Questions Submitted to Michael B. Mukasey, Nominee for Attorney General of the United States, by Democratic Members of the Senate Judiciary Committee and Carl Levin, Chair of the Senate Armed Services Committee

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Questions to Mukasey, as submitted by the senators, appear in this document in the following order by rank on the committee:

1. Patrick Leahy, (D-VT)
2. Edward Kennedy (D-MA)
3. Joseph R. Biden, Jr. (D-DE)
4. Herb Kohl (D-WI)
5. Dianne Feinstein (D-CA)
6. Russell D. Feingold (D-WI)
7. Charles E. Schumer (D-NY)
8. Richard J. Durbin (D-IL)
9. Benjamin L. Cardin (D-MD)
10. Sheldon Whitehouse (D-RI)
    and
11. Carl Levin (D-MI)

WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE,
FOR MICHAEL B. MUKASEY,
NOMINEE FOR ATTORNEY GENERAL OF THE UNITED STATES

Torture/Executive Power

1. Our nation's top military lawyers, the Judge Advocates General of the Army, Navy, Air Force and Marines, have said that the use in interrogations of simulated drowning, dogs, forced nudity, and stress positions – in which prisoners are forced to stand, sit, or kneel in abnormal positions for extended periods of time – are not only bad policy because they yield unreliable information and could expose our own troops to such tactics, but also violate our law and the laws of war. The Army Field Manual published in September 2006 prohibited the military from using waterboarding or dogs in interrogations, as well as beatings and induced hypothermia. Yet in response to questioning at your Senate Judiciary Committee hearing, you declined to say that even the most extreme of these tactics, forced drowning or waterboarding, constitutes torture or cruel, inhuman, and degrading treatment and would therefore be illegal for the President to authorize.

   A. With further time to reflect, do you agree with our top military lawyers that each of these interrogation techniques – simulated drowning, dogs, forced nudity, stress positions, beatings, and induced hypothermia – is unlawful?

   B. Are these tactics, either individually or in combination, ever acceptable as a matter of law? Would it be acceptable for the President to authorize such tactics or immunize officials who carry them out?

   C. The Army Field Manual asks soldiers evaluating whether or not to use a specific interrogation technique, "If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?" Do you believe that the techniques set out above would be abuse if applied to captured American soldiers?

   D. If you are not willing to declare any of these tactics to be unlawful at this time, what type of further information and analysis will you need in order to make such a determination?

   E. As Attorney General, will you consult with the JAGs before approving or issuing legal opinions on the subject of interrogation techniques?

2. The memo dated August 1, 2002, signed by then-Assistant Attorney General Jay Bybee and known as the "Bybee memo" concluded that for an act to violate the

torture statute, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." That memorandum has since been withdrawn, but it is not entirely clear what standard currently governs. What is your understanding of what standard the Department of Justice currently has in place for determining what type of conduct constitutes torture or cruel, inhuman, or degrading treatment, and what do you believe the standard should be?

3. This administration appears to have engaged in a policy of extraordinary rendition – sending detainees to be interrogated in other countries where they could be, and in some cases apparently have been, tortured. I asked Attorney General Gonzales on several occasions about the case of Maher Arar, a Canadian citizen who when returning home from a vacation in 2002, was detained by federal agents at JFK Airport in New York City on suspicion of ties to terrorism. He was sent, not to Canada, but to Syria, where he was held for 10 months. A Canadian commission found no evidence that he had any terrorist connection or posed any threat, but concluded that he was tortured and held in abhorrent conditions in Syria. The Canadian government has apologized to Mr. Arar for its part in this debacle. The head of the Royal Canadian Mounted Police resigned, and the country has agreed to compensate Mr. Arar almost $10 million. This country has not apologized or admitted any wrongdoing.

   A. Will you commit that you will not approve the transfer of any detainee to another country where there is a realistic possibility that he or she may be tortured, regardless of any assurances you receive from that country?

   B. If you are confirmed, will you commit to look into issuing some form of apology or compensation to Mr. Arar and to anyone else who may have been transferred from the United States to another country and tortured?

Executive Privilege

4. You testified that executive privilege was related to the President's need to gather facts. You did not categorically rule out that it could apply to third parties.

   A. Do you view executive privilege as a communications privilege?

   B. Do you think executive privilege extends to matters in which the President was not personally involved?

   C. What are the limits of executive privilege in your view?

5. No prosecutor should take a matter to a grand jury, or to trial, if he or she believes there is not probable cause. But prosecutors need to be able to test the validity of a claim of privilege. Under our current statutes, the way to test the validity of the executive privilege claim is through a contempt citation. That is a mechanism

that brings the executive's claim of privilege to withhold information and the legislature's claim to the information to a head. You suggested in your testimony, though, that where an official relied on Justice Department advice in asserting executive privilege, then no Justice Department prosecutor could move forward on a contempt citation.

A. If the other two branches have not been able to work out an accommodation, then the courts as the third branch can referee the dispute and apply what is actually a judicially-created privilege. Isn't that the logical place in our constitutional system of checks and balances to resolve a dispute between the executive and Congress about an assertion of executive privilege?

B. The language of the governing statute, a statute that was passed by the Congress and signed by the President, says that in connection with a contempt of Congress citation, the U.S. Attorney "shall" refer the citation to a grand jury. If the U.S. Attorney does not proceed as the statute provides, how does the claim of executive privilege get evaluated and how does the conflict with the Congress get resolved?

Civil Rights

6. On the first day of your hearing before the Senate Judiciary Committee, you were asked questions about your plans for restoring the morale and the historical priorities of the Civil Rights Division. In the last seven years, arguably as a result of blatant politicization, we have seen the Justice Department abandon its historic positions in civil rights cases ranging from employment discrimination to racial integration in schools. During the hearing, you testified that the Civil Rights Division is "important" and that you had met with a few Civil Rights Division attorneys who were "energized," but what is your vision for the role of the Justice Department with regard to civil rights enforcement? How do you plan to address the well-documented problems with low morale in the Division?

Senator Edward M. Kennedy
Questions for the Record
Senate Judiciary Committee Hearing on the Nomination of Michael B. Mukasey to be Attorney General

1. As you know, the nation was disgraced in the eyes of the world by the Bybee "torture memorandum" of August 2002, a legal opinion by the Office of Legal Counsel that redefined torture in such a narrow way that it justified interrogation techniques widely recognized as cruel, inhuman, and degrading.

As the memo stated: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Anything that fell short of this standard would not be torture, the memo said. CIA interrogators called this memo their "golden shield," because it allowed them to use virtually any interrogation method they wanted.

The memo also created a commander-in-chief exception, which no legal authority had ever recognized, stating that the President and the people he directs are not bound by laws passed by Congress that prohibit torture.

The memo further stated that government officials can avoid prosecution for their acts of torture by invoking the defenses of "necessity" or "self-defense"—even though the Convention Against Torture, an international treaty ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.

All of these arguments in the memo were morally repugnant, and they were also legally repugnant. The Office of Legal Counsel eventually took the extraordinary step of withdrawing the memo because it was so flawed. This was apparently the first time that an opinion from the Office had ever been overturned within a single Administration.

The torture memo did not come to light until 2004, and along with the photos from Abu Ghraib prison, it created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come.

We've been told that the Bybee memo was withdrawn at the end of 2004, but it has never been repudiated by the Administration. In the October 17 hearing, you stated that "the Bybee memo, to paraphrase a French diplomat, was worse than a sin, it was a mistake. It was unnecessary." I agree wholeheartedly that the memo was a mistake, but I was troubled that you did not repudiate its contents explicitly. Your statement that it was "unnecessary" leaves the alarming impression that you may agree with its legal reasoning.

Questions:

- **Dean Harold Koh of the Yale Law School has said that the Bybee memo was "perhaps the most clearly erroneous legal opinion I have ever read." He called it "a stain upon our law and our national reputation."**
    - **Do you agree?**
- **In the words of Jack Goldsmith, the former head of the Office of Legal Counsel, "The message of the [Bybee memo] was indeed clear: violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority."**
    - **Do you believe that Mr. Goldsmith has accurately characterized the legal analysis of the memo?**
    - **If so, what, if anything, do you find wrong with this legal analysis?**
- **Do you agree or disagree with the memo's claim that "necessity" can justify the use of torture?**
- **Do you agree or disagree with the memo's claim that "self-defense" can justify the use of torture?**
- **Do you agree or disagree with the theory—still not repudiated by the Administration—that laws banning torture do not always bind the Executive Branch, because of the President's inherent powers as commander-in-chief?**
- **As Attorney General, will you completely rescind and repudiate this memo?**
    - **Will you make it clear that the Department *is* empowered to enforce the federal criminal laws against torture?**

2. At the end of 2004, when the Office of Legal Counsel withdrew the Bybee memo, it replaced it with a less extreme opinion that did not address the most controversial parts of the earlier opinion. The Department made this new opinion public.

But on October 4, 2007, we learned from the *New York Times* that the Office of Legal Counsel had issued two more secret "torture memos" in 2005—only a few months after publicly releasing the memo that replaced the Bybee memo.

The first secret memo reportedly authorized interrogators to use harsh techniques in combination, to create a more extreme overall effect. They could deprive detainees of sleep and food, bombard them with loud music, and subject them to freezing temperatures, all at the same time. These are techniques that our Judge Advocates General have said are illegal under U.S. law and the Geneva Conventions.

The second memo declared that none of the CIA's interrogation methods violated the ban on cruel, inhuman, and degrading treatment that Congress was preparing to pass. At the time, the CIA was using "waterboarding" and other abhorrent techniques copied from the Soviet Union and other brutal regimes.

Before he was sidelined by the White House, Deputy Attorney General James Comey told his colleagues at the Justice Department that they would all be "ashamed" when the world eventually learned of these opinions. The world has now learned of them, and once again there's a scandal involving opinions of the Office of Legal Counsel, issued in secret, authorizing interrogation techniques widely believed to violate laws against torture.

Questions:

- **Despite our repeated requests for the opinions relating to interrogation, Congress has not been given these documents. We had to learn about them from the *New York Times*.**
    - **If you are confirmed, will you produce these opinions for this Committee?**
- **Do you think it was appropriate that these opinions were issued in secret, at a time when the Department was publicly claiming it had rejected the Bybee torture memo?**
- **If these memos really do say what the press accounts report, will you rescind them immediately?**
- **The second memo was apparently written while Congress was considering the Detainee Treatment Act, which prohibits the use of cruel, inhuman, and degrading practices. The Administration seems to have concluded that the Act would have no effect, even before it was enacted. That information certainly would have been helpful during the legislative debate.**
    - **Do you think the Administration had an obligation to inform Congress of its view during our consideration of the Detainee Treatment Act?**
    - **If confirmed, will you be more forthcoming in sharing with Congress the information we need to perform our legislative and oversight functions?**
- **Professor David Luban of the Georgetown Law School has written that the second memo most likely stated that treatment of detainees will only be considered cruel, inhuman, or degrading if it is "unjustifiable by any government interest." Such a position completely distorts Supreme Court precedent and leads to the absurd result that *nothing* the government does in an interrogation will ever qualify as torture.**

- **If Professor Luban is correct about the content of the memo, do you agree that this is an outrageous argument, both legally and morally?**

3. Congress attempted to take a strong stand against torture in 2005 in the Detainee Treatment Act by prohibiting "cruel, inhuman, and degrading treatment" in interrogations. It required all Department of Defense interrogations to comply with the Army Field Manual, which recognizes that such techniques are both immoral and ineffective, because they produce unreliable information and put our own troops at greater risk.

The Senate passed the Detainee Treatment Act by the overwhelming vote of 90 to 9. President Bush issued public statements suggesting he would comply with the Act and signed it into law. But immediately after signing it, the President issued a signing statement saying he would construe the law in a manner consistent with the constitutional authority of the President to supervise the executive branch and protect the American people. In other words, the President said he would follow that law only as long as it did not interfere with his commander-in-chief powers. If he thought it did, he would ignore it. And as we now know, a secret opinion of the Office of Legal Counsel had told him the CIA could continue to use torture.

That signing statement was a particularly outrageous example of a larger pattern. President Bush has been more aggressive than any previous president in claiming the right to ignore congressional enactments. Until recently, he's rarely used his veto power, but he's issued signing statements affecting nearly 800 provisions of laws passed by Congress.

Questions:

- **Do you believe the President is free to disregard a direct congressional enactment? If so, under what circumstances?**

- **Do you agree or disagree with the President's unprecedented use of hundreds of signing statements asserting a right to ignore provisions in laws that Congress has passed? Doesn't this undermine our system of checks and balances if the President can simply decide which parts of which laws he will comply with?**

4. When Congress was considering the Military Commissions Act last year, I offered an amendment to direct the Secretary of State to notify other parties to the Geneva Conventions that we would consider it a war crime to subject an American to any of the techniques prohibited by the Army Field Manual. Those practices include waterboarding, use of dogs, extreme temperatures, beatings, electric shocks, and forcing detainees to be naked.

During the debate, Senator Warner, then-Chairman of the Armed Services Committee and manager of the bill, stated that all of those practices constitute "grave breaches" of the Geneva Conventions and would be "clearly prohibited" by the Military Commissions Act.

Question:

- **Senator Warner, the manager and a primary author of the Military Commissions Act, stated clearly that the Military Commissions Act prohibits these practices. Will you follow Senator Warner's interpretation of the law? If not, what weight will you give to his statement?**

5. In the October 17 hearing, you stated that Congress has the constitutional authority to prohibit torture, no matter where it occurs or under what circumstances, and you acknowledged that we have in fact done so. You acknowledged that following the McCain Amendment and other laws, U.S. personnel may never subject anyone to "cruel, inhuman, or degrading treatment." No exceptions. I was gratified that you were so clear on this point.

But there is disagreement on what constitutes "cruel, inhuman, or degrading treatment." As the recently revealed secret OLC memos and other sources indicate, the President believes that numerous interrogation techniques—such as sleep deprivation, freezing temperatures, and even waterboarding—do not constitute "cruel, inhuman, and degrading treatment," even though most legal experts and the great body of observers worldwide believe they do. The Administration appears to take such a narrow view of what counts as torture that it makes a mockery of our laws against it. And the CIA appears to be implementing this alarming view.

In the October 18 hearing, your comments on these matters were deeply troubling. You refused to take a position on whether waterboarding is unlawful, or to say anything whatsoever on the crucial questions of what constitutes torture and who gets to decide the issue. The implication of your comments is that while you are committed to the position that "torture" is immoral and illegal, you take such a narrow view of what counts as torture that this commitment is meaningless in practice. Your opposition to torture appears to be "purely semantic," as Senator Whitehouse observed.

You also suggested that government interrogations are not necessarily governed by Common Article 3 of the Geneva Conventions, notwithstanding the Supreme Court's clear ruling to the contrary in *Hamdan v. Rumsfeld*. You seemed to say that in *Hamdan* the Court applied only the fair trial requirements of Common Article 3 to "enemy combatants," and not its humane treatment requirements. This is an astonishing interpretation of *Hamdan* that has never received any support from legal experts or even from the Bush Administration.

Questions:

- **Do you stand by everything you said in your testimony on torture, interrogation, and *Hamdan*?**
    - **Do you acknowledge that the humane treatment requirements of Common Article 3 apply to the interrogation of "enemy combatants" in U.S. custody?**
    - **Since Common Article 3 is a universal standard that protects both prisoners in U.S. custody as well as American servicemen and women in foreign**

custody, do you agree that the opinions of the Judge Advocates General—the nation's top military lawyers—are highly relevant for the determination of what techniques may be authorized under Common Article 3?

- **Will you consult with the Judge Advocates General in deciding whether to authorize interrogation techniques as consistent with Common Article 3?**

- **Is waterboarding torture, as defined by domestic and international law?**

  - **As defined by U.S. criminal law, torture means "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." Does the use of waterboarding for interrogation meet this definition?**

- **Is waterboarding illegal under U.S. law?**

- **If you cannot commit to the position that waterboarding is torture, it is hard to conclude that your views are significantly different than the views expressed in the Bybee memo.**

  - **What assurances can you give Congress and the American people that you will faithfully apply the laws against torture—not as the White House might want to define it, but as Congress, the courts, and outside legal experts have defined it?**

- **When asked about interrogation techniques during the hearings, you repeatedly stated that if a practice "amounts to torture, it is not constitutional." You never qualified this statement. In light of your remarks, is it fair to say that you believe torture to be unconstitutional no matter where it occurs, including overseas?**

- **If you do not believe that torture inflicted by the United States outside U.S. territory is unconstitutional, what assurances can you give that it will be treated as unlawful?**

6. In enacting the Detainee Treatment Act, Congress sought to ensure that the government honors its commitment to the basic rights enshrined in the Geneva Conventions.

But we didn't go far enough. We required compliance with the Army Field Manual by the Department of Defense, but we said nothing about the CIA. As this latest scandal shows, it is the CIA, acting with the approval of the Justice Department, that we need to worry about now.

The Army Field Manual represents our best effort to develop an effective and responsible interrogation policy. It acknowledges that torture does not yield reliable information, and often hinders the effort to acquire it. As the Manual clearly states, "use of torture is not only illegal

but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [interrogator] wants to hear."

The Manual ensures that we collect only credible information in pursuing terrorists. It prevents the secret abuse of detainees. It protects our own interrogators from the risk of prosecution. And it protects our own servicemen and women from being tortured.

I'm sponsoring a bill now—the "Torture Prevention and Effective Interrogation Act"—to close the loophole left open by the Detainee Treatment Act. It would apply the Army Field Manual to *all* government interrogations. It makes clear that brutal interrogation methods such as waterboarding, using dogs, or inducing hypothermia are *never* permissible.

The issue is whether the CIA and all other agencies of the government should, like the Department of Defense, be bound by the interrogation standards set out in the Army Field Manual. The Manual is highly flexible and allows interrogators to do a lot of things. But it does not allow them to use techniques such as waterboarding, use of dogs, sleep deprivation, forced nudity, or beatings—the most brutal techniques that experts believe are not only immoral but also ineffective in obtaining good information and illegal under both domestic and international law.

Questions:

- **Shouldn't we require *all* interrogations to comply with the standards of the Army Field Manual?**
    - **If not, which specific techniques do you believe the CIA should be allowed to use, even though the Department of Defense has rejected them as immoral, illegal, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas?**
    - **Specifically, which of the following interrogation techniques that are prohibited by the Army Field Manual would you consider lawful and which would you consider appropriate for use by CIA interrogators?**

      1. Forcing detainees to be naked, perform sexual acts, or pose in a sexual manner.
      2. Placing hoods or sacks over the heads of detainees, or duct tape over their eyes.
      3. Using beatings, electric shock, burns, waterboarding, military dogs, or other types of physical abuse.
      4. Inducing hypothermia or heat injury, or conducting mock executions.
      5. Depriving detainees of food, water, or medical care.

- **If you're confirmed and the Torture Prevention and Effective Interrogation Act is passed, will you do everything in your power as Attorney General to ensure that every interrogation conducted by the U.S. government complies with the law?**

- **As Attorney General, would you advise the President that he is bound by this law?**

- **The brutal interrogation techniques being debated today are not new. After World War II, we tried and convicted Japanese soldiers of using these same techniques against American prisoners. Our soldiers were forced to endure stress positions for hours. They were exposed naked to severe temperatures. They were denied food, water, and medical treatment. Water was poured down their mouths and noses to simulate drowning—the very technique of waterboarding that the Bush administration now refuses to ban.**

    - **If we don't categorically reject the use of such techniques today, what purpose did those trials serve half a century ago? Were we wrong to prosecute those soldiers after World War II?**

- **Last May, General Petraeus wrote to all U.S. service members serving in Iraq that "adherence to our values distinguishes us from our enemy." He said "this fight depends upon" occupying "the moral high ground," and "torture and other expedient methods to obtain information" are not only illegal and immoral but also "neither useful nor necessary."**

    - **Do you agree with General Petraeus?**

- **In September 2006, the Army's top intelligence officer, Deputy Chief of Staff for Intelligence Lt. Gen. John Kimmons, said: "No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that."**

    - **Do you agree with General Kimmons?**

- **The minimum standards we apply to detainees set the standard for other nations' treatment of Americans they take into custody, such as CIA agents and members of our Special Forces who do not wear uniforms. If we decide it is lawful for us to engage in sleep deprivation, waterboarding, and the use of stress positions, then we increase the likelihood that other countries will subject Americans to those practices.**

    - **Do you agree that we shouldn't subject anyone to interrogation practices that we'd consider unlawful if used against an American?**

- **Do you think it would be lawful for another country to subject an American to:**

    - **Waterboarding?**
    - **Induced hypothermia or heat stress?**
    - **Standing naked?**

- **The use of dogs?**
- **Beatings, including head slaps?**
- **Electric shocks?**

7. In a May 2004 op-ed in the *Wall Street Journal*, you wrote that "the hidden message in the structure of the Constitution . . . is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt."

I am not sure exactly what you meant by this statement, but I am concerned that you believe the government has a right to say, "Trust us," and the American people should fall in line. Too often, the Bush Administration has said "trust us," but there is absolutely no reason to trust the Administration after all it has done.

Questions:

- **Do you believe that this Administration deserves the trust of the American people after taking us to war in Iraq on false pretenses, denying that it engaged in torture when we know that it did, and listening to the conversations of Americans without warrants?**

- **Do you believe that this Department of Justice deserves the trust of the American people, when we know that political considerations have infected its hiring and its law enforcement decisions and that it has given severely flawed legal advice?**

- **When you say that "the government . . . is entitled . . . to receive from its citizens the benefit of the doubt," what is the role of Congress in your theory? Too often, the Administration has asked Congress to trust it. Do you agree that Congress has a constitutional duty to conduct oversight of the Executive Branch and the laws it passes and cannot simply trust the Executive?**

- **In your testimony on October 17, you cited the Hamdi case for "the authority of the president to seize U.S. citizens [on the battlefield] and detain them without charge," but you said you "can't say now" whether the "battlefield" applies to the United States. You never clearly answered the question of whether the President may indefinitely imprison without charges a U.S. citizen, seized on U.S. soil, solely on the President's determination that the person is an "enemy combatant." Nor did you make any reference to the due process requirements that Hamdi established or to its reminder that "a state of war is not a blank check for the President when it comes to rights of the Nation's citizens."**

    - **May the President indefinitely imprison without charges a U.S. citizen, seized on U.S. soil, solely on the President's determination that the person is an "enemy combatant"?**

- **Are there any constitutional limits on the President's power to detain U.S. citizens or non-citizens in its war on terrorism?**

- **As Attorney General, how would you enforce the Supreme Court's instruction that "a state of war is not a blank check for the President when it comes to rights of the Nation's citizens"? With respect to the detention of "enemy combatants," what specifically would you do to ensure that all legal requirements are complied with?**

8. It is obvious that this Administration does not respect the Foreign Intelligence Surveillance Act. Instead of working with Congress to amend FISA—as other Administrations have done about 30 different times since it was enacted in 1978—this Administration chose to eavesdrop on Americans in secret, without warrants, in violation of the law.

The scandal over the Administration's warrantless eavesdropping is still coming to light. But we already know that its surveillance activities were so shocking that up to 30 Justice Department employees threatened to resign over them. Jack Goldsmith, the conservative legal scholar and former head of the Office of Legal Counsel, testified that, like John Ashcroft and James Comey, he "could not find a legal basis for some aspects of the program." He called it "the biggest legal mess [he] had ever encountered."

Here is how Mr. Goldsmith, in his just-published book which you praised during your testimony, describes the Administration's general approach to FISA: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations." He says David Addington, the powerful Counsel to the Vice President, once exclaimed, "We're one bomb away from getting rid of that obnoxious [FISA] court."

As you know, Congress is currently debating possible reforms of FISA. The White House has asked that we make permanent the Protect America Act, enacted last August, and amend FISA in several other ways as well. Yet at the same time that it makes these requests, the Administration refuses to acknowledge that it is bound by FISA. So we have a strange situation: the Administration is demanding that Congress pass a new law, but is simultaneously insisting that no such law is necessary.

The language of FISA is clear: it provides the "exclusive" means by which the Executive may conduct foreign intelligence surveillance. As we know from Justice Jackson's opinion in the Steel Seizure Cases, the President's authority is at its weakest when he acts contrary to a congressional enactment. Yet President Bush wants to defy clear statutory language.

Questions:

- **I am concerned that in your confirmations hearings, you seemed to suggest that the President is free in certain cases to ignore the crystal-clear instruction from**

Congress that FISA is the "exclusive" means by which the Executive may conduct foreign intelligence surveillance.

- **Do you agree that the Executive Branch is bound to conduct all foreign intelligence surveillance according to FISA?**

- **When, in your view, would the President ever be authorized to disregard or violate FISA?**

- **Many legal experts, such as Judge James E. Baker of the U.S. Court of Appeals for the Armed Forces, have argued that the President may *never* validly disregard or contravene FISA. As Judge Baker states, "in light of the specificity of the [FISA] statute, and the longstanding acquiescence of the executive in the Act's constitutionality, . . . FISA did not leave the president at a low ebb exercising residual inherent authority, but extinguished that authority."**

  - **If you disagree with this statement, in what way and why?**

- **If Congress does not extend the Protect America Act and does not pass any other new laws, will you insist that the Administration must comply with FISA?**

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

- **In an Administration that has shown no respect for FISA, it will obviously take courage to insist that the law must be followed. Your predecessor did not show this courage. No matter what pressures you face, will you insist that government surveillance must comply with FISA?**

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

- **In a speech you gave in April, on "Terrorists and Unlawful Combatants," you recommended that Congress abolish the FISA court and instead create a single "national security court" to oversee surveillance, detention, and prosecution of suspected terrorists.**

  - **Why did you make this recommendation—do you think the FISA court is flawed?**

  - **Isn't the FISA court precisely the kind of specialized "national security court" you say we need—with unique procedures, almost total secrecy, and judges appointed specially by the Chief Justice?**

- **If you do not support the FISA court, what would you prefer to see in its place?**

9. It's also no secret that the Administration does not like to cooperate with Congress. Time after time, it's refused to work with Congress, even though doing so could have made its counterterrorism policies more effective and given them a sounder legal basis. When Attorney General Ashcroft wouldn't rubber-stamp some of its activities, the Administration even sidelined its own Department of Justice. This "go-it-alone" approach has not only inspired anger and mistrust, but also made us less safe.

When Attorney General Gonzales came before this Committee last year, I questioned him about FISA and the recently revealed warrantless eavesdropping program. I offered to work with him, and I asked him why he had not approached Congress sooner. He answered bluntly, "We did not think we needed to, quite frankly."

We're now paying a high price for that arrogance. Warrantless wiretapping has apparently been used to spy on Americans illegally for years. As a result, prosecutions have been jeopardized, intelligence professionals are in fear of criminal penalties, government lawyers threatened to resign, public trust was undermined, and resources were misallocated. The Administration's reckless disregard for FISA has made us more vulnerable. It has also made many Americans afraid for their rights.

When the Administration finally came to Congress on FISA a few months ago, it did so not in the spirit of cooperation, but to demand that we pass certain reforms. The reforms were negotiated in secret and at the last minute, while the Administration issued dire threats that failure to enact a bill before the August recess could lead to disaster. The resulting legislation, the Protect America Act, is badly drafted and severely flawed, and has caused even more uncertainty and public outrage.

The history of FISA teaches us that there is a better way. I was present at the creation of FISA, when a Democratic Congress worked closely with Republican Attorney General Edward Levi to draft it. Four different times, Mr. Levi invited members of Congress to the Justice Department to work on the legislation. Together, we found a way to give our intelligence agencies the authority they needed, and to build in checks and balances to prevent abuses. The final bill passed the Senate by an overwhelming vote of 95 to 1, and it served this country well for three decades.

Congress is now considering legislation to revise the Protect America Act. The Administration has demanded that we include retroactive immunity for the telecommunications companies that participated in the warrantless eavesdropping program. The Administration has gone so far as to refuse to produce documents related to the program unless the Judiciary Committee commits in advance to granting immunity. Obviously, that is backwards. The Committee should not be considering retroactive immunity in the dark.

Questions:

- **If you are confirmed as Attorney General, which tradition will you follow—the Edward Levi model or the Alberto Gonzales model—when it comes to working with Congress?**

- **Do you agree with Jack Goldsmith and others that it was a mistake for the Administration not to come to Congress with its so-called "Terrorist Surveillance Program" and other warrantless wiretapping programs?**

- **Will you commit to producing for all members of the Judiciary Committee, prior to our consideration of FISA legislation, all documents related to the legal justifications for and authorizations of the warrantless wiretapping program that the Administration conducted between September 11, 2001 and this year?**

- **Do you agree that Congress cannot responsibly grant retroactive immunity to telecommunications companies, when it has no idea what the companies may have done, who may have directed their conduct, and what the legal justification for their conduct may have been?**

- **Do you believe that telecommunications companies that broke the law should be given full retroactive immunity by Congress?**

- **Do you believe that FISA imposed liability on telecommunications companies to ensure that they would act as a check on unlawful surveillance requests by the Executive?**

- **What does it do to the structure of FISA to eliminate their liability for breaking the law?**

- **What do you think was the role of the lawyers who advised the telecommunications companies on the lawfulness of their warrantless surveillance?**

- **What does it say about the Administration's commitment to the rule of law to insist on retroactive immunity as a precondition for any FISA reform?**

- **Do you believe that it is wise for Congress to step into ongoing litigation to dictate victory for one side?**

- **The Administration has been asserting an extremely broad version of the state secrets privilege in an attempt to derail the litigation against the telecommunications companies, even though it is no longer a secret that the Administration conducted widespread warrantless surveillance.**

    - **Do you share the Administration's view on the application of the state secrets privilege to these lawsuits, even though a number of federal courts have expressly rejected it?**

- **Do you agree or disagree with the many critics who claim that the Justice Department has abused the state secrets privilege in post-9/11 litigation to conceal the Executive's activities from public scrutiny, when there is no legitimate security reason for doing so?**

- **Even if the state secrets privilege were to apply to some portion of the warrantless wiretapping lawsuits, could Congress adopt special procedures to permit the litigation to continue in a protected setting?**

10. There is still a great deal we don't know about the warrantless wiretapping used by the Administration after 9/11. The Administration has refused to comply with subpoenas for documents that would explain the programs and their legal justifications. We do know that Americans were spied on without warrants, that the FISA court declared at least some of the program illegal, and that many Justice Department employees believed the programs were so flagrantly illegal that they threatened to resign if changes were not made.

Early last year, the Justice Department's Office of Professional Responsibility began to investigate whether the Administration's domestic eavesdropping programs were legal, and whether department officials, including Attorney General Gonzales and Attorney General Ashcroft, had acted properly in overseeing them.

But the Office of Professional Responsibility's investigation never got off the ground. The investigators were denied security clearances to do their work. The Office was asking only for internal Justice Department communications and legal opinions, and it has detailed procedures in place to ensure that no sensitive information leaks out. When the Office of the Inspector General launched a more limited investigation, its investigators received necessary clearances.

As a result of the obstruction of the Office of Professional Responsibility investigation, the American people and their representatives in Congress still don't know what happened. No one has been held accountable, and no lessons have been learned.

Questions:

- **If confirmed, will you commit to reauthorizing an investigation into the government's secret spying programs, and to doing everything in your power to see that this investigation is as thorough and effective as possible?**

- **Will you commit to reporting all the findings of this investigation to Congress?**

11. The material witness law allows the government, in narrow circumstances, to detain witnesses to prevent them from fleeing to avoid testifying in a criminal proceeding. The court can order them to be incarcerated if it finds that they have information that's "material" to the

proceeding and will likely flee if subpoenaed. But they have not been accused of any crime, and can only be held for as long as necessary to testify.

After 9/11, the Justice Department began to use the material witness statute in a new way, to detain an unknown number of Muslim men. We still don't really know what happened to them, because the court records are sealed. But we know that at least 70 of them, and possibly many hundreds, were detained in New York City as "material witnesses" because the government believed they might have some knowledge of the attacks or pose some danger to society. These men had lawyers, but for months they were held in harsh conditions, without criminal charges or bail, and nearly half of them were never brought before a court or a grand jury to testify. Some of them were abused while held in a Brooklyn jail.

As chief judge of the federal court in the Southern District of New York, you played a major role in overseeing this process. We don't know how you handled these cases or how many material witness warrants you signed, but it has been said that you signed more than any other judge.

Commentators have criticized your court's handling of these detentions, in particular the secrecy you imposed and the way you appear to have allowed innocent people to be arrested and incarcerated for months in degrading conditions on the skimpiest of evidence. A report by Human Rights Watch and the ACLU states that many of these material witness detainees were held on "baseless accusations of terrorist links."

Questions:

- **How do you respond to these allegations?**

- **How do you respond to the lawyer who claims you were insensitive to his clients?**

    - **One client was a 21-year-old college student with no criminal record who claimed he was beaten in his cell. After he showed you the bruises hidden beneath his orange jumpsuit, the transcript shows that you didn't seem very concerned. You said: "As far as the claim that he was beaten, I will tell you that he looks fine to me. You want to have him examined, you can make an application. If you want to file a lawsuit, you can file a civil lawsuit."**

        - **Do you think that you handled this complaint appropriately? We know that some of these detainees—who may have been completely innocent of any wrongdoing whatever—were in fact beaten by their guards.**

- **In your May 2004 op-ed in the *Wall Street Journal*, you wrote the following: "No doubt there were people taken into custody [after 9/11], whether on immigration warrants or material witness warrants, who in retrospect should not have been. If those people have grievances redressable under the law, those grievances can be redressed. But we should keep in mind that any investigation conducted by fallible**

- **I appreciate your concern that the government do everything it can to prevent the next attack, but I am concerned by the way you make this point. It sounds as if you think anything goes in such a situation. You were the chief judge of the Southern District, and you were publicly dismissing a serious question of law and policy that might still be litigated in your court. Can you elaborate on your thinking when you wrote those words?**

12. Many legal scholars say the Administration abused the material witness statute during this episode. The Administration relied on it and indefinitely detained people accused of no crime. Some scholars emphasize that this violates the Fourth Amendment. Others say the material witness law allows the government detain witnesses only to testify at a criminal trial, not to testify before a grand jury.

You faced these questions in a 2002 case. You ruled that the material witness statute authorizes the government to imprison a witness for grand jury investigation. You dismissed the argument that there might be a constitutional problem in doing so. In United States v. Awadallah, however, Judge Scheindlin on your court reached the opposite conclusion. On appeal, the Second Circuit appears to have adopted your reasoning. But a number of legal scholars have written articles criticizing your Fourth Amendment analysis.

Questions:

- **As Attorney General, would you use the material witness statute in the same way it was used in the aftermath of 9/11? What, if anything, would you do differently?**

- **Do you think that holding someone in jail, solely on the grounds that they might be called to testify before a grand jury, ever raises constitutional concerns?**

    - **Does it raise any moral or policy concerns?**

13. From what we know, it appears that many of those detained without charges after 9/11 were immigrants. The press reported the FBI was rounding up hundreds of Muslim men and imprisoning them on very little evidence.

According to Human Rights Watch and the ACLU, the "evidence often consisted of little more than the fact that the person was a Muslim of Middle Eastern or South Asian descent, in combination with having worked in the same place or attended the same mosque as a September 11 hijacker, gone to college parties with an accused terrorism suspect, possessed a copy of *Time*

magazine with Osama bin Laden on the cover, or had the same common last name of a September 11 hijacker."

The government apparently used the material witness statute as a pretext to arrest and hold individuals who could not be charged with a crime or an immigration violation, because there was no probable cause. What the government actually wanted in some of these cases, it seems, was to detain these persons preventively, or investigate them for possible wrongdoing.

I'm particularly concerned that so many of these persons were immigrants. This kind of mass detention of Muslims raises serious civil rights concerns.

Along with other Justice Department programs used after 9/11 to fingerprint, photograph, and interrogate immigrant men from Muslim countries, this kind of activity created massive fear in our Muslim communities. At a time when we needed critical intelligence, members of these communities were unfairly stigmatized and discouraged from coming forward to assist in our counterterrorism efforts.

Questions:

- **Do you believe that the material witness statute may have been used as a pretext to detain individuals preventively or to investigate them? Does this trouble you?**

- **Does the disproportionate number of immigrants targeted in material witness warrants raise any concerns for you?**

14. In June 2003, the Inspector General for the Justice Department issued a report evaluating the treatment of 762 detainees who were held on immigration charges and designated as of "special interest" to the investigation of the 9/11 attacks. The report noted "significant problems in the way detainees were handled" following 9/11. These problems included:

- a failure by the FBI to distinguish between detainees whom it suspected of having a connection to terrorism and detainees with no connection to terrorism;
- the inhumane treatment of the detainees at a federal detention center in Brooklyn;
- unnecessarily prolonged detention, both from delays in charging and holding people in detention well after they had been ordered deported;
- interference with access to counsel; and
- closed hearings.

A subsequent report published by the Inspector General in December 2003 elaborated on the severe physical and verbal abuses that special immigrant detainees were subjected to during this time.

Questions:

- **When the report was issued, the Department of Justice announced that it made "no apologies" for any of its conduct or policies. If you had been Attorney General at the time, what response would you have recommended?**

- **What steps should the Justice Department and the Department of Homeland Security take to prevent such abuses in the future?**

15. The death penalty is the most extreme form of punishment we have. Once administered, it cannot be undone, so we must be absolutely certain that it is applied in a fair and consistent manner. We know that since 1993, 120 people convicted and sentenced to death have been exonerated from state death rows prior to execution. We also know that minority defendants are disproportionately sentenced to death; the reason for this discrepancy is not clear, and a recent study by the National Institute of Justice has not provided adequate answers.

The possibility that innocent people are being executed or that the death penalty is being applied in a discriminatory manner makes it essential that the decision to execute a defendant be open and transparent. Since 2001, however, the Department has changed its death penalty protocols in a way that makes the Attorney General's decision-making process confidential. In addition, the line prosecutors, who are most familiar with their cases, are being given little input into the decision whether to pursue the death penalty in a particular case.

Questions:

- **Do you believe that the government's decisions to apply the death penalty should be more transparent? As Attorney General, what steps would you take to make deliberations on the application of the death penalty more transparent?**

- **A National Institute of Justice study on racial bias and the death penalty examined data from 1995-2000 and concluded that there was no racial bias at the federal level. Yet, the next 6 individuals facing the death penalty at the federal level are all African American males. As Attorney General, will you commit to make recent data available for analysis of the impact of race on the death penalty?**

- **In your testimony, you refused to agree to speak personally with U.S. Attorneys who disagree with your decision to pursue the death penalty and want to discuss the matter with you. I am not satisfied by the answer you gave, and I want to give you an opportunity to explain your position in more depth. Why, if you are committed to "review[ing] every [death penalty] case in excruciating detail" and to adopting an open and collaborative management style, as you said, would you refuse to speak with these U.S. Attorneys, who may have personal knowledge and expertise relevant to the case?**

16. As you may know, the Department of Justice recently issued extremely controversial regulations on death penalty appeals in federal courts. They give the Attorney General the power

to certify states for special, "fast-track" procedures. If the Attorney General certifies a state, federal courts are required to review that state's capital cases on a faster and more limited basis.

In the Patriot Act reauthorization, Congress authorized the Department of Justice to issue regulations on this subject. The intention was that if states develop systems to guarantee adequate representation of their death row prisoners, they can receive the benefits of abridged federal court review. Such a provision would encourage states to provide quality counsel to their prisoners and help make sure that innocent persons are not sentenced to death.

The proposed regulations make a mockery of this goal. They fail to provide any meaningful definitions, standards, or requirements to ensure that states have in fact established counsel systems that comply with Congress's intent. They fail to provide any safeguards to shield the certification process from conflicts of interest or political influence. As a result, federal court review of death sentences will be dramatically curtailed, even in cases where the defendant may not have received a full and fair trial.

These regulations have produced intense controversy. Comments from the Judicial Conference, the American Bar Association, capital defense organizations, federal public defenders of all 50 states, and many others explain how these regulations are badly drafted and dangerous. They're vague; they flout well-settled case law; they place significant burdens on the federal courts; and they create an unacceptable risk that innocent prisoners will be denied justice. In short, as Chairman Leahy, Senator Feingold, and I explained in our comments to the Department, these regulations are "unclear, unjust, and unwise." (Document ID: DOJ-2007-0110-0166, regarding OJP Docket No. 1464, available at http://www.regulations.gov)

If these regulations are implemented, they will cause protracted litigation and public outrage, and deal a serious blow to the nation's commitment to due process and equal justice for all.

In July 2001, Justice O'Connor stated, "After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." The proposed regulations would raise even more questions and take this nation a giant step backwards.

Questions:

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

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

17. We know you've been close friends with Rudy Giuliani ever since your years together in the U.S. Attorney's office and in private practice in New York City. When Mr. Giuliani was elected mayor, he asked you to swear him in. When he decided to run for President, he asked you and your son to serve on his "Justice Advisory Committee." You once wrote him a letter saying, "Your achievements have been such that neither I nor anyone else I know could match them. . . . Please also know that my admiration and love [for] you and your family is without limit." I understand that as a judge you recused yourself from litigation involving Mr. Giuliani, and your close association with him suggests it may be difficult for you to act impartially as Attorney General on issues that affect him.

Questions:

- **In your October 17 testimony, you answered in the affirmative to Senator Leahy's question, "would it be safe to say that you will totally recuse yourself from any involvement, either with Mr. Giuliani or any candidate for president?" It is good to have on record that you will not involve yourself with Mr. Giuliani or any of his competitors in the presidential race, but what further assurances can you give Congress and the American people that your association with Mr. Giuliani will not affect your decision-making?**

- **Will you recuse yourself from all decisions that might affect him personally or politically?**

- **What safeguards will you put in place to ensure that you do not inadvertently make a decision that affects him?**

- **Has the Administration assured you that you will have the ability to make personnel decisions free from White House interference?**

18. As Attorney General, one of your duties will be to oversee the Department's role in enforcing the federal election laws. The details are still coming out about how this responsibility was improperly politicized under Attorney General Gonzales. The Department abused its authority and its influence to help Republicans win elections, and U.S. Attorneys were fired if they refused to go along.

The Department of Justice should never make a decision—or appear to make a decision—based on the desire to affect an election. In fact, the Department has long been aware of this problem. Launching investigations, interviewing witnesses, or issuing indictments shortly before an election can obviously affect its outcome. For that reason, the Department had developed written guidelines to prevent such interference.

In May, the Department issued a new guidebook on "The Federal Prosecution of Election Offenses," replacing the 1995 manual and reversing the Department's longstanding policy of not taking any action before an election that could affect the election outcome.

As the previous guidelines had stated: "In investigating election fraud matters, the Justice Department must refrain from any conduct which has the possibility of affecting the election itself." That language was severely weakened by the revision.

The previous guidelines had also stated that "most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates." That provision was removed.

The previous guidelines had further stated that: "Federal prosecutors and investigators should be extremely careful to not conduct overt investigations during the pre-election period or while the election is underway." That provision was removed as well.

When Senator Feinstein asked Attorney General Gonzales in July why these changes were made, Mr. Gonzales said, "I don't know the answer to that question. I would like to find out . . . ." We have not received an answer, but the clear impression is that the Department wanted to give itself greater leeway to take actions that might interfere with upcoming elections.

Questions:

- **What assurances can you give Congress and the American people that you will restore the Department of Justice to its rightful role as the nonpartisan guardian of fair and open elections?**

- **In your testimony, you were clear that "partisan politics plays no part in either the bringing of charges or the timing of charges," but you never specifically addressed the changes made to this manual. Restoring the 1995 guidelines is an obvious reform that would go a long way toward restoring public trust in the Department. Will you commit to restoring the 1995 version of the "The Federal Prosecution of Election Offenses" manual?**

    - **If you will not commit to do this, do you agree that the changes recently made to the manual were dangerous and inappropriate?**

    - **Do you think it's appropriate that under the new guidelines, prosecutors and investigators are given so much freedom to influence election outcomes?**

19. Violent crime continues to increase across the country, and hate crimes are a particular concern. Many states have recognized the significant impact of hate crimes and have enacted laws to combat them. The annual hate crime reports that you authorized the FBI to publish reflect such crimes in every state except Alabama and Mississippi in 2005.

It is obvious that hate crimes are a national problem, and should be a priority of the Department. I was encouraged that at the October 18 hearing, you said that "prosecution of hate crimes has become, sadly, much a priority," and that the Department must "be actively involved in" this effort. In your hearing testimony, however, you did not go into any specifics.

There are concerns that the Department is not doing enough to combat hate crimes, and that the FBI's annual report fails to represent an accurate number of hate crimes. In 2005, as national crime rates increased, the hate crimes reported and the number of reporting agencies declined. The guidelines implemented by the FBI in collecting and classifying data on hate crimes seem overly restrictive.

The FBI has the authority to create additional categories of bias based on ethnic background and national origin, and to establish reasonable criteria to determine whether prejudice is involved in a crime. If the guidelines are enhanced to include more expansive categories of race, ethnic background and national origin, the data would be more accurate and would advance the purpose of the Act. In light of this:

Questions:

- **How should the Department go about making hate crimes investigations and prosecutions a higher priority?**

- **Will you ask the FBI to enhance its guidelines to produce accurate data that will advance the purpose of the Act?**

Civil Rights

1. I was encouraged by your statements during the hearing that you appreciate the importance of the Department's role in enforcing civil rights. However, to fulfill the Department's leadership responsibilities in this area will require immediate, sustained, and concrete action. When asked about your plans for correcting the problems in the Civil Rights Division, you offered no specifics. It is important for the Committee to know in greater detail how you propose to approach this problem.

In recent months, there have been troubling reports that personnel decisions in the Civil Rights Division have been based on improper partisan considerations. There has been a concerted effort by the Administration to replace long-serving career attorneys with attorneys chosen at least in part because of their politics and ideology. This practice has been widespread and was very damaging to the morale of the attorneys who have the important job of enforcing our civil rights laws.

-- Bradley Schlozman, a former official in the Division, sought to transfer three minority women – all of whom had served successfully for years –out of the Appellate Section of the Division. Mr. Schlozman, the acting head of the Division at the time, admitted seeking to transfer them so they could be replaced by "good Americans." They were replaced by men with conservative credentials. Mr. Schlozman also told the Committee that he had bragged about hiring Republicans in the Division.

-- A Deputy Chief of the Voting Section, who had served in the Department for over 25 years with distinction, was transferred involuntarily to a dead-end training job after he and other career attorneys recommended raising a Voting Rights Act objection to a Georgia photo ID law that had been pushed through by Georgia Republicans. That law was later blocked by the courts, which compared it to a poll tax of the Jim Crow era.

-- Beginning in 2003, according to press reports, an increasing proportion of attorneys hired in three key Sections of the Division were members of the Republican National

Lawyers Association and other conservative groups, and fewer of these new hires had experience in civil rights.

-- There are many examples of career Section Chiefs who were removed, and attorneys who were transferred were denied assignments, or left because they found working in the Division so difficult. Similar concerns have been raised by other career employees with the Division, including some of the civil rights analysts who help review voting changes in states covered by the Voting Rights Act.

Federal law clearly prohibits this sort of political litmus test for career civil service employees. These changes in hiring practices have been demoralizing to the Division's personnel, and have undermined the Division's mission of enforcing civil rights. The Department's Inspector General and Office of Professional Responsibility are investigating these abuses, but their investigation is likely to take many months.

a. Correcting these problems will require immediate action by the next Attorney General. Can you tell the Committee specifically how you plan to do that?

b. Is it your understanding that the White House will give you free reign to investigate and correct the problems in the Civil Rights Division?

c. As you know, many key positions in the Justice Department are currently unfilled. Will you have substantial input in filling those positions, including the head of the Civil Rights Division?

d. Will you issue a statement to the attorneys in the Civil Rights Division that all personnel and litigation decisions will be based on merit, not partisan considerations?

e. Will you review the management of the Division – both by political appointees and by career employees – to ensure that the Division is capable of carrying out needed reforms and fulfilling its vital mission? Will you agree to remove managers who have improperly considered political factors in hiring, promotions and performance evaluations?

f. Will you review the serious allegations of politically motivated decision-making in recent years and take corrective action?

g. Will you identify victims of improper personnel practices and provide remedies for them?

h. Will you adopt a plan to recruit and hire career attorneys of the highest caliber? If so, please describe that plan.

i. If you are confirmed, I would be interested to hear in more detail about your progress in addressing the problems in the Civil Rights Division once you're on the job. If confirmed, will you be willing to inform the Committee within a month or so to discuss progress on civil rights issues?

2. Many of us on the Committee have repeatedly tried without success to get information from the Administration on its civil rights enforcement.

> -- We were troubled when the Civil Rights Division overruled its career professionals and rubber stamped the Republican-backed 2005 photo ID requirement for voting in Georgia that disproportionately disadvantaged minorities. That decision was widely condemned as based on partisan considerations. A court later blocked the Georgia law, comparing it to a modern-day poll tax, and the state abandoned it. I asked repeatedly about the justification for the Division's decision to approve it, but never got a full explanation.

-- I also asked former Assistant Attorney General Wan Kim why the Division had filed so few cases of racial discrimination in voting. He testified that the Division had filed as many as 15 such cases, but later sent a letter to the Committee that showed the Division actually has filed only two.

-- We also never received a full explanation of the reasons for the involuntary transfer of Robert Berman, the long-time Deputy Chief of the Voting Section, after he agreed with the career professionals' recommendation to object to the 2005 Georgia photo ID law on voting.

If confirmed, will you work cooperatively with the members of the Committee to review these issues and provide specific responses on each of the issues listed above?

3. At your nomination hearing, Senator Cardin asked you about the Department of Justice's Voting Access and Integrity initiative, adopted in the early years of the Bush Administration. In practice, the initiative was a major change from previous policy, and put high emphasis on combating fraudulent voting or registration by persons who are ineligible for the franchise. As a result, the Department shifted many of its priorities and resources away from efforts to increase access to voting, and toward the prevention of voter fraud. Senator Cardin asked whether "your priority and your instructions to the Civil Rights Division" would focus on the traditional role of seeking to remove obstacles to voting, or whether you would focus on discouraging voter fraud. You responded that you "don't think it's an either/or proposition," and that "opening up access to the vote and preventing people who shouldn't vote from voting are essentially two sides of the same coin."

I was troubled by your answer. Everyone agrees that only eligible citizens should vote, but the evidence shows that the Department's recent emphasis on fraudulent efforts to impersonate voters is unjustified. Voter fraud at the polls simply hasn't been a problem. In the past five years, despite the Administration's strong focus on voter fraud, there have been only 86 convictions nationwide – mostly involving poor, immigrant, or minority voters who had no intention of violating the law, but didn't know that they were not legally allowed to register to

vote. Even states that have enacted photo ID laws to combat voter fraud admit they have no concrete evidence that voter fraud is occurring. Georgia's Secretary of State said she knew of no example of anyone impersonating a voter to cast a fraudulent ballot. Indiana couldn't cite a single example of voter fraud. By contrast, strong evidence exists of discriminatory efforts to limit access to the ballot based on race, national origin, and language minority status, as the extensive record collected during last year's reauthorization of the Voting Rights Act makes clear. Obviously, there is a far greater need for the Department to protect against attempts to limit ballot access than to prevent the exceedingly rare occurrence of fraudulent voting by those impersonating other voters.

a. Do you agree that the Department's priorities should focus on the most prevalent and significant voting problems? Do you also agree that the lack of evidence of fraudulent voting by persons impersonating other voters does not warrant a large commitment of resources by the Department?

b. If a photo ID requirement for voting is found to have a disproportionately negative impact on minority voters, and, at the same time, little evidence exists of voter impersonation to justify the need for such a requirement, doesn't that potentially constitute unlawful discrimination in violation of the Constitution and Section 2 of the Voting Rights Act?"

c. The role of the Civil Rights Division has been to increase ballot access. Prosecution of election-related crimes largely has been left to the Criminal Division, although the Civil Rights Division sometimes brings criminal prosecutions to punish those who sought to restrict voters' access to the ballot on the basis of race. This distinction in roles is important. If the Civil Rights Division is perceived as prosecuting those who vote erroneously, citizens will be less likely to report access problems to the Division, and it will be unable to maintain the community relationships that are essential to its mission of preventing discrimination. Do you agree that the Civil Rights Division's traditional emphasis on ballot access should be maintained?

d. The shift in priorities to combating voter fraud has affected the Civil Rights Division's work. The Division has failed to file cases to enforce provisions of the National Voter Registration Act that increase voters' access to the ballot. Instead, it has attempted to use the Act to force states to purge voters from registration lists. The Department brought one such case in Missouri, but it was thrown out because there was no evidence that any inaccuracy in Missouri's registration lists would affect the outcome of an election. This focus on non-existent voter fraud has been an enormous waste of resources. Now that we know there's no evidence to support the Department's focus on voter fraud, will you restore the Division's proper focus on ballot access rather than continuing to spend resources on voter fraud?

e. As noted above, in this Administration, the Division has filed only two cases to protect African Americans against racial discrimination in voting (one under Section 2 of the Voting Rights Act, the other under Section 5 of the Act) – a fraction of the number of such cases filed in the Clinton Administration. The low number of suits in this area is extremely troubling. Enforcing the Act on behalf of African Americans and other minorities should be a central part of the Division's work on voting rights. If confirmed, will you examine the work of the Voting Section to ensure it's enforcing all of the Voting Rights Act, including the prohibition in Section 2 of the Act against racial discrimination? Will you also look into the reasons why the Division has filed so few cases to protect African Americans from racial discrimination in voting, and provide an explanation to the Committee?

4. There have been several disturbing reports of improper personnel practices in the Civil Rights Division particularly in the Voting Section. In addition to the involuntary transfer of Robert Berman, mentioned above, I am concerned about reports of low morale in the Department's Section 5 Unit. At least thirteen of the analysts who review Section 5 requests have left since 2003 – that's more than are now in the Section. Recently, Teresa Lynn, an African American civil rights analyst who served for 33 years in the Section 5 unit, said in a National Public Radio interview that she had retired because of "fear of retaliation" and "disparate treatment of civil rights analysts based on race."

Ms. Lynn also spoke of low morale among the Section 5 analysts and identified the current Chief of the Voting Section, John Tanner, and the new Deputy Chief for the Section 5 unit as responsible. When she retired, Ms. Lynn sent an email to her colleagues saying that she left "with fond memories of the Voting Section I once knew" and was "gladly escaping the plantation it has become." Those are very serious charges from a person who had spent decades in the Department under both Republican and Democratic administrations. Do you agree that these allegations of race discrimination and poor morale in the Voting Section raise serious concerns that should be addressed?

5. During your hearing, Senator Cardin asked you about the Civil Rights Division's approval of a 2005 Georgia photo ID law over strong objections by career professionals that the law would have a discriminatory impact on minority voters. That 2005 law was enjoined by a federal court as having the effect of a Jim-Crow era poll tax, and the injunction was upheld by the Eleventh Circuit. The Georgia legislature abandoned the 2005 law, and passed a new version the following year. The Washington Post reported that Mr. Tanner dismissed concerns over the racially discriminatory impact of photo ID laws in recent public remarks to the National Latino Congresso, suggesting that such laws affect the elderly, but not minorities because "minorities don't become elderly the way white people do. They die first." These remarks display a shameful lack of understanding and sensitivity that is unacceptable in the person charged with enforcing the nation's laws against voting discrimination. These comments only underscore the Voting Section's troubling record under Mr. Tanner. If you are confirmed, will you review Mr. Tanner's record and consider whether he should be replaced as head of the Voting Section?

6. Allegations recently became public that Susana Lorenzo-Guiguere, a Special Litigation Counsel in the Civil Rights Division's Voting Section, under the supervision of Mr. Tanner, may have reopened the case of United States v. City of Boston, which was settled in 2005, for the purpose of obtaining taxpayer reimbursement for travel to and from Massachusetts, where her family reportedly maintains a summer home. Reports suggest that she collected per diem expense payments while spending the summer at her Cape Cod home. Although it appears that this particular incident is under investigation by the Inspector General and the Office of Professional Responsibility, if you are confirmed, it is important that you also investigate the

possible abuse of the Division's enforcement authority and its resources. If you are confirmed as Attorney General, will you examine these allegations regarding the Boston case?

7. One of the most disturbing aspects of the U.S. Attorney scandal is the evidence that some of the U.S. Attorneys were fired for failing to use their offices for political gains. The U.S. Attorney in New Mexico was fired after he refused to prosecute Democrats for election crimes because he felt the accusations were not supported by the evidence. The U.S. Attorney in Washington was let go after he refused to bring election fraud cases against Democrats in the state's 2004 Governor's race. There is also evidence that political advisors in the White House were involved in the effort to press U.S. Attorneys to bring cases to benefit Republicans.

a. Do you agree that no U.S. Attorneys should be removed for refusing to bring cases they believe lack legal basis? If confirmed, will you investigate whether political motivations had a role in the U.S. Attorney firings?

b. Will you pledge that if confirmed, you will not allow the political arm of the White House to influence decisions on prosecutions?

8. I'm also troubled by the Civil Rights Division's record in enforcing Title VII, the law against job discrimination based on race, gender, national origin or religion. The Division has filed and resolved far fewer Title VII lawsuits of all kinds compared to the previous Administration, even though it now has more attorneys. If you exclude cases developed by the Clinton Administration or by a U.S. Attorney's office, according to the Division's website, it's filed only 42 Title VII job discrimination cases since 2001. That's an average of only 7 cases a year. The Section currently has almost 40 attorneys, so it should have a stronger enforcement record. Do you agree that this record raises serious questions on whether the Department of Justice is adequately enforcing the laws against job discrimination?

9. The number of cases brought by the Department alleging a pattern or practice of discrimination against women, African Americans, or Latinos, is especially troubling. Pattern or practice cases have a huge potential to improve the workplace, because they root out broad, systemic discrimination that generally affects many workers, not just a few. The Department's role in bringing such cases is particularly important, because the cases usually require far more time and resources than civil rights organizations or even many private attorneys have available. If the Department fails to bring these cases, serious workplace problems are likely not to be addressed. Since 2001, the Division has filed 13 complaints alleging a pattern or practice of discrimination, roughly half the number filed in the Clinton Administration each year. If confirmed, will you look into the Department's record in pattern or practice cases, and ensure that the Department is doing all it can in this area?

10. I'm also concerned that the Division has backed away from bringing cases on behalf of African Americans and Latinos. According to the Equal Employment Opportunity Comission, each year since 2002, approximately eight times as many race discrimination charges have been filed nationwide by African Americans as by whites, although whites make up a far greater proportion of the overall population. This is a powerful indication that race discrimination against African Americans occurs more frequently in the nation's workplaces than race discrimination against whites. Yet the Section has filed almost as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined. No one should be the victim of discrimination, regardless of their race. But the Division's focus should also reflect the reality of where the greatest problems occur, and charges of racial and ethnic discrimination against African Americans and Latinos make up the largest group of charges of discrimination. If confirmed, will you review the Division's record and priorities on job discrimination to ensure that the Division's enforcement activities reflects the areas of greatest need?

11. As a judge, you frequently dismissed workers' cases of job discrimination, often denying them the chance to have their claims decided by a jury. I'm troubled that in some of these cases, you seemed to ignore or disregard clear evidence in the workers' favor.

In Sorlucco v. New York City, which was finally decided in 1992, you were twice reversed by the Second Circuit for overturning a jury verdict in favor of a female police officer who claimed that her employer retaliated against her after she reported having been raped at gunpoint by a more senior officer. First, you ruled that she should not even have a chance to present her claims to a jury. The Second Circuit overturned your decision, and ordered that the police officer be given a trial. After Officer Sorlucco won at trial, you tried to throw out the jury verdict. The Second Circuit overruled you again, saying you had abused your discretion as a judge.

In a 2005 case, Tomassi v. Insignia Financial Group, the Second Circuit ruled you "failed to apply the correct legal standard" when you dismissed an age discrimination case. The worker was a 60-year-old woman subjected to repeated negative remarks about her age by a supervisor. He suggested she should retire, admitted he wanted to hire workers who were "younger, energetic" and "attractive," and lied about the reason for replacing her with a 25-year-old employee. You said there wasn't enough evidence to give the worker her day in court, and dismissed her supervisor's negative comments about her age as simply "stray remarks."

In Lopez v. Metropolitan Life Insurance Company, you ruled against an African American worker of Jamaican descent who claimed he was denied a job because of his race. You denied him a trial, and your opinion barely even mentioned that the employer had told the applicant he was unlikely to succeed in attracting clients because the applicant had an accent and there were few African Americans in the area the company served. Most people would say that if an employer suggests someone can't do the job because he has an accent and only African Americans customers will want to work with him, it's at least relevant to the question whether there's been discrimination. But in weighing the evidence, you failed to discuss these critical facts.

a. Although you sometimes ruled for victims of workplace discrimination, on the whole, your record suggests you may be skeptical of workers who claim to suffer discrimination. When Senator Feinstein asked you about the Sorlucco case during your hearing, you said that you believe discrimination is wrong, and that you personally opposed a rule barring women from a club of which you previously were a member. Your stand in that instance is commendable. However, discrimination is often far less stark than the example you provided of a per se rule against admitting women members, and, often must be proved by indirect evidence viewed in the totality of the circumstances. Generally, the Department is faced with cases – like those you considered as a judge – in which the defendant does not admit to having a blanket discriminatory rule, and discrimination must be proved by circumstantial evidence. Why are you the right person to help turn around the Division's poor record on job discrimination?

b. Why did you give such little weight to supervisors' statements suggesting bias in the Lopez and Tomassi cases?

12. The racially charged prosecution of six African American high school students in Jena, Louisiana has raised concerns throughout the nation. Six African American youths were expelled and then charged with attempted second-degree murder last year after they were alleged to have fought with a white student. For months before the fight, there were heightened racial tensions at the school, which began when white students hung nooses from a tree in the schoolyard. The white students who hung the nooses, however, received only a slap on the wrist. Sen. Leahy, I, and other members of Congress have asked the Department to describe the actions it has taken to respond to the events in Jena. We have not received any response.

a. If confirmed, will you get back to us promptly on that issue?

b. The circumstances in Jena suggest a large discrepancy in the level of discipline that African American students and white students received from the school. Unfortunately, the problem of disparate discipline in schools is not unique to Jena. If confirmed, will you work with the Civil Rights Division and the Department of Education to determine whether the Department of Justice is doing all it can to address this the problem?

13. In a series of cases, the Supreme Court has interpreted the definition of "disability" under the Americans with Disabilities Act in a restrictive manner that has led several courts to conclude that people with a range of serious health conditions including epilepsy, diabetes, cancer, HIV, and mental retardation are not persons with disabilities protected by the Act.

a. In your view, does the Supreme Court's narrow interpretation of the definition of "disability" under the Act reflect the intent of Congress when it enacted the law?

b. What are the possible ramifications of this interpretation for veterans returning from war with conditions such as traumatic brain injury, loss of the use of limbs, post traumatic stress disorder, or epilepsy?

Prosecution of Former Governor Don Siegelman of Alabama

There has been a great deal of publicity recently surrounding allegations of partisan motivation in the prosecution of former Governor Don Siegelman of Alabama. Do you plan to review ongoing prosecutions, grand jury proceedings and investigations to ensure that there are no other proceedings with similar partisan motivation? If so, who will conduct those inquiries?

DC Gun Ban

For almost three decades, the District's ban on handguns and assault weapons has helped reduce the risk of deadly violence. City residents and public officials overwhelmingly support the ban, and until the recent decision, courts have upheld it. In that decision, the D.C. Circuit found that D.C.'s gun ban was unconstitutional under the Second Amendment. The Supreme Court has yet to decide whether it will review the ruling, so residents of the District are waiting to see if the current gun ban will remain in force. It's obvious that allowing more guns on the streets and in our community will increase the number of violent deaths in D.C., including homicides, suicides and accidental shootings. It's more likely that deadly gun violence will erupt in our public buildings, offices, and neighborhoods.

D.C. has a major gun violence problem already because of steady flow of guns into the District from other states with more lenient laws. The effectiveness of the District's current ban on gun possession is demonstrated by the fact that virtually none of the guns used in crimes in the District originated there. The solution to D.C.'s gun crime problem is in strengthening lax gun laws elsewhere, not weakening those in the District. According to the Bureau of Alcohol, Tobacco, Firearms and Explosives, nearly all guns used in crime in the city originated outside of the District – coming from jurisdictions with gun laws far less strict than the District's. The tragic and graphic stories of gun violence that capture front-page headlines in the District show that the current gun-safety laws need to be strengthened, not abolished.

1. What is your view of the Second Amendment?

2. Do you agree with former Attorney General Ashcroft that "the text and the original intent of the Second Amendment clearly protects the right of individuals to keep and bear firearms"?

3. Why should the District be prevented from regulating guns under an individual-rights view of the Second Amendment?

Assault Weapons Ban

Assault weapons are killing machines intentionally designed to maximize their deadly power by using a rapid rate of fire. Over and over, the nation has endured horrific mass shootings that might have been less devastating if we had an effective and permanent ban on these killing weapons and their ammunition. As the Virginia Tech tragedy reminded us, the high capacity ammunition clips used with these weapons virtually guarantee that a killer can inflict severe damage in a brief period of time. In one of the worst mass shootings in recent history, a troubled college student engaged in a killing spree lasting only 9 minutes that inflicted over 100 wounds on the victims. An estimated 170 shots were fired – about one shot every three seconds. In the end, more than 50 students, staff and faculty were injured or killed. Although the weapons involved at Virginia Tech were not semiautomatic weapons, investigators recovered 15-round and 10-round magazines -- magazines that were banned for ten years under the Assault Weapons Ban.

Many organizations have called for a renewal of the assault weapons ban. In a recent report, the International Association of Chiefs of Police called for a complete ban on military-style assault weapons. They pointed out that a 2003 analysis of FBI data revealed that almost 20% of officers who died in the line of duty between 1998 and 2001 were killed with weapons that could be classified as assault weapons. They've also called for a ban on .50 caliber sniper rifles, which can penetrate armor plating and destroy aircraft. These weapons are currently sold with less restrictive federal controls than standard handguns. We know from a GAO report that these weapons have been obtained by drug dealers in Indiana, Missouri and California. As Seattle policy analyst Bob Scales points out, the assault weapons issue is "not just a police issue. It's a public health issue, it's a youth issue and our schools are involved."

The risks of these weapons not only jeopardize lives in our communities. They also pose a serious threat to law enforcement. According to the National Law Enforcement Officers Memorial Fund, during the first six months of 2007, more than 101 U.S. police officers have been killed on duty already this year – the highest number of such deaths in 29 years. More than half were the result of fatal shootings. Homicides involving assault weapons are on the rise. The failure to renew the ban has undermined the safety of our streets, our neighborhoods and our schools. These high-capacity weapons and ammunition have no place in any community in America.

1. What is your position on the assault weapons ban? What about .50 caliber rifles?

2. Would you support legislation that regulates high capacity magazines?

3. Part of the answer to this violence is linked to reducing the number of assault weapons on the street. Would you be willing to work with those of us in Congress opposed to the ban?

Hate Crimes

Hate crimes violate everything our country stands for. More than 8,000 hate crimes are reported every year in the United States, but that's only the tip of the iceberg. The Justice Department confirmed in 2001 that many hate crimes go unreported. The Southern Poverty Law Center estimates that the real number of hate crimes committed in the United States each year is closer to 50,000. Despite the large number of such crimes every year, there's been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the Department charged 45 persons with hate crimes and convicted 38. In 2006, the Department charged 20 and convicted 19. Hate crime prosecutions have essentially been cut in half by the Bush Administration. Shamefully, the 2005 and 2006 editions of the FBI crime data compendium, *Crime in the United States*, contain no summary of hate crime data, a section that had previously been included since 1996. Hate crimes have obviously become less of a priority in recent years.

The numbers suggest a serious shift in the Department's priorities away from hate crime investigations and prosecutions, which is very troublesome. The current federal hate crime law was passed soon after the assassination of Martin Luther King, Jr. Today, however, it is a generation out of date. It still does not protect many vulnerable groups in society from bigotry and hate-motivated violence. Too often, these hate crimes go unnoticed. Last month, the Senate passed legislation to protect additional classes of victims and provide increased resources for state and local governments to investigate and prosecute hate crimes, but President Bush has threatened to veto the bill if it reaches his desk. The Administration's official position is that such legislation is "unnecessary and constitutionally questionable."

1. Do you share the Administration's view of the pending hate crimes legislation?

2. Would you be willing to publicly support our efforts to expand hate crime legislation to protect victims of such bigotry?

Rising Crime Rates and Federal Funding for Law Enforcement

The Attorney General needs to take a more active role to see that the federal government is doing its part to assist state and local law enforcement in combating violent crime. The FBI has reported an increase in the crime rate for the second year in a row. The trend is disturbing because crime rates had been falling steadily since the mid-1990s. Clearly, we need to provide greater federal support to state and local law enforcement. But, we're doing just the opposite. As crime rates are going up, federal funding for state and local law enforcement is going down. Two important federal anti-crime programs have been steadily losing funds: the community policing program and the grants to combat gangs and local crime. The COPS program has been improving community policing across the country with federal grants to state and local law enforcement to hire and train more police, purchase new crime-fighting technologies, and develop more effective police strategies. It's been a major success. It put more officers on the street in 13,000 communities across the country and was an important factor in reducing violent crime by over 26% between 1994 and 2001. It's an excellent return on investment.

In Massachusetts, Boston experienced suffered serious increases in gang and firearm violence during the late 1980's and early 1990's. We had the highest-ever homicide total of 152 in 1990. Significant investment from the COPS program -- a total of $17 million from 1994-2000 -- helped the Boston Police to dramatically decrease gang, gun and youth violence, quickly bringing the number of homicides down to the lowest level ever in 1991 - only 31 homicides has kept it there through in 2000. But in 2001, youth, gun and gang violence began to increase, but by 2005 and 2006 had since then doubled. During these six years period support dwindled. Boston received only $3 million in this period. Now, the President wants to cut the community policing program by 94 percent, and virtually eliminate the anti-gang grants.

1. What is your response to the President's threat to veto the Senate appropriations bill that would add $550 million for community policing grants and $1.4 billion for Byrne grants to combat violent crime and gangs?

2. What actions can the Department of Justice take to help state and local governments dealing more effectively with rising crime rates and falling funding?

Crime Prevention

Former Attorney General Gonzales stated in a speech earlier this year at the National Press Club that the Justice Department believes "…prevention is the real solution to crime among our youngest citizens. By law, the federal government has only a very limited role in prosecuting juvenile offenders – the vast majority of such crimes are prosecuted by the states. These are not issues that the Department can fix through heightened enforcement or by using federal tools. Instead we must focus on helping out communities that have plans and structures in place to work on prevention and offer positive alternatives to crime, violence and gang membership." Those were his words.

1. As Attorney General, would you have a similar philosophy on prevention?

2. What role, do you believe the Department of Justice should have in encouraging crime prevention programs?

Death Penalty

The death penalty is the most extreme form of punishment we have. Once administered, it cannot be undone, so we must be absolutely certain that it is applied in a fair and consistent manner. We know that since 1993, 120 people convicted and sentenced to death have been exonerated from state death rows prior to execution. We also know that minority defendants are disproportionately sentenced to death. The reason for this discrepancy is not clear, and a recent study by the National Institute of Justice has not provided adequate answers.

The possibility that innocent people are being executed or that the death penalty is being applied in a discriminatory manner makes it essential that the decision to execute a defendant to be open and transparent. Unfortunately, since 2001, the Department has changed its death penalty protocols in a way that makes the Attorney General's decision-making process confidential. In addition, the line prosecutors who are most familiar with their cases have been cut out. They are being given little input into the decision whether to pursue the death penalty in a particular case.

1. Do you believe that the government's decision to apply the death penalty should be more transparent?

2. As Attorney General, what steps would you take to make deliberations on the application of the death penalty more transparent?

3. A National Institute of Justice study on racial bias and the death penalty examined data from 1995-2000, and concluded that there was no racial bias at the federal level. Yet, the next 6 individuals facing the death penalty at the federal level are all African American males. As Attorney General, will you commit to make recent data available for analysis of the impact of race on the death penalty?

Death Penalty Procedure

As you may know, the Department of Justice recently issued extremely controversial regulations on death penalty appeals in federal courts. They give the Attorney General the power to certify states for special, "fast-track" procedures. If the Attorney General certifies a state, federal courts are required to review that state's capital cases on a faster and more limited basis. In the Patriot Act reauthorization, Congress authorized the Department of Justice to issue regulations on this subject. The idea was that if states develop systems to guarantee adequate representation of their death row prisoners, they could receive the benefits of abridged federal court review. This *quid pro quo* would encourage states to provide quality counsel to their prisoners and help make sure that no innocent person is sentenced to death.

The proposed regulations make a mockery of this goal. They fail to provide any meaningful definitions, standards, or requirements to ensure that states have in fact established counsel systems that comply with Congress's intent. They fail to provide any safeguards to shield the certification process from conflicts of interest or political influence. As a result, federal court review of death sentences will be dramatically curtailed, even in cases where the defendant may not have received a full and fair trial. These regulations have produced a firestorm of controversy. Comments from the Judicial Conference, the American Bar Association, capital defense organizations, federal public defenders of all 50 states, and many others understand that these regulations are badly drafted and dangerous. They're vague; they flout well-settled case law; they place significant burdens on the federal courts; and they create an unacceptable risk that innocent prisoners will be denied justice. In short, as Chairman Leahy, Senator Feingold, and I explained in our comments to the Department, these regulations are "unclear, unjust, and unwise."

If these regulations are implemented, they will cause protracted litigation and public outrage, and deal a heavy blow to the nation's commitment to due process and equal justice for all. In July 2001, Justice O'Connor stated, "After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." The proposed regulations would raise even more questions and take this nation a giant step backwards.

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

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

Sentencing Guidelines

The United States has the highest incarceration rate in the world. Over 2.2 million Americans are being held in federal or state prisons or local jails. The federal prison system is now the largest prison system in the country -- larger than any state system -- with nearly 200,000 prisoners. Two-thirds of these prisoners are African American or Hispanic. Nearly twelve percent of all young African-American men are incarcerated. Women are the fastest-growing part of the prison population, and more than 1.5 million children have a parent behind bars. These numbers suggest serious systemic failures in our society, especially the disproportionate impact of the criminal justice system on minorities and the poor.

Disparity in sentencing is a long-standing problem. Many of us on the committee worked together to produce the bipartisan Sentencing Reform Act of 1984 to balance the goal of impartial sentencing with discretion to make the sentence fit the crime in individual cases. We sought to correct the often outrageous sentencing disparities that resulted from consideration of race, gender and other illegitimate criteria. Before the enactment of the Sentencing Reform Act, Judge Marvin Frankel described these disparities as "terrifying and intolerable for a society that professes devotion to the rule of law."

Some judges think the Act went too far in limiting their discretion. As a federal judge in 1988, you ruled that the sentencing guidelines were unconstitutional. One could say that you were ahead of your time in light of recent Supreme Court decisions on constitutional problems with the guidelines. As a result, the federal sentencing guidelines are now advisory. But they still authorize judges to consider a wide range of so-called "relevant conduct" in deciding on sentences.

1. Has your opinion of the sentencing guidelines changed since your ruling in the *Mendez* case?
2. Given that you previously determined that the sentencing guidelines are unconstitutional, what is your opinion of the Justice Department's attempt to re-establish a mandatory sentencing guideline system?
3. How difficult will it be for you to reconcile your opinion as a judge on the sentencing guidelines with your responsibility as Attorney General to support the Administration's policies?
4. If sentencing guidelines are abolished, what sort of sentencing rules would you recommend to replace them?

Mandatory Minimums

The Administration strongly supports sentencing guidelines, and in June, the Department of Justice proposed legislation that would once again make the guidelines mandatory by creating a "minimum guideline system with an advisory maximum penalty" structure. In other words, the Department is advocating mandatory minimum sentences for all federal crimes, while leaving the maximum sentences advisory.

In a recent report, the United States Sentencing Commission found that "the rate of imprisonment for longer lengths of time climbed dramatically" in the last two decades and that "there has been a dramatic increase in time served by federal drug offenders." A major factor in the large increase in incarceration is the use of mandatory sentences, especially for low level drug offenders. According to the Sentencing Project, drug arrests have tripled over the last 25 years to a record 1.8 million in 2005, and the number of drug offenders in prisons and jails has increased by twelve-fold since 1980. Almost half a million people are incarcerated in state or federal prisons or local jails for drug offenses. Mandatory sentences have contributed to the enormous increase in the prison population.

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

2. Do you have any concern that increasing the use of mandatory minimum sentences will increase the disparate impact of such sentences on poor and minority communities?

Crack-Powder Laws

The crack-powder laws illustrate how mandatory minimum sentences can become a severe problem. The crack powder laws were originally designed to punish those at the highest levels of the illegal drug trade, such as traffickers and kingpins. However, the amount of a drug that triggers the harsh sentences is not associated with high-level drug dealing. A 2005 Sentencing Commission report found that only 15% of cocaine traffickers were high-level dealers. The overwhelming majority of defendants are low-level participants, such as street dealers, lookouts or couriers. These laws also have a severe impact on the African American community. In 2005, 82% of crack cocaine defendants were African Americans, even though they represent only a third of those who actually use the drug.

Under the current sentencing structure, the ratio for powder and crack cocaine is 100:1. One gram of crack cocaine triggers the same penalty as 100 grams of powder cocaine. Possession of 5 grams of crack cocaine triggers a 5 year mandatory minimum penalty. This is the only drug that has a mandatory prison sentence for a first-time possession offense. Senator Hatch and I recently introduced legislation to reduce the ratio from 100:1 to 20:1, and eliminate the mandatory minimum sentence of 5 years for first-time possession. The amount of crack cocaine triggering a mandatory minimum sentence would be raised from 5 grams to 25 grams, to reflect the most serious cocaine traffickers. The cocaine laws would be more consistent with the penalty structure for other types of drugs and would address the disparities in sentencing.

The Sentencing Commission recently amended the guidelines for crack cocaine by reducing the sentencing ranges, a change that will affect 78% of federal defendants. An analysis of the amendment suggests that if the amendment is made retroactive, nearly 20,000 non-violent, low level drug offenders would be eligible for a reduction in their sentences. However, the Commission recognized this as only an initial step in eliminating unwarranted disparities in the federal crack powder laws, and they have strongly urged Congress to act on the 100:1 ratio.

1. What is your view on the Sentencing Commission's proposed amendment to the guidelines for crack cocaine?

2. What's your position on the existing mandatory minimum sentences for crack cocaine?

3. Are you opposed to the proposal that Senator Hatch and I offered to repeal the mandatory 5 year sentence for mere possession?

Department of Justice Priorities

Federal law enforcement data show a major shift in the types of criminal prosecutions currently being pursued by the Department of Justice. Since 2000, white collar crime prosecutions are down 27%, while organized crime cases have declined 48%. Prosecutions of government employees for corruption have dropped 14%. Meanwhile, prosecutions for immigration, terrorism and national security cases have increased dramatically. Immigration cases have increased by 127% since 2000. Federal resources have also been redirected to national security and terrorism-related investigations. The proposed budget for the FBI is a useful example. The FY 2008 proposed distribution of funds for the FBI includes 60% for intelligence and counter-terrorism work; 33% for criminal law enforcement; and 7% for state and local assistance.

There is no question that investigating and prosecuting terrorism must be a high priority, but we must not forget the importance of protecting our citizens from everyday crime. For the second year in a row, violent crime has increased. Funding has been reduced for important law enforcement initiatives such as the COPS Program and the Byrne Grant Program. By focusing the majority of our resources on foreign threats, we may be compromising our safety here at home. Neglecting to pursue white collar criminals and corrupt officials can have an adverse effect on our economic well-being and our trust in the government.

As a federal district court judge, you've presided over hundreds of cases, ranging from drugs and weapons to terrorism and white collar crime. You undoubtedly understand how crime can undermine community safety and public trust. As Attorney General, you will have a major role in shaping the priorities of the Department.

1. Do you agree that a balanced approach would be more effective in meeting our security goals both domestically and internationally?

2. What actions would you take to improve the distribution of resources to ensure that we do not compromise the safety of our communities?

Juvenile Justice and the 'Jena 6'

The "Jena 6" case is a stark reminder that, despite the progress in reducing racial disparities in the justice system, they're still serious problems, especially in the juvenile justice system. The racially charged prosecution of six African American high school students in Jena, Louisiana has raised concerns throughout the nation. Six African American youths were expelled and then charged with attempted second-degree murder last year after they were alleged to have fought with a white student. For months before the fight, there were heightened racial tensions at the school, which began when white students hung nooses from a tree in the schoolyard. The white students who hung the nooses received a slap on the wrist.

In 1998, Congress addressed the issue of disproportionate minority contact within the juvenile justice system. States were asked to collect data on juvenile contacts with police, courts and corrections. Currently, states are required only to "address" efforts to reduce racial disparities. Clearly, more needs to be done. DMC is a problem in every state in the country. Youth of color are more likely to be detained, to be formally charged in juvenile court, and to be confined to state correctional systems than white youth who have committed the same types of offenses and have similar delinquency histories. Despite making up only 16% of the youth population in America, African Americans youth comprise more than 58% of youth admitted to adult prisons.

1. The circumstances in Jena suggest a large difference in the level of discipline that African American students and white students received from the school. Unfortunately, the problem of disparate discipline in schools is not unique to Jena. If confirmed, will you work with the Civil Rights Division and the Department of Education, to determine whether the Justice Department is doing all it can to address the problem?

2. What steps would you take to address this problem?

3. Would you support requiring states to take concrete steps to reduce racial disparities in the juvenile justice system, such as providing the federal government with more detailed information on the monitoring, evaluation and reporting of detained youth?

4. Research demonstrates that youth of color are treated more harshly than white youth – even when charged with the same offense. However, in many parts of the country, no accurate data exists on the number of Hispanic or Latino youth in the juvenile justice system. Would you support efforts to improve data collection, so that there is more information on detention rates across the country – and to help jurisdictions reduce any disparities that exist?

Transfer of Youth to Adult Court

There are 200,000 youths that are tried, sentenced or incarcerated as adults every year in the United States. The majority face charges for nonviolent offenses. On any given day, nearly 7,000 young people are locked up in adult jails – a number reflecting a growing trend over the last decade. According to the Department of Justice, between 1990 and 2004, the number of youth in adult jails increased by 208%. One in ten youths incarcerated on a given day is in an adult jail. In 1997, youth of color comprised 46% of the cases transferred by the judicial system to adult criminal court and 58% of the youth admitted to state prisons.

In a recent study of metropolitan New York and New Jersey, teenagers prosecuted in adult courts were 26% more likely to be re-incarcerated. Research shows that longer sentences do not reduce the likelihood of re-arrest either in the juvenile or adult court. A study found that the suicide rate of juveniles in adult jails is 7.7 times higher than in juvenile detention centers. Although youths 15 to 21 made up only 13 percent of the prison population, they comprised 22 percent of all suicide deaths in prison. Additionally, nearly 10% of the youth interviewed in a recent study reported a sexual attack or rape attempt against them in adult prisons, compared to one percent in juvenile institutions.

1. Given the data on this issue, what is your view on the transfer of youth to the adult system?

2. Would you be willing to work with the Committee on efforts to reduce the number of youths transferred to the adult criminal system?

Juveniles and Mental Health

A disturbing trend has developed called "warehousing" – which places youths with mental illnesses in the juvenile justice system because no appropriate treatment is available. More than 9,000 children a year are placed in juvenile justice systems so that they can receive mental health care, which often is not available. Two-thirds of juvenile detention facilities report holding children, sometimes as young as seven, who are waiting for mental health placements. Overall, about 7% of youth in detention facilities are awaiting such placement.

It is now well established that the majority of youth involved with the juvenile justice system have mental health disorders. Youth in the juvenile justice system experience substantially higher rates of mental disorder than youth in the general population. Studies consistently document that anywhere from 65% to 70% of youth in the juvenile justice system meet criteria for a diagnosable criteria mental health disorder.

1. What is your view on the number of mentally ill juveniles currently detained – even though they have not been convicted of any crime?

2. Are you willing to work with Congress and the Office of Juvenile Justice and Delinquency Prevention to provide better care for youths with mental illness who come into contact with the criminal justice system – not for any crimes but for medical treatment?

Prison Rape Elimination Act of 2003

1. Sexual violence in detention is a serious human rights issue. In *Farmer v. Brennan* in 1994, the Supreme Court recognized that the failure to protect inmates from this form of abuse can amount to cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution. Every U.S. jurisdiction has a law criminalizing custodial sexual misconduct. The federal government began addressing this problem through the Prison Rape Elimination Act in 2003. It calls for the analysis of the incidence and effects of prison rape and the provision of adequate funds to protect detainees from sexual abuse. Will you fully enforce the Act's mandate to establish a zero-tolerance standard for sexual violence in detention facilities across the country?

2. One of the Act's key provisions is the development of national standards for the detection, prevention, reduction, and punishment of sexual violence in detention. It created the National Prison Rape Elimination Commission to study the problem and prepare standards. The Commission has convened expert working groups on particular issues. Each working group is composed of experts in the relevant fields, including corrections administrators, researchers, government consultants, and advocates. Once the Commission has preliminarily approved the standards, and after a public comment period and subsequent Commission revisions, if any, the Attorney General will have one year to publish a final rule adopting national standards, based on his independent judgment and giving due consideration to the recommended standards provided by the Commission. What degree of deference will you give the experts who have worked together over the past year to develop the standards and ensure that they sufficiently balance the costs of compliance with the urgent need to improve inmate safety?

3. Once the national standards are adopted, all corrections systems will be required to comply with them. The Attorney General must establish procedures ensuring compliance and reducing the discretionary grants by five percent to states that fail to adhere to the standards. As Attorney General, will you promptly develop a policy that strictly enforces the expectation that all jurisdictions will fully comply with every provision of the ratified national standards?

4. The Attorney General is authorized to provide grants for research through the National Institute of Justice or any other appropriate entity. Will you use this grant-making power to compile information about the problem of prisoner rape, and refuse to support efforts that seek to minimize the extent of the problem?

5. One of the stated purposes of the Act is to "increase the accountability of prison officials who fail to detect, prevent, reduce and punish prison rape." As Attorney General, will you take responsibility for ensuring that sexual violence is not tolerated by personnel within federal facilities?

6. Under federal law, a person with custodial, supervisory or disciplinary authority who engages in a sexual act with someone in federal detention or custody has committed a felony. As the nation's chief law enforcement officer, will you encourage the criminal prosecution of

federal officials who abuse their authority by engaging in sexual contact with detainees, and seek severe penalties for such violations?

7. There has been ongoing concern about the Texas Youth Commission, where more than 2,000 allegations of sexual and physical abuse of juvenile detainees have recently come to light. The Dallas Morning News reported that the Justice Department had collected information over the course of four years but failed to prosecute anyone or do anything to produce agency-wide reforms. Former department attorneys told reporters that the political climate in the Department discouraged the prosecution of official misconduct. Will you ensure that such abuses return to the top of the Civil Rights Division's agenda?

8. Sexual violence has a disproportionate impact on the most marginalized prisoner populations, especially gay and transgender inmates. Do you agree that the right to be free from sexual abuse is universal, and must be protected regardless of a prisoner's status, sexual orientation, or gender identity?

Nomination of Michael B. Mukasey for Attorney General

Questions for the Record
Senator Joseph R. Biden, Jr.

Politicization of Hiring/Termination Decisions

On September 14, 2007, I sent a letter to then serving Attorney General Alberto Gonzales requesting a briefing to the Senate Judiciary Committee by October 15, 2007 on the hiring process and conversion of political appointees to career positions at the Department of Justice. To date, I have received no response from the Department (a copy of this request will be forwarded to you upon request).

- Do you intend to respond to my request within a reasonably short time should you be confirmed as Attorney General? And, will you, or an appropriate designee, provide this briefing to the Senate Judiciary Committee staff?

- Given the politicization of the hiring and termination process of political appointees and career positions at the Department, will you commit to taking steps to ensure that any conversion of political appointees to career positions is transparent, non-political, adheres to all applicable rules and regulations, and avoids even the appearance of impropriety?

COPS and Assistance to Law Enforcement

- In your hearing testimony you expressed the view that grants programs such as COPS were meant as a short-term supplement to states. In your view, what are the appropriate circumstances for the implementation of grant assistance such as the COPS program to local law enforcement?

- The increase in crime around the country to levels not seen since the 1990s, the post-9/11 reallocation of FBI resources away from traditional crime to counterterrorism, and the reduction in the number of state and local law enforcement officers has created a perfect storm for police and sheriffs departments. Put simply, state and local law enforcement are being asked to do more with less. Under these circumstances isn't limited competitive grant assistance from the federal government to state and local law enforcement appropriate? If not, please elaborate on the circumstances under which you would feel that federal financial assistance to state and local law enforcement would be warranted.

Military Commissions Act of 2006

- During debate on the Military Commissions Act of 2006, Senator John Warner stated that all the techniques banned by the United States Army Field Manual on Intelligence Interrogation including "water boarding," forcing detainees to be naked, applying beatings, electric shocks, burns, or other forms of physical pain, using dogs, and inducing hypothermia or heat injury, constitute "grave breaches" of Common Article 3 of the Geneva Conventions and are "clearly prohibited" by the Act.[1]

- Senator Warner – one of the Military Commissions Act's primary authors – was expressing the intent of Congress to criminalize the use of these techniques when it passed the Military Commissions Act. Will you stand by Senator Warner's interpretation of the law he authored? If not, why not?

Torture

- Article 2 of the Convention against Torture states, in relevant part: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

- Do you believe any "exceptional circumstances" exist that would justify torture? If so, please describe those circumstances in as much detail as possible.

- As attorney general, would you authorize the use of torture in any circumstances? If so, please describe those circumstances in as much detail as possible.

Waterboarding

- The US has long taken the position that techniques such as waterboarding, forced standing, and sleep deprivation constitute war crimes. As early as 1901, a US Army Major, Edwin Glenn, was sentenced to 10 years hard labor for waterboarding a captured insurgent in the Philippines. US military commissions after World War II prosecuted Japanese troops for engaging in waterboarding and other techniques allegedly currently being employed by the CIA. A Japanese soldier named Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to "stand at attention for seven hours" (*United States of America v. Tetsuo Ando*, Yokahama, May 8, 1947). Another was sentenced to 10 years for, among other things,

[1] Congressional Record, September 28, 2006, p. S10390.

forcing a prisoner to “bend his knees to a half bend, raise his arms straight above his head, and stay in this position anywhere from five to fifteen minutes at a time” (*United States of America v. Chikayoshi Sugota*, Yokahama, April 4 1949).

- Do you believe the US was right to prosecute these men?

- If the Department of Justice now takes the position that waterboarding, forced standing and use of stress positions are legal – and within the bounds of Common Article 3 – what grounds will we have to condemn or prosecute enemies of the US if they engage in such practices against captured US forces in the future?

Hamdan

In the wake of the *Hamdan* decision, everybody – including the administration – has acknowledged that Common Article 3 of the Geneva Conventions applies to the treatment of anyone the US takes into custody in the fight against terrorism. The same minimal standard that protects US troops and citizens applies to the people we have taken into custody – which means that anything we say can be lawfully used against those in our custody can also be lawfully used against captured Americans.

- Would you agree, then, with the commonsense principle that we should not employ any interrogation techniques against enemy prisoners that we would consider unlawful if used against Americans?

- If the government of Iran or North Korea captured an American, held him incommunicado with no access even to the Red Cross, tied his hands to the ceiling and forced him to stand without sleep in the cold for days on end, would you consider that acceptable? Would it be acceptable for Iran or North Korea to strap that captured American to a table, stuff his mouth with a cloth, and pour water over his face to create a sensation of drowning?

Rendition

Many have noted that President Clinton initiated the so-called rendition program. But renditions under Clinton were designed to bring terrorist suspects *to* justice – by bringing them here to the United States to face charges, as was done with respect to a suspect in the 1993 World Trade Center bombing, or by returning them to their countries of origin to be tried for their crimes or imprisoned pursuant to past convictions.

The program changed under President Bush – into rendition *away* from justice, by taking detainees from places like Italy and Germany where they could have

been prosecuted to places where they were hidden away from any court. Some of those rendered away from justice were innocent victims – individuals like Khaled el Masri, the German abducted in Macedonia, and Maher Arar, the Canadian arrested at JFK airport, who were then sent to Syria, where they were not charged with any crime, but held incommunicado and abused. And others – such as Khalid Sheikh Mohammad (KSM) and other high value detainees – rendered to secret prisons and other undisclosed locations where they are widely alleged to have been tortured and abused, making it difficult, if not impossible, to charge them before a tribunal and bring them to justice as the victims of 9/11 deserve.

- How can you justify the rendition of individuals *away* from justice?

- If the purpose is to gather intelligence, why would the United States trust interrogations carried out by Egyptian or Syrian intelligence agencies – agencies that the United States has long acknowledged and criticized for engaging in torture and abuse?

- If the purpose is to keep them off the streets, why the need for secrecy and incommunicado detention in a place where they can never be brought to justice? Do you think that the leaders of al-Qaeda didn't know when KSM was arrested? And that by detaining him in secret the US somehow tricked al-Qaeda into thinking he was still at-large, and if the US had acknowledged his arrest and detention they would be giving away a great secret?

President's constitutional powers

When asked whether the president's constitutional powers allow him to authorize an illegal act, you responded: "If by illegal you mean contrary to statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law."

- In his well-known concurring opinion in the Steel Seizure Case (*Youngstown Sheet & Tube Co. v. Sawyer*), Justice Jackson articulated an often-cited test for evaluating the limits of presidential power during wartime. Justice O'Connor cited this case in support of her statement in *Hamdi v. Rumsfeld* that, "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Do you subscribe to Justice Jackson's test, which limits the president's wartime power in a particular area when Congress has passed legislation in that area, or do you believe the president's power under Article II of the Constitution is plenary?

U.S. Attorney Dismissals & Executive Privilege

- Do you believe the reputation of the Department of Justice has been damaged by the way former Attorney General Gonzales handled the firings of the US Attorneys and the manner in which the Department and the White House explained the firings to Congress and the American people?

- If so, and if confirmed, what steps will you take to correct those mistakes to ensure that such inexcusable conduct does not happen under your watch?

- As you know, the Inspector General at the Justice Department has commenced investigations into the conduct of the former Attorney General Gonzales and others former Department personnel regarding testimony provided to this Committee about the firings of U.S. Attorneys.

- If confirmed, do you promise that you would not interfere with, hinder or otherwise obstruct these investigations, even if upholding this pledge were contrary to the President's (or his advisers') direction?

- If the Inspector General uncovers potential criminal conduct by Mr. Gonzales or any other Department personnel, will you promise to appoint a nonpartisan special prosecutor to handle any such finding of improper conduct?

- The Department of Justice has taken the legal position that former top White House aides, such as Harriet Miers and Karl Rove, are immune even from appearing before a Congressional Committee. Do you believe that the President's invocation of Executive Privilege protects *former* top White House officials from even appearing before Congress in response to a validly issued subpoena?

- The White House under President Bush has taken unprecedented steps to "politicize" federal agencies that should be independent from political influence. From the hiring and firing to bankruptcy judges to the formulation of national drug control policy, the White House Office of Political Affairs has had enormous and improper influence. In fact, when the former head of that office testified before this Committee, she remarked, "I took an oath to the President." Of course, her oath was in fact to the Constitution and she quickly corrected this mistake when pointed out by Chairman Leahy.

    - Will you allow the Office of Political Affairs to, in any way, influence decisions about the hiring or firing of DOJ personnel?

- Will you pledge not to provide the Office of Political Affairs any information about any ongoing investigation, civil or criminal?
- How else can you assure me and the American people that you will not be subject to such improper influence, that you will speak truth to power, and that you will above all else uphold your oath to the Constitution and the rule of law?

- This summer the Justice Department announced that, even if Congress issued a contempt of Congress citation in response to an official's failure to appear pursuant to a validly issued subpoena, it would block prosecution of any contempt of Congress charge against presidential aides (current or former) covered by Executive Privilege.
  - Do you believe that the Constitution and the principle of separation of powers allow the Department to prevent a U.S. Attorney from pursuing such a contempt citation?
    - If so, please explain in detail your legal rational.
    - If not, will you pledge to allow any U.S. Attorney to use his or her prosecutorial discretion in such instances to determine whether there is probable cause to charge the contempt citation?
  - On the first day of your testimony before this Committee you indicated that if Congress referred a contempt citation to the U.S. Attorney and the President invoked Executive Privilege, the U.S. Attorney must make an independent determination of the merits of the Executive Privilege claim before deciding whether to proceed. Yet, later you seemed to indicate that it would be improper for the U.S. Attorney to pursue such a citation if DOJ had instructed it not to.
    - Which view do you hold?
    - If it is the former, doesn't this put the U.S. Attorney in a position of deciding the merits of the claim of Executive Privilege, a job that is more appropriately suited for the courts?
    - If it is the latter, doesn't this make any claim of Executive Privilege absolute?
      - Then how do you square that action with the Supreme Court authority of *U.S. v. Nixon*, which recognized a qualified – not absolute – privilege.
      - Under this view, would the U.S. Attorney ever review the merits of the contempt claim, or must he or she simply refuse to pursue every contempt referral based on the Department's (and the Administration's) direction?

  - Is it your view that 2 U.S.C. § 194 does not apply in any case where the President has invoked Executive Privilege?

        - If so, is this based on your views on Executive power rooted in Article II? If not, what is the basis for this view?

Renewing the Federal Assault Weapons Ban

- The Federal Assault Weapons Ban expired in 2004. The ban had prohibited the manufacture and sale to civilians of AK-47s and other semi-automatic assault weapons, as well as high-capacity magazines holding more than 10 rounds. As you know, the bloodiest shooting in U.S. history on the campus of Virginia Tech involved a shooter with large capacity magazine clips, which would have been illegal for purchase had the ban been extended.
    - What steps will the Department of Justice take to urge Congress to renew the Assault Weapons Ban?
    - Will you actively push for renewing the Assault Weapons Ban?
    - Do you believe renewing the ban is important to fighting gun crimes, saving lives, and improving public safety?
    - Do you believe that high-capacity ammunition magazines, like the ones used by the Virginia Tech shooter, should be illegal?

Drug Sentencing

As a federal judge in Manhattan, you've addressed and dealt with the scourge of drug use on our city's streets and the effects it has on lives, families, and our society. Under federal law it takes 100 times more powder cocaine to trigger the same sentences as it does for crack cocaine.

- Do you believe that the penalties for these two forms of the same drug should be equalized?
    - If so, would you do so by raising penalties for powder cocaine, and if so, why do these penalties warrant increased sentences?
    - If not, please explain your view with specific, evidence-based reasons.
- Do you believe that the current mandatory minimum sentence of five years for simple possession of five grams of crack cocaine should be repealed? If not, why do you believe that crack cocaine should be the only drug for which there is a mandatory minimum sentence for simple possession for a first time offender?

Civil Law

- There has been much discussion in recent years about whether the U.S. judicial system should even consider or look at foreign law or customs in determining our own precedent. Without relying on it as precedent, do you believe that foreign laws or customs might ever be useful comparisons or perspectives when deciding issues that have little precedent in U.S. case law?

Nomination of Michael B. Mukasey to be Attorney General of the United States
Written Questions from Senator Herb Kohl

Office of Legal Counsel Independence

1. In 2004, 19 former Office of Legal Counsel (OLC) officials outlined a number of principles that they believe should guide OLC opinions. One of their recommendations included the principle that "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies." According to press accounts, the Office of the White House Counsel and the Office of the Vice President have been deeply involved in the drafting of opinions issued by the Office of Legal Counsel.

   Is it appropriate for the White House to be involved in the drafting of OLC opinions before OLC renders final advice on the legality of Administration policies, whether ongoing or proposed?

   Will you place limitations on communications between OLC officials and the White House prior to the issuance of final OLC opinions?

2. According to Jack Goldsmith, during his time as head of OLC, he withdrew more opinions than any of his predecessors. One of those opinions was the August 2002 torture memo that you called a "mistake." According to a recent *New York Times* story, in February 2005, OLC issued another opinion endorsing the "harshest interrogation techniques" ever used by the CIA. Many view this as a reinstatement of the withdrawn August 2002 memo.

   Will you commit to notifying Congress if other opinions withdrawn or modified during Goldsmith's tenure at OLC were reinstated, in whole or in part, or if the policies or programs affected were continued based on similar or new legal reasoning after Attorney General Gonzales was sworn in as Attorney General on February 3, 2005?

Interrogation of Enemy Prisoners

3. During the hearing, you acknowledged that Congress has the authority to prohibit torture and cruel, inhuman and degrading treatment. You also expressed the belief that the current statutes in this area are constitutional. On the issue of electronic surveillance, however, you left open the possibility that the President may have inherent powers that Congress cannot limit under the Foreign Intelligence Surveillance Act. You referred to former Attorney General Griffin Bell, who said that FISA may not have reached the limits of presidential authority.

   Do you believe the same is true of Congressional limitations on interrogation? Can Congress define these limitations however it chooses, or do you believe that the President has certain inherent powers to interrogate enemy prisoners that Congress cannot limit?

4. **Do you believe that torture is an effective method of interrogation that elicits valuable intelligence information?**

5. **Do you believe that cruel, inhuman and degrading treatment, or other coercive techniques that fall short of torture, are effective methods of interrogation that elicit valuable intelligence information?**

6. Many national security experts argue that the abusive interrogation techniques authorized by the Administration have undermined our efforts to combat terrorism around the world. Specifically, they argue that the use of abusive interrogation tactics strains relationships with our allies, fuels anti-Americanism, and bolsters terrorist recruitment. Former Secretary of State Colin Powell suggested that the world is "beginning to doubt the moral basis of our fight against terrorism."

   Do you agree with these criticisms of the use of abusive interrogation techniques?

7. In 2005, Congress passed the Detainee Treatment Act in response to public allegations of ongoing abuse by government interrogators. That law was intended to govern interrogations by all government personnel, including the Central Intelligence Agency. According to the *New York Times*, OLC issued an opinion saying that the aggressive interrogation methods being used at the time were not impacted by that law.

   Do you believe it is appropriate for OLC to issue secret opinions interpreting Congressional statutes and then refuse to share that interpretation with Congress?

State and Local Law Enforcement

8. When I asked you about the COPS program, you said it was not supposed to be an ongoing funding program for police departments. You went on to say that it should encourage state and local governments to pick up the funding for these positions when the federal funds run out. I do not disagree with that. However, we have to deal with the reality on the ground today. Medium-sized cities around the country have seen record increases in violent crime in recent years. As a result of cuts to the COPS Universal Hiring Program, police departments in those cities have large numbers of vacancies, without the funding to fill them.

   Do you agree that we have an obligation to provide assistance under the COPS Hiring Program to these communities today to help combat violent crime?

Antitrust

9. I have been very disappointed in a sharp cutback of antitrust enforcement at the Justice Department. The Justice Department's own statistics show that, compared to the last four years of the Clinton administration, the number of merger investigations initiated by the Justice Department in the most recent four years for which there are complete statistics (FY 2003-2006) has declined by nearly 60 percent, and the numbers of mergers challenged have declined by 75 %. And the number of non-merger civil investigations has declined by over a

third during these last four years as compared to the last four years of the Clinton administration.

Additionally, mergers among direct competitors in highly concentrated industries affecting millions of consumers have been approved by the Justice Department in recent years – including the Whirlpool/Maytag deal, and AT&T's acquisition of Bell South, to name just two – without the requirement of any divestitures or consent decrees to protect consumers, often over the objections of Justice Department career staff. Sometimes it appears that the Department has been more concerned with lessening the burden on merging companies in the merger review process than protecting the American consumer. Indeed, in October 2006, the New York Times editorialized that Justice Department merger policy "often appears to be little more than 'anything goes.' One gets the impression at times that the referee has left the playing field."

Do you share my concern at what appears to be a sharp decline in antitrust enforcement at the Justice Department? And what steps will you take to reverse this trend?

10. **Do you agree with the conclusion contained in the Antitrust Modernization Commission's April 2007 Report that merger law, as reflected in the joint Justice Department/Federal Trade Commission <u>Horizontal Merger Guidelines</u>, is fundamentally sound and should apply without modification to high tech industries?**

11. **Are there any recommendations of the Antitrust Modernization Commission which you believe would require changes to the Justice Department's policies or practices which you favor implementing? Are there any with which you disagree?**

12. The Antitrust Modernization Commission's April 2007 Report stated:

> "Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where . . . [the immunity] is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."

Do you agree with this statement and the principle that exemptions from the antitrust law should be disfavored?

13. I have introduced legislation, S. 772, the Railroad Antitrust Enforcement Act, which would remove the antitrust exemptions currently protecting the freight railroad industry and authorized the Justice Department to bring action to block mergers and acquisition in the railroad industry that violate antitrust law.

Do you support this legislation?

14. We have received allegations of anti-competitive and monopolistic conduct by DFA, the nation's leading milk marketing cooperative. One allegation in Florida is that independent

dairy cooperatives could not have their milk processed in plants affiliated with DFA unless the independent cooperative paid the processor millions of dollars about the cost of processing the milk. It is alleged that this and other anti-competitive conduct destroys the ability of independent cooperatives to compete and ultimately results in higher milk prices to consumers.

We have been informed that a year ago the staff of the Antitrust Division recommended to the Assistant Attorney General for Antitrust that the Justice Department pursue an antitrust case against DFA, but that the Assistant Attorney General has taken no action on that recommendation.

Will you pledge to investigate this issue, and to pursue an antitrust enforcement action should Antitrust Division staff find that the basis exists for such an action?

Questions from U.S. Senator Dianne Feinstein
to Michael B. Mukasey, Nominee for Attorney General of the United States

1. During the hearing, Senator Whitehouse asked you whether water-boarding is constitutional. You answered, "If water-boarding is torture, torture is not constitutional." As you know, you have received a letter from the Democratic members of the Judiciary Committee, asking you a follow-up question in relation to that testimony. In addition to the question posed in that letter of October 23, please answer the following question:

- Are all credible, physical threats of death torture (and therefore illegal)?

2. During the hearing I asked you about the statement in your *Padilla* opinion that the President would have unreviewable authority to act to repel an aggressive act, even without Congressional authorization. I asked how long that unreviewable authority would last, and you said, "as long as it has to until the other political parties involved in the matter can take the matter up and deal with it."

- Do you mean that if Congress takes no action, the President's power could be indefinite? What if Congress doesn't act for several years – would the President's power last until then? And how long can the President claim to be acting in response to an attack – could something the President does tomorrow be unreviewable as a response to the attacks on 9/11 (more than six years ago)?

- How broad is the President's authority during this time? Are there any constitutional limits on that authority?

- What if Congress didn't act at all? Would the President have unlimited authority, even in contradiction of previous statutes Congress had enacted?

- Once Congress acts, does that immediately terminate the President's authority?

- Is this power only in response to an attack, or are there other circumstances when the President can act without review by the courts? For instance, could the President use this power to act preemptively?

3. You indicated during your testimony that, under certain circumstances, the President might have authority to decide that a statute is unconstitutional.

- Please describe the parameters of that authority.

- Do you agree that if the President decides to act in contradiction to a statute, the President would have an affirmative obligation to notify Congress of this fact?

4. At the beginning of the *Padilla* case, you signed an arrest warrant for Mr. Padilla as a material witness, and assigned him counsel. Later, the government notified you *ex parte* that it wanted to withdraw the material witness subpoena, and asked you to sign an order vacating the arrest warrant – which you did. The consequence of vacating the warrant was that Padilla would be transferred from New York to South Carolina and would be denied access to a lawyer.

- Did the government tell you, before you signed the order vacating the arrest warrant, that the government would continue to detain Mr. Padilla but move him out of New York and deny him access to the lawyer you had appointed for him?

- If not, would knowing those facts have changed your decision about whether to vacate the arrest warrant?

5. Attorney General Gonzales has testified that "it would be improper to remove a U.S. Attorney to interfere with or influence a particular prosecution for partisan political gain." That is a very low bar, and it appears that some U.S. Attorneys were fired simply because of disagreements about priorities – like whether to pursue gun cases or public corruption cases.

- Will you implement a standard, either formal or informal, for when U.S. Attorneys may be fired? What will that standard be?

- How will you communicate the Department's priorities to U.S. Attorneys, and how will you let them know whether they are meeting those priorities?

- Do you agree with Mr. Gonzales that "interfering with or influencing a particular prosecution for partisan reasons" is the only improper basis for firing a U.S. Attorney? If not, what are other improper reasons?

6. As you know, the Preserving United States Attorney Independence Act of 2007 (S. 214) has become law. It repealed the Attorney General's authority to name interim U.S. Attorneys for indefinite periods. When the bill was under consideration in the Judiciary Committee, there was discussion of allowing an Interim U.S. Attorney to serve for 120 days, followed by an Acting U.S. Attorney pursuant to the Vacancies Reform Act. The Committee did not take that approach; instead, the new law limits interim appointments to 120 days, after which the district court must appoint an Acting U.S. Attorney.

- If confirmed, will you commit to sending nominees for U.S. Attorney positions to the Senate soon after a vacancy arises, to allow the Senate to confirm a new U.S. Attorney within 120 days?

7. I am the author of the United States Attorney Local Residency Restoration Act of 2007 (S. 1379), which is now pending in the Senate. Under the law before 2006, U.S. Attorneys were required to live in or near their districts, although exceptions were permitted in special circumstances (such as the appointment of Patrick Fitzgerald as special prosecutor). My bill would restore that law, undoing a change that was made in the 2006 Patriot Act reauthorization that has led to many U.S. Attorneys serving dual roles.

- If confirmed, will you commit to not appoint incumbent U.S. Attorneys to any dual or additional responsibilities that would require an exemption from the residency requirement?

8. During the hearing I asked you about your rulings in the case of *Sorlucco vs. NYPD*. You said that the question before you was whether the NYPD acted unlawfully, not whether it had acted sensibly or humanely.

The question before you was whether the NYPD discriminated against Officer Sorlucco by treating her differently than it treated the perpetrator. Officer Sorlucco was disciplined harshly for, among other things, not safeguarding her weapon properly: she was put on modified duty, then on restricted duty, and then fired. At the same time, nothing happened to the perpetrator. The Department did not promptly interview him or initiate a thorough investigation of him until well over a month after Officer Sorlucco had been fired.

- Why did you substitute your judgment for the jury's finding that the NYPD had discriminated against Officer Sorlucco?"

- What more would have been necessary for you to have found a legal violation by the Department?

9. Since this Administration took over the Department of Justice in January 2001, the Employment Section of the Civil Rights Division has filed 44 Title VII cases, just 34 of which involved individual lawsuits against state or local employers. At this point, the Department of Justice is on track to file 40% fewer cases than under the previous Administration. Yet there is no evidence that complaints of employment discrimination have decreased.

- The Department of Justice provides the initial assessment of whether an allegation of discrimination should proceed. Your decision in *Sorlucco* suggests that you imposed an unusually high bar in determining whether a case merits its day in court. What in your record demonstrates your commitment to fair consideration of civil rights cases? What steps will you take to ensure vigorous Title VII enforcement?

10. Over the past five years, appeals from the Board of Immigration Appeals (BIA) to the circuit courts have increased by more than 600 percent. In the Sixth and Eleventh Circuits they have increased by more than 1000 percent, and in the Second Circuit they have increased by more than 1500 percent. The reason appears to be a 2002 "streamlining" of procedures at the BIA, which has led to a sharp increase in the rate at which cases are appealed to the circuit courts.

- Will you commit to reviewing the 2002 "streamlining" and making any necessary changes to ensure adequate review in the BIA?

11. In 1996, the U.S. Government joined with California and Pacific Lumber Company in an agreement known as the Headwaters Agreement, which led to federal acquisition of the 7,500-acre Headwaters Forest and the implementation of a Habitat Conservation Plan for all 210,000 acres of land owned by Pacific Lumber Company. Earlier this year, Pacific Lumber Company filed for bankruptcy in Corpus Christi, Texas. Depending on the outcome of those bankruptcy proceedings, continuing compliance with the Habitat Conservation Plan may be in doubt.

- Since the federal government is a party to the Headwaters Agreement, will you commit the federal government to defending the agreement and the Habit Conservation Plan?

- Will you commit to taking affirmative steps, such as intervening in the bankruptcy case, if necessary to help defend the agreement and the Habitat Conservation Plan?

Senate Judiciary Committee
Hearing on "Executive Nominations"
October 17-18, 2007

Questions Submitted by U.S. Senator Russell D. Feingold
to Judge Michael Mukasey

1. Your testimony indicated that you believe the President may violate statutes such as the Foreign Intelligence Surveillance Act as long as he is acting within his exclusive constitutional authority, and that each branch of government has a sphere of authority that is exclusive to it. You also indicated that the Constitution gives the President the responsibility to "protect the country" and that he has authority "commensurate" with that responsibility. You told Senator Leahy that "if by illegal you mean contrary to a statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law."

    a. Do you agree with this characterization of your testimony? If not, please specify your precise areas of disagreement.
    b. Please cite the clauses in the Constitution that in your view grant the President the authority to "protect" or "defend" the country.
    c. Do you believe that protecting or defending the country is within the President's exclusive sphere of authority?
    d. Article I, Section 8 of the U.S. Constitution grants Congress the authority to "provide for the common Defence," "make Rules concerning Captures on Land and Water," and "make Rules for the Government and Regulation of the land and naval Forces." Do these authorities affect your view of whether the President has exclusive authority to "protect" or "defend" the country?
    e. Is it your position that, as long as the President is acting to protect the country and is not violating another part of the Constitution, such as the Fourth or Eighth Amendments, the President's action is constitutionally authorized and therefore legal, even if it contravenes an express statutory prohibition? If that is not a correct statement of your position, please explain in detail how the statement should be amended to reflect your view of the scope of the President's Article II powers.
    f. Exactly what powers you believe to be incident to the rank of "Commander in Chief"? Is it your position that the constitutional designation of "Commander in Chief" authorizes the President to take any action that is not forbidden by another clause of the Constitution, regardless of whether that action violates a statute passed by Congress, as long as he is acting in his role as Commander in Chief?
    g. In 1977, David Frost interviewed former President Richard M. Nixon and the following exchange took place:

    FROST: So what in a sense, you're saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the president can decide that it's in the best interests of the nation or something, and do something illegal.

NIXON: Well, when the president does it that means that it is not illegal.

FROST: By definition.

NIXON: Exactly. Exactly. If the president, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position.

Do you agree with President Nixon? If not, please explain how your view of the President's power to authorize a subordinate to violate a law differs from the view expressed in this interview.

2. You told me at the hearing that when the President authorizes warrantless domestic wiretaps without complying with FISA, his power is at its lowest ebb "to the extent that is not a war-based authority directly involving a war." Is the President employing a "war-based authority directly involving a war" if he authorizes warrantless wiretaps of suspected terrorists without complying with and in violation of FISA?

3. You told Senator Durbin that you do not believe that the McCain amendment is an unconstitutional infringement on the power of the President. In your view, is the Foreign Intelligence Surveillance Act an unconstitutional infringement on the power of the President?

4. On October 23, 2007, Jeb Rubenfeld, a professor of constitutional law at Yale Law School, wrote the following in an oped in the *New York Times*: "As a minimum prerequisite for confirmation as attorney general, a nominee should be required to state plainly whether the executive branch or a federal statute is supreme when the president and the Congress, both acting within their constitutional powers, clash. . . . If Judge Mukasey cannot say plainly that the president must obey a valid statute, he ought not to be the nation's next attorney general."

    a. Are you prepared to say that a President must obey a valid statute that was within Congress's constitutional power to enact?
    b. If not, please explain why the Senate should not adopt Prof. Rubenfeld's test in voting on your nomination.

5. If Congress and the President disagree about the proper interpretation or application of a law, the final arbiter of that disagreement is supposed to be the courts, as according to *Marbury v. Madison* it is "emphatically the province and duty of the judicial department to say what the law is." Moreover, insofar as some courts have found certain controversies between the two branches to be nonjusticiable as presented, they have emphasized the tools that Congress has at its disposal to respond to the President's actions. Where the President undertakes to violate the law in secret, he prevents the matter both from being known to Congress and from reaching the courts and thus arrogates to himself the power to adjudicate the disagreement.

a. Do you agree that the Constitution generally grants to the courts, and not the President, the authority to make the final determination about the scope of the President's Article II authority?
b. Assuming for argument's sake that there are some disputes between the political branches that cannot be resolved by the courts, do you agree that two other branches together must attempt to resolve the disagreement?
c. Do you agree that it upsets the balance of power among the three branches of government for the President to determine, unilaterally and in secret, that he has the constitutional authority to violate a statute?
d. Do you agree that if, in the future, the President believes he or she has the constitutional authority to act in a manner that contravenes a statutory limitation, the proper course is for the President to notify Congress so that any disagreement may be resolved by the two branches and/or by the courts?

6. There has been a great deal of controversy about a variety of post-9/11 programs and activities undertaken by the Bush Administration. You have written that civil liberties concerns about the Patriot Act, material witness warrants, and the immigration round-ups of Arabs and Muslims were overblown.

   a. In your view, have there been <u>any</u> valid privacy, civil liberties or human rights complaints about the Administration's actions in the wake of September 11? Please respond yes or no.
   b. If yes, please specifically identify one or more of the concerns that you think are or were valid and explain what steps you would take as Attorney General to address those concerns.

7. The excesses of American intelligence agencies led, in the 1970s, to a number of reforms, including new legal limitations on intelligence activities and new oversight structures. In that time period, Congress passed the Foreign Intelligence Surveillance Act, it amended the National Security Act, and it created the intelligence oversight committees. Do you think the reforms of the 1970s went too far?

8. In a number of your speeches, you argue that the structure of the Constitution gives primacy to the provisions creating the government, and that the individual rights laid out in the Bill of Rights are secondary. As a result, you have stated that "the hidden message in the structure of the Constitution is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt." Does your view change if the executive branch actively tries to consolidate power and to shut out the other two branches of government? Does a single branch of government, acting alone, still deserve that benefit of the doubt?

9. Michael Hayden, the Director of the CIA, has been quoted as saying that after September 11, he was troubled if he was not "using the full authority allowed by law" and that the administration was "going to live on the edge."

a. Do you think that the Intelligence Community and the Justice Department must "live on the edge" in the post-9/11 world?
b. What is the Justice Department's role in providing legal advice to the President – to provide the best view of the law, or to provide the most aggressive interpretation?

10. When we met privately, you told me that you did not necessarily agree with the argument that the Authorization for Use of Military Force could authorize the President to violate the FISA statutory requirements. As you may know, that argument is featured prominently in a January 2006 Justice Department White Paper laying out the Department's legal justification for the NSA wiretapping program, as it existed at the time. In your view, did the AUMF authorize warrantless surveillance beyond what is permitted under FISA?

11. According to Jack Goldsmith, former head of OLC, at a meeting in February 2004 at the White House, Vice President Cheney's counsel David Addington stated, "We're one bomb away from getting rid of that obnoxious court," referring to the FISA Court. What is your reaction to that statement?

12. At your hearing, Sen. Feinstein asked you if Congress has the power to set boundaries on military actions. You responded that Congress has the power under Article I of the Constitution to "provide tools to the President" but "[w]here provision of tools leaves off and interference with the use of tools and the way those tools are used" is something that has to be worked out in the "conflict between the two branches."

a. Do you believe that Congress has the constitutional authority to enact legislation setting a deadline for withdrawing troops from a particular military conflict, such as the conflict in Iraq?
b. If Congress were to enact such legislation, does the President have to abide by it?

13. Federal Judge John Gleeson, of the Eastern District of New York, wrote a 2003 law review article (89 Va. L. Rev. 1697) expressing his view that the Attorney General should overrule U.S. Attorneys to require them to seek the death penalty only in exceptional circumstances, and that the best way to achieve uniformity in the federal death penalty is to specifically define the types of particularly federal interests that will justify bringing a federal capital case. With respect to the decision to seek the federal death penalty, do you agree there should be a uniquely federal interest to justify the federal government seeking capital punishment?

14. Judge Gleeson's article also contended that seeking the death penalty could, in some instances, jeopardize prosecutors' ability to secure a conviction, because jurors hold them to a higher standard in capital cases. Should the Attorney General give any weight to this consideration in his or her decision whether to seek the death penalty?

15. In 2000, Attorney General Reno publicly issued a nearly 400-page report with a great deal of data about federal death-eligible cases, aggregated at the district level, since the federal death penalty was reinstated in 1988. This included, by district, a breakdown of what the U.S. Attorney and Capital Case Review Committee recommended, and what the Attorney General

decided. It also included breakdowns by race of the defendant, and by race of each of the victims in a case. This comprehensive report was extremely helpful to the Justice Department, this Committee and others in understanding how the federal death penalty had been implemented since it was reinstated. I have asked the Department whether it would prepare a similar report covering the time period since 2000. I have not yet received a response. Such a report would give the Department an opportunity to demonstrate its commitment to transparency about its death penalty work and provide important statistical information to help understand how it has been implemented. Will you commit to making this information publicly available if you are confirmed, just as Attorney General Reno did?

16. Zachary Carter, former U.S. Attorney for the Eastern District of New York, has argued that any committee, either at Main Justice or in individual U.S. Attorney's offices, that is making death penalty-related decisions should have ideological or philosophical diversity, including individuals who are not avid proponents of capital punishment. He argues this is necessary to ensure a robust debate, in which all sides of the issue are fully considered. Will you ensure ideological or philosophical diversity on the Capital Case Review Committee?

17. Earlier this year, the Justice Department publicly issued draft regulations to implement Section 507 of the Patriot Act reauthorization legislation, Public Law 109-177. A provision of that legislation gave the Attorney General, rather than the Courts of Appeals, the authority to allow states that prove they provide competent counsel in post-conviction proceedings to "opt in" to the procedural rules in Chapter 154 of Title 28, which favor the government and disadvantage the inmate who has filed the habeas petition. Serious concerns have been raised about DOJ's proposed implementing regulations by a number of entities. The Judicial Conference has asked DOJ to reconsider the regulations, stating that the regulations provide "no guidance about the criteria to be considered by the decision maker" in assessing whether a state has provided competent counsel. The American Bar Association has said that the proposed rule "is deeply and fundamentally flawed."

    a. If confirmed, will you commit to review, personally, the proposed regulations and the critical comments of the Judicial Conference and the ABA, and consider whether the regulations need to be revised?
    b. Legal ethics experts have argued in comments to the Justice Department that the Attorney General should not be granted this function at all because it creates an inherent conflict of interest for the nation's chief prosecutor to be adjudicating whether states can opt in to prosecutor-friendly procedural rules in habeas cases. Those comments are attached for your review. Do you see any conflict in the Attorney General playing this role?

18. Since 1986, courts have been wrestling with a law that treats 1 gram of crack cocaine as the equivalent to 100 grams of powder cocaine for sentencing purposes. This 100-to-1 disparity has a clear disparate impact on African Americans because crack cocaine offenses are more common among African Americans while powder cocaine offenses are more common among whites. Do you believe the 100-to-1 ratio is appropriate? If not, would you support legislation to equalize the penalties?

19. In the wake of *United States v. Booker*, the Supreme Court case holding that the federal sentencing guidelines are only advisory, former Attorney General Alberto Gonzales pushed Congress to enact legislation that would all but remove judges' discretion to impose sentences lower than the sentencing guidelines range. Judge Paul Cassell, Chairman of the Criminal Law Committee of the United States Judicial Conference, strongly criticized the proposal as "one-size-fits-all justice." Do you agree with Judge Cassell that judges should retain discretion to determine sentences in light of the facts of the individual case?

20. I have been very concerned about the increase in the violent crime rate in this country, and in particular in cities like Milwaukee, over the past couple of years.

    a. Your testimony was not clear with respect to your commitment to the Community Oriented Policing Services (COPS) program. Law enforcement agents across my state, and across the country, have been pleading with their elected representatives to increase the level of funding for the COPS program to the levels it was receiving before the current Administration made significant cuts. As funding levels have fallen, violent crime rates have been on the rise. What do you believe is the appropriate level of federal funding for the COPS program?
    b. Both the House and Senate this year approved increased levels of funding for state and local law enforcement grants, including COPS and the Byrne Justice Assistance Grants. Do you support these increases in funding?
    c. If confirmed, what else will you do to reduce the violent crime rate?

21. On July 25, 2007, Senators Schumer, Feinstein, Whitehouse and I wrote to Solicitor General Paul Clement, asking him to appoint an independent special counsel to investigate whether then-Attorney General Alberto Gonzales had misled Congress or committed perjury in testimony before the Senate Judiciary Committee. Mr. Clement was the Acting Attorney General in matters from which Mr. Gonzales had recused himself. As of today, we have not received a response to our request. Shortly thereafter, Chairman Leahy asked the Inspector General to investigate the truthfulness of Mr. Gonzales's testimony, and news reports indicate that that investigation is ongoing. Whether the Attorney General of the United States has lied to Congress is obviously a serious matter.

    a. Will you pursue this matter forcefully to a conclusion?
    b. Under what circumstances would the appointment of a special counsel be appropriate?

22. Sen. Durbin asked you about Stephen Bradbury, who is currently serving as the Principal Deputy for the Office of Legal Counsel. He was nominated several years ago to head that office as Assistant Attorney General, but the Senate did not act on his nomination and the nomination was returned to the President several times. At this point, under the Vacancies Act, he can no longer serve in an acting capacity as the head of OLC. His nomination is still technically pending, but it is highly unlikely that he will be confirmed before the President's term ends. Yet he is currently the most senior person in the office, and as I understand it he is effectively still running it.

A number of us have written to the President and asked that he withdraw Mr. Bradbury's nomination. To continue to have Mr. Bradbury creates tension with Congress that is entirely unnecessary.

a. Is Mr. Bradbury's continued supervision of the Office of Legal Counsel consistent with the Vacancies Act?
b. Will you urge the White House to put forward a new nominee for this important position at the Department?

23. You indicated at the hearing that the President would never have constitutional authority to authorize torture because torture is prohibited, not only by statute, but by the Fifth, Eighth, and Fourteenth Amendments of the Constitution. Do you take the position that any detainee in United States custody anywhere in the world is protected by the United States Constitution?

24. If you believe that, in theory, there could be detainees in United States custody who are not entitled to the protections of the United States Constitution, are there any circumstances under which you believe the President could legally authorize torture of such individuals in violation of the Detainee Treatment Act?

25. When Senator Durbin asked whether you agreed with the Judge Advocates General that certain interrogation techniques would violate the Geneva Convention, you responded that the unlawful combatants with whom we are now dealing are "a very different kind of person" from enemies we have fought in the past.

a. In your view, does the legal definition of "torture" or "inhumane treatment" depend on the identity of the person administering the technique and/or the identity of the person who is its subject?
b. More specifically, are there any circumstances under which you would consider a technique administered by a foreign government official to a citizen of the United States to be torture, but would not consider that same technique to be torture when applied by a United States official to a non-U.S. citizen suspected of terrorism? If you believe that such circumstances exist, please give an example.

26. When Senators Durbin and Graham mentioned the Supreme Court's holding in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to detainees in the conflict with al Qaeda, you indicated that you did not precisely recall that part of the case, but that you believed the Court was referring only to the portion of Common Article 3 pertaining to the opportunity for a hearing. Please review the decision in *Hamdan* and answer the following question: Do you agree that, following the Supreme Court's holding in *Hamdan*, Common Article 3 of the Geneva Conventions applies to detainees in the conflict with al Qaeda?

27. In your 2007 *Wall Street Journal* article, describing the *Quirin* case concerning German agents who were caught on American soil during World War II, you wrote, "Because they were not acting as ordinary soldiers fighting in uniform and carrying arms openly, they were in violation

of the laws of war and not entitled to Geneva Conventions protections." As I understand the history, that's not correct. The German agents were indeed in violation of the laws of war, but that simply meant they were not prisoners of war and were subject to military trials – not that they were removed from the protections of international law. Do you agree that violating the laws of war does not, by itself, take someone outside the protection of the Geneva Conventions?

28. In response to questions by Senator Kohl and Senator Durbin, you said that you believed Guantanamo detainees were "humanely treated" and that you don't think Guantanamo detainees have been "mistreated." In 2004, in response to a Freedom of Information Act request, the FBI released documents in which FBI agents detailed incidents at Guantanamo that they personally witnessed, including wrapping a detainee's head in duct tape for reciting the Koran, shackling detainees to the floor in a fetal position, the use of "growling dogs" during interviews, deliberate frequent interruption of sleep for detainees deemed "non-cooperative," subjecting detainees to extremes of heat and cold, and what appeared to be a common practice of subjecting detainees to blaring music and strobe lights. One agent summarized his/her observations (the name of the agent was redacted) as follows:

"On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on, I was told that interrogators from the prior day had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor."

a. Were you aware of these FBI documents, the release of which was extensively covered in the news media, at the time of your hearing testimony?
b. If you were aware of such documents or had heard reports of them at the time of your hearing testimony, did you discount their veracity or did you consider what they described not to be mistreatment or inhumane?
c. If you were not aware of these documents, do you consider the treatment described above to be humane?

29. In our private meeting you told me that the DOJ mishandled the fallout of the U.S. Attorney firing scandal. You stated that the President has the right to fire a U.S. Attorney simply because he would prefer that someone else serve, but that outgoing U.S. Attorneys should be dignity and not later accused of being incompetent when it simply isn't true. Please comment on the following specific grounds for firing.

a. Would it be appropriate to fire a U.S. Attorney for not prosecuting enough immigration cases, if no notice is ever given that the administration found inadequate the number of immigration cases that were pursued by that U.S. Attorney?
b. Would it be appropriate to fire a U.S. Attorney for wanting to speak to the Attorney General directly about a death penalty decision?
c. Would it be appropriate to fire a U.S. Attorney for seeking additional resources to investigate the murder of an assistant in his office?
d. Would it be appropriate to fire a U.S. Attorney based on complaints from members of Congress that he or she has not pursued investigations of alleged political corruption by members of the opposing party or has not sought indictments fast enough?

30. In response to questions about insulating Department investigations and prosecutions from political influence, you stated that any elected official who wishes to discuss a pending matter will have to call one of a small group of people at the Department. My understanding is that while elected officials may properly discuss general Department policies and priorities with senior Department officials, it is *never* appropriate for them to attempt to influence a specific investigation or prosecution, regardless of whether they attempt to exert that influence on a line attorney or through the Attorney General himself. Please clarify: If you are confirmed, what will be your policy and the policy for the Department of Justice for responding to a phone call from a member of Congress or someone from the White House who wants to discuss an ongoing criminal case or investigation?

31. Last year, the Boston Globe reported that a major change in hiring procedures took place in the Department of Justice in 2002. Before that time, career attorneys played a key role in hiring decisions; after 2002, those decisions were made or closely vetted by political appointees, with little or no input from career staff. The result in the Civil Rights Division, according to documents obtained under the Freedom of Information Act, was a sharp decrease in the number of attorneys who had civil rights experience, and a sharp increase in the number of attorneys with conservative credentials, such as membership in the Federalist Society. As Attorney General, will you ensure that the pre-2002 hiring procedures are restored, or, if a different set of procedures are adopted, that these procedures will give career attorneys the same amount of input that they had prior to 2002?

32. What will you do if you learn that certain attorneys now working at the Department were hired based on an improper political test?

33. In response to a question by Senator Leahy, you testified that a United States Attorney could not take steps to enforce a congressional subpoena unless he or she concluded that the subject of the subpoena was unreasonable in relying on the President's assertion of executive privilege. That, of course, is a different standard than whether the assertion was valid. In a situation where it is deemed reasonable for the subject of a subpoena to have relied on the President's assertion of privilege, what legal avenue then exists for Congress to obtain a judicial ruling on whether or not the President's assertion of privilege is, in fact, valid?

34. The Supreme Court first recognized the so-called "state secrets privilege" in a 1953 case called *United States v. Reynolds*. The lawsuit was brought by the widows of three men who

had been killed in a military aircraft crash. The government submitted an affidavit claiming that it could not produce the Air Force's crash investigation report because it would reveal military secrets about the plane's equipment. The Supreme Court upheld the privilege without ever looking at the document. Decades later, the document was declassified; it revealed no military secrets, but it did suggest that the crash was caused by faulty maintenance.

a. If you become Attorney General, will you agree to submit any documents for which DOJ lawyers have asserted the "state secrets" privilege to the judge in the case, to inspect privately, with appropriate security precautions?
b. If your answer to that question was anything other than "yes," please fully explain the reason for not allowing a United States District Judge to examine the document. For purposes of this question, assume that the highest security precautions would be taken, that proceedings to resolve the assertion of privilege would be *ex parte*, and that the judge would be required to give a high degree of deference to the government's assessment of the national security interests involved.

35. In 2001, in his first address to a joint session of Congress, President Bush declared that racial profiling is wrong and pledged to end it in America. He then directed his Attorney General to undertake this task. Two years later, the Civil Rights Division issued guidelines to federal law enforcement banning racial profiling. These guidelines only apply to federal law enforcement, not state and local law enforcement. While this guidance is useful, it still falls short of fulfilling the President's pledge. Federal legislation banning racial profiling, would carry the force of law, and would apply to state and local law enforcement, as well as federal law enforcement. Will enacting federal legislation be a priority item on your agenda? Will you commit to working with Rep. Conyers and me on our bill, the End Racial Profiling Act?

36. In a 2002 speech, you dismissed as "nonsense" the idea that there was a systematic round-up of Muslims and Arabs after 9-11. In fact, the Department of Justice's Office of the Inspector General found that several hundred Muslim and Arab immigrants were detained and held on immigration charges between September and November 2001 for the express purpose of allowing the FBI to investigate their possible connections to 9-11. The Inspector General found that government officials "made little attempt to distinguish" between immigrants who were legitimate subjects of the 9-11 investigation and those who were not. Immigrants were arrested on leads such as "anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules."

    You defended these detentions on the grounds that these individuals had overstayed their visas, and that "it made a certain amount of sense to enforce the law" against them after 9-11. Is it your position that, as long as those targeted have violated the law, it is acceptable and appropriate to target immigration and law enforcement efforts at Muslims and Arabs?

37. At the hearing, you told Senator Cardin that "opening up access to the vote and preventing people who shouldn't vote from voting are two sides of the same coin." But just because preserving the integrity of the electoral process is as important as protecting the right to vote doesn't mean that voter fraud is as prevalent or as serious a problem as voter suppression.

a. Do you agree that the Department's voting rights enforcement resources should be directed in ways that will have the most impact on protecting the right to vote?
b. In your view, which is a more prevalent and serious threat to American elections today: voter fraud or voter suppression?
c. In my view, all available nonpartisan evidence clearly shows that, while there are very few cases of voter fraud, our elections continue to be undermined by organized efforts to disenfranchise voters. If, either at this time or after further review of the evidence, you agree with that assessment, will you ensure that more of the Department's limited resources are directed to voter suppression cases than voter fraud cases?

38. The Department of Justice is charged with enforcing Section 7 of the National Voter Registration Act, which requires states to designate all offices that provide public assistance as voter registration agencies. Despite evidence of widespread Section 7 violations, the Department has brought only one Section 7-related case since 2001. Will you ensure that the Department of Justice enforces Section 7 of the NVRA if you are confirmed?

39. Section 2 of the Voting Rights Act prohibits practices that result in a denial or abridgement of the right to vote based on race, color, or membership in certain language-minority groups. In the last five years, the Voting Rights Section has only filed seven Section 2 cases; by comparison, during the last two years of the Clinton administration, the Voting Rights Section filed fourteen Section 2 lawsuits. Will you commit to vigorously enforcing Section 2 of the Voting Rights Act if you are confirmed?

40. Congress enacted the federal material witness statute in 1984 to permit the brief detention of witnesses who may have information material to an ongoing criminal proceeding. The statute makes detainment unlawful if the desired testimony could be obtained through deposition, suggesting that Congress intended to preclude investigative or preventive detention.

a. Do you believe that the material witness statute, properly read, precludes investigative or preventive detention?
b. Are there statutory or constitutional problems with using the material witness statute to hold someone indefinitely? What if the individual being held is never actually called to testify before any court?
c. Do you think that a preventive detention statute that authorized the indefinite detention of individuals without charging them with any crime would be constitutional?
d. Do you believe that the President has the constitutional authority to authorize indefinite material witness detentions even if prohibited by Congress?

41. In your capacity as a judge in the Southern District of New York, you presided over multiple material witness hearings. However, the New York Times recently published excerpts from the transcript of a material witness hearing over which you presided in October 2001. *See* "Post- 9/11 Cases Fuel Criticism for Nominee," NYT, September 24, 2007.

a. How do you respond to charges that you did not appear to be objective in your consideration of this particular case, and that your tone was inappropriately dismissive of the arguments of the detainee and his lawyer? I am particularly concerned about reports that you dismissed a defense counsel's claim that his client was beaten while in custody by saying "he looks fine to me," that you expressed no concern over the defense counsel's claim that he, based in San Diego, did not receive notice that his client was transferred to New York until the day before the hearing, and that you mocked the competence of a prominent New York defense attorney whom defense counsel wished to assist him in the case.
b. In retrospect, do you think you handled this case appropriately? Looking back on it, is there anything you would have done differently, or any statement in the transcript that was excerpted in the *Times* that you regret making?
c. Would you be willing to release to this Committee the transcripts of all the material witness hearings over which you presided?
d. As a judge, did you ever deny a request for a material witness warrant? How many material witness warrants did you deny and how many did you grant?

42. In *Padilla v. Bush*, you ruled that the President has authority to designate individuals, including American citizens, as enemy combatants, and that the government need only show "some evidence" to support that contention to hold someone without trial. In *Hamdi v. Rumsfeld*, the Supreme Court rejected the "some evidence" standard and found that citizens detained as enemy combatants have the right to challenge their detention before a neutral decision-maker.

    a. Do you agree with the Supreme Court's decision in *Hamdi*? If not, please explain.
    b. What do you make of the government's decision, after its *Hamdi* opinion was issued, to release Hamdi and send him back to Saudi Arabia without charging him with any crime?

43. In a Wall Street Journal piece in 2007, you wrote that "the rules that apply to ordinary criminal cases . . . do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means." The following questions pertain to procedures for prosecuting and punishing those accused of crimes related to terrorism, not the procedures for reviewing the detention of enemy combatants pending hostilities.

    a. One of the rules that apply to ordinary criminal cases is the rule against using evidence obtained by coercion. In your view, should the government be able to use evidence obtained by coercion when prosecuting suspected terrorists?
    b. In criminal cases, the government is required to prove guilt beyond a reasonable doubt. In your view, should this standard of proof be relaxed in cases where the crime is related to terrorism?
    c. In your view, should a person charged with a terrorism-related crime be permitted to see all of the evidence against him or her?
    d. Do you believe a person charged with a terrorism-related crime should have access to a lawyer on the same terms as a person charged with a crime unrelated to terrorism?

Questions for the Record to Judge Michael B. Mukasey
From Senator Charles E. Schumer

1. You assured me in our private interview and at your confirmation hearing that you will undertake a review of existing Office of Legal Counsel opinions if you are confirmed. In particular, you agreed to review and re-examine legal opinions relating to the Terrorist Surveillance Program, detention, interrogation, and torture.

    i. If confirmed, do you pledge not only to review any operative legal opinions, but also to correct and/or withdraw any that you find are problematic?

    ii. If confirmed, do you commit to telling Congress and otherwise publicly announcing when you have completed your review of operative OLC opinions?

    iii. If confirmed, do you commit to disclosing to Congress and otherwise publicly announcing whether you have directed that any OLC opinion be corrected and/or withdrawn?

2. At your confirmation hearing, you stated that you would review the Administration's legal justification for its assertion of executive privilege with respect to Congress's investigation into the firing of nine United States Attorneys. Although you testified that you had not had the opportunity to carefully read Solicitor General Paul Clement's written opinion in support of the invocation of privilege, you did say that the section of the opinion relating to third-party communications with the White House caused you to wonder, "Huh?"

    i. If confirmed, do you commit to reviewing the legal bases for the Administration's assertion of executive privilege in this matter within 30 days of taking office?

    ii. Do you commit, after your review, to providing your own opinion on the matter to Congress?

3. At our first meeting, I asked you about the Inspector General's upcoming report on the conduct of the Attorney General and other matters related to the firing of United States Attorneys. I asked you whether, if you are confirmed and the Inspector General makes a criminal referral, your Department will bring a criminal case. You assured me that you will review it carefully and if there is a case to be brought, you will absolutely bring it.

    i. Do you stand by that commitment?

4. There was wide concern when President Bush's Justice Department put political appointees instead of career attorneys in charge of hiring for the Department's prestigious summer law clerk and Honors Attorney programs. In April, the Department put hiring back in the hands of career officials.

    i. Do you commit to leaving career attorneys in charge of making these new hires, and do you commit to reexamining the hiring process and establishing any new safeguards needed to ensure that hiring for career attorneys is not governed by partisan or ideological considerations?

5. Currently, both the Office of Professional Responsibility and the Office of the Inspector General are investigating whether political considerations were taken into account in hiring decisions by the Department of Justice's Civil Rights Division.

    i. Do you commit to cooperating fully with this investigation?

    ii. Following the conclusion of this investigation, do you pledge to make any changes necessary to ensure that political or partisan considerations do not taint hiring decisions?

6. Since late 2004, the Civil Rights Division and other Justice Department components have been required to assist with an overload of deportation cases that have consumed up to 60% of appellate dockets. I am concerned that this immigration backlog is weakening civil rights enforcement. Immigration enforcement is very important, but setting law enforcement priorities should not be a zero-sum game.

    i. If you are confirmed, will you commit to reviewing this situation and giving Congress (a) an estimate of when the immigration backlog will clear and/or (b) a request for whatever additional authority or resources are needed to ensure that immigration prosecutors can handle deportation cases without tying up other divisions of the Department?

7. In recent elections, we have seen many despicable attempts to spread false information to voters. These misinformation campaigns are clear efforts to confuse or frighten voters and prevent them from getting to the polls. Yet the Justice Department has few tools to combat these practices because it is not a federal crime to lie to voters about basic election-related facts such as voter eligibility rules or the time and place of an election.

    i. Do you agree that we need to update our voter protection laws in order to give the Justice Department new tools to combat voter deception in federal elections?

ii. Do you agree that it should be a federal crime to spread false information about basic election facts with the intent to prevent another person from voting?

8. As Professor Jed Rubenfeld, writing in a *New York Times* Op Ed piece, dated October 23, 2007, points out, you suggested at your hearing that the President's obligation to obey a federal statute depends on whether his authority "to defend the nation" trumps his duty to follow the law. I agree with Professor Rubenfeld that the President has no authority to disobey a Constitutional law.

i. Do you agree with this bedrock principle?

ii. Can you state directly and clearly your view of the President's authority to disregard a duly enacted and constitutional federal statute?

9. If you are confirmed and your Justice Department experiences serious disagreement over whether a specific law enforcement or intelligence tool is permissible under existing law, do you pledge to come to Congress to resolve the disagreement and seek a specific legal authorization for the practice in question?

10. If you are confirmed, and if it comes to your attention as the Attorney General that there has been any unintentional misuse or intentional abuse of new powers granted in FISA modernization legislation, do you commit to coming forward and immediately disclosing this misuse or abuse to Congress?

Senator Dick Durbin
Written Questions for Attorney General Nominee Michael Mukasey
October 25, 2007

1. When we met prior to your confirmation hearing, you told me the Geneva Conventions are "a two-way street" and suggested that our country should not comply with the Conventions if our enemies do not. During your hearing, I asked you about Common Article 3 of the Geneva Conventions. You seemed to take the position that only certain elements of Common Article 3 govern the United States' treatment of detainees. You said:

   > What part of Common Article 3 the Supreme Court found in *Hamdan* was applicable through, I believe through the Universal Code of Military Justice, unless I'm confusing my cases. I can't, as I sit here, recall precisely what part of Article 3 the Supreme Court found applicable. I thought they were talking about the need for a trial and for an opportunity for a detainee to get a hearing. I did not think that that concerned interrogation techniques.

   This seems to contradict the Administration's interpretation of the *Hamdan* decision. For example, during a Senate Judiciary Committee hearing on July 18, 2006, I asked then Attorney General Gonzales, "All U.S. personnel, including intelligence personnel, are now required, do you believe, to abide by Common Article 3 in the treatment of detainees?" In response, he said:

   > I read the [*Hamdan*] opinion, it says it applies to our conflict with Al Qaeda. … That is what it says, without qualification. … I mean, the court says, we believe, in Hamdan, that in our conflict with Al Qaeda, Common Article 3 applies.

   a. Do you agree that Common Article 3 governs the treatment of all detainees, without qualification?

   b. Do you agree that all interrogation techniques used by U.S. personnel must comply with Common Article 3?

   c. If all interrogation techniques used by U.S. personnel must comply with Common Article 3, could enemy forces legally use all such techniques against American prisoners?

2. As you know, the President recently issued an Executive Order interpreting Common Article 3 of the Geneva Conventions as applied to CIA detention and interrogation. The Military Commissions Act (MCA) reaffirmed the President's authority to interpret the meaning and application of the Geneva Conventions, just as he may interpret any treaty. The MCA did not grant the President the authority to redefine or narrow the Geneva Conventions. In fact, during consideration of the MCA, Congress specifically rejected the Administration's request to redefine Common Article 3.

Nonetheless, the Executive Order seems to redefine the meaning of Common Article 3 in a manner that would permit abusive interrogation techniques. Common Article 3 states that "outrages upon personal dignity, in particular humiliating and degrading treatment" are absolutely prohibited (emphasis added). The Executive Order, on the other hand, prohibits "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency" (emphasis added). In other words, humiliating and degrading treatment, which Common Article 3 absolutely prohibits, is permitted under the Executive Order as long as it is not "willful and outrageous" or a reasonable person would not consider it "beyond the bounds of human decency."

In your opinion, does the Executive Order comply with our nation's legal obligations under Common Article 3?

3. On June 19, 2007, during his confirmation hearing to be CIA General Counsel, John Rizzo was asked about the difference between the prohibition on cruel, inhuman and degrading treatment and Common Article 3 and said, "the prohibitions are actually somewhat similar. … the Due Process Clause bars interrogation techniques that 'shock the conscience.' So that would be the applicable legal standard I would say in both – in both statutes."

   Do you agree with Mr. Rizzo?

4. As I told you during your confirmation hearing, the Judge Advocates General, the highest-ranking military lawyers in each of the U.S. Armed Forces' four branches, told me unequivocally that each of the following techniques is illegal and violates Common Article 3 of the Geneva Conventions: 1) painful stress positions, 2) threatening detainees with dogs, 3) forced nudity, 4) waterboarding (i.e., simulated drowning) and 5) mock execution. On July 24, 2007, during his last appearance before the Senate Judiciary Committee, I asked Alberto Gonzales whether it would be legal for enemy forces to subject an American citizen to these same techniques. Unlike the JAGs, he equivocated, saying, "[I]t would depend on circumstances, quite frankly." For each of the five techniques named above, please respond to the following questions:

   a. **Would it be legal for enemy forces to use this technique on an American detainee?**

   b. **Would it violate Common Article 3 of the Geneva Conventions for enemy forces to use this technique on an American detainee?**

   c. **If the United States does not explicitly and publicly prohibit the five techniques named above, how can we plausibly argue that it would be illegal for enemy forces to subject Americans to such treatment?**

5. **Do you agree that it would be inappropriate for the Senate to confirm a Justice Department nominee who is under investigation by the Department's Office of Professional Responsibility?**

6. Last year, the Justice Department's Office of Professional Responsibility opened an investigation into the conduct of Justice Department attorneys who authorized the NSA program. In an unprecedented move, President Bush personally denied security clearances to the Justice Department investigators, effectively blocking the investigation. H. Marshall Jarrett, the head of OPR, has stated:

> Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels. In all those years OPR has never been prevented from initiating or pursuing an investigation.

In August 2006, Senator Kennedy, Senator Feingold and I sent President Bush the attached letter asking him to allow the Justice Department internal investigation to go forward. We have not yet received a response to this letter. Please review this letter and respond to the following question.

If you are confirmed, will you pledge to review this issue and to make a recommendation to the President regarding whether the OPR investigation of the Justice Department's role in the NSA program should be allowed to proceed?

7. I am concerned that it will be difficult for you to restore the credibility of the Justice Department without new leadership at the Office of Legal Counsel. Although he has not yet been confirmed, Steven Bradbury has been the de facto head of OLC for over two years. There are serious unresolved questions about Mr. Bradbury's role in the NSA warrantless surveillance program. During the confirmation process, Mr. Bradbury has refused to answer straightforward questions from Judiciary Committee members about torture. According to a recent article in *The New York Times*, in 2005 Mr. Bradbury signed two OLC legal opinions approving the legality of abusive interrogation techniques. On October 16, 2007, Senators Kennedy, Feingold and I sent the attached letter to President Bush urging him to withdraw the nomination of Steven Bradbury to head OLC. Please review the letter and respond to the following question.

If you are confirmed, will you recommend that the President select a new nominee to head OLC?

8. The Justice Department has refused to provide OLC opinions regarding surveillance, interrogation techniques, and detention standards to the Judiciary Committee. When we met, I asked you about secret OLC opinions. You compared these memos to "brainstorming memos" written by your judicial clerks or congressional staff and said

you wouldn't want such memos to be made public. OLC opinions are not brainstorming memos. They are the Executive Branch's official interpretation of the law and are binding on all Executive Branch agencies.

a. Will you acknowledge that OLC opinions are different from brainstorming memos written by a judicial clerk or congressional staffer?

b. Would you agree that there should be a presumption that OLC opinions will be public unless there is some compelling national security rationale for keeping them confidential?

c. If you are confirmed, will you pledge to review personally all OLC opinions regarding surveillance, interrogation techniques, and detention standards to determine whether each of these opinions can be provided to Congress and to determine whether the legal analysis and conclusions of each of these opinions is correct?

d. In conducting this review, will you pledge to consult with career Justice Department, Defense Department and CIA attorneys with expertise in these areas?

e. If you disagree with the legal analysis and/or conclusions of any of these OLC opinions, will you pledge to rescind this opinion?

9. According to the *New York Times*, in 2005 Mr. Bradbury authored an opinion on so-called "combined effects," which authorized the CIA to use multiple abusive interrogation techniques in combination. Alberto Gonzales approved this opinion over the objections of then Deputy Attorney General Jim Comey, who said the Justice Department would be "ashamed" if the memo became public. The *New York Times* also reported that Mr. Bradbury authored and Alberto Gonzales approved an OLC opinion concluding that abusive interrogation techniques such as waterboarding do not constitute cruel, inhuman or degrading treatment. This opinion was apparently designed to circumvent the McCain Torture Amendment, then being considered by Congress, which clarified that such treatment is absolutely prohibited.

   Would you agree that when OLC issues an opinion that has the effect of circumventing legislation then being considered, or recently passed by, Congress, that Congress should be notified?

10. In your recent *Wall Street Journal* op-ed, "Jose Padilla Makes Bad Law," you suggest that Guantanamo detainees "may be put in custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation – a practice, known as rendition, followed during the Clinton administration."

    a. What is your basis for stating that rendition is a practice "followed during the Clinton administration"?

b. Why did you not mention the Bush Administration's use of this practice?

11. According to Michael Scheuer, the former head of the CIA's Bin Laden Unit, there is a crucial difference in the way rendition was used during the Clinton and Bush Administrations. Under President Clinton, detainees were required to be taken to countries where there was outstanding legal process against them, not for the purpose of interrogation, while under President Bush, renditions are done solely for the purpose of interrogation and detainees are rendered to countries that frequently use torture. Some call Clinton's approach "rendition to law" and Bush's "rendition to torture."

    a. Do you believe rendition for the purposes of interrogation is legal?

    b. Would it be legal if the intelligence service of a foreign country detained an American in the United States and transferred him to another country for interrogation?

12. I am concerned about recent reports that Guantanamo detainees with a credible fear of torture have been sent to countries that routinely engage in torture, including Libya, Saudi Arabia, and Tunisia. I support reducing the Guantanamo detainee population, but this must be done in compliance with our legal obligations. The Administration relies on so-called "diplomatic assurances" as the legal basis for concluding that a detainee will not be tortured. It is difficult to understand how the Administration can rely on promises from countries that routinely violate their legal obligations not to use torture as the basis for concluding a detainee will not be tortured.

    a. Do you think relying on non-legally binding diplomatic assurances from a country that routinely engages in torture satisfies our legal obligations not to transfer an individual to a country where she or he is at risk of torture?

    b. Would it be legal for another country to send an American detainee to a country that routinely engages in torture on the basis of diplomatic assurances?

13. The recent killing of 17 Iraqis in a shooting involving U.S. security firm Blackwater has highlighted the need for greater oversight of contractors in Iraq. In the last several years, the Defense Department and the CIA Inspector General have referred a number of detainee abuse cases involving contractors and civilians to the Justice Department. These agencies will only refer an allegation to the Justice Department if they believe it rises to the level of criminal behavior.

    In 2004 then Attorney General Ashcroft transferred all pending Justice Department detainee abuse cases to the U.S. Attorney's Office for the Eastern District of Virginia. It has been three years since this transfer and in that time there has not been a single indictment in any of these cases. During the same time period, the Defense

Department has prosecuted numerous military personnel for detainee abuses. Of course, every case must be considered on its individual merits, but it is difficult to believe that every case referred by the CIA IG and the Defense Department was baseless. What troubles me most is the appearance that servicemembers are being held to a higher standard than others when it comes to fighting the war on terrorism.

a. Please provide an update on the detainee abuse cases referred to the U.S. Attorney's Office for the Eastern District of Virginia. How many of these investigations are still ongoing? How many have been closed?

b. Does it concern you that so many military personnel have been prosecuted while none of the contractors implicated in these cases have been?

c. If you are confirmed, what will you do to improve the Justice Department's oversight of private security contractors in Iraq and Afghanistan?

14. According to the *Washington Post*, before you were confirmed you "spent part of the weekend meeting with leading figures in the conservative world, seeking to allay their concerns about [your] philosophy and suitability for running [the] Justice Department."

a. With whom did you meet?

b. Who asked you to take these meetings?

c. In addition to "leading figures in the conservative world," have you met with any leaders of civil rights or human rights organizations?

15. If confirmed, you would serve as Attorney General in the run-up to a hotly contested presidential election. There is a perception in some quarters that this Administration has, to some extent, played politics with important national security issues. We saw this in 2004, when President Bush argued that our national security would be threatened if the PATRIOT Act was not reauthorized immediately, even though the law did not sunset until the end of 2005. Many are concerned that this Administration will try to use the Protect America Act [the recently-passed FISA law] or some other national security legislation for the same purpose in the 2008 election.

If confirmed, how would you ensure that important national security issues do not become inappropriately politicized during your tenure?

16. I read the *Wall Street Journal* op-ed in which you wrote that the PATRIOT Act "has become the focus of a good deal of hysteria, some of it reflexive, much of it recreational." The Justice Department's Inspector General has concluded that the FBI was guilty of "serious misuses" of National Security Letters and failed to report these violations to Congress and a White House oversight board. The Inspector General also reported that the number of NSL requests has increased exponentially from about

8,500 the year before enactment of the Patriot Act to an average of more than 47,000 per year and that even these numbers were "significantly understated" due to flaws in the FBI's database.

I believe the abuses documented in the Inspector General's report demonstrate the need for reasonable reforms to the PATRIOT Act that I and a bipartisan group of Senators proposed years ago in a bill called the SAFE Act. For example, the PATRIOT Act allows the FBI to issue NSLs for the sensitive personal information of innocent Americans without any connection to a suspected terrorist. As the Inspector General report noted, the standard for issuing an NSL "can be easily satisfied." The SAFE Act would restore a standard of individualized suspicion for using an NSL, requiring that the FBI to certify that the records sought have some connection to a suspected terrorist.

If you are confirmed, are you willing to work with Congress to ensure that the PATRIOT Act includes adequate protections for innocent Americans?

17. You have publicly defended the Justice Department's detention of Arab men after 9/11. But the Justice Department's Inspector General found that none of the 762 individuals held as "September 11 detainees" were charged with terrorism-related offenses, and that the decision to detain them was "extremely attenuated" from the 9/11 investigation. The Inspector General concluded that the Justice Department's designation of detainees of interest to the 9/11 investigation was "indiscriminate and haphazard." The Inspector General also found detainees were subjected to harsh conditions of confinement and "a pattern of physical and verbal abuse."

a. What is your reaction to the Inspector General's findings?

b. If you are confirmed, will you pledge to implement fully the Inspector General's recommendations for fixing these serious problems?

18. The following questions concern your *Wall Street Journal* op-ed, "Jose Padilla Makes Bad Law."

    a. You suggest that the government was forced to use the material witness law to detain suspects because we don't have a statute authorizing administrative detention on the basis of reasonable suspicion, as countries like the United Kingdom and Israel do. Do you think that the law should allow administrative detention of American citizens without criminal charges?

    b. In your op-ed, you state that, while in military custody, Padilla reportedly confessed to plotting to detonate a dirty bomb, and you lament that the government was unable to use this confession because Padilla did not have access to legal counsel. Do you think the government should be able to use the confessions of terrorism suspects against them, even if they

violate the Constitution?

c. In your op-ed, you cite *Ex parte Quirin* as justification for the detention of Padilla as an enemy combatant. In *Quirin*, the Supreme Court upheld the trial by military commissions of Nazi saboteurs during World War II. The *Quirin* defendants were quickly charged, tried and convicted by military commissions. *Quirin* did not uphold the indefinite detention of American citizens as enemy combatants without charge or trial. Does *Quirin* really support the indefinite detention of American citizens as an enemy combatant?

19. The resignation of Attorney General Gonzales appears to be linked to the U.S. Attorney firing scandal. Earlier this year, we learned that at least nine U.S. Attorneys were fired in 2006: David Iglesias (NM), John McKay (WA), Bud Cummins (AR), Carol Lam (CA), Kevin Ryan (CA), David Bogden (NV), Paul Charlton (AZ), Margaret Chiara (MI), and Todd Graves (MO).

Based on what you know about the job performances of these nine individuals, would you have permitted any of them to be terminated if you had been the Attorney General at the time?

20. The congressional investigation of the U.S. Attorney firing scandal disclosed that certain U.S. Attorneys may have been permitted to keep their jobs because they brought prosecutions against Democratic officials. Norman Ornstein, a scholar at the American Enterprise Institute, had an off-the-record conversation with a partisan Republican former U.S. Attorney and wrote in April 2007: "What was most interesting, however, was his insistence that the big problem was not the eight federal prosecutors fired, but the ones left in place. He told me to watch the cases of those who kept their posts while pursuing unwarranted and politically motivated prosecutions."

Just this week, former Attorney General Richard Thornburgh, a Republican, testified about this issue before the House Judiciary Committee. He testified that the U.S. Attorney in the Western District of Pennsylvania, Mary Beth Buchanan, engaged in a troubling practice of prosecuting Democrats – but not a single Republican -- in the run-up to last year's election, stating: "Ms. Buchanan thus succeeded in the Department's apparent mission of casting Democrats in a negative light during the election year."

Speaking more generally about the Justice Department's conduct during the past seven years, Attorney General Thornburgh testified: "We came to learn that those United States Attorneys who, inter alia, aggressively pursued Democrats, as opposed to those that did not, remained in place or were promoted. In fact, we learned from the study conducted by Donald Shields and John Cragan, from the University of Minnesota, that this Administration is *seven times* more likely to prosecute Democrats than Republicans."

In addition, there have been recent press reports indicating Karl Rove urged a U.S. Attorney in 2005 to prosecute former Alabama Democratic governor Don Siegelman.

And several months ago, we learned that the U.S. Attorney in Milwaukee, Steven Biskupic, brought a prosecution against a state employee that many people believe was motivated by a desire to bring bad publicity to the Democratic governor in Wisconsin who was in a tough re-election fight last year. The U.S. Court of Appeals for the Seventh Circuit took the extraordinary step of overturning the conviction in this case and ordering the defendant to be released immediately from prison.

a. What specific steps will you take to communicate to the 93 U.S. Attorneys that selective prosecution against Democratic officials is unethical and intolerable?

b. What actions would you take if you learned that an individual currently serving as a U.S. Attorney brought or plans to bring a prosecution against a Democratic official for either partisan gain or professional advancement?

c. If confirmed, will you request that former White House officials Karl Rove and Harriet Miers come before Congress to testify about the roles they played in firing or maintaining U.S. Attorneys?

21. If you are confirmed to be Attorney General, you will oversee the U.S. Marshals Service, an office within the Justice Department whose primary mission is to protect federal judges and their families. This issue hits home for me, in light of the tragic murders in 2005 of Chicago Federal Judge Joan Lefkow's husband and mother by a disgruntled litigant. I have worked with the Marshals Service over the past two years to improve judicial security for federal judges across the country.

Press reports indicate you were given a Marshals Service protective detail from 1993 to 2005. An October 16 article in the *Washington Post* reported that the Marshals Service filed a grievance against you and another judge for allegedly abusing their services.

Among other allegations, they claim that you, the other judge, or your spouses engaged in the following activities: (1) asking the Marshals Service employees to carry groceries, luggage, and golf clubs, (2) insisting the Marshals Service employees empty your trash, (3) prohibiting the Marshals Service employees on the night shift from flushing the toilet while working, and (4) demanding that Marshals Service employees drive you to your vacation home in dangerous weather conditions.

a. With respect to you or your wife, are any of these allegations true? If so, please provide an explanation.

b. Do you believe it is appropriate for a federal judge or their spouse to make these types of demands on Marshals Service personnel?

c. What was the resolution of the grievance filed against you by the Marshals Service?

d. If you are confirmed, will you pledge not to retaliate against the Marshals Service in any way?

22. Many recent press reports have described a troubling politicization of the hiring process at the Justice Department, particularly in the Civil Rights Division. The hiring process has been largely taken away from career attorneys and given to political appointees, who have packed the Division with Federalist Society members and Republican Party loyalists.

a. Will you agree to restore the power of Civil Rights Division career section managers to select attorneys they would like to interview and hire through the experienced attorney hiring process?

b. Will you agree to restore the power of career attorneys to select individuals they would like to interview and hire through the Honors Program and Summer Law Intern Program?

c. What other specific steps will you take to ensure that attorney hiring in the Civil Rights Division – and throughout the Department – is based on professional competence rather than ideological purity?

23. In addition to the politicization of the Civil Rights Division's hiring process, serious concerns have been raised about that Division's lack of enforcement on behalf of African Americans. The Civil Rights Division brought the first Voting Rights Act Section 2 lawsuit in history on behalf of whites, but failed to bring a single Voting Rights Act Section 2 case on behalf of African Americans during a five-year period between 2001 and 2006. And it took the Civil Rights Division six years to file their first employment discrimination disparate impact case on behalf of African Americans.

The president of the NAACP Legal Defense Fund, Theodore Shaw, submitted written testimony in conjunction with your hearing and accused the Civil Rights Division of "a retreat from its longstanding commitment to eliminate racial discrimination against African Americans."

Are you concerned about this retreat? If so, what specific steps would you take to reverse it?

24. My Illinois colleague, Senator Barack Obama, has said: "In our democracy, the goal should be to encourage eligible voters to vote, not to create new barriers to make it more difficult for them to exercise their most basic right."

Do you agree with that statement? Please explain your answer.

25. The Civil Rights Division's Voting Section has been hit particularly hard over the past seven years. Conservative firebrands like Hans von Spakovsky and Bradley Schlozman were brought into the Division, and they severely politicized voting rights

work. They rejected the recommendations of career attorneys in politically sensitive matters and they advanced positions that set back the voting rights of minorities.

One example is their approval of the Georgia photo ID law, which Senator Cardin asked you about at your hearing. This law had a disparate impact against minority voters and was struck down by federal courts as an unconstitutional "poll tax." Those are the court's words.

You testified at your hearing that it was "over the top" to characterize the Georgia photo ID law as a poll tax. Your statement is troubling because it reflects a lack of understanding of the case law and of the impact photo ID laws can have in restricting voting rights for minorities, the poor, and the elderly. Such laws are passed in the name of preventing fraud, yet there is virtually no evidence of polling place fraud in America.

There is a major case before the U.S. Supreme Court this term on the constitutionality of an Indiana photo ID law. The Justice Department has not yet publicly indicated whether it will file an *amicus* brief in the case and, if so, which side it will support.

If confirmed, will you agree to meet personally with the leaders of the NAACP Legal Defense Fund, the Leadership Conference on Civil Rights, and other top representatives of the civil rights community before the Justice Department decides whether to file an *amicus* brief in the Indiana case, so you can hear their side of the story as to why photo ID laws are harmful to minority voters?

26. The chief of the Voting Section, John Tanner, has made a series of statements and decisions that have led many elected officials and civil rights advocates to call for his resignation. Earlier this month, Mr. Tanner spoke on a panel and argued photo ID laws disenfranchise elderly voters but not minority voters because "our society is such that minorities don't become elderly the way white people do; they die first" and also that "anything that disproportionately impacts the elderly has the opposite impact on minorities." Mr. Tanner's suggestion that photo ID laws don't harm minority voters because they "die first" is inaccurate and insensitive.

Mr. Tanner, who was handpicked to be the chief of the Voting Section in early 2005 after the previous chief, Joseph Rich, was pressured to leave, has demoralized the section whose primary mission is to safeguard the voting rights of the American people. There has been an unprecedented exodus of Voting Section staff, including nine out of thirteen African-American professional employees, three out of four deputy chiefs, and nearly two-thirds of its career attorneys. Teresa Lynn, an African-American civil rights analyst and 30-year veteran of the Justice Department described the Voting Section as a "plantation" and two African-American employees have filed EEO complaints against Mr. Tanner.

In recent days, it has been reported that Mr. Tanner allowed a member of his staff, Susana Lorenzo-Giguere, to abuse the Justice Department's travel policy and to receive per diem compensation for personal travel. According to an October 24 *Washington Post*

article, this employee was permitted to collect $64 per day while spending nearly three months at her beach house in Cape Cod. The Justice Department's Office of Professional Responsibility is investigating Mr. Tanner and Ms. Lorenzo-Giguere regarding this matter.

Do you believe Mr. Tanner deserves to keep his position as chief of the Voting Section and top voting rights official at the Justice Department?

27. The chief of the Employment Litigation Section, David Palmer, has also been discredited in recent months. Eight former career staff members sent a letter to the Senate in July 2007 stating that Mr. Palmer, who was installed as the chief of the Employment Litigation Section in April 2002 after the previous chief was involuntarily removed, has created a "work environment permeated with partisanship and animosity" in which "he treated many of his subordinates with disdain and contempt." Their letter indicated Mr. Palmer was appointed section chief despite the fact that he was "reprimanded for poor work performance," "did not understand the basic principles of Title VII and constitutional law," and was the subject of one or more discrimination complaints.

The letter also stated: "Over the past several years, Mr. Palmer took a law enforcement organization that was the vanguard of civil rights enforcement for forty years and noticeably changed its direction. The Section has seen a decline in the filing of new cases at the same time that the Section has involved itself in controversial matters that would undermine core civil rights protections. The Section has failed in its core mission to secure the rights of African-Americans, Hispanics, women, and other protected groups, as the number of cases has declined precipitously."

Do you believe Mr. Palmer deserves to keep his position as the chief of the Civil Rights Division's Employment Litigation Section?

28. At your nomination hearing, NAACP Legal Defense Fund president Theodore Shaw gave the following advice about de-politicizing the hiring process at DOJ: "I also think that it would be a good thing for the attorney general and the assistant attorney general, whoever that might be, of the Civil Rights Division to have some dialogue with some of the people who ran the Civil Rights Division under prior administrations, under both parties, as well as some of the career attorneys who have left the department, to get a sense of perhaps how the department could operate to restore its credibility and integrity."

Would you be willing to engage in such a dialogue with former officials and career attorneys who served in previous administrations under both parties?

29. In response to a question at your nomination hearing about your commitment to civil rights, you indicated that when you served as a federal judge, half of the law clerks you hired were women.

a. How many law clerks did you hire who were African-American?

b. How many total law clerks did you hire during your 18 years of service as a federal judge?

30. According to the FBI's Uniform Crime Reports, violent crime in the United States increased by 2.3 percent in 2005, and increased again by 1.9 percent in 2006. At the same time that violent crime rates have gone up, the Administration has sought to cut funding for Department of Justice programs that provide state and local law enforcement assistance.

As Attorney General, would you continue the Administration's annual efforts to cut funding for the following Department of Justice programs:

The Community Oriented Policing Services Program?
The Edward Byrne Memorial Justice Assistance Grant Program?
The State Criminal Alien Assistance Program?
The Drug Court Discretionary Grant Program?
Juvenile Justice and Delinquency Prevention Act programs?

31. When I became aware earlier this year of the serious health risks associated with the use of restraints on pregnant inmates, I began working with the Federal Bureau of Prisons and the U.S. Marshals Service to clarify their policies regarding the use of such restraints.

a. Do you believe that pregnant inmates should be shackled or restrained in ways that put the pregnancy or the health of mother or child at risk?

b. If you are confirmed as Attorney General, would you work with me to ensure that agencies within the Department of Justice have policies in place to protect pregnant inmates and their children from the adverse health impacts of certain uses of restraints?

32. In August 2004, the Office of Legal Counsel issued a memorandum concluding that the Second Amendment secures an individual right to keep and to bear arms.

a. Do you agree with this endorsement of the view that the Second Amendment protects a right to possess firearms for private purposes unrelated to the militia, even though that view been rejected by most Federal appeals courts and conflicts with the holding of the U.S. Supreme Court in *United States v. Miller*?

b. Do you support efforts to overturn federal, state and local gun control laws on the grounds that these laws violate the "individual right" interpretation of the Second Amendment?

c. It is an unfortunate fact that there are federal firearms licensees (FFLs) who knowingly sell or supply guns to gang members and other criminals. It is imperative that we break these supply chains and keep guns out of the hands of

those who are prohibited from using them. If you are confirmed as Attorney General, will you make it a Department priority to identify and prosecute those FFLs who supply guns to gangs and criminals?

33. In recent years, numerous federal agencies have sought to preempt established bodies of state law through the rulemaking process, despite the absence of underlying statutory authority for such preemption. On several occasions, federal agencies have inserted statements regarding the preemptive effect of agency rulemakings within preambles to final rules published in the Federal Register, without providing notice and an opportunity to comment on such preemption statements.

a. Do you believe it is appropriate for a federal agency to state in the Federal Register that an agency rule or regulation preempts state law, where Congress has not expressly authorized such preemption and where compliance with duties imposed by state law does not make compliance with the federal rule or regulation impossible?

b. Do you believe it is appropriate for a federal agency to state in the Federal Register that an agency rule or regulation preempts state law, without providing notice and an opportunity to comment on such statement?

34. On October 24, 2006, Dr. David Cornbleet of Chicago was brutally murdered in his office by a former patient, Hans Peterson. Peterson is a U.S. citizen who was born in the United States and who had lived in the United States up until the time of the murder. After the murder, Peterson fled to the French West Indies, turned himself in to the French authorities, and confessed to killing Dr. Cornbleet. Peterson's mother was a French citizen, and therefore Peterson is also considered a French citizen under French law. Because French law prohibits the extradition of French citizens to the United States, France is refusing to extradite Peterson to face trial for his crimes in Illinois. Media reports indicate the Peterson purposefully fled to French territory and turned himself in to French authorities because he knew that if he was convicted for murder under French law, he would face more lenient punishment than under American law.

a. If you are confirmed as Attorney General, will you work to see that justice is done in the matter of Dr. Cornbleet's murder?

b. If you are confirmed as Attorney General, will you work with other federal agencies to ensure that U.S. citizens who have dual citizenship with another country are not able to commit murder within the United States and then surrender to the authorities of the other country in order to avoid justice in the United States?

35. The National Institute on Drug Abuse reports that about half of state and federal prisoners meet standard diagnostic criteria for alcohol or drug dependence. Yet only 13% of those needing drug abuse treatment receive it while incarcerated. This means that many of the 650,000 inmates who are released back into the community each year have

not received treatment for their addiction. This makes them likelier to relapse, and to recidivate.

a. What steps do you believe the Department of Justice should take to address the issue of addiction among the federal inmate population?

b. What assistance would you recommend that the Department provide to states with regard to addiction treatment programs for prisoners?

36. In September 2006, the Bureau of Justice Statistics released a report stating that 45% of federal prisoners suffered from mental health problems. Many of these prisoners will also be released into society at some point.

a. What steps do you believe the Department of Justice should take to address the mental health problems of inmates in order to reduce recidivism?

b. What assistance would you recommend that the Department provide to states with regard to mental health treatment programs for prisoners?

37. Asylum law in the United States lacks the flexibility or openness of other nations and is designed to address the common difficulties of politically active men, but often neglects the horrors that women face. For example, in the Rodi Alvarado case, a Guatemalan woman who had been routinely abused by her husband and ignored by local police, fled to the United States. She would have been killed had she returned to her native land. She was granted asylum initially, but that was overturned by an administrative immigration court, at which point then Attorney General Janet Reno proposed new rules that would address this hole in the law and create more gender equity.

Those rules were stayed by Attorney General John Ashcroft, and the Alvarado case, along with other similar cases, have either remained in limbo, or have been decided on narrow legal grounds. The Department of Homeland Security has expressed dismay over how narrowly the law is being read and wants more protections for female asylees. In effect, they would like the Reno regulations to be adopted, or other similar rules that end this limbo and strike at the problem of inflexible and inequitable asylum law. This has put DHS at odds with the Department of Justice, which has so far refused to promulgate new regulations that will overturn the rigid immigration appellate ruling.

If you are confirmed as Attorney General, will you make a commitment to support regulations that will equalize the law and make American asylum law more open to the particular plight of women and girls?

38. In August 2007, the Transportation and Security Administration released a new policy for the secondary screening of religious head coverings. They did so without consulting the relevant community groups and without pre-training TSA screeners on the cultural implications of the new policy, which created an arbitrary system for checking head coverings, particularly turbans, when passengers successfully passed through

primary screening (the metal detector). Many Sikh individuals felt violated, and complained to their community organizations, as well as to TSA. As a result of public pressure, TSA recently revised and improved its policy.

As Attorney General, you would not have direct authority over TSA, but your guidance and opinions on matters relating to profiling would have widespread impact.

a. Your writings and judicial opinions indicate that on matters of national security you tend to strongly defer to government policies. What assurance can you provide that you would honor individual rights and liberties when offering guidance on profiling and airport screening?

b. Would you discourage agencies, inside and outside of the Justice Department, from promulgating regulations and policies that contain elements of profiling?

QUESTIONS FROM SENATOR BENJAMIN L. CARDIN

NOMINATION OF ATTORNEY GENERAL

JUDGE MICHAEL MUKASEY

SENATE JUDICIARY COMMITTEE

OCTOBER 25, 2007

Federal law, 18 USC 2340A, specifies that U.S. citizens, U.S. nationals, and individuals on U.S. soil who commit torture whether here or overseas "shall be fined under this title or imprisoned not more that 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

1. As Attorney General, will you order the Justice Department to prosecute individuals who have under 18 USC 2340-2340A committed acts of torture?

Federal law, 18 USC 2340A, specifies that "[a] person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy."

2. As Attorney General, will you order the Justice Department to prosecute of individuals who have participated in conspiracy to commit torture?

Article 2 of the Convention Against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

3. **Do you believe that any "exceptional circumstances" exist that would justify torture?**

4. **As Attorney General, would you authorize the use of torture in any circumstances?**

Questions Submitted by Senator Whitehouse for Michael Mukasey:

1. The State of Rhode Island has a serious problem with human trafficking, which is an important criminal justice and human rights issue. If confirmed, what will you do as Attorney General to ensure that the Department's resources are effectively deployed to combat human trafficking? Does the Department have adequate resources to effectively confront this problem? Is any new legislation necessary to help the Department combat human trafficking?

2. Do you believe that the President may act contrary to a valid executive order? In the event that he does, need he amend the executive order or provide any notice that he is acting contrary to the executive order?

3. The U.S. has long taken the position that techniques such as waterboarding, forced standing for prolonged periods, and sleep deprivation constitute war crimes. As early as 1901, a U.S. Army Major, Edwin Glenn, was convicted for waterboarding a captured insurgent in the Philippines. U.S. military commissions after World War II prosecuted Japanese troops for engaging in waterboarding and stress positions. A Japanese soldier named Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to "stand at attention for seven hours." Similarly, Yukio Asano was convicted for, among other charges, "forcing water into [the American prisoners'] mouths and noses." Do you believe the United States Government was right to prosecute these men?

4. In your testimony to the Senate Judiciary Committee on October 18, 2007, you indicated that you did not know what is involved in the technique of waterboarding and that if the practice of putting someone in a reclining position, strapping him or her down, putting cloth his or her face and pouring water over the cloth to simulate the feeling of drowning "amounts to torture, it is not constitutional." Now that you have had a chance to review the relevant public documents describing waterboarding, can you explain any circumstances under which waterboarding would not constitute torture?

5. The Judge Advocates General (JAGs) of the U.S. Army, Navy, Air Force and Marines stated in August 2006 that the use of stress positions, dogs, and forced nudity for interrogation purposes are all unlawful. Do you agree with the JAGs that the use of stress positions, dogs and forced nudity are unlawful? Please address each technique individually, and, if you believe any of these techniques are lawful, please explain the legal basis for each conclusion.

6. On what legal basis would the United States object if the Government of Iran or North Korea detained an American citizen, accused him of engaging in hostile acts, and detained him in secret, denying consular visits and ICRC access, and even refusing to acknowledge his detention?

7. In his book, Jack Goldsmith concluded that, at the direction of the White House, the Office of Legal Counsel had refused to show certain draft opinions to the Department of

State in order to "control outcomes in the opinions and to minimize resistance to them." If you are confirmed as Attorney General, would you allow your attorneys to accept direction from the White House to exclude or ignore the Department of State lawyers when analyzing international law? Can you imagine a circumstance in which it would be appropriate to exclude these attorneys?

8. What specific steps will you take, beyond having conversations with current and former Department officials and with members of Congress, to audit which internal processes, rules, traditions, norms, and practices need to be changed or restored in order to support the Department's return to independent, professional, and non-political standards?

Will you convene a bipartisan "blue-ribbon" commission composed of former high-ranking Department officials to make recommendations in this regard?

Questions for Judge Michael B. Mukasey
Nominee for Attorney General

Senator Carl Levin
October 23, 2007

1. Would you consider it inhumane to secure a detainee onto a flat surface and slowly pour water directly onto the detainee's face or onto a towel covering the detainee's face in a manner that induced a perception by the detainee that he was drowning?

2. Would you consider it inhumane to intentionally expose a detainee to cold or intentionally immerse a detainee in water until such time as the detainee began shivering?

3. Would you consider it inhumane to threaten to transfer a detainee to a third country with the knowledge that the detainee is reasonably likely to fear that country would subject him to torture or death?

4. Would you consider it inhumane to force a detainee to remove his clothes or remain naked other than for security or medical reasons?

5. Would you consider it inhumane to intentionally subject a detainee to treatment that violates the detainee's religious beliefs?

6. The Detainee Treatment Act requires that detainees not be subject to cruel, inhuman, or degrading treatment or punishment, as prohibited by the 5th, 8th and 14th Amendments to the Constitution. An October 4, 2007, New York Times article stated that, in 2005,

the Department of Justice determined that "in some circumstances, not even waterboarding was necessarily cruel, inhuman or degrading, if, for example, a suspect was believed to possess crucial intelligence about a planned terrorist attack."

A. Is the belief that a suspect possesses crucial intelligence about a planned terrorist attack relevant to whether the suspect's treatment is consistent with the constitutional standards in the 5th, 8th, and 14th Amendments?

B. If the government interest in obtaining information to prevent terrorist attacks is relevant to the constitutional analysis of the Detainee Treatment Act, what is the minimum standard of treatment required by the Detainee Treatment Act, notwithstanding the government interest involved?

C. Is the government interest in obtaining information from a suspect who is believed to possess crucial intelligence about a planned terrorist attack relevant to a constitutional analysis of what interrogation techniques U.S. law enforcement operating in the United States are permitted to use in questioning such a suspect?