to send one DOJ detailee, rather than two as you originally requested. Your office indicated a preference to host a DOJ detailee on the Drug Caucus, rather than on the Senate Finance Committee. Accordingly, the DOJ detailee to the Drug Caucus began his six-month detail on June 1, 2006.

### **Deliberative Documents and Line Agent Policies**

**47. I asked you during the hearing to provide by the end of the week a written legal justification – not policies or principles -- for denying access to deliberative prosecutorial documents and for obstructing interviews with line agents in the performance of my oversight responsibilities to examine allegations of government misconduct. When do you plan to provide a response?**

**ANSWER:** We understand that the Department's letter to you, dated August 2, 2006 addresses this issue. Please let us know if you require additional information.

### **Credit Card Interchange Fees**

**48. Just last week, the Senate Judiciary Committee conducted a hearing on the practice of credit card interchange fees. Interchange fees are fees charged to retailers by debit and credit card issuing financial institutions for processing electronic transactions. I've heard many concerns that interchange fees violate the antitrust laws and result in higher prices for merchants and consumers. Has the Justice Department looked into these financial practices, and if so, has the Department identified any antitrust problems?**

**ANSWER:** The Department of Justice has been active in recent years protecting competition in the credit-card market, which is an important area of our economy. For instance, we obtained an injunction prohibiting Visa and Mastercard from barring their

member banks from issuing American Express and Discover cards. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234 (2d Cir. 2003). At this time, the Department of Justice has no pending litigation regarding interchange fees. As with any allegations of anticompetitive conduct, however, the Department of Justice would take credible evidence of a possible antitrust violation in this area very seriously. The Department continues to monitor industry activities, including private litigation concerning interchange fees and industry conduct concerning interchange fees and related practices involving credit and debit cards.

## **(Former) Senator DeWine**

### **FBI Staffing Policy**

**49. I recently received a letter from an FBI agent in Ohio, and he is very concerned about an FBI management policy. Specifically, the policy imposes a 5 year term limit on Supervisory Special Agents in the field, so that they must either be promoted to positions at FBI Headquarters in Washington or to Assistant Special Agent in Charge within 5 years or be demoted, with a salary cut. This has caused a great deal of concern among some agents, and in particular among those who were made Supervisory Special Agents before this policy went into effect - - they now have to consider applying to work in the Washington office or possibly face a pay cut, which also affects their retirement benefits. Of course, many agents have families or other considerations which make that a difficult choice, and there is some concern that these Supervisory Special Agents may retire rather than take the pay cut, which would rob the FBI of a great deal of talent and expertise. Is there any thought to grandfathering these provisions, so that those who became Supervisory Special Agents before the 5 year policy was instituted would not be affected by it?**

**ANSWER:** The Field Office Supervisory Term Limit Policy (FOSTLP) was initially implemented in June 2004 as a way to better position the Bureau for the challenges of the future. As the FBI evolves toward a global, intelligence-driven agency focusing on terrorist organizations, hostile intelligence services, and international criminal enterprises, we must ensure that our front-line leaders develop a broad base of experience as they acquire leadership skills. The FOSTLP will promote a diversification of experiences among the supervisory ranks through a strong emphasis on continued career development.

In developing this policy, consideration was given to allowing those Supervisory Special Agents (SSAs) promoted prior to June 2004 to remain in their positions but, given the current terrorist threat level and the escalating complexities of criminal conspiracies, the FBI could not afford the luxury of waiting five years before realizing the benefits of this policy.

With the understanding that the SSAs affected by this policy are among the FBI's most experienced mid-level managers, however, the program affords a grace period ranging from two to three years (based on tenure) during which these SSAs can exercise the following available options:

- Compete for Assistant Special Agent in Charge (ASAC) positions in the field.
- Compete for Unit Chief and Assistant Section Chief positions at FBIHQ.

- Compete for Term GS-15 Team Leader positions in the Inspection Division.
- Compete for Assistant Legal Attaché or Legal Attaché positions.
- Participate in the Alternate FBIHQ Credit Plan Pilot Project, which allows accelerated opportunities to obtain FBIHQ credit and acquire eligibility to compete for ASAC positions.
- Compete for additional five-year SSA terms in positions designated as “hard to staff.”
- Compete for positions in the FBIHQ Term Temporary Duty (TDY) Pilot Program, which allows SSAs to compete for GS-14 and GS-15 SSA positions at FBIHQ and obtain full FBIHQ credit upon completion of an 18-month TDY assignment.

Those SSAs who ultimately decide to remain in the current office of assignment and return to investigative duties will benefit from the FBI's Highest Previous Rate (HPR) policy, pursuant to which GS-14 SSAs returning to investigative duties will be placed in the GS-13 “step” comparable to the GS-14 salary. Only those whose pay conversions exceed a GS-13, Step 10 salary will experience a pay reduction (pay set according to HPR cannot exceed step 10).

While we understand that some SSAs are disappointed in the changes brought about by the FOSTLP and we are aware that some have publicly indicated that they do not intend to seek advancement, this stated intent is contradicted by results obtained through tracking those SSAs affected by the FOSTLP. As of 7/17/06, 93 out of 162 SSAs facing term limits in calendar year (CY) 2006 have already made career decisions, with 88% securing promotions in career-advancing positions. For those SSAs affected by the policy in CY 2007, 102 out of 255 SSAs have already made career decisions, with 82% pursuing career advancement. These career advancements have included the selections of 50 ASACs, 20 Unit Chiefs, 19 Legal Attachés or Assistant Legal Attachés, and 3 Assistant Inspectors. It appears, therefore, that the vast majority of the SSAs affected by this policy are pursuing promotional opportunities.

### **Byrne/JAG Program**

- 50. Many law enforcement officials, whether in Ohio or elsewhere, have expressed concern about the disappearance of Byrne/JAG program funds. These grant monies have been used for a variety of new and innovative programs such as establishing a Financial Investigations Unit within the Ohio Bureau of Criminal Identification and Investigation, establishing the Franklin County Mental Health Court, conducting studies on Prisoner Re-entry, and providing support to victims, witnesses and jurors statewide.**

**For FY06, \$411M was appropriated for these grant programs, but unfortunately for FY07, the President's budget zeroed it out. Nonetheless, the House has appropriated \$635M and the Senate \$555M, and most likely the final amount will fall somewhere in between. So Congress continues to believe these are important programs that are worthy of support, and so do I.**

**At the Judiciary Committee oversight hearing on July 18, 2006, you were asked a question about the lack of support for Byrne/JAG Program and responded that there were more effective ways for state and local law enforcement to obtain funding for their initiatives; you also suggested that DHS had some such funding programs. Obviously any such a funding stream is much more limited in its permissible uses than the Byrne/JAG program. What specific alternatives to Byrne/JAG program were you referring to? Are there any other specific programs or proposals that you believe would be adequate substitutes that would encompass all of the types of programs currently funded through Byrne/JAG?**

**ANSWER:** The decision to eliminate JAG was not made lightly. We recognize the concern this raises among Members of Congress, law enforcement, and other interested parties. For our Fiscal Year 2007 budget request we decided to focus funding on initiatives in key priority areas, where we have the best chance of making a difference.

There are other resources, both within the Department of Justice and in other federal agencies, which can help states and localities combat crime and drug use. The Fiscal Year 2007 President's Budget request provides over \$1.2 billion in discretionary grant assistance to State, local and tribal governments, including \$44.6 million to fight terrorism; \$66.6 million to strengthen communities through programs providing services such as drug treatment; \$88.2 million to combat violence, including enhancements to Project Safe Neighborhoods; \$409.2 million to assist crime victims; \$214.8 million for law enforcement technology, including funding to continue and further develop the Administration's DNA initiative; and \$209 million to support drug enforcement, including funding to continue and expand the Southwest Border Drug Prosecution Program.

Another of our key sources of support for law enforcement activities is the Regional Information Sharing Systems (RISS) Program, which improves local law enforcement's ability to target, investigate, and prosecute crime, as well as the ability to share information with member Federal, state, local and tribal law enforcement agencies.

From 2003 through 2005 RISS member agencies' efforts led to over 14,000 arrests, seizure of \$124 million in narcotics, and \$46 million in seized currency and property. All of the seized funds remain in local jurisdictions. RISS nodes, which are the access points for information, continue to grow and now include 17 High Intensity Drug Trafficking Areas, 18 State agency systems, and 12 federal systems.

## Senator Sessions

### FY2005 and To Date 2006 NCIC Immigration Violators File entries

51. Immigration violator file entries into the NCIC have crawled along at an incredibly slow rate for the last 4 to 5 years. As of February 3, 2004, only 135,380 Immigration and Customs Enforcement owned immigration violator files had been entered into the NCIC Immigration Violators File (IVF).

Although you don't oversee the Department of Homeland Security Law Enforcement Support Center in Vermont which is responsible for entering these files (and therefore can not tell me whether they have changed their administrative procedures to speed up entries), the Department is responsible for overseeing the NCIC system as a whole.

- a) How many files are currently contained in the NCIC Immigration Violators File?
- b) How many of those files are in each Immigration Violators sub-files (deported felons; alien absconders; NSEERS violators, and aliens with outstanding ICE criminal warrants)?

**ANSWER:** As of August 17, 2006, there were 214,119 records in the NCIC Immigration Violators File. Of these, 123,315 were deported felons, 90,804 were alien absconders, and 0 were National Security Entry/Exit Registration System violators. As of August 24, 2006, Immigration and Customs Enforcement had 1,718 records in the National Crime Information Center (NCIC) Wanted Person file.

### Basic Immigration Prosecution Statutes

52. a) What are the basic "bread and butter" criminal statutes that DOJ uses to prosecute immigration offenses?

**ANSWER:** The vast majority of criminal prosecutions for immigration offenses are accomplished using one of the three following statutes:

- Bringing in and harboring certain aliens, 8 U.S.C. § 1324;
- Entry without inspection, 8 U.S.C. § 1325(a);
- Reentry of removed alien, 8 U.S.C. § 1326.

DOJ also uses the following statutes in appropriate circumstances:

- Naturalization fraud, 18 U.S.C. § 1425;
- Forgery or false use of passport, 18 U.S.C. § 1543;
- Misuse of passport, 18 U.S.C. § 1544;

- Fraud and misuse of visas, permits, and other documents, 18 U.S.C. § 1546;
- Alien in possession of a firearm, 18 U.S.C. § 922(g)(5);
- False representation of U.S. citizenship, 18 U.S.C. § 911;
- Fraud in the use of social security card, 42 U.S.C. § 408;
- Marriage fraud to evade immigration laws, 8 U.S.C. § 1325(c).

**b) What improvements are needed to make these “bread and butter” statutes more effective?**

**ANSWER:** In our view, the following improvements would significantly assist enforcement efforts. We will also continue to review the issues, and look forward to discussing the below suggestions and additional potential improvements that may be proposed.

Increased penalties. The Department believes that the existing criminal penalties in the United States Code do not adequately address the growing problem posed by alien smuggling and immigration fraud (benefit fraud, visa fraud, and passport fraud). As a result, we believe that the existing penalties for these offenses should be increased, particularly in circumstances where the offenses are committed on a large scale or by organized criminal syndicates.

Uniform Statute of Limitations. The statutes of limitation for immigration offenses within titles 8 and 18 are presently uneven. Some offenses have a five-year limitation, while others have a ten-year limitation. We recommend addressing this inconsistency to provide for a uniform statute of limitation of ten years.

Pre-trial Detention. Many criminal defendants in the federal courts are aliens with few if any ties to the district of prosecution. Thus, they typically pose a serious risk of flight. As a result, the pre-trial detention statute, 18 U.S.C. § 3142, should be amended to specifically address the flight risk posed by alien defendants who (1) are in the United States illegally, (2) are subject to a final order of removal, or (3) have been charged with a serious immigration offense, such as alien smuggling, illegal re-entry, or immigration document fraud.

Intentional Visa Overstays. Under current law, it is a misdemeanor federal offense to enter the country illegally, but it is not an offense to overstay one’s visa with the same aim. We would recommend addressing this inconsistency to make it a misdemeanor offense for an alien to overstay his or her visa in order to remain in the country illegally.



## **Statistics on Immigration Prosecutions**

53. **When I talk to DHS, they tell me that many of the cases they recommend to DOJ for prosecution are rejected – either because the sentencing penalties are not high enough (misdemeanors) or because the immigration offenses are often too difficult to prove.**

**However – when I look at the 2003 Sourcebook of Criminal Justice Statistics, it appears that most of the immigration offenders investigated (assumedly by DHS), are eventually charged, convicted, and admitted to Federal prison.**

**The last year contained in the chart (2000) lists “16,495 cases investigated; 15,613 offenders charged; and 13,151 offenders admitted to federal prison.” Those numbers reflect an “immigration case declination rate” as low as 6%.**

**Can you tell me – for each of the last 10 years (1995 to 2005):**

- a) How many immigration cases were presented by DHS to U.S. Attorney’s Offices for prosecution?**

**ANSWER:** Data from United States Attorneys’ Offices (USAOs) is maintained by the Executive Office for United States Attorneys’ (EOUSA) case management system. The EOUSA case management system uses program category codes to identify and quantify types of cases. The code for “Immigration Offenses” is composed of violations of the “Immigration and Nationality Act” (INA), which is codified in Title 8 of the U.S. Code. There are, however, multiple offenses in other titles within the U.S. Code which might receive the “Immigration Offenses” program category code including, but not limited to, 18 U.S.C. § 911 (false claim of U.S. citizenship); 18 U.S.C. § 1028 (document fraud); 18 U.S.C. § 1546 (document fraud); and 42 U.S.C. § 408 (Social Security card fraud). Due to agency variations in defining the presentation of cases, there are differences between Department of Homeland Security and Department of Justice case presentation data. Department of Homeland Security agencies and their legacy components presented virtually all of the cases which were coded as immigration offenses. The data below reflects information kept by the Department of Justice and does not differentiate between referring agencies.

The Department of Justice keeps its statistical information by fiscal year (FY). Some cases might be received or opened as “matters” in one fiscal year and then become a “case” in another fiscal year. The term “matters” means investigatory matters referred to a USAO for prosecution. Not all matters ultimately have charging instruments (complaints, informations, or indictments) filed. A “matter” is opened in a USAO when an agency requests a prosecutive opinion, but no commitment is made by a USAO to actually prosecute. A “matter” becomes a “case” upon the filing of a charging instrument. The data below reflects the number of “Immigration Offense” matters received by USAOs.

FY 1995	7,081
1996	7,045
1997	9,135
1998	13,514
1999	15,459
2000	16,188
2001	15,560
2002	16,366
2003	20,941
2004*	35,661
2005*	35,172

\*The dramatic increase in matters received for FY 2004 and 2005 was caused in large part by the inclusion of immigration misdemeanor cases under 8 U.S.C. 1325(a) entered as “matters received.” Cases that do not receive a district court docketing number are not, under the current case management database, entered as “cases” in the system. The offense of improper entry into the United States, a misdemeanor under 1325(a), is often disposed of quickly by plea to a criminal complaint before a United States Magistrate Judge, and does not result in any district court proceedings. Historically, such cases were not entered into the case management system at all. In 2004 and 2005, several Southwest border USAOs began entering these cases into the system as “matters received.”

**b) How many immigration cases presented by DHS for prosecution were *accepted* for prosecution by DOJ?**

**ANSWER:** The data below reflects the number of “Immigration Offense” cases filed by USAOs during a particular fiscal year. It should be noted that a case might be accepted for prosecution in one fiscal year; however, the charging instrument might be filed in another fiscal year. As noted above, a “matter” becomes a “case” upon the filing of a charging instrument. Thus, the cases filed in a given year are not a complete subset of the matters received in that same year.

FY 1995	4,042
1996	5,754
1997	6,929
1998	10,080
1999	11,580
2000	13,033
2001	12,537
2002	13,676
2003	16,621
2004	18,164
2005	18,147

- c) **Based on the information provided in response to numbers 1 and 2 above, what was the “immigration case declination rate” for each year?**

**ANSWER:** It is important to note that subtracting the “cases filed” in a given fiscal year from the “matters accepted” in that same fiscal year will not produce an accurate number of cases declined. The prosecutive decision to file charges or decline a matter does not always occur in the same fiscal year in which the matter was originally referred to the USAO. Thus, the figures below do not reflect the difference between the data in (a) and (b) above. In addition, as discussed above in the footnote to 53(a), many of the “matters received” for 2004 and 2005 are in fact misdemeanor 1325(a) cases that have resulted in convictions.

Provided below are the “immediate declinations” and “later declinations” for a given year. Immediate declinations are those cases that on their face do not meet prosecution standards in a given district. Given the myriad of ways in which cases can be presented, the data on immediate declinations likely do not capture all such declinations that may occur at the USAOs. Later declinations are those cases that are subject to significant review and consultation at the USAO prior to being declined, and are an accurate representation of such efforts.

**Immediate Declination Data**

FY	1997	<b>1,545</b>
	1998	<b>661</b>
	1999	<b>673</b>
	2000	<b>662</b>
	2001	<b>714</b>
	2002	<b>795</b>
	2003	<b>1,195</b>
	2004	<b>1,145</b>
	2005	<b>2,151</b>

**Later Declination Data**

FY	1997	<b>253</b>
	1998	<b>296</b>
	1999	<b>374</b>
	2000	<b>332</b>
	2001	<b>386</b>
	2002	<b>419</b>
	2003	<b>1,030</b>
	2004	<b>504</b>
	2005	<b>424</b>

**d) How many immigration convictions were secured by DOJ?**

**ANSWER:** According to EOUSA case management data, the information below reflects the number of “Immigration Offense” convictions.

FY	1995	<b>3,733</b>
	1996	<b>5,522</b>
	1997	<b>6,254</b>
	1998	<b>8,985</b>
	1999	<b>11,206</b>
	2000	<b>12,195</b>
	2001	<b>12,435</b>
	2002	<b>12,580</b>
	2003	<b>16,425</b>
	2004	<b>15,847</b>
	2005	<b>17,757</b>

**e) Under what criminal statutes were the majority of the immigration convictions secured?**

**ANSWER:** The majority of the cases listed under “Immigration Offense” program code involve three statutes: 8 U.S.C. § 1324(a) (Bringing In and Harboring Certain Aliens); 8 U.S.C. § 1325 (Improper Entry by Aliens); and 8 U.S.C. § 1326 (Reentry of Removed Aliens).

FY	<u>§ 1324</u>	<u>§ 1325</u>	<u>§ 1326</u>
1995	<b>666</b>	<b>632</b>	<b>2,406</b>
1996	<b>1,253</b>	<b>607</b>	<b>3,448</b>
1997	<b>1,310</b>	<b>461</b>	<b>4,196</b>
1998	<b>1,694</b>	<b>1,793</b>	<b>5,462</b>
1999	<b>2,302</b>	<b>2,880</b>	<b>6,426</b>
2000	<b>2,429</b>	<b>2,934</b>	<b>7,330</b>
2001	<b>2,348</b>	<b>2,759</b>	<b>7,876</b>
2002	<b>2,103</b>	<b>2,691</b>	<b>8,425</b>
2003	<b>2,654</b>	<b>3,023</b>	<b>10,865</b>
2004	<b>2,457</b>	<b>3,097</b>	<b>9,475</b>
2005	<b>3,120</b>	<b>2,794</b>	<b>10,880</b>

## Worksite Enforcement

54. A year ago (June 21, 2005), GAO told us that:

*“[various studies] have found that the single most important step that could be taken to reduce unlawful migration is the development of a more effective system for verifying work authorization.” ... yet “in the nearly 20 years since passage of IRCA, the employment eligibility verification process and worksite enforcement program have remained largely unchanged.”<sup>1</sup>*

Despite the GAO report this Administration has not told Congress exactly what they need – in terms of new laws, money, or people – to eliminate the “job magnet” and implement a real worksite verification system. Indeed, in last year’s report, GAO found that *“worksite enforcement has been a low priority under both INS and ICE.”<sup>2</sup>*

**It is DHS’s responsibility to initiate worksite investigations and present them to DOJ for prosecution, but it is the Department’s responsibility to accept as many of those cases as you possibly can and to aggressively prosecute workplace violators – especially employers.**

a) Please tell me:

**i) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274A(a)(1) – hiring, or recruiting for a fee, an alien for employment in the United States, knowing the alien is unauthorized.**

**ANSWER:** This data cannot be accurately provided due primarily to the unique problems posed by the codification of the worksite enforcement statute, 8 U.S.C. § 1324a (Unlawful Employment of Aliens), and its similarity to a separate immigration statute, 8 U.S.C. § 1324(a) (Bringing In and Harboring Certain Aliens). The EOUSA case management system does not distinguish the various parentheses in the United States Code. Accordingly, the case management system is not able to readily distinguish between 8 U.S.C. § 1324(a) and 8 U.S.C. § 1324a. The Department of Justice has contracted for a new case management system which is expected to be partially introduced in late 2007 or early 2008.

In addition, several other statutes that are utilized to enforce a wide variety of criminal behavior, (such as the False Statements Act, 18 U.S.C. § 1001; and harboring

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<sup>1</sup> U.S. General Accounting Office, Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts, GAO-05-822T, p.1 (Washington D.C.: June 21, 2005) (emphasis added)

<sup>2</sup> U.S. General Accounting Office, Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts, GAO-05-822T, p.3 (Washington D.C.: June 21, 2005) (emphasis added)

aliens, 8 U.S.C. § 1324(a)(1)(A)(iii) and (iv)) can sometimes be used to punish the employment of illegal aliens. Prosecutors may choose in some cases to charge one of these other statutes rather than 1324a for a variety of evidentiary or other reasons.

Based upon a manual polling of the USAOs, it is clear that 8 U.S.C. § 1324a is not widely utilized, but districts make use of the statute in appropriate circumstances.

Here are three examples of worksite enforcement cases DOJ prosecuted this year under § 1324a and/or § 1324:

- On December 14, 2006, Fenceworks, Inc., d.b.a. Golden State Fence Company, ("Golden State") and two corporate officers pled guilty in federal court in the Southern District of California to charges arising from the hiring of unauthorized alien workers between January 1999 and November 2005. Specifically, Golden State pled guilty to hiring unauthorized alien workers, in violation of Title 8, United States Code, Section 1324a, a misdemeanor. It also agreed to forfeit \$4,700,000 as proceeds gained from its unlawful activities under Title 18, United States Code, Section 982(a)(6)(A)(ii)(I). Next, it agreed to implement a compliance program to minimize the possibility of hiring unauthorized alien workers in the future. Melvin Kay, President of Golden State, and Michael McLaughlin, a Vice-President of Golden State, each pled guilty to hiring at least ten individuals with actual knowledge that the individuals were unauthorized alien workers, in violation of Title 8, United States Code, Section 1324(a)(3)(A), a felony. Kay and McLaughlin have also agreed to pay fines of \$200,000 and \$100,000, respectively. Kay and McLaughlin face a maximum sentence of five years in prison, a \$250,000 fine, and three years of supervised release. A sentencing hearing is scheduled for March 28, 2007, at 4:00 p.m.
- On July 20, 2006, Asha Ventures, LLC, successor in interest to Asha Enterprises, Inc., and Narayan, LLC, pleaded guilty in United States District Court in the Eastern District of Kentucky to one count of conspiracy to harbor illegal aliens, one count of conspiracy to launder money and two counts of forfeiture. Asha Ventures, LLC and Narayan, LLC were hiring illegal aliens to work at the Holiday Inn Express, two Days Inn Motels, the Sleep Inn and the Super 8 Motel located in London, Kentucky. The companies were harboring illegal aliens and encouraging the illegal aliens to remain in the United States. The companies were sentenced on October 20, 2006 and ordered to each pay a \$75,000 criminal fine for a total of \$150,000. Additionally, the companies were ordered to pay \$1,500,000 in lieu of the forfeiture of certain assets, and \$800 in Special Assessments. The companies paid the 1.5 million dollars in open court, and the judge gave them 12 months probation in which to pay the fine and the special assessments, if unable to pay immediately.
- On December 15, 2006, in the Southern District of Florida, the two leaders of a six-person nationwide employee-leasing conspiracy that exploited hundreds of illegal aliens throughout the United States were sentenced to terms in prison.

Jozef Bronislaw Bogacki, 43, a native of Poland and naturalized U.S. citizen residing in Clearwater, Fla., was sentenced to 57 months in prison. The judge also imposed a money judgment of \$950,000 and ordered Bogacki to forfeit six pieces of real property valued at approximately \$500,000. Jaroslaw “Jerry” Sawczuk, 38, a Polish and Canadian citizen was sentenced to 51 months in prison and ordered to pay a money judgment of \$950,000. A third defendant in the conspiracy, Pavel Preus, 39, a Slovak citizen residing in Pompano Beach, Florida, was sentenced on Sept. 13, 2006 to 37 months in prison and 36 months of supervised release. Bogacki, Sawczuk and Preus had all pleaded guilty to charges of conspiracy to transport, house and otherwise encourage illegal aliens to remain in the United States, and to commit visa, wire, mail and tax fraud, and money laundering.

**ANSWER:** Please see the answer above to (i).

**ii) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274A(f) – engaging in a pattern or practice of hiring an alien knowing they are unauthorized.**

**ANSWER:** See the answer above to (i).

**iii) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274(a)(3) – knowingly hiring for employment 10 individuals with actual knowledge that the aliens are unauthorized and have been brought into the United States illegally.**

**ANSWER:** See the answer above to (i).

**iv) The number of criminal convictions obtained for each of the above in each of the last 10 years.**

**ANSWER:** Please see the answer above to (i).

**b) How can each of these statutes (INA 274A(a)(1); INA 274A(f); and INA 274(a)(3)) be improved for more effective prosecution of employers that hire illegal aliens?**

**ANSWER:** As you know, the Administration has and will continue to work with Congress on various legislative proposals as part of immigration enforcement.

## **Biometric ID**

**55. It will be essential that the biometric identification card developed by the Administration to be used in the immigration / visa issuance process be one that is able to identify the card holder as the recipient of the card. The card must also be unable to be duplicated – it must solve the current problems of immigration document fraud.**

**a) Has DOJ done any work on a biometric ID card?**

**ANSWER:** The Department of Justice has established a program management office (PMO) within the Justice Management Division to address the requirements of HSPD-12. The PMO has performed market analysis and developed plans for providing a biometric ID card for every employee and contractor in the Department's 500+ locations across the U.S. The Department has not specifically worked on the technology needed to prevent immigration document fraud.

**b) What are your recommendations for making a biometric ID card fraud proof?**

**ANSWER:** Since nothing is truly “fraud proof” we believe it is most realistic to aim for fraud resistance when designing the identity cards. Technology alone cannot solve this problem; training, physical security, and auditing are necessary to reduce risk. The overall fraud resistance of a card is only as strong as the weakest link in the business process. If you cannot manage insider threats and security gaps then you are bound to have some fraud or abuse.

The U.S. Government must approach this based on risk, as the costs could be prohibitive if the threshold is set too high. Public Key Infrastructure (PKI) can help reduce the risk by adding digital signatures to the card. There are other technical measures that could be employed, but each one involves significant costs and constraints. The Department has not analyzed this complex issue in enough detail to provide specific recommendations to the Judiciary Committee on the implementation of the immigration cards.

## **Drug smuggling at border / Meth**

**56. Undoubtedly, the number one drug trafficking concern in the State of Alabama (according to the DAs I talk to) is the Meth traffic now crossing border from Mexico.**

**What is the Department doing to step up prosecutions in this area?**



**ANSWER:** The Department of Justice recognizes that the importation of methamphetamine from Mexico into the United States is a major concern and has been working very closely with our counterparts in Mexico to address the problem of methamphetamine trafficking. Methamphetamine consumed in the United States originates from two general sources, controlled by two distinct groups. Most of the methamphetamine consumed in the United States is produced by Mexico-based and California-based Mexican traffickers. These drug trafficking organizations control “super labs” (a laboratory capable of producing 10 pounds or more of methamphetamine within a single production cycle), and have distribution networks throughout the United States, as well as access to drug transportation routes to smuggle the methamphetamine from Mexico into the United States. Current drug and lab seizure data suggests that, while approximately 20 percent of the methamphetamine consumed in this country comes from small toxic laboratories, roughly 80 percent of the methamphetamine used in the United States comes from larger laboratories operated by Mexican-based trafficking organizations on both sides of the border. As we have seen a decrease in the number of domestic small toxic labs, we have seen an increase in methamphetamine trafficked into the United States. The Department is addressing the international methamphetamine problem through several avenues.

In May 2006, Attorney General Gonzales, along with the Attorney General of Mexico, announced several joint initiatives to address the meth trafficking problem. For example, DEA is working with Mexican authorities to stand up clandestine lab teams in Mexican “hot spot” locations, to include vetted units to focus on methamphetamine and precursor chemical investigations; DEA is providing training to Mexican officials regarding precursor chemical diversion; DEA is working with CBP, INL and Mexican authorities to establish initiatives at ports to increase scrutiny of containerized cargo; and the Department is assisting the Government of Mexico with a methamphetamine public awareness campaign.

The Administration is also working to attack the diversion and trafficking of meth precursors. The Administration has been working with the United Nations Commission on Narcotics Drugs (CND). At the March 2006 meeting, the U.S. and other countries sponsored a resolution entitled “Strengthening Systems for Control of Precursor Chemicals Used in the Manufacture of Synthetic Drugs.” The resolution requests member states to take several important steps that, taken together, plot a useful roadmap to greater operational international cooperation against chemical diversion. It requests governments to: (1) provide annual estimates to the INCB of their legitimate requirements for the critical chemicals used in the manufacture of methamphetamine and synthetic drugs, including drug products containing these chemicals; (2) ensure that imports are commensurate with estimated annual needs; (3) continue to provide to the International Narcotics Control Board (INCB) information on all shipments of the precursors listed above, including, for the first time, drug products containing these chemicals; and (4) permit the INCB to share information on specified consignments with law enforcement and regulatory authorities to prevent or interdict suspect shipments.

While there is much work to be done, overall we have seen cooperation in implementing the new resolution. Many nations have provided annual estimates to the INCB of their legitimate requirements for these chemicals and steps are being taken towards establishing initiatives that will allow for the greater sharing of information regarding suspect shipments of these substances.

DEA, with the support of the Department of State and other U.S. law enforcement agencies, has provided or sponsored training to over 1500 Mexican law enforcement officers and regulatory officials since 2006 in the areas of clandestine laboratories, chemical training, methamphetamine, and related prosecutions.

Between FY 2003 and 2005, OCDETF has experienced a 59% increase in the number of investigations initiated involving methamphetamine. In addition, OCDETF recently allocated 28 new AUSA positions, 16 of which were in districts either on the Southwest Border (SWB) or in districts known to have a significant methamphetamine threat (including the Northern and Middle District of Alabama). This represents a significant commitment of law enforcement and prosecutorial resources to address the methamphetamine problem.

With the significant reduction in the number of domestic small toxic labs, DEA's Clandestine Laboratory Enforcement Teams (CLETs) will expand their efforts beyond dismantling methamphetamine labs to include the targeting of large-scale methamphetamine trafficking organizations. In addition, DEA has redirected the focus of its Mobile Enforcement Teams (METs) to prioritize deployments to assist with methamphetamine investigations. Currently, the teams are assisting state and local agencies by focusing on targeting methamphetamine Priority Target Organizations and clandestine laboratory operators in areas of the United States that have a limited DEA presence. DEA increased the percentage of methamphetamine-related MET deployments from 23 percent in FY 2002 to 74 percent in FY 2006.

In addition, the Department is training U.S. prosecutors and domestic and foreign law enforcement to improve our ability to bring drug traffickers to justice. In July 2006, the Department sponsored training at the National Advocacy Center (NAC) for approximately 80 federal prosecutors that was specifically focused on how to prosecute methamphetamine and precursor chemical cases. Furthermore, we are assisting Mexican authorities as they deploy vetted units along the border, and are engaged in on-going training of law enforcement and regulatory officials overseas in an effort to prevent methamphetamine from reaching our borders.

We believe our efforts have assisted in the advances made in keeping young people away from meth. The most recent Monitoring the Future survey indicates that methamphetamine use by young people is down significantly since 2001 — by more than 40 percent for all young people in the survey combined. By combining proven law enforcement strategies with new partnerships with domestic and foreign law enforcement, we are attempting to make progress against the evolving methamphetamine

threat. And as drug traffickers modify their tactics to evade law enforcement, we will adapt our methods to dismantle their organizations.

**Certificate of Reviewability (similar to federal Habeas process)**

**57. I have stated previously that the reason Immigration Litigation has increased so much is because immigration attorneys know that it delays their clients' removal from the country. As a result there are many frivolous immigration appeals filed in Circuit Court. In testimony before this Committee on April 3, 2006 Deputy Assistant Attorney General John Cohn (Civil Division) urged us to include a requirement that an immigration appeal receive a Certificate of Reviewability before being considered by a Circuit Court Panel.**

**Do you agree that this would be an important change that would help alleviate the flood of litigation?**

**ANSWER:** Yes. The certificate of reviewability provision is an appropriate and reasonable response to the overwhelming surge of immigration cases that has overwhelmed the federal courts and the Executive Branch. This provision would require an alien to obtain a certificate of reviewability from a federal judge in order to pursue his appeal. If the judge were to deny the certificate of reviewability, the government would not have to file a brief and the alien would be subject to removal without additional time-consuming and unnecessary proceedings. If the judge were to grant the certificate of reviewability, then the case would proceed to full briefing and consideration by a three-judge panel.

It is important to emphasize that this provision would allow every alien to obtain review of his case by a federal judge. The doors to the courthouse are not closed. At the same time, it provides a statutory mechanism for the courts of appeals to resolve weak cases very quickly. The current system, in certain circuit courts, encourages aliens to file appeals from the Board of Immigration Appeals because the appeal could take well over a year to resolve and the alien will likely be able to remain in the United States during that time. As the Supreme Court has recognized, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. 314, 321-25 (1992).

The certificate of reviewability provision is modeled after a statute applicable to federal collateral proceedings, 28 U.S.C. 2253, which derives in its current form from legislation introduced by Senators Specter and Hatch, S. 623, § 3, 104th Cong., 1st Sess. (1995). Section 2253 requires a party to obtain a certificate from a federal judge before pursuing an appeal in order to control frivolous habeas appeals and to allow courts to focus on cases that have substantial merit. Given that section 2253 applies to United States citizens (as well as aliens), and it applies to criminal cases in which the consequence of an erroneous determination might be life imprisonment or death, there is no compelling reason to avoid a similar requirement in the immigration context.

Ultimately, if adopted, the certificate of reviewability requirement would allow the courts to quickly resolve weak cases (and thus reduce the incentive to appeal such cases) and allow the courts to focus on the more difficult cases.

### **Judicial Review in Immigration Litigation**

**58. Deputy AG Cohn also told us that the Department has taken the position the Congress should clarify two other immigration litigation matters: 1) clarify that immigration questions of Administrative discretion are not subject to Judicial Review; and 2) clarify the limits on judicial review in cases involving criminal aliens.**

**Do you feel these are important fixes to the immigration laws? Are there other fixes that you believe are needed?**

**ANSWER:** Yes, these are important clarifications of the INA, because they will help alleviate the immigration litigation burden, particularly in the Ninth Circuit. That Court has found that there are loopholes in the restrictions on judicial review that Congress enacted in 1996. It is important that we close these loopholes, which simply add to the floodtide of immigration litigation in the federal courts. Specifically, we support modifying section 242(a)(2)(B) of the INA (8 U.S.C. 1252(a)(2)(B)) to make clear that discretionary determinations are not reviewable, and clarifying the scope of section 242(a)(2)(C) of the INA (8 U.S.C. 1252(a)(2)(C)), which limits judicial review over factual determinations regarding criminal aliens.

In addition to these fixes, the Department supports other changes that will have the effect of reducing immigration litigation, such as requiring a certificate of reviewability (see the answer to question 57), authorizing the Board of Immigration Appeals to issue removal orders, limiting judicial review over visa revocation decisions, clarifying the Secretary's authority to reinstate removal orders, restricting review of motions to reopen to legal questions, clarifying the alien's burden of proof for withholding of removal, limiting the availability of attorney fee awards in immigration cases, reforming the procedures relating to voluntary departure, and requiring that background checks be performed before immigration benefits may be conferred.

### **Board of Immigration Appeals Streamlining**

**59. In his April 3<sup>rd</sup> testimony Mr. Cohn told us that the streamlining procedures (such as affirmances without written opinions) are not the cause of the increase in immigration litigation and have not resulted in an increase in Circuit Court reversals of administrative decisions.**

**Do you agree that the streamlining procedures instituted by the Board of Immigration Appeals have been a valuable in combating the increase in immigration cases? Should they be preserved?**

**ANSWER:** So that there is no confusion, Mr. Cohn stated that the increase in cases in the federal courts has been caused by two factors. First, the Department of Homeland Security has stepped up its enforcement efforts, generating a larger pool of aliens who might choose to appeal. Second, the rate at which aliens appeal Board decisions to the courts of appeals has risen – from 6% in fiscal year 2001 to 33% in fiscal year 2006. Either factor standing alone would increase the total number of cases; simultaneous occurrence of both makes the increase even more pronounced.

Some have contended that the streamlining procedures instituted by the Board—particularly the issuance of affirmances without opinion (AWOs)—have resulted in weaker decisions by the Board that in turn are primarily to blame for the increase in the rate at which aliens are appealing to the courts. For a number of reasons, however, the Department is not convinced that that is the case.

First, streamlining applies nationwide, but the appeal rate is far higher in two circuits, the Second and the Ninth, than it is overall. In FY 2006, the appeal rate for the Second and Ninth Circuits was 45% and 43%, respectively; for the Eleventh Circuit it was 10%. This disparity suggests that factors other than streamlining are at work, such as the extent to which an alien can stay his removal by filing a petition for review in different courts.

Second, the Board has actually reduced the number of AWOs since FY 2002, but the rate of appeals to the federal courts has increased over the same time period. In FY 2002, which was after Attorney General Reno authorized the Board to utilize streamlining procedures (including AWOs) in 1999 but before Attorney General Ashcroft expanded the Board's streamlining authority, 31% of all Board decisions were AWOs; in FY 2006, only 15% were AWOs.\* Over the same time period, according to the Administrative Office of the U.S. Courts, the rate of appeal nationwide increased from 10% to 33% percent. It is not surprising that the rate of appeal has increased even while the percentage of AWOs has fallen. This is because it is implausible that the primary factor in an alien's decision to appeal would be dissatisfaction with perceived insufficiency of the Board's explanation for its decision, whether that decision takes the form of an AWO or short single-judge opinion. As described below, it is far more likely that the decision to appeal would instead be driven by a desire for a better short-term or long-term outcome, including the calculation that even an unsuccessful appeal may allow the alien to remain in the United States while the appeal is pending.

Finally, what evidence there is does not suggest that aliens' probability of succeeding on appeal before the courts has increased as a result of the streamlining rules. Rather, the rate at which the courts of appeals affirm immigration cases on the merits is

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\* For the first quarter of FY 2007, that figure fell to under 10%.

high and quite similar to what it was before the 2002 rules. According to the Administrative Office of U.S. Courts, in FY 1999, 89% of immigration cases resolved on the merits in the courts of appeals were affirmed. In FY 2005 that figure was 86%. Affirmance rates are not a perfect proxy for whether an appeal has produced a favorable resolution for the alien or is well-founded, because they do not take into account cases other than those decided on the merits such as stipulated dismissals, but they are a strong indicator.

Meanwhile, what is beyond dispute is that since full implementation of streamlining, the backlog of cases at the Board of Immigration Appeals has been dramatically reduced. According to EOIR's Office of Planning, Analysis and Technology, in September 2002, before streamlining was fully implemented, nearly 30% of the BIA's pending cases had been pending for two or more years, but by September 2006, that figure had dropped to less than 1.5%. Resolving the Board's backlog was of great importance both to hasten the resolution of cases where aliens are being detained during the pendency of removal proceedings and to prevent appeals to the BIA from being used to delay removal for long periods of time in non-meritorious cases.

Much of the increase in the rate of appeal is, therefore, likely due not to changes in the quality of the Board's decisions between FY 1999 and FY 2006 so much as it is to the interest that aliens have in delaying their removal and the increasing necessity of appealing to the courts to secure significant delays. Before streamlining, it often took the Board several years to decide a case, and aliens thus did not need to resort to an appeal to the courts for a reprieve from removal. Now, however, the Board takes only months to decide the average case, so aliens must turn to the federal courts in hopes of any significant reprieve. It is thus unsurprising that the federal courts where a stay is most readily available have also seen the highest appeal rates.

All that said, the Department remains deeply committed to ensuring that immigration adjudications are both fair and efficient. In January 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to conduct a comprehensive review of the Immigration Courts and the Board of Immigration Appeals, including the streamlining rules. Based on that review, in August, the Attorney General directed that twenty-two new measures be implemented to improve immigration adjudication at the Executive Office of Immigration Review. With regard to streamlining in particular, the Attorney General concluded that the fundamentals of streamlining should be retained but that some adjustments should be made through proposed amendments to the current rules. One such proposal will seek to encourage an increase of one-member written opinions to address poor or intemperate immigration decisions that reach the correct result but would benefit from expansion or clarification. Another proposal will provide for the use of three-member written opinions to provide greater legal analysis in a small class of particularly complex cases. Yet another proposal would revise the process for publishing Board decisions as binding precedents. Finally, the Attorney General directed the Deputy Attorney General and the Director of EOIR to monitor the effect of these adjustments and instructed the Deputy Attorney General to

reevaluate the effectiveness of the adjustments after they have been in place for two years.

## Chairman Leahy

### Hamdan/Military Commissions

**60. At the hearing, you indicated that you would have “a lot of objections” to procedures I described, involving a hypothetical American soldier captured by a foreign government. In my example, the soldier is accused of being a spy and so not entitled to POW protections under the Geneva Conventions. He is interrogated for 18 hours a day, prevented from sleeping for days on end, and required to stand or squat for hours at a time. A military commission is then convened, with judges handpicked by the foreign government’s leader. The accused is excluded from large portions of his trial, and the prosecutors introduce a statement from the interrogators that they never gave the accused an opportunity to read. He is convicted and sentenced to death on less than a unanimous vote. Afterwards, his only appeal is to a panel whose members were, again, handpicked by the foreign leader, and who had assisted the prosecution in the preparation of the case. What specifically would you find objectionable about these procedures?**

**ANSWER:** As stated at the hearing, I believe the hypothetical you pose could raise a number of issues under the Geneva Conventions. By contrast, I believe that the military commissions established under both the President’s original order and the MCA would avoid the issues raised by your hypothetical.

A foreign state could not validly avoid its obligations under the Geneva Conventions simply by making the unsupported accusation that an American soldier is a spy. The treatment and interrogation of a uniformed American soldier in the manner that you describe would appear to violate the protections that the Geneva Conventions afford to legitimate prisoners of war. By contrast, the President has found that members of al Qaeda and the Taliban do not qualify as prisoners of war because those forces do not abide by the laws of war and do not meet the definitions established for lawful combatants under the Third Geneva Convention. Nothing in the Supreme Court’s decision in *Hamdan* disturbs the correctness of that judgment by the President. The Geneva Conventions also require that lawful enemy combatants be tried in the same courts as the state gives to its own military troops. If the American soldier in your hypothetical were a lawful combatant, then military commissions could not be used unless identical procedures were employed by that state to try its own soldiers.

The trial procedures you describe also raise a number of issues relating to the fairness of the proceeding. A trial before a biased judge obviously is not a fair trial. Of course, it is the regular practice in the United States, as well as in other countries, to allow the Executive Branch to nominate and appoint judicial officers, and so a judge is not necessarily biased simply because he has been chosen by the head of state. Nonetheless, a judge clearly would not be impartial if he were appointed for a particular trial because of his bias or because of his participation in the prosecution of the case.



Neither the military commissions established pursuant to the President's original order (which expressly recognized the accused's right to an impartial and fair proceeding), nor those codified in the MCA, countenance the appointment of biased officials. Under the MCA, the presiding officer must be a certified military judge with the same protections for impartiality that exist under the UCMJ. *See* 10 U.S.C. § 948j. Similarly, the MCA establishes a formal appellate process that parallels the UCMJ, providing an appeal to a military appellate court, followed by an appeal as of right to the Court of Appeals for the D.C. Circuit. *See id.* §§ 950f, 950g.

In your hypothetical, the accused is also sentenced to death on a less than unanimous vote by the finder of fact. I am not aware of any principle of international law requiring unanimity as to the findings of liability or sentence before a military commission. The federal civilian courts do require unanimity as a matter of constitutional law, but in most cases, courts-martial under the UCMJ would not require unanimity. Article 52 of the UCMJ does require a unanimous vote for the imposition of the death penalty, however, and Congress also adopted this approach in the MCA. *See* 10 U.S.C. § 949m.

Finally, although there may be circumstances that would justify the exclusion of the accused under extraordinary circumstances, your hypothetical does not suggest any justification for the individual's exclusion from large portions of the trial. The Administration firmly believes that sharing sensitive intelligence information with terrorist detainees during an ongoing conflict could harm the national security interests of the United States. The previous military commission procedures therefore provided for the exclusion of the accused under limited circumstances and required that the exclusion be limited so as to ensure the fair trial of the accused.

The MCA, as enacted by Congress, ensures that the accused may be present at all proceedings, and he has the ability to challenge all evidence introduced against him. *See* 10 U.S.C. § 949a(b). At the same time, the MCA protects the ability of the Government to withhold the sources and methods used to collect sensitive classified evidence. *See id.* § 949d(f)(2)(B).

These procedures will provide the accused with a full and fair trial, permit the Nation to protect our most important secrets during military commission trials, and avoid the objectionable aspects suggested by your hypothetical.

- 61. In light of the Supreme Court's decision in *Hamdan*, does the Administration intend to try any of the detainees through courts-martial and if not, why not? Are there specific aspects of the courts-martial proceedings that cannot be used in this context? Given the effectiveness of Article 32 of the UCMJ, why does the Administration need to create an entirely new system to try these detainees?**

**ANSWER:** We believe that courts-martial are inappropriate and impractical to try unlawful enemy combatants in the war on terror. Congress made that same judgment in the MCA, which recognizes that many provisions of the UCMJ would be impracticable if applied to the prosecution of terrorists in the midst of ongoing hostilities. The Administration thus plans to prosecute terrorist detainees before military commissions, in accordance with the MCA.

Your question states that Article 32 of the UCMJ has been effective in the context of courts-martial. Article 32 provides for a pre-charging investigation that is akin to, but considerably more protective than, the civilian grand jury. We believe that such a proceeding would be unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war. The MCA accordingly does not provide for a procedure analogous to an Article 32 investigation, and indeed, the statute expressly provides that Article 32 of the UCMJ shall have no application in the military commission process. *See* 10 U.S.C. § 948b(d)(1)(C).

### **NSA Wiretapping Program**

**62. In your testimony regarding the NSA's domestic surveillance programs, you stated that you were in discussions with the Administration about what additional information you could provide to this Committee about any other government surveillance programs that may be operating without a court order or warrant. Have you obtained authorization to disclose this information to the Committee and if not, when do you expect to receive such authorization? Are there any other government surveillance programs or activities that the Administration is carrying out without obtaining a court order or warrant?**

**ANSWER:** As you know, intelligence programs are highly classified and exceptionally sensitive. It would be inappropriate for me to discuss in this setting the existence (or non-existence) of specific intelligence activities, though my inability to respond more fully in this setting should not be taken to suggest that any such activities exist. We would like to reaffirm, however, the Administration's commitment to keeping Congress apprised of intelligence activities. Throughout the war on terror, the Administration has notified Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. Of course, we always take account of developments in the law and consider how best to make maximum use of the authorities now available under FISA.

**63. You stated at the hearing, in response to a question I posed, “I think there is a serious question as to whether or not FISA could accommodate what it is that the President has authorized.”**

**(A) Please clarify your response: Can the current FISA statute accommodate the so-called Terrorist Surveillance Program, as Senator Feinstein and others have said, yes or no?**

**(B) If you believe that FISA as currently written cannot accommodate this program, please identify the specific provision or provisions at issue, and indicate what specific changes would need to be made so that FISA would accommodate this program.**

**ANSWER:** Please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

**64. The former presiding judge of the FISA court, Judge Royce Lamberth, said on May 8 that in his view, the so-called Terrorist Surveillance Program would “require some tweaking” to make it comport fully with FISA. Rather than amending FISA to accommodate the program, have you given any thought to “tweaking” the program to comply with the law?**

**ANSWER:** Please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

**65. You also testified that the Administration is experiencing a problem with a backlog of FISA applications. What is the extent of the problem, and what additional resources are needed to address it?**

**ANSWER:** The Department of Justice files numerous applications with the Foreign Intelligence Surveillance Court (FISC) every year, and, as a result, numerous requests for FISA authority are pending in the Department at any one time. These requests fall into two categories: (1) requests to initiate collection authority for a target for the first time (referred to as “initiations”); or (2) requests to renew existing collection authority (referred to as “renewals”).

The Department strives to prioritize its work on FISA requests in accordance with the needs of the Intelligence Community to review and process promptly requests that the Intelligence Community identifies as having the highest priority. Such prioritization can, and does, change frequently during any given day. The Department regularly responds to Intelligence Community requests to obtain FISA authority on an emergency or expedited basis, which necessarily requires us to reprioritize work and shift resources from one matter to another. The Department, therefore, processes FISA requests that are of a

lower priority – as determined by the Intelligence Community – after it first processes matters that are of a higher priority.

Of course, we adhere to the law at all times. As a result, the Department does not present applications to the FISC until, as FISA requires, the application meets all of the criteria and requirements of the Act. Thus, requests for FISA collection authority that are insufficient when submitted require additional work, and take longer to process, than requests that meet the requirements of FISA when originally submitted.

Thus, lower priority requests and requests that are insufficient when first submitted take longer to process than higher priority requests that are legally sufficient when submitted.

In the past few years, the Department has had tremendous success in reducing: (1) the amount of time it takes to obtain authorization for FISA collection; and (2) the overall number of initiation requests that are pending at the end of a calendar year. The Department has dramatically increased its production and efficiency in processing applications to the FISA Court in recent years. From the end of 2004 to September 2006, for instance, the Department reduced the number of days it takes to process FISA applications by the FBI by approximately 35 percent. In that same time span, the Department reduced the number of FBI FISA applications pending by roughly 65 percent. Thus, the Department has simultaneously improved its output and its efficiency with respect to processing FISA requests. Nevertheless, based on upon information we have received from the Intelligence Community, we expect that the demand for FISA collection authority will continue to increase significantly in the future.

### **State Secrets Privilege**

66. **On July 19, 2006, a U.S. District Court judge in California denied the Department’s motion to dismiss a lawsuit filed against AT&T involving the NSA’s domestic surveillance programs. Noting its constitutional duty to adjudicate the disputes that come before it, the court ruled: “To defer to a blanket assertion of [state] secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.” The Justice Department has also asserted the state secrets privilege in at least 19 other cases challenging the NSA’s domestic surveillance programs. Given the court’s ruling in the AT&T case, it appears that the state secrets privilege is being misapplied in these cases.**
- (A) **Will the Department continue to assert the state secrets privilege in cases challenging the NSA’s domestic surveillance programs?**

**ANSWER:** The Department will continue to assert the state secrets privilege in cases challenging alleged NSA intelligence activities where it is appropriate to do so -- i.e., where the Director of National Intelligence has determined, after giving personal consideration to the matter, that there is a reasonable danger that disclosure of information at issue in the case could cause harm to the national security.

**(B) What is the current status of the lawsuit involving AT&T?**

**ANSWER:** Recognizing that the state secrets issues presented in Hepting represent "controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, Judge Walker certified his decision for an immediate interlocutory appeal pursuant to 28 USC § 1292(b). The Department has petitioned the United States Court of Appeals for the Ninth Circuit to accept such an appeal, and the Ninth Circuit has granted that petition. Briefing begins in February 2007.

**67. The Justice Department has also used the state secrets privilege to ask the courts to throw out a lawsuit brought by whistleblower Sibel Edmonds, an ex-translator for the FBI who was fired after accusing her coworkers of security breaches. It appears that the Department used the privilege in this case to stop a whistleblower from coming forward and disclosing government misconduct.**

**(A) What is the Department's policy about asserting the state secrets privilege in whistleblower cases?**

**ANSWER:** In any case, including a whistleblower case, the purpose of asserting the state secrets privilege is to protect against the disclosure of classified or other national security information.

**(B) Would you support legislation that would require the court to rule in favor of a whistleblower if his or her case is dismissed because the Government asserts this privilege?**

**ANSWER:** We strongly oppose legislation that would require a court to rule in favor of a whistleblower if his or her case must be dismissed because the litigation cannot go forward without harm to national security. Not only would such legislation fly in the face of well-established principles regarding the assertion of this important privilege, but it could lead to absurd results. For example, assume that classified information, the disclosure of which, by definition, would be harmful to the national interest, revealed that a Department of Homeland Security employee had been assisting terrorists in smuggling weapons of mass destruction into the country. Based upon this information, which cannot be disclosed, the employee is fired. If legislation you describe is enacted into law, the employee could claim that the termination was in reprisal for alleged whistleblowing

and would be entitled to judgment and relief, which could include reinstatement and monetary relief, because the Government could not reveal the reasons for the termination.

It may be regrettable that, at times, litigation cannot go forward because to allow it to do so would harm national security. However, if plaintiffs were entitled to judgment on whistleblower claims whenever the Government successfully asserted the state secrets privilege, it would encourage plaintiffs to raise and focus their claims in the national security context. A rule rewarding plaintiffs for filing claims presenting state secrets concerns -- even frivolous and non-meritorious claims -- cannot be construed as in the national interest. The current state of the law on the assertion of the state secrets privilege adequately balances the interests of litigants and the needs of national security, and should not be disturbed.

### **OPR Investigation**

**68. There are still many questions about the shut down of OPR's investigation into the role of your predecessor and other senior Justice Department officials in reviewing the legality of NSA's domestic surveillance programs. You testified at the hearing that the President made the decision to deny OPR attorneys and investigators access to information about this program. However, under 5 U.S.C. § 301; 28 U.S.C. §§ 509-510 and 28 C.F.R. §0.39, OPR derives its authority from the Attorney General, not the President.**

**(A) Given this, why was the President involved in any aspect of this investigation?**

**ANSWER:** The Terrorist Surveillance Program (TSP) is a highly classified and exceptionally sensitive intelligence-gathering program. Decisions to provide access to classified information about TSP for non-operational purposes are made by the President of the United States.

**(B) Did the President override your directive for OPR to investigate this matter by denying these security clearances and effectively shutting down the OPR investigation?**

**ANSWER:** The President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. Every additional security clearance that is granted for TSP increases the risk that national security may be compromised.

**(C) Please explain why Criminal and Civil Division Department attorneys have been granted security clearances to review information about the NSA's program in the past, but the OPR attorneys and investigators were denied such clearances in this particular case?**

**ANSWER:** Decisions to provide access to classified information about TSP for non-operational purposes are made by the President of the United States.

- (D) **Have there been other situations where the President has denied security clearances for Department personnel to access and review (i) the NSA's domestic surveillance programs? (ii) any other classified programs?**

**ANSWER:** We are not aware of any other instances where Department of Justice personnel have been denied access to review TSP. TSP is subject to extensive oversight within the Executive Branch, a regime that includes thorough review of the program by NSA's Inspector General and Office of General Counsel.

In addition, the Department of Justice Inspector General recently announced that he will conduct "a program review that will examine the Department's controls and use of information related to the use of the program and the Department's compliance with legal requirements governing the program."

#### **Acree v. Iraq**

69. **During our exchange about the American prisoners of war involved in the *Acree v. Iraq* litigation, you stated that, despite several requests that you do so, you have not met with these POWs or their families.**

- (A) **Has any one else within the Department or the Administration met with these brave Americans?**
- (B) **Given the clear evidence that these POWs were tortured by the Hussein regime, what steps has the Department taken to ensure a just resolution of this case?**

**ANSWER:** The plaintiffs in the *Acree* litigation, *Acree v. Iraq*, Civil Action No. 02-632 (D.D.C.), brought suit against the Republic of Iraq under a 1996 amendment to the Foreign Sovereign Immunities Act, which allows certain claims against designated state sponsors of terrorism. On July 7, 2003, the United States District Court for the District of Columbia granted a judgment in favor of plaintiffs, awarding them over \$900 million in compensatory and punitive damages. Following the entry of judgment, the United States sought to intervene in the matter to advise the District Court of Presidential Directive 2003-03, passed under the authority of the Emergency Wartime Supplement Appropriations Act of 2003, and the United States' substantial foreign policy interests. Thereafter, on appeal, the Court of Appeals for the District of Columbia Circuit issued a decision that vacated plaintiffs' judgment and ordered the suit dismissed. *Acree v. Iraq*, 370 F.3d 41 (D.C. Cir. 2004). On August 19, 2004, the Court of Appeals denied plaintiffs' petition for en banc rehearing of the case, and on April 25, 2005, the Supreme

Court denied plaintiffs' petition for certiorari. Thereafter, on June 3, 2005, following the Supreme Court's denial of certiorari, plaintiffs filed a motion in the District Court in an effort to re-open their lawsuit. Because the United States is an intervenor in the proceedings, we filed an opposition to this motion on August 2, 2005. The United States' position regarding the viability of plaintiffs' effort to reinstate their lawsuit despite the decision of the Court of Appeals that the suit was to be dismissed is fully explained in our public filing. Plaintiffs' motion remains pending in the District Court.

In February 2005, prior to the filing of the Department's brief in opposition to plaintiffs' petition for certiorari in the Supreme Court, attorneys in the Office of the Solicitor General and the Civil Division met with plaintiffs' counsel to discuss the claims raised by these plaintiffs. Moreover, most recently, in February 2006, the Assistant Attorney General of the Civil Division responded to a letter from plaintiffs' counsel which proposed terms that, if agreed to between plaintiffs and the United States, would have had the effect, in plaintiffs' view, of making it appropriate for the United States to withdraw from its participation in the litigation. The Assistant Attorney General, after extensive consultation with the Departments of State and Defense, concluded that the proposal made by plaintiffs' counsel did not alleviate the United States' concerns which have prompted our participation in this litigation, and did not proffer terms that would warrant the United States' withdrawal from the lawsuit. The Department's position in this litigation was not intended to downplay plaintiffs' suffering or the outrageousness of their captors' conduct. Rather, the United States appeared in the Acree litigation to enforce a Presidential act, issued in furtherance of the United States' foreign policy and national security interests in Iraq, and we support the outcome of that litigation.

Finally, at no time in these proceedings has the United States suggested that Iraq is not responsible for any violation of its international obligations, including under the Geneva Convention, with respect to its treatment of these heroic Americans. To the contrary, to the extent plaintiffs' injuries resulted from violations by Iraq of the Geneva Convention, they were eligible for compensation from the United Nations Compensation Commission ("UNCC"). The UNCC was established by the United Nations Security Council to address the 2.6 million claims from nearly 100 countries seeking approximately \$353 billion in damages from Iraq stemming from the first Gulf War. See <http://www2.unog.ch/uncc/start.htm>.<http://www2.unog.ch/uncc/>. The compensation fund, derived from the proceeds of Iraqi oil sales, has made awards of roughly \$52 billion, of which \$20 billion has been paid. Id. State Department records indicate that 15 of the 17 service member plaintiffs in Acree applied for and received some compensation through the UNCC. Moreover, in its Supreme Court brief opposing certiorari, the United States made clear that "[a]fter the Iraqi regime has had time to become firmly established, the President may choose to espouse petitioners' claims through diplomatic means." Throughout this litigation, therefore, the United States has recognized and honored its commitment to ensure that Iraq is not absolved of its international obligations.



## **Investigation of Journalists**

70. **Recently, there have been press reports that the Department is stepping up its efforts to prosecute journalists for publishing stories about the Administration’s domestic surveillance programs. During the July 18, hearing, you refused to answer questions about whether the Department was actively investigating any journalists for publishing stories about these programs and you stated that the Department’s policy is to “pursue the leaker” and to “work with responsible journalists and persuade them not to publish the story.”**
- (A) **Without getting into the details of any pending matters, are there currently within the Department of Justice any ongoing investigations or prosecutions of journalists or news organizations for publishing classified information about these programs?**
- (B) **If so, how many ongoing investigations or prosecutions of journalists are currently pending at the Department?**
- (C) **What criteria does the Department use to decide when to open an investigation of a journalist or news organization and what role do you have in making such a decision?**

**ANSWER:** Taking the last sub-part of the question first, the Department of Justice takes seriously any investigative or prosecutorial decision that implicates – directly or indirectly – members of the news media, whether it be the issuance of a subpoena or the filing of an indictment. The seriousness with which the Department approaches these decisions is reflected in the Department’s governing policy, 28 C.F.R. § 50.10, which is reiterated in the United States Attorney’s Manual. This policy seeks to “balanc[e] the concern that the Department of Justice has for the work of the news media and the Department’s obligation to the fair administration of justice.”

Specifically, the policy states that “in requesting the Attorney General’s authorization for a subpoena to a member of the news media, the following principles will apply”:

- (1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation;
- (2) In civil cases, there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance;
- (3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources;

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information;

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment;

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

As for the role the Attorney General plays in this decision-making process, the Department's policy requires his express authorization for any decision to prosecute a member of the news media for an offense committed during the course of, or arising out of, the news gathering or reporting process. The Attorney General's decisions are guided by the Department's policy of "balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10.

It would, however, be inappropriate to comment upon the existence or non-existence of any investigation or upon whether the Department is now considering the prosecution of journalists for publishing classified information.

**71. Earlier this month, I asked you about troubling press reports in *The Christian Science Monitor* and other publications that the FBI is monitoring the phone calls of journalists at *ABC News*, *The New York Times* and *The Washington Post*. During the July 18 hearing, you stated that as far as you knew, you did not believe that the Department has a program to engage in the surveillance of journalists. Because your response did not completely confirm or deny these reports, I ask the following questions.**

- (A) Is the FBI, or any private telephone company on its behalf, monitoring the telephone calls of journalists, and if so to what extent?**
- (B) If the FBI is monitoring such calls, what legal authority is the Department relying upon to monitor these calls, and in particular, has the Department used National Security Letters under the PATRIOT Act to access the phone records of any journalists?**
- (C) Has the Department considered the chilling impact that surveillance has on the press and its ability to inform the public about important**

**national security matters. If so, how is the Department is addressing the privacy and civil liberties concerns raised by such call monitoring.**

**ANSWER:** As an initial matter, the Department cannot comment on any ongoing investigation, or even whether such an investigation has been initiated. Because we cannot discuss whether or not a particular investigation has been initiated, we also cannot discuss whether any particular investigative steps may or may not have been taken.

As a general matter, however, the Department does not monitor telephone calls or seek records of such calls made by individuals on the basis of their profession. Outside of the Terrorist Surveillance Program, which targets for interception communications where at least one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization, and does not target wholly domestic communications or the communications of persons who have no connection to al Qaeda or an affiliated terrorist organization, nonconsensual monitoring is only done with the approval of a court. Any investigative activity involving journalists takes into account Department of Justice policy as set forth at 28 C.F.R. § 50.10. As noted above, this longstanding policy expressly recognizes the sensitive First Amendment concerns implicated when the newsgathering process and the needs of law enforcement intersect.

### **The Anderson Search**

72. **Like many Americans, I was troubled by the FBI's request to search the files of deceased journalist Jack Anderson. Under the Department's official policy with regard to the issuance of subpoenas to members of the news media -- 28 C.F.R. '50.10 -- the Attorney General must approve not only prosecutions of members of the press, but also investigative steps aimed at the press, even in cases where the press is not itself the subject of the investigation. In addition, before a subpoena may be issued to a member of the news media, the government must try to obtain the needed information from non-media sources.**
- (A) **Given this policy, did you expressly authorize the FBI's attempt to rummage through deceased journalist Jack Anderson's papers? If not, who did authorize this?**
  - (B) **Had the FBI made any attempt to obtain the information sought from alternative non-media sources?**
  - (C) **Has the Justice Department made any other attempts to search the files of journalists, either living or deceased?**

**ANSWER:** The FBI attempted to gain consensual access to Mr. Anderson's files pursuant to an investigation in connection with a criminal prosecution currently pending

in the Eastern District of Virginia. We understand that the FBI Special Agents (SAs) in question did not seek access to the files for the purpose of retrieving classified material. Rather, when the SAs were informed that there was classified material in the files, they sought permission to take possession of that material under the general duty of government personnel to safeguard classified material as directed by the President in Executive Order 12958. Whether the information was actually classified and, if so, whether it constitutes evidence of crime is unknown because consent was refused.

With respect to the final part of your question, we are informed that, over the past five years, subpoenas directed to journalists in 65 matters have been approved by the Attorney General and former Attorney General Ashcroft, pursuant to 28 C.F.R. § 50.10. This includes witness subpoenas and subpoenas for documents, film, footage, and other records. In addition, over the past five years, the Department has approved three search warrants for materials related to the news gathering process pursuant to the Privacy Protection Act, 42 U.S.C. 2000aa et seq. It is worth noting, however, that almost all of the subpoenas issued have not sought confidential source information. In addition, a number of the subpoenas approved by the Attorney General have been issued in the context of an agreement between the Department and the media organization in question, whereby the organization agrees in advance to produce the material upon the issuance of a subpoena.

### **Aid To State and Local Law Enforcement**

**73. In the FBI's Preliminary Annual Uniform Crime Report for 2005, the Bureau reports that across America violent crime has risen by 2.5% just in the past year. What's more, according to the report, there has been a 4.8% increase in murders and a 4.5% increase in robberies. What trends do you see in these figures and do you expect the final crime statistics for 2006 to be consistent with these figures?**

**ANSWER:** After many years of decreases in the number of violent crimes, the final 2005 data released September 18, 2006, showed an increase. In summary, these data indicate that the rate of violent crime increased by 1.3 percent, but that the rate of property crime decreased by 2.4 percent.

The Uniform Crime Reports (UCR) data for 2005 revealed increases in the number and rate of violent crimes (murder, robbery and, to a lesser extent, aggravated assault). The UCR revealed an annual increase nationally of 1.3 percent in the 2005 violent crime rate. While increases were observed, crime remains at low levels, with 2005 having the second-lowest rate recorded by the UCR in over 30 years. (Only 2004 had a lower violent crime rate.) The 2005 National Crime Victimization Survey (NCVS), which measures both reported and unreported crime, showed no change in the number of violent crimes or in the violent crime rate between 2004 and 2005 when released on September 10, 2006. Like the UCR, the NCVS showed a decline in property crime.

The NCVS and UCR are complementary programs measuring an overlapping but not identical set of crimes. Data from the two programs taken together show that while the recent declines in crime have halted, at least temporarily, it is too early to tell whether this is a one year phenomenon or the beginning of a new trend.

The UCR data do not identify any reasons for the observed increases. While the Nation experienced a 2.4 percent increase in the murder rate from 2004 to 2005 (to the second-lowest rate ever recorded, identical to the murder rate in 2003), the Northeast experienced a 5.3 percent increase in the murder rate and the Midwest a 4.3 percent increase. At the same time the South experienced a 0.8 percent increase and the West experienced a 1.7 percent increase in the murder rate. Trends varied by size of city. While all cities combined experienced a 5.7 percent increase in the number of homicides from 2004 to 2005, cities between 100,000 and 249,999 experienced a 12.4 percent increase and cities between 50,000 and 99,999 experienced an 11 percent increase. However, cities over 1,000,000 in population experienced a 0.6 percent increase, and cities between 10,000 and 24,999 experienced a decline of 0.9 percent.

Preliminary UCR estimates for the first half of 2006 indicated that the number of violent crime offenses from January through June 2006 increased 3.7 percent when compared to the reported level for the first half of 2005. The number of property crime offenses for the same period was down 2.6 percent. The numbers reported are preliminary, based on the submissions of 11,535 law enforcement agencies that submitted three to six months of data to the UCR program for January through June of both 2005 and 2006. Because of the preliminary nature of these numbers, they may well change before the final report on 2006 violent crime is released next fall. The preliminary crime statistics do not take into account population increases, and thus do not measure the rate of violent crime. It is too soon to determine whether the increase in the violent crime offenses from the first half of 2005 to the first half of 2006 signals a change in the downward trend in violent crime rates.

**74. One concern is that the rise in crime is directly related to the Administration's \$2 billion cut in aide to state and local law enforcement programs. Given the FBI's own figures showing a dramatic rise in crime, how do you justify cutting \$2 billion to aide law enforcement officials at the state and local levels?**

**ANSWER:** There are many factors that can play a role in the rise of violent crime, and there is little reason to believe that a decline in federal aid to state and local law enforcement programs is responsible for the recent uptick. Indeed, it is unlikely that a decline in federal aid is responsible because federal aid represents a very small portion of the total funding spent on law enforcement activities by state and local governments. Department of Justice spending on state and local law enforcement has never accounted for more than a small percentage, less than 5% of state and local law enforcement spending. At the same time, state and local expenditures for police protection have increased every year since 1982, regardless of the size of the federal contribution. And ongoing federally funded partnerships among federal, state, and local law enforcement,

such as the Project Safe Neighborhoods (PSN) gun-crime reduction initiative, continue to be highly effective at combating serious and specific crime problems.

All across the federal government, the Administration was required to make difficult choices in the FY 2007 budget proposal. We note that the President's 2007 budget request reduced grant programs by \$1.3 billion, rather than by \$2 billion as asserted in this question.

**75. According to a July 13, 2006, article in *USA Today*, 42% of robbery suspects in Washington this year have been juveniles – up 25 % from 2004. That article also notes that juvenile arrests in Boston rose 54% in 2005 and weapons arrest involving juveniles rose 103%. What impact have the deep cuts in juvenile justice programs had on the rising crime rate? What is the Department doing to address the increase in crime involving juveniles?**

**ANSWER:** Indicators show that violent juvenile crime is at historically low levels. In 2005, law enforcement agencies in the United States made an estimated 1.6 million arrests of persons under age 18. According to the FBI, juveniles accounted for 16 percent of all arrests and 15 percent of all violent crime arrests in 2005. Specifically, between 1996 and 2005, the number of juvenile arrests for Violent Crime Index offenses fell 25.2 percent. The number of arrests of juveniles for murder fell 46.8 percent from 1996-2005. As a result, the juvenile Violent Crime Index arrest rate in 2004 was at its lowest level since at least 1980. From its peak in 1993 to 2004, the juvenile arrest rate for murder fell 77 percent.

Some cities have reported anecdotal evidence that offenders, including juveniles, are getting younger and more violent. Some cities have reported dramatic jumps in arrest rates of juveniles in recent months. These recent increases in juvenile violent crime arrests in various jurisdictions should still be viewed in the overall context, where a small increase still represents a historically low level of juvenile violence.

Although the overall trends in juvenile crime are encouraging, we must remain vigilant, especially in light of the recent anecdotal reports on juvenile crime, in ensuring that communities have the tools necessary to identify at-risk youth and address juvenile risk behavior crime and victimization with effective prevention, intervention, and treatment programs, as well as proven enforcement strategies.

Because the federal government's role in prosecuting juvenile offenders is limited, the Attorney General has emphasized prevention efforts. For example, the Attorney General directed each U.S. Attorney to convene a Gang Prevention Summit in his or her district to explore opportunities in the area of gang prevention. These summits bring together law enforcement and community leaders to discuss best practices, identify gaps in services, and create a prevention plan to target at-risk youth within their individual communities. These summits have already reached over 10,000 law enforcement officers,

prosecutors, community members, social service providers and members of the faith-based community.

At the national level, the Department has hosted two gang prevention webcasts that are accessible to the public. These webcasts share best practices on gang prevention, identify resources, and support and complement the Department's anti-gang initiative. The Department has also played a major role in the President's Helping America's Youth initiative led by First Lady Laura Bush. This initiative features an online Community Guide that aids community coalitions in developing strategic prevention programs, and provides a database of effective prevention programs.

The Department, through the Bureau of Justice Assistance (BJA) in the Office of Justice Programs (OJP), administers the Gang Resistance Education and Training (G.R.E.A.T.) Program, a school-based, law enforcement officer-instructed classroom curriculum. The program's primary objective is prevention and is intended as an immunization against delinquency, youth violence, and gang membership. G.R.E.A.T. lessons focus on providing life skills to students to help them avoid delinquent behavior and violence to solve problems. In addition, the Department has long supported gang prevention activities such as the National Youth Gang Center, the Boys & Girls Clubs of America, and OJJDP's Gang Reduction Program.

### **Public Corruption/Border Security**

**76. At the July 18 hearing, I asked you about the recent report in the *Washington Post* of bribery, smuggling and other forms of corrupt activity by Border Patrol Agents assigned to protect our Southern border. Following our exchange, you promised to look into the matter. Please state whether the Department is actively investigating the allegations of corruption and misconduct by Border Patrol Agents? If so, what is the status of these investigations and what steps are being taken to ensure that there is not a culture of corruption developing on our Border?**

**ANSWER:** The Department of Justice takes all allegations of criminal conduct very seriously and U.S. Attorneys' Offices (USAOs) carefully review any investigative evidence presented to support allegations of wrongdoing. The Department Homeland Security is responsible for investigating allegations of corruption and misconduct of Border Patrol Agents. However, due to legal and ethical considerations, neither Department can discuss the status of any matter that may be pending in a USAO, other than facts on the public record. As the series of press releases demonstrates, both Departments are committed to ensuring that there is not a culture of corruption developing on our border.

77. **According to press reports, the allegations about corruption within the Border Patrol first surfaced because whistleblowers came forward to reveal this misconduct. These whistleblowers have also indicated that they have been discouraged from speaking out about this problem. Please describe what steps are being taken by the Department to protect the whistleblowers who first alerted us to this illegal activity.**

**ANSWER:** Retaliation against whistleblowers is a prohibited personnel practice. Border Patrol Agents and others within the Department of Homeland Security who suspect they have been retaliated against in violation of law have a variety of administrative remedies available, including but not limited to the Department of Homeland Security's Office of Inspector General, the Office of Special Counsel, and the Merit Systems Protection Board.

### **Presidential Signing Statements**

78. **During his five years in office, President Bush has made extensive use of his bill signing statements B presenting more than 750 constitutional challenges to various provisions of legislation adopted by Congress. You testified at the hearing that President Bush has issued only 110 to 125 signing statements challenging laws passed by Congress. You further stated that the *Boston Globe* had retracted its story reporting that the President has issued more than 750 constitutional challenges to laws.**

- (A) **On July 19, 2006, the *Boston Globe* published a story stating that the newspaper has not retracted any stories or figures on the President's signing statements. (A copy of this article is attached.) The *Boston Globe* also reported that, as of two weeks ago, President Bush's signing statements covered 807 laws, according to Christopher Kelley – a government professor at Miami University of Ohio who has studied the use of presidential signing statements through history. Will you now concede that the President has made more than 750 constitutional challenges to the laws enacted by Congress, and that this figure far exceeds the comparable figures for any other President in U.S. history?**

**ANSWER:** On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as "750 laws." The correction, a copy of which is attached, reads: "Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills." Even the July 19, 2006 article you cite concedes that "[t]he [Globe] corrected an editing error . . . that referred to Bush challenging 750 'bills'." Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or "laws enacted since he took office."



The ABA Task Force Report on Signing Statements also acknowledges that “these [higher] numbers refer to the number of challenges to provisions of laws rather than to the number of signing statements.” ABA Task Force Report on Signing Statements 14-15 n.52 (2006).

We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than his predecessors’ signing statements. President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g., Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act* (Dec. 21, 2000) (“The Act includes an *additional number* of provisions regarding the conduct of foreign affairs that raise serious constitutional concerns. My Administration’s objections to these and other language provisions have been made clear in previous statements of Administration policy. I direct the agencies to construe *these provisions* to be consistent with the President’s constitutional prerogatives and responsibilities and where such a construction is not possible, to treat them as not interfering with those prerogatives and responsibilities.”) (emphases added); *Statement on Signing the Consolidated Appropriations Act, FY 2001* (Dec. 21, 2000) (“There are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.” “*Several provisions* of the Act also raise concerns under the Recommendations Clause. These provisions purport to require a Cabinet Secretary or other Administration official to make recommendations to Congress on changes in law. To the extent that *those provisions* would require Administration officials to provide Congress with policy recommendations or draft legislation, I direct these officials to treat any such requirements as precatory.”) (emphases added); *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001* (Nov. 6, 2000) (“I will not interpret *these provisions* to limit my ability to negotiate and enter into agreements with foreign nations.”) (emphasis added); *Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act* (Oct. 28, 2000) (“there are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.”) (emphases added); *Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) (“While I strongly support this legislation, *certain provisions* seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because *these provisions* appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory.”) (emphases added); *Statement on Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century* (Apr. 5, 2000) (“*certain provisions* of this legislation must be interpreted

and applied in a manner that avoids violating the constitutional separation of powers.”) (emphasis added); *Statement on Signing the Open-market Reorganization for the Betterment of International Telecommunications Act* (Mar. 17, 2000) (“The President’s constitutional authority over foreign affairs necessarily entails discretion over these matters, and I will therefore construe *these provisions* as advisory.”) (emphasis added); *Statement on Signing the Intelligence Authorization Act for Fiscal Year 2000* (Dec. 3, 1999) (“I am concerned about *several parts* of the legislation as well as segments of the accompanying joint explanatory statement. Although not law, classified language in the statement accompanying the bill, entitled ‘State Department Restrictions on Intelligence Collection Activities,’ could, if required to be implemented, interfere with my responsibilities under the Constitution to conduct foreign policy and as Commander in Chief.”) (emphasis added); *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.”) (emphases added); *Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act* (Oct. 22, 1999) (“there are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.”) (emphases added); *Statement on Signing the Treasury and General Government Appropriations Act* (Sept. 29, 1999) (“*Several provisions* in the Act purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court’s ruling in *INS v. Chadha*.”) (emphases added); *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act* (Oct. 23, 1998) (“*several provisions* in the Act purport to condition my authority or that of certain officers to use funds appropriated by the Act

on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.”) (emphases added); *Statement on Signing the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999* (Oct. 17, 1998) (“I am also concerned that *several provisions* of the Act could be interpreted to intrude unconstitutionally on the President’s authority to conduct foreign affairs and to direct the military as Commander-in-Chief. *These provisions* could be read to regulate negotiations with foreign governments, direct how military operations are to be carried out, or require the disclosure of national security information. I will interpret *these provisions* in light of my constitutional responsibilities.”) (emphases added); *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998* (Nov. 26, 1997) (“This Act contains *several provisions* that raise constitutional concerns, such as requirements that the United States take particular positions in international organizations. I will apply *these and other provisions* in the Act consistent with my constitutional responsibilities.”) (emphases added).

The Department of Justice believes the accurate number of the President’s constitutional signing statements in May was 100, not 125. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain” some type of constitutional concern, “as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of signing statements President Bush has issued is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Finally, we note that signing statements do not represent “constitutional challenges to the laws,” as your question erroneously suggests. As Assistant Attorney General Walter Dellinger explained during the Clinton Administration, such signing statements can serve to “guide and direct executive officials in interpreting or administering a statute.” *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (*available at* [www.usdoj.gov/olc/signing.htm](http://www.usdoj.gov/olc/signing.htm)). “Relatedly, a signing statement may . . . explain[] that the President will construe [a provision] in a certain manner in order to avoid constitutional difficulties.” *Id.* at 133. As Assistant Attorney General Dellinger explained, this practice is “analogous to the Supreme Court’s practice of construing statutes, where possible, to avoid holding them unconstitutional.” *Id.*

- (B) When I asked you about the President’s signing statement for the USA PATRIOT Act reauthorization bill, you testified that the President “will follow his oath of office.” Given the Administrations track record of simply ignoring the laws passed by Congress, I am not reassured by your response. So let me rephrase my question: Will you comply with the audit and reporting requirements contained in the PATRIOT reauthorization legislation, yes or no?**

**ANSWER:** We take exception to the statement that the Administration “simply ignor[es] the laws passed by Congress.” There is no basis for any claim that the Administration has done anything but scrupulously follow the letter of the law.

The Administration will comply with the requirements of the PATRIOT Act reauthorization with the understanding, shared by numerous past Presidents interpreting similar provisions of law, that those requirements do not require the President to abandon his constitutional duties. The President’s constitutional reservation about the PATRIOT Act echoes those made consistently by prior Presidents. Presidents routinely assume that when Congress passes a bill requiring the disclosure of information, it does so against the backdrop of what President Clinton called the “President’s duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch.” *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999). President Clinton used signing statements to construe similar provisions in light of that responsibility on numerous occasions during his presidency. *See, e.g., Statement on Signing the Intelligence Authorization Act for Fiscal Year 2000* (Dec. 3, 1999) (“H.R. 1555 provides that ‘[n]o department or agency of the Government may withhold information from the [National Commission for the Review of the National Reconnaissance Office] on the grounds that providing the information to the Commission would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods.’ I do not read this provision to detract from my constitutional authority, including my authority over national security information.”); *Statement on Signing Legislation To Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action* (Nov. 8, 1999) (“section 3 of the bill would require the Secretary of State to report to the Congress on efforts taken with regard to section 2(a) and additional information obtained about the individuals named in section 2(a). I sign this bill with the understanding that this section does not detract from my constitutional authority to withhold information relating to diplomatic communications or other national security information.”); *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999) (“A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President’s duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise. . . . Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President’s duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164).”); *Statement on Signing the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999* (Oct. 17, 1998) (“I am also concerned that several provisions of the Act could

be interpreted to intrude unconstitutionally on the President's authority to conduct foreign affairs and to direct the military as Commander-in-Chief. These provisions could be read to . . . require the disclosure of national security information. I will interpret these provisions in light of my constitutional responsibilities.”); *Statement on Signing the Intelligence Authorization Act for Fiscal Year 1998* (Nov. 20, 1997) (“So that this provision cannot be construed to detract from my constitutional authority and responsibility to protect national security and other privileged information as I determine necessary, and so that the provision does not require the release of information that is properly classified, I direct that it be interpreted consistent with my constitutional authority and with applicable laws and executive orders.”); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1998* (Nov. 18, 1997) (“Other provisions of H.R. 1119 raise serious constitutional issues. Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch (section 1305). . . . Th[is] provision[] will be construed and carried out in keeping with the President's constitutional responsibilities.”); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1997* (Sept. 23, 1996) (“Provisions purporting to require the President to enter into or report on specified negotiations with foreign governments, as well as a provision that limits the information that could be revealed in negotiations, intrude on the President's constitutional authority to conduct the Nation's diplomacy and the President's role as Commander in Chief. I will interpret these provisions as precatory.”); *Statement on Signing Legislation on United States Policy on Haiti* (Oct. 25, 1994) (“Section 2 of the resolution calls, inter alia, for a detailed description of ‘the general rules of engagement under which operations of the United States Armed Forces are conducted in and around Haiti.’ I interpret this language as seeking only information about the rules of engagement that I may supply consistent with my constitutional responsibilities, and not information of a sensitive operational nature.”); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1995* (Oct. 5, 1994) (“section 101 directs that the Secretary of Defense provide a weekly National Operations Summary to the Committees on Armed Services of the House and Senate. Implementation of this provision must be consistent with my constitutional authority as Commander in Chief and my constitutional responsibility for the conduct of foreign affairs. While I understand the interest of the two Defense oversight committees in receiving this sensitive information, there are questions of scope that need to be resolved.”).

In a similar context, President Eisenhower wrote:

I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.

Pub. Papers of Dwight D. Eisenhower 549 (1959).

- (C) **Do you think that the President’s use of signing statements to interpret the law in ways narrower than, or contradictory to, the actual text of the statute is an unconstitutional infringement on the legislative power given to Congress under the Constitution?**

**ANSWER:** Both Congress and the President are bound by the Constitution as the Supreme Law. Presidents are sworn to “preserve, protect, and defend the Constitution,” U.S. Const., art. II, § 1, cl. 8, and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America’s founding document. For this reason, Presidents have long used signing statements for the purpose of “informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications,” *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid constitutional infirmities. *Id.* at 132-33. Moreover, Presidents, like courts, assume that Congress does not intend to legislate unconstitutionally. Therefore, Presidents routinely assume that when Congress passes a law, it is the intent of Congress that the bill be construed in keeping with the requirements of the Constitution. Doing so does not infringe on the legislative power given to Congress because Congress does not have the power to override the Constitution through ordinary legislation.

79. **Please provide a comprehensive list of each provision of law that the President has determined not to enforce or carry out and the basis for his decision not to faithfully execute the laws passed by Congress.**

**ANSWER:** The President always faithfully executes the laws consistent with his obligation to “preserve, protect, and defend the Constitution.” U.S. Const., art. II, § 1. If a statute enacted by Congress is inconsistent with fundamental law, the President’s duty to “take care that the Laws be faithfully executed,” *id.*, art. II, § 3, requires that the Constitution take precedence.

It is not practicable for the Department to identify and to respond with respect to provisions of law enforced by other agencies. In recognition of that fact, 28 U.S.C. § 530D(a)(1)(A)(i), which provides that the Attorney General shall report any formal or informal policy of the Department of Justice to refrain from “enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law . . . on the grounds that such provision is unconstitutional,” applies only to those laws “whose enforcement, application, or administration is within the responsibility of the Attorney General” or another official of the Department. For policies not to enforce provisions of law administered or enforced by other agencies, section 530D provides that “the head of each executive agency or military department that establishes or implements [such] a policy” shall submit such a report. *Id.* § 530D(e). Thus, our response will be limited to any formal or informal policies adopted by the Department of Justice since January 20, 2001 to refrain from enforcing, applying, or administering a

provision of a Federal statute, rule, regulation, or other law, on the ground that such provision is unconstitutional. The only such policy of which we are aware (which does not, strictly speaking, appear to be covered by section 530D(a)(1)(A)) is listed below. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement, because Congress is already aware of those policies.

**11 U.S.C. § 526(a)(4).** On December 15, 2006, the United States District Court for the Northern District of Texas entered a final judgment and order in *Hersh v. United States*, No. 3:05-CV-2330-N (N.D. Tex. Dec. 15, 2006), enjoining the United States from enforcing 11 U.S.C. § 526(a)(4) on the ground that it violates the First Amendment to the United States Constitution. Section 526(a)(4), in general, prohibits those who provide bankruptcy assistance to certain types of debtors from advising them to incur more debt in contemplation of filing bankruptcy. The United States is bound by that injunction while the Department considers whether to appeal; the United States would have to file a notice of appeal in the case by February 13, 2007. Because the Department is simply obeying the injunction while a decision is made whether to appeal, this matter does not appear to be covered by section 530(a)(1)(A), but we report it in the interest of completeness.

### **Internet Privacy and CALEA**

**80. In January, we learned that the Justice Department issued subpoenas to three major Internet companies seeking information about what millions of law-abiding Americans search for on the Internet. There are also recent reports that the Department has asked Microsoft, Google, AOL and other Internet companies to retain records on their customers= web-browsing activities to aid law enforcement. What sorts of records has the Department asked these companies to retain and for how long? Will the Department propose new legislation in this area?**

**ANSWER:** Other than specific requests in specific cases under 18 U.S.C. § 2703(f), the Department has not made any formal requests of Internet companies to retain particular data for a specified length of time. The Department has engaged in discussions with Internet companies about the need to preserve certain information to enable the investigation and prosecution of certain crimes, especially those involving child exploitation. The Department is continuing to review possible solutions to the challenges of investigating and prosecuting crimes committed through the Internet.

The subpoenas to Google and to other search engine providers are separate. Those subpoenas were for random samples of web pages from their indexes, as well as random samples of queries. Both sets of web pages were used to test Internet content filtering software against those pages to determine whether the software succeeded at

blocking adult material and at avoiding the blocking of non-adult material. That testing was the subject of expert testimony in the trial of *ACLU v. Gonzales*, E.D. Pa. No. 98-5591, concerning the constitutionality of the Child Online Protection Act.

**81. In July, there were several press reports indicating that the FBI intends to propose sweeping new legislation that would amend the Communications Assistance for Law Enforcement Act (“CALEA”) to, among other things, expand CALEA’s wiretapping capabilities to commercial Internet services and eliminate the current requirement that the Department publicly disclose the number of communications interceptions that it conducts each year. Such a proposal could have a negative impact on the privacy rights of the millions of law-abiding Americans who use the Internet. First, are the reports that the Department is proposing sweeping new legislation to amend CALEA true, and if so, what is the proposal? Second, has the Department considered the privacy and civil liberties implications of such legislation?**

**ANSWER:** The ability to conduct authorized electronic surveillance is a critical law enforcement tool in investigating and preventing our country's most serious crimes, including terrorism, organized crime, drug trafficking and child exploitation. Because constantly changing communication technologies could put this vital investigative tool at risk, Congress enacted the Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C. §§ 1001 – 1021, to “preserve the government’s ability ... to intercept communications involving advanced technologies” and “to insure that law enforcement can continue to conduct authorized wiretaps in the future.” In the past three years, the Department has considered possible revisions in the statutory language of CALEA to clarify that its wiretapping provisions extended to internet service providers. Even though the Federal Communications Commission has issued opinions in recent years interpreting current law to include the broadband transmission facilities that increasingly connect end users to their ISPs, the Department believes that revision of the statute may be desirable to clarify the scope of the coverage. Although the Administration does not intend to introduce its own legislation this year, it would welcome the opportunity to work with members of Congress and relevant private sector interests on possible modifications to CALEA. The Department has already initiated discussions with the private sector and state and local law enforcement on this issue. We believe that new legislation will not have a negative impact on the privacy rights of American citizens using the Internet, it will simply preserve law enforcement intercept capabilities in today's world of advancing technologies. Any such effort will include careful consideration of privacy and civil liberty implications of proposed statutory changes.



## **FOIA**

- 82. The Department of Justice is still operating under a 2001 directive from former Attorney General John Ashcroft encouraging all federal agencies to use the exemptions under FOIA to withhold information sought under that law. According to a recent study by the Coalition of Journalists for Open Government, even when the Government does release information, it is taking longer and longer for the public to get a response to FOIA requests. Will you rescind former Attorney General Ashcroft's directive encouraging federal agencies to withhold information under FOIA and if not, why not?**

**ANSWER:** Attorney General Ashcroft's October 2001 memorandum encourages compliance with the Freedom of Information Act (FOIA) by reminding federal agencies to consider carefully the interests underlying the FOIA's exemptions, and to make discretionary disclosures of information falling within those exemptions when appropriate. This memorandum represents an appropriate step by the Justice Department to discharge its government-wide role in administering the FOIA. FOIA memoranda such as the one issued by Attorney General Ashcroft have commonly been issued by Attorneys General at the beginning of new presidential administrations. Such FOIA memoranda were issued in May 1977 by Attorney General Griffin B. Bell; in May 1981 by Attorney General William French Smith; and in October 1993 by Attorney General Janet Reno. As the October 2001 memorandum is consistent both with good FOIA practice and with Executive Order 13,392, entitled "Improving Agency Disclosure of Information" (Dec. 14, 2005), the Department plans to leave the memorandum in effect.

- 83. Under the Department's 2001 directive, federal agencies are encouraged to assert the exemptions under FOIA to keep from having to disclose information to the public – including Exemption 2, which relates to the internal personnel rules and practices of federal agencies and Exemption 5, which covers inter-agency and intra-agency documents. How many times did the Department defend FOIA cases based upon Exemptions 2 and 5 of the Freedom of Information Act in the last two years (2004 - 2006)? Does this figure represent an increase or decrease in the number of cases relying upon these exemptions during the previous two years (2002 - 2004)?**

**ANSWER:** The 2001 directive encourages federal agencies "to carefully consider the protection" of the values and interests underlying the FOIA exemptions" when making disclosure determinations under the FOIA. The Civil Division, which, together with the United States Attorneys' Offices, defends litigation challenging exemptions, does not keep statistics tracking the use of particular exemptions. You can be assured, however, that no exemption is defended without careful consideration that it is well-founded and necessary to protect the important governmental interests underlying the exemption.

## Schering-Plough Case

**84. I was stunned recently when I learned that the Department of Justice refused to support the position of the Federal Trade Commission in the Schering-Plough case before the Supreme Court. The FTC was acting to protect American consumers and the Department of Justice sided with the big drug companies. In that case, in which the FTC recommended that the Supreme Court grant review of whether a large pharmaceutical company paid a potential generic competitor not to offer a generic version of the medicine. The choice by your Department was to side with the big drug companies over seniors and families. A number of us have introduced a bill, S.3582, to correct the situation. It is no secret that prescription drug prices are a source of considerable concern for seniors and American working families. In a marketplace free of manipulation, generic drug prices can be as much as 80 percent lower than brand name versions. This is the first time in history that I know of when the Solicitor General has opposed an FTC request for *certiorari* before the Supreme Court.**

**(A) Why did you take that position and oppose Supreme Court review?**

**ANSWER:** In responding to an invitation from the Supreme Court to file a brief expressing the views of the United States regarding a pending petition for a writ of certiorari, the Solicitor General has traditionally sought to provide the Court with an assessment of the “certworthiness” of the case, measured against the criteria applied by the Court itself in deciding whether to grant certiorari. See Sup. Ct. R. 10. Applying those criteria in this case, the Solicitor General concluded – and the Court agreed – that the petition for certiorari did not satisfy the demanding standards for Supreme Court review.

Rather than side with any one interested party, the brief filed by the United States took a balanced approach to the question presented. As the brief explained, some patent settlements involving pioneer and generic drug companies “may pose a risk of restricting competition in ways that are not justified by a lawful patent, to the detriment of consumers.” But as the brief also recognized, some patent settlements can be procompetitive, resulting in more choices and lower prices for consumers. Because any Supreme Court ruling discussing the ways to distinguish between pro- and anti-competitive patent settlements under the antitrust laws is likely to have a significant impact on this critical part of our economy, it is important that any case reviewed by the Supreme Court present the relevant issues squarely and without undue complications.

The Eleventh Circuit's decision in *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), did not present that opportunity. The important and unsettled issues of federal law that the FTC raised in its certiorari petition were not well-presented in that case, which was marked by evidentiary disputes that the Supreme Court typically does not resolve. Moreover, the Eleventh Circuit's decision did not conflict with any decisions

of the Supreme Court or any other Court of Appeals, which are usual grounds for supporting a certiorari request. Accordingly, in response to the Supreme Court's order inviting the Solicitor General to express the views of the United States regarding the FTC's certiorari petition, the Solicitor General recommended that it be denied.

**(B) Did the White House or the Department of Justice meet with Schering-Plough on this matter? If yes, please supply the Committee with notes or summaries of these meetings.**

**ANSWER:** In the course of responding to Supreme Court invitations for views of the United States regarding whether a matter is appropriate for certiorari for the Supreme Court, it is common practice for lawyers from the Solicitor General's Office and other interested components of the Department to meet with representatives of the parties and hear their views in order to increase understanding of relevant issues. In accordance with that typical practice, lawyers from the Department heard from representatives of Schering-Plough, as well as from FTC officials, in the course of determining how to respond to the Supreme Court's order. Any notes of those meetings would be privileged.

## Senator Kennedy

**85. After both the 2000 and 2004 Presidential elections, there were widespread reports of disenfranchisement of African-American voters. Yet, the Department did not file a single lawsuit related to either of those elections on behalf of African-American voters. The Bush Civil Rights Division has litigated only three lawsuits on behalf of African-American voters, two of which were initiated by Attorney General Janet Reno. A week ago, the Department filed a complaint against Euclid, Ohio, the first voting rights lawsuit investigated and filed on behalf of African-American voters on President Bush's watch. The Department is also in the process of litigating the Department's first-ever case alleging discrimination against white voters by African Americans.**

**Is it really the case that there have been just three meritorious claims of voting discrimination against African-American voters since 2001?**

**ANSWER:** In this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We are interested in allegations of possible Voting Rights violations from all sources, and have solicited such information widely.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During fiscal year 2006, the Voting Section filed 17 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian-Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

- 86. In light of the 28 percent African-American voting age population in Euclid, Ohio, the existence of racially polarized voting in elections for the Euclid City Council, the fact that not a single African American has ever been elected to the Euclid City Council, and the fact that an investigation was initiated in 2003, why did it take until July 2006 to file this lawsuit?**

**ANSWER:** In general, the Division conducts a careful investigation and, where suit is authorized, engages in a period of negotiations with a potential defendant before filing a lawsuit. The *Euclid* case was filed as promptly as possible, consistent with the Division's historical practice.

- 87. In recent years, serious concerns have been raised about the impartiality of the administration by the Department of Justice of Section 5 of the Voting Rights Act, which requires covered jurisdictions to submit voting changes to you or to the District Court in the District of Columbia for approval before they can go into effect. This provision has been a powerful force in preventing jurisdictions from implementing discriminatory voting practices, and it is one that Congress has just voted to reauthorize.**

**We have to be certain that a reauthorized Section 5 will be applied impartially and vigorously, without partisan favor. Yet, we know that the Texas redistricting of 2003 was precleared by the Civil Rights Division after political appointees overruled career attorneys who unanimously recommended an objection. That plan was later found by the Supreme Court to violate Section 2 of the Voting Rights Act.**

**We also know that the Civil Rights Division precleared Georgia's recent law requiring voters to present one of a restricted group of photo identifications. For those who didn't have the appropriate identification, the state agreed to provide one for \$20. Career attorneys recommended an objection, but were overruled by political appointees. A federal court had no trouble striking the law down as imposing an unconstitutional poll tax. Yet, the Department saw no problem with it. When Georgia re-enacted the law without the poll tax, you precleared it again, even though it was apparent that minorities were less likely than whites to have the appropriate identification, such as a driver's license and, therefore, would be less likely to vote. The federal court struck down the law again. This troubling history only scratches the surface regarding the recent problems in the Civil Rights Division.**

**In Judge Murphy's order enjoining enforcement of Georgia's 2005 photo identification law as an unconstitutional burden on voting and an unconstitutional poll tax, he stated the following: "[T]he Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom**

**obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting.” *Common Cause/Georgia v. Billups*, 406 F. Supp.2d 1326, 1365 (N.D. Ga. 2005). How do you reconcile this finding with your conclusion that Georgia’s 2005 photo identification law did not have a retrogressive impact upon African-American voters in Georgia?**

**ANSWER:** With respect to the Supreme Court’s decision in *Lulac v. Perry*, we are pleased that the Court agreed with the Department’s principal argument that the State did not violate Section 2 of the Voting Rights Act by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 97% of Texas’ plan. The Supreme Court’s decision – which reversed the decision of a three-judge panel that upheld the plan *in toto* -- produced six separate opinions from six different Justices and 120 pages of discussion. A 5-4 majority of the Court concluded that the State had violated Section 2 (not Section 5) by redrawing former congressional district 23 in southwest Texas. As the Chief Justice explained in his dissent, the majority’s decision on this aspect of the plan was based entirely on a new principle, under Section 2 of the Voting Rights Act, that the creation of a majority-minority district is not sufficient to remedy the redrawing of a minority district in the same part of the State, if the new district is not compact enough to preserve communities of interest. That new compactness inquiry issue was not the subject of briefing and was not addressed by the Department. In any event, the Court’s decision in no way questions the Department’s decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion.

The Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared under Section 5 of the Voting Rights Act after a careful analysis that lasted several months. The decision took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver’s license cards. The data showed, among other things, that the number of people in Georgia who already possess a valid photo identification greatly exceeds the total number of registered voters. In fact, the number of individuals with a valid photo identification is slightly more than the entire eligible voting age population of the State. The data also showed that there is no racial disparity in access to the identification cards. The State subsequently adopted, and the Department precleared, a new form of voter identification that will be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did *not* conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act.

Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision.

- 88. When you precleared Georgia's 2006 photo identification law, what law did you use as the benchmark against which to determine the retrogression question? Did you use the 2005 law, which Judge Murphy had enjoined as unconstitutional? Or, did you use the identification requirements in place in Georgia prior to enactment of the 2005 photo identification law? Please explain the basis for making the benchmark determination that you did.**

**ANSWER:** As in all matters subject to preclearance under Section 5 of the Voting Rights Act, the benchmark plan included those new (post-1964) legally enforceable provisions that had not previously been precleared under Section 5.

- 89. In light of the controversy surrounding your decisions to preclear the Georgia and Texas submissions and given the subsequent court findings raising serious questions about these determinations, have you reviewed the Civil Rights Division's administration of Section 5?**

**If you have not reviewed the administration of Section 5, please do so and report back to the Committee within 30 days. Please include in the report a description of all personnel changes affecting the administration of Section 5 since 2004, including a description of any involuntary transfers from the Voting Section. Please, also provide copies of all communications from the Chief of the Voting Section to employees of the Section addressing the procedures for administering Section 5.**

**ANSWER:** On many occasions, the Attorney General has discussed the application of Section 5 of the Voting Rights Act with senior officials in the Civil Rights Division. We are confident in the proper administration of Section 5 by the Department.

- 90. The Bush Administration supports reauthorization of the Voting Rights Act. However, in light of the above-cited controversies surrounding the Department's recent enforcement of the Act, what assurances can you give us that the Department will enforce Section 5 in a non-partisan and vigorous manner?**

**ANSWER:** The Administration strongly supported reauthorization of the Voting Rights Act, and is currently vigorously defending the Act's constitutionality in court. When Congress reauthorized the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the Attorney General stated that: "The Department of Justice is proud to have supported the passage of this historic legislation. The Voting Rights Act of 1965 was a critical chapter in the still-unfolding story of American freedom. As President Johnson said when he signed that bill, the right

to vote is the lifeblood of our democracy. The reauthorization of this act is an important and proud American moment, and I know that President Bush looks forward to signing the bill. The Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections.” The Department will continue to enforce Section 5 in a non-partisan and vigorous manner.

- 91. An article on July 23 in the Boston Globe, “Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed,” documented a hiring policy change for the Civil Rights Division initiated by Attorney General Ashcroft. According to the article, career civil servants had primary responsibility for decades for hiring Civil Rights Division attorneys, but Attorney General Ashcroft shifted hiring responsibilities to political appointees of the administration. One result of this shift has been the hiring of attorneys without civil rights experience. A former Voting Section attorney interviewed for the article stated, “If anything, a civil rights background is considered a liability.”**

**There has also been a shift in priorities. Cases alleging discrimination against whites and religious discrimination against Christians have replaced cases alleging discrimination against African Americans. Those interviewed for the article attributed plunging morale in the Division to the new hiring practices and accompanying shift in the Department’s civil rights enforcement agenda. Department figures reveal that 63 attorneys left the Civil Rights Division in 2005, nearly double the average annual attrition rate since the late 1990’s.**

**ANSWER:** We respectfully disagree with many of the assertions made in the Boston Globe article. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Career civil servants continue to play a central role in hiring attorneys to work in the Civil Rights Division. Attorneys from an extremely wide variety of backgrounds have been hired to work in the Division under this Administration.

- 92. Please explain the current hiring process in the Civil Rights Division. Have you continued the hiring policy of Attorney General Ashcroft? What role, if any, do career attorneys play in the process?**

**ANSWER:** The Attorney General’s Honors Program (HP) is one of the most prestigious and competitive hiring programs in the country. It is administered by the Office of Attorney Recruitment and Management (OARM). This is a career office with administrative oversight of all career attorneys within the Department. OARM promotes



and administers the HP and screens the electronic applications for initial eligibility based on factors such as graduation date and citizenship. Applicants are then referred to components (such as the Civil Rights Division) based on the applicant's stated preference.

The current system for HP hiring offers several improvements to the previous program. Prior to 2002, HP applicants paid their own way to interview in various locations across the country; they often met with a single representative from the Justice Department. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political and career attorneys for an interview. *More* individuals are now typically involved in the hiring process, not fewer. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program.

**93. Please describe the process for reviewing applications and interviewing applicants.**

**ANSWER:** The Office of Attorney Recruitment and Management (OARM) manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the Attorney General's Honors Program. The applications are then reviewed by both career and political appointees. Certain applicants are selected for interviews. Applicants are then interviewed by both career employees and political appointees and recommendations are made to the Assistant Attorney General.

**94. What are the roles of the career attorneys (such as Section Chiefs and Deputy Section Chiefs) and political appointees in the process of evaluating attorney performance?**

**ANSWER:** The standard form used to evaluate attorney performances requires approval by both a rating official and a reviewing official. In the Civil Rights Division, the rating official is typically the Section Chief who, along with the Deputy Section Chiefs, works directly and regularly with the attorneys. The reviewing official is typically a Deputy Assistant Attorney General to whom the Section reports. These evaluations are important tools for attorneys and Division management to measure an attorney's progress and work performance.

**95. Career attorneys have complained that they have been penalized in their job evaluations for making recommendations that differ from the views of political appointees. Please provide all of the performance evaluations for every member of the teams that worked on the Texas redistricting preclearance and the Georgia photo identification preclearances. This**

**request includes evaluations for the periods before and after these preclearance determinations.**

**ANSWER:** Performance evaluations are not adversely affected by virtue of an attorney's difference of opinion on a matter. There is always opportunity for healthy debate amongst colleagues over the legal and factual issues involved in the Department's work. Issues are often debated extensively before a decision is reached, and differences of opinion are expected. Furthermore, the Department of Justice has a robust system in place for employees to appeal negative performance evaluations.

In light of the privacy interests of the attorneys referenced in this question, we will provide the following information. Both the Texas redistricting and Georgia identification submissions were precleared after a deliberate and careful review of every relevant fact. No attorney's performance evaluation was adversely affected because of his or her opinions on these matters.

**96. What steps have you taken to slow the attrition of experienced career attorneys from the Civil Rights Division?**

**ANSWER:** The attrition rate in the Civil Rights Division during this Administration is almost identical to that of the previous Administration. We nevertheless make every effort to retain our talented and experienced attorneys. The current head of the Civil Rights Division has worked hard to create an environment of hard work, mutual respect, open dialogue and professionalism. In this vein, the Division recently created a new Office of Professional Development that is focused on the needs of individual attorneys for training and career resources. The Division also recently created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns.

**97. The Boston Globe article also discusses three matters in which the Civil Rights Division assigned new hires with conservative credentials to advance arguments unprecedented in the Division. One case involved a lawsuit challenging a paid fellowship program at Southern Illinois University for minorities and women. A second case involved the Division's review of Georgia's photo identification law under Section 5 of the Voting Rights Act, in which a recent law school graduate's view that the law did not discriminate against African Americans prevailed over that of four other career staff with longer tenures in the Division. In the third case, the Division filed an amicus brief arguing that a public library violated a Christian group's civil rights by preventing religious groups from using the library for worship services.**

**Is it the Civil Rights Division's practice to hire attorneys whose ideological views are in keeping with the Department's apparent shift in priorities?**

**ANSWER:** Without accepting the characterization of those three matters presented in the preamble, it should be noted that these three cases are hardly representative of the many hundreds of matters litigated by the Civil Rights Division in the past six years. The Civil Rights Division has worked hard to vigorously enforce the laws passed by Congress on behalf of all Americans. The Division's broad efforts in this area are unprecedented in scope; we have brought cases on behalf of African Americans, Hispanic Americans, Asian Americans, Native Americans, and women, as well as members of the Muslim, Christian, and Jewish faiths, among others.

The attorneys in the Civil Rights Division are among the best and the brightest in the country. While the Civil Rights Division employs a number of talented attorneys with a wide variety of backgrounds, there is no political litmus test used in deciding to hire or promote attorneys.

**98. It appears to be the practice of the Civil Rights Division to assign attorneys to particular matters based on ideology. Is this consistent with your view of the manner in which the Department should staff investigations and litigation?**

**ANSWER:** A career Section manager's decision to assign an attorney on a particular assignment or case involves many factors, including an attorney's experience, caseload, interests, and potential conflicts. The Department's goal is the even-handed enforcement of the laws passed by Congress. Political ideology plays no role in proving, as we must, that the facts of a specific case violate the requirements of federal law.

**99. Where the career staff function effectively as an extension of the political appointees, what checks exist to ensure that the law and not ideology motivates the legal advice of the career staff?**

**ANSWER:** The career section chiefs, who each have on average some two decades of experience in the Civil Rights Division, provide advice and recommendations in every case before it is brought. The Civil Rights Division, moreover, litigates its cases against competent counsel before independent courts. Our exemplary record of enforcement reflects the soundness of our litigation decisions. During this Administration, for example, the Appellate Section has an 87% success rate in filing amicus briefs in civil rights cases, as compared to just 61% during the previous Administration. Nor has the Division, during this Administration, ever been sanctioned by a court and ordered to pay damages, a record that compares favorably to the previous Administration's.

**100. Please list all of the attorneys who left the Civil Rights Division from 2004 to the present and the date on which each began work in the Civil Rights Division.**

**ANSWER:** In light of the individual privacy interests implicated by this request, we are providing the following responsive information. The rate of attorney attrition during this Administration is almost identical (less than a 1.5 % difference) to a comparable period of the prior Administration.

During FY 2004, 36 attorneys left the Division. Of those 36 attorneys, ten began work in the Division during the period from Calendar Year (CY) 2001 to 2004, 15 began work in the Division during the period from CY 1995 to 2000, five began work in the Division during the period from CY 1989 to 1994, three began work in the Division during the period from CY 1983 to 1988, two began work in the Division during the period from CY 1977 to 1982, and one began work in the Division during the period from CY 1971 to 1976. A number of Civil Rights Division attorneys accepted a retirement package offered to multiple Justice Department components in FY 2005. This explains a spike in the number of attorneys departing the Civil Rights Division in FY 2005.

During FY 2005, 63 attorneys left the Division. Of those attorneys, 25 began work in the Division during the period from CY 2001 to 2005, 25 began work in the Division during the period from CY 1995 to 2000, four began work in the Division during the period from CY 1989 to 1994, one began work in the Division during the period from 1983 to 1988, two began work during the period from CY 1977 to 1982, five began work in the Division during the period from CY 1971 to 1976, and one began work in the Division during the period between CY 1965 and 1970.

Finally, in FY 2006, 52 attorneys left the Division. Of those, 30 began work in the Division during the period from CY 2001 to 2005, while 16 began work during the period from CY 1995 to 2000, three began work in the Division during the period from CY 1989 to 1994, and three began work in the Division during the period from CY 1983 to 1988. The Division has been and remains strong, with each section chief, for example, averaging nearly two decades of experience in the Civil Rights Division. This experience, dedication, and practical knowledge continue to serve the Division well.

**101. Please provide for each section of the Civil Rights Division the employment applications of the attorneys hired between 2004 and the present.**

**ANSWER:** The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

**102. Robert S. Berman, a long-time veteran of the Civil Rights Division, was overseeing the Voting Section's administration of Section 5 when political appointees overruled the recommendations of career attorneys to deny preclearance to Texas for its 2003 redistricting plan and to Georgia for its 2005 photo identification law. Mr. Berman agreed with the career staff that Section 5 objections were warranted. My understanding is that Mr. Berman**

**was recently reassigned and not permitted to return to the Voting Section after completing a detail to another office.**

**Please explain the circumstances of Mr. Berman's reassignment.**

**ANSWER:** Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. When Mr. Berman completed this detail and returned to the Civil Rights Division, it was decided that he would serve in a senior position in the Office of Professional Development.

### **Presidential Signing Statements and Executive Nonenforcement**

**103. On June 27th, 2006, Deputy Assistant Attorney General Michelle Boardman testified before this committee on the disturbing frequency with which President Bush has disregarded portions of duly enacted laws through his use of signing statements. The American Bar Association convened a special Task Force on Presidential Signing Statements and the Separation of Powers Doctrine made up of respected legal scholars and professionals from across the ideological spectrum. The Task Force recently issued its report, indicating that the President's use of signing statements fundamentally flaunts the basic constitutional structure of our government. The President of the ABA, Michael Greco, has said that the report "raises serious concerns crucial to the survival of our democracy."**

**In light of the ABA report, do you still maintain that there are no differences between this President's practice with regard to signing statements and the practices of prior Presidents in this area? If so, please indicate the flaws in the ABA's methodology that led it to an erroneous conclusion.**

**ANSWER:** The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force suggests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g., Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as

precatory.”). Indeed, Assistant Attorney General Dellinger made clear early in the Clinton Administration that if “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994).

The conclusions of the ABA Task Force Report have been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service (“CRS”) recently reviewed the ABA Report and concluded that “in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006) Moreover, the CRS found that while there is controversy over the number of statements, “it is important to note that the substance of [President George W. Bush’s] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton.” *Id.* at CRS-9; accord Prof. Curtis Bradley and Prof. Eric Posner, “Signing statements: It’s a president’s right,” *The Boston Globe*, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”).

The ABA Report was also mistaken in suggesting that the President has issued significantly more constitutional signing statements than his predecessors. Indeed, the ABA Report claimed that the President had “produced signing statements containing . . . challenges” to more provisions than all other Presidents in history combined. See ABA Task Force Report at 14-15 & n. 52. That was done by separately counting each provision mentioned in a signing statement rather than by counting only the number of bills on which the President had commented. We believe that the number of individual provisions referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question. See, e.g., *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy.

*Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*." (emphases added). Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Because the ABA report did not present any new factual information or constitutional analysis, the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman continues to represent the position of the Administration on signing statements.

**104. In 2002, Congress passed a law that requires the Attorney General to "submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice" either formally or informally refrains from "enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D. This law requires the Attorney General to inform Congress both in the case of a signing statement for a new law and in situations where the President declines to enforce existing laws.**

**At the hearing before the Senate Judiciary Committee on June 27, 2006, Ms. Boardman committed to providing the Committee with a full accounting of the Justice Department's compliance with this provision over the last four years. We have yet to receive a follow-up from Ms. Boardman consistent with that commitment, and have not received any response to our written questions highlighting and restating this request. As the Attorney General,**

**you are specifically charged with fulfilling statutory reporting requirements outlined in 28 U.S.C. § 530D.**

**Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001.**

**ANSWER:** For a full accounting, please see our response to question 79. As set forth in our response to question 106, below, we disagree that section 530D “requires the Attorney General to inform Congress . . . in the case of a signing statement for a new law.”

**105. As the Attorney General, have you complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that you have complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.**

**ANSWER:** Section 530D comprises three basic reporting provisions for the Department: a provision stating that the Attorney General or any officer of the Department shall report any formal or informal policy to refrain from enforcing or applying any Federal statute, rule, regulation, program, policy or other law within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional, or a policy to refrain from adhering to, enforcing, applying, or complying with a binding rule of decision of a jurisdiction respecting the interpretation, construction, or application of the Constitution, any statute, rule, regulation, program, policy, or other law, *see* 28 U.S.C. § 530D(a)(1)(A); shall report determinations to contest affirmatively in a judicial proceeding the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or a decision to refrain on the grounds that the provision is unconstitutional from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of such a provision of law, *see id.* § 530D(a)(1)(B); and shall report certain settlements against the United States involving more than \$2 million or injunctive or nonmonetary relief that exceeds 3 years in duration, *id.* § 530D(a)(1)(C).

The Department takes the reporting provisions of section 530D very seriously. It is the practice of the Department to provide Congress with quarterly reports under 28 U.S.C. § 530D(a)(1)(C). Copies of those reports are attached; note that we have not yet located a copy of the report for the first quarter of 2004, but will provide a copy of that report when we do. The original of that report is in the possession of several Members of Congress, the Senate Legal Counsel, and the General Counsel of the House of Representatives.

To ensure compliance with the reporting provisions of section 530D(a)(1)(A), the Department periodically sends to components a reminder of the reporting provisions of section 530D(a)(1)(A) and a solicitation of relevant information. We are not aware of any



Department policy adopted since January 20, 2001, that implicates section 530D(a)(1)(A)(I). See our response to question 79. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement.

Finally, the Solicitor General has sent reports to Congress pursuant to section 530D(a)(1)(B) with respect to the following provisions of law.

**11 U.S.C. § 106.** In *In re: Robert J. Gosselin*, No. 00-2255 (1st Cir.), the Solicitor General declined to intervene to defend the constitutionality of this provision, and notified Congress about it in a letter dated October 25, 2001. A copy of that letter is attached. Section 106 abrogates state sovereign immunity in certain bankruptcy matters, and, at the time of the Solicitor General's letter, the Third, Fourth, and Fifth Circuits each had held that section 106(a) violated the Eleventh Amendment because Congress lacked the power validly to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4. See generally *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers."). In the letter, the Solicitor General noted that in 1997 and 1998, his predecessor had declined to file a petition for certiorari in the Fourth and Fifth Circuit cases and notified Congress of that decision.

In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against intervening to defend the challenged provision, on the ground that no valid basis existed on which the provision could legitimately be defended. We are seeking to obtain a copy of that letter. The Court did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. See *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). The Court again granted certiorari to address that question in *Central Virginia Community College v. Katz*, No. 04-885 (S. Ct.). In a letter dated August 3, 2005, the Solicitor General again notified Congress that he had decided against intervening in the case to defend the constitutionality of 11 U.S.C. § 106(c). A copy of that letter is attached. See also *Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006).

**18 U.S.C. 2257.** In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular

regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet “chat rooms,” reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court’s ruling. We are seeking to obtain a copy of that letter. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

**29 U.S.C. § 2612(a)(1)(D).** Following the Supreme Court’s 2001 decision in *Bd. of Trustees of Univ. of Alabama v. Garrett*, and a series of adverse decisions from the courts of appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, the Solicitor General notified Congress on December 20, 2001, in connection with *Bates v. Indiana Department of Corrections*, No. IP01-1159-C-H/G (S.D. Ind.), that he would no longer intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the individual medical leave provision of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2612(a)(1)(D), as “appropriate legislation” within the meaning of section 5 of the Fourteenth Amendment. The letter noted that “[t]he Supreme Court’s analysis and holding in *Garrett* have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment Immunity” in cases of this sort. At the same time, the Solicitor General stated that the Department would continue to defend the constitutionality of the *substantive* medical leave provision, and that “no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising under the parental and family leave provisions of the Act.” Indeed, the Department later successfully defended the abrogation of Eleventh Amendment immunity in the family care provisions of the FMLA. See *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003). A copy of that letter is attached.

**42 U.S.C. § 14011(b).** Section 14011(b), which was enacted as part of the Violence Against Women Act (“VAWA”), states that a victim of a sexual assault that was criminally prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the Supreme Court’s more recent decision in *United States v. Morrison*, 529 U.S. 598 (2000), which held that Congress lacked authority under the Commerce Clause to enact another provision of VAWA that provided a federal civil remedy for victims of gender-motivated violence, 42 U.S.C. § 13981, the Solicitor General determined not to defend the provision. We are seeking to obtain a copy of the letter notifying Congress.

**Pub. L. No. 108-199, div. F, tit. II, § 177, 118 Stat. 3 (2004).** In *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the Solicitor General determined not to appeal, in light of First Amendment and Spending Clause concerns, a decision holding unconstitutional a congressional appropriations provision placing a condition on transportation grants that precluded local transport authorities from permitting display of advertising or other messages advocating the legalization or medical use of marijuana. By a letter dated December 23, 2004, a copy of which is attached, the Solicitor General notified Congress of that decision.

**Regulations implementing 42 U.S.C. § 6971(a).** *State of Florida v. United States*, No. 01-12380-HH (11th Cir.), involved Department of Labor regulations used to resolve certain whistleblower complaints. In that case, a state employee filed an administrative complaint alleging prohibited retaliation in employment. The State of Florida then filed suit in federal district court seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings on the ground that the claimant's claims were barred by the Eleventh Amendment. The government filed an appeal and the Eleventh Circuit affirmed, relying on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that "state sovereign immunity bars [the federal agency involved in that case] from adjudicating complaints filed by a private party against a nonconsenting State." Similarly, *Ohio EPA v. United States*, No. 01-3237 (6th Cir.), involved a former employee of the Ohio EPA who claimed he had been retaliated against. The district court there granted the state partial relief from administrative proceedings, and held that future proceedings could go forward "only if" the federal Government itself joined the action, apparently to overcome Eleventh Amendment concerns. In light of the Supreme Court's decision in *South Carolina State Ports Authority*, the Solicitor General notified Congress in an August 21, 2002 letter that he had decided not to file a petition for a writ of certiorari in *State of Florida*, and to dismiss the Government's appeal in *Ohio EPA*. A copy of that letter is attached.

**Other:** Notification letters also were sent to Congress in the following instances, although the intervention and review decisions at issue did not reflect any judgment by the Department that provisions were constitutionally infirm.

**2 U.S.C. § 441b.** In *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001), the court of appeals held that, in light of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), section 441b could not be constitutionally applied to the National Rifle Association with respect to payments made during one of the years in question. In a letter dated December 21, 2001, the Solicitor General notified Congress that he had decided against seeking certiorari in that case "primarily because I do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari," because the decision "does not squarely conflict with the decision of other courts of appeals on an issue on which the FEC lost." The letter also detailed several other considerations counseling against seeking certiorari.

The letter explicitly noted that the decision “[wa]s not based on any determination that Section 441b is constitutionally infirm.”

**8 U.S.C. § 1226(c).** Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), prohibits the Attorney General, except in limited circumstances, from releasing aliens who have committed specified offenses and are removable from the United States. Two courts of appeals, and district courts in various circuits, held in habeas corpus proceedings that this provision violated due process because it does not provide for individualized bond hearings. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The Department appealed some of the adverse district court decisions in cases that became moot for various reasons. In those mooted appeals, the Department requested that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. The Department succeeded in obtaining such a vacatur and remand order in only a few cases; in the majority of cases, the courts of appeals simply dismissed the appeal. Because the filing of such appeals involved a significant expenditure of government resources and because the individual district court cases had no binding effect on other cases, the Solicitor General determined not to file a motion for vacatur and remand routinely in all section 1226(c) appeals that became moot. In a letter dated January 23, 2002, a copy of which is attached, the Solicitor General notified Congress of that decision, and of his decision not to pursue an appeal in two related district cases, one of which he determined was an unsuitable vehicle for appellate consideration of the constitutionality of section 1226(c) and the other of which had no continuing effect. The Solicitor General continued to defend the constitutionality of the statute, and succeeded in persuading the Supreme Court that the statute was constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

**8 U.S.C. § 1229b(b)(1)(A).** The Solicitor General decided not to file a petition for a writ of certiorari in *Ramirez-Landeros v. Gonzales*, 148 Fed. Appx. 573 (9th Cir. 2005), in which the Ninth Circuit held, in an unpublished decision, that the Board of Immigration Appeals’ denial of eligibility for cancellation of removal to an alien violated her constitutional right to equal protection. The Ninth Circuit’s decision did not state that it was holding a provision of the statute unconstitutional, but rather that the BIA’s application of its own adjudicatory precedent to the petitioner violated the alien’s right to equal protection. The Solicitor General determined that the decision did not merit filing a petition for a writ of certiorari, because it was unpublished and did not create a conflict with any other court of appeals, and because the court had remanded to the BIA for further proceedings. Noting that “it is unclear whether the court’s ruling is of the sort for which a report to Congress is contemplated by 28 U.S.C. 530D,” the Solicitor General nevertheless submitted a letter informing Congress of his action on December 23, 2005, because he “thought it would be appropriate to bring this matter to [Congress’s] attention.” A copy of the letter is attached.

**Pub. L. No. 108-21, § 401(I), 117 Stat. 650 (2003).** The Solicitor General decided not to appeal the district court’s opinion in *United States v. Robert Mendoza*, No. CR 03-730 DT, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004), holding that section 401(I) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 unconstitutionally interfered with judicial independence and violated the constitutional separation of powers. In a letter dated May 11, 2004, the Solicitor General indicated that his decision was based on the unusual facts of that case: section 401(I) had never gone into effect (because the Department had implemented a statutory alternative procedure instead), the district court had sentenced the defendant within the Sentencing Guideline range, and other cases appeared to be better vehicles for defending the constitutionality of section 401(I). The letter noted that the decision not to appeal “does not reflect a determination on the part of the Executive Branch that Section 401(I) is unconstitutional,” and observed that “the government has vigorously defended the provision’s constitutionality.” A copy of the letter is attached.

- 106. At a minimum, this statute requires the submission of a report to Congress every time a signing statement is issued. If there have been no transmittals, please indicate why you believe you can ignore the plain meaning of duly enacted provisions of law.**

**ANSWER:** Signing statements are publicly issued documents published in the *Federal Register*, but the statute, 28 U.S.C. § 530D, does not require a separate submission to Congress when the President issues a signing statement. The President’s signing statements that raise points of constitutional law generally do not “establish[] or implement[] a formal or informal policy to refrain” from enforcing a statute on constitutional grounds. 28 U.S.C. § 530D(a)(1)(A). Instead, they typically state in general terms that a particular provision will be construed consistent with the President’s duties under the Constitution. In addition, a signing statement is a statement of the President, not an Executive Order or a memorandum that might fall under 28 U.S.C. § 530D(e). Therefore, not until the Department of Justice or the Attorney General has occasion to make an enforcement decision would the requirements of 28 U.S.C. § 530D apply. If the time comes when a potential constitutional violation would be realized by a statute’s enforcement, Congress then would receive a report under the statute.

- 107. When you testified before Congress on July 18, 2006, Senator Leahy referred to 750 distinct provisions of law that have been disclaimed by this President through the use of signing statements. At the time, you testified under oath that the statistic of more than 700 was incorrect and had been disclaimed by the Boston Globe. Specifically, you said, “[t]hat's not true. That number is wrong”, and later that “the Boston Globe retracted that number.”**

**A follow-up article in the Boston Globe on July 19<sup>th</sup> entitled “Bush Blocked Probe, AG Testifies” disputes your claim, indicating that the Globe stands by**

**its claim that the president has challenged more than 750 laws. Christopher Kelly, one of the foremost scholars on the topic, claims that 807 challenges have been issued to individual provisions of law by this President through July 11, 2006. The ABA Taskforce report indicates that the President has challenged over 800 provisions of law; more than the roughly 600 total challenges issued by every previous president combined. In addition, most estimates are likely to be on the low end since the vague and sweeping language in many of these statements could theoretically touch on a wide range of provisions in a given bill. The statement issued in conjunction with the Consolidated Appropriations Act of 2004 contains 116 specific constitutional challenges. Contrast this with the 95 total constitutional challenges issued by the Reagan Administration, which supposedly accelerated the pace of constitutional challenges in signing statement.**

**Why did you claim that the Boston Globe retracted its estimate?**

**ANSWER:** On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as “750 laws.” The correction, a copy of which is attached, reads: “Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.” Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or “laws enacted since he took office.” We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to questions 78 and 103 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question.

Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

**108. As you know, it is possible to issue multiple challenges to discrete provisions of law in a single signing statement. Aside from the question of how many physical statements have been issued, what is your best estimate of how many *discrete provisions of law* have been challenged by this President through his**

**use of signing statements? Please also provide the source and methodology you have used to provide us with that number.**

**ANSWER:** The Department has not counted the individual provisions mentioned by the President in his signing statements and it is not sensible to do so. In our extensive review of the statements of this and prior Presidents, it became apparent that this President is much more specific in detailing the provisions that could raise constitutional concern than other Presidents have been. Where other Presidents often referred generally to “several provisions” that raised constitutional concerns, this President specifically lists each provision. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns. *See, e.g., Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.”) (emphases added). The precision of President Bush’s statements is a benefit, not a detriment, to Congress and the public. Thus, even if one wanted to count the number of specific provisions each President noted and compare them one to another, the statements of prior presidents do not allow for such a comparison, as discussed above.

### **Prison Rape Elimination Act**

- 109. In response to the 2003 Prison Rape Elimination Act, the National Institute of Justice commissioned a study on prison rape by Case Western Reserve University Professor Mark Fleisher. The purpose of the Act was to create and implement a zero-tolerance policy toward rape and sexual abuse in**

**prisons. The clear legislative intent was that the Institute would commission a large-scale study of the issue.**

**From the outset, the choice of Professor Fleisher was troubling. Based on interim press reports on his findings, he appears to have used the study to advance drive an ideological agenda. Fleisher claims that rape rarely happens in prison and that prison sexual activity is consensual – rejecting out of hand the plain evidence that led to the enactment of the law in the first place.**

**Despite early and persistent criticism of the selection of Professor Fleisher by my office and others, he completed his study with the use of substantial department funds. We have yet to receive a full accounting of how and why someone with his far outside-the-mainstream agenda was selected to lead this critical research.**

**Please provide any information you have on the process by which Professor Fleisher was awarded over \$900,000 by National Institute of Justice for a study on prison rape issues.**

**ANSWER:** Immediately following the passage of the Prison Rape Elimination Act of 2003 (PREA), the National Institute of Justice (NIJ) began a program of research aimed at understanding the nature of prison sexual violence and what effective means could be used to prevent and eliminate it. NIJ's work is the counterpart to the large-scale statistical work sponsored by the Bureau of Justice Statistics (BJS), which will measure the incidence and prevalence of prison rape on a facility level basis in all correctional settings.

NIJ began work on this complementary effort by commissioning an ethnographic study on prison rape. Ethnography, a method drawn from anthropology, is designed to provide a qualitative description of a social phenomenon, based on field observations and/or interviews. This approach provides a means to understand human behavior and the context in which behavior occurs. In this case, the proposed research would study the culture of sexuality and rape in prisons from the perceptions of the inmates themselves.

NIJ staff recommended that Professor Fleisher of Case Western Reserve University be invited to submit a proposal for the study. This recommendation was based on the recognition of Professor Fleisher's record on prison research and his unique qualifications to conduct the proposed ethnographic studies. Following review of the submitted proposal, former NIJ Director Sarah V. Hart made the decision to make the research award to Professor Fleisher.



**110. Was the process by which Professor Fleisher was awarded the grant noncompetitive? If so, please explain why other bids were not solicited. If not, please provide a list of rejected bids.**

**ANSWER:** NIJ is committed to competitive processes for research awards. Most of NIJ's research awards are made through a competitive process. In a very few situations, however, a broad competition is not feasible or desirable. In the case of the ethnographic study, NIJ sought a specific type of study (ethnography) with specific research parameters.

In the fields of criminal justice and anthropology, there are many scholars who have successfully conducted ethnographic research and others who have conducted research on violence in male prisons. But very few researchers are experienced in both. NIJ staff reviewed Professor Fleisher's previous research and work and consulted with research scholars who had undertaken other types of research in prisons. Through these consultations, NIJ staff determined that Professor Fleisher was uniquely qualified by having successfully conducted research that intersects ethnography and violence research in male prisons. His book, *Warehousing Violence*, was an ethnographic study of violence in prisons and was recognized as an authoritative study by researchers in both criminology and anthropology. Professor Fleisher had the added credentials of having worked previously as a corrections officer at the Federal Bureau of Prisons. He brought real-life experience working in the very type of environment he proposed to study.

**111. In a letter dated March 20, 2006, Assistant Attorney General William Moschella responded to an inquiry I made and indicated that an advisory panel was convened *after* Professor Fleisher was selected to lead the research, and did not appear inclined toward intensive oversight. The foremost advocacy group on this issue, Stop Prisoner Rape, is listed by [Assistant] AG Moschella as a participant on this advisory panel, but they have informed us that they were not present at this meeting and were told of Professor Fleisher's selection to lead this study by an email exchange between Professor Fleisher and Professor Robert Weisberg of Stanford University. When finally learning about the Fleisher study, they immediately objected.**

**How was this advisory panel constituted?**

**ANSWER:** For many research projects, particularly for large-scale nationally based research, NIJ often recommends to its grantees that advisory panels be created to provide guidance to them for their proposed research. These panels are not intended to be oversight panels or to direct the researcher on how to conduct their work; rather, they function as a consulting team, providing guidance and reviews to the principal investigator, who is ultimately responsible for all aspects of the study. For that reason, they are usually comprised after NIJ makes a research award.

The advisory panel on Professor Fleisher's project was first convened in October, 2003, to review his initial research design. The panel examined his proposed research methods and study design and provided substantive recommendations to improve his research plan, including the recommendation to limit the study to examining only non-consensual and forcible sex rather than a broader range of prison sexual activity. The panel gave an overall endorsement to the project and to Professor Fleisher.

The advisory panel included prison administrators, prison researchers, criminal justice researchers, prisoner advocates, former inmates, and staff from NIJ, the Bureau of Justice Statistics, and the Federal Bureau of Prisons. As with most advisory panels on NIJ-sponsored research, NIJ staff made specific recommendations as to the membership of the panel, and the final composition of the panel was agreed to by both NIJ and the principal investigator.

**112. Why was Stop Prisoner Rape listed as a participant in the advisory panel when in fact it played no role in overseeing Professor Fleisher's research?**

**ANSWER:** The letter dated March 20, 2006 to Senator Kennedy from Assistant Attorney General William Moschella misstated that Lara Stemple, then Executive Director of the Stop Prisoner Rape (SPR) organization, was a member of the project advisory panel. This incorrect information was provided in error by an NIJ staffer who assisted in preparing the letter. NIJ learned of the error on March 28, 2006, when Kathy Hall-Martinez, Co-Executive Director of SPR, called NIJ to ask why Ms. Stemple's name had been included as a member of the advisory board in Mr. Moschella's letter.

The NIJ staffer responsible for the error immediately acknowledged the mistake. On March 30, 2006, the staffer contacted Mrs. Hall-Martinez to apologize for the error and to explain how it had been made. Mrs. Hall-Martinez accepted the apology. During the call, Mrs. Hall-Martinez asked the staffer to meet with her during an upcoming trip to Washington. On May 1, 2006, Mrs. Hall-Martinez and Ms. Cynthia Totten, Senior Policy Associate at SPR, met with NIJ staff managing the project to inquire further about Professor Fleisher's study, and to receive a summary of the research results. Both Mrs. Hall-Martinez and Ms. Totten seemed satisfied by their discussions with NIJ. Following the discussions, NIJ considered the matter of the error closed.

**113. If the advisory panel met after Professor Fleisher was selected to conduct this research, who was directly involved in selecting him and what was the purpose of the panel?**

**ANSWER:** As stated in the responses to questions 109 and 111, following passage of the Prison Rape Elimination Act of 2003 (PREA), NIJ began a program of research aimed at understanding the nature of prison sexual violence and what effective means could be used to prevent and eliminate it. An ethnographic study was commissioned by

former NIJ Director Sarah V. Hart to study the culture of sexuality and rape in prisons from the perceptions of the inmates themselves.

NIJ staff recommended that Professor Fleisher of Case Western Reserve University be invited to submit a proposal for the study. This recommendation was based on the recognition of Professor Fleisher's record on prison research and his unique qualifications to conduct the proposed ethnographic studies. Following review of the submitted proposal, Director Hart made the decision to make the research award to Professor Fleisher.

NIJ often recommends to its grantees that advisory panels be created to provide guidance to them for their proposed research. The advisory panel examined Professor Fleisher's research methods and study design and provided substantive recommendations to improve his research plan, including the recommendation to limit the study to examining only non-consensual and forcible sex rather than a broader range of prison sexual activity.

### **Geneva Convention / Torture**

**114. If we want other nations to respect us, we have to respect the law of nations, which means full compliance with the Geneva Conventions. I'm deeply concerned about the direction you have led President Bush to take on one of the basic principles of international law. By refusing to follow the plain language of the Geneva Conventions at Guantanamo Bay, you are unnecessarily jeopardizing our respect in the world and endangering the safety of our own military personnel.**

**Until now, our nation has always complied with the Geneva Conventions, because doing so is so clearly in our national interest. Those rules guarantee legal protections to soldiers of all nations, including American soldiers. Every other country in the world, including our closest allies in the war on terrorism, knows that we are violating the plain language of these historic treaties. We're making up our own laws of war as we go along. The Administration's actions at Guantanamo have damaged our reputation abroad, caused serious tensions with our allies, made the war on terrorism harder to win, and violated a fundamental principle of international law that has long protected American soldiers serving abroad.**

**You've called the Geneva Conventions "quaint." Recently, one of your top Assistants, Steven Bradbury, called them "vague and ambiguous." During your confirmation hearings, many of us on this Committee were concerned with your role in the Bybee Memo, which made outrageous justifications for the use of torture, even though the Convention Against Torture, which Congress ratified in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.**

**You played a key role in the promulgation of this Administration's policies on torture. You were part of a legal analysis that concluded that techniques such as 20-hour interrogations, excessive sleep deprivation, the use of dogs, slaps to a person's face or stomach and forced nudity were "lawful."**

**Isn't it true that the Supreme Court held in Hamdan that Common Article 3 of the Geneva Conventions applies to al Qaeda detainees? Isn't it true that Common Article 3 prohibits imposing on any detainee "inhumane treatment," or "humiliating or degrading treatment?"**

**ANSWER:** Let us be clear first that the United States remains, as it always has, committed to complying with our obligations under the Geneva Conventions, including Common Article 3. Neither the Attorney General nor any other Administration official has ever stated that the Geneva Conventions, taken as a whole, are "quaint" or that the United States remains anything but deeply committed to the Geneva Conventions. Rather, what we have stated, and what we believe to be indisputable, is that the Conventions, which were drafted shortly after World War 2, were not drafted with a conflict against an international terrorist organization in mind. Indeed, some provisions in the Third Geneva Convention, which governs the treatment of prisoners of war, appear ill-suited to apply to captured terrorists. For instance, the treaty requires that prisoners of war be provided commissary privileges, scrip (i.e, advances of monthly pay, ranging from the equivalent of eight Swiss Francs per month for prisoners below the rank of sergeant to seventy-five Swiss Francs per month for generals), athletic uniforms, and scientific instruments. These are not the kind of materials that one would expect to provide to captured members of al Qaeda. The President has concluded that such unlawful enemy combatants are not entitled to the protections that the Geneva Conventions provide to prisoners of war.

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court did hold that Common Article 3 of the Geneva Conventions applies to the armed conflict with al Qaeda. *Id.* at 2794-96. Common Article 3 imposes an overarching requirement of humane treatment, and then imposes specific prohibitions that implement the humane treatment requirement. Its explicit prohibitions include bans on torture and murder. Contrary to the suggestion in your question, Common Article 3 does not contain an unspecified prohibition on "humiliating and degrading treatment." Rather, Common Article 3 bars "outrages upon personal dignity, *in particular, humiliating and degrading treatment or punishment.*" The terms used by Common Article 3 are important, as they refer to the humiliating and degrading treatment that constitutes an outrage upon personal dignity. As authoritative commentators have noted, this prohibition is directed at conduct that is universally condemned. Jean Pictet, III *Commentary on the Geneva Convention* at 39 (the "outrages upon personal dignity" prohibition "concern[s] acts which world public opinion finds particularly revolting").

The President, as well as senior members of his Administration, have expressed concern about the lack of definition in certain of Common Article 3's terms. Address of the President (Sept. 6, 2006). As you note, Acting Assistant Attorney General Steve Bradbury described Common Article 3's prohibition against "outrages upon personal dignity, in particular, humiliating and degrading treatment" to be "vague and ambiguous." Indeed, the Attorney General made the same point in his August testimony before this Committee. Many Members of Congress have reached the same conclusion. The Administration worked with Congress to address the problems created by this uncertainty, a dialogue that resulted in Congress's enactment of the Military Commissions Act of 2006 ("MCA"). The MCA amended the War Crimes Act to provide nine specific criminal offenses covering the grave breaches of Common Article 3 on which signatories are obligated to impose criminal sanctions. MCA §§ 6(a)(2), 6(b). To address the remaining requirements of Common Article 3, Congress restated its prohibition on the cruel, inhuman, and degrading treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. MCA § 6(c). Also, Congress confirmed the President's power to issue an authoritative interpretation of the Geneva Conventions, outside of the grave breaches prohibited by the nine specific offenses in the War Crimes Act. MCA § 6(a)(3). These actions were essential, because we owe our brave intelligence personnel "clear rules, so they can continue to do their jobs and protect the American people." Address of the President (Sept. 6, 2006).

Your assertion therefore that this Administration has displayed contempt for the Geneva Conventions is plainly incorrect. The President always has endeavored to uphold our international commitments, including those under the Geneva Conventions. As an initial matter, he determined that members of al Qaeda—terrorists who do not wear uniforms, are not commanded by a responsible authority, and do not abide by the laws of war—are not entitled to the protections due prisoners of war under the Third Geneva Convention. *See* Statement of White House Press Secretary Ari Fleischer (May 10, 2003). As discussed above, that determination is consistent with the opinion of the Supreme Court in *Hamdan*, which did not accord detainees in the armed conflict against al Qaeda prisoner-of-war status.

That determination is also fully consistent with the Geneva Conventions themselves. One of the bedrock principles underlying the Geneva Conventions is reciprocity. State Parties abide by the Convention in return for ensuring that their soldiers will receive similar treatment. Al Qaeda, however, has not, cannot, and would not sign the Conventions. To the contrary, as we know from the brutal execution videos that they release for propaganda, al Qaeda tortures, beheads, and executes those who fall into their hands. It is beyond question that they would not respect the Geneva Conventions no matter how we treat their combatants. Despite the President's determination that the United States had no international law obligation to afford the protections of the Third Geneva Convention to al Qaeda detainees, he directed the Department of Defense to treat all al Qaeda and Taliban detainees held at Guantanamo Bay humanely and, where practical, consistent with the principles of the Geneva Conventions. Members of Congress from both parties have recognized in fact that the

detainees at Guantanamo Bay have been treated humanely. *See* David D. Kirkpatrick, *Senators Laud Treatment of Detainees In Guantanamo*, N.Y. Times, June 28, 2005, at A15.

The President also determined that Common Article 3, which applies only to “conflict[s] not of an international character” did not apply to the armed conflict with al Qaeda. Memorandum of the President (Feb. 7, 2002). After all, the United States was engaging al Qaeda forces throughout the world, and the vicious attacks of September 11th were conducted by foreign terrorists, trained abroad, who infiltrated the United States to cause massive civilian casualties. These facts supported the President’s determination that the conflict with al Qaeda was “of an international character.” Although five members of the Supreme Court ultimately disagreed with the President, the Court of Appeals (including now-Chief Justice Roberts) accepted that reading, and thus we disagree with your assertion that the President’s interpretation violated the “plain language” of the Geneva Conventions. Indeed, the international community has recognized that the text of Common Article 3 does not plainly extend so far and thus sought Additional Protocol I to the Geneva Conventions to accomplish this task. As you know, the United States consistently has declined to ratify Additional Protocol I precisely because it would have extended the protections of the Geneva Convention to terrorist organizations. Message of President Ronald Reagan Transmitting to the Senate a Protocol to the 1949 Geneva Conventions (Jan. 29, 1987). In this context, the President’s interpretation of the text of the Geneva Conventions was entirely reasonable.

The application of the Geneva Conventions to the war on terror raises difficult and novel questions. The war on terror is unlike any this Nation has faced before. We have an enemy that owes allegiance to no nation state, that lacks any responsible command, that wears no uniforms, and that has no regard for the laws of war. Moreover, this is an enemy whose very purpose is to attack innocent civilians and instill fear in the American people, rather than to engage and defeat our military. This type of conflict “was not envisaged when the Geneva Conventions were written in 1949.” Statement by the White House Press Secretary on the Geneva Conventions (May 7, 2006). The dedicated men and women who are prosecuting the war on terror are not, as you state, “making up our laws of war as we go along.” Rather, they are conscientiously and in good faith striving to apply treaties that were written for an entirely different type of conflict.

**115. What is your view now? Would you now say that such techniques are “degrading and humiliating” and violate Article 3 of the Geneva Convention? Should the United States obey Article 3?**

**ANSWER:** It is unclear what you mean by “such techniques,” but your question here touches upon several assertions made in Question 114 about particular forms of treatment and interrogation techniques that you state are part of the Administration’s “policies on torture.” To be clear: The President has not authorized torture and will not do so. As the President has recently re-affirmed: “I want to be absolutely clear with our people and the

world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it." (September 6, 2006 speech); *see also, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, Public Papers of the Presidents (July 4, 2005) (“[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law.”). It is strictly prohibited by United States law, and by the policies of the Administration. The Supreme Court has determined that Common Article 3 applies to the armed conflict with al Qaeda, and the United States will abide by it.

**116. Article 3 of the Geneva Convention requires that tribunals be independent and impartial. It also requires that the accused should be present at all stages of the proceeding. What is your view on legislation proposed by Chairman Specter that fails to include these basic safeguards which are fundamental requirements of human rights law and the laws of war?**

**ANSWER:** Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Nothing in that text specifies any particular procedural rights for the accused. The MCA, however, does provide that the accused will be present at all stages of the proceeding (except where the accused is disruptive or threatens the physical safety of other participants, *see* 10 U.S.C. § 949d(b), (e)), and it gives the accused the ability to see and challenge any evidence introduced against him, *see id.* § 949d(f). At the same time, the MCA grants the Government robust protection for the sources and methods used to collect classified evidence. *See id.* § 949d(f)(2)(B). We believe that Chairman Specter’s bill, like the MCA, would have fully satisfied Common Article 3. Congress now has enacted the MCA, which will provide the United States with the tools to conduct full and fair trials of captured al Qaeda terrorists.

**117. Follow-Up: Fundamental due process safeguards must exist to identify the guilty and protect the innocent. As Dean Koh testified before this Committee last week, 156 countries – including the United States -- have ratified Article 14 of the International Covenant on Civil and Political Rights, which demands basic procedural guarantees. They include:**

- **an independent and impartial tribunal,**
- **the presumption of innocence,**
- **proof “beyond a reasonable doubt,”**
- **open and public trials, with exceptions only for demonstrable reasons of national security or public safety,**
- **representation by independent and effective counsel,**
- **the right to examine and challenge evidence offered by the prosecution,**

- the right to present evidence of innocence,
- the right to cross-examine adverse witnesses and to offer witnesses,
- fixed, reasonable rules of evidence, and
- fair appellate review of convictions and sentences.

**What is your position on whether these requirements must met in any legislation authorizing trials of detainees accused of terrorism?**

**ANSWER:** We agree that military commissions conducted by the United States should provide the accused with full and fair trials. We reach this conclusion not because the constitutional guarantees provided to our Nation’s citizens necessarily apply to the trials of unlawful enemy combatants, but because our Nation’s commitment to the rule of law demands no less. We believe that the MCA authorizes military commissions that provide full and fair trials, while preserving the flexibility required by the circumstances surrounding the capture and detention of unlawful enemy combatants. And, indeed, the Act specifically provides for every one of the safeguards that you have identified above.

That said, we would emphasize that while the MCA includes the rights you have identified, we would disagree with the suggestion that the International Covenant on Civil and Political Rights (“ICCPR”) provides an appropriate body of law for military commissions. The legal framework for the War on Terror is the law of armed conflict, and the ICCPR does not apply to the military commission prosecutions of enemy combatants, particularly if those trials are conducted outside the United States. Military commissions established under the MCA do comply fully with the law of armed conflict, including Common Article 3.

**118. If you object to the inclusion of any of these requirements, could you please provide the Committee with your specific objections and your rationale for them within one week of today’s hearing?**

**ANSWER:** Please see answer to question 117, above.

**Authorization for Use of Military Force**

**119. I hope that you would agree with me on one very clear point made by the Supreme Court – the Executive Branch is bound to comply with the rule of law. As Justice Breyer stated in *Hamdan v. Rumsfeld*, "Congress has not issued the Executive a “blank check.” Yet, the Administration continues to rely on the Authorization for the Use of Military Force passed by Congress in 2001 for its unprecedented and reckless expansion of its powers, while refusing to work with Congress on important issues relating to national security. Yet the Joint Resolution says nothing about detention of terrorist suspects or about domestic electronic surveillance.**



**We cannot let the President misuse fear of terrorism as an excuse for seizing absolute power. Instead of working with Congress to modernize the law, the President has chosen to ignore the rule of law.**

**In light of the *Hamdan* decision, the Administration continues to insist that the Supreme Court’s ruling has no impact on the Terrorist Surveillance Program. A wide range of bipartisan constitutional law scholars and former government officials strongly disagrees.**

**ANSWER:** Please see the response to question 120, below.

**120. How can the Administration continue to assert that the Authorization for Use of Military Force authorized these activities of questionable legality? Where do you draw the line on the President’s inherent powers under Article II?**

**ANSWER:** We assume for the purpose of answering this question that the Terrorist Surveillance Program involves electronic surveillance as that term is defined in FISA.

The suggestion that the Administration has “chosen to ignore the rule of law” or would use “fear of terrorism as an excuse for seizing absolute power” is demonstrably false. The Administration is acutely aware that we are a nation of laws, and that no matter how barbaric our enemies, all actions taken by the United States in the war on terror must follow the rule of law. To that end, the Administration has carefully and consistently scrutinized all programs that are part of the war on terror to ensure that they comply with the Constitution and other laws. Nor has the Administration avoided “working with Congress” in waging the war on terror. To the contrary, since September 11, 2001, the Administration has, consistent with its responsibilities to protect national security information and long-standing Executive Branch practice, regularly briefed congressional leaders from both political parties, the leaders of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, and members of the Intelligence Committees on various intelligence activities. The Administration also has worked with Congress time and again on legislation relevant to the war on terror, including the PATRIOT Act, the PATRIOT Act reauthorization, the MCA, and other more discrete pieces of legislation; and for months, it has sought legislation to modernize FISA for the 21st Century.

With respect to your specific question, we do not believe that the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), negates the legal basis for the Terrorist Surveillance Program. In *Hamdan*, the Court concluded that the Military Commission Order Number 1 (“MCO”) conflicted with the Uniform Code of Military Justice (“UCMJ”). Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and also held that certain of the procedures in the MCO, if ultimately implemented in a military

commission, would not be consistent with the UCMJ, including a provision that incorporated standards in Common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President's inherent constitutional authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the Force Resolution. *See id.* at 2777 n. 29.

For several reasons, we continue to believe that the Court's opinion does not undermine our analysis of the Terrorist Surveillance Program. First, as we have explained, section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 20-23 (Jan. 19, 2006) (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside the procedures of FISA and Title III. *See id.* at 22-23 & n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The primary point of analysis in our *Legal Authorities* paper is *not* that the Force Resolution altered, amended, or repealed any part of FISA. Rather, the Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004). In *Hamdi*, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," even of U.S. citizens who fight for the enemy, as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Although, as you note, the Force Resolution "says nothing about detention of terrorist suspects," Justice O'Connor wrote that "it is of no moment that the Force Resolution does not use specific language of detention." *Id.* at 519. Instead, what mattered was the fact that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Id.* So it is with signals intelligence as well. FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

Second, the UCMJ expressly deals with the Armed Forces, and with armed conflicts and wars. By contrast, under FISA, Congress left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). It is therefore more natural to read the Force Resolution to supply

the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which, as noted, is intended to continue to apply for the duration of any armed conflict or war. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of electronic surveillance of international communications. Both Presidents Wilson and Roosevelt ordered the interception of electronic communications during the two World Wars, based only on general force authorization resolutions and their inherent powers under the Constitution. *See Legal Authorities* at 16-17; *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The words of the Force Resolution should be interpreted in light of that historical practice.

Third, the punishment of violations of the laws of war through military commissions is a matter closer to explicit grants of constitutional authority to Congress, such as its authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10. The Terrorist Surveillance Program does not concern matters of retrospective punishment, but rather involves a choice of tactics—the interception of enemy communications—in the armed conflict with al Qaeda. There is no clear authority for Congress to regulate the President's collection of intelligence against an enemy during an armed conflict. Indeed, the Court in *Hamdan* expressly contrasted matters of military justice at issue there with the authority to direct military campaigns, which is a matter exclusively for the President's control. *See* 126 S. Ct. at 2773 (quoting approvingly *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). Moreover, nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have addressed the issue that the President has constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan's* reliance on Chief Justice Chase's opinion in *Ex Parte Milligan*.

Fourth, the Government did not argue and the Court did not decide in *Hamdan* that the UCMJ would be unconstitutional as applied if it were interpreted to prohibit Hamdan's military commission from proceeding. *See* 126 S. Ct. at 2774 n.23. In order to sustain this argument, the Court would have had to conclude that the UCMJ, so interpreted, unduly interfered with "the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97. Such a showing would be considerably easier in the context of the Terrorist Surveillance Program, where speed and agility are so essential to the ongoing defense of the Nation.

Finally, statutes must be interpreted, where "fairly possible," to avoid raising serious constitutional concerns. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations

omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. See *Department of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Although we believe that FISA is best interpreted to allow statutes such as the Force Resolution to authorize electronic surveillance outside traditional FISA procedures, this interpretation is at least "fairly possible," and, in view of the very serious constitutional questions that otherwise would be presented, must therefore be accepted under the canon of constitutional avoidance. See also *Legal Authorities* at 28-36.

### **Hate Crime Legislation**

**121. During your confirmation hearings, I asked you if you would be willing to publicly support our efforts to expand hate crime legislation to protect victims of discrimination-based violence. You promised that you would "commit the Department to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law." Yet, the Department has consistently declined to take action, or even state a formal position on pending hate crime legislation.**

**How do you account for the Department's inability to make hate crimes investigations and prosecutions a priority? Are you willing to make it one?**

**ANSWER:** The Civil Rights Division has compiled a significant record on criminal civil rights prosecutions. Since 2001, we have increased the staffing of criminal prosecutors within the Division by 13 percent. During this Administration, we have filed a record number of criminal civil rights cases, and charged a record number of such defendants, in a single year. And in the area where the Division has historically brought the bulk of its criminal prosecutions, cases involving the willful use of excessive force by law enforcement officials, in the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000) we have increased prosecutions by 25 percent (238 v. 190) -- and convicted 50 percent more defendants (327 v. 219). Also, in FY 2006, the Division charged more defendants in bias-motivated cases than the previous year (20 v. 16) and convicted more defendants than the previous year (19 v. 13). In addition, from FY 2001 through FY 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division convicted 58 defendants during that same period.

Prosecuting hate crimes remains a priority of the Department. The Civil Rights Division is committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. Examples of recent prosecutions include:

*United States v. Coombs* (M.D. Florida): In August 2006, a defendant in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family that was considering buying a house located next door to the defendant's residence.

*United States v. Saldana, et al.* (C.D. California): In July 2006, four Latino gang members were convicted of threatening and assaulting African Americans in a neighborhood that the defendants and their gang members sought to control. All four defendants, members of the notorious Avenues street gang, were convicted of a conspiracy charge that alleged numerous violent assaults against African-Americans, including murders that took place in 1999 and 2000. Specifically, the jury found that the defendants caused the death of Christopher Bowser, an African-American man who was shot while waiting at a bus stop in Highland Park on December 11, 2000. The jury also found that the defendants caused the death of Kenneth Kurry Wilson, an African-American man who was gunned down while looking for a parking place in Highland Park on April 18, 1999. Three of the defendants were also convicted of murdering Wilson because he was African-American and because he was using a public street, and using a firearm in furtherance of a conspiracy to commit hate crimes. Three of the four defendants received life sentences and one defendant is scheduled to be sentenced in January 2007.

*United States v. Oakley* (District of Washington, D.C.): In April 2006, the defendant entered a guilty plea to emailing a bomb threat to the Council on American Islamic Relations.

*United States v. Baird* (W.D. Arkansas): In April 2006, the defendant entered a guilty plea to burning a cross near the home of a woman whose white daughter's African American boyfriend was living with her and her daughter. Three additional defendants were charged in May 2006 with participating in the cross burning. The defendant was sentenced in November 2006. Three additional defendants were tried in September 2006, two of whom were convicted on charges of conspiracy and are awaiting sentencing.

*United States v. Nix* (N.D. Illinois): In March 2006, the defendant entered a guilty plea to igniting an explosive device that damaged a van owned by a Pakistani family and parking near their house in an attempt to interfere with their housing rights.

*United States v. Baalman, et al.* (District of Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pled guilty to assaulting an African-American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.

*United States v. Fredericy and Kuzlik* (Northern District of Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.

*United States v. Hobbs, et al.* (Eastern District of North Carolina): In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

*United States v. Hildenbrand, et al.* (Western District of Missouri): In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

*United States v. May* (Western District of North Carolina): On March 4, 2004, in a case personally argued by then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.

In addition to these cases, the Division has worked in recent years with local prosecutors in an effort to investigate Civil Rights era murders. In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants who subsequently admitted guilt were acquitted in state court four weeks after the murder. Both men are now deceased. Although the investigation showed that there was no federal jurisdiction, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi for her consideration.

In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American sharecropper in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

Moreover, after September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons and resulting in serious injury, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias motivated

incidents since September 11, 2001. Our efforts have resulted in 32 federal convictions in “backlash” cases. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

Additionally, the Community Relations Service (CRS) of the U.S. Department of Justice launched proactive information and conflict resolution efforts with Arab American, Muslim, and Sikh communities. CRS created a series of educational law enforcement protocols for Federal, State, and local officials addressing racial and cultural conflict issues between law enforcement and Arab American, Muslim American, and Sikh American communities. CRS also created a law enforcement roll-call video titled, "The First Three to Five Seconds," that addresses cultural behaviors and sensitivities, stereotypes, and expectations encountered in interactions and communications with Arab, Muslim, and Sikh communities.

CRS established the Arab, Muslim, Sikh Cultural Awareness Train the Trainer Program, which has created a group of community-based Arab, Muslim, and Sikh trainers capable of delivering law enforcement training across the country. This program has been implemented in numerous cities across the nation. As a result of this training effort, as well as direct training of law enforcement by CRS, Federal, state, and local law enforcement and local communities have reported increased cultural knowledge and awareness, a newly developed cooperative spirit within the community, and decreased community anxieties.

CRS instituted a Rapid Response Team, which aims to defuse rumors and prevent escalation of violence when there are allegations of racial profiling, discrimination, or when a hate incident has taken place by facilitating dialogue between law enforcement and the community and facilitating rapid and accurate dissemination of information.

**122. The current federal hate crime law was passed soon after the assassination of Martin Luther King. Today, however, it is a generation out of date. It still does not protect many marginalized and vulnerable groups in society from increasing bigotry and hate. These hate crimes often pass unnoticed. Currently, there are no statistics on these crimes. These are few – if any – investigations, and rarely a prosecution.**

**In light of reported and confirmed hate crimes against Arab and Middle Eastern communities since 9/11, why hasn't the Department included a specific category in its annual hate-crimes report that reflects the number of hate crimes targeting these communities? As I am sure you know, some Arab Americans are Christians, so the existing category for anti-Muslim attacks is insufficient. Is the Department willing to provide more information beyond “Anti-Other Ethnicity” to at least include “Anti-Arab Crimes?”**

**ANSWER:** The annual FBI hate crime report has to date included a sub-category for Muslims under "religion," but not a category for persons of Arab or Middle Eastern national origin. The Department is always seeking ways to better track patterns of hate crimes, and will continue to consider ways to make its reporting more effective. Both the FBI and the Civil Rights Division currently keep, and regularly publicize, records on the number of hate crime cases they have investigated that can be considered possible post-9/11 backlash. This category includes attacks on Muslims, Arabs, Persians, and South Asians. It also includes attacks on Sikhs, who have faced attacks because they are mistakenly believed to be Muslim or Middle Eastern. The Civil Rights Division has opened files on 760 incidents of hate crimes against these groups since 9/11.

**123. Would you also be willing to report [on] more specific data on attacks against transgender individuals? Would you be willing to include information on gender-based crimes which is now collected by many states? If you are unwilling or unable to provide detailed statistics, can you please provide a detailed response explaining why you object to the inclusion of such statistics?**

**ANSWER:** The issue of victimization of transgender individuals is an emerging concern, especially in correctional settings. The Bureau of Justice Statistics is addressing this issue, by including in its surveys of sexual violence in prisons, jails and juvenile facilities, a question to determine if an inmate is a transsexual. The survey question is self-administered using computer assisted technology, to avoid any social stigma in reporting such a status.

Sample surveys, which depend on a relatively small, randomly selected group of respondents to produce national estimates, are generally not well suited to measuring the experiences of numerically small populations. Consequently, inclusion of questions on victimization of transgendered individuals in most BJS surveys would not provide reliable (or even usable) data. The studies being done under the Prison Rape Elimination Act, however, are very large (with nearly 80,000 sample prisoners expected to be interviewed each year); and as a result, we will be able to determine if the studies will produce any reliable statistics.

### **Gun Control (Vitter Amendment / CJS Approps)**

**124. In the aftermath of Hurricane Katrina, law enforcement and public safety officials worked to restore the peace and security of the people in New Orleans. Recently, the Senate voted to adopt an amendment offered by Senator Vitter that will prevent law enforcement from using funds appropriated under the Act to create safe zones and will also reduce the ability of these communities to protect themselves or disaster. Technically, first responders won't even be able to collect abandoned guns if they are receiving federal funds from the Department of Homeland Security.**



**Has the Department taken a position on Senator Vitter's amendment? What impact would this amendment have on the effectiveness of first responders during an emergency or natural disaster?**

**ANSWER:** The Department of Justice has not taken a position on Senator Vitter's amendment. The Department has been unable to identify any instance in which its agents or personnel confiscated any lawfully possessed weapons from any person in the aftermath of Hurricane Katrina. Therefore, the Department does not believe this amendment will have a significant impact on its operations in similar circumstances. A limitation on the use of appropriated funds would likely have no impact on state and local law enforcement officials' authority to conduct operations as they deem appropriate.

**125. Follow-up: Recently, Senator Feinstein offered an unsuccessful amendment to a Commerce, Justice State appropriations bill that would allow state and local governments and law enforcement agencies to obtain crime gun trace data for certified law enforcement, counterterrorism, national security or intelligence purposes.**

**What is the position of the Justice Department on whether local law enforcement should have access to this data?**

**ANSWER:** The Department's position on firearms trace data is expressed in its two views letters on H.R. 5005, which were transmitted to House Judiciary Committee Chairman Sensenbrenner. Copies of those two letters are attached for your information.

**126. What about creating explicit provisions in federal law to guarantee that sufficient information-sharing is available to ensure that guns are not sold to individuals on the FBI's Terrorist Watch List?**

**ANSWER:** The Department is still studying the issues presented by the purchase of firearms by individuals in the FBI's terrorist organization database to ensure both that any new authority to deny a firearm transfer to a person in the database does not prematurely compromise ongoing investigations and that the process that would be available to any person so denied does not unduly compromise sensitive intelligence information, sources, or methods.

**Use of confidential informants:**

**127. Recently, the House Judiciary Committee approved significant legislation that responds to the Boston FBI office's use of confidential informants. For decades, unchecked and unaccountable rogue FBI agents in Boston failed to follow the Attorney General's Guidelines in handling confidential**

**informants. The Guidelines require state and local prosecutors to be notified by the FBI if the FBI learns that confidential informants are engaging in criminal activity. We now know that there were over twenty murders by such informants in Massachusetts, and the FBI never told state and local law enforcement what it knew.**

**On your watch, what steps are you taking to ensure that past misuse of confidential informants will not happen again? What safeguards are in place to prevent abuses from occurring?**

**ANSWER:** After the misconduct and criminal activity involving the use of confidential informants in the Boston Field Office was uncovered, the Department of Justice revised the Guidelines governing the FBI's use of confidential informants. Since that time, the Department has endeavored to scrupulously enforce those Guidelines, while continuing to assess their efficiency and to anticipate the emergence of new operational challenges.

The Guidelines provide basic standards and procedures on the use of confidential informants, including rules for such matters as determining the suitability of an individual for use as an informant, the instructions that should be given to informants, special approval requirements for the use of individuals in certain sensitive categories as informants, payment of informants, authorization of otherwise illegal activity, and the reporting of unauthorized illegal activity. Specifically, all FBI confidential informants are subjected to a rigorous validation process. An FBI Agent must document extensive background information on a person intended to be opened as an informant. This includes the person's criminal history, motivation for providing information, and any promises or benefits that may be provided. The FBI is also required to repeatedly instruct an informant as to the proper scope of his or her activities. An FBI Supervisor must review the documentation and approve the use of the person as an informant. The Guidelines provide special approval requirements for informants who are: high-level confidential informants; under the obligation of a legal privilege or affiliated with the media; federal or state prisoners, probationers, or parolees; and for "long-term informants" - - that is, informants who have been registered with the FBI for more than five years. These informants present unique and highly-sensitive circumstances which require increased scrutiny and oversight. The approvals for the continued use of such informants in a criminal investigation or prosecution are considered by a "Confidential Informant Review Committee" (CIRC), which is jointly comprised of representatives from the FBI and attorneys from the Department of Justice. Further, an FBI Agent is prohibited from authorizing an informant to engage in any activity that would otherwise constitute a criminal violation under federal, state, or local law unless the activity has the prior, written authorization of the FBI Special Agent-in-Charge and, in the case of more serious criminal activity, the authorization of the Chief Federal Prosecutor as well. In any event, the authorization for that criminal activity is generally limited to 90 days, and is required to be extensively monitored to minimize any adverse effect on innocent persons, and to ensure that the informant does not realize undue profits from his or her participation in the activity. Should an FBI Agent learn that the informant has engaged in

unauthorized criminal activity, the Agent must notify his supervisor and the appropriate federal prosecutor.

Currently, the Department of Justice is in the process of finalizing the FBI's multi-faceted project to "re-engineer" its Confidential Human Informant Program. We are pleased to report that this project is making great progress in its principal objective: to standardize the policies and procedures applicable to all FBI confidential human sources (including not only confidential informants, but also cooperating witnesses and intelligence assets). As part of the project, the FBI has dedicated considerable resources to the development of an automated system to maintain standardized records required for determining the suitability of an individual to be used as a source, and for documenting required procedures providing continual oversight of the source's activities. In addition, the Attorney General recently signed and issued a revised version of the Attorney General Guidelines relating to confidential FBI sources, entitled "The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources." These new Guidelines, drafted jointly by the FBI and Department of Justice attorneys, will significantly facilitate the re-engineering project by streamlining administrative requirements and will also serve to improve compliance with established rules addressing the use of human sources.

**128. What measures are you implementing to improve information-sharing with state and local law enforcement? Has the Justice Department taken a position on the House bill, H.R. 4132, sponsored by Congressman Delahunt?**

**ANSWER:** Information-sharing is a top priority of the Department of Justice. The Department has a strong commitment to exchanging law enforcement information with state and local governments and other federal agencies and departments. As reiterated in a recent memorandum from Deputy Attorney Paul J. McNulty to the Departments' United States Attorneys and law enforcement components, the Department continues to implement its Law Enforcement Information Sharing Program (LEISP) strategy and to transform the way we share information with our federal, state, and local partners.

A guiding principle of the LEISP strategy is the concept of OneDOJ. As its name implies, OneDOJ embodies the Department's commitment to presenting a single face to our information-sharing partners by enabling components' information to be presented in a uniform and consistent manner through the use of common tools, systems, and other sharing mechanisms. Our OneDOJ approach enables and indeed obligates Department components to move forward aggressively to expand existing information-sharing capabilities. Our LEISP strategy and OneDOJ approach also recognize the reality of resource limitations and the fact that different components possess different capabilities. Accordingly, the Department is fully committed to moving forward aggressively and efficiently, while recognizing the limits of available resources and capacities, to achieve its information sharing objectives.

The Department has made significant progress in recent years by, for example, launching information-sharing pilot programs in Seattle, Washington, and San Diego, California. In addition, the FBI has used the Regional Data Exchange System (R-DEx) to facilitate information-sharing in Jacksonville, Florida, and St. Louis, Missouri. These efforts, among others, have resulted in the Department and state and local law enforcement agencies exchanging valuable information and achieving operational successes within communities. The Department intends to expand its regional sharing initiatives in 2007 and beyond.

### **The Department of Justice's Review of Immigration Courts**

**129. As you know, public criticism of immigration judges has increased, especially by federal court judges. There have been complaints of judicial misconduct, due process violations and abusive behaviour towards immigrants appearing before them.**

**In January, you wrote to the immigration judges and members of the Board of Immigration Appeals expressing our concern that persons coming before the immigration courts are not being treated with the respect and consideration they deserve. I commend you for acknowledging this problem and ordering a comprehensive review of the immigration courts.**

**I understand that Department officials have been meeting with personnel from the Executive Office for Immigration Review, the private bar, as well as non-profit organizations representing immigrants as part of this review.**

**Can you give us an update on the review of the immigration court system? Will you have recommendations for areas of improvement?**

**ANSWER:** As noted in our answer to question 30, above, on August 9, 2006, the Department announced the completion of the review together with twenty-two measures that the Attorney General has directed as a result of the review that are designed to improve the performance and quality of work of the immigration courts. That same day, Assistant Attorney General Moschella also sent the Committee a letter summarizing the results of the review and attaching a description of the twenty-two measures. We believe those documents answer these questions and we are pleased to provide a copy of them for inclusion in the record of this hearing.

## Senator Biden

### Justice Assistance Grant and COPS Funding.

**130. During your testimony before the Senate Judiciary Committee, you stated that the massive cuts in federal assistance to state and local law enforcement did not demonstrate a lack of support for local law enforcement. Rather, you argued that this decision was reluctantly made in the face of a tough budget climate. You also stated that funding from the Department of Homeland Security can be used for crime prevention programs, but at the same time the Administration has advocated the complete elimination of the Law Enforcement Terrorism Prevention Program – the only DHS guaranteed for law enforcement. Local cops have told me for years the value of the Justice Assistance Grant, and the Government Accountability Office recently released a report concluding what you testified to before the House Appropriations Committee last years – cops on the streets helps to deter crime. Given that the FBI’s Uniform Crime Report has begun to reflect the anecdotal evidence of rising crime in our communities, it is my hope that you the Administration will reverse course and begin to re-build the Federal, state and local law partnership that helped drive crime rates down to the lowest levels in a generation.**

**A) Do you believe that programs such as the Justice Assistance Grant and the COPS hiring program help local police agencies fight crime?**

**ANSWER:** We do not dispute that historically local law enforcement agencies have found JAG and COPS funds useful . As was noted in the response to question 50, the decision to eliminate JAG was not made lightly. The Department was required to make many difficult choices, and JAG was one of them.

As was also reflected in the response to question 50, we decided to focus funding on initiatives in key priority areas where we have the best chance of making a difference. It should also be noted that JAG funding represents less than one percent of the total funding spent by state and local governments on law enforcement activities.

**B) As the nation’s top cop, do you believe that it is your role to fight for the interests of state and local law enforcement during the budget decisions that are made at the Office of Management and Budget? If yes, how do you explain the decision to cut over \$1 billion in guaranteed funding for law enforcement over the past five years? If no, who should (or does) take on this responsibility in Bush Administration?**

**ANSWER:** The Department of Justice most assuredly takes into account the interests of our state and local partners during the OMB budgeting process. However, Department

spending on state and local law enforcement has never accounted for more than a small fraction of total state and local law enforcement spending, at most five percent. Over the last two decades spending on police protection by states and localities has increased every year regardless of the size of the federal contribution.

The Department continues to make significant contributions to state and local law enforcement not only through grants but also through federal agency-led joint crime task forces. The Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Drug Enforcement Agency, and the United States Marshal's Service each partner with state, and local law enforcement through joint task forces that continue to be highly effective at combating serious and specific crime problems. The Department also continues to fund numerous initiatives, such as Project Safe Neighborhoods, the Weed and Seed Program, the Anti-Methamphetamine Initiative, and the Comprehensive Anti-Gang Initiative, aimed at reducing drug and violent crime.

**C) Do you believe that rising crime rates should lead to a shift in priorities at the Department of Justice?**

**ANSWER:** Federal prosecutors continue to focus resources on the most serious violent offenders, taking them off the streets and putting them behind bars where they cannot re-offend. In FY 2006, the Department prosecuted 10,425 federal firearms cases against 12,479 defendants, an increase of more than 65 percent since the inception of Project Safe Neighborhoods.

The Department has also taken several important steps to address the prevalence of gang violence. The Department established an Anti-Gang Coordination Committee to organize the Department's wide-ranging efforts to combat gangs. Each United States Attorney has appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. The Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, have developed comprehensive, district-wide strategies to address the gang problems in their districts. The Department has also established a Comprehensive Anti-Gang Initiative, which focuses on reducing gang membership and gang violence through enforcement, prevention, and reentry strategies.

The Department has created a new national gang task force, called the National Gang Targeting, Enforcement and Coordination Center (GangTECC). GangTECC is composed of representatives from the Criminal Division, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, United States Marshals Service, and the Department of Homeland Security, among others. The center targets national and international gangs, coordinates overlapping investigations, ensures that tactical and strategic intelligence is shared among law enforcement agencies, and serves as a coordinating center for multi-jurisdictional gang investigations involving federal law enforcement agencies. GangTECC itself works in close cooperation with the National Gang Intelligence Center,

an interagency entity that provides federal, state, and local law enforcement officers with access to timely intelligence about gangs, their activities and their members.

The Criminal Division's Gang Squad is a specialized group of federal prosecutors charged with developing and implementing strategies to attack the most significant national and international gangs in the United States. These prosecutors will not only prosecute select gang cases of national importance, they will also formulate policy, assist and coordinate with USAOs on legal issues and multi-district cases, and work with numerous domestic and foreign law enforcement agencies to construct effective and coordinated prevention and enforcement strategies.

The Department has established and leads numerous joint violent-crime-related task forces, including, among others, FBI-led Safe Streets Task Forces and Gang Safe Streets Task Forces that focus on dismantling organized gangs; U.S. Marshals Service-led Congressionally-mandated Regional Fugitive Task Forces and district-based task forces across the country that focus on fugitive apprehension efforts; ATF-led Violent Crime Impact Teams, which include federal agents from numerous agencies and state and local law enforcement, that identify, target, and arrest violent criminals to reduce the occurrence of homicide and firearm-related violent crime; and the DEA Mobile Enforcement Team (MET) Program that responds to requests from state, local, and tribal law enforcement officials to help stem the rise in drug-related violence and methamphetamine trafficking, often targeting violent gangs involved in drug trafficking activity, such as the Hell's Angels, Latin Kings, Bloods, Crips, Mexican Mafia, and Gangster Disciples.

**D) Do you see any connections, as many local law enforcement officials do, between funding cuts and the increase in crime rates?**

**ANSWER:** As was noted in the response to question 74, it would be premature to attribute a rise in the crime rate to a decline in federal aid to state and local law enforcement programs. This is especially true given that federal aid is a very small percentage of the total funding spent by state and local governments on law enforcement activities.

**FBI Personnel**

**131. In the Administration's most recent budget proposal, the Administration does not request any funding for additional agents at the Federal Bureau of Investigation. Since 2000, you have added nearly 2,000 total agents and you have transitioned nearly 1,000 from crime to terrorism. Undoubtedly, this is an appropriate response, but it is my view that we need to add an additional 1,000 agents to, at a minimum, maintain our ability to combat crime and drugs. For example, new drug investigations have dropped nearly 60 percent; new white collar investigations are down by 32 percent and violent**

**crime investigations are down 40 percent. Given that we are asking so much more of local law enforcement and providing minimal assistance through federal grants, we need to ensure that our FBI has the resources and personnel to maintain its pre 9-11 capacity to combat crime.**

- A) In your view, is it possible to re-orient the FBI towards a counter-terrorism posture while maintaining its capacity to combat crime?**
- B) Is it possible to do this with 1,000 fewer agents focusing on the crime problem? If you answer “yes,” please explain how this is possible in your view.**

**ANSWER:** The Funded Staffing Level for FBI criminal case agents has decreased by 994 agents, or 18%, since the attacks of 9/11. Despite the loss of those agent positions, protecting the nation's citizens from traditional criminal offenses has always remained a core function of the FBI, and 48% of all FBI agents remain allocated to these criminal matters.

To compensate for the decrease in criminal agents, the FBI has made difficult choices in determining how to most effectively use the available agents. In 2002, the FBI established as its criminal program priorities: public corruption, civil rights, transnational and national criminal enterprises (which include violent gangs and the MS-13 initiative), white collar crimes (which include corporate fraud and health care fraud), and violent crimes (which include crimes against children).

Since public corruption was designated as the top criminal priority, over 260 additional agents were shifted from other criminal duties to address corruption cases. The FBI is singularly situated to conduct these difficult investigations, and our effectiveness is demonstrated by the conviction of more than 1,000 corrupt government employees in the past two years.

The FBI has also maintained a steady commitment to addressing civil rights matters, and the number of these cases has remained fairly constant even as the complexity of the cases has increased. For example, the number of complex human trafficking cases increased by almost 200% from 2001 to 2005, and the resolution of these cases has generally required both more time and more agents than the average non-human trafficking case.

The FBI has addressed violent street gang matters through its Violent Gang Safe Streets Task Force (VGSSTF) program, which leverages Federal, state, and local law enforcement resources to investigate violent gangs in urban and suburban communities. There are currently 128 VGSSTFs in 54 FBI field offices, composed of 561 FBI SAs, 76 other Federal agents, and 924 state/local law enforcement officers. The number of FBI SAs addressing gangs has increased, with a decrease in the number of SAs addressing bank robberies, although the FBI still addresses violent and serial bank robberies.



Although the FBI has had to reduce the number of SAs working Governmental fraud matters since 9/11/01, FBI agents still respond to serious crime problems, as exemplified by the FBI's current initiatives to address hurricane-related fraud and Iraq contract fraud. The FBI does not currently open Governmental fraud cases unless the loss exceeds \$1 million.

The FBI also prioritizes investigations within its White Collar Crime Program, emphasizing corporate/securities fraud and health care fraud. The corporate fraud cases, in particular, are very labor intensive, but they are a priority for the FBI because so many represent the private industry equivalent of public corruption, where the dishonest actions of a few people in leadership positions cause tremendous monetary losses and undermine investor confidence, both of which can threaten economic stability.

The FBI has also compensated for the decrease in SAs addressing traditional criminal matters by leveraging resources through the Organized Crime Drug Enforcement Task Force and High Intensity Drug Trafficking Area initiatives. Following September 11, 2001, resources were diverted from FBI's drug enforcement efforts, and the Department of Justice, with Congressional support, has been restoring the drug agent level within DEA. Since September 11, 2001, DEA has continued to increase its Priority Target Organization (PTO) investigations and has repeatedly exceeded established targets for disrupting and dismantling those organizations, which includes the removal of ill-gotten revenues from trafficking drugs. In 2001, DEA disrupted or dismantled 94 PTOs and in FY 2006, DEA disrupted or dismantled 1,305 PTOs, an increase of 1,288%. Since 2001, DEA has increasingly focused its agent investigative work hours on disrupting and dismantling PTOs and Consolidated Priority Organization Targets (CPOTs) - the "Most Wanted" drug trafficking and money laundering organizations, believed to be primarily responsible for the nation's illicit drug supply.

The FBI has shifted criminal resources to implement the Child Prostitution and Violent Crime Task Force initiatives. The child prostitution initiative is a coordinated national effort to combat child prostitution through joint investigations and task forces that include FBI, state and local law enforcement, and juvenile probation agencies. This initiative has resulted in more than 500 child prostitution arrests (local and federal combined), 101 indictments, 67 convictions, and the identification, location, and/or recovery of 200 children. To address violent crime, the FBI has partnered with other state and local law enforcement agencies to create 24 Violent Crime Task Forces throughout the U.S. The FBI also funds and operates 18 Safe Trails Task Forces to address violent crime in Indian Country.

In addition to the above initiatives, the FBI has continuously worked to offset the effect of reduced personnel resources through technology, intelligence analysis, and enhanced response capability. In October 2005, the NCIC fugitive data base was integrated with the Department of State passport application system, resulting in automatic notification when fugitives apply for United States passports. In December 2005, eight Child Abduction Rapid Deployment Teams were established in four regions of the United States. These teams are available to augment field office resources during

the crucial initial stages of a child abduction. The FBI is currently developing a means of integrating sex offender registries and other public data bases to better identify sex offenders in the vicinities of child abductions and to "flag" sex offenders who have changed locations without satisfying registration requirements.

Finally, we note that in addition to the FBI, the Department deploys the resources of the Drug Enforcement Administration, especially its Mobile Enforcement Teams, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, especially its Violent Crime Impact Teams, to combat violent crime around the country. The Marshals Service has a significant role to play as well through its fugitive apprehension functions in assisting state and local law enforcement in their efforts to address violent criminals.

**132. I understand that beginning in May 1997 states began submitting protection orders records to the National Crime Information Center (NCIC). Please update me on the status of the federal collection of domestic violence protection orders and the ability of individual states to electronically access protection orders issued in other states.**

**ANSWER:** As of August 1, 2006, the NCIC Protection Order File contained 959,772 records. Forty-seven of the 50 states contribute records to the file. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia and the U.S. Virgin Islands.

The information contained in the NCIC Protection Order File is accessible to all 50 states, the District of Columbia, and the territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

**133. While the vast majority of domestic violence and sexual assault investigations and prosecutions are handled at the state and local level, federal law enforcement also plays a critical role. I am particularly interested in data on the following crimes: 18 U.S.C. § 2241 (aggravated sexual assault), 18 U.S.C. § 2242 (sexual abuse), 18 U.S.C. § 2244 (abusive sexual contact), 18 U.S.C. § 922(g)(8) and § 922(g)(9) (firearm possession by a batterer), 18 U.S.C. § 2261 and § 2261A (interstate domestic violence and stalking) and 18 U.S.C. §2262 (interstate violation of a protection order). For each of these provisions, for each year since 2002, please describe how many cases your Department investigated, how many were prosecuted and what were the outcomes (e.g., sentence duration, restitution, etc.).**

**ANSWER:** Data from United States Attorneys’ Offices (USAOs) is maintained by the Executive Office for United States Attorneys’ (EOUSA) case management system. The Department of Justice keeps its statistical information by fiscal year (FY). Some cases might be received or opened as “matters” in one fiscal year and then become a “case” in another fiscal year. The term “matter” means investigatory matters referred to a USAO for prosecution. Not all matters ultimately have charging instruments (complaints, informations, or indictments) filed. A matter is opened in a USAO when an agency requests a prosecutive opinion, but no commitment is made by a USAO to actually prosecute. A matter becomes a “case” when a charging document (complaint, information, indictment) is filed with the court.

	<u>Investigations</u> (Matters received)	<u>Prosecuted</u> (Cases filed)	<u>Outcome</u> (Termination)
<b>18 U.S.C. § 2261</b> (also includes 2261A)			
FY			
2002	35	20	16 guilty <sup>3</sup> , 0 acquitted, 1 dismissed, 13 incarcerated (1 for a life term), 3 no imprisonment
2003	36	18	14 guilty, 3 acquitted, 1 dismissed, 14 incarcerated (1 for a life term), 0 no imprisonment
2004	31	18	14 guilty, 0 acquitted, 1 dismissed, 14 incarcerated, 0 no imprisonment
2005	33	19	17 guilty, 0 acquitted, 0 dismissed, 17 incarcerated (4 for life terms), 0 no imprisonment
2006	22 <sup>4</sup>	11	18 guilty, 1 acquitted, 3 dismissed, 17 incarcerated (3 for life terms), 1 no imprisonment

<sup>3</sup> Guilty means that either a guilty plea was tendered by the defendant or that the defendant was convicted following a trial.

<sup>4</sup> FY 06 includes data received by EOUSA through July 31, 2006.

**18 U.S.C. § 2262**

FY

2002	9	5	4 guilty, 0 acquitted, 1 dismissed, 4 incarcerated, 0 no imprisonment
2003	6	4	1 guilty, 0 acquitted, 0 dismissed, 1 incarcerated, 0 no imprisonment
2004	8	5	3 guilty, 0 acquitted, 2 dismissed, 3 incarcerated, 0 no imprisonment
2005	12	4	5 guilty, 0 acquitted, 0 dismissed, 5 incarcerated, 0 no imprisonment
2006	5	5	2 guilty, 0 acquitted, 0 dismissed, 2 incarcerated

**18 U.S.C. 922(g)(8)**

FY

2002	106	75	64 guilty, 1 acquitted, 12 dismissed, 55 incarcerated, 9 no imprisonment
2003	113	84	63 guilty, 1 acquitted, 9 dismissed, 59 incarcerated, 4 no imprisonment
2004	128	88	75 guilty, 1 acquitted, 5 dismissed, 62 incarcerated, 13 no imprisonment

2005	109	78	61 guilty, 2 acquitted, 11 dismissed, 55 incarcerated, 6 no imprisonment
2006	75	46	62 guilty, 1 acquitted, 4 dismissed, 52 incarcerated, 10 no imprisonment

**18 U.S.C. 922(g)(9)**

FY

2002	245	197	129 guilty, 2 acquitted, 13 dismissed, 110 incarcerated, 19 no imprisonment
2003	257	220	166 guilty, 5 acquitted, 20 dismissed, 142 incarcerated, 24 no imprisonment
2004	299	231	175 guilty, 3 acquitted, 20 dismissed, 144 incarcerated, 31 no imprisonment
2005	253	194	199 guilty, 3 acquitted, 15 dismissed, 174 incarcerated, 25 no imprisonment
2006	149	137	161 guilty, 3 acquitted, 16 dismissed, 142 incarcerated (2 for life terms), 19 no imprisonment

**18 U.S.C. § 2241<sup>5</sup>**

FY

2002	419	197	128 guilty, 6 acquitted, 27 dismissed, 104 incarcerated (2 for life terms), 24 no imprisonment
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<sup>5</sup> The crime of aggravated sexual abuse involves an act of penetration and can be used to charge cases where either an adult or child has been victimized. The statistics provided herein include cases where an adult, a child or both was sexually assaulted.

2003	397	198	155 guilty, 7 acquitted, 17 dismissed, 138 incarcerated (2 for life terms), 17 no imprisonment
2004	344	161	117 guilty, 8 acquitted, 14 dismissed, 107 incarcerated (5 for life terms), 10 no imprisonment
2005	311	147	145 guilty, 6 acquitted, 12 dismissed, 123 incarcerated (4 for life terms), 22 no imprisonment
2006	242	127	116 guilty, 4 acquitted, 11 dismissed, 100 incarcerated (6 for life terms), 16 no imprisonment

**18 U.S.C. § 2242<sup>6</sup>**

FY

2002	98	48	35 guilty, 1 acquitted, 10 dismissed, 28 incarcerated, 7 no imprisonment
2003	89	58	47 guilty, 3 acquitted, 4 dismissed, 44 incarcerated, 3 no imprisonment
2004	95	34	28 guilty, 5 acquitted, 5 dismissed, 27 incarcerated, 1 no imprisonment
2005	89	43	34 guilty, 3 acquitted, 3 dismissed, 31 incarcerated, 3 no imprisonment

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<sup>6</sup> The crime covers acts of sexual penetration against an adult or a minor over the age of 12. Thus, the statistics represented here reference cases where an adult, a minor over 12 years of age, or both were victimized.

2006	55	27	33 guilty, 2 acquitted, 3 dismissed, 33 incarcerated, 0 no imprisonment
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**18 U.S.C. § 2244<sup>7</sup>**

FY

2002	123	94	80 guilty, 4 acquitted, 12 dismissed, 62 incarcerated, 18 no imprisonment
2003	113	80	82 guilty, 3 acquitted, 7 dismissed, 65 incarcerated, 17 no imprisonment
2004	98	73	73 guilty, 2 acquitted, 4 dismissed, 62 incarcerated (1 for a life term), 11 no imprisonment
2005	102	74	78 guilty, 3 acquitted, 6 dismissed, 61 incarcerated, 17 no imprisonment
2006	80	53	49 guilty, 1 acquitted, 4 dismissed, 38 incarcerated, 11 no imprisonment

**134. The Violence Against Women Act of 2005 contains several new and innovative programs, such as the court training and improvement program and privacy protection program in Title I, the sexual assault services program in Title II, several initiatives for young victims of violence in Title III, child-focused programs in Title IV, and targeted programs for Indian women in Title IX. What efforts is the Department taking to implement all of the Act’s new programs? Is your Department actively seeking full funding for these new initiatives? Please include in your answer details on the new deputy director position in the Office on Violence Against Women who is charged with overseeing efforts to combat violence against Indian women.**

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<sup>7</sup> This statute pertains to sexual assault cases where sexual contact, the touching of an intimate body part, forms the basis of the offense. The statute can be used to charge cases where an adult or child is victimized. Thus, statistics included herein count cases where an adult, a child, or both were sexually assaulted.

**ANSWER:** . The President's 2007 Budget allocates \$347,013,000 for the Department's Office on Violence Against Women (OVW). An additional \$21,869,000 is requested for programs administered by the Office of Justice Programs that support victims of child abuse. These amounts do not include increased funding or new initiatives based on the recently enacted reauthorization of the Violence Against Women Act (VAWA) ("VAWA 2005"), due to the fact that the reauthorization was signed just prior to the release of the 2007 President's Budget. As the Administration prepares future budget proposals, the reauthorization will be considered.

OVW has implemented the changes that VAWA 2005 made to existing OVW grant programs. First, the Office will issue a letter to all FY 2006 grantees to notify them of certain changes that will take effect with their 2006 awards. Second, OVW has modified grant special conditions to reflect those statutory changes that took effect in FY 2006. Third, OVW program specialists have begun drafting FY 2007 solicitations that reflect statutory changes that take effect in FY 2007. Several of these solicitations are now available at [www.usdoj.gov/ovw/currentsolicitations.htm](http://www.usdoj.gov/ovw/currentsolicitations.htm).

In addition, OVW began to implement two of the new grant programs authorized by VAWA 2005 – Grants to Indian Tribal Governments and Enhancing Culturally and Linguistically Specific Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking – because the funding for these two programs is based on a percentage of funds appropriated for existing grant programs. In July 2006, OVW convened a focus group on culturally and linguistically specific services for victims. The information gained from this meeting will be used to develop the new program and to administer other programs. For example, information from the meeting will guide OVW and State formula grant administrators in implementing the new set-aside for culturally and linguistically specific services in the STOP Violence Against Women Formula Grant Program.

OVW held the first annual Tribal Consultation on September 19, 2006, in Prior Lake, Minnesota. OVW worked closely with numerous tribal leaders to develop the consultation's agenda. OVW also sought the advice of the National Congress of American Indians in planning the consultation. Over 100 tribal leaders and representatives attended the Consultation. OVW is using tribal input from the consultation to develop the new Grants to Indian Tribal Governments Program. OVW plans to post the solicitation for the Grants to Indian Tribal Governments Program in January, 2007. OVW has already begun the planning process for the 2007 Consultation.

The new Deputy Director for Tribal Affairs, Lorraine P. Edmo, joined OVW on October 30, 2006. Ms. Edmo comes to the Department with more than 25 years of experience working on behalf of American Indian and Alaska Native people in both the federal and nonprofit sectors. Ms. Edmo has directed several national organizations that advocate for tribal and national education issues. These include the National Indian Education Association, the American Indian Graduate Center, and the federally chartered National Fund for Excellence in American Indian Education. Prior to joining the Department of Justice, Ms. Edmo worked with the U.S. Department of the Interior as the



Executive Director for the National Fund for Excellence in American Indian Education. She has also contributed to research and policy issues as a specialist with the Office of Indian Education at the U.S. Department of Education. As Deputy Director for Tribal Affairs, Ms. Edmo will assist in the efforts to explore different innovations regarding violence against Native women and share knowledge that can be replicated nationwide.

- 135. The Violence Against Women Act contains important directives for your Department to collect and disseminate information and research on family violence. Please update me on the status of the following reports and when you expect them to issue.**

*Annual Report on Effectiveness of STOP Program*

*Biennial Report on Effectiveness of all VAWA Programs*

*Annual Report on Campus Programs*

*Annual Stalking Report*

*Report on Effects of Parental Kidnapping*

*Report on State Laws Regarding Insurance Discrimination Against Victims of Violence Against Women*

*Report on Workplace Effects from Violence Against Women*

*Biennial Safe Havens for Children Pilot Program Report*

*Annual Transitional Housing Program*

**ANSWER:** Please see the list below indicating the status of reports listed in your question.

1. Annual Report on the STOP Program: The 2004 STOP formula grant program report was submitted to Congress on September 13, 2005. This report relied on data collected on a now-discontinued subgrantee reporting form through December, 2003. STOP Administrator and subgrantee data for calendar year 2004 was collected on a newly developed set of computerized reporting forms, which were distributed in August, 2005. Grantees were required to submit grantee and subgrantee reports by October 11, 2005. However, the process of reviewing and analyzing this data was significantly delayed. OVW plans to submit the 2005 and 2006 STOP Reports based on this data in early 2007.
2. Biennial Report on the Effectiveness of all VAWA Programs: The Effectiveness Reports for both October 2002 and October 2004 were submitted to Congress on September 13, 2005. The October 2006 Effectiveness Report will be submitted in 2007.
3. Annual Report on Campus Program: The 2004 Campus Report was submitted to Congress on September 13, 2005. The 2005 Campus Report was submitted on December 27, 2006. The 2006 Campus Report will be submitted in 2007.

4. Annual Stalking Report: A consolidated report for 2002-2004, which contained a state legislation update for 2001-2004, was submitted to Congress on September 13, 2005. OVW will submit a consolidated report for 2005-2006 in 2007.
5. Report on Effects of Parental Kidnapping: This one-time report, mandated by section 1303 of the Violence Against Women Act of 2000 (VAWA 2000), was submitted to Congress on September 14, 2005.
6. Report on State Laws Regarding Insurance Discrimination Against Victims of Violence Against Women: This one-time report, mandated by section 1206 of VAWA 2000, was submitted to Congress on December 30, 2004.
7. Report on Workplace Effects from Violence Against Women: This one-time report, mandated by section 1207 of VAWA 2000, was submitted to Congress on May 4, 2005.
8. Biennial Safe Havens for Children Pilot Program Report: On September 13, 2005, the Department submitted the first report to Congress on the status of a national survey regarding supervised visitation and Safe Havens grantee reporting. The 2005 Safe Havens report was sent to Congress on September 27, 2006. The third Safe Havens report will be submitted in 2007.
9. Annual Transitional Housing Program Report: Section 40299(f) of the PROTECT Act (codified at 42 U.S.C. 13975(f)) requires the Attorney General to report annually to Congress on the status of the Transitional Housing program. On March 2, 2006, the Department submitted a report to Congress on the implementation of the new grant program and the development of grantee reporting tools. Changes in VAWA 2005 require future Transitional Housing reports to be submitted on October 30 of even-numbered years. OVW submitted a preliminary report on November 16, 2006. Transitional Housing grantees have only recently submitted data for their first reporting cycle (October-December 2005) and are still in the process of submitting data regarding the January to June 2006 reporting period. OVW will submit a final report in 2007.

**136. What efforts is the Department taking to edify, consult with and assist the Bureau of Citizenship and Immigration Services in the U.S. Department of Homeland Security with respect to the timely issuance of visas, i.e., the T and U-Visas, for battered and trafficked immigrant women and their immediate families? Please include in your answer the Office's consultations with the U.S. Department of Homeland Security regarding the issuance of relevant regulations.**

**ANSWER:** The Department of Justice published regulations implementing the T nonimmigrant status requirements on January 31, 2002. Attorneys in the Civil Rights Division assigned to trafficking cases make every effort to interview potential victims

and to make a timely determination on whether to apply for continued presence or to file a I-914B supplement to a victim's I-914 T nonimmigrant status application, stating that the individual is likely a trafficking victim and has fulfilled the requirements for T nonimmigrant status. The Department has been working with DHS on their regulations implementing the U nonimmigrant status provisions of the Immigration and Nationality Act.

**137. What steps, if any, is the Department taking alone, and/or in concert with the State Department, to review the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)? What is the status of that review, and when, if ever, do you expect the Department of Justice to complete the review and request Senate action on the treaty?**

**ANSWER:** The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) remains under review by the Administration. While we strongly support the goal of eliminating discrimination against women, the Administration finds that the text of the treaty and the record of the UN's CEDAW Committee, including its controversial statements on issues such as abortion and prostitution, raise a number of concerns that need to be fully and carefully examined before the United States could become a party. For these reasons, the Administration is not currently seeking Senate action on this Convention. The Department of Justice stands ready to advise the State Department should passage of the treaty be made a priority by the Senate.

Of course, the United States does not need to be a party to CEDAW to be a leader in the promotion of women's rights and, conversely, many of the countries that are signatories of CEDAW deny women the most basic rights that we take for granted, such as the right to vote.

**138. I am troubled by the surge of violent crimes committed by girls. What is your Department doing to address this recent increase of girls as perpetrators of crime? Is your agency supporting and initiating specialized programs for female delinquents, and if so, please describe. Also, please describe any targeted research and intervention your Department is supporting to deal with this alarming trend.**

**ANSWER:** There has been, in recent years, a rise in the proportion of females entering the juvenile justice system. In 1980, 20 percent of all juvenile arrests were females; by 2003, this percentage had increased to 29 percent—with the majority of this growth since the early 1990s. The percentage of females among juvenile arrests increased between 1980 and 2003 for Violent Crime Index offenses (from 10 percent to 18 percent) and for Property Crime Index offenses (from 1 percent to 32 percent); however, the female

proportion of arrests for drug abuse violations was the same in 1980 and 2003 (16 percent).

Questions remain about whether these trends reflect an actual increase in girls' delinquency or are instead a reflection of changes in societal responses to girls' behavior. To help find answers, our Office of Juvenile Justice and Delinquency Prevention convened the Girls Study Group in 2004.

Initial research conducted by Girls Study Group members indicates that the increase in girls' violence, as reported by the arrest data from the FBI's Uniform Crime Reports, is not mirrored in other major sources of data on youth violence over the same period. These other data sources include the National Crime Victimization Survey (in which victims identify the sex of the offender), Monitoring the Future (self-reported violent behavior), and the National Youth Risk Behavior Survey. In other words, a comparison of the "official" (arrest) data with the "unofficial" (self-report) data indicates that the rise in girls' violence over this period (1980-2003) as counted in police arrests is not seen within these other datasets.

So far, the evidence does not suggest an actual increase in girls' violent behavior. Aside from more violence itself by girls, possible explanations for the increase in the proportion of girls entering the juvenile justice system might include societal and policy changes such as:

- Reclassification of offenses which were formerly considered "minor" or status offenses (such as incorrigibility) to more serious offenses (such as simple assault).
- The increasing willingness of law enforcement to arrest girls who may be assisting the criminal conduct of boys.
- The changing response of law enforcement to domestic violence incidents. A larger proportion of aggravated assault known to law enforcement in which the victim was a family member or intimate partner were committed by juvenile females (33 percent) than juvenile males (18 percent). Mandatory arrest laws for domestic violence, coupled with an increased willingness to report these crimes to authorities, would yield a greater increase in female than male arrests for assault, while having no effect on the other violent crimes.

Work continues in the Girls Study Group to continue to answer questions on girls' violence, and more importantly, to identify effective prevention, intervention and treatment programs for girls in the juvenile justice system

**139. Myspace.com and facebook.com are fast becoming the most popular web sites for our nation's teenagers. Teenagers are using video- and picture-based methods of communication (like web cams and picture phones), and social networking web sites that combine these elements with instant messages, chat, and other technologies. It is marvelous technology that is changing the way we live, and I am certain that the creators of this new technology do not want it to be used to harm children. What steps, if any, is your Department taking to be familiar with social networking web sites and prevent possible risks to children?**

**ANSWER:** The Attorney General is very concerned with the new and evolving ways that the Internet, including social networking sites, can be abused by sexual predators to target and cause harm to children. Earlier in 2006, the Attorney General announced the creation of Project Safe Childhood, an initiative to combat online child exploitation and abuse. The purpose of Project Safe Childhood is for federal law enforcement to work more closely with state and local law enforcement partners in investigating and bringing more child pornography and solicitation cases and obtaining longer sentences against those convicted. The first year of the initiative culminated with the Project Safe Childhood conference in Washington, D.C., which brought together 700 federal, state, and local prosecutors and law enforcement officers to focus their efforts on increasing the number of investigations and prosecutions of those who would use the Internet to target and abuse children.

The Department is very much aware of social networking web sites such as MySpace.com and facebook.com, as well as their popularity among our nation's youth. We are deeply concerned that predators will continue to find ways to misuse the ever-evolving technology of the Internet and computers to exploit children, and we are actively combating this abuse.

For example, the Department has specialized expertise in combating the use of social networking web sites to exploit children within the High Technology Investigative Unit (HTIU) of the Criminal Division's Child Exploitation and Obscenity Section (CEOS). This expertise and knowledge is disseminated nationwide by CEOS through a variety of means, greatly enhancing federal law enforcement's fight against child pornography. For example, at CEOS's annual advanced training seminar on the investigation and prosecution of child exploitation cases held this past July, HTIU computer forensics specialists conducted hands-on training for more than 100 Assistant United States Attorneys and federal law enforcement agents on the capabilities of social networking sites such as MySpace.com, how these sites are used by offenders to facilitate child exploitation crimes, and how to investigate and prosecute those crimes.

Law enforcement has been working with MySpace.com to address crimes involving the misuse of their system. Specifically, on August 4, 2006, representatives from MySpace.com addressed law enforcement at a meeting organized by the National

Center for Missing & Exploited Children (NCMEC). Law enforcement representatives from the Department of Justice, Internet Crimes Against Children Task Forces, Immigration and Customs Enforcement, the United States Postal Inspection Service, and the Federal Bureau of Investigation (FBI) attended this meeting. The meeting allowed federal law enforcement to learn about the steps MySpace.com is taking to detect and prevent illegal activity on its system, and to learn how to coordinate with MySpace.com concerning the information needed for law enforcement investigations. Based on that meeting, the FBI will shortly be disseminating information to its field offices concerning the investigation of cases involving MySpace.com. That information will include detailed investigative guidance as well as coordinating information allowing law enforcement quickly to obtain key information from myspace.com through their law enforcement contacts.

The Federal Bureau of Investigation has initiated multiple cases involving MySpace.com (we cannot provide an exact number, however, as the FBI does not specifically track cases involving MySpace.com). The United States Marshal's Service has also been involved in a number of investigations involving MySpace. Moreover, CEOS (in conjunction with federal law enforcement agencies) is currently coordinating at least 6 nationwide investigations that involve the use of other social networking web sites to commit child exploitation offenses.

The Department is also actively involved in making information available to parents on protecting their children online. For example, the Project Safe Childhood website provides information about online safety and links to additional resources <http://www.projectsafekidhood.gov/>. Additional information from CEOS is available at [www.usdoj.gov/criminal/ceos/onlinesafety.html](http://www.usdoj.gov/criminal/ceos/onlinesafety.html).

## Senator Feingold

**140. Chairman Specter recently announced a legislative proposal regarding the Foreign Intelligence Surveillance Act (FISA) and the National Security Agency (NSA) warrantless wiretapping program that he said he worked out with the White House.**

**A) Was anyone at the Justice Department involved in these negotiations? If so, who?**

**ANSWER:** As has been publicly acknowledged, the Acting Assistant Attorney General for the Office of Legal Counsel was the primary Department official who participated in discussions with Senator Specter. In addition, numerous attorneys from the Department of Justice analyzed Senator Specter's proposed legislation (S. 2453). As demonstrated by our extensive answers to the many oral and written questions that have been posed to us, the Department is always available to address questions about the substance of legislation pending before the Senate.

**B) The Specter bill would enact the following statement: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." Congress in FISA in 1978 repealed a similar provision because, as the Senate Judiciary Committee report said at the time, Congress intended "to put to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained" in FISA and the criminal wiretap statute. The bill also repeals the statement in current law that FISA and the criminal wiretap laws are the "exclusive means" for conducting electronic surveillance. As the top lawyer for the government, if that type of language were to become law once again, would you rely on these changes to argue that Congress had affirmed the President's Article II authority, and that the President would be operating at the height of his powers under Justice Jackson's analysis in the *Youngstown* decision?**

**ANSWER:** The provision of S. 2453 containing the language you recite in paragraph (B) of your question has undergone significant changes, and that language does not appear in a successor version of Sen. Specter's bill, S. 3931. Be that as it may, as the Department has indicated, nothing in the plain reading of that provision would have granted the President any new constitutional authority. This interpretation is strongly supported by the Supreme Court's decision in *United States v. United States District Court* ("*Keith*"), 407 U.S. 297 (1972), which construed a similar provision then codified at 18 U.S.C. § 2511(3), involving the issuance of wiretap orders in criminal cases, which stated that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [against specified dangers]." The Court wrote:

At most, this [language] is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection ‘against actual or potential attack or other hostile acts of a foreign power.’ But so far as the use of the President’s electronic surveillance power is concerned, *the language is essentially neutral*.

Section 2511(3) *certainly confers no power*, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. *In short, Congress simply left presidential powers where it found them*.

*Keith*, 407 U.S. at 307 (emphases added). The apparent purpose of the referenced provision in S. 2453 was to make clear that Congress did not seek a constitutional clash between the Executive and the Legislative Branches regarding the conduct of electronic surveillance for the purpose of collecting foreign intelligence information.

- C) You indicated at the hearing that the Administration has agreed to “submit” the program to the FISA court to rule on it if Congress passes the bill the Administration agreed to. If the FISA court were to review the program, would it do so in secret, and with only the government participating? Who would argue the case on the other side?**

**ANSWER:** The Government is the only party to the *ex parte* proceedings for electronic surveillance orders under FISA (as is the case with respect to wiretap orders in criminal investigations under Title III and generally in proceedings to secure search warrants). Proceedings before the FISA Court are held in secret because of the nature and sensitivity of the information presented to the Court.

- D) Do you agree that if the bill became law, the President could choose whether to submit any particular surveillance program for judicial review or whether to go forward without judicial approval?**

**ANSWER:** Although we do not read S. 2453 and S. 3931 to require the Attorney General to submit an electronic surveillance program to the FISC, both bills would create powerful incentives to do so, not all of which can be discussed in this setting. The innovative procedure created by proposed section 702(a) would enable the Attorney General to obtain a prompt judicial determination that a program is lawful, and to take advantage of the benefits that would be provided by the proposed Title VII of FISA. The FISC also would be authorized to review the programs brought before it, including the minimization procedures in place, to help ensure the surveillance is focused upon the international terrorist or foreign intelligence threat at issue and that information collected



about United States persons is treated properly. For these reasons, the President pledged to submit the Terrorist Surveillance Program to the FISC if S. 2453 were enacted. The availability of these procedures similarly would encourage future Presidents to bring electronic surveillance programs to the FISC for court review.

**E) One provision of the Specter bill would amend the title of FISA that requires court orders before the government conducts secret searches of peoples' homes and offices. Currently, the statute prohibits these searches except as authorized by statute. The bill would amend that provision by adding "or under the Constitution." If enacted, could this be read to grant the government the authority to break into peoples' homes and search them with no court order whatsoever, not even from the secret FISA court? Why is the Administration seeking this change?**

**ANSWER:** The provision of S. 2453 containing the "or under the Constitution" language you recite has undergone significant changes, and that language no longer appears in S. 3931.

The apparent purpose of the provision was to make clear that Congress did not seek a constitutional clash between the Executive and the Legislative Branches regarding the conduct of electronic surveillance for the purpose of collecting foreign intelligence information. We do not believe the phrase "or under the Constitution" could be construed as a blanket authorization for the Government to "break into" anyone's home. Any physical search conducted pursuant to FISA, another statute, or the "under the Constitution" provision must be consistent with the Fourth Amendment's basic requirement of reasonableness.

**141. You have testified before this Committee that the NSA wiretapping program expires approximately every 45 days, and that the President has to reauthorize it personally. When will or did the first review after the Supreme Court's *Hamdan* decision occur?**

**ANSWER:** Operational details about the Terrorist Surveillance Program are classified and highly sensitive and, therefore, cannot be discussed in this setting. Consistent with the notification provisions in the National Security Act of 1947, however, the Executive Branch has briefed the Intelligence Committees regarding the operational details of the Program. In addition, please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

**142. Michael Shaheen, who headed the Justice Department’s Office of Personal Responsibility (OPR) for more than twenty years, stated in May 2006 that “[n]o one in OPR for the 24 years I was there was denied a necessary clearance, ever, and much less one that brought to a conclusion an investigation.” Are you aware of any OPR investigations that have been denied security clearance, other than the recent investigation of the NSA’s warrantless wiretapping program?**

**ANSWER:** No. It bears mentioning, however, that the TSP is a highly classified and exceptionally sensitive intelligence-gathering program. The President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. TSP is subject to extensive oversight within the Executive Branch.

**143. In his July 17, 2006 letter to Chairman Specter, [Assistant] Attorney General Moschella stated: “With regard to TSP, the President decided that protecting the secrecy and security of the program requires that a strict limit be placed on the number of persons granted access to information about the program for non-operational reasons.”**

- i. When was this decision made?**
- ii. What precise limitations has the President now imposed on who is granted security clearance on this program?**
- iii. How many OPR lawyers would have needed clearance on the NSA program to participate in the investigation? Would any of OPR’s document or interview requests involved documents or individuals not already inside the Justice Department?**

**ANSWER:** The Terrorist Surveillance Program is a highly classified and exceptionally sensitive intelligence-gathering program. Its continuing success depends critically on keeping information about the Program’s operations confidential. Other things being equal, the fewer individuals permitted access to the operational details of the Program, the lower the likelihood of damaging and irreversible leaks that could threaten national security by compromising the Program’s effectiveness. Thus, the number of persons who have been granted security clearances to learn the operational details of the Terrorist Surveillance Program has been limited since the inception of the Program, and the clear focus has been on granting clearances to those people with a need to know operational details so they can participate in the actual *operations* of the Program. Accordingly, security clearances to learn the operational details of the Program generally have been limited to those who have a need to know for the purposes of implementing the Program or for conducting the periodic review procedure that has been in place since the Program’s inception (by, among others, the Office of the Inspector General of the NSA, the Office of the General Counsel of the NSA, and certain attorneys of the Department of Justice). In addition, the Department’s Inspector General, Glenn A. Fine, announced on November 27, 2006 that he will conduct “a program review that will examine the

Department's controls and use of information related to the program and the Department's compliance with legal requirements governing the program."

The Terrorist Surveillance Program is overseen a rigorous oversight regime. Since its inception, the Program has been subject to several rigorous and extensive review processes within the Executive Branch. As we have noted previously, the internal review process begins with the Office of the Inspector General and the Office of General Counsel of the NSA, which have conducted several reviews of the Program since its inception in 2001. Attorneys from the Department of Justice and Counsel to the President also have reviewed the Program multiple times since 2001. Finally, the President, based upon information provided by the NSA, the Office of the Director of National Intelligence, and the Department of Justice, decides approximately every 45 days whether to continue the Program. In addition to that, Inspector General Fine recently indicated that he is conducting a review of the Department's activities in the operation of the Program.

In addition to Executive Branch scrutiny, the Terrorist Surveillance Program has been subject to extensive review by Members of Congress. Congressional leaders, including the leaders of the Intelligence Committees, have been given regular, extensive briefings since the Program's early days, and all Members of both Intelligence Committees have access to the operational details of the Program. Numerous Executive Branch officials have testified before several congressional committees about the Program and have answered literally hundreds of questions for the record about the Program.

**144. H. Marshall Jarrett of OPR sent you a letter on April 21, 2006, regarding the investigation of the NSA program. He cited a number of examples of other employees obtaining clearances to learn about the program. For each of the examples cited in the letter and restated below, please confirm if clearances were, in fact, granted. Please provide details as to how many individuals were given clearance in each instance.**

- A) "[A] large team of attorneys and FBI agents investigating certain news leaks about the NSA programs."
- B) "[I]ndividuals involved in the Civil Division's responses to legal challenges to NSA program and FOIA litigation."
- C) "[T]he five private individuals who make up the Privacy and Civil Liberties Oversight Board."
- D) "[I]nspector General (IG) Glenn Fine and two members of his staff."

**ANSWER:** As the Department has noted previously, we cannot disclose publicly the identities and numbers of specific individuals who have been briefed into the Terrorist Surveillance Program because of concerns about the security of the Program and such individuals. Consistent with the long-standing practice of the Executive Branch pursuant to the notification provisions of the National Security Act of 1947, the Intelligence

Committees have been briefed regarding the Terrorist Surveillance Program. We note, however, that we have confirmed that the Office of the Inspector General of the NSA, the Office of the General Counsel of the NSA, and certain attorneys of the Department of Justice have been involved in periodic reviews of the Program that are conducted as part of the reauthorization process. In addition, as noted above, the Department's Inspector General, Glenn A. Fine, announced on November 27, 2006 that he would review the Department's activities in the operation of the Program, and various members of the President's Privacy and Civil Liberties Oversight Board have spoken about their review of the Program.

**145. In your written responses to questions following the February 2006 Judiciary Committee hearing on the NSA program, you stated the “the targeting process does not include, and never has included, consideration of whether a potential target is a political opponent of the president.” That did not respond to the question asked, which was: “To be clear, have you, the President, or anyone else in the Administration, under this or any other program, engaged in warrantless surveillance of political opponents of the President?” Please respond to that question now, specifically with regard to any such individuals who have no links to terrorist organizations.**

**ANSWER:** The Administration does not and would not target the Administration's political opponents for surveillance. We believe that the Attorney General already responded to your initial question, which was whether the Government would use the Terrorist Surveillance Program to “monitor private calls of its political enemies, people not associated with terrorism but people who they don't like politically.” The Attorney General responded: “We're not going to do that. That's not going to happen.” We reaffirm that response. The Terrorist Surveillance Program is not—and will not become—a program designed to engage in warrantless surveillance of domestic political opponents of the President. As the Executive Branch has stated repeatedly, the Terrorist Surveillance Program is exceedingly narrow, targeting only for interception those communications where one party is outside the United States and a professional intelligence officer determines there are reasonable grounds to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization. The Program does not target for interception wholly domestic communications, and it does not target the communications of persons who have no connection to al Qaeda or an affiliated terrorist organization. The purpose of the Program is solely to create an early-warning system to enable the United States to detect, prevent, and deter a catastrophic attack by al Qaeda or its affiliates upon the United States.

**146. One of the major differences between the court-martial system and the military commission system authorized by the President is judicial review. An individual convicted through the President's military commission system could only appeal through the Defense Department, with final review by the President. An individual convicted through a court-martial, on the other**

**hand, can appeal to the Court of Appeals for the Armed Forces and ultimately seek review by the U.S. Supreme Court. What reason is there for not permitting independent judges to review the military commission process?**

**ANSWER:** At the time of the Supreme Court's decision in *Hamdan*, the Detainee Treatment Act provided for the review of final military commission decisions in the U.S. Court of Appeals for the D.C. Circuit. We believe that such judicial review is appropriate, and the MCA provides for a formal appellate process that parallels the appellate process under the UCMJ. The UCMJ provides for an appeal to the Court of Criminal Appeals within each service, and then for discretionary review by the United States Court of Appeals for the Armed Forces. *See* 10 U.S.C. §§ 866-867. The MCA similarly provides two levels of appellate review, with review for all errors of law first by a Court of Military Commission Review to be established within the Department of Defense, *see id.* § 950f, and then a review by the U.S. Court of Appeals for the D.C. Circuit, *see id.* § 950g. The Act gives all convicted detainees an appeal as of right to the D.C. Circuit, regardless of the length of their sentence. *Id.* The Supreme Court retains jurisdiction to review the decisions of the D.C. Circuit through petitions for writs of certiorari. *See id.* § 950g(d). We believe this approach strikes the proper balance between sufficient appellate review of decisions by military commissions on the one hand and the need for flexible and efficient prosecution of unlawful combatants' war crimes on the other.

**147. According to news reports, the Administration is going to propose legislation to Congress in response to the *Hamdan* case. The last time the President proposed a military commission system, news reports indicate that only a small number of aides in the White House and Vice President's Office were involved in the decision, and that the President issued the order without the knowledge of or consultation with the Secretary of State, the National Security Adviser, the Assistant Attorney General for the Criminal Division, or any of the top military JAG lawyers. Who in the Administration, and in particular at the Justice Department, is working on the proposal this time around?**

**ANSWER:** The Administration's legislative proposal was developed through extensive interagency deliberations, as well as numerous consultations with individual Members of Congress. Our deliberations included detailed discussions with and input from attorneys and policy makers throughout the Executive Branch, including the Department of State, the National Security Council, and military lawyers in all branches of the Armed Services, including the TJAGs. Their comments were reflected throughout our legislative proposal. Similarly, within the Department of Justice, all relevant offices offered input, including the Acting Assistant Attorney General for the Office of Legal Counsel and the Assistant Attorney General for the Criminal Division.

**148. In his concurrence in *Hamdan*, Justice Kennedy stated: “The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.” Do you agree?**

**ANSWER:** We agree with Justice Kennedy’s statement, which reflects an important principle underlying the rule of law. We would emphasize, however, that military commissions themselves are entirely consistent with the constitutional standards tested over time by our Nation’s experience. Presidents and military commanders since George Washington have convened military commissions as a necessary and appropriate instrument to administer justice during wartime. The Supreme Court repeatedly has recognized, including in *Hamdan* itself, that the President has the constitutional authority to establish military commissions for the trial of enemy combatants, and in Article 21 of the UCMJ, Congress expressly authorized the President to convene military commissions separate and apart from courts-martial. *Hamdan* did read Articles 21 and 36 of the UCMJ as imposing certain restrictions on the establishment of these commissions, and in light of that decision, we believe Congress appropriately clarified the President’s authority to convene military commissions through the MCA.

**149. In your written response to a written question from Sen. Feinstein asking if Executive Order 12333 has ever been amended or a non-public directive interpreting it been issued, you stated “to the extent that the President has issued any non-public directives regarding the collection of intelligence, it would not be appropriate to share them in this setting.” Please respond fully to Sen. Feinstein’s question, in a classified form if necessary.**

**ANSWER:** As both you and Senator Feinstein are Members of the Senate Select Committee on Intelligence, we would be happy to ensure that the question is addressed in that setting.

**150. In a November 2001 op-ed arguing for the need to try detainees in military commissions, rather than in established military courts, you wrote that these Bush military commissions would be able to “dispense justice swiftly, close to where our forces may be fighting.”**

**A) Did you believe in November 2001 that military commissions were going to be predominantly used in military theaters, such as Afghanistan, rather than Guantanamo, 70 miles off the American shore?**

**B) Once it became clear that the commissions were going to be used at Guantanamo, did you reassess whether the deviations from the UCMJ were necessary or fair? If not, why not?**

**ANSWER:** As the Attorney General explained in the editorial, the Administration designed military commissions because circumstances in a war zone can make it

impossible to follow civil-justice procedures. The Attorney General wrote that editorial two months after 9/11, and at that time, we certainly did believe that the military might need to hold commission trials near the battlefield. He also noted, however, that military commissions provide other advantages, sparing non-military jurors, judges and courts the risks associated with terrorist trials, permitting the finder of fact to consider the broadest range of evidence, and permitting the Government to use classified evidence without compromising intelligence or military efforts.

At that time, we did look to UCMJ procedures as a guide to setting up commission procedures, but the President made the determination that many of those procedures would not be feasible for military commissions. That judgment rested not simply upon the difficulties of holding commission proceedings near the battlefield, but upon the difficulties of conducting trials concerning events that themselves took place on the battlefield. For instance, court-martial rules provide for prophylactic *Miranda*-type warnings, strict requirements for the authentication of evidence, and prohibitions on the use of hearsay. These rules will often not be practicable in wartime conditions, and that remains true, no matter whether the trial is to be conducted in Afghanistan or in Guantanamo Bay. Thus, having considered current conditions, we consider the MCA procedures to be necessary and fair.

The initial President's Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001), specified that the accused must receive a full and fair trial. The procedures established pursuant to that order, which were revised on several occasions to accomplish better the President's mandate, borrowed from the UCMJ in many respects. Both before and after the decision was made to hold commission proceedings in Guantanamo Bay, the procedures for the military commissions relied on many of the UCMJ procedures. The Administration believes that Congress appropriately went further in the MCA by establishing a separate chapter of title 10, modeled in structure on the UCMJ, but adapted where appropriate for the special context of the military commission trials of terrorists.

**151. I am sure you are aware that the most recent FBI crime statistics indicate an overall increase in crime rates across the country, and in particular in the Midwest. Recently I have started hearing from law enforcement officers in my state that they are concerned about an increase in the crime rates in their communities. Yet you defended the Administration's proposed cuts by saying that, "In fact, what it reflects is a decision by the administration that this is a program that either is no longer efficient or effective, that there is a better way to address the particular problem." Please provide a full and detailed explanation as to why you believe the COPS and Byrne grant programs are no longer efficient or effective.**

**ANSWER:** The Byrne Discretionary Grant Program, in years past, was used to develop and test model programs for replication in jurisdictions across the country. It promoted the undertaking of educational and training programs of national and multi-jurisdictional scope. However, in recent years the level of earmarking within the Byrne

Discretionary Grant Program has severely limited the Department's ability to use it to address new and innovative criminal justice initiatives. It also curtails us from effectively evaluating the funded programs. Since Fiscal Year 2002, 100 percent of the appropriations for Byrne Discretionary grants were earmarked.

In the 2002 Program Assessment Rating Tool review, the COPS program was also rated "results not demonstrated." Since that time OMB approved new outcome measures that COPS will use to assess their grant programs in the future.



## Senator Schumer

**152. In your testimony, you referred my questions about the damage caused by the NSA warrantless surveillance leak to the intelligence community, and, specifically, to CIA Director Michael Hayden. Given the criminal investigation into that leak, I am curious to know:**

- **Have you yourself asked him what damage was done to national security interests by that disclosure?**
- **Has your Department asked any other member of the intelligence community?**
- **If not, why not?**
- **If so, what damage to national security have they described?**

**ANSWER:** We continue to believe that General Hayden and Director of National Intelligence John Negroponte are the appropriate members of the Intelligence Community to respond to your questions on that point. As you know, the Department of Justice has confirmed that it is conducting an investigation into that particular unauthorized disclosure of classified information. As a result, we respectfully submit that it would be inappropriate to discuss the damage caused by that disclosure in this context, since it may be the subject of future prosecution and litigation.

**153. In your testimony, you indicated that you do not know how many ongoing leak investigations exist within your department. As soon as possible, please advise of the following:**

- **How many leak investigations are occurring in the Justice Department right now?**
- **How many leak investigations has your office declined to pursue?**
- **How does your office determine which leaks to investigate and which not to?**
- **Who makes the decision whether to investigate a leak?**
- **Have any leak investigations failed to proceed because the appropriate personnel could not get security clearances?**

**ANSWER:** Respectfully, we believe it would be inappropriate to comment on the number of leak investigations that currently exist or have been considered and declined in the past. As the Attorney General mentioned during his July 18, 2006, testimony, however, the Department of Justice takes all unauthorized disclosures of classified information very seriously.

The decision whether to pursue a leak investigation is made by career prosecutors, along with their supervisors, at the Department of Justice. A leak investigation typically starts with a referral from the victim agency (i.e., the Government agency whose classified information has been compromised). The Department of Justice asks the

victim agency to respond to an eleven-question questionnaire which is designed to assist prosecutors in determining whether a leak investigation is feasible. The factors which inform that decision include, but are not limited to, the sensitivity of the compromised information, the number of people who had access to that information, the scope of the dissemination of that information in documentary form, and whether the classified information could be confirmed in a public prosecution (giving due consideration to the protections afforded by the Classified Information Procedures Act).

After reviewing this response and considering the possibility of ultimately demonstrating a criminal violation, career prosecutors at the Department of Justice and the relevant U.S. Attorney's Offices, along with their supervisors, make the initial decision whether a particular leak investigation should be pursued. We do not keep any data on whether any particular leak investigation has not been pursued due to the inability to get security clearances. It is fair to say, however, that in the past certain leaks of classified information have not been referred to the Department of Justice by the victim agency and/or pursued by the Department due to the sensitivity of the classified information which was compromised.

**154. On February 24, 2004, the *Washington Times* published an article specifying that "The Pentagon is moving elements of a super-secret commando unit from Iraq to the Afghanistan theater to step up the hunt for Bin Laden." Was the leak that led to this story ever investigated? If so, what is the status? If not, why not?**

**ANSWER:** It is the long standing policy of the Department of Justice not to comment on the existence or non-existence of any particular leak investigation. As indicated in response to Question 153, there are numerous factors which could determine whether a particular leak is ever investigated and those decisions are made by career prosecutors and their supervisors at the Department of Justice in consultation with the victim agency.

**155. On May 18<sup>th</sup>, Congressman Peter Hoekstra – in most matters a loyal ally of the President and a defender of his efforts in the war on terror – wrote a letter expressing concern about another Government program the President has kept secret from the Congress. He reportedly got that secret information from “government tipsters.” In your testimony, you stated that you were unaware of whether the government has conducted any investigation into those tipsters, but you committed to looking into it. I am reiterating any request for that information in writing:**

- a) **Is anyone in the Government investigating the leak of this information to Congressman Hoekstra?**
- b) **Is the DOJ?**
- c) **Is the CIA?**
- d) **Is any other office, department or agency, to your knowledge?**

- e) **If so, when did these investigation(s) begin?**
- f) **Have they been concluded?**
- g) **If not, why not?**
- h) **Who was involved in making the decision about whether or not to investigate?**

**ANSWER:** It is the long standing policy of the Department of Justice not to comment on the existence or non-existence of any particular leak investigation. As indicated in response to Question 153, there are numerous factors which could determine whether a particular leak is ever investigated and those decisions are made by career prosecutors and their supervisors at the Department of Justice in consultation with the victim agency.

**156. In your testimony, you suggested that your office launches investigation into leaks “when we believe the circumstances, based upon the recommendations of the career folks, are warranted.” Please provide a more specific answer about the criteria your department follows in launching an investigation. Are these criteria reduced to writing? If so, please provide these guidelines. Additionally, please provide a more specific explanation of who makes these decisions.**

**ANSWER:** As set forth in our answer to Question 153, above, the Department of Justice considers a host of factors in making the determination whether to pursue a particular leak investigation and we work very closely with the victim agency in making those decisions. The factors which inform that decision include, but are not limited to, the sensitivity of the compromised information, the number of people who had access to that information, the scope of the dissemination of that information in documentary form, and whether the classified information could be confirmed in a public prosecution (giving due consideration to the protections afforded by the Classified Information Procedures Act). Career prosecutors at the Department of Justice and the U.S. Attorney’s Offices, along with their supervisors, make the initial decision whether a particular leak investigation should be pursued.

**157. Last week, I wrote a letter to your office with Congressman Delahunt requesting that you clarify the Administration’s policy regarding the classification of sensitive national security information, as well as the role of the Department of Justice in investigating possible leaks of such information. That letter is attached. Please respond to the questions therein.**

**ANSWER:** In a letter, dated September 6, 2006, the Director of National Intelligence, John D. Negroponte, responded to the questions posed in Congressman Delahunt’s and your letter. The only remaining questions concern the number of “leak” referrals to the Department and the status of our investigations, if any, into those referrals. With all due respect, it would be improper to comment on the existence or non-existence of any

specific referral or investigation. The Department of Justice responded to Senator Schumer and Congressman Delahunt on January 3, 2007.

**158. I asked you during your February appearance before the Committee several simple questions, which you did not answer. I asked them again in writing. Your responses – received only after a five and a half month delay – also failed to answer the questions I asked. I ask them again, here. Have you, the President, or anyone else in the Administration, under the Terrorist Surveillance Program or any other program, done the following since the passage of the Authorization of the Use of Military Force (“AUMF”):**

- a) Authorized the warrantless opening of mail of private citizens or residents in the U.S.?**
- b) Authorized the warrantless search of a home or office in the U.S.?**
- c) Authorized the warrantless placement of a listening device within a home or office in the United States?**

**Two months ago, I had the following exchange with FBI Director Mueller.**

**Senator Schumer: Would you have legal or constitutional concerns about the use of warrantless physical searches in the United States?**

**Mr. Mueller. Yes.**

**Senator Schumer. To your knowledge, has the FBI conducted any such searches?**

**Mr. Mueller. No.**

**If the Director of the FBI could answer quickly and straightforwardly, it is my belief that you can too. If you cannot, please explain why. Were Director Mueller’s statements factually correct?**

**ANSWER:** Yes, we believe that Director Mueller was correct in stating that the FBI had not conducted any warrantless physical searches in the United States. The answer to your other questions is no: since the enactment of the Force Resolution, neither the President, nor the Attorney General, nor, to the best of our knowledge, another member of this Administration, has authorized the warrantless opening of mail of private citizens or residents within the United States, authorized the warrantless search of a home or office in the United States, or authorized the warrantless placement of a listening device within a home or office in the United States.

We do not understand this question to be inquiring about warrantless searches of a home or office in the United States that occur during law-enforcement operations and that

are conducted under any of the many well-recognized exceptions to the Fourth Amendment warrant requirement, such as consent by a resident or a person having authority over the space, *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973), search incident to a lawful arrest, *Maryland v. Buie*, 494 U.S. 325, 334 (1990), exigent circumstances, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Warren v. Hayden*, 387 U.S. 294, 298-99 (1967), “hot pursuit,” *United States v. Santana*, 427 U.S. 38, 42-43 (1976), or the plain view doctrine, *see Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). Nor do we understand your question to be inquiring about any search without a court order of “premises, information, material, or property used exclusively by, or under the open and exclusive control of, a foreign power or powers,” as authorized by 50 U.S.C. § 1822, or an emergency physical search pursuant to 50 U.S.C. § 1824(e). Nor do we understand your question to be inquiring about the warrantless placement of a listening device with the consent of a person with authority over the space. *See United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1460-61 (11th Cir. 1991). Nor do we understand your question to be inquiring about the placement of a listening device without a court order from “property or premises under the open and exclusive control of a foreign power,” as authorized by 50 U.S.C. § 1802, or emergency electronic surveillance pursuant to 50 U.S.C. § 1805(f). Nor do we understand your question to involve the warrantless searching of mail entering or leaving the United States pursuant to the long-established border search exception to the Fourth Amendment, *see, e.g., United States v. Ramsey*, 431 U.S. 606, 616 (1977), and which is specifically authorized by statute and regulation. *See, e.g.,* 19 U.S.C. § 1583(a)(1) (permitting warrantless search of “mail of domestic origin transmitted for export . . . and foreign mail transiting the United States”), (c)(1)–(2) (permitting search of first-class mail weighing more than 16 ounces if there is reasonable cause to believe that the mail contains specified contraband, merchandise, national defense or related information, or a weapon of mass destruction, but requiring a judicial warrant or consent to read any correspondence in first-class mail); 19 C.F.R. pt. 145 app. (authorizing Customs Service to examine, with certain exceptions for diplomatic and government mail, “all mail arriving from outside the Customs territory of the United States which is to be delivered within the [Customs territory of the United States]”); 19 C.F.R. § 145.3(a) (authorizing opening of mail that appears to contain matter besides correspondence “provided [that Customs officers and employees] have reasonable cause to suspect the presence of merchandise or contraband”); *see also* 31 U.S.C. § 5317(b) (authorizing search at border of, among other items, “envelopes” for evidence of currency violations). Nor do we understand your question to involve the warrantless opening of mail where the mail is reasonably suspected of posing an immediate danger to life or limb or an immediate and substantial danger to property. *See* 39 C.F.R. § 233.11(b).

**159. Do you continue to believe that the Administration’s NSA Surveillance Program is legal and Constitutional?**

**ANSWER:** Yes.

**160. Do you believe that this Supreme Court would agree with you, if they had the opportunity to decide the question?**

**ANSWER:** Yes.

**161. Last week, your office responded to my request for an update of the Administration’s legal justification with a letter that said, effectively, *Hamdan* changes nothing, even though the Supreme Court made clear that the Administration’s view of the scope of the AUMF was too broad. But commentators on both sides of the aisle vigorously disagree with you.**

- **Conservative commentator Andrew McCarthy wrote in the National Review Online that: The *Hamdan* decision “is a disaster because it sounds the death knell for the National Security Agency’s Terrorist Surveillance Program.”**
- **A distinguished group of constitutional law scholars and former government officials gave their views on your office’s letter to me, stating in a letter that the *Hamdan* decision “further refutes” the Administration’s legal argument on this issue. The group of law experts went on to dismantle your department’s updated legal argument piece by piece.**

**My questions are:**

- a) How does the Administration respond to the letter from constitutional law scholars?**
- b) In light of these concerns, does the Administration plan to fight the NSA surveillance program and other programs with even murkier legal justification after *Hamdan* all the way to the Supreme Court?**
- c) Is your department really conducting a fresh review of these issues?**

**ANSWER:** We have already responded to the first part of your question in responding to questions 6 and 120 above. Please see our responses to those two questions.

Furthermore, for the reasons given in our response to questions 6 and 120, the legal justification for the Terrorist Surveillance Program is not “murkier” after *Hamdan*. The Department believes that the Terrorist Surveillance Program is lawful. We will defend it against all legal challenges, and we believe that the federal courts, if they were to reach the merits of the question, would ultimately affirm the legality of the Program.

The dedicated men and women of the Department of Justice take very seriously our obligation to follow the law scrupulously even as we work to prevent another

catastrophic terrorist attack. Rest assured that the Department of Justice will continue to review all legal developments regarding the Terrorist Surveillance Program.

**162. Please identify any individuals in the Department of Justice, the Department of Defense, and any other agencies, to the extent you know, who are reviewing the legal justification for the President's various programs on the war on terror.**

**ANSWER:** We cannot catalogue all of the dedicated men and women throughout the Government who have been involved in ensuring the legality of the Government's activities in prosecuting the global war on terror. The Department's main focus for the past five years has been to prevent another terrorist attack and to bring terrorists to justice, and so numerous programs could be thought to constitute "programs on the war on terror." The same is true of other agencies, including the Department of Defense, the Department of the Treasury, the Central Intelligence Agency, the National Security Agency, and numerous others. Those programs could include the making of government grants for language programs, terrorist-finance tracking efforts, cryptographic analysis, computer security programs, immigration enforcement efforts, transportation and aviation, customs and international trade, electronic surveillance, and criminal law enforcement efforts, just to name a few.

**163. As you know, the *Hamdan* decision specifically restricted the sweep of the Authorization to Use Military Force. In the wake of that decision, I sent a letter to your office on July 2<sup>nd</sup> urging the establishment of an independent commission to conduct a top-to-bottom legal review of all the Administration's ongoing anti-terror measures. I asked Steven Bradbury that question, and he said it was part of his job to do an ongoing review. That ongoing review has now been going on for five years and it has not gotten us very far. It has gotten you a rebuke from this conservative Supreme Court, and it has gotten people on the left and the right to question the legal justification for the NSA wiretapping program. Why will you not commit to a formal review process?**

**ANSWER:** The Department of Justice is and has been engaged in an ongoing review process. The Department takes seriously its role as the chief legal counsel to the Executive Branch. *See* 28 U.S.C. §§ 511-513. With regard to the Terrorist Surveillance Program specifically, it is subject to extensive oversight at several levels within the Executive Branch and by the Intelligence Committees of Congress. The oversight of the Program includes review by lawyers in the Office of the Inspector General of the NSA and the Office of the General Counsel of the NSA, as well as review by lawyers from the Department of Justice and the Counsel to the President. In addition, with the participation of the Office of the Director of National Intelligence and the Department of Justice, the President reviews the program every 45 days and decides whether to reauthorize it. In addition, the Department's Inspector General, Glenn A. Fine,

announced on November 27 that he “will examine the Department’s controls and use of information related to the program and the Department’s compliance with legal requirements governing the program.” Letter for the Hon. Maurice Hinchey, Member of Congress, from Glenn A. Fine, Inspector General, U.S. Department of Justice, at 1 (Nov. 27, 2006). Also, as we have noted, the Executive Branch continues to brief the Intelligence Committees regarding ongoing intelligence activities, including the Terrorist Surveillance Program, and the Intelligence Committees are carrying out extensive oversight of the Program.

**164. Please detail to what extent you believe the holding of *Hamdi* has survived the holding of *Hamdan*.**

**ANSWER:** The Supreme Court’s 2004 decision in *Hamdi v. Rumsfeld*, 542 U.S. 207 (2004), remains valid after the Court’s decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). At issue in *Hamdi* was, among other things, the President’s authority to detain as an enemy combatant a U.S. citizen who had taken up arms against the United States in Afghanistan. See 542 U.S. at 517 (plurality opinion). Hamdi claimed his detention violated 18 U.S.C. § 4001(a), which prohibits the Government from imprisoning or detaining citizens, “except pursuant to an act of Congress,” 18 U.S.C. § 4001(a), because Congress never explicitly authorized the detention of U.S. citizens as enemy combatants. The Supreme Court disagreed. In September 2001, it explained, Congress passed the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (“Force Resolution”), which gave the President authority to “use all necessary and appropriate force” against al Qaeda and its allies. See 542 U.S. at 518-19 (plurality opinion). Five Justices explained that “the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” *Id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Thus, the Court “found it of no moment that the [Force Resolution] does not use specific language of detention.” *Id.* at 519 (plurality opinion). By authorizing the President to take all “necessary and appropriate force” against the Taliban, Congress “clearly and unmistakably authorized detention” as a fundamental and accepted incident to the use of force, five justices concluded. See *id.* at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Accordingly, the Court held that the Force Resolution “satisfied § 4001(a)’s requirement that a detention be ‘pursuant to an Act of Congress.’” *Id.* at 517 (plurality opinion).

*Hamdan*, by contrast, dealt with an entirely different statutory framework. It involved a statute, the Uniform Code of Military Justice (“UCMJ”), that, according to the Court, did not expressly contemplate that Congress might authorize military commissions outside the UCMJ. And it concerned an area of the law over which Congress has express constitutional authority, namely the authority to “define and punish . . . Offenses against the Law of Nations,” U.S. Const. art. I., § 8, cl. 10, and to “make Rules for the Government and Regulation of the land and naval forces,” *id.* cl. 14. Under these circumstances, the Court in *Hamdan* concluded that the President’s military commission order conflicted with the UCMJ. Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—the



UCMJ and its related regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the Military Commission Order Number 1, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in Common Article 3 of the Geneva Conventions. *Hamdan* in no way, however, undercut *Hamdi*'s central holdings that the Force Resolution authorizes the President to take actions that are fundamental and accepted incidents to the use of force.

**165. I continue to be concerned about the Administration's refusal to consult with Congress on matters vital to our national security. This is not a Democratic issue or a Republican issue. Chairman Specter has repeatedly chided the Administration for ignoring Congress and failing to consult, as required by the Constitution. As mentioned above, on May 18<sup>th</sup>, Congressman Hoekstra wrote a letter expressing concern about another Government program the President has kept secret from the Congress. About that program, he wrote that the failure to brief Congress: "[M]ay represent a breach of responsibility by the Administration, a violation of law, and, just as importantly, a direct affront to me and members of the committee. . . . Congress simply should not have to play 'Twenty Questions' to get the information that it deserves under our Constitution."**

**Can you please confirm whether the secret program Congressman Hoekstra referred to exists? Is it true that the Intelligence Committees were not briefed about such activities, as alleged in the letter? Have the intelligence Committees since been briefed? Had there not been a letter from Mr. Hoekstra, would there have been any briefings? Are there other programs beyond the one that Congressman Hoekstra referred to that the Intelligence Committees have not been briefed on?**

**ANSWER:** We wish to reiterate the Administration's commitment to keeping Congress appropriately apprised of intelligence activities, and our commitment to working with Congress in prosecuting the war on terror.

As you know, intelligence programs are highly classified and exceptionally sensitive. It therefore would be inappropriate for me to discuss in this setting the existence (or non-existence) of specific intelligence activities, though my inability to respond more fully should not be taken to suggest that such activities exist. Consistent with the National Security Act of 1947, the Executive Branch informs Congress about classified intelligence collection efforts through appropriate briefings of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

**166. You and the Administration have endorsed Chairman Specter's bill on FISA. Would you prefer that Congress not legislate in this area? If the**

**surveillance program is legal and constitutional, from your perspective, what need is there to legislate?**

**ANSWER:** . Essentially for the reasons set forth in the Department's January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("Legal Authorities"), the Terrorist Surveillance Program complies fully with the Constitution and statutes of the United States, including FISA. We have explained in response to questions 6 and 120 above why we do not believe that the Supreme Court's decision in *Hamdan* alters that conclusion.

The Administration supported legislative proposals in the last Congress that would have amended FISA to address concerns with the traditional FISA process. Those proposals would have amended FISA to provide additional authority for programs of electronic surveillance targeted at the international communications of the affiliates of our most dangerous adversaries. They also would have streamlined and augmented the FISA process by extending the period of emergency authorization from three to seven days, by increasing the number of national security officials who could make FISA certifications, and by streamlining the FISA application process. The Administration remains committed to working with Congress to advance these important reforms.

**167. Senator Specter has characterized his bill as simply allowing the Court to decide the Constitutionality of the program, including whether the President has the authority to authorize this surveillance.**

- a) **Why doesn't the Administration just submit the program to the FISA Court now, without any legislation?**
- b) **If the Specter bill were to pass in its current form, and the Administration then voluntarily submitted the program to the FISC, would the Administration argue that the Specter bill authorized the NSA's Terrorist Surveillance Program?**

**ANSWER:** (a) Please see the attached letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

(b) Senator Specter's bill, S.2453, would add a new title to FISA that would expressly grant the FISA court "jurisdiction to issue an order . . . that authorizes an electronic surveillance program to obtain foreign intelligence information or to protect against international terrorism," where certain conditions are met.

**168. As you know, President Bush has used signing statements to challenge more than 750 laws duly enacted by Congress. The design of most of these signing statements makes it very hard for anyone to challenge them in court because of standing and other procedural barriers.**

**a) Do you think the President should have the final word on deciding whether an act of Congress is constitutional?**

**ANSWER:** As set forth in response to questions 78, 103, 107 and 108 above, the President has issued constitutional signing statements in signing approximately 125 bills, which is comparable to the records of every President since President Reagan. And as explained above, it is not accurate to describe signing statements as “challenges” to legislation.

Signing statements do not give the President “the final word on deciding whether an act of Congress is constitutional.” Signing statements are part of a respectful dialogue between the Branches on statutory and constitutional matters, and Congress can respond to such statements in the passage of subsequent legislation and through numerous other mechanisms. That dialogue is a natural part of the system of checks and balances that the Founders provided under the Constitution. In addition, enforcement decisions implementing a signing statement may be subject to court challenge under appropriate circumstances, and under such circumstances, courts may be able to address the legal issues involved.

**b) Do you have any reason to believe the statements have been intentionally designed to prevent judicial review of the President’s decision not to follow a law?**

**ANSWER:** No signing statement of which we are aware during this Administration has been designed to prevent judicial review of the President’s decisions or actions. When a President construes a law in keeping with the Constitution, he is by necessity construing a law he has been charged with executing. Unlike the many federal laws that do not require Executive Branch involvement to be enforced, these laws tend to involve the interaction between branches of government or the internal workings of the Executive Branch. By their nature, these laws are often outside the scope of judicial review, but signing statements neither increase nor decrease the likelihood that an executive action will be judicially reviewable.

Whether a presidential action is reviewable in court does not turn upon the content of a signing statement or whether there is a signing statement. As the Congressional Research Service has stated, “If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-14 (Sept. 20, 2006).

**c) If the Founders wanted to promote the type of activity engaged in by this President – that is, repeatedly issuing signing statements but choosing not to veto a bill when he believes a subpart of it is unconstitutional – why do you think they chose not to provide for a line item veto in the Constitution?**

**ANSWER:** The Founders charged the President both with the execution of the laws and with the duty to uphold the supreme law—the Constitution. Making the President subject to the overriding obligation to comply with the supreme law of the land is far different from granting line-item veto authority. A President could in theory employ a line-item veto to nullify a provision for policy reasons or even for no reason at all in the exercise of the presidential prerogative, and such a line-item veto authority thus would give the President broad power with respect to Congress. By contrast, a President’s signing statement is simply an explanation by the President of his interpretation of the law and, on occasion, may contain a construction adopted to avoid constitutional concerns that may arise under certain circumstances. Its application is much more narrowly circumscribed because it is simply an implementation of the President’s duty to act in accordance with the Constitution. In addition, a line-item veto permanently would remove an entire provision from the law that would bind that President and all future Presidents. A provision addressed in a signing statement, on the other hand, ordinarily would continue to be enforced by that President and his successors and would remain enforceable in court. Because a signing statement and a line-item veto operate in markedly different ways, the Founders’ choice to permit one but not the other is understandable.

**d) When the President sees a bill he does not like, why does he not just veto it as the Founders intended?**

**ANSWER:** It has never been the case that a veto is the President’s only option when confronting a bill that contains an unconstitutional provision (or one capable of unconstitutional application). Presidents Jefferson (*e.g.*, the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, as well as George H.W. Bush and Clinton, have signed legislation rather than vetoing it despite concerns that the legislation posed constitutional difficulties. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 nn.3 & 5, 134, 138 (1993) (*available at* <http://www.usdoj.gov/olc/signing.htm>); *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (“it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds”). As Assistant Attorney General Dellinger explained early during the Clinton Administration: “In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision.” 17 Op. O.L.C. at 135. Presidents in this way avoid rendering all of Congress’s work a nullity by giving full effect to the vast bulk of the bill’s provisions and giving effect to the problematic provision to the extent it is constitutional to do so. Because many signing statements discuss constructions of a statute to avoid constitutional issues only in certain applications, most provisions that are subject to signing statements are implemented as they are written.

**169. A committee of the American Bar Association recently released a report opposing, “as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.” Please respond to the arguments raised in the ABA report.**

**ANSWER:** The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force suggests that the Clinton Administration’s position was that the President could decline to enforce an unconstitutional provision only in cases in which “there is a judgment that the Supreme Court has resolved the issue.” ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g., Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) (“While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory.”). Indeed, Assistant Attorney General Walter Dellinger made clear early in the Clinton Administration that if “the President, *exercising his independent judgment*, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (emphasis added).

The ABA Task Force Report has been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service (“CRS”) recently reviewed the ABA Report and concluded that “in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006) Moreover, the CRS found that while there is controversy over the number of statements, “it is important to note that the substance of [President George W. Bush’s] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton.” *Id.* at CRS-9.

Because the ABA report did not present any new factual information or constitutional analysis, you may continue to rely for our position on the Attorney General’s testimony and the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman.

**170. The ABA task force also specifically recommended two pieces of legislation: (1) requiring the President to submit a report to Congress setting forth in full the reasons and legal basis for any signing statement he issues; and (2) enabling the President, Congress, or other entities or individuals to seek judicial review in any instance in which the President claims the authority to disregard or decline to enforce all parts of a law he has signed. Do you have any objection to these proposals, in principle?**

**ANSWER:** The first proposal is unnecessary. In addition to the explanation the President provides in signing statements that raise a constitutional issue, the Department of Justice often sends letters to Congress while a bill is pending, noting the very same constitutional defects and asking that they be addressed. Moreover, many constitutional defects in bills are so commonly repeated as to be routine. For example, nearly every appropriations bill enacted by Congress continues to include at least one provision with a one-house veto, despite the Supreme Court's 1983 holding that one-house vetoes are unconstitutional. *See INS v. Chadha*, 462 U.S. 919 (1983). Such *Chadha* objections are common, and President Clinton made numerous such objections, as reflected in our answer to question 78(A) above. An explanation of such common defects need not be lengthy to be complete.

The second proposal raises serious questions about whether the parties would be able to fulfill the constitutional requirements of standing and cannot be evaluated in the abstract. As the Congressional Research Service has noted, "[i]t is not clear that" these attempts "would satisfy either the 'case or controversy' or standing requirements of Article III of the Constitution. *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-26 (Sept. 20, 2006).

**171. You testified that the President himself decided to deny security clearances to OPR lawyers seeking to investigate the behavior of Administration lawyers in developing, implementing, and monitoring the Terrorist Surveillance Program. How many times in the past has the President caused a halt to a government investigation because of his refusal to grant security clearances to investigators?**

**ANSWER:** To our knowledge, none.

**172. As you may know, Congress established the Civil Rights Division in 1957 to respond to the South's strong resistance to the Supreme Court's decision in *Brown v. Board of Education*. The original mission of the Division, therefore, was to protect African Americans from racial discrimination and violence in the wake of court-ordered integration. Although Congress has since**

**broadened the scope of the Division's charge to include the enforcement of laws enacted to protect women, persons with disabilities, immigrants, and others, Congress never intended that the Division abandon its original mission. While I am pleased that enforcement of certain kinds of cases within the Division's jurisdiction has increased – in particular, the prosecution of human trafficking crimes and the rights of language minorities under the Voting Rights Act – I am disturbed by reports that enforcement of civil rights cases on behalf of African Americans has sharply declined. Indeed, your testimony fails to mention any lawsuits filed by the Department on behalf of African-American victims of race discrimination.**

**Therefore, please provide the name and a summary of the facts and legal issues involved in each enforcement action approved and filed by the Division's voting, employment, and housing sections to combat race discrimination against African Americans since January of 2002.**

**ANSWER:** The Division has been active in enforcing the federal civil rights laws on behalf of all Americans, including African-Americans. Indeed, during this Administration, the Division has filed scores of cases on behalf of African-American victims. Some of these cases include:

- In November 2006, the Division filed a complaint against Tallahassee Community College (TCC) alleging that TCC failed to select an African American applicant for the position of HomeSafenet Trainer because of the applicant's race in violation of Title VII. Under a court-approved consent decree entered on November 7, 2006, TCC agreed to offer the applicant \$34,363 in back pay and accumulated interest.
- In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.
- In August 2006, the Division obtained a verdict against a former apartment manager for discrimination on the basis of race as a result of his refusal to rent to African-Americans in Boaz, Alabama. The Division conducted an investigation of the manager and his employer through the use of fair housing testers. The defendant was ordered to pay a civil penalty of \$10,000. Earlier in the year, the defendant's employer agreed to pay a civil penalty of \$17,000 and compensatory damages of \$32,700 to individuals who were subjected to the alleged discriminatory housing practices.
- In July 2006, the Division filed suit against the City of Chesapeake, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination on the basis of race and national origin in violation of Section 707

of Title VII of the Civil Rights Act of 1964 by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.

- In July 2006, the court entered a consent decree resolving our suit against the City of Virginia Beach, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination in violation of Section 707 of Title VII through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree alters the City's method for selecting entry-level police officers in a way that will eliminate the disparate impact of the mathematics test. In addition, the decree requires the City to provide remedial relief, including money damages, priority job offers, and retroactive seniority, to identifiable African-American and Hispanic victims of the challenged test.
- In July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African-Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.
- In December 2005, the Division filed a complaint alleging that a Wisconsin nightclub violated Title II by discriminating against African-Americans. According to our complaint, nightclub employees falsely told African-Americans they could not enter because a private party was underway or the club was full to capacity, while at the same time admitting whites. On December 29, 2006, the court approved a consent decree settling the case and requiring the nightclub to adopt new entry procedures designed to prevent racial discrimination, to pay for periodic testing to assure that discrimination does not continue, to post a prominent sign at the entries advising that the nightclub does not discriminate on the basis of race or color, to train its managers, to send periodic reports to the Department, and to adopt an objective dress code approved by the Department.
- In 2004, the Division entered into a consent decree resolving allegations that Cracker Barrel Old Country Store, Inc., a nationwide family restaurant chain, accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African-American customers and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.



- In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants who subsequently admitted guilt were acquitted in state court four weeks after the murder. Both men are now deceased. Although the investigation showed that there was no federal jurisdiction, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi for her consideration.
- In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.
- In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American farm worker in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.
- In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida, for a total of \$455,000 in compensatory damages. The lawsuit alleged that the city of Fort Lauderdale violated Title VII by denying an African-American employee promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied promotion for discriminatory reasons.
- In 2002, the Division filed a lawsuit under Section 208 of the Voting Rights Act that was the first ever to protect the voting rights of Haitian Americans.
- From FY 2001 through August 30, 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division convicted 58 defendants during that same period. For example, in September 2006, two defendants were convicted of conspiring to interfere with the housing rights of a family that included an African American by burning a cross in front of their house.
- In April 2006, an additional defendant pleaded guilty to the same offense. In a separate case, a defendant pleaded guilty on August 16, 2006 to intimidating and interfering with an African-American family that was negotiating for the purchase of a house by burning a cross on the property adjacent to the house.

- On April 13, 2004, a defendant in a different case pleaded guilty to building and burning a cross in the front yard of an African-American couple's home; that defendant was sentenced to 18 months of incarceration.
- In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.
- On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.
- Since 2001, the Division has obtained four consent decrees involving redlining of predominantly African-American neighborhoods by major banking institutions. The first, filed and resolved in 2002, involved a major bank in Chicago that will invest more than \$10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it had engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest \$3.2 million in small business and residential loan programs and to open three new branches in the City of Detroit. This was the first redlining case the Division had ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest \$5.7 million and open new branches in these neighborhoods. On October 13, 2006, the Justice Department filed a complaint alleging that Centier Bank discriminated on the basis of race and national origin by avoiding serving the lending and credit needs of minority neighborhoods in the Gary, Indiana metropolitan area in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The suit was resolved by a consent decree entered on October 16, 2006, which requires the Bank to: invest a minimum of \$3.5 million in a special financing program for residential and CRA small business loans; commit at least \$375,000 in targeted advertising; invest \$500,00 to provide credit counseling, financial literacy, business planning, and other related educational programs targeted at the residents and small businesses of African-American and Hispanic areas and sponsor programs offered by community or governmental organizations engaged in fair lending work; open or acquire at least two full service offices within designated African-American neighborhoods; expand an existing supermarket branch in a

majority Hispanic neighborhood to provide full lending services; provide the same services offered at its majority white suburban locations to all branches regardless of their location; train employees on the requirements of the Fair Housing Act and Equal Credit Opportunity Act; as well as other remedial relief.

173. **On Sunday, July 23, 2006, an article in the *Boston Globe* reported that “[t]he Bush administration is quietly remaking the Justice Department’s Civil Rights Division, filling the permanent ranks with lawyers who have strong conservative credentials but little experience in civil rights, according to job application materials obtained by the Globe.” The article ties this politicization of the workforce to former Attorney General John Ashcroft’s decision to disband hiring committees made up of veteran career lawyers, a system that, according to Charles Cooper, a former deputy attorney assistant attorney general for civil rights during the Reagan Administration, “worked well.” The article states that only 19 of the 45 lawyers hired under the new system into the Civil Rights Division’s voting, employment, and appellate sections have any civil rights experience, and of those 19, “nine gained their experience either by defending employers against discrimination or by fighting against race-conscious policies.” Consequently, the article notes that “the kinds of cases the Civil Rights Division is bringing have undergone a shift. The division is bringing few voting rights and employment cases involving systematic discrimination against African Americans, and more alleging reverse discrimination against white and religious discrimination against Christians.”**

a) **Is the Globe report accurate?**

**ANSWER:** No.

b) **How do you respond to its allegations?**

**ANSWER:** The Globe article, among other things, incorrectly suggests that a central hiring committee of career employees within the Civil Rights Division made all hiring decisions during previous Administrations; obtained limited information regarding attorneys hired in only three of the ten litigating sections in the Division; and did not obtain resumes of attorneys hired during previous Administrations in order to make an objective comparison. Most significantly, the Globe article was not based on any personal interviews of the attorneys hired by the Civil Rights Division to measure their interest in, and dedication to, enforcing the nation’s civil rights laws.

The talented and accomplished individuals hired in the Civil Rights Division have a profound commitment to public service and law enforcement. Generalizations are often inaccurate and unhelpful in defining an individual. No attorney is hired based solely on his or her resume, but rather after a profoundly more comprehensive review, including detailed personal interviews.

- c) **Will you consider reversing your predecessor's unprecedented politicization of the career ranks, and immediately reinstitute the hiring committee so that veteran career attorneys may make hiring recommendations in the Civil Rights Division, as they did for the last several decades?**

**ANSWER:** Veteran career attorneys continue to make hiring recommendations throughout the Department, and within the Civil Rights Division. The procedure implemented by Attorney General Ashcroft throughout the Department for hiring attorneys through the Attorney General's Honors Program (HP) offers several improvements to the previous program. Prior to 2002, HP applicants paid their own way to interview in various locations across the country; they often met with a single representative from the Justice Department. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political and career attorneys for an interview. *More* individuals are now typically involved in the hiring process, not fewer. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program.

- 174. In January 2002, Deputy Attorney General Larry Thompson commissioned a study on diversity at the Department. After refusing to release the results of the study to the public, the Attorney General and the Deputy Attorney General announced a new initiative to increase diversity in the Department's workforce by focusing on the economic and geographic background of job applicants. More than a year later, the study was finally released in response to a FOIA request; most of the study's key findings, conclusions, and recommendations, however, were redacted. The redacted portions, which were quickly revealed due to a computer glitch, demonstrated a need for more diversity on the basis of race and sex, not the factors emphasized by the new hiring initiative. I believe that a diverse workforce in the Civil Rights Division is critical to carrying out the work of the Division on behalf of this country's increasingly diverse population, and I am concerned that the new hiring initiative, together with the disbandment of the hiring committee, has had a negative impact.**

**Please provide the number of African-American attorneys hired into the Civil Rights Division since the hiring committee was abolished in 2002, and please identify their position and section.**

**ANSWER:** Since 2002, 17 African-American attorneys have been hired by the Civil Rights Division. These attorneys were hired to fill the positions of Trial Attorney, Supervisory Attorney, Deputy Chief, and Special Assistant to the Assistant Attorney General. They joined the Division's Disability Rights Section, the Housing and Civil Enforcement Section, the Special Litigation Section, the Educational Opportunities

Section, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, the Criminal Section, the Employment Litigation Section, the Voting Section, and the Office of the Assistant Attorney General.

**175. On November 4, 2004, Deputy Attorney General James Comey issued a memo calling on all of the Department's litigating components to temporarily assist the Civil Division's Office of Immigration Litigation in alleviating a backlog of deportation cases. The memo stated that the assistance would be required for only four months. More than 20 months later, however, Civil Rights Division attorneys continue to work on these cases. I am concerned that these cases are being disproportionately assigned to that Division in an effort to drive out career attorneys and deter them from working on civil rights matters. This appears to be true in the Appellate Section, where a small number of attorneys have filed hundreds of immigration briefs since the end of 2004. According to Assistant Attorney General Wan Kim, 120 out of 193 briefs, or 62% of the briefs, filed by Appellate Section attorneys in FY 2005 were deportation cases.**

- a) Please provide the number of immigration cases assigned to each of the Department's *appellate* offices (not each Division) and indicate the number of attorneys in those sections.**

**ANSWER:** From November 2004 through December 2005, the Civil Rights Division received 215 briefs, which is 4.77% of the total number of briefs distributed nationwide. The total number of Civil Rights Division attorneys (344) represented 5.06% of the attorneys available nationwide for briefing immigration cases. By way of simple comparison, the Environment and Natural Resources Division received 234 briefs (400 attorneys), Antitrust Division received 222 (359 attorneys), Criminal Division received 217 briefs (451 attorneys), and Tax Division received 172 briefs (296 attorneys). The United States Attorneys, other than the Southern District of New York, collectively received 3,286 briefs. Overall, more than 4,500 cases were distributed to the litigating divisions and USAOs during the first year of this program. In the first six months of the 2006 calendar year, briefs have continued to be distributed in proportion to the total workforces of each component. The Civil Rights Division received 114 briefs, while the Criminal Division received 121, ENRD received 124, Antitrust received 188, and the Tax Division received 93. OIL additionally sent another 324 briefs to U.S. Attorney's Offices, and SDNY continued to distribute approximately another 200 cases per month to the USAOs.

The distribution of briefs within each component is determined by that component head. No directive has been issued requiring any particular appellate section to undertake the responsibility for briefing all the immigration cases assigned to the particular office or division. Because the work primarily involves preparing appellate briefs, and hence is work where appellate expertise may produce efficiencies, many component heads have chosen to have their appellate attorneys bear the primary burden imposed by the

immigration brief overload. However, it is important that each component head have flexibility to determine the best way in which to handle the work assigned.

- b) Of the non-immigration briefs filed in the courts of appeals by attorneys in the Civil Rights Division's Appellate Section since November of 2004, please indicate how many of those briefs were *amicus* briefs and compare that number with the number of *amicus* briefs filed in 1996 (do not include *amicus* briefs filed by the Solicitor General in the Supreme Court). Please also list the name of each case and indicate the court, issue, and position of the government.**

**ANSWER:** The Appellate Section of the Civil Rights Division during this Administration has an 87% success rate in filing *amicus* briefs in civil rights cases, as compared to 61% during the previous Administration. In Fiscal Year (FY) 2006, the Appellate Section achieved an 89% success rate in the federal courts of appeals as *amicus curiae* in civil rights cases. Notably, the Appellate Section also has an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. The overall success rate pertains to both *amicus* filings and direct appeals.

Since November 2004, the Appellate Section has filed 14 briefs as *amicus curiae* in the courts of appeals. Please see the attached chart for a description of these cases. Of the cases that have been decided so far, we have prevailed 83% of the time. In 1996, the Appellate Section filed 21 *amicus* briefs in the courts of appeals. The Section prevailed in approximately 50% of these cases, resulting in 10 successful *amicus* briefs.

- c) Please provide the name of every attorney in the Civil Rights Division who has been assigned an immigration case. Please also indicate the number of cases assigned to each of those attorneys, and the date the attorney was hired into the Division.**

**ANSWER:** A career Section manager's decision to assign an attorney to a particular matter or case involves many factors, including an attorney's experience, caseload, interests, and potential conflicts. In response to your specific question, approximately 417 immigration briefs had been assigned to 145 different attorneys in the Civil Rights Division through the end of 2006. Approximately 199 of those briefs were assigned to 77 attorneys who had less than 5 years of experience in the Civil Rights Division. Approximately 98 of those briefs were assigned to 48 attorneys who had between 5 and 14 years of experience in the Civil Rights Division. Approximately 74 of those briefs were assigned to 14 attorneys who had between 14 and 25 years of experience in the Civil Rights Division. Approximately 46 of those briefs were assigned to 6 attorneys with more than 25 years of experience in the Civil Rights Division.

- d) **The reassignment of immigration cases from the Office of Immigration Litigation to other components has now lasted five times longer than former Deputy Attorney General Comey initially stated. Will you commit to an end date for the reassignment of immigration cases to Civil Rights Division attorneys? If so, please provide that date.**

**ANSWER:** The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY. In this regard, OIL received a significant budget increase for the fiscal year that ended September 30, 2006. In addition, the President has sought another substantial budget increase for OIL in 2007. Finally, the Administration has proposed several much-needed legislative reforms that would help reduce the volume of immigration cases in the federal courts. Because OIL has not received the necessary budget increases and because the legislative reforms have not yet been enacted, OIL is unable to shoulder the entire immigration workload on its own.

**176. There have been other reports of political favoritism within the Civil Rights Division.**

- a) **Please provide the date of hire and resume for each attorney promoted to the position of “Special Litigation Counsel” in each of the litigating sections since January of 2002.**

**ANSWER:** The Civil Rights Division has hired or promoted twenty-three attorneys into the position of Special Litigation Counsel since January 1, 2002. Almost all of these individuals were promoted from the position of Trial Attorney in the Division to the position of Special Litigation Counsel. Of the twenty-three individuals chosen for the position of Special Litigation Counsel, eleven were hired into the Division during years 2001-2006, eight were hired into the Division during the years 1995 to 2000, two were hired during the years 1989 to 1994, one was hired into the Division during the years 1977 to 1982, and one was hired into the Division during the years 1971 to 1976. With regard to the request for these individuals’ resumes, the Civil Rights Division is currently gathering that information and will provide a supplement to this response.

- b) **Please provide the name of each attorney (including managers) who has been reassigned from one section to another and please also indicate the attorney’s date of hire into the Division and the reason for the reassignment.**

**ANSWER:** The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

- c) **Please indicate the name of every attorney who has received a cash merit or service award since January of 2002 and indicate the amount of the award and the date the attorney was hired into the Division.**

**ANSWER:** The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

**177. The House and Senate have recently voted overwhelming to reauthorize the Voting Rights Act for another 25 years. Both you and the White House have stated the Administration’s support for this legislation, including two provisions to restore Congress’s original intent with respect to Section 5, which requires federal oversight of certain, covered jurisdictions with a history of race discrimination. On the date of passage, your office issued a press release in which you stated that “[t]he Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections.” Yet, the Division’s record of vigorous enforcement on behalf of African-American voters is abysmal. I am aware of only one Section 2 case brought on behalf of African-American voters by the current Administration. Interestingly, this case was filed just one week before your oversight hearing. Moreover, last year, the *Washington Post* reported that the recommendation of experienced career staff to deny Section 5 preclearance to Georgia’s photo identification law because of its discriminatory impact on African-American voters was overruled. Unsurprisingly, the law was soon struck down by a federal judge who compared it to an unconstitutional Jim Crow Era poll tax. After this story appeared in the *Washington Post*, career attorneys were prohibited from making future recommendations in Section 5 proceedings. Finally, while ignoring discrimination against African Americans, the Division has filed an unprecedented reverse discrimination case on behalf of White voters in Noxubee County, Mississippi, a covered jurisdiction under the Voting Rights Act because of its egregious history of discriminating against African Americans.**

- a) **What will you do to ensure that Congress’s intent in reauthorizing the Voting Rights Act will be carried out?**
- b) **What steps will the Department take to ensure that pervasive discrimination against African Americans, found to exist by both the House and Senate Judiciary Committees during the reauthorization process, will be addressed?**
- c) **Will you insist that career attorneys again be allowed to make recommendations in Section 5 proceedings? If not, why not?**



**ANSWER:** As described in our answer to question 90, above, the Administration strongly supported reauthorization of the Voting Rights Act, and is currently vigorously defending the Act's constitutionality in court. When Congress enacted the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the Attorney General stated that: "The Department of Justice is proud to have supported the passage of this historic legislation...The Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections." The Department will continue to enforce Section 5 in a non-partisan and vigorous manner.

As noted in our answer to question 85, above, in this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We welcome allegations of possible Voting Rights violations from all sources, and have solicited such information widely.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During fiscal year 2006, the Voting Section filed 17 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D.Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian-Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

The Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared under Section 5 of the Voting Rights Act after a careful analysis that lasted several months. The decision took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver's license cards. The data showed, among other things, that the number of people in Georgia who already possess a valid photo identification greatly

exceeds the total number of registered voters. In fact, the number of individuals with a valid photo identification is slightly more than the entire eligible voting age population of the State. The data also showed that there is no racial disparity in access to the identification cards. The State subsequently adopted, and the Department precleared, a new form of voter identification that will be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did *not* conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision.

Career attorneys do make recommendations in Section 5 proceedings. Indeed, the Chief of the Voting Section is a career Division attorney for more than 30 years.

**178. You testified that you are Co-Chair of the President's Task Force on Identity Theft, created by Executive Order on May 10, 2006. A couple of weeks after the Task Force was created, the public learned for the first time that a laptop containing the personal information of more than 25 million veterans, and more than one million active military personnel had been stolen. Since then, there have been at least 10 reported major security breaches involving federal government databases containing personal, sensitive data of Americans, including the publication on a public website of the names, birth dates, and social security numbers of 100,000 members of the Navy, and the hacking of a Department of Agriculture computer system containing the names, social security numbers, and photographs of 26,000 former and current employees. What steps are you and the Task Force taking to prevent, track, and assist persons affected by these breaches in the federal government?**

**ANSWER:** All members of the President's Identity Theft Task Force share the concern about data security breaches. In the Executive Order that he issued to establish the Task Force, the President made clear that he expects the Task Force to develop and pursue an aggressive response to all forms of identity theft through law enforcement actions, public outreach and education measures, and improved safeguards for data security. The Department anticipates that the Task Force's final strategic plan, which will be submitted to the President in early 2007, will address all of these issues.

In particular, both the Attorney General and the co-chair of the Task Force, Federal Trade Commission Chairman Deborah Platt Majoras, take very seriously the need for a swift response by law enforcement and prompt assistance to consumers when a major data breach results in the illegal accessing or disclosure of consumers' personal

information. As you may know, the Task Force, in September 2006, issued Interim Recommendations to the President on steps that could be taken immediately to begin to address the problem of identity theft. One of the Task Force's recommendations was that the Office of Management and Budget distribute to all federal agencies a guidance memorandum, written by the Task Force, which sets forth the steps that an agency should take if it suffers a data breach. We are pleased to say that the OMB distributed the Task Force's data breach guidance to all agencies and departments within a few days of the Task Force issuing its Interim Recommendations. We are confident that, with that guidance, agencies will be better equipped to effectively and quickly respond to data breaches and to mitigate any harms that may arise as a result of a data breach.

In its Interim Recommendations, the Task Force also recommended that in order to more effectively and quickly respond to data breaches, agencies should publish a "routine use" under the Privacy Act that would allow any agency that suffers a data breach to disclose information to those persons and entities in a position to cooperate (either by assisting in informing affected individuals or by actively preventing or minimizing harms from the breach), thereby helping to mitigate consequences of a breach. The Department of Justice took the lead in publishing such a routine use.

One of the first steps in response to a reported data breach is to determine whether any data has actually been improperly accessed or disclosed. In the cases of the Veterans Administration laptop that was stolen and the Department of Agriculture computer that was reportedly hacked, we understand that forensic review of computer data showed that no personal identifying information was downloaded or transferred from those computers. In situations involving actual misappropriation of data breaches, the Department of Justice works closely with investigative agencies such as the FBI and the Secret Service, as well as state and local law enforcement authorities in appropriate cases, to pursue the investigation expeditiously.

With respect to remediation and assistance to victims of data breaches, the Department understands that the FTC worked closely with the Veterans Administration in the laptop case to provide veterans with information on obtaining their credit reports and dealing with potential identity theft. The FTC has excellent information resources for consumers on identity theft, as well as a toll-free number and a website that identity-theft victims can use to report the crime and to obtain information on mitigating the harm caused by the identity theft. The Identity Theft Task Force has been considering many other steps that can be taken to assist victims of identity theft. Among other things, in its Interim Recommendations, the Task Force recommended that Congress amend the criminal restitution statutes to allow victims of identity theft to recover for the time spent attempting to remediate the harms that they suffer. The Department of Justice transmitted that proposed amendment to Congress in the autumn. The Task Force as a whole is now working on a series of comprehensive recommendations that will address criminal law enforcement, data security, and education and outreach in improving the federal government's response to identity theft.