

QUESTIONS OF SENATOR CHARLES E. GRASSLEY FOR JUDGE MICHAEL MUKASEY, SENATE COMMITTEE ON THE JUDICIARY, OCTOBER 17, 2007

Antitrust

A) Judge Mukasey, as you know, I've been extremely concerned about increased concentration in the agriculture sector of our economy. I believe that the Justice Department's Antitrust Division needs to dedicate more time and resources to agriculture competition issues. The Justice Department must play a key role in limiting monopsonistic and monopolistic behavior in agriculture.

1) I'd like to get a commitment from you that the Antitrust Division, under your watch, will pay heightened attention to agribusiness transactions. Can you give me an assurance that agriculture antitrust issues will be a priority for the Justice Department if you are confirmed?

2) Judge Mukasey, earlier this year, I introduced S. 1759, the Agriculture Competition Enhancement Act of 2007, which among other things, would require the Justice Department to issue agriculture merger guidelines. With the current Farm Bill debate going on here in the Senate, I'd like to get a commitment from you that DOJ will review the legislation, provide me with comments, and work with me on this bill. Can I get that commitment from you?

Obscenity

A) Illegal obscenity is more available now than ever before. Obscenity is abundant on the Internet and on cable and satellite television. In fact, there have been news reports that some people are having pornography sent directly to their cell phones and Palm Pilots.

1) If you are confirmed as Attorney General, will you agree to review the Justice Department's strategy on obscenity prosecutions to ensure that it is as effective as possible?

2) Can you assure me that the Justice Department will prosecute the major producers and distributors of illegal obscenity and make such prosecutions a priority under your leadership?

3) It is my understanding that both the Justice Department and the FBI have created Obscenity Prosecution Task Forces to conduct obscenity investigations and prosecutions. If you are confirmed as Attorney General, will you continue to support these task forces and ensure that they are adequately staffed and aggressively pursuing obscenity cases?

4) Will you review any obscenity prosecution policies and guidelines that the Justice Department and the FBI have in place to determine whether they are as effective as possible or whether they can be improved to combat the dissemination of obscenity?

Oversight

A) The Constitution grants Congress the authority to oversee and investigate the activities and operations of the Executive Branch. This duty is both explicit and implicit through various authorities provided in Article 1. Conducting oversight is an essential part of our system of government and an integral part of the system of checks and balances. In the years following 9/11, Congress has given the Department of Justice significant new investigative and enforcement powers, such as those contained in the USA Patriot Act. It is important for Congress to know how well these new investigative and enforcement powers are utilized.

Often times, Congress will ask the Government Accountability Office (GAO) to evaluate the Justice Department, subordinate agencies, as well as programs and activities. These evaluations require the cooperation of the Department in providing documents for review and access to witnesses for interviews. The cooperation of the Department is critical in allowing the GAO to fulfill the requests Congress makes.

- 1) Will you commit to ensuring that GAO requests for access to documents and witnesses are agreed to in a timely manner?
- 2) Will you commit to working with the GAO in a constructive manner to address the oversight and other needs of Congress?
- 3) Will you encourage subordinate agencies of the Department to also cooperate with GAO in a similar fashion?
- 4) What specific steps will you take to ensure that GAO receives timely access to the information and agency officials it needs to carry out reviews of the Department and its programs?

B) One of the problems I have encountered relative to receiving documents from the Justice Department is the claim that there is a policy of not releasing Office of Professional Responsibility (OPR) documents. However, OPR documents are routinely provided in civil litigation, and have been provided to Congress in the past. I am aware of no legal support for a general policy of withholding all OPR documents from Congress, and this policy hinders our ability to examine OPR decisions for potential retaliation.

- 1) If you are confirmed, will you continue this policy of withholding OPR documents from Congress? If so, what is the legal basis for withholding OPR documents from Congress?

Youssef Case

A) Bassem Youssef is the FBI's highest-ranking agent fluent in Arabic. He is an Egyptian-American, a Coptic Christian, and an experienced expert in Middle Eastern

counterterrorism. He is also an FBI whistleblower who says that the FBI's counterterrorism efforts are being hindered by the FBI's unwillingness to promote agents with his skills and experience into senior management positions. According to FBI officials questioned in the course of Youssef's lawsuit, the FBI's policy for choosing managers in its counterterrorism programs is that (1) knowledge of Arabic is not needed, (2) knowledge of Middle Eastern culture and history are not needed, (3) experience in counterterrorism programs is not needed, and (4) subject matter expertise in Middle Eastern counterterrorism is not needed. I find that hard to believe, but FBI officials explicitly said so under oath. Do you agree with the FBI that these factors should not be considered in promoting managers to oversee the FBI's counterterrorism efforts?

B) According to Youssef, he is prepared to testify in detail about a host of deficiencies in the FBI's counterterrorism efforts, including its (1) over-reliance on translators, (2) inability to recruit human sources, (3) inability to properly identify, prioritize, and respond to threats, (4) over-reliance on technology, (5) failure to analyze key sources of information, (6) failure to audit the effectiveness of its programs, and (7) failure to adequately staff counterterrorism positions. If confirmed as Attorney General, would you undertake a serious review of these concerns and consider appointing a panel of independent experts to review the FBI's counterterrorism efforts, assess their effectiveness, and recommend policy changes to improve its ability to protect Americans from another catastrophic terrorist attack?

FDA

A) Judge Mukasey, last year I started examining the issue of prescription drugs being sold on the market that have not yet been approved by the Food and Drug Administration (FDA). According to the FDA, almost 2% of all prescription drugs are unapproved drugs. Unapproved drugs may pose heightened risks to the American people because their safety, efficacy, labeling and quality have been not reviewed by the FDA.

In the last year, FDA has taken regulatory action against manufacturers of several unapproved drugs. However, many more unapproved drugs remain on the market, and it has been alleged that Medicaid is being billed inappropriately for these drugs. I have been told that some companies place their own National Drug Codes (NDCs) on the labels of their products, and Medicaid is billed using these invalid NDCs. I have also been told that some companies are sending marketing representatives to doctors' offices to promote the use of their drugs, but doctors are not informed that they would be writing prescriptions for drugs that have not been approved by the FDA.

Judge Mukasey, if these allegations are true, then the federal government should be recouping monies paid for such drugs, and the Department of Justice should be playing a key role in such efforts.

1) Please provide an overview of current efforts by the Justice Department to investigate and recover monies paid for unapproved drugs, including any current cases.

2) Please describe how the Justice Department works with the Department of Health and Human Services' Office of Inspector General (HHS OIG), the FDA, and the Centers for Medicare and Medicaid Services (CMS) to understand and investigate allegations of fraud involving unapproved drugs.

3) Will you commit to ensuring that sufficient resources are devoted to this important safety issue?

4) What actions will you take to address this issue?

5) What will you do to encourage coordination between DOJ and HHS OIG, FDA, and CMS?

Bankruptcy

A) Comprehensive bankruptcy reform was enacted a couple of years ago, and because of it, I believe that the bankruptcy system is better and fairer. However, there are many who want to weaken the statute. Will you commit to actively support enforcement of the bankruptcy reform law, and assist in efforts to beat back any attempt to undermine it?

Money Laundering

A) Currently, investigative authority for violations of federal money laundering statutes is governed by a Memorandum of Understanding (MOU) between the Secretary of Treasury, the Attorney General and the Postmaster General. This MOU was signed in August 1990 and delegates federal law enforcement authority among the various federal agencies. I'm concerned that this MOU is outdated, and includes federal agencies that no longer exist or were moved to the new Department of Homeland Security. Given the importance of cutting off funds that are obtained through criminal enterprises and utilized by criminal, terrorist or drug trafficking organizations, I believe that this MOU should be updated and brought into the 21st century.

1) Is there an effort underway to begin negotiations between the Justice Department, Department of the Treasury, Department of Homeland Security, and other affected agencies to update the MOU regarding money laundering investigations? If so, when will this be completed?

2) If there is no current effort underway to update this MOU, will you pledge to open discussion with the various affected agencies and ensure that federal law enforcement agencies are working under a framework representative of the federal government in the 21st Century?

B) The FBI took control of terrorist financing investigations in 2003, but, according to Justice Department data, the number of terrorist financing convictions has dropped from 103 in 2003 to just 49 in 2006. According to government officials quoted in the *Los*

Angeles Times a month ago, Al Qaeda now has the funding to merge with other extremist groups and provide them with funding, training and logistical support.

1) What steps will you take, as Attorney General, to more aggressively address all the methods these terrorists use to earn, move and store assets?

DEA

A) Since the FBI got out of the business of drug enforcement in 2001, the Drug Enforcement Agency has done an admirable job of picking up the slack in major urban areas. Nevertheless, rural areas continue to suffer, partly because the DEA has been hamstrung by a hiring freeze and work-force cuts.

1) While Congress works to ensure that DEA receives adequate funding, what steps would you, as Attorney General, take to ensure that the DEA receives the support it needs to address our nation's drug problems?

B) DEA is currently under a hiring freeze for new special agents, and I understand that this hiring freeze may extend into FY 2009 or FY 2010.

1) Has the DEA prepared any estimates on the potential shortfall of agents in the future given the current hiring freeze? If so, please provide those estimates.

2) Has the DEA considered the impact that this hiring freeze may have on institutional knowledge and the effectiveness of the agency? Is DEA concerned that this hiring freeze may result in a largely inexperienced agent pool?

**ADDITIONAL QUESTIONS FROM SENATOR GRASSLEY TO JUDGE
MICHAEL MUKASEY**

1. At the Judiciary Committee hearing, in your answer to my question about the propriety of the FBI participating in the investigation of its own conduct by Inspector General's Office, I was pleased that you shared some of my concerns. You were correct when you said, "having an agency investigate itself is generally not the optimum way to proceed." However, it was disappointing that you went on to express essentially no problem with the FBI's participation in the particular investigation of its issuance of so-called "exigent letters," which the OIG is now conducting.

(a) Please clarify your reasoning as to why what you characterized as "not the optimum way to proceed" should be considered appropriate in this instance.

(b) Specifically, do you have any basis for believing that the OIG's "preliminary conclusion" was that "nobody bothered to read the form" used to generate exigent letters with false statements?

(c) My understanding is that one goal of the OIG's current investigation is to determine exactly who authorized and used the exigent letter form and under what circumstances. An objective, independent determination of these facts is at the heart of the question as to whether any of the false statements made by the FBI in order to obtain phone records without legal process were knowing or willful, and if so, who should be held responsible. How can the public have confidence in that investigation's conclusions if it is being conducted jointly with the FBI—the agency whose conduct is at issue?

(d) Another reason for my concern about the objectivity of this investigation is that a central witness is FBI whistleblower Bassem Youssef. As you may know, Agent Youssef had previously reported mismanagement of the FBI's counterterrorism program to Congress and subsequently had his transfer to the International Terrorism Operations Section halted in-process, in apparent retaliation for bringing his concerns to Congress. He has now been notified that he is a subject in the investigation regarding the use of exigent letters, even though he claims that he substantially slowed and corrected their use after becoming the head of the FBI's Communications Analysis Unit. Given these circumstances, can you explain why allowing the FBI to participate in the OIG investigation doesn't risk undermining confidence in the objectivity its findings by raising questions of further retaliation?

(e) Will you agree to promptly reconsider this issue if you are confirmed, determine whether it is appropriate to continue to allow the FBI to participate in the investigation, and get back to me directly?