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We've been told that the Bybee memo was withdrawn at the end of 2004, but it has never been repudiated by the Administration.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 <u>Hamdi</u> 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 <u>Hamdi</u> 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?