S. HRG. 109–722

CONFIRMATION HEARING ON THE NOMINATION OF PAUL J. MCNULTY, OF VIRGINIA, TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

FEBRUARY 2, 2006

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THURSDAY, FEBRUARY 2, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, DeWine, Sessions, Leahy, Kennedy, Schumer, and Durbin.

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

Chairman SPECTER. The Judiciary Committee will now proceed with the hearing for the nomination of Paul J. McNulty, to be Deputy Attorney General for the Department of Justice.

We have waited just a few moments here for Senator Warner, who had been on the premises. But it is five after, so we have Senator George Allen, our distinguished colleague, with us.

So let us proceed with your introduction, Senator Allen.

PRESENTATION OF PAUL J. MCNULTY, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman and members of the Committee. I thank you for the opportunity to appear before this Committee to relate to you and tell you about my friend, Paul McNulty. He is here today with his wife, Brenda, and two of their four children, Annie and Corey. Their two oldest children are in college. One is a freshman—Joe is a freshman at James Madison University, over in the Shenandoah Valley of Virginia.

Let me just say one thing personally before I get into the attributes about Paul McNulty. In the midst of preparing for this trial, or this hearing, his mother passed away and they had the funeral earlier this week. Today would actually be her 82nd birthday. Our thoughts and prayers are with Paul, and we know that his mother is looking down, joining her husband who passed away a few years ago, and looking down with pride on their son, Paul, and his opportunity to continue to serve this country.

I have known Paul since the days I was Governor. One of the key things we tried to do, and successfully did in Virginia was abolish the lenient, dishonest parole system and institute truth in sentencing. Paul McNulty was one who I counted on as a very loyal, expert, knowledgeable adviser. And thanks to those reforms we made in Virginia, Virginia is safer.

Back in 2001, my colleague, Senator Warner, who will be here undoubtedly, we had the honor of recommending to President Bush the nomination of Paul McNulty to be U.S. Attorney for the Eastern District of Virginia. The Senate confirmed Paul McNulty on September 14, 2001, just after we were attacked by the terrorists. The U.S. Attorney's office in the Eastern District of Virginia has played a central role in the war on terrorism ever since.

Now, there is not time to talk about all the different important terrorism cases that Paul has been involved in and has prosecuted since he has been in office, but let me relate to the Committee two of these cases that Paul has overseen personally during his time as U.S. Attorney.

First, of course, is the case of Zacarias Moussaoui. I know that the Chairman joined me in saying let's make sure that the families could somehow view those proceedings since the victims' families are all over the country. Paul was engaged in this effort in unprecedented victim outreach in connection with that case.

Over the years since Moussaoui was indicted, Paul's office has interviewed over 2,000 victims and maintained regular contact with more than 5,000 victims or family members. This effort, I think, demonstrates Paul's compassion for the victims of crime and his long-standing commitment to victims rights.

Also, last November, Paul's office obtained a conviction of Ahmed Omar Abu Ali, an American citizen who joined an al Qaeda cell. Abu Ali had plotted to assassinate the President and hijack airplanes. As Paul has said, the evidence presented during that trial proved that Abu Ali was a, quote, "dangerous terrorist who posed a grave threat to our national security." The sentencing hearing will be later on this month, but Abu Ali faces a minimum sentence of 20 years for this crime.

Under Paul's leadership, the U.S. Attorney's office in the Eastern District of Virginia has accomplished a great deal in traditional law enforcement areas, working with localities in the State combatting gangs. The Eastern District of Virginia led the Nation in the prosecution of gun crime for the past 3 years, it lead the Mid-Atlantic region in drug trafficking prosecutions, and also dismanted a high-tech piracy group that operated servers around the world distributing millions of dollars worth of illegal software and movies.

Paul has accomplished these things by promoting a series of initiatives, and what I think was very important, drawing upon the resources of other Federal agencies, as well as developing close working partnerships with State and local law enforcement.

I am pleased, Mr. Chairman, to say to you that I think that the President has chosen very well in nominating someone with a strong background in prosecuting terrorism for this important position as Deputy Attorney General. Paul will be a thoughtful, knowledgeable, decent, caring, excellent addition to the Department of

Justice as we continue to fight the global war on terror and keep Americans safe.

I hope, Mr. Chairman, that you all have a good hearing, and I respectfully urge you all to move as quickly as possible. Paul McNulty has my very strongest recommendation for this position.

I thank you so much for allowing me to be here, and now I am joined—as I said, he would be here directly and here he is, the senior Senator from Virginia.

Chairman SPECTER. Thank you very much, Senator Allen. We knew that Senator Warner was on the premises and we waited to accorded him the status as senior Senator. We later heard that he had commitments in the Intelligence Committee. So we welcome you here, Senator Warner, and look forward to your testimony.

PRESENTATION OF PAUL J. MCNULTY, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Let the record show I was here at precisely 9:28 this morning.

Mr. Chairman, I have listened to my distinguished friend and colleague here give a very comprehensive statement. I will just ask unanimous consent to place my statement in the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator WARNER. Mr. Chairman, you and I came up through the prosecutorial ranks of the various departments that we have served in, in the Justice Department, and as I look on this distinguished public servant's career, it is really extraordinary. He has had the background and the experience to take on the challenging tasks in the Department of Justice to which our President has appointed him. He has my whole-hearted support. I assure this Committee that he will fulfill, and even exceed the expectations that all of us have as to his capability, knowledge of the law, respect for fairness and equality of justice for all.

So with that, Mr. Chairman and distinguished ranking member, Mr. Kennedy, I will put in my statement and you can get on with your hearing.

Chairman SPECTER. Thank you very much for being with us Senator Warner, Senator Allen. Mr. McNulty is a Virginian at the moment. He is also a Pennsylvanian. He was born and raised in Pennsylvania, and if he were being presented to the Armed Services Committee, I might be presenting him instead of Senator Warner and Senator Allen.

Senator ALLEN. Notwithstanding that background, we did endorse him for being U.S. Attorney for the Eastern District of Virginia. He had a breadth of experience.

Chairman SPECTER. Your endorsements are very amendable.

Senator WARNER. Mr. Chairman, Senator Allen and I have been working with the White House and the Department of Justice on the successor. 29 individuals came forward to apply for this position, partially because of the extraordinary heritage that this distinguished gentleman left in that office. Hopefully, we will be mak-

ing that announcement together with the President soon as to his successor. I thank you.

Chairman SPECTER. Thank you very much, Senator Warner. Thank you very much, Senator Allen.

Paul McNulty comes to the proceedings today with an outstanding record, a graduate of Grove City College, 1980, Capital University Law School in 1983. Extensive experience as a prosecutor, has been the United States Attorney since 2001, and before that was the Principal Associate Deputy Attorney General, was Chief Counsel to the Office of Majority Leader of the House of Representatives. He is an adjunct professor from Grover City College. I will ask without objection that his extensive biographical material be made a part of the record. The position of Deputy Attorney General is one of enormous importance, as the administrative officer right behind the Attorney General on the Department of Justice, which has so many, many responsibilities.

Before swearing in, Mr. McNulty, let me ask Senator Kennedy if he has any opening comments.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. I know we are going to be joined by Senator Leahy in just a few moments. If I could just take a moment to welcome Mr. McNulty.

I understand you served on the Legal Service Program, and you also received the O'Neill award, as a student. If that is after Tip O'Neill, I would be interested in the reach of that award.

I would like to put my full statement in the record.

I think you are very much aware of the issues about the extent of Executive power and authority that is part of the national debate and discussion at the present time. You are going to be in a very important position on advising on the legality and the justification for that kind of authority, the whole range of accountability on prosecutions in the CIA, I am interested in how you dealt with those individuals. The President has spoken of accountability, and a number of these individuals that have been turned over from the CIA to your shop for processing and for prosecution. I want to hear you on this issue because this is enormously important for obvious reasons.

The range of civil rights issues—what the Department has been doing, what it has not been doing, the selection of various individuals in the Civil Rights Division, particularly the provisions of the Voting Rights Act, the cases that were brought and not brought. The areas of immigration, the difficulty and the complexity that we are finding now, that has raised enormous kinds of challenges since the procedures were changed by the Attorney General, and that raised concerns as to the fairness and integrity of this process. These are just some of the very important areas that you will have, and do have, and have had important responsibilities for, and we are looking forward to hearing you out on some of these issues.

I will put my full statement in the record and look forward to the question and answer period.

I thank the Chair. I ask that the full statement be put in the record.

Chairman SPECTER. Thank you, Senator Kennedy. Your full statement will be made a part of the record.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman SPECTER. I now yield to the distinguished ranking member, Senator Leahy.

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

Senator LEAHY. Thank you, Mr. Chairman. I apologize for the delay, but I have been working, as you know, along with Senator Durbin and others on the PATRIOT Act.

As has already been said, of course, this is for the No. 2 position. The previous deputies, James Comey and Larry Thompson, had extensive experience as prosecutors. When Tim Flanagan was proposed for this, I questioned the fact that he did not have experience. I am worried that neither the current Attorney General, nor the Associate Attorney General, nor the Assistant Attorney General chosen to head the Criminal Division, nor the Solicitor General, had real experience as a prosecutor before going to the top law enforcement office in the country.

The President withdrew Mr. Flanagan's nomination. Of course, anyone who reads the papers still sees the questions regarding that nomination. I joined Senator Durbin in a letter yesterday to the Attorney General about the role that Mr. Flanagan's dealings with Jack Abramoff and David Safavian played in that decision. We will see whether I get a response back. The Justice Department rarely responds to my letters, notwithstanding their Attorney General's pledge under oath at his confirmation hearings to be more responsive.

Mr. McNulty does come to us as the Acting Deputy Attorney General and a U.S. Attorney for the Eastern District of Virginia, so he has had supervisory experience with criminal matters. I am not sure how many cases he has personally prosecuted, but I think as Deputy Attorney General, prosecutorial experience and prosecutorial judgment is going to be sorely tested. There are a lot of very delicate investigations that you have to oversee, and prosecutorial experience will be beneficial, may be critical, and the reason I keep mentioning this, Mr. McNulty, is that nobody else has prosecutorial experience. You have had supervisory prosecutorial experience, and that is a plus. We would like to see more, especially when the President has such an expansive view of his power, and the Justice Department is the only place left that might serve as a check if that power is being used illegally.

The most recent Deputy Attorney General, James Comey, a respected prosecutor and a long-time Republican, seemed to many to have taken that position very seriously, and he appointed a committed, independent prosecutor to carry out investigations within the Bush administration. He questioned the President's authority to conduct warrantless wiretapping. He defended career attorneys who sought to put the brakes on over expansive assertions of Executive power. He refused to be a "yes" man, and of course, he got pushed out of the Department. Unfortunately, the position of Deputy is one where you are supposed to be willing to speak truth to

power and not be a "yes" man. In fact, that is why I voted against the current Attorney General, because I felt that he would not be willing to say no to anything from the White House.

I know the importance of that. Ultimately the Attorney General's duty is to uphold the Constitution and the rule of law, and not labor to circumvent it. Both the President and the Nation are best served by an Attorney General who gives sound legal advice and takes responsible action without regard to political considerations, not one who develops legalistic loopholes to serve the ends of a particular President or administration. That holds true for the Deputy Attorney General, and that holds true whether it is a Democratic or Republican administration.

We see the extraordinary rendition of prisoners to the "black site" prisons in the former Soviet Union, something that every President, Republican and Democrat, had condemned before this administration. Now we are doing it. We saw the scandal of Abu Ghraib. We saw the withdrawn torture memo, and we saw the outgoing Justice of the Supreme Court remind us all very forcefully that nobody is above the law, not even this President, not even at a time of war.

I first met Mr. McNulty while he was serving as staff for Republicans on the House Judiciary Committee. I remember you as an extraordinarily hard-working person, and I suspect you still are. I would hope that you would be able to follow Mr. Comey's example of independence and the example of other Republicans like Elliot Richardson and William Ruckelshaus, who left rather than violate their principles and the law.

The Eastern District has been the go-to district for terrorism prosecutions, national security issues, and detainee abuse allegations. I think we need to understand how much you would be willing, even under those circumstances, to question any assertions of presidential power and look out for the individual liberties of ordinary Americans and protecting the law.

According to a recent letter from the Department of Justice to Senator Durbin, since the beginning of the war in Afghanistan in 2001, 20 allegations of detainee abuse by American civilians, 20, have been referred to the Department of Justice. All but one of these cases have been assigned to your district with a task force under your supervision. Only one of these allegations has resulted in an indictment, and that one, incidentally, was the one sent to a different district than yours. These have hurt American credibility in the world. The press reports say these referrals include one case in which a detainee was killed in CIA custody within 45 minutes of the beginning of interrogation, and the CIA's own Inspector General found the possibility of criminality.

It has been 18 months since the creation of the task force to investigate these. I want to know why, when the military has prosecuted detainee abuse cases—and the Eastern District of North Carolina has returned the one indictment so far—nothing has come out from your task force.

I want to know about the President's warrantless domestic spying program, how you have responded to this. We all want to help stop terrorists. I helped write and pass the USA PATRIOT Act. I am working on ways to get it re-authorized, but we have to have

some honest answers if we are going to be able to do that, and if it is going to have credibility so the American people can trust it.

Mr. Chairman, I went over my time, but I appreciate your consideration allowing that.

Chairman SPECTER. Thank you very much, Senator Leahy.

Mr. McNulty, if you would now stand for the administration of the oath.

Do you solemnly swear that the testimony that you will give before this Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. MCNULTY. I do.

Chairman SPECTER. Thank you. Mr. McNulty, let us begin with the introduction of your family. I see some beautiful people sitting behind you. I infer they are your family. We do not ordinarily have people of that beauty here, so if you would introduce your family, we would appreciate it.

[Laughter.]

Mr. MCNULTY. Thank you very much, Mr. Chairman, and Senator Leahy, Senator Kennedy, Senator Durbin, for welcoming me here today.

I am very pleased to introduce my family to you. My wife Brenda of nearly 25 years is here with me today, and two of my four children. As Senator Allen said, two of my children are in college. We thought it best to leave them there. My daughter Annie and my daughter Corrie are here, and my niece, Carrie Quinn, is here as well, as well as a number of good friends that have made the effort to be with me today in this room.

Thank you very much for giving me the opportunity to introduce them.

Chairman SPECTER. Thank you, Mr. McNulty. We would be pleased to hear any opening statement you care to make.

STATEMENT OF PAUL J. MCNULTY, OF VIRGINIA, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. MCNULTY. Thank you, Senator. I only want to make a couple brief points, and allow you to ask your important questions to me.

Mr. Chairman, in my view, there is no finer agency of Government, perhaps anywhere n the world, than the Department of Justice. When yo consider the mission of the Department of Justice, the importance of what the Justice Department is responsible for doing in protecting people's liberties and enforcing law, when you consider the men and women of the Department of Justice and the broad range of talents, the skill, the courage, the dedication that they have, when you consider the commitment to the highest professional standard that DOJ stand for and has stood for for decades, it really is an extraordinary agency of Government. And, again, there may be nothing like it in all the world.

In particular, over the pst 4 years, I have had the privilege of leading about 250 men and women who are part of the Department of Justice in the United States Attorney's Office in the Eastern District of Virginia. And of all those 100,000 plus employees of the Department of Justice, these 250 or so folks, in my view, are among the finest of all of the DOJ people. Their dedication and skill and kindness is really extraordinary, and what they have accomplished

over the past 4 years is a big reason why I am here today. It has been an honor and a privilege to serve them.

I say that because my second point to you, members of this Committee, is that the Deputy Attorney General is entrusted to guard all of that. The Deputy Attorney General is entrusted with this extraordinary legacy that the Department of Justice has of guarding the rule of law, and I see it, if I'm confirmed, as my duty to enhance, to strengthen, to build what has been established so well over the decades.

So, therefore, Mr. Chairman and members of the Committee, I pledge this to you. I pledge that if I am confirmed, that I will use all of my energies, by the grace of God, to act with integrity, to do what is right, and to be guided only by the law every day I have the opportunity and the privilege of serving as Deputy Attorney General, if I am confirmed.

Thank you for your courtesy, Mr. Chairman.

And I thank Senator Allen and Warner, by the way, for their kind introduction, and the President for the honor of being nominated to this very significant position.

I welcome your questions to me.

[The biographical information of Mr. McNulty follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Paul Joseph McNulty

2. Address: List current place of residence and office address(es.)

   Home: Fairfax Station, VA

   Work: Office of the Deputy Attorney General
   950 Pennsylvania Avenue, N.W.
   Washington, DC 20530

3. Date and place of birth.

   January 31, 1958, Pittsburgh, PA

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Brenda L. (Millican) McNulty, homemaker
   Staff Assistant (one day per week)
   Immanuel Christian School
   Springfield, VA

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Grove City College	9/76-5/80	B.A. (5/80)
Capital University Law School	9/80-5/83	J.D. (5/83)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   1980 Franklin County Sanitary Engineer (employee)

   1981-1982 Matan, Rinehart and Smith (law clerk)

1982	Capital University Law School (staff assistant)
1982-1983	Ohio Ethics Committee (investigator)
1983-1985	Committee on Standards of Official Conduct (counsel) U.S. House of Representatives
1985-1987	Legal Services Corporation Director of Government Affairs (initial title was Assistant to the Vice President).
1987-1990	Faith and Law Project (officer - unpaid)
1987-1990	Subcommittee on Crime (Minority Counsel) Committee on the Judiciary U.S. House of Representatives
1990-1993	U.S. Department of Justice (Director of Policy and Communications)
1993-1995	Shaw, Pittman, Potts and Trowbridge (Counsel)
1994-2000	Grove City College (Adjunct Professor)
1994-1995	First Freedom Coalition (Executive Director)
1995-1999	Subcommittee on Crime (Chief Counsel) Committee on the Judiciary U.S. House of Representatives
1996-1997	School of Government (Advisory Board Member) Regent University
1998-2001	Trinity University School of Law (Advisory Board Member)
1998	Chesapeake Theological Seminary (Board of Directors)
1999-2001	Office of the Majority Leader (Chief Counsel) U.S. House of Representatives

1999-2001	Department of Criminal Justice Services (Board Member) (Appointed by governor Gilmore on 4/99 to unexpired term ending 6/01)
2000-2001	Juvenile Justice and Delinquency Prevention Advisory Board (Appointed by Governor Gilmore on 6/00 for two year term)
2001	U.S. Department of Justice (Principal Associate Deputy Attorney General)
2001-Present	U.S. Attorney for the Eastern District of Virginia
2001-Present	Attorney General's Advisory Committee of U.S. Attorneys Vice-Chair (Feb. 2002 - May 2005); Chair (May 2005 - present).
2001-Present	Executive Board, Washington-Baltimore High Intensity Drug Trafficking Area (presently serving as Chair).
2001-Present	Judicial Conference of the U.S. Court of Appeals for the Fourth Circuit (ex-officio).
2003-Present	Acting U.S. Attorney for the Southern District of West Virginia (regarding a series of related matters from which that office was disqualified).
2004-Present	Special Department of Justice Attorney representing former Attorney General John Ashcroft in his individual capacity in a series of civil lawsuits.
2004-Present	Member, Board of Trustees, Grove City College.
2005-Present	Acting Deputy Attorney General U.S. Department of Justice

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Northern Virginia Victim Assistant Coalition Championship Award, National Crime Victims' Rights Week Annual Candle Light Vigil, 2005.

Honorary Doctor of Law Degree (LLD Honoris Causa), The Capital University

O'Neill Scholarship for Outstanding Student Leadership (1977-1980)

Grove City College Alumni Achievement Award (1998)

U.S. Attorney General's Award for Distinguished Service (1992)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Pennsylvania Bar Association (1980s)

2001-Present	Attorney General's Advisory Committee of U.S. Attorneys Vice-Chair (2001-2005); Chair (2005-Present)
2001-Present	Executive Board,Washington-Baltimore High Intensity Drug Trafficking Area (presently serving as Chair).
2001-Present	Judicial Conference of the U.S. Court of Appeals for the Fourth Circuit (ex-officio).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am not a member of any organizations that are active in lobbying before public bodies. I am a member of the following other organizations:

Ardmore Woods Homeowners Association (by-laws attached)
National Geographic Society
New Hope Presbyterian Church

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Currently active status in Pennsylvania Commonwealth Courts (first admitted in November 1983). I elected to switch to inactive status during a portion of my career because I was employed in a series of legislative or policy-making positions that did not require active bar membership and I did not anticipate returning to Pennsylvania to practice law.

U.S. Court of Appeals for the Fourth Circuit (admitted 2002).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Clinton and Crime: Rhetoric or Reality?," Free Congress Foundation, No. 516, October 1993. [This article is no longer in print and not available from Free Congress Foundation.]

"What's Wrong with the Brooks and Biden Crime Bills," The Heritage Foundation Issue Bulletin, No. 184, November 8, 1993.

"The Crime of It All: The Injustice of Justice's Revolving Door," Rising Tide, Vol. 1, No.2, January/February 1994.

"Who's in Jail, and Why They Belong There," The Wall Street Journal, November 9, 1994.

"Natural Born Killers? Preventing the Coming Explosion of Teenage Crime," Policy Review, The Heritage Foundation, No. 71, Winter 1995.

Speech at the Attorney General's Summit on Law Enforcement Responses to Violent Crime: Public Safety in the Nineties, March 3-5, 1991. [This item is not in print.]

2002 Commentary, "9/11 Expands Crime Fight," Richmond Times Dispatch, April 21, 2002 Sunday City Edition.

"Drugs, Guns and Violence: Data Mining," Law and Order Magazine, December 2003, co-authored with Colleen McCue.

As United States Attorney, I have given dozens of speeches to various groups at various occasions, including several law enforcement academy commencement exercises, regarding the initiatives, priorities and activities of the U.S. Attorney's Office. These speeches do not generally address issues of constitutional law or criminal justice policy. I do not use prepared remarks; as a result, copies of the speeches do not exist. Copies of several outlines, which may come closest to involving legal policy or constitutional law, are attached.

I have testified before Congress on the following occasions:

Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary on H.R. 1751, the Secure Access to Justice and Court Protection Act of 2005, April 26, 2005.

Testimony before the Subcommittee on Airland of the Senate Armed Services Committee concerning Air Force Acquisition Oversight, April 14, 2005.

Testimony before the Senate Committee on the Judiciary on Criminal Terrorism Investigations and Prosecutions, October 21, 2003.

Testimony before the Select Committee on Homeland Security of the U.S. House of Representatives concerning Identification Document Fraud, October 1, 2003.

Testimony before the Committee on the Judiciary of the United States Senate on Project Safe Neighborhoods, May 13, 2003.

Testimony before the Immigration, Border Security and Claims Subcommittee of the House Judiciary Committee concerning the Risk to Homeland Security from Identity Fraud and Identity Theft, June 25, 2002.

Testimony before the House Republican Conference Task Force on Crime and the GOP Anti-Crime Initiative, August 23, 1993.

Testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on Habeas Corpus, May 20, 1993.

Testimony before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee on Semiautomatic Assault Weapons, June 12, 1991.

Testimony before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee on the Firearms Provisions of H.R. 1400, May 23, 1991.

Testimony before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee on H.R. 7, Brady Handgun Violence Prevention Act, March 21, 1991.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. Last physical was 11/04.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Board member of Virginia's Department of Criminal Justice Services (appointed to an unexpired term in 1999; term expired June 30, 2001).

Member of Virginia's Juvenile Justice and Delinquency Advisory Board (appointed in 2000; term expired in 2002).

U.S. Attorney for the Eastern District of Virginia (appointed by President George W. Bush on September 24, 2001).

Acting U.S. Attorney for the Southern District of West Virginia for purposes of a series of related matters from which the U.S. Attorney's office in that district was disqualified (appointed by the Attorney General on January 22, 2003).

Special Department of Justice Attorney representing former Attorney General John Ashcroft in his individual capacity in a series of civil lawsuits (appointed June 23, 2004.)

Acting Deputy Attorney General, (appointed by the President on November 1, 2005).

15. Legal Career:

A. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

   No.

2. whether you practiced alone, and if so, the addresses and dates;

   No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

   8/1983 - 4/1985 - Counsel
   Committee on Standards of Official Conduct
   U.S. House of Representatives
   Washington, DC 20515

   4/1985-4/1987 - Director of Government Affairs (initial title was Asst. to the Vice President)
   Legal Services Corporation
   750 First Street, NE
   Washington, DC 20002

   4/1987-8/1990 - Minority Counsel;
   1/1995 - 6/1999- Chief Counsel
   Committee on the Judiciary
   U.S. House of Representatives
   Washington, D.C. 20515

   8/1990 - 1/1993 - Director of Policy and Communications
   1/2001 - 9/12/01 - Principal Associate Deputy Attorney General
   9/2001 - Present - United States Attorney for the Eastern District of VA
   11/2005 - Present - Acting Deputy Attorney General
   U.S. Department of Justice
   950 Pennsylvania Ave., NW
   Washington, DC 20530

6/1999 - 1/2001 - Chief Counsel and
Director of Legislative Operations
Office of the Majority Leader
U.S. House of Representatives
Washington, DC 20515

B. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Nearly all of my legal career has been in the public sector. This experience has included service as legal counsel to two committees and the Majority Leader in the U.S. House of Representatives and in various policy positions at the U.S. Department of Justice.

From 1983 to 1985, I was Counsel to the Committee on Standards of Official Conduct in the U.S. House of Representatives. In this position, I advised Members and staff on ethical restrictions established in House Rules and federal statutes. I also conducted investigations and drafted reports in relation to alleged violations of ethical standards.

From 1985 to 1987, I was Director of Government Affairs for the Legal Services Corporation. My duties included advising Members of Congress on proposed changes to the federal statute governing the Corporation and drafting legislative proposals.

From 1987 to August 1990, I served as Minority Counsel to the Subcommittee on Crime in the House. This position required the performance of a wide range of legal services including research, legal advice on policy issues, and legislative drafting.

From 1990 until the beginning of 1993, I served at the Department of Justice as a senior official in the area of policy and communication. My legal practice involved research, legal advice on policy issues, and legislative drafting. I served as a top advisor to Attorney General William Barr and participated in numerous briefings, discussions and strategy sessions on pending criminal and civil matters.

After leaving the Department of Justice in January 1993, I became a counsel at the law firm of Shaw Pittman, 2300 N Street, NW, Washington, DC 20037. My legal duties covered the full range of a legislative practice.

In January 1995, I returned to the House Crime Subcommittee after being named to the position of Chief Counsel. My legal work was very similar to my Minority Counsel duties, with the added responsibility of planning, administration and management.

In June of 1999, I became the Chief Counsel and Director of Legislative Operations to the House Majority Leader. I was the top legal counsel to the House Leadership and advised the Leaders and staff on a wide variety of legal issues as well as conducting complex negotiations on pending legislation. I served in this position until the start of the Bush Administration.

From January 21, 2001, to September 23, 2001, I served as the Principal Associate Deputy Attorney General. I was responsible for managing virtually all aspects of the Justice Department's mission, and I regularly participated in decision-making pertaining to investigations and prosecutions.

I now serve as the United States Attorney for the Eastern District of Virginia. As United States Attorney, I have been personally involved in the prosecution decisions in many significant cases during the past four years. For certain cases - particularly those related to terrorism - I have approved strategy decisions, plea offers and other key decisions during the prosecution. For every prosecution during my tenure, I have required the prosecutors in my office to keep me informed at every step of the way. Where I have concluded that my personal involvement in the case is necessary, I have intervened and met with prosecutors, defense attorneys and, in some cases, the victims of the crime. In civil cases, I have made numerous litigation and settlement decisions. Additionally, I personally argued one case before the U.S. Court of Appeals for the Fourth Circuit where one of the prosecutors in my office had been accused of prosecutorial vindictiveness when she carried out office policies relating to enhanced penalties for drug dealers. I am scheduled to argue another case before that Court in December 2005.

From January 2003 to present I have served as Acting U.S. Attorney for the Southern District of West Virginia regarding a series of related matters for which that Office was disqualified.

From June 2004 to present I have served as Special Department of Justice Attorney representing former Attorney General John Ashcroft in his individual capacity in a series of civil lawsuits.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My clients presently include the United States of America, a wide range of federal agencies, federal officials sued in their official capacities.

During my time at the law firm of Shaw Pittman, my practice was primarily legislative in nature and my clients were mostly banks and banking interests. I also represented clients on agriculture and technology legislation.

C. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Before becoming the U.S. Attorney (EDVA), my legal practice has not required me to make an appearance in court. As U.S. Attorney, I frequently attend court proceedings in the Federal District Court in Eastern Virginia. I have also argued one case before the U.S. Court of Appeals for the Fourth Circuit and am counsel of record in hundreds of appeals annually.

2. What percentage of these appearances was in:

(a) federal court;
(b) state courts of record;
(c) other courts.

All appearances have been in federal courts.

3. What percentage of your litigation was:

(a) civil:
(b) criminal.

My responsibilities as United States Attorney included both criminal and civil litigation, though the majority of my time is spent focusing on criminal matters.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

N/A

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

   N/A

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

While I did not personally handle matters in court as U.S. Attorney, I have been involved in every step of some of the most significant prosecutions brought during the past four years, including *United States v. Zacarias Moussaoui*, *United States v. John Walker Lindh*, and *United States v. Abu Ali*, among others. My office has led the way in adapting to the changes wrought by the September 11, 2001, attacks on the United States, by pursuing charges against alleged terrorists and bringing prosecutions that will make it more difficult for future terrorists to exploit our free and open society for their deadly purposes.

The litigation matter that I personally handled as U.S. Attorney was *United States v. Christopher Hill*, No. 03-4024 (4th Cir. April 2, 2004) (Wilkins, C.J., King and Gregory, JJ.), and I represented the United States. The defendant appealed from his conviction and sentence, and the government cross-appealed from the sentence and argued that the defendant was subject to a mandatory life sentence under the relevant statute. I was involved in the briefing and presented oral argument before the court in October 2003. The court affirmed the conviction but vacated the sentence and remanded for further proceedings. On remand, the court imposed the life sentence required by law.

Co-counsel: Michael J. Elston, 950 Pennsylvania Ave., N.W., Rm. 4210, Washington, D.C. 20530, (202) 307-2090.

Opposing counsel: Frederick Hope Marsh, Hill, Tucker & Marsh, P.O. Box 27363, Richmond, VA 23262, (804) 648-2116.

Professional Reputation references:

- William Barr	- 703 351 3032
- Ken Melson	- 703 299 3709
- Richard Cullen	- 804 775 1000
- George Terwilliger	- 202 626 3628
- Larry Thompson	- 914 253 2000
- Brian Miller	- 202 501 0450
- Brian Whisler	- 804 819 5508
- Rob Spencer	- 703 299 3700
- Larry Gregg	- 703 299 3700
- Michael Elston	- 202-307 2090

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

a. As Counsel to the House ethics committee, I provided ethical guidance to Members and staff and conducted investigations of alleged violations of the standards of conduct. The most significant cases I handled during this time involved the investigation of certain allegations against Representative Geraldine Ferraro. I served as the lead counsel and principal draftsman of the final report in this matter. A copy of this Report, absent the attachments, is appended to this application.

b. As the Director of Government Affairs for the Legal Services Corporation (LSC), I was the primary liaison between Congress and the Corporation. During my tenure, the House considered a major re-authorization bill for the Corporation. I was responsible for drafting amendments favored by LSC and analyzing legislative proposals offered by Members of the House Judiciary Committee.

c. I served for a total of eight years as Counsel for the Subcommittee on Crime in the U.S. House of Representatives, including more than four years as Chief Counsel. During that time, I played a substantial role in the drafting of hundreds of provisions of the federal criminal law. Among my most significant accomplishments are the following:

- I drafted substantial portions of the "Anti-Drug Abuse Act of 1988;" including the "user accountability" provisions, several drug trafficking penalties, asset forfeiture enhancements, and the landmark child pornography and obscenity provisions. I was the lead negotiator for the House Minority when the bill was in conference.

- In the "Crime Control Act of 1990," I drafted several amendments to the child pornography and obscenity provisions, the exclusionary rule reform amendment, and several other portions of the bill. I was also responsible for drafting the Justice Department's comments on the bill and negotiating for DOJ with Senate and House Members.

- The "Financial Institution Recovery and Enforcement Act," contained several enforcement provisions relating to bank fraud that I drafted and negotiated in conference.

- When the "Violent Crime Reduction Act of 1994," was in conference, I was called upon while in private practice to participate in negotiations between Senate and House Members. I re-wrote the "safety valve" provision and the new rules of evidence regarding the admissibility of similar crimes in sexual assault cases.

- In 1995, I was the principal draftsman of legislation concerning block grants, truth-in-sentencing habeas corpus reform, and exclusionary rule reform.

- I was the principal draftsman of several sections of the "Anti-Terrorism and Effective Death Penalty Act of 1997," including provisions to increase penalties for criminal use of explosives, habeas corpus reform, and several other terrorism issues.

- In the area of juvenile justice, I was the lead counsel in drafting the juvenile accountability block grants, new federal procedures in juvenile crime cases, and several firearms offenses.

d. I also played a major role in drafting the sentencing reform initiative adopted by the Commonwealth of Virginia in 1994.

e. During my time at the Department of Justice, I have had significant involvement in the development of many major legal policies, decision-making on major investigations and prosecutions, drafting of legislative proposals, and negotiations with congressional committees. Among my most significant legal work was directing the drafting of the "Violent Crime Reduction Act of 1991," which was transmitted to the Congress by President Bush, participation in the development of "Project Triggerlock" and "Weed and Seed," and "Project Safe Neighborhoods."

f. As United States Attorney, I supervise 120 career prosecutors and attorneys and over 100 support staff who daily carry out extraordinary work on behalf of the United States in many areas. During the past four years, I have been a hands-on manager and directly participated in litigation and strategy decisions in numerous cases. I also have been personally involved in every step of some of the most significant terrorism-related prosecutions brought

during the past four years, including *United States v. Zacarias Moussaoui*, *United States v. John Walker Lindh*, and *United States v. Abu Ali*, among others. In addition to anti-terrorism activities, I have set priorities and goals for the office in several areas, including reduction of gun violence, anti-gang efforts, cybercrime, corporate fraud and procurement fraud. Most recently, I have established a procurement fraud task force that has participation from a wide range of federal law enforcement agencies and inspectors general. Through these initiatives, I have shaped the types of cases that are brought in Eastern Virginia and significantly advanced the goals of federal law enforcement during my tenure.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Only federal civil service retirement.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   Because nearly all of my professional life has been in government service, I expect my conflicts of interest would be minimal. If a potential conflict should arise, I will consult with the ethics officials for the Department of Justice.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See attached financial disclosure statement.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

   See attached financial statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   I served as a volunteer on the issues committee for the congressional campaign of Tom Davis (Virginia, 11th District) in 1994. Otherwise, I have never held a formal position in any political campaign.

   I have served as an unpaid policy advisor on crime issues for the following candidates:

   George Bush for President, 1988
   Bob Dole for President, 1996
   George W. Bush for President, 2000
   George Allen for Governor, 1993
   George Allen for Senate, 2000
   Bill Brock for Senate, 1994

   As a crime policy specialist on Capitol Hill, I have had numerous isolated conversations with political candidates about crime issues.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   I have had the occasion to serve the disadvantaged through food and clothing donations, financial contributions and public service (e.g., expanding Boys and Girls Clubs, Weed and Seed). As a leader in my church, I have been involved in raising money for victims of natural disasters and crime. I have also worked closely with crime victims organizations. In addition, as a father of four school-aged children, I have had extensive involvement in their community and school activities. This includes four years as a head basketball coach, two years as a baseball coach, and occasional speaker at school programs.

   One initiative worth noting is the student outreach program I developed as U.S. Attorney. I have visited about a dozen high schools and junior high schools and spoken to thousands of students about the dangers and consequences of drugs and gun crime.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

   No.

U.S. Department of Justice

Washington, D.C. 20530

NOV 10 2005

Marilyn Glynn
General Counsel
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Paul J. McNulty, who has been nominated by the President to serve as Deputy Attorney General of the United States. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. Section 208, requires that Mr. McNulty recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute, including Grove City College which he serves as a Trustee, has a financial interest. Mr. McNulty has been counseled and has agreed to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

We have advised Mr. McNulty that because of the standard of conduct on impartiality at 5 CFR 2635.502, he should seek advice before participating in a particular matter involving specific parties which he knows is likely to have a direct and predictable effect on the financial interest of a member of his household, or in which he knows that a person with whom he has a covered relationship is or represents a party.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination *(Month, Day, Year)*	**Reporting Status** (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐	Termination Date *(If Applicable) (Month, Day, Year)*

Reporting Individual's Name	Last Name	First Name and Middle Initial
	McNulty	Paul J.
Position for Which Filing	Title of Position	Department or Agency *(If Applicable)*
	Deputy Attorney General	Department of Justice
Location of Present Office (or forwarding address)	Address *(Number, Street, City, State , and ZIP Code)*	Telephone No. *(Include Area Code)*
	2100 Jamiesan Avenue, Alexandria, VA 22314	703-299-3708
Position(s) Held with the Federal Government During the Preceding 12 Months *(If Not Same as Above)*	Title of Position(s) and Date(s) Held	
	United States Attorney, EDVA, 9/24/01 - present	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
	Committee on Judiciary	☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date *(Month, Day, Year)*
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Paul J. McNulty	11-10-05
Other Review (If desired by agency)	Signature of Other Reviewer	Date *(Month, Day, Year)*
	Jai M. Rap	11/10/05
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official Reviewing Official	Date *(Month, Day, Year)*
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	RRCh	11-10-05
Office of Government Ethics Use Only	Signature	Date *(Month, Day, Year)*

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding **two** calendar years and the current calendar year up to the date of filing.

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Supersedes Prior Editions, Which Cannot Be Used.

278-112

NSN 7540-01-070-8444

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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name	SCHEDULE A	Page Number
McNulty, Paul J.		2 of 5

Assets and Income — BLOCK A

Valuation of Assets at close of reporting period — BLOCK B

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. — BLOCK C

For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income.

For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse).

None ☐

	Assets and Income	Valuation of Assets: None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Trust	Qualified Trust	Type: Dividends	Type: Rent and Royalties	Type: Interest	Type: Capital Gains	Amount: None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples	Central Airlines Common				x											x						x								
	Doe Jones & Smith, Hometown, State																													Law Partnership Income $130,000
	Kempstone Equity Fund																						x							
	IRA: Heartland 500 Index Fund																							x						
1	Massachusetts Investors Trust		x											x							x									
2	AIM Weingarten Fund		x											x							x									
3	AIM International Growth Fund		x											x							x									
4	MFS Emerging Growth Fund		x											x							x									
5	MFS Research Fund		x											x							x									
6																														

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

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Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
McNulty, Paul J.		3 of 5

Assets and Income	Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.												
BLOCK A	BLOCK B										BLOCK C												
											Type			Amount								Other Income (Specify Type & Actual Amount)	Date (*Mo., Day, Yr.*) Only if Honoraria
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Yes, Qualified Blind Trust	Excepted Trust	No	Dividends	Rent or Royalty	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000		
1 Immanuel Christian School Springfield, VA																														Spouse Salary	
2																															
3																															
4																															
5																															
6																															
7																															
8																															
9																															

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name	SCHEDULE C	Page Number
McNulty, Paul J.		4 of 5

Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at **any time** during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None ☒

	Creditors *(Name and Address)*	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x)										
						$10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	$1,000,001 - $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.			X								
	John Jones, 123 J St., Washington, DC	Promissory note	1999	10%	on demand	X										
1																
2																
3																
4																
5																

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1			
2			
3			
4			
5			
6			

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Reporting Individual's Name	SCHEDULE D	Page Number
McNulty, Paul J.		5 of 5

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	Grove City College, Grove City, PA	Non-profit educational institution	Trustee	05/2004	present
2					
3					
4					
5					
6					

Part II: Compensation in Excess of $5,000 Paid by One Source

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

None ☒

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1		
2		
3		
4		
5		
6		

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FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	8,000		Notes payable to banks-secured		
U.S. Government securities-add schedule	9,000		Notes payable to banks-unsecured	7,000	
Listed securities-add schedule	39,657		Notes payable to relatives		
Unlisted securities--add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable-add schedule	580,000	
Real estate owned-add schedule	1,000,000		Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize:		
Autos and other personal property			Auto lease ($515/mo.)		
Cash value-life insurance			Auto payment ($250/mo.)		
Other assets itemize:					
Household furnishings, personal property	40,000				
			Total liabilities	587,000	
			Net Worth	509,657	
Total Assets	1,096,657		Total liabilities and net worth	1,096,657	
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	0		Are any assets pledged? (Add schedule)	No.	
On leases or contracts	0		Are you a defendant in any suits or legal actions?	No.	
Legal Claims	0		Have you ever taken bankruptcy?	No.	
Provision for Federal Income Tax	0				
Other special debt					

Financial Statement Schedules

U.S. Government Securities

1. U.S. Savings Bonds

Listed Securities

All securities are held in mutual funds. Items #1 - #4 are the assets of irrevocable trusts for the benefit of my children's college education. Item #5 is the sole asset in three educational IRA accounts.

1.	AIM Weingarten Fund	$ 7,704
2.	Massachusetts Investors Trust	$ 12,123
3.	AIM International Equity Fund	$ 13,040
4.	MFS Emerging Growth Fund	$ 5,290
5.	MFS Research Fund	$ 1,500

Real Estate Owned

Value of personal residence:	$1,000,000
Real Estate Mortgages Payable to: Lehman Brothers	$580,000
Equity	$420,000

Chairman SPECTER. Thank you very much, Mr. McNulty. We will now proceed with our practice of 5-minute rounds for members.

A key issue is our oversight authority over the Department of Justice. This is a subject which I took up in detail with the Attorney General. I sent you a letter summarizing the oversight authority of the Judiciary Committee as summarized in a CRS statement of the law, and I told you earlier this morning, when we talked briefly, that I would be asking you about it. And to quote some of the pertinent sections, the Congressional Research Authority cites the law as follows, quote: "The Department of Justice has been consistently obliged to submit to Congressional oversight regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance, malfeasance or the maladministration in the Department of Justice or elsewhere."

This includes, according to this summary, quote, "The testimony of subordinate Department of Justice employees such as line attorneys and FBI field agents, which was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases." And the Committees have been provided with, "documents respecting open or closed cases that include prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases," and it goes on.

I would like your specific agreement that that does represent the authority of this Committee on oversight of the Department of Justice.

Mr. MCNULTY. You have my agreement.

Chairman SPECTER. Thank you. I like your brevity almost as much as I like your agreement.

We are having oversight hearings, as you know, on the presidential authority on electronic surveillance, and the Attorney General will be coming in on Monday to testify. I do not intend to get into those substantive matters with you because we will be hearing from the No. 1 man in the Department. And you do not speak for the Department at this time until—well, you are Acting Attorney General, Acting Deputy Attorney General, but I do seek your response on the question of access by the Committee to legal memoranda prepared by the Office of Legal Counsel or otherwise, your view as to the propriety of the Committee having access to that in order to more fully question the Attorney General?

Mr. MCNULTY. Senator, I understand that that's an important question that's going to be faced by the Committee and the Department of Justice. As I've just responded to you a moment ago, I have a strong commitment to the role of oversight, and to making sure that this Committee has what it needs to fulfill its responsibility. I have probably the unusual experience, as Senator Leahy referred to briefly about my experience on the Judiciary Committee. I spent 12 years on Capitol Hill, and I spent a lot of years in oversight work. I have dealt with the Department of Justice on numerous occasions. I can't even think of all the times that I was working on situations where we had to get documents or deal with the Department, and we had to work through difficult issues. Sometimes we came up with accommodations where the chairman, Ranking Mem-

ber looked at things, sometimes we were able to provide more access.

I'm afraid that today, sitting here, though, I'm not able to give a response about the availability of certain documents in relation to this issue because I just haven't been involved with it. I became just recently aware of the fact of what this request is. I don't know what considerations already have occurred at the Department. I know the Department will be working with the Committee to figure out how to work through that challenge, but I can't provide specific information about what can be provided or can't be provided as we sit here today.

There's a long history to this availability of OLC opinions, and I have to learn more about it myself, and I certainly have to consult with others at the Department of Justice about how that's going to be worked out.

Chairman SPECTER. Mr. McNulty, moving on to another subject, on the prosecution of the civilians on the detainee issue, we would be interested, to the extent you can tell us, what the status is of those investigations and potential prosecutions.

Mr. MCNULTY. Thank you, Mr. Chairman. Mr. Chairman, those cases were assigned to my office for investigation about 18 months ago, as mentioned by Senator Kennedy. Deputy Attorney General Comey asked me to do it because he believed that my office had the experience and the aggressiveness to do that job. It was Deputy Attorney General's Comey's decision to ask me to do those cases. He had called upon my colleague, Pat Fitzgerald, to do a case. He had called upon David Kelley in New York to do a case. He called upon me to take on these cases.

Now, there were 19 cases that have been referred to my office for investigation. The first thing I did was put together a team of the most experienced prosecutors the Department really has. There are decades of prosecutorial experience represented in the team I have working on this, career, longstanding, hard-charging prosecutors. And we took those referrals in whatever shape and condition they were in, and they were very thin in the sense of the information initially given to us, and we began to work.

Now, as we've been proceeding on the course of these investigations—and they are ongoing investigations—there are a number of obstacles that we face in trying to come to the point of bringing criminal charges against individuals who have in any way been associated with an allegation of some form of abuse. The obstacles include jurisdiction. We have to deal with—we're dealing with civilians now, not military personnel. Military personnel are prosecuted under the Code of Military Justice. Civilians, who do conduct overseas, have to be prosecuted under the International Jurisdiction Statute that was established a few years ago, and that presents certain challenges in terms of bringing charges.

We have issues of access to witnesses, victims. In some of our cases our victims can't be found. We have had real problems in getting access to the potential witnesses in the case. I sent a prosecutor to Baghdad for interviews, and he was outside the Green Zone for quite some time and interviewed over 15 people, and we're trying to make progress in a particular case there. We've had to wait in some cases for the military to complete its work because

our witnesses were tied up with the military side of the prosecution, and you can't have collateral prosecutions in certain circumstances. You have to wait until those witnesses have testified, and then they're available.

So like any complex case, time does pass as you try to work through the problems, but I assure this Committee that we are still working hard on those cases, and it may very well be that in the not-too-distant future charges will be brought. We'll bring charges when we know we have the evidence necessary to succeed.

Chairman SPECTER. Thank you, Mr. McNulty. My time has lapsed. I will just, without objection, place into the record the letter which I wrote to you on oversight authority, make it a part of the record.

I am going to have to excuse myself at this point. Senator Hatch will be arriving shortly to preside. In the interim I have asked Senator Sessions if he would preside during my absence.

Now I yield to our distinguished ranking member, Senator Leahy.

Senator LEAHY. Mr. Chairman, I would put into the record a letter from the Fraternal Order of Police, signed by Chuck Canterbury, addressed to you and me in favor of the nomination of Mr. McNulty.

Chairman SPECTER. Without objection it will be made a part of the record.

Senator LEAHY. I know when you praised the Department of Justice—and I join you in the praise of the men and women who are there—you were referring to the civilian end of our Government. You were not in any way denigrating the military end; is that correct?

Mr. MCNULTY. No, I think that the——

Senator LEAHY. I just did not want you to get caught later on.

Mr. MCNULTY. I guess I am not familiar with all the ways you can get caught, but——

Senator LEAHY. Trust me, you will learn.

[Laughter.]

Senator LEAHY. Let me just follow up a little bit on what Senator Specter was saying on these cases that have been referred to. The reason we ask, there were 20 allegations of detainee abuse. 19 of them went to you. One went to the Eastern District of North Carolina. They were able to obtain an indictment. Were you suggesting that your primary—I do not want to put words in your mouth—but are you suggesting the primary reason there have not been indictments yet is a jurisdictional one?

Mr. MCNULTY. No. I just raised that as one of a number of factors that has come into play with some of the referrals.

Senator LEAHY. The reason I ask that, obviously, in North Carolina they felt that was not a problem. The military has been able to prosecute a number of these cases, have they not?

Mr. MCNULTY. Right. And as I mentioned, we had to let them go first in some of our allegations.

Senator LEAHY. And in among the referrals include one case in which a detainee was killed in CIA custody only 45 minutes after interrogations. The CIA's Inspector General found a possibility of

criminality. You have had that case for 18 months. Anything you can tell us about the progress in that case?

Mr. MCNULTY. It's an ongoing investigation. What's interesting about that case is that there were a number of Navy SEALs charged in the military context, and they were acquitted. So you see that sometimes in these cases it's very difficult, as I know you know, because of the nature of the evidence. In that particular case, those SEALs had custody over that individual prior to his delivery into the hands of anyone else.

And on the case in North Carolina, that case was further along in investigation and preparation for being charged. It was charged almost immediately after the referrals were made because of the work that had been done on it.

Senator LEAHY. Do you think that these others will be coming to a conclusion sometime in the near future?

Mr. MCNULTY. I think so. And to be candid with you, Senator Leahy, there may be declinations in some of the cases.

Senator LEAHY. I understand.

Mr. MCNULTY. And there may be some charges in some of the cases.

Senator LEAHY. After 18 months, there are going to be declinations. In those cases, that decision should be made too.

Mr. MCNULTY. That's right, Senator. We'll plow forward with all aggressiveness.

Senator LEAHY. Let me ask you this. There has been a lot in the press lately about the NSA domestic spying program. When did you first learn about it?

Mr. MCNULTY. When the New York Times article came out.

Senator LEAHY. You did not know about it before then?

Mr. MCNULTY. For the past 4 years I have been serving as the U.S. Attorney in Virginia. I haven't been involved in Department of Justice wide matters.

Senator LEAHY. After you learned about it, what did you do?

Mr. MCNULTY. I became aware of the program. I am not in a—read into that program, and so there is nothing more I can do in terms of action when I'm not a part of or read into the specific program itself.

Senator LEAHY. But if you were Deputy Attorney General you would be.

Mr. MCNULTY. Possibly. I mean as Acting Deputy, I think it was determined, and rightly so, that it's not appropriate in an area that's so closely held.

Senator LEAHY. Did you see the Attorney General's 42-page white paper he released a couple weeks ago?

Mr. MCNULTY. I did.

Senator LEAHY. Did you agree with everything in that paper?

Mr. MCNULTY. I read the paper carefully, and I have to say that I found you arguments, the legal arguments that were being presented there, to be credible and compelling arguments.

Senator LEAHY. Did you find anything you disagree with?

Mr. MCNULTY. I don't recall right now, Senator, of anything that I would cite as an area of disagreement. It's a general legal argument in that paper. And there may be some things that I found

more compelling than others, but as an overall argument, that's the way I viewed it.

Senator LEAHY. I am going to give you a copy. If somebody could hand a copy of a letter that I and the other Democratic members of the Judiciary Committee sent to Attorney General Gonzales last week. We requested the contemporaneous legal opinions and other documents related to the NSA domestic spying program. Senator Specter has also raised some of the issues, and has given you a letter pointing out where such documents have been made available in investigations by appropriate committees in the past. If you are confirmed, will you release to Congress and appropriately cleared staff, and where appropriate to the public, the requested materials?

Mr. MCNULTY. I can't make that commitment to you today, Senator. As I tried to explain to the Chairman, the decisions that have to be worked through in this request that I'm looking at—and I hadn't seen this before today, are challenging—and I'd have to consult with others at the Department of Justice as to precedence in the past and what can be released.

Senator LEAHY. Just one last question if I might, Mr. Chairman.

Are you aware of instances in which information obtained through the domestic spying program was used in any manner in a criminal prosecution in the Eastern District of Virginia or any other district?

Mr. MCNULTY. No, I'm not aware of that.

Senator LEAHY. Okay. Mr. Chairman.

Senator SESSIONS [presiding]. Thank you, Senator Leahy.

Mr. McNulty, it is a pleasure to see you. I have admired your work for a number of years. I think the experience you have had now as a United States Attorney will be particularly valuable to you in this position.

Tell us briefly what the role of the Deputy Attorney General is in the vast Department of Justice. It includes far more than just line prosecutors in the Department of Justice. You have quite a good deal more to deal with. I also would note that—having been on this side of the aisle, on the congressional side as a top staff person—will that not give you some appreciation for legitimate demands of Congress on the Department of Justice to respond promptly and sufficiently to legitimate inquiries from the Congress?

So I guess I will first ask you that question. Do you feel that your perspective, in being counsel in the House Judiciary Committee, would give you insight into legitimate needs of Congress, and does that make you more or less willing to be responsive?

Mr. MCNULTY. I do think that experience is helpful in this process. I think, if nothing else, when you call me as Deputy Attorney General, if you confirm me, that I will have an immediate understanding of the process that you're going through and the responsibilities that this Committee and other committees have. I will understand and appreciate the importance of oversight.

In my view the Department of Justice has to be held accountable in many different ways. We have to have a strong Inspector General. We have to have strong oversight by the Congress, including GAO, and we have whistleblowers that are a part of that oversight framework. I think all of those elements of oversight have to func-

tion well in order to hold Department of Justice accountable for its work, and we ought to be ready to be examined that way.

And so it doesn't mean that some questions won't be difficult. They have been difficult for decades, and Senator Specter's letter cites a number of issues where there has been cooperation and agreement reached on oversight, but all those examples were preceded by lengthy discussions about how much should be available, sensitivity of the information, deliberative process and so forth, but accommodation was reached in each of those instances, and I think that's the long tradition of working together on this.

Senator SESSIONS. I think Congress has a right to demand certain documents, and I think Congress has an obligation to recognize that the executive branch has the right to have internal discussions of matters that remain privileged to the Department of Justice or the President himself. My understanding of the attorney-client privilege—and you're attorneys for the executive branch—is that those documents have not been produced, that Democrat and Republican attorneys have repeatedly testified (that have served in the Department of Justice) that they should not be. And it is ultimately the documents you prepare—that the Deputy Attorneys General prepare, the Attorneys General, the Counsel to the President—those documents are prepared as an attorney, are they not? And are those documents, your documents, or do they belong to the Government and to the Chief of the executive branch?

Mr. MCNULTY. Right.

Senator SESSIONS. And is that not the person that ultimately makes a decision on whether or not to release them?

Mr. MCNULTY. That's right. Some documents that go to the very core of the deliberative process, that are sort of quintessential deliberative process work, requirements for candidacy are important. I appreciate your point about the policies in previous administrations, because I did my oversight work on the Judiciary Committee with the previous administration, and there were a number of documents that the Committee sought that we did not receive from the Department of Justice during the administration of President Clinton.

Senator SESSIONS. You never received those documents from the Clinton administration.

Mr. MCNULTY. No. And there were some instances where we had to accept either significant limitations or "no," and that's never easy to accept. but we did get that answer on a number of occasions.

Senator SESSIONS. It is just a complex issue, but there are some legitimate Executive concerns there that have been asserted by every President. Maybe a little later we can talk about the fact that you will be dealing, if you are confirmed as Deputy Attorney General, with many more issues than this. It is a huge supervisory management position that involves the Bureau of Prisons, the United States Attorneys, the Drug Enforcement Administration, the FBI, as well as many other agencies in the Department that is one of the most important in the country. I am glad that you have had this U.S. Attorney experience because it shows how the Department of Justice actually operates at the grass roots level.

I believe Senator Kennedy would be next.

Senator KENNEDY. Thank you, Mr. Chairman. Good morning.

Mr. McNulty, I am somewhat surprised to hear you say that these cases, these detainee cases came to you with a thin record. The case of Manadel al-Jamadi, who died in CIA custody at Abu Ghraib, was investigated extensively by the military, and the General Taguba report was 6,000 pages long. The Jones/Fay report, which was the other—these are reports from the Armed Services Committee, of which I am a member. That report identifies two CIA employees involved. So what is the difficulty in building the case? Is the CIA cooperating and to what extent does it cooperate, first of all, and then what is the difficulty in building the case?

Mr. MCNULTY. Senator, we're getting cooperation. I don't mean to be evasive on that one point, but I have certain classified information issues that I have to work with there, but we are getting fine cooperation from the agencies that are involved, that we're working with.

When I made that point, Senator, what I was referring to is that often when you're a prosecutor you get a presentment of a case from an agency that is a notebook which lays out quite specifically the theory of prosecution, the evidence, and puts you in a position to draft an indictment rather soon after receiving the information. Referrals is a general term, and I just don't want anyone to think that referrals means it's the full presentment of the case ready to go to indictment. The reports you cited refer literally just to observations or facts that someone reporter. We have to take those observations or facts or letters and then build a case from that. We've gotten great cooperation in trying to do that. The obstacles are more the kinds of things you run into when you're doing a case on foreign soil.

Senator KENNEDY. Let me move on to the topic of Voting Rights enforcement, and I am just going to move through this quickly. Last August the Department granted approval for the new voter ID requirement in Georgia. This disproportionately affects African-Americans, Latinos, Native Americans. Voters were required to pay $35 to obtain a card. Those IDs were available at less than 60 locations in Georgia, which has 159 counties. The Federal District Court stopped the law because the IDs functioned as a modern day poll tax. In reaching its conclusion, the Court wrote that it had great respect for the Georgia legislature but simply had more respect for the Constitution. Those are pretty strong words about a law the Department of Justice said did not violate minority voting rights. And then the conservative 11th Circuit Court of Appeals upheld the District Court's decisions.

The news reports show that the career staff and Department opposed the law because it would violate civil rights—but they were overruled by political appointees. There is yet a similar situation with a unanimous staff recommendation against approving a redistricting plan in Texas. The Texas case is going to come up to the Supreme Court next month.

I understand you were not supervising voting right cases when these staff recommendations were made. We are going to have a separate Civil Rights oversight hearing, as the Chairman has indicated. But if you are confirmed, you will be in the chain of com-

mand above the Civil Rights Division, so your position on the matter is important.

Just last week, Georgia passed a new voter photo ID program, which the Department has the responsibility of reviewing. The issue is whether the law will actually make it harder for minorities to exercise their vote.

Do we have your assurance that you will personally notify the Civil Rights Division leadership and the Voting Section that you expect a fair review of the new Georgia law, and that you will not permit politics to trump fair civil rights enforcement?

Mr. MCNULTY. You have that assurance. Senator, let me just add, I feel very strongly that politics can never play a role in what the Department of Justice does, and the Civil Rights Division has to be—operate always in a fair and appropriate way under the rule of law because it's the vision that really seeks to guard opportunity for every American.

I will point out that the section chief of that section is a career person, who has been the one signing off on those Georgia decisions.

Senator KENNEDY. But you will follow that?

Mr. MCNULTY. Absolutely.

Senator KENNEDY. Let me just move quickly on to this issue as well. You are familiar with the role of the Honors Program in the Department's hiring practices. That has been changed, especially in the hiring of the Civil Rights Division, where career attorneys have been totally excluded from reviewing candidates. It is now done only by political appointees. That is a dramatic change from the past. The Honors Program was originally designed to get rid of political considerations in new hiring. So will you agree that political considerations should not have a role in who is named in career positions in the Department, and if you are confirmed, will you review the Honors Program?

Mr. MCNULTY. I will.

Senator KENNEDY. And work with us to guarantee that the politics is not the controlling factor?

Mr. MCNULTY. Absolutely, Senator. I looked into this briefly because I knew this was a concern. And we may have to check the facts that you have and I have and make sure we're on the same page.

Senator KENNEDY. Fine.

Mr. MCNULTY. But I understand that a career employee and a political employee are both involved in every hiring decision that's made in the Honors Program. So that's my understanding of the current policy.

Senator KENNEDY. If you look it over, we can talk about it later.

My time has expired. I will just take a second here. Just this morning we learned of a terrible tragedy in New Bedford, Massachusetts. Three people are now in the hospital after suffering brutal attacks. The suspect allegedly walked into a bar, asking if it was a gay bar. And then the suspect started attacking customers, swinging a hatchet, and then pulled out a gun and started shooting at everyone. So this really was a crime of hate, and such acts of violence represent, I believe, domestic terrorism.

Senator Smith and I, and Senator Specter have been enormously interested in hate crimes. Will you work with us? We have a current hate crimes bill. We have passed others in the Senate. We have not been able to get it into law. But will you work with us in terms of hate crimes legislation generally? I cannot ask you now for a specific position on it, but I would like to ask for your assurance that you at least will work with us in terms of that subject matter. We may not come to the same decision, but I would like assurance at least you will work with us on this issue.

Mr. MCNULTY. Right. I will work with you. I remember the issue—I haven't thought about it recently—but I remember the issue when I worked for the House Judiciary Committee, and I will be very prepared to work with you on your efforts to try to address the question.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman. My time is up.

Senator DEWINE [presiding]. Mr. McNulty, good to see you.

Mr. MCNULTY. Good to see you, Senator, thank you.

Senator DEWINE. You have a distinguished record. You and I first met each other in I think about 1983, right after I came to the House of Representatives. You were with the Legal Services Corporation. Shortly after that you went I think with Bill McCollum on the Crimes Subcommittee of the House. You and I worked on the Crime Bill. You went off to the Justice Department for a while, had a career there. And then you came back, and you and I worked together when you were again Chief Counsel on the House Crimes Subcommittee, and then your distinguished career in Virginia, some very famous cases. Now back at Justice Department, U.S. Attorney's Office. It was a very distinguished career.

So anyway, it is good to see you back.

Let me just ask you, Paul, a couple questions, one on asylum cases. As you probably know, in the past year several Federal Circuit Courts have openly criticized the Department's handling of immigration cases involving those who seek asylum in the United States. Some have criticized the decisions of immigration judges. Others have commented on the quality of appellate review conducted by the Bureau of Immigration Appeals in these cases. The issue, however, seems to stem from a decision made by DOJ in 2002 to streamline the appellate review process in immigration cases. Without question, this streamlining has made the difficult process of deciding hundreds of thousands of asylum claims each year more efficient. But some of us fear that it has also led to a number of meritorious asylum claims really slipping through the cracks.

What is your thinking in this area? Do the current DOJ regulations strike, in your opinion, the proper balance between efficiency and individual justice, or do we need to reexamine these regulations to be certain that meritorious asylum claims do not slip through the cracks?

Mr. MCNULTY. Well, I am familiar with the changes in part because the effort to expedite the immigration cases has also resulted in really an avalanche of cases in the circuit courts for review. And my office in the Eastern District of Virginia, like every U.S. Attorney's office in the country and every litigating unit or component

of the Department of Justice, is now participating and working on briefs on those cases. So we all understand the volume.

Just a week ago, Senator, Attorney General Gonzales asked my office and the Associate Attorney General's office to conduct a thorough review of the way the immigration courts are operating, the quality of the work that is being done, the efficiency and effectiveness, and whether or not we have struck that right balance.

So we are currently going through a very large effort to review what is being done by immigration judges in these cases, these petitions. I would like to get the results of that, which should be rather soon because the Attorney General told us to get it done quickly, and talk to you about what we find at that point.

Senator DEWINE. Well, I would hope maybe you could come in with me or have someone come in and brief me and my staff on that because I have a concern about this. When you have the circuit court judges openly criticizing the Department's handling, I think that is a problem. We are picking it up, frankly, through my office and some of the horror stories that we are hearing, and I think it is a real problem.

Mr. MCNULTY. I understand, and the concern——

Senator DEWINE. And the time line for that is what, do you think?

Mr. MCNULTY. It is not a lengthy review. It is one that the Attorney General wants back quickly. So we have been at it now for about 3 weeks and I can't give you a specific date, but we are talking about just literally weeks of more work to do and not a long period of time.

Senator DEWINE. Let me ask you one more question. As United States Attorney for the Eastern District of Virginia, you, of course, have been involved in some of the most important anti-terrorism cases in the country.

Do you want to take a moment to give us some idea of what is working in this area and what, from your perspective, maybe is not working? Again, have we struck the right balance between fighting terrorism and protecting civil liberties, and are the tools that Congress has given our investigators and our prosecutors in the USA PATRIOT Act, in your opinion, actually working? From a practical standpoint, what would be the effect on anti-terrorism investigations if we do not reauthorize the PATRIOT Act?

Mr. MCNULTY. I think there would be serious problems if the PATRIOT Act was not reauthorized. The provisions that sunset provide very significant tools. We all talked about the wall, and the concern we have as prosecutors is the chilling effect that a lack of reauthorization would have on the sharing of information.

Some sharing has improved that may not be connected necessarily to the PATRIOT Act directly, but there is an important part of the sharing that is directly tied to the PATRIOT Act. And if it is not reauthorized, we will go back to that stovepiping that keeps prosecutors from knowing actually what is going on and being able to pursue important cases.

Also, Senator, as far as other tools in the Act, they provide the kind of thing that is needed in the right moments when you are trying to use what is available to make a case. They are not necessarily used everyday, but they provide a solution to an important

problem, whether it is delaying a notification in a search or whether it is seeking a certain set of records that wouldn't be available because of the national security concern with a grand jury subpoena.

We made a lot of progress in 4 years. In my office, in prosecuting these cases, I think we have learned how to overcome major obstacles that historically we just hadn't confronted in prosecuting cases where evidence was all over the world. And I think that we are much stronger today as a Department in prosecuting international terrorism cases than we were before 9/11. We will continue to look at what we can do legislatively and practically to improve, but I think my assessment to you, Senator, is that we have made great progress in overcoming obstacles.

Senator DEWINE. Thank you very much.

Senator Durbin.

Senator DURBIN. Thank you very much, Mr. McNulty, and thank you for joining me in my office yesterday. It is good to see your family here.

Mr. MCNULTY. Thank you.

Senator DURBIN. Mr. Chairman, I would say that if people on the Hill, including members of this Committee, understood the importance of the position that you seek, this room would be filled. It should be, because I think what we have seen with Mr. Comey, whom we both hold in high regard, is that during the course of his service in this same position, he was called on to make some extraordinarily important and difficult decisions.

When you and I met yesterday, we talked about this compelling Newsweek article that attempts to describe Mr. Comey's experience at the Department of Justice in this position, and particularly the fact that he was, because of Attorney General Ashcroft's illness, drawn into an important responsibility of deciding whether to go forward with the domestic spying program which is going to be the subject of this Committee's hearing next week. The article indicates that he ran into some resistance for his position on this issue from Mr. David Addington, who is the chief of staff to Vice President Cheney.

The reason I raise this is because you and I talked about it and I want to make sure it is laid out on the record here. There may come a moment, if you are approved by the Senate, where you are put in the same predicament, where you would be faced with making a critical decision relative to our rights and freedoms in America and face political pressure within the administration, as apparently Mr. Comey did from the office of the Vice President.

My question to you in public session, as it was in my office yesterday, is whether you are prepared to resign the position if you found it to conflict with what you considered to be ethical or constitutional conduct.

Mr. MCNULTY. Thank you, Senator, and I fully appreciate the significance of your question, and my answer to you today is the same as it was yesterday. I would never let a job come in the way of my integrity. If I felt that that was a necessary thing to do, I would certainly do it because, first and foremost, I have to do the right thing in this job everyday.

I believe I have the standing as a result of more than two decades in this town, I have the confidence, I have the ability to assert myself that I might be persuasive to anyone I might come in contact with where I feel strongly about a position, and that I would prevail. But if that situation should arise as you framed it, then I would be prepared certainly to walk away from a job if it came to a question of integrity versus employment.

Senator DURBIN. And although I didn't raise it yesterday, I want to set out in the record, is there anything in your past service with the House Majority Leader relative to his legal problems concerning the K Street Project or Mr. Abramoff or anything—is there any aspect of this that you were involved in as a member of the staff?

Mr. MCNULTY. Well, I didn't work for that Majority Leader. I worked for Congressman Dick Armey, the former Majority Leader.

Senator DURBIN. I see.

Mr. MCNULTY. I served as the general counsel and I am unaware of any issue that has ever been identified that has been associated with my service to him in that way.

Senator DURBIN. So there is nothing in current investigation that relates to your service at all in the House?

Mr. MCNULTY. No, sir. I am unaware of anything like that.

Senator DURBIN. Thank you.

Let me ask you specifically about an issue raised earlier. Senator Leahy referred to the letter which I received relative to the referrals by Mr. Comey for detainee abuse cases to the office of the U.S. Attorney in the Eastern District of Virginia.

I asked you yesterday if you agreed with the President's statement that no American could legally engage in torture, cruel, inhumane or degrading treatment. Do you agree with that statement?

Mr. MCNULTY. Yes. As I understand it, that is the law of the land.

Senator DURBIN. And so if anyone in the administration suggested that the President had the authority to authorize torture, would you come to the conclusion he does not?

Mr. MCNULTY. Right. As I understand it, the McCain amendment has addressed this very subject we are talking about and the administration has expressed its full support for the McCain amendment.

Senator DURBIN. And so that would be your position as well?

Mr. MCNULTY. Correct.

Senator DURBIN. All right. So, if confirmed, you would not be advising the administration that they have the authority to ignore what is the clear statement in the McCain law?

Mr. MCNULTY. No, Senator, I can't anticipate that—I wouldn't anticipate that situation.

Senator DURBIN. I see my time is up, so I will defer to my colleague, Senator Schumer.

Senator DEWINE. Senator Schumer.

Senator SCHUMER. If Senator Durbin, with your permission, Mr. Chairman, wants to finish his line of questioning, I think I would end up going beyond the 5 minutes. It is better to have him finish his and then I finish mine, if that is okay with you, Mr. Chairman.

Senator DEWINE. Senator Durbin.

Senator DURBIN. Okay, thank you. I thank you my colleague from New York.

So as you described it to me yesterday, the cases that have been referred to the Eastern District of Virginia U.S. Attorney's office—some 17 pending cases, if I am not mistaken?

Mr. MCNULTY. That is right, minus the two we have declined, so we are down to 17.

Senator DURBIN. Seventeen pending cases involve, as you described it, some cases that came in with a thin file, limited information, often involving witnesses and victims who were overseas, some of which are now being considered in other courts, such as military courts. And you said to me that was the reason why there hasn't been more activity. Now, don't let me put words in your mouth.

Mr. MCNULTY. Well, I wasn't saying there hasn't been more activity. There has been a lot of activity. We have worked very hard on this. What I was trying to describe to you is something that I am sure in the vast majority of prosecutions people confront, which are the reasons why you can't move from a referral on Monday to an indictment on Thursday. You have to have the work done to succeed in the case.

All of the witnesses—let me qualify that—many of the witnesses, if not most of the witnesses, are overseas, and the victims, as well, and so forth. Those are just two of several factors that make the investigations difficult, not impossible, but just difficult.

Senator DURBIN. I think that is a reasonable explanation, and when I was asked by the press yesterday, that is exactly what I said. I hope there is some timely determination as to whether they are going forward for prosecution, whatever might be the fate of that office and the next office-holder.

Mr. MCNULTY. Yes.

Senator DURBIN. One last question. You have been involved in some terrorism cases. Have any of the defendants in these cases been subject to this NSA surveillance, this domestic spying program which is now going to be considered by this Committee next week?

Mr. MCNULTY. I don't know the answer to that question. At least two of the defendants in cases that my office has prosecuted have filed motions to that effect, but not based upon any information available to them.

Senator DURBIN. So you have no knowledge that any defendant has been subject to this surveillance?

Mr. MCNULTY. I have no knowledge of that.

Chairman SPECTER. Okay. Thank you very much, Mr. McNulty.

Senator DEWINE. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and I want to welcome Paul McNulty and his family, his wife, his daughters.

My condolences on your loss last week.

Mr. MCNULTY. Thank you.

Senator SCHUMER. Mr. Chairman, it is no secret that Paul McNulty and I go way back. One of my proudest moments as a Congressman—I served 18 years in the House—was putting together the crime bill, which had a little motto: Tough on Punishment, Smart on Prevention. It got a majority of the Black Caucus

and close to a majority of the Republican members of the House to vote for it as it went through.

I would say the staff member I worked most closely on with that legislation was Paul McNulty, who I believe was probably minority counsel at that point?

Mr. MCNULTY. At different times, yes, sir.

Senator SCHUMER. Yes, and I can tell my colleagues that Paul is not only extremely bright and hard-working and diligent, but a man of integrity and his word is good, and I appreciate that.

So I guess I would say here that it is no secret that most of us on this side of the aisle have had serious differences with the Justice Department on a whole range of issues over the last 4 years. I am glad they chose you, as opposed to somebody else.

Having said that, another one of your qualities which I respect is loyalty, and I worry that in this Justice Department two very fine qualities of integrity and loyalty are going to cause you some sleepless nights. So my questions are all in that sort of general vein, and I think it is my obligation to bring them out, as much respect as I have for you.

I think that the Justice Department in the last 4 years has become more political than I have seen it in all the years I have been in Washington. Some of the cases at the Department proceed with complete professionalism, but others seem to be saturated with politics. The Justice Department should not be a den of ideology.

My colleague, Dick Durbin, mentioned Jim Comey, and he was, like you, a consummate professional, forthright, true to the law, guided by what he thought was right. And I am sure you have read some of the newspaper and magazine stories. There has been at least speculation—Comey would be too much of a professional to comment on this—that he left because loyalty demanded too much. And there is talk that other people left the same way—Mr. Goldsmith, who was head of the Office of Legal Counsel, and some others. Again, I make it clear neither of them has said anything to that effect. These were articles I saw most recently, one in Newsweek.

The job, in my judgment, of Attorney General or Deputy Attorney General is different than that of just about any other Cabinet position. Just about every other one, you are supposed to follow the President, period. But the Justice Department has an extra halo, if you will, which is it is the law enforcement agency of the country, and in a nation of laws, by definition, you don't always just follow.

So one area I have concern in is the investigation of Jack Abramoff. This is a political issue, by definition. Names of politicians have been involved, and thus far I think the Public Integrity Section has pursued the case appropriately. But I worry when the investigation turns to Government officials, elected officials, and particularly, if it should occur, moves in the direction of some people who have a whole lot of power and a whole lot of connections with this administration.

That is why I believe that given the ties between Mr. Abramoff and senior Government officials, this is a place where a special counsel is justified and necessary. We don't have an independent counsel law anymore. That was sort of knocked out, I think, in a

bipartisan way. But a special counsel gives some distance, and Patrick Fitzgerald is an indication of that. Whether people like or don't like what he has done, no one has debated that he has free rein, and that is why whatever he does I am going to be happy with. I have faith in his integrity. I have faith in the structure that was set up.

So here we have Abramoff with ties to the Republican leadership in Congress, certain ties to the White House itself. Who knows how deep? We are trying to figure that out.

Second, the rules, DOJ's own regulations. The Attorney General must appoint a special counsel when a criminal investigation would present a conflict of interest and it would serve the public interest to appoint a special prosecutor. And now you have the added complication just in the last week or so that the career prosecutor in charge of the investigation, Noel Hillman, has been nominated to be a judge on the Third Circuit.

So while this cauldron is bubbling, there is going to be a new appointment there, and even if that appointment is made totally, totally on the merits, there is going to be an appearance that you can't avoid, and couldn't avoid in any administration. This is not aspersions on this; this is just the facts of the matter.

Senator DEWINE. Senator Schumer, in the spirit of bipartisanship to show you that bipartisanship reigns in this Committee, I am going to turn the gavel over to you at this point.

Senator SCHUMER. Well, thank you, thank you.

Senator DEWINE. I have another engagement that I am late for.

Senator SCHUMER. No problem. I will just ask my questions and then conclude the hearing.

Senator DEWINE. Well, you are doing so well here that I will just let you continue.

Senator SCHUMER. Thank you. Thank you, Mr. Chairman.

Senator DEWINE. If I could just say again, Paul, we are delighted at the President's nomination.

Mr. MCNULTY. Thank you for your support.

Senator DEWINE. We look forward to working with you.

Mr. MCNULTY. I certainly look forward to that.

Senator DEWINE. We are glad to see your family here today, too.

Mr. MCNULTY. Thank you.

Senator DEWINE. Thank you.

Senator SCHUMER. Thanks, Mr. Chairman.

Senator DEWINE. Thank you.

Senator SCHUMER [presiding]. I would just say one other thing that sort of again leads to some concerns. Frederick Black was the acting U.S. Attorney in Guam and the Marianas and was removed while he was investigating Mr. Abramoff, again, some allege because he was investigating Mr. Abramoff, and even that Mr. Abramoff had a hand in removing him.

So I guess my question to you is, given all these circumstances and the lack of public confidence that exists today, would you support the appointment of a special—oh, one other thing I should say is 35 of us in the Senate, all Democrats, are sending a letter asking that a special counsel be appointed today.

So I would ask you what is your view of a special counsel in this case. Is it needed? What are the criteria you will use? I had asked

the same question of Mr. Comey when he was sitting in your chair and he basically—well, as you saw then in the Plame case, did appoint a special counsel. So just give me some of your thoughts here.

Mr. MCNULTY. Well, first, let me say, Senator, how much I appreciate your kindness to me. In this town, which can be a very rough place, the fact that you would remember the time we did spend together working and credit that toward me is something that I will always appreciate. I think it speaks a lot of who you are as a person and I appreciate it.

Senator SCHUMER. Well, more to who you are. You are somebody I greatly respect.

Mr. MCNULTY. Well, thank you.

Second, when you talk about loyalty and integrity, loyalty is a good thing. I have benefitted from loyalty in my career and I have benefitted from loyalty in my life. I have friends here today who are loyal to me and that is nice, but loyalty and integrity aren't equals. Integrity trumps loyalty. Values have some hierarchical structure to them and when it comes to doing the right thing, you have to be willing to do that even to the people—if you are an enforcement person, even to people that you might have some knowledge of or relationship with.

But on the question of the special counsel generally, I think it is an important tool in very limited ways. I think it does create that sense of public confidence. Public confidence is huge when it comes to the Department having the kind of standing that I described in my opening statement, and that is why from time to time it makes some sense.

I do believe that the prosecutors working on this particular investigation are really thoroughgoing professionals, all career, and it has a lot of resources as far as the work that is being done. I will commit to you that I will certainly take your recommendation seriously and look at the matter and, if I am confirmed, give it every possible consideration for what is the appropriate thing to do. And I will consult with you as I do that so you know where I am coming from.

I like to see the career people do their jobs without any interference, and I believe they put in the time and the effort and that they are in the place to make good judgments. And so with that only bias that I have toward the way in which the career people have demonstrated a record of integrity, I will give your proposal consideration.

Senator SCHUMER. Well, I appreciate that very much, and you did say, which I think is very important, that this investigation will get whatever resources are necessary. They won't be hamstrung for a lack of——

Mr. MCNULTY. No. It already has a lot of resources and anything they need to——

Senator SCHUMER. Up to now, I don't have any complaints from my knowledge, limited as it should be, because it is—well, it is somewhat public because there have been articles about it, but it is private.

The problem I worry about is not the career prosecutors in the Public Integrity Section, but it is standard procedure in the Public Integrity Section, should the investigation turn to indict some high-

level political figure, or even make that person a target—move the grand jury in a different direction is a little different—that often it goes beyond the Public Integrity Section and beyond the career prosecutors. That is my worry.

Now, how do we address that type of—and that is standard procedure in the Justice Department and I am not here at the moment to quarrel with that. But in this sensitive situation, how do you deal with that? You will admit there will be decisions, not every decision, but some decisions made at a higher level than the Public Integrity Section, should this investigation find serious wrongdoing among certain people. Isn't that fair to say?

Mr. MCNULTY. Sure, absolutely. I have had the experience of being around attorneys general and deputy attorneys general over the course of my career and I have never, ever heard a conversation about political considerations when it comes to charging. There is a culture at the Department of Justice that is blind to that and just looks at the facts and the law and tries to move forward.

And there is a structure at the Department of Justice that is probably, I think we would both agree, a good thing, which is that there is political leadership that is accountable, that changes with elections. And they do have, by the very design of our Founders, a responsibility for administering the law.

In the current structure of special counsel, it is not like an independent counsel was under the statute where you have someone who actually has this charging authority that exists outside of the Department. Jim Comey faced the question with appointing Pat Fitzgerald. Pat Fitzgerald reported to him. He was a political appointee.

Senator SCHUMER. Right.

Mr. MCNULTY. And so you have to work through some of those questions that even with a special counsel, ultimately if one is picked, that person would report to me, unless I am recused, then report to somebody else.

Senator SCHUMER. So if whoever is the new prosecutor brings something to you, you would not try to overrule it on any kind of political grounds, no matter——

Mr. MCNULTY. Absolutely not.

Senator SCHUMER. Great. Second, I guess what you are saying here is you will look at the issue of a special counsel seriously. You don't foreclose ruling it out right now at all?

Mr. MCNULTY. No, Senator, I don't.

Senator SCHUMER. Thank you. The next questions are related not to the special counsel, but since 2001 I have talked and my staff has talked to a good number of career people in the Justice Department who are very frustrated with what they would call the politicization of some parts of the Justice Department—I am not talking about shifts in policy here. Obviously, that is the President's prerogative. He won the election and my party lost—but rather where political appointees routinely overrule experience and expertise of dedicated staff. If they believe it is on all fours, not even equivocal, that the law requires one thing, they are overruled in a different direction. They are removed from current posts and given less desirable assignments.

The hiring process is taken over by political appointees for appointments further down the chain without input from career managers, where a highly experienced, talented and rather long-term workforce is purged. And all too often, who pops up in their place is someone with less experience, but far more conservative ideological credentials or political connections.

An example: Last June, political appointees overruled career attorneys on the tobacco litigation team and ordered them to ask one of their witnesses to downplay testimony that was damaging to the tobacco industry, and then ordered them to dramatically reduce their request for civil penalties by billions of dollars. The veteran career attorney who had led the case suddenly and inexplicably withdraw from the litigation amid speculation she was driven out.

In August, Lawrence Greenfield, the head of the Bureau of Justice Statistics, was asked to resign and was later demoted after he objected to a White House order that he delete references to racial disparities in news releases prepared to announce a study on racial profiling.

The one that I find most disturbing is the pattern in the Civil Rights Division, where some of the most egregious and appalling examples have occurred. The front page of the Washington Post said that political appointees have overruled experienced career attorney recommendations to deny pre-clearance to voting changes in Georgia and Texas; that the attorneys determined after thorough, non-political legal analysis that it would have a discriminatory effect on minority voters.

If those political appointees or people in the White House thought that the Voting Rights Act, as it is, goes too far, they had every right to try and change the law, come to us and change the law, but to veto cases or to change the way cases are being done in compliance with the law. Experienced attorneys are departing this division at an alarming and unprecedented rate, and many who choose to remain get assigned to less desirable posts. They are ordered to work on deportation cases rather than civil rights cases.

So again, with complete respect for you and who you are, but realizing it is a tough world, how can you assure us that you will deal with these kinds of—if they are as I described, and I don't know if you have looked into any of them in your acting capacity—how you will deal with them. I don't think you would deny that at least out there in the buzz, there is a view that this Justice Department in certain areas, particularly civil rights, has behaved more politically.

Mr. MCNULTY. I am aware, Senator, of that buzz, and in the 3 months that I have been the Acting Deputy I have become more familiar with some of the issues that you raise here.

Perhaps the best answer I could give you is as a general matter I was enjoying my life as a U.S. Attorney and really finding that to be the best job I have ever had. And when I was given the opportunity to move to the Department of Justice to serve as the Deputy Attorney General, the thing that primarily motivated me to take it was not fame and fortune by any means, but rather the fact that I have a great regard for the Department of Justice as an institution.

And I think we are talking about over 100,000 people here, and the need to manage the place well is critical, and to see that people are treated well. And so if I am confirmed, I expect as the Deputy Attorney General to hold everybody accountable for their conduct in relation to how we deal with career people and how we respect the work that is being done by everybody in the Department, to avoid the appearance of politics coming into what we do, to follow up on things that I read about or hear about and to get to the bottom of it.

That is about the best I can say to you with regard to this sort of list of things that you are talking about, that if they come up under my watch, I will address them. And if somebody calls me and says I heard about this, you can have the confidence that I will look into it and get back to you.

Senator SCHUMER. One thing I would ask you to address, if you are confirmed, is would you be willing to look into what is going on in the Civil Rights Division and report back in a way you feel appropriate to me, to the Committee, to the Chairman? I think that does need some looking into.

Mr. MCNULTY. Well, I understand. I have talked to Wan Kim, the new Assistant Attorney General. I believe he is a very good man who has a real commitment to making the Civil Rights Division everything it can be and it should be. The work is very important. As you say, sometimes there are policy issues that come up that have to be resolved.

On this question of voting rights, I am aware that the section chief is the person under the guidelines who is responsible for the pre-clearance authority. And so when you see pre-clearance, you know that a career person has made that decision. I think that sometimes gets lost in the process, but nevertheless the concern you express is something that I will take seriously. And I will look at the Civil Rights Division and make sure that it is functioning in a way that has everyone's confidence that it is doing its job.

Senator SCHUMER. What I would like to do is send you just a letter or something asking that you look into certain things in there. Would you be willing to just get back to me once you are confirmed?

Mr. MCNULTY. That sounds fine.

Senator SCHUMER. I just want to let you know, Paul, that I am proud of who you have been and you have been a wonderful public servant. I have real concerns, as you know, but I have faith in you. I had faith in Jim Comey and I thought he did the right job at a difficult. I am prepared to support your nomination.

Mr. MCNULTY. Thank you very much.

Senator SCHUMER. We are going to leave the record open for written questions for 1 week and the record will close on February 9 at 5 p.m.

The hearing comes to a close, and again to the McNulty family—my brother-in-law is a McNulty, as well, but we are to related. That has nothing to do with this today.

[Laughter.]

Senator SCHUMER. The hearing is adjourned.

[Whereupon, at 11:34 a.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

February 14, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to written questions I received from Senators Grassley, Sessions, Leahy, Kennedy, Kohl, Feingold, Schumer and Durbin following my confirmation hearing. Please do not hesitate to contact the Department if you need anything further in connection with my nomination.

Sincerely,

Paul J. McNulty

Enclosures

cc: The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary

Responses to Senator Charles Grassley
Questions for
Paul McNulty

Mr. McNulty, in 1986, I authored amendments to the False Claims Act ("FCA") which enable private citizens who learn of fraud against the government - known as whistleblowers - to bring suits to recover money lost to the Treasury as well as additional damages. Since these amendments took effect, the False Claims Act has been instrumental in detecting and deterring fraud. In fact, 15 billion dollars have been recovered under the Act since 1986.

Because of the importance of the position to which you have been nominated, I want to ask you some questions about the False Claims Act.

1) Do you view the qui tam provisions of the act to be constitutional?

Response: The Department has filed briefs in support of the constitutionality of the *qui tam* provisions, and I am personally unaware of any reason why the Department should reconsider that position.

2) Will you vigorously enforce the False Claims Act?

Response: Yes I will. The Department of Justice is committed to uncovering fraud against the American taxpayer. The False Claims Act is the government's principal civil tool to recover federal funds that have been fraudulently obtained from government programs. I know from my experience as United States Attorney, just how effective the False Claims Act has been and can be. I have been advised that since the 1986 amendments there has been over $15.5 billion in False Claims Act judgments and settlements, with over $1.4 billion in FY 2005 and almost $500 million for the current fiscal year to date.

Mr. McNulty, I am very concerned about the way the Department of Justice ("DoJ") has been administering the FCA. Though it has accomplished some good things, DoJ has consistently failed to use the FCA to its full potential. This is unfortunate, because the FCA is the federal government's premier tool for suppressing fraud against its various programs. In particular, I am concerned that the DoJ is not giving adequate resources to the enforcement of this critical fraud fighting tool.

3) I have introduced a bill, S.636, to require the Department to report on FCA settlements. Is there any portion of my proposal you cannot support? Please specify.

Response: I appreciate the Congress's role in oversight of the Department's enforcement of the False Claims Act and particularly your interest. I understand that S. 636 is directed at aiding that oversight. The Department already makes available to Congress a

great deal of information about its settlements, and we will continue to do so. The Department will work with you on any legislation addressing such reporting.

4) I have heard reports that DoJ has begun to decline more FCA cases because of resource shortages. Please give me a candid assessment of this situation.

Response: Managing finite resources will always be a challenge. Nonetheless, the Department is committed to reviewing each and every *qui tam* case that is filed and presenting it to the Agency whose program has been defrauded for its assessment as well. The number of cases the Department joins is a function of the strength of the cases filed by relators and the investigative results in those cases. Over a lengthy period of time that number has been in the 20 to 25 percent range. It necessarily varies from year to year. Nonetheless, since FY 2002 the number of cases in which the government has elected to intervene has actually been rising, and was over 25 percent in FY 2005. In large part, the Department's judgment as to intervention has been borne out by the statistics; there have been extremely few cases that were declined by the Government that produced significant recoveries.

5) Would you consider the establishment of a new branch in Civil Division for Affirmative Civil Enforcement (ACE), including the FCA?

Response: As you have noted, the Department has achieved a good measure of success in its False Claims Act enforcement efforts. The Civil Division and the United States Attorney's offices, working with relators and their lawyers, have used the False Claims Act and its *qui tam* provisions for bringing in over a billion dollars in five of the last six years. With the addition of eight new attorneys in the last few months there are now 77 attorneys in Washington and many more throughout the country who are dedicated full-time to investigating and litigating False Claims Act cases. The Civil Division's Commercial Litigation Branch, Fraud Section is led by an SES Branch Director and Deputy Branch Director, who work on affirmative civil enforcement cases full-time, under the supervision of both a Deputy Assistant Attorney General and the Assistant Attorney General, both of whom are closely involved in setting policy and making strategy decisions in significant cases. Moreover, substantial energy has gone into joint training and coordination between those in Washington and in the United States Attorneys offices. My experience as a United States Attorney is that Main Justice and the field cooperate with each other and work well together in the handling of False Claims Act cases and I believe the results support this.

6) What priority is the Attorney General giving to health care fraud cases, including FCA cases?

Response: As you know, Attorney General Gonzales has made the fight against health care fraud one of the Department's top priorities, and that message has been repeated to our attorneys time and again. It has been a top priority in my office in the Eastern

District of Virginia, as well. Our efforts in this area are vital to saving lives, stopping physical harm, and replenishing an increasingly strained health care payment system. Just last week, we gathered over 140 Assistant United States Attorneys from around the country to the National Advocacy Center where we trained them exclusively on health care fraud issues. I can assure you that the Department will continue to develop these cases, work proactively with our law enforcement partners to foreclose future fraud schemes, and diligently investigate allegations brought to us by *qui tam* relators as we proceed together in the fight against health care fraud. If confirmed as Deputy Attorney General, I will continue to do all within my ability to assure that these investigations and cases succeed.

7) Would you consider establishing a task force under your direction focused on the cases against pharmaceutical companies, with enhanced resources?

Response: Effectively, the Department has taken a task force approach to these cases. The cases, which are high profile, are under the direct supervision of the U.S. Attorneys in the districts where they are filed or being investigated and the Assistant Attorney General for the Civil Division. Significant health care fraud initiatives and matters are also monitored by an Associate Deputy Attorney General in my office. The Department has announced that there have been over 150 drug-pricing *qui tam* cases, the majority of which are still under active investigation. I'm informed that both in the districts where the cases have been filed as well as at Main Justice dozens of attorneys have been assigned to these cases. Indeed, the Civil Division has hosted two conferences (and is currently planning a third conference) for its attorneys, Assistant United States Attorneys from around the country, FDA personnel, state representatives and HHS attorneys and investigators to coordinate and move these cases along. In addition, substantial monetary resources have been set aside to establish databases accessible by government personnel working on these cases and for other investigative and litigative functions. To date the results have been impressive – over $4.2 billion recovered for all federal, state, criminal and civil claims.

Mr. McNulty, I want to again stress that I expect the DoJ to allocate appropriate resources to the enforcement of the FCA. Once you are confirmed, I will be enquiring further about the specific resources that are dedicated to the FCA.

Response: I look forward to working with you.

Responses to Senator Jeff Sessions
Questions for
Paul McNulty

1) **Credit Counseling**

Mr. McNulty, as you know, I was a strong supporter of the recently-enacted bankruptcy reforms contained in PL 109-8. I am currently the Chairman of the Judiciary Subcommittee with oversight jurisdiction for bankruptcy courts and championed the pre-bankruptcy credit counseling requirement, which is administered by the Department of Justice.

I have heard reports that the counseling requirement is being suspended by bankruptcy attorneys who have developed financial ties to bankruptcy plaintiffs and are paying for these clients to go through counseling. I had intended, and the legislative history is clear on this issue, that pre-bankruptcy counseling be a mechanism for financially-strapped consumers to get independent advice about their financial options. Bankruptcy is not the only way to deal with debt, and I want consumers to hear this message since bankruptcy lawyers are not making this clear to their clients. This may be the case because attorney's who don't recommend bankruptcy don't receive legal fees.

I have been informed that the Department of Justice is developing a role to implement the counseling requirement in PL 109-8. Mr. McNulty, will you commit to personally ensure that PL 109-8 prohibits arrangements between attorneys and credit counselors that may inhibit the independence of credit counselors?

Furthermore, I am convinced that the Internet counseling may not be robust enough to fully educate consumers, unless the Department of Justice exercises diligence in administering the plan. Mr. McNulty, will you use this rule to develop a model curriculum for use by credit counselors who intend to use the Internet to deliver counseling services?

Response: **Senator, you have my commitment. The credit counseling provisions of the new bankruptcy reform law provide important new protections for consumer debtors to ensure that they are made aware of options for addressing their financial difficulties, including alternatives to bankruptcy. It is critical that credit counseling agencies provide independent advice not unduly influenced by the debtors' bar, creditors, or others.**

The United States Trustee Program (USTP) is the component of the Department of Justice with responsibility for approving credit counseling agencies in accordance with standards established under 11 U.S.C. § 111. The statute proscribes approved agencies from having a financial incentive based on the outcome of counseling sessions. In addition to reviewing applications, the USTP investigates complaints against approved providers, including allegations of ineligibility under section 111.

The USTP will vigorously investigate and take appropriate action against any credit counselor it has reason to believe failed to render independent advice to debtor-clients.

Most provisions of the new bankruptcy reform law became effective on October 17, 2005. The USTP issued standard application forms for credit counselors and debtor educators. To date, 123 credit counseling and 178 debtor education applications have been approved, and many of those providers offer services either nationally or in multiple districts. Agencies must reapply for approval six months after their initial approval and then annually thereafter. The USTP has quickly developed the capacity to carry out its substantial new responsibilities in credit counseling. Later this year, the USTP will promulgate proposed rules for notice and comment in the Federal Register that will allow the USTP to fill in legislative gaps based upon the additional information and experience gained since the new law's effective date.

The bankruptcy reform law provides that the USTP will develop a model debtor education curriculum and evaluate its effectiveness. The USTP recently issued the model curriculum and has commenced testing. By statute, the debtor education study will continue for 18 months and a report must be issued three months from the conclusion of the study. The statute does not provide for development of a model curriculum for use by credit counselors who intend to use the Internet, although it does expressly permit credit counselors to deliver services via the Internet. To insure the quality and integrity of Internet counseling, the USTP does require that all counseling sessions include direct interaction with the consumer. Nonetheless, a model counseling curriculum geared specifically to the Internet may be a promising approach to help ensure the quality of such counseling. I will direct the USTP to consider development of an Internet counseling curriculum or the evaluation of current Internet curricula and to make a recommendation to me.

2) <u>Means-Test</u>

Mr. McNulty, the bankruptcy reforms vest discretion in the Department of Justice regarding the ability to dismiss Chapter 7 bankruptcy cases that violate the means-test. Could you describe for me the standards being used to determine when to move to dismiss such a case under the means-test?

Response: **The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) provides many important new tools to help ensure the integrity and efficiency of the bankruptcy system. Foremost among the reforms contained in the BAPCPA is the means test which provides a more objective formula for helping determine an individual debtor's eligibility for relief. If a debtor has disposable income above a prescribed amount after calculation of the means test formula, then the debtor's case is presumed abusive and may be dismissed.**

The Justice Department's United States Trustee Program (USTP) is the primary enforcement agency for this new provision. The USTP reviews chapter 7

bankruptcy petitions under the means test, files a statement that is noticed to creditors if the case is presumed abusive, and then files either a motion to dismiss such case or a statement explaining why filing the motion would not be appropriate. In making its determinations, the United States Trustee relies upon information filed in the case on the official forms recently promulgated by the Judicial Conference of the United States.

In exercising its discretion, the United States Trustee analyzes whether there are circumstances that warrant an adjustment to income or expenses that would reduce the debtor's disposable income below the amount prescribed in the means test. One such circumstance would relate to natural disasters. For example, in the aftermath of Hurricane Katrina, the Executive Office for U.S. Trustees issued important guidance to all field offices directing, among other things, that financial calamities caused by the hurricane would generally constitute "special circumstances" that would excuse a debtor from dismissal based upon the means test. (The USTP guidance does not apply to impacted judicial districts within Alabama because the USTP's jurisdiction excludes judicial districts in Alabama and North Carolina.)

Responses to Senator Patrick Leahy
Questions for Paul McNulty

1) The *New York Times*, in December, cited several officials familiar with the domestic spying program as saying that it helped uncover a terrorist plot by Iyman Faris – who was prosecuted in the Eastern District of Virginia in 2003. How do you reconcile this widely-publicized report with your assertion at the hearing that no defendants in the Eastern District of Virginia were subject to the NSA's domestic spying program?

Answer: **During the February 2 hearing, you asked me whether I was "aware of instances in which information obtained through the domestic spying program was used in any manner in a criminal prosecution in the Eastern District of Virginia or any other district." I testified that I was not aware of any such instance. My answer remains correct and is easily reconciled with the New York Times article. I continue to be unaware of any information that links the terrorist surveillance program with the prosecution of Iyman Faris or any other person. As I testified, I have not been read into the program. Therefore, I do not know the basis for the claim made in the New York Times article, which may or may not be based on a credible or official source.**

2) What are some examples of occasions during your time as U.S. Attorney and at the Department of Justice where you have stood up to the administration and resisted or rejected their recommendations about what the Department and the government should do?

Answer: **On numerous occasions over the past five years, I have participated in discussions with colleagues at the Department of Justice and in the Administration where there has been a healthy debate over various matters. In my experience, it is a fairly routine matter for issues to be debated extensively before a decision is reached. In many of these discussions, my position has been adopted; in others, my position has not been adopted. There has been no instance where resistance to another person's position was viewed as inappropriate. The disclosure of the specific content of such discussions and internal deliberations, of course, would be inappropriate.**

3) As Deputy Attorney General, you will oversee U.S. Attorney and Special Prosecutor Patrick Fitzgerald's investigation and prosecution of Scooter Libby and other administration officials. If you were asked to fire Mr. Fitzgerald, based on disagreements with his investigative and prosecutorial decision making, rather than based on any misconduct, would you do so? Or would you allow him to proceed independently?

Answer: **The authority to oversee this particular investigation and prosecution has been delegated to Associate Deputy Attorney General David Margolis, a long-time career Department official. Therefore, under the language of that delegation, I**

am not in a position to fire my friend and colleague, Patrick Fitzgerald, even if I believed that he should be relieved of his duties for misconduct or any other reason.

4) You submitted a government memorandum in the *Hamdi* case – the case in which Justice Sandra Day O'Connor later observed that even war "is not a blank check for the President when it comes to the rights of the Nation's citizens." In your memorandum, you made the argument that the Federal Public Defender could not represent Hamdi, a U.S. citizen, because Hamdi had not requested representation. Of course, Hamdi had not requested representation because the government had denied him access to an attorney or the courts. Do you now agree with Justice O'Connor's statement that, at least in the case of U.S. citizens, detainees must at a minimum have the ability to contest their detention in court?

Answer: I accept the Supreme Court's decision in the *Hamdi* case. I should also note that the pleading to which you refer was prepared by the Office of the Solicitor General. My name appears on the pleading solely because the document was filed on the government's behalf in the Eastern District of Virginia and I am the United States Attorney in that district.

5) At the end of last year, Congress passed a Defense Appropriations bill containing a provision, known as the McCain Amendment, which prohibited cruel, inhuman, and degrading treatment of detainees by U.S. personnel under all circumstances. The administration opposed this provision. The President wrote in his signing statement on December 30 that the executive branch "shall construe" the McCain amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch." I read the President's statement to assert that he can choose to disregard this law, as he sees fit. Do you agree with the President's assertion in his signing statement that he need not abide by the law's clear prohibition against torture and cruel, inhuman, and degrading treatment? What are the grounds for any authority the President might have to disobey a law passed by Congress and signed into law?

Answer: To clarify, the McCain Amendment relates to "cruel, inhuman, or degrading treatment or punishment," which it defines as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment." The McCain Amendment does not address "torture," or conduct that amounts to torture. Torture was already a crime when the McCain Amendment was enacted. Torture was then, and continues to be, contrary to the announced policy of the President.

The signing statement does not reflect an intention not to abide by the law. The McCain Amendment reflects the President's -- and our Nation's -- policies and

values, and the President is fully committed to executing it faithfully. Because the Constitution makes the President the Commander in Chief and gives him broad authority over foreign affairs, presidents often have issued similar signing statements when Congress legislates in these areas. Presidents Reagan, George H.W. Bush, and Clinton each issued many such statements; President Clinton alone issued over a dozen. While I would not attempt to define in the abstract the limits of the President's constitutional powers, I wish to emphasize that the question you have asked is a purely hypothetical one. The President has indicated that he is fully committed to executing the Detainee Treatment Act faithfully.

6) Three years ago, the Office of Legal Counsel at the Justice Department issued a secret legal opinion concluding that the President of the United States had the power to override domestic and international laws outlawing torture. The memo sought to redefine torture and asserted that the President enjoys "complete authority over the conduct of war" and asserted that application of the criminal law passed by Congress prohibiting torture "in a manner that interferes with the president's direction of such core war matters as the detention and interrogation of enemy combatants would be unconstitutional." It seemed to assert that the President could immunize people from prosecution for violations of United States criminal laws that prohibit torture. This Justice Department memo was withdrawn after it became public. What is your view of the legal contention in that memo that the President can override the laws and immunize illegal conduct?

Answer: **I strongly disagree with the contention that the President can override the laws. The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution.**

For the reasons stated in response to question 5 above, whether, in an exceptional case, the President has the power to authorize actions that would otherwise contravene an applicable statute where such actions are necessary to fulfill his constitutional duty to protect the Nation is a difficult and weighty question. The President has clearly stated that the United States will not engage in torture under any circumstances, and this clear statement removes any possible need to explore this hypothetical question in the context of 18 U.S.C. §§ 2340-2340A. That is why the Office of Legal Counsel's opinion dated December 30, 2004, describes the discussion of the Commander in Chief power in the August 1, 2002, memorandum as, among other things, "unnecessary."

7) The Office of Legal Counsel issues opinions that often control how the Executive Branch will construe laws and conduct itself. Yet Congress, which conducts important oversight of the Executive, does not have access to many OLC opinions. If confirmed, will you agree to share OLC opinions with Congress?

Answer: I am committed to a basic policy of openness in government, as well as to the important constitutional function of congressional oversight. I fully appreciate that Congress needs information about the administration of Executive Branch programs and activities in order to perform its legislative function under the Constitution. Congressional committees, acting through their chairmen, conduct oversight about matters within their jurisdiction in order to obtain that information. The Executive Branch has an obligation to facilitate oversight, doing so in a principled way consistent with its own constitutional responsibilities, resolving any issues through a process of good-faith accommodation. I intend to work with the Senate Judiciary Committee to satisfy its oversight needs, and I am confident that we can do so.

I agree that many OLC opinions merit disclosure, both to Congress and to the American people, in due course. I understand that, in recent years, the rate of publication of OLC opinions has increased and the time between opinion signature and opinion publication has decreased. When consistent with the legitimate confidentiality interests of the President and of the Executive Branch, I believe it should be, and is, the Department's policy to publish OLC opinions. This practice, however, does not diminish the legitimate interest that the Government may have in preserving the confidentiality of other OLC opinions. At the time they are issued, most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions for an appropriate period of time is often necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts. Moreover, it is vital that OLC be able to maintain confidentiality at times, precisely so that senior Executive Branch officials will be encouraged to seek OLC's advice at precisely those critical times when it is most needed.

In 1993, when he was the nominee to serve as Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger provided the following response to a question from Senator Grassley:

> I share [the Attorney General's] commitment [to a basic policy of openness in government]. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. Opinions resolving inter-

agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.

I agree with this statement from Assistant Attorney General Dellinger. I understand that similar considerations would govern decisions to release opinions to Congress.

8) As a criminal prosecutor, how many cases and what kinds of cases have you personally prosecuted, as opposed to supervised?

Answer: **As United States Attorney, I have been involved in a wide variety of aspects of prosecuting hundreds of cases. The prosecution of a case begins with a criminal investigation and involves many activities and decision points, including charging, plea bargaining, trial strategy, sentencing arguments and appeals. I have made literally hundreds of decisions in these areas over the past four and a half years. The Eastern District of Virginia is one of the largest and most productive United States Attorney's Offices in the country. With four separate divisions and over 120 attorneys, EDVA has handled some of the most important and complex cases in United States history since 2001. The same leadership skills used in managing that office are the leadership skills important to the management of the entire Department of Justice, to include the offices of all 93 U.S. Attorneys.**

9) If confirmed, you are going to be working closely with prosecutors throughout the country and overseeing delicate investigative and prosecutive decisions. You will surely run into situations where the benefit of personal experience conducting an investigation or trying a criminal case would be invaluable. What experience or assistance will you draw upon when those situations arise?

Answer: **I will draw upon the experience described in my answer to question eight as well as the experience of the more than 10 attorneys currently serving in the Office of the Deputy Attorney General who have experience as Assistant United States Attorneys in a variety of places (California, Connecticut, the District of Columbia, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, New York, and Virginia). Two of my Associate Deputy Attorneys General have served as United States Attorney (Southern District of Illinois and District of Montana).**

10) You worked from 1999 to 2001 as Chief Counsel for House Majority Leader Dick Armey, serving, as you explained in your questionnaire, as "the top legal counsel to the House Leadership." In the course of your work for the House Republican leadership, what participation did you have in the K Street project, in which the House leadership pressured lobbyists to hire Republicans in order to have access to influential members of Congress? What interactions did you have, if any, with Jack Abramoff? With Michael Scanlon? With David Safavian?

Answer: I had no participation in the K Street project. While I encountered lobbyists in my twelve years of service in the House of Representatives, I have no recollection of ever meeting Jack Abramoff. Michael Scanlon worked for Congressman Tom DeLay, who was then Majority Whip. I may have had some casual conversations with him, but I do not recall any substantive interactions with him.

While David Safavian worked for a Member of Congress during my tenure with the House Judiciary Committee and the House majority leader, I do not recall any substantive interaction with him during that time. Much later, in early 2005, he called me in his capacity as director of procurement policy at the Office of Management and Budget. We had a brief conversation about EDVA's procurement fraud initiative (which I announced in February of 2005) and whether I was intending to get involved in procurement policy.

11) The case of *Schering-Plough Corp. v. Federal Trade Commission*, 402 F.3d 1056 (11th Cir. 2005), concerned a patent settlement agreement between a patent-holding company that produced a brand name medication and a company that sought to produce a generic version of that medication, in which the patent-holder paid the generic manufacturer, and the generic manufacturer agreed not to produce the generic drug for a period of time. The FTC found that this agreement illegally restrained trade in violation of antitrust laws, but the Eleventh Circuit reversed the Commission's ruling. The FTC has filed a petition for certiorari with the Supreme Court, and the Supreme Court has asked the Office of the Solicitor General to take a position on the matter.

The FTC asserts that this type of patent settlement agreement is highly problematic because it allows both the patent-holder and the generic manufacturer to profit from the patent-holder's monopoly, while consumers are stuck paying high prices for medications without a cheaper, generic alternative – contributing to skyrocketing health care costs. The FTC argues that the Eleventh Circuit's decision ignored the intent of Congress, which passed statutes disfavoring such settlement agreements, and gave insufficient deference to the FTC's decision.

Do you agree with the FTC's concerns about patent settlement agreements which reduce consumer choice and increase the costs of needed medication?

Answer: I certainly agree that patent settlement agreements that reduce consumer choice and increase the cost of needed medication are a concern and should be pursued vigorously by enforcers if they violate the antitrust laws. Patent settlements can be either procompetitive or anticompetitive and distinguishing between the two can be extremely challenging. In *Schering-Plough*, the FTC was presented with a so-called "reverse payment" case, a case where the alleged infringer receives a payment from the patent holder and stays out of the market longer than if patent holder unsuccessfully

pursued its exclusivity through litigation, but shorter than if the patent holder successfully asserted its patent exclusivity. As I understand the FTC opinion in this case, the FTC declined to say that all such payments should be per se illegal or inherently suspect, but concluded that an antitrust violation had occurred on the facts of that particular case. The Eleventh Circuit set aside the FTC decision in *Schering-Plough Corp. v. Federal Trade Commission*, 402 F.3d 1056 (11th Cir. 2005), basing its decision primarily on the ground that it was not supported by substantial evidence. The FTC has filed a petition for certiorari and the Supreme Court has invited the Solicitor General to express the views of the United States. As I understand it, the Solicitor General's Office is currently reviewing this matter and has not yet submitted a response to the Supreme Court.

I would expect the Solicitor General's Office to follow its normal practices in examining this matter, including looking at whether the case is an appropriate one for certiorari by examining whether complex factual issues would be required to be decided, whether a clear legal issue would be before the Supreme Court based on the record, and whether a circuit split exists, in addition to considering the merits of the Eleventh Circuit's decision.

Responses to Senator Edward Kennedy
Questions to Paul McNulty

Gun Control and the Brady Bill

In 1991, you testified in the House that you opposed the Brady Bill because you felt that consistent identification of felons was impossible, and that the large majority of dangerous felons do not obtain their firearms from licensed dealers. You stated that "use of severe federal penalties is the most direct form of gun control." You also said that you didn't believe that the Brady Bill would "enhance[] the effectiveness or the viability of [the Administration's] comprehensive approach to violent crime."

1. Do you still believe use of the severe federal penalties is the most direct form of gun control?

Answer: **Aggressive enforcement of existing federal and state gun laws through the Project Safe Neighborhoods initiative has had a significant impact on gun crime. Under that initiative, the number of federal firearms cases has increased by 73%, and defendants charged with federal firearms offenses are being sentenced to significant jail time. In FY 2005, over 93% of those offenders received prison terms and over 68% were sentenced to three or more years in prison. While the Department and its state and locals partners have been working diligently to enforce the law, the violent crime rate has fallen to its lowest level in more than 30 years, and the rate of violent crime victimization with a firearm is also at the lowest level recorded by the National Crime Victimization Survey.**

2. Have your views on the effectiveness of background checks changed?

Answer: **I believe that the National Instant Check System (NICS) established under the Brady Act has been effective in denying prohibited persons access to firearms from Federal Firearms Licensees.**

3. Now that the Brady Bill has been law for over 10 years, do you still feel that it is not an effective form of gun control?

Answer: **Since its inception on November 30, 1998, the NICS has conducted over 60 million background checks on prospective firearm transferees and has denied approximately one million transfers to persons identified as having a prohibiting record. The NICS has proven to be an effective tool in reducing access to guns by criminals and other prohibited persons.**

Surveillance Activities by the National Security Agency

Public statements by the Administration indicate that this program began shortly after the tragic events of September 11th.

1. Did you know anything about this program while you were the Principal Associate Deputy Attorney General from January 23, 2001 to September 23, 2001?

Answer: **No.**

2. Under what circumstances – if any – do you think that information collected by the government should be used against a defendant in court if the government obtained the information by breaking the law?

Answer: **I do not believe that the terrorist surveillance program has resulted in the collection of evidence in violation of law, and, as I stated during the hearing, I am not aware of any case in which information from that program was used against a defendant in court. As a general principle, I agree that evidence collected in violation of the Fourth Amendment should be suppressed. In *United States v. Leon*, however, the Supreme Court established an exception for good-faith errors where a warrant is later determined to be invalid. Like the Supreme Court, I do not believe that suppression is always the appropriate remedy if evidence has been collected in violation of the law. Ultimately, courts must decide whether evidence may be used on a case-by-case basis.**

3. The President is telling us that the Authorization for Use of Force in Afghanistan constitutes a sufficient statutory basis for avoiding existing wiretapping laws, including the Foreign Intelligence Surveillance Act. To your knowledge, are there other intelligence programs conducted inside the US that the Administration believes are justified by this same analysis?

Answer: **The Authorization for Use of Military Force ("Force Resolution"), enacted on September 18, 2001, authorizes the terrorist surveillance program described by the President. This is a limited program, directed at international communications where there are reasonable grounds to believe that one party is a member of al Qaeda or an related terrorist organization. Five members of the United States Supreme Court held that the Force Resolution authorized the detention of enemy combatants as a fundamental and accepted incident to war, *see Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and signals intelligence against a declared enemy of the United States is certainly also a fundamental incident to war.**

The existence or nonexistence of other additional intelligence programs is not an appropriate matter to discuss in this forum. As you know, intelligence programs are highly classified. Accordingly, the National Security Act of 1947 contemplates that intelligence programs are disclosed to the Intelligence Committees of both Houses of Congress, and the Act specifically contemplates even more limited disclosure in the case of sensitive programs.

Questions on Special Counsel Cases

1. Do you see any gaps or problems in the mandate given by Deputy Attorney General Comey to Patrick Fitzgerald in the CIA Leak case?

Answer: **As you are aware, my predecessor, James B. Comey, was Acting Attorney General for that matter and he appointed Mr. Fitzgerald as Special Counsel to conduct the investigation and any resulting prosecutions. Before he left office, Mr. Comey delegated his authority as Acting Attorney General with respect to that matter to David Margolis, a senior career official in the Department. I have not participated in that matter and do not intend to alter the current structure set by Mr. Comey. After consultation with the Special Counsel, Mr. Margolis reports that there are no such gaps or problems and that the existing mandate is entirely adequate. If unforeseen problems should arise in the future, Mr. Margolis has the authority to expand the Special Counsel's mandate to meet every contingency.**

a. If you determine that the Attorney General should be disqualified on any matter that might be appropriate for consideration by an Independent Special Counsel, will you have any hesitation in informing him of that fact and requesting that he permit you to proceed on your own?

Answer: **In the event that I make such a determination, I will not hesitate to so inform the Attorney General and to make that request.**

b. If you decide to appoint an Independent Special Counsel on any matter, will you give us your assurance that you will give the counsel at least the level of authority, independence and discretion that Mr. Fitzgerald has?

Answer: **If I appoint a Special Counsel on any matter, I will ensure that he or she has the level of authority, independence, and discretion necessary to fulfill his or her mandate.**

2. If disputes arise over the declassification of material that Mr. Fitzgerald believes he needs to have available for disclosure to defendants or to the court, is it clear to you now that neither the Attorney General nor anyone else who served in the White House during the Bush Presidency nor anyone involved in the policy

decisions or intelligence activities leading up to the war in Iraq should make the declassification decisions?

Answer: **For the purpose of the Special Counsel investigation, Mr. Fitzgerald has all of the authority of the Attorney General. The delegation of authority granted to him includes decisions with respect to materials for which he seeks declassification; therefore, those decisions will be made by Mr. Fitzgerald, in consultation with the relevant agencies that own the information at issue. The only other person within the Department of Justice who holds any authority with respect to the Special Counsel investigation is Associate Deputy Attorney General David Margolis, to whom former Deputy Attorney General James Comey granted any authority he held with respect to the Special Counsel investigation and Mr. Fitzgerald's service as Special Counsel in a letter dated August 12, 2005.**

a. Do you feel you are capable of making such decisions free from any bias or interest in the outcome of the case or the protection of the Administration or its policy?

Answer: **As stated above, Mr. Fitzgerald has the authority of the Attorney General for the purpose of the Special Counsel investigation and will be making declassification decisions in consultation with the relevant agencies that own the information at issue. Therefore, I do not anticipate being involved in any decisions with respect to declassification of information.**

b. If so, will you undertake to do all within your power to ensure that such decisions by the administration are made only by persons who are similarly independent?

Answer: **As stated above, Mr. Fitzgerald has the authority of the Attorney General for the purpose of the Special Counsel investigation and will be making declassification decisions in consultation with the relevant agencies that own the information at issue.**

The Department of Justice's Review of Immigration Courts

In recent years, we've had many reports that the federal courts are inundated with immigration cases and that some federal courts are forced to eliminate oral arguments in asylum cases. Most of these problems can be traced back to 2002 when Attorney General Ashcroft implemented streamlining regulations that have undermined due process.

Public criticism of immigration judges has increased, especially by federal court judges. Federal judges have described immigration court decisions as "woefully inadequate," full of errors, ignoring facts, and containing "astounding" lapses in logic. Many of us share Judge Richard Posner's recent statement that the adjudication of immigration cases "has fallen below the standards of legal justice."

I'm sure you understand the profound impact that immigration decisions have on people's lives, especially asylum seekers, who may face persecution or even death, and long-time residents, who may face permanent separation from their families.

I was pleased to learn that Attorney General Gonzales is aware of the gravity of this problem and has recently written to the immigration judges and members of the Board of Immigration Appeals expressing concern that persons coming before the immigration courts are not being treated with the respect and consideration they deserve. I understand that Attorney General Gonzales has requested you to be responsible for leading a comprehensive review of the immigration courts.

1. I understand that you are already several weeks into the review. As the Committee of jurisdiction on this important issue, it is important that the staff of the Judiciary Committee be briefed as soon as possible. I understand that Senator DeWine has also made a request for a briefing. I trust that you will contact my staff as soon as possible to respond to my request.

Answer: **Absolutely. I understand that your staff has already reached out to our Office of Legislative Affairs and we are working to arrange a briefing in the near future.**

2. I would also recommend that you speak to immigration attorneys and other advocates to identify additional problems with the immigration court system that may be preventing the claims of asylum and other immigration relief from being considered fairly. Do you have any plans to speak with some of the attorneys or organizations that represent persons before the immigration courts? Who have you spoken to or plan to speak to?

Answer: **Yes. That is an important part of our review. The Associate Attorney General and I have assembled a review team of lawyers and others from different components of the Department of Justice, not including the Executive Office of Immigration Review. Members of this team have met with the American Immigration Lawyers Association (AILA) to discuss the review and seek their assistance. Members of the team will also be meeting with and speaking to local AILA members as they visit immigration courts in different cities. We have also asked AILA to survey their members and provide us any other input they believe would be helpful.**

3. Immigration decisions are unique in the extensive number of factors that can exacerbate error, since most appellants are unfamiliar with U.S. customs, laws and language. What types of transparency or quality controls would you build into the agency system to monitor the process and reduce the potential for error?

Answer: **These are important areas we will be looking at during the review to see what improvements can be made.**

4. Many federal courts remand cases to the Board of Immigration Appeals for further review, finding that the Board has impeded federal circuit court review by failing to indicate its basis for affirming an immigration court decision. I am very concerned that we have no idea if a person is receiving effective and meaningful review if the Board is merely issuing affirmances without opinions. Given the high stakes in asylum cases and in cases of long-time permanent residents, don't you think that the Board and immigration judges should explain the reasons for their decisions?

Answer: **I understand the concerns of the U.S. Courts of Appeals about the use of summary procedures. Any such procedures represent an effort to strike the right balance between the need to ensure that parties receive a sufficient hearing on their claims and the need to ensure timely and efficient adjudication of cases. I believe the courts of appeals themselves have found that they are making increasing use of such procedures in order to be able to give sufficient time to harder cases by disposing more efficiently of easy ones.**

My understanding is that the Board of Immigration Appeals' use of summary procedures dates back to a pilot program launched under the prior Administration that was expanded in the current streamlining regulations. I am told that what led to the streamlining effort was that the Board had been accumulating an enormous backlog of cases.

My understanding is that the regulations do not provide for indiscriminate use of summary procedures. Rather, they direct the Board to issue affirmances without opinions ("AWOs") only when the immigration judge reached the correct result – without any errors or with harmless or nonmaterial errors – and only when the issues on appeal are either squarely controlled by existing precedent or insubstantial. Moreover, under the regulations, all aliens are to receive effective and meaningful review. Even when the Board affirms without opinion, the alien's case is reviewed by an immigration judge, a staff attorney, and a member of the Board. I am also informed that the regulations have been upheld in every regional circuit Court of Appeals (their validity has not been litigated in the D.C. Circuit and the Federal Circuit because petitions for review are not filed there). Finally, I am advised that some courts have remanded some AWOs to clarify the basis of the Board's affirmance. I am told, however, that the Board has been paying careful heed to the courts' decisions and has issued instructions not to affirm cases of this sort without opinion in the future.

As part of the comprehensive review directed by the Attorney General, the Associate Attorney General and I will be looking at issues that have been raised about the existing regulations on summary procedures, bearing in mind the competing considerations that are necessarily involved.

Attorney General's Honors Program

At your nomination hearing, I asked about changes in the Attorney General's Honors Program. You indicated that you would provide the information once you had the opportunity to obtain more details. Please state:

1. Whether career employees are involved in the process of reviewing applications to the Honors program, interviewing applicants, or recommending applicants for hire. If so, please describe in detail the role of these career employees.

Answer: **The Attorney General's Honors Program (HP) is administered by the Office of Attorney Recruitment and Management (OARM). This is a career office with administrative oversight of all career attorneys within the Department. OARM promotes and administers the HP and screens the electronic applications for initial eligibility based on factors such as graduation date and citizenship. Applicants are then referred to components that participate formally (such as the Civil Division) based on the applicant's stated preference. Formal participants are components that have committed to hire a set number of HP attorney positions that year. Each component has developed its own procedure to review the applications and select individuals for interviews. The number varies each year, but typically there may be 130 vacancies to fill for ten components. For this number of vacancies approximately 600 individuals would be chosen by the components to come to Washington (or other major cities) for interview. While each component develops its own internal process, career component personnel are usually involved in each step from initial selection for an interview, interviewing and the decision to request OARM to make a formal employment offer. Final clearance for hiring is vested in OARM which does a suitability adjudication based on a full FBI Background Investigation. National Security clearances are done separately by another office.**

2. If career employees are involved in the Honors program hiring, please identify the Division and Section in which these employees work.

Answer: **In addition to the career personnel in OARM, there are career personnel involved in each participating component and, where appropriate, component sections or regional offices. These components are typically the Criminal, Civil, Tax, Antitrust, Civil Rights, the Environment and Natural Resources Divisions, the Executive Office for Immigration Review, the Federal Bureau of Prisons, and the U.S. Trustee Program, as well as several other components.**

3. Who determined which Justice Department personnel will participate in reviewing Honors program applications and recommending attorneys for hire through this program, and the criteria relevant to that determination.

Answer: **It is my understanding that OARM sets general overall policy for administering the program. OARM will offer advice as requested and conducts training on interviewing and other procedures. OARM employees are career and are selected by the Director of OARM who is a career SES. The eligibility criteria for the Honors Program apply across the board and are published at www.usdoj.gov/oarm. However, each participating component has distinct legal practice areas that comprise its mission. Applicants may, at the time they apply, designate the components they wish to be referred to for consideration. All eligible applicants are referred to the components they designate according to their preferences.**

I am told that each component manages its own internal review and selection process and assigns personnel to review applications and make hiring decisions. Practices vary among the many participating components. Some have review teams. Some defer to the individual section that is hiring. Some have more centralized programs. Some leave hiring to a specific individual (e.g., for immigration judges hiring a clerk.) Some components or offices hire only 1 attorney and participate intermittently. Others participate regularly and hire between 5 and 30 attorneys each year, depending on their needs. The selection process for the responsible screening and recommending component personnel may vary but is done under the direction of the appropriate Assistant Attorney General or component Head. Each year a Department level ad hoc working group is also formed to review component selections for interviews as a whole. This is usually done under the coordination of the Deputy Attorney General's office. This latter function was most significant the first year of the new on-line application system as components requested approximately 900 interviews when a budget had been set for only 600 interviews and the overall pool had to be proportionately reduced. Since then, components have accommodated the yearly budget limit of 600 and the central review has become nominal based on academic and other quality standards. Typically only a few requests are denied each year on that basis and even those are subject to appeal. A review of qualification characteristics among those hired shows a prior Judicial Clerkship to be the most significant element, followed by law journal experience and then several other factors.

4. How the Department decides which Honors hires are assigned to particular Divisions within the Department.

Answer: **It is my understanding that each participating component selects its own candidates and makes independent hiring decisions based on budget and other considerations. There is no central process that assigns incoming Honors Program attorneys to particular components within the Department. Each spring, OARM sends out a Department-wide memorandum asking components (and all offices that employ attorneys) whether they will**

participate in fall hiring through the Honors Program and, if so, how many attorneys they expect to hire. Components can participate formally or informally. Formal participants are listed on the application by name and appear on recruitment materials. Informal participants may request referrals from the pool of eligible applicants, but are not listed on the application as a participant and are not bound by the formal time lines. Applications are accepted each fall for entry on duty the following summer/fall. During the period from selection to entry on duty each component determines to which of its sections to post HP hires, based on vacancies and other resource allocation considerations.

Responses to Senator Herb Kohl
Questions for Paul McNulty
February 2, 2006

1) We both agree that juvenile crime is a serious problem in this country. We may disagree on how best to address and solve this issue. In a 1995 article *"Natural Born Killers?"* you argued for stronger enforcement measures to deal with juvenile offenders - a so-called "catch and convict" strategy. Specifically, you stated:

"Government's role is to enforce the law, and it should be vigorous and purposeful in the acceptance of that duty. When families fail to instill virtue in children, government must be prepared immediately to send a clear message to those children, and their parents, that lawbreaking will not be tolerated, and that the children will be held accountable. To do that will require a complete overhaul of the juvenile justice system."

We may agree that it makes some sense to "get tough" with the worst juvenile offenders. With this goal in mind, Congress enacted the Juvenile Accountability Block Grant (JABG) program in 1997 and reauthorized it in 2002. Funds from JABG could and have been used to implement stronger enforcement measures against juvenile offenders. Yet, the current Administration has proposed its elimination for the last three years in a row. Do you agree with the Administration's goal to eliminate the JABG program? If so, why? Do you believe the federal government should support local efforts to combat juvenile crime through grant programs like JABG?

Response: **As the chief counsel for the subcommittee on crime in 1997, I played a major role in developing and drafting the JABG legislation. One of its primary purposes was to assist state and local governments in establishing a system of graduated sanctions for juvenile offenders. Later in my career, I was appointed to the juvenile justice advisory board in the Commonwealth of Virginia and worked on the implementation of JABG grants. I believe the federal government, through the Office of Juvenile Justice and Delinquency Prevention (OJJDP), should continue to be supportive of research-based local efforts to combat juvenile crime. Given the current fiscal constraints, however, it is imperative that the government be selective on the resources being expended. I support the President's FY2007 budget request and the effort to reduce federal spending and focus assistance on programs within Administration and Congressional priorities.**

I should also note that during the FY 2004 budget process, the Office of Management and Budget (OMB) used the Program Assessment Rating Tool (PART) to evaluation the JABG program. The program received an overall rating of "Ineffective." At that time, OMB stated that the program "has not demonstrated any measurable impact on either juvenile crime or the juvenile justice system."

The Office of Juvenile Justice and Delinquency Prevention, which administers the JABG program, has actively been addressing OMB's concerns about the program.

Since the 2002 reauthorization of the Juvenile Justice and Delinquency Prevention Act, the Administration has requested funds for the new Part C block grant program which exists to, "carry out projects designed to prevent juvenile delinquency ... " Section 241 (a). If funds were appropriated, this block grant would allow for the support of the types of programs that have been allowable under the JABG grant program. However, the new Part C requires states and local communities to carry out activities based on sound and proven strategies, whenever possible, to prevent and reduce delinquency. It would also provide additional flexibility to states to address new and developing issues such as youth gangs, mental health, and girls in the juvenile justice system. I agree with the Administration's goal of assuring continued funding for local efforts to combat juvenile crime.

2) Given your belief in 1995 that the juvenile justice system was in need of a "complete overhaul" I am curious if you believe there is a role for juvenile crime prevention programs, like the Title V Local Delinquency Prevention Program. You seem to disdain these "liberal" programs which you described in your article in the following excerpt:

"Liberals argue that crime results from such things as inadequate education, economic deprivation, and low self-esteem. Consequently, they favor early intervention programs aimed at preschoolers, government-initiated job opportunities, and treatment-oriented responses for young criminals."

Studies show that for every dollar spent on juvenile crime prevention, we save three to four dollars in costs associated with juvenile crime. Furthermore, polls reveal that 71 percent of police chiefs, sheriffs and prosecutors believe that prevention efforts, such as educational child care for preschoolers and after-school programs for children and teenagers, would have the greatest impact in reducing youth violence and crime. In light of these facts, do you believe juvenile crime prevention programs work? Do you believe the federal government should fund juvenile crime prevention programs or "early intervention" programs?

Response: **Yes, I believer that juvenile crime prevention programs work. I also believe that the federal government should fund <u>research-based</u> juvenile crime prevention and early intervention programs. Regarding the Title V program, the consistent funding support for the Incentive Grants Program demonstrates the Administration's recognition of the cost-effectiveness of sound delinquency prevention programming. It is, in fact, the only federal funding source solely dedicated to delinquency prevention.**

The Incentive Grants Program, working from a research-based framework, focuses on reducing risks and enhancing protective factors to prevent youth from entering the juvenile justice system. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) helps communities formulate, implement, and evaluate comprehensive delinquency prevention plans.

The current issue with Title V is the lack of non-earmarked funds to be distributed across the nation. In FY 2006, after subtracting funds for earmarked programs, only $4.9 million was enacted for the program. In support of the original intent of this program, the President has requested over $19.6 million for FY 2007.

3) We were very disappointed with the elimination of the COPS Universal Hiring program in last year's budget. As you know, this national initiative added tens of thousands of police officers to police departments across the country. Not surprisingly, the COPS program has been overwhelmingly popular among our local police departments. Yet you opposed this program when it was proposed in 1993 and said it wouldn't work. With the benefit of hindsight, what would you say now about whether or not the COPS program has worked? Have the criticisms you cast at the program in 1993, that it's "too little, too late" or that "money may come from other law enforcement programs" or that "more police alone will not keep criminals off the streets" been proven correct when looking back at this program's history and the decline of crime during its lifetime?

Response: **There are a number of elements from the 1994 Crime Act that contributed to reductions in crime. One of my principal concerns in 1994 was whether local governments would be able to pay the matching funds required under the hiring program. The awarding of technology grants, which did not require a match, significantly helped jurisdictions participate in the program. More than 13,400 of the nation's 18,000 law enforcement agencies have received COPS grants, and these grants have been used not only to add community policing officers to the streets and schools, but also to make technological upgrades and improve interoperability, train officers and citizens on community policing, improve police integrity programs, clean-up and combat meth drug labs, and improve law enforcement infrastructure on Tribal lands. State and local law enforcement executives have used these grants to supplement and increase public safety activities.**

4) Almost four years ago, when Attorney General Ashcroft testified before the Appropriations Committee I asked him about the COPS program and why the Universal Hiring Program was being eliminated. And much to my surprise, he said that the COPS program was a "good thing" that it "worked very well" and that it had been one of the "most successful programs" we have ever had. Yet, he still proposed its wholesale elimination. Do you support the elimination of the COPS Universal Hiring Program? If so, why?

Response: **As United States Attorney, one of my most important and fulfilling experiences has been working with police chiefs and sheriffs. I have a strong bias towards any program beneficial to these local leaders. Nevertheless, the Administration's position is that the COPS Office has achieved its mission -- COPS has already dedicated $11.7 billion to add 118,000 community policing officers to the streets and schools. COPS grants have also been used to purchase crime-fighting technology,**

improve public trust with law enforcement, fight methampetamine, improve the law enforcement infrastructure in Indian Country, and increase community policing training and technical assistance.

In 2007, the budget request directs federal resources in the areas of greatest need for law enforcement. This includes funding to continue training and technical assistance, so that the federal government can support law enforcement agencies implement community policing strategies. The request also includes funds to combat meth, by supporting DEA and their efforts to clean-up meth lab sites. Finally the request includes funds to assist Tribal law enforcement agencies.

Responses to Senator Russell Feingold
Questions for Paul McNulty

1. During your confirmation hearing before the Senate Judiciary Committee, you testified that you have read and generally agree with the legal arguments presented by the Department of Justice in its January 19, 2006, White Paper in support of the National Security Agency's domestic wiretapping program. Based on what you currently know about this program please answer the following questions.

a) Do you agree with the White Paper that the September 2001 Authorization for Use of Military Force (AUMF) authorized the President to direct the NSA to conduct wiretaps of Americans in the United States, outside of the authorities in the Foreign Intelligence Surveillance Act (FISA)?

Answer: **As I stated at my confirmation hearing, I believe the paper released on January 19 makes a compelling argument. The Attorney General set forth that argument in his testimony before the Senate Judiciary Committee on February 6. In summary, the position is that the September 2001 Force Resolution authorizes the terrorist surveillance activities recently described by the President. As the paper explains, the terrorist surveillance program is limited: The program intercepts only *international* communications where there are reasonable grounds to believe that one party to the communication is a member of al Qaeda or an affiliated terrorist organization. The Force Resolution clearly authorizes this program. It broadly charges the President to employ "all necessary and appropriate force" against those persons and organizations responsible for the September 11th attacks. Five members of the Supreme Court of the United States have determined that this sweeping language authorizes the President to use "the fundamental incidents of war," even if the Force Resolution does not specifically address them (as it does not address the detention of enemy combatants, as was at issue in that case). *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Electronic surveillance against a declared enemy of the United States during a time of war is an accepted and fundamental incident of war. As detailed in the January 19 paper, signals intelligence against suspected enemy communications has been a crucial tool of warmaking since the early days of the Republic, and previous Presidents have construed similar force authorizations to permit far broader interception of international communications during wartime. Moreover, a majority of the Justices determined that the Force Resolution overcomes a pre-existing statutory prohibition on detention "except pursuant to an Act of Congress." *See* 18 U.S.C. § 4001; *Hamdi*, 542 U.S. at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Although FISA restricts certain types of electronic surveillance, that statute contemplates that electronic surveillance could be authorized by a statute other than FISA. 50 U.S.C. § 1809(a). Just as in *Hamdi*, the Force Resolution is such a statute.**

b) Do you agree with the White Paper that, if the AUMF did not grant the President authority to authorize wiretaps of Americans in the United States outside of FISA, the President has an inherent constitutional authority to order such wiretaps?

Answer: **I have not done an independent analysis of this question, but I accept the conclusions of the Attorney General, who addressed this subject in great detail in his recent congressional testimonies. His position is that it is unnecessary to confront this question in order to conclude that the terrorist surveillance activities described by the President are lawful. As stated above, electronic surveillance against the declared enemy of the United States in a time of war is so fundamental and accepted an incident of war that it is necessarily entailed in Congress's authorization for the President to use "all necessary and appropriate force" against al Qaeda and affiliated terrorist organizations.**

Even if the Force Resolution and FISA were ambiguous on that point, the canon of constitutional avoidance would require interpreting any ambiguity in favor of the President's authority. Federal courts have long recognized that, as Commander in Chief and the sole organ of the Nation in foreign affairs, the President has inherent authority to engage in warrantless surveillance for foreign intelligence purposes, even during peacetime. *See in re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002); *see also* Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (stating that while "the current bill recognizes no inherent power of the President to conduct electronic surveillance, I want to interpolate here to say that this does not take away the power [of] the President under the Constitution") (statement of Attorney General Griffin Bell). The circumstances supporting the exercise of that power are considerably stronger when engaged in armed conflict against a declared enemy of the United States than they are during peacetime. The President further has a solemn constitutional obligation to protect the Nation from foreign attack. The terrorist surveillance program stands at the confluence of the President's constitutional powers. Relying on this inherent constitutional authority, several other Presidents have authorized far broader electronic surveillance of international communications during a time of war. Indeed, President Wilson authorized the interception of *all* telephone, telegraph, and cable communications into and out of the United States.

c) Do you agree with the White Paper that the President's authorization of wiretaps of Americans in the United States, outside of FISA, does not violate the Fourth Amendment?

Answer: **I have not done an independent analysis of this question, but I accept the conclusions of the Attorney General, who addressed this subject in great detail in his recent congressional testimonies. His position is that the terrorist surveillance program described by the President does not violate the Fourth Amendment. Before FISA, every court of appeals squarely to decide the question had held that the President had inherent authority, consistent with the Fourth Amendment, to engage in warrantless foreign intelligence surveillance. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). The touchstone of the Fourth Amendment is reasonableness, and the Supreme Court has held time and again that warrants are not required for searches justified by "special needs, beyond the**

normal need for law enforcement." The terrorist surveillance program is not directed at building the basis for criminal prosecutions. Instead, the program is aimed at detecting a terrorist attack before it occurs. *See* Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence, 103d Cong. 2d Sess. 62, 63 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[I]t is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities .... [W]e believe that the warrant clause of the Fourth Amendment is inapplicable to such [foreign intelligence] searches.").

d) Does either the AUMF or the President's inherent constitutional authority allow the President to order searches of Americans' homes outside of the authorities in FISA?

Answer: **As an initial matter, I am told that the terrorist surveillance program described by the President does not involve physical searches of homes in the United States. This question therefore is not analyzed in the Department of Justice's January 19 paper discussing the legal authorities supporting that program. Whether the Force Resolution would authorize physical searches would seem to depend on whether warrantless domestic searches are considered a fundamental and accepted incident to war. While I have not undertaken a historical inquiry into that question, I am not aware that there is an established tradition that warrantless domestic searches are a fundamental and accepted incident to warfare.**

As I understand it, prior administrations authorized warrantless physical searches for foreign intelligence purposes and without congressional authorization. For example, Attorney General Janet Reno authorized eight warrantless foreign intelligence searches of the home and property of Aldrich Ames, who was later convicted of being a spy. Attorney General Reno also authorized a warrantless foreign intelligence search of the home of a suspected Hamas financier. All of those searches were undertaken at a time that FISA did not authorize such searches, and were based exclusively on the President's inherent authority under the Constitution to order warrantless foreign intelligence searches. Courts have recognized that the President has inherent authority to order such searches. *See Truong, supra.*

e) Does either the AUMF or the President's inherent constitutional authority allow the President to order wiretaps of purely domestic telephone conversations outside of the authorities in FISA?

Answer: **It is my understanding that the interception of domestic telephone conversation is not part of the terrorist surveillance program described by the President. FISA is a vital and important tool in the war on terror, and the President has stated that the government employs FISA to intercept domestic communications of the sort you describe. The terrorist surveillance program has been described as limited to communications into or out of the United States, where there are reasonable grounds to believe at least one party to the communication is a member of al Qaeda or an affiliated group.**

Because this issue is not presented by the terrorist surveillance program, the January 19 paper does not address this issue, and this question is significantly different legally. The President's decision to intercept international communications is strongly supported by the long history of conducting surveillance of international communications during time of war, which was undertaken by both Presidents Wilson and Franklin Roosevelt, among others. I have not studied whether there is an established tradition that the interception of domestic communications is a fundamental and accepted incident of war. Given the significant legal differences between the terrorist surveillance program and your hypothetical question, it would be inappropriate for me to speculate about whether such activities could be authorized outside of FISA. I note that Justice Jackson counseled that the division of authority between the President and Congress should not be delineated in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

f) Does either the AUMF or the President's inherent constitutional authority allow the President to order the detention without charge of U.S. citizens inside the United States?

Answer: **It is the position of the United States Government that the Force Resolution and the President's constitutional powers authorize the President to detain a United States citizen who the President designates as an enemy combatant without bringing criminal charges. The President makes those designations according to specific criteria and with exceedingly close care. The Supreme Court upheld the President's authority to detain a United States citizen and hold him inside the United States without criminal charge once the President has made that designation. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The Executive Branch has argued successfully that the authority recognized in *Hamdi* extends to the detention of a U.S. citizen who took up arms on behalf of an enemy of the United States in a foreign combat zone, who "thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets," and who was then captured on United States soil. *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005), pet. for cert. filed, No. 05-533 (Oct. 25, 2005). I agree with the conclusions reached in these cases and stand by the position of the United States Government in its court filings on these issues.**

g) Does either the AUMF or the President's inherent constitutional authority allow the President to order the assassination of U.S. citizens inside the United States?

Answer: **Inside the United States, the Fifth Amendment prohibition against depriving a person of life without due process of law and the Fourth Amendment restriction on unreasonable seizures place significant restraints on the government's authority to use deadly force. At the same time, it is well established that, consistent with those protections, law enforcement officials may use deadly force to prevent a criminal act**

that threatens life or severe bodily injury or to apprehend a suspect who is believed to have committed such a crime. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 10-12 (1985). I have not studied how the Fourth and Fifth Amendment protections, and how the authority to use deadly force and other authorities, might bear on your question regarding the scope of warmaking authority under the Constitution and the AUMF, and I do not think it appropriate to speculate.

2. You testified before the Senate Judiciary Committee that there are 17 detainee abuse cases against employees or contractors of the Defense Department and Central Intelligence Agency that are pending in the Eastern District of Virginia, where you served until recently as U.S. Attorney. Since these cases were transferred to that office in June 2004, no indictments have been issued and only two cases have been dismissed.

Answer: **It is inaccurate to state that that "cases" were transferred to the Eastern District of Virginia in June 2004. The task force was created in June 2004, and several allegations were referred during that month. The 19 total referrals, however, did not all occur during that month. The referrals occurred over a four-month period of time beginning in June 2004. It is possible that additional referrals may be made in the future. As explained below, none of these are accurately described as "cases."**

a) Please specifically identify the "roadblocks" you mentioned at your confirmation hearing that have created delays in the investigatory process.

Answer: **While 19 matters have been referred to the Eastern District of Virginia, that number is somewhat misleading. We do not have 19 *credible* allegations of detainee abuse. For example, many of the 10 Department of Defense (DoD) referrals do not appear to meet the standards for referral under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Under DoD guidelines, there is supposed to be probable cause finding of a qualified legal officer (Staff Judge Advocate) before referral. That did not happen; nonetheless, we took the referrals because of the importance of investigating and prosecuting civilians who are alleged to have abused detainees in Iraq or Afghanistan.**

Several referrals have been made for conduct that would constitute a misdemeanor (which may not be prosecuted under MEJA) or is a crime only under the Uniform Code of Military Justice (*e.g.*, failure to obey an order, dereliction of duty or conduct prejudicial to good order and discipline), which does not apply to civilians. One civilian referred by DoD has actually been cleared of any wrongdoing in a subsequent DoD report.

Of the other-agency referrals, several consist of uncorroborated allegations from a single source, and there is no possible way to obtain any corroboration. One referral appears to involve conduct by Iraqis in Iraq, and there is no jurisdiction to prosecute such cases in the United States. In two instances, after a searching investigation by agents and a thorough review by prosecutors, matters referred for prosecution have been declined based upon an assessment that the allegations could not be proven beyond a reasonable doubt, that the alleged misconduct did not rise to

a level warranting criminal prosecution, or both, or because there was no jurisdiction over the person who was referred or the conduct in which the person was allegedly involved, or both.

The investigation and prosecution of these cases would be difficult under the best of circumstances. To the extent that an allegation of abuse is facially credible, the conduct occurred outside of the United States, and most if not all of the evidence is overseas. Our efforts in these cases have involved scores of interviews of civilian and military witnesses in the United States and in countries in the Middle East. One prosecutor traveled to Iraq to assist in the interview of witnesses still being held in military custody outside of Baghdad – several miles outside of the "Green Zone." We anticipate additional efforts to collect evidence outside of the United States. Such efforts take time and the cooperation of the foreign government, not to mention significant amounts of money.

In two cases, the alleged Iraqi victims are no longer in U.S. custody (one escaped and one was released) and could not be located. In one case, the alleged victims are citizens of another Middle Eastern country, and, despite repeated requests, that country has denied our requests to interview the victims. Two of our prosecutors had obtained visas for that country and were prepared to travel there to conduct the interviews before we learned that we would not be given access to the alleged victims.

Several soldiers and Navy SEALS have been acquitted in detainee-abuse cases, which underscores the need to avoid bringing charges without a solid case. Some of these acquittals make it more difficult to bring charges against civilians implicated in the same events.

There are also delays inherent in pursuing those cases that involve both military and civilian subjects and/or classified information. We have to wait on the military to get our cases completely investigated. Under the provisions of MEJA the military cannot be stripped of their jurisdiction if they want to court-martial uniformed personnel. They, therefore, get first bite at the evidence and we have to wait. Unlike the typical drug case or gun case, several of these referrals involve classified information. Dealing with classified information in the investigation also necessarily complicates the prosecutors' task.

b) Will you commit to keeping the Senate Judiciary Committee up-to-date on the Justice Department's progress in these cases?

Answer: **Yes, I will to the extent possible consistent with long standing Department policies.**

3. The Department of Justice has recently dealt with numerous controversial legal issues, including torture and domestic wiretapping. Do you believe the Justice Department would benefit on such issues from the input of outside experts or academics to provide independent, non-biased legal opinion?

Answer: **For over two centuries, Attorneys General of all parties have been called upon to provide authoritative legal advice to the Executive Branch on a wide variety of important, sensitive, and controversial questions. One of the most important statutory duties committed to the Attorney General by Congress remains "to give his advice and opinions on questions of law when required by the President" or heads of departments. 28 U.S.C. §§ 511 & 512. In carrying out these duties, Attorneys General have relied on the expertise and good judgment of the lawyers of the Department of Justice, both political appointees and career lawyers. In addition, Congress has provided for the Attorney General to appoint special assistants and special attorneys. *See id.* § 515. Many of these individuals are already experts in their fields when they come to the Department (some of them coming from the legal academy), and many others become experts in the course of their work at the Department. All of them strive to provide the Attorney General and the President with the best, most thorough, and most accurate legal advice possible. That has included telling the client "no" or "not in this way" when the law requires. That also includes maintaining the confidentiality that is essential to any attorney-client relationship and critical to advising on the sensitive matters that confront the Executive Branch. The Department of Justice has been and remains a superb lawyer to its clients in all of these respects. I therefore do not believe that revising the way in which the Department carries out its most sensitive and significant duties is either necessary or desirable.**

4. In your hearings before the Senate Judiciary Committee, you discussed the importance of and your commitment to congressional oversight of the Justice Department.

a) Specifically, how do you intend to adequately inform Congress about important law enforcement issues? What role should the Congress play in determining and helping to shape key Justice Department policies?

Answer: **It would be my goal to maintain as open and forthcoming a relationship with Congress as possible. Based upon my experience working at the Department and in Congress, a primary way Congress becomes well informed about law enforcement issues is through the oversight process. The Department, of course, also provides information to Congress through its participation in the legislative process. Congress also affects the development of Department policies through the legislative process and committee oversight.**

b) How broad is the attorney-client privilege for memoranda written by the Office of Legal Counsel and other Justice Department lawyers in response to requests from the President? In what cases should that privilege be waived?

Answer: **I understand that memoranda of this kind are protected by, among other things, the presidential communications privilege. For information on the scope of that privilege, I would refer you to *United States v. Nixon*, 418 U.S. 683 (1974), *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), and *Judicial Watch v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004). I do not think it would be appropriate for me to speculate about the circumstances in which the privilege should be waived**

because it is a privilege of the Office of the President.

5. The Washington Post on January 23, 2006, reported that the Department of Justice Civil Rights Division's Voting Section has lost a third of its approximately 36 lawyers in the past nine months. That same article suggested the Voting Section is increasingly seen as a political entity rather than as an independent government entity committed to enforcing civil rights laws. If confirmed, what steps will you take as Deputy Attorney General to reverse the perception, or potential reality, that the Civil Rights Division, and in particular the Voting Rights Section, is overly political? How will you ensure that hiring for non-political, staff attorney positions is based on merit and not politics?

Answer: **If confirmed, I will strive to correct any mistaken impression that the Department's actions are "overly political." Indeed, I very much believe that the Department's decisions must be based only on the facts and the law. As you note, recent media accounts have questioned certain decisions by the Civil Rights Division's Voting Rights Section. The Department's has responded to letters by Chairman Specter and Senator Leahy to correct these misimpressions. Moreover, I am confident in the leadership of the new Assistant Attorney General for the Civil Rights Division, who has spent most of his career at the Justice Department, and the Chief of the Voting Section, who is a 30-year veteran of the Civil Rights Division. They share my conviction that the work of the Justice Department is too important to be based on partisan considerations. Finally, I am informed that career attorneys play a role in every Division hire, and I expect that every hire in the Department of Justice is based on merit, not politics.**

6. Recently, a number of federal judges have criticized immigration judges for a pattern of biased and incoherent decisions in asylum cases. For example, Seventh Circuit Judge Posner noted in a November 2005 decision the staggering percentage of asylum cases reversed by his court, and the severe criticism by his own court and others of both the Board of Immigration Appeals and immigration judges. Judge Posner wrote: "This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." Do you agree with Judge Posner's criticism? What will you do, if confirmed, to address this issue?

Answer: **The Attorney General and I take these concerns very seriously. On January 9, the Attorney General sent a memo to all immigration judges and to the Board of Immigration Appeals informing them that he has watched with concern reports of immigration judges who fail to treat aliens who appear before them with appropriate respect and consideration and who fail to produce the quality of work he expects of employees of the Department of Justice. He noted that while he is convinced that most immigration judges discharge their difficult duties ably and professionally, he believes there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve. The memo also explains that in order better to understand the scope and nature of the problem, the**

Attorney General has directed the Associate Attorney General and me, in my capacity as Acting Deputy Attorney General, to develop a comprehensive review of the immigration courts. The Associate Attorney General and I have recruited a team of lawyers from different components of the Department, not including the Executive Office for Immigration Review, to conduct this review. We expect this review to be completed very promptly and to form the basis for recommendations to the Attorney General on these issues.

Responses to Senator Charles E. Schumer
Questions for Paul J. McNulty

1. At your confirmation hearing, I asked you about your view of the request of 36 Senators for the appointment of a special counsel in the Abramoff case, currently being handled by the Public Integrity Section of the Department of Justice. You said that you believed the use of a special counsel could be "an important tool" insofar as it can create a "sense of public confidence." You also said that you would commit to "give it every possible consideration" if you are confirmed and that you would consult with me on the issue. In addition, you noted that the investigation is currently staffed with "thoroughgoing professionals, all career, and it has a lot of resources as far as the work being done." I appreciated your candor in these answers and your commitment to consult with the Congress. I do have several follow-up questions:

   A. If confirmed, how quickly will you be able to review the request for a special counsel and report back on your assessment? I trust that you will be able to do so soon, within a matter of weeks.

Answer: **As a general matter, the decision whether to appoint a special counsel depends on the specific facts and circumstances, which may change over time. I appreciate your confidence in the way in which this matter has been handled to date. The career professionals in the Public Integrity Section of the Criminal Division have a proud tradition of handling even the most sensitive matters in a fair and impartial manner. I expect that the evaluation of whether this matter should continue to be handled by the Department's Criminal Division or whether a special counsel is warranted will continue as the investigation progresses. It would be difficult to commit to a particular timetable because the assessment may be undertaken periodically, depending upon developments in the evidence. I can assure you that I recognize the importance of this investigation and the public perception that it is conducted vigorously, fairly, and with utmost integrity.**

   B. Do you commit to ensuring that, for the duration of the Abramoff investigation, the case continues to be staffed with career professionals?

Answer: **This matter will continue to be handled at the trial attorney level by career professionals, who are supervised by experienced attorneys, both career and non-career. The Public Integrity Section has substantial experience in conducting sensitive investigations involving allegations of bribery and other public corruption.**

   C. Although the investigation currently may have "a lot of resources," as you know, investigations of this nature are apt to expand and current resource levels may not be sufficient to make sure that investigators and prosecutors are able to get to the bottom of things, no matter how professional. Do you commit to dedicating whatever resources become necessary for the career staff – both government lawyers and law enforcement agents – to complete the job they have begun?

Answer: You have my commitment that this investigation, like any other important public corruption matter, will receive the resources that are necessary and appropriate to assure that the investigation is conducted in a manner which is thorough, complete, and professional.

2. As you may know, Congress established the Civil Rights Division in 1957 to respond to the South's strong resistance to the Supreme Court's decision in Brown v. Board of Education. The original mission of the Division, therefore, was to protect African Americans from racial discrimination and violence in the wake of court-ordered integration. Although Congress has since broadened the scope of the Division's charge to include the enforcement of laws enacted to protect women, persons with disabilities, immigrants, and others, Congress never intended that the Division abandon its original mission. While I am pleased that enforcement of certain kinds of cases within the Division's jurisdiction has increased – in particular, the prosecution of human trafficking crimes and the rights of language minorities under the Voting Rights Act – I am disturbed by reports that enforcement of civil rights cases on behalf of African Americans has sharply declined. Indeed, in Assistant Attorney General Wan Kim's written responses to questions submitted by Committee Members following his own confirmation hearing, Mr. Kim listed only two enforcement actions brought under Section 2 of the Voting Rights Act on behalf of African Americans, both of which were approved by Clinton Administration officials before they left office.

   A. Please provide the name and a summary of the facts and legal issues involved in the enforcement actions that have been approved by the current Administration in cases involving racial discrimination of African Americans.

Answer: The Civil Rights Division exists to protect all Americans. It is my understanding that the Civil Rights Division has never tracked or categorized its investigations and enforcement actions by the race of the victims. Nonetheless, the Division has been active in protecting the civil rights of all Americans, including African Americans. Indeed, the Division has brought dozens of cases on behalf of African American victims, and reached numerous consent decrees directly benefiting African-Americans. Listed below are some of the more significant actions taken during this Administration on behalf of African Americans:

- **In 2004, the Division entered a consent decree with Cracker Barrel resolving allegations that Cracker Barrel accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African American customers, and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.**

- **In 2004, the Division announced that federal assistance would be provided to local state officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi, after he purportedly**

whistled at a white woman. Two defendants, who subsequently admitted guilt, were acquitted in state court four weeks after the murder. Both men are now deceased. Federal and state officials are investigating the murder in order to determine whether a local criminal prosecution of any surviving perpetrator is warranted, as the statute of limitations has long since expired on any possible federal crime.

- In December 2005, the Division filed a complaint in United States v. Candy II, d/b/a Eve in Wisconsin, alleging that a Milwaukee nightclub violated Title II by discriminating against African Americans. According to our complaint, Eve employees falsely told African Americans that they could not enter because a private party was underway, while at the same time that whites were admitted. On other occasions, the complaint alleges, Eve employees falsely told African Americans that Eve was at capacity, while at the same time that whites were admitted.

- Public accounts report that the Division recently sent a notice letter to the Virginia Beach Police Department alleging a pattern or practice of employment discrimination against African Americans and Hispanics.

- Since 2001, the Division has brought 29 cross-burning prosecutions, charging a total of 46 defendants. On April 13, 2004, one defendant pleaded guilty to building and burning a cross in the front yard of an African American couple. On February 19, 2004, three defendants were charged with conspiring to interfere with the housing rights of an African American family by carrying out a series of racially-motivated threats of violence against the victims. Two of the three defendants recently pleaded guilty. And, on March 4, 2004, in a case personally argued by the former Assistant Attorney General, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence for the perpetrator of a cross burning in Gastonia, North Carolina.

- In 2002, the Division filed the first lawsuit ever to protect Haitian Americans, this under Section 208 of the Voting Rights Act.

- Since 2001, the Division has obtained three consent decrees involving the redlining of predominantly African American neighborhoods by major banking institutions. The first involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs in the City of Detroit and to open three new branches in the City of Detroit. This was the first redlining case the Division has ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank

intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods.

- **In April 2004, five white supremacists pled guilty to assaulting two African American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed, and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.**

- **In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African American farm worker in Mississippi who, because of the victim's race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times—including a shotgun blast to his head. That convictiou was affirmed by the Court of Appeals in April 2004.**

- **In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida, for a total of $455,000 in victim's compensatory damages. The lawsuit, consolidated with a private lawsuit, alleged that the city of Fort Lauderdale violated Title VII of the Civil Rights Act of 1964, by denying an African-American employee promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied promotion for discriminatory reasons.**

- **In recent months, the Division has successfully prosecuted two defendants, who were members of a national white supremacist group, for their role in the racially motivated assault of an African-American man.**

B. If confirmed, what steps will you take to ensure that all of our Nation's federal civil rights laws are being fairly and zealously enforced and, in particular, that the civil rights of African Americans are not being ignored over others?

Answer: The enforcement of our civil rights laws has been, and remains, a priority for the Department of Justice. The Civil Rights Division remains committed to vigorously enforcing and prosecuting illegal discrimination on behalf of all Americans. The legacy of the Civil Rights Division is a proud one that has helped secure access and rights for millions of Americans. If confirmed, I will work closely with the Attorney General and the Assistant Attorney General for the Civil Rights Division to ensure that federal civil rights laws are fairly and zealously enforced.

3. At your confirmation hearing, I asked you about politicization of the hiring process at the Department. You responded that both political and career staff were involved in hiring new employees. In his written responses to questions submitted after his confirmation hearing,

Assistant Attorney General Kim acknowledged that the longstanding hiring committee for the Attorney General's Honor Program had been abolished and replaced with a new "centralized" system. Mr. Kim has told the committee that this change in the hiring process was ordered by the Attorney General. If confirmed, will you try to persuade the Attorney General to reinstate the hiring committee for Honor Program attorneys in the Civil Rights Division and throughout the Department?

Answer: The Attorney General's Honors Program is one of the most prestigious and competitive hiring programs in the country. If confirmed, I will ensure that the Department continues to hire the best and brightest attorneys. As I understand it, the current system offers several improvements to the previous program. Prior to 2002, Honor Program applicants paid their own way to interview in various locations across the country, often meeting with only one representative from the Justice Department. Thereafter, a small committee – who had not personally met with each candidate – met in Washington, D.C., to make hiring selections. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political appointees and career attorneys in each Division that selected them for an interview. *More* individuals are now involved in the hiring process. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program. If confirmed, I certainly would discuss ways of further improving this program with the leadership of the Justice Department.

4. In January 2002, Deputy Attorney General Larry Thompson commissioned a study on diversity at the Department. After refusing to release the results of the study to the public, the Attorney General and the Deputy Attorney General announced a new initiative to increase diversity in the Department's workforce by focusing on the economic and geographic background of job applicants. More than a year later, the study was finally released in response to a FOIA request; however, most of the study's key findings, conclusions, and recommendations were redacted. The redacted portions, which were quickly revealed due to a computer glitch, demonstrated a need for more diversity on the basis of race and gender, not the factors emphasized by the new hiring initiative. I believe that a diverse workforce in the Civil Rights Division is critical to carrying out the work of the Division on behalf of this country's increasingly diverse population.

   A. Please provide an update on the racial, ethnic, and gender diversity of the Civil Rights Division, in light of hiring practices over the last four years.

Answer: I am informed that, in the past four years (FY 2002 to FY 2005), the majority of attorneys hired to work in the Civil Rights Division have been minorities or women: 41% of the Civil Rights Division's attorney hires have been women, and 27% of attorney hires have been minorities. I am also informed that both of these figures are higher than the Department-wide averages.

B. If confirmed, will you commission another diversity study that focuses only on the last four years and quickly make the results of the study available to the public?

Answer: The Department has been, and remains, committed to diversity among its entire workforce. If confirmed, I will continue the efforts undertaken by my predecessors to achieve maximum opportunities for all Department staff, regardless of their race, color, religion, national origin or gender. If confirmed, I will carefully examine this issue, including the need for, and utility of, another diversity study.

C. If confirmed, what will you do to ensure that the Department's workforce, especially the attorneys hired into the Civil Rights Division, reflect the diversity of the American population?

Answer: Consistent with the President's appointment of the most diverse cabinet in history, the Administration has worked vigorously to enhance the diversity of every component of the Justice Department. For example, in 2003, the Department announced a diversity initiative designed to ensure a broad and well-qualified applicant pool for attorney positions within the Department. Soon thereafter, the Department implemented an Attorney Student Loan Repayment Program, a Mentor Program, and a program requiring the central posting of all attorney vacancies on the internet and intranet. The Department also greatly expanded its employment outreach program to include substantially more locations/job fairs whose recruitment is primarily targeted at diverse communities, and created a new position in its Office of Attorney Recruitment and Management (OARM) -- Deputy Director for Legal Recruitment and Outreach -- to coordinate these activities. Further, the Department now distributes notices of its attorney vacancies to public sector and diversity contacts on a weekly basis so as to guarantee maximum awareness of job opportunities.

In November 2004, the Department's commitment to these goals was reinforced by a memorandum from the Attorney General directing the head of the Office of Attorney Recruitment and Management (OARM) to develop additional projects in this area. If confirmed, I will work closely with the OARM Director, who reports directly to me, to maintain this strong commitment.

5. On November 4, 2004, Deputy Attorney General James Comey issued a memo calling on all of the Department's litigating components to temporarily assist the Civil Division's Office of Immigration Litigation in alleviating a backlog of deportation cases. The memo stated that the assistance would be required for only four months. Fifteen months later, however, Civil Rights Division attorneys continue to work on these cases. Concerns have been raised that these cases may have been disproportionately assigned to that Division in an effort to prevent career attorneys in that Division them from working on civil rights matters, or even worse, to drive them out of the Department altogether. In the Appellate Section, for instance, a small number of attorneys have filed hundreds of immigration briefs since the end of 2004. According to Assistant Attorney General Wan Kim, 120 out of 193 briefs, or 62% of the briefs, filed by Appellate Section attorneys in FY 2005 were deportation cases.

Answer: **After the Board of Immigration Appeals reaches a final decision to remove an alien, that decision may be appealed to the United States Courts of Appeals. Responsibility for briefing these appeals has, historically, rested primarily with the Civil Division's Office of Immigration Litigation (OIL), with the exception that appeals filed in the Second Circuit have been the responsibility of the U.S. Attorney's Office for the Southern District of New York (SDNY). For a variety of reasons, the number of such appeals requiring the United States to file a brief has risen dramatically in the last several years, overwhelming the capacities of OIL and SDNY to keep pace with the demands of this litigation. As a result, Deputy Attorney General Comey directed in November 2004 that a system be established for requiring all United States Attorneys Offices and each of the Department's litigating divisions to contribute to preparing appellate briefs in order to complete those briefs that exceeded the combined capacity of SDNY and OIL. The program was extended in June 2005, and briefs are continuing to be distributed outside of OIL and SDNY.**

A. Please provide the number of immigration cases assigned to each of the Department's appellate offices and indicate the number of attorneys in those sections.

Answer: **Under the program, those immigration appeals that exceed the combined capacity of OIL and SDNY and that require appellate briefing have been distributed to the litigating divisions and to the U.S. Attorney's Offices in shares closely proportional to the total workforce of each division and USAO. Exactly proportional distribution is not possible for a variety of reasons. For example, offices with operations affected by Hurricane Katrina were given temporary relief due to extraordinary circumstances. In addition, other offices have chosen to "detail" an attorney to OIL full-time as a substitute for periodically receiving briefs or in return for a reduced share. Finally, each component typically has small ebbs and flows in the number of attorneys on board that may result in modest departures from the number of attorneys on which their proportionate share was computed. From November 2004 through December 2005, the Civil Rights Division received 215 briefs, which is 4.77% of the total number of briefs distributed nationwide. The total number of Civil Rights Division attorneys (344) represented 5.06% of the attorneys available nationwide for briefing immigration cases. By way of simple comparison, Environment and Natural Resources Division received 234 briefs (400 attorneys), Antitrust Division received 222 (359 attorneys), Criminal Division received 217 briefs (451 attorneys), and Tax Division received 172 briefs (296 attorneys). The United States Attorneys, other than Southern District of New York, collectively received 3286 briefs. Overall, more than 4500 cases have been distributed to the litigating divisions and USAOs in addressing this problem.**

Distribution of briefs within each component is in the discretion of that component head; no directive has been issued requiring any particular appellate section to undertake the responsibility for briefing all the immigration cases assigned to the particular office or division. Because the work primarily involves preparing appellate briefs, and hence is work where appellate expertise may produce efficiencies, many component heads have chosen to have their appellate attorneys bear the primary burden imposed by the immigration brief overload. However, it is important that each

component head have flexibility to determine the best way in which to handle the work assigned.

B. If confirmed, will you continue to order the assignment of deportation cases to the Civil Rights Division? If so, will you insist that the cases be assigned proportionately throughout the Division and/or only to those attorneys who volunteer to work on them?

Answer: Department-wide distribution of immigration cases based upon pro-rata shares of briefs to total attorney staff is expected to continue for the foreseeable future, until OIL has sufficient staff to manage the overwhelming workload. The Department is seeking to move to staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY. In this regard, OIL received a significant budget increase for this fiscal year, and is in the process of filling more than 50 new staff positions (including approximately 35 attorneys). As a result, assuming that the number of appeals remains about constant, it is expected that the number of appeals requiring distribution will be reduced during the fiscal year as new OIL attorneys are hired. The Department also is seeking another substantial budget increase for OIL in 2007 to allow additional hiring to further address the problem.

6. If confirmed, what will you do to ensure that all attorneys in the Civil Rights Division are treated fairly?

Answer: I have a great deal of confidence in the career and political leadership of every component of the Department, including the Civil Rights Division. If confirmed, I will ensure that the Department's leadership shares my belief that each and every employee should enjoy their work in an environment that rewards the highest standards of professionalism. The Department has an important mission that requires the full attention of a productive and enthusiastic workforce who should be respected as valued members of the Department.

7. At the hearing, Senator Kennedy and I asked you about recent reports of political decision-making in voting cases in Georgia and Texas. You responded by saying that the current chief of the Voting Section, John Tanner, is a career attorney. This response does not address concerns some have raised that decisions may have been made for partisan reasons without support in law or facts. In the Texas case, for example, the former chief of the Voting Section, Joe Rich, apparently recommended that the AG deny preclearance to a redistricting that he and a team of experienced career attorneys and analysts concluded would violate the rights of minorities. His recommendation was overruled. In the Georgia case, Mr. Tanner, who was selected by current Administration officials to replace Mr. Rich after he retired, is said to have overruled a near-unanimous recommendation (with only one attorney, a recent Administration hire, dissenting) to deny Section 5 preclearance to Georgia's photo identification law, which a federal judge likened to a "poll tax." After this story appeared in the Washington Post, Mr. Tanner reportedly made an unprecedented decision to prohibit career attorneys from making future recommendations in Section 5 proceedings.

A. What will you do to ensure that future decisions in the Civil Rights Division's Voting Section are made based on facts and careful legal analyses prepared by experienced career staff, and without consideration of whether a particular case will help Republicans win elections?

Answer: Partisan considerations should not play a role in the Justice Department's decisions. I know that Assistant Attorney General Wan Kim of the Civil Rights Division believes strongly in this principle as well. The Division's successful record in the courts demonstrates that its decisions are based on the facts and the law. If confirmed, I will continue to work closely with the Assistant Attorney General of the Civil Rights Division to maintain the high degree of professionalism in the Division.

B. Will you insist that career attorneys again be allowed to make recommendations in Section 5 proceedings?

Answer: There is no policy in the Civil Rights Division that prevents staff attorneys from making recommendations. Voting Section (and other Civil Rights Division) attorneys are in fact required to prepare detailed memoranda setting forth the facts and law on each proposed enforcement matter. There is always a full opportunity for lively debate. The Section Chief -- a veteran career attorney with 30 years experience in the Civil Rights Division -- -- expects and encourages thoughtful and aggressive recommendations from Section staff, and this career official has decisional responsibility for many matters. When the Assistant Attorney General for the Civil Rights Division makes a decision, he also welcomes opposing views, and is always available for responsible, productive discussion. I subscribe to these same principles.

Senator Richard J. Durbin
Questions for Paul J. McNulty
February 9, 2006

Deputy Attorney General's Independence

1. During your hearing and our meeting, we spoke about the need for the Deputy Attorney General to have the independence and integrity to stand up to the Attorney General and/or the President if he or she disagrees with the administration's position on an issue.

   You have spent the vast majority of your career in political positions in Congress or in the Executive Branch in Republican administrations. Can you please provide some examples of instances where you differed with the position of your employer?

Answer: A fundamental tenant of my moral framework is that political affiliation must never come before integrity and professionalism. On numerous occasions over the past five years, I have participated in discussions with colleagues at the Department of Justice and in the Administration where there has been a healthy debate over various matters. In my experience, it is a fairly routine matter for issues to be debated extensively before a decision is reached. In many of these discussions, my position has been adopted; in others, my position has not been adopted. There has been no instance where resistance to another person's position was viewed as in appropriate. The disclosure of the specific content of such discussions and internal deliberations, of course, would be inappropriate.

Detainee Abuse Investigations

2. I would appreciate if you could confirm for the record something that you told me during our meeting. You said that none of the 19 detainee abuse cases that have been referred to your office since mid-2004 involve the use of interrogation techniques that were authorized by the administration. Is that correct?

Answer: Because of the classified nature of some of the allegations, I would not have been in a position to respond to this question during our meeting. I recall indicating, however, that to date, in the course of these investigations, the use of authorized interrogation techniques has not become an issue.

3. In order to supervise the detainee abuse cases, have you been briefed on the interrogation techniques the administration has authorized?

Answer: No.

4. In how many of the 19 cases have grand juries been convened?

Answer: Grand juries are not convened to conduct a particular investigation. Additionally, as you know, Federal Rule of Criminal Procedure 6(e) prohibits the disclosure of information regarding matters occurring before a grand jury. Nonetheless, I can assure you that we have used various investigative tools in the course of pursuing these investigations, including grand juries.

5. Please provide information on the two cases which have been closed, including the identities of the victims, summaries of the allegations, whether grand juries were ever convened, and why you decided to decline prosecution.

6. Please provide an update on the status of the Manadel Al-Jamadi case, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

7. Please provide an update on the status of the Abed Hamed Mowhoush case, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

8. Please provide an update on the status of the so-called "Salt Pit" case, which reportedly involved a detainee's death from hypothermia, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

Answer to 5 through 8: As the Department has explained in a January 2005 letter to you, 19 allegations of detainee abuse have been referred to my office and 17 remain open matters. Under long-standing Department policy, it would be inappropriate to provide detailed information about matters that may or may not be pending in my office. Moreover, some of the information you seek in these questions – even if it were appropriate to provide it – is classified, and, obviously, I cannot disclose that information in this manner. As I said during my confirmation hearing, the experienced prosecutors who are on the task force are pursuing these cases vigorously, and I expect each matter to be resolved either with charges or a declination as quickly as possible. I am confident that, if I am confirmed, my successor as U.S. Attorney also will make resolution of these matters a priority.

9. During your hearing, you told me that it is "the law of the land" that no American can legally engage in torture or cruel, inhuman, or degrading treatment. In light of this, please respond to the following questions.

    a. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding (simulated drowning)?

    b. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution?

    c. In your personal opinion, is it legally permissible for U.S. personnel to physically beat a detainee?

    d. In your personal opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period?

Answer: Without a doubt, there are specific practices that are legally prohibited. But it would be inappropriate for me to purport to give a definitive, considered legal judgment without the support of a thorough legal analysis and detailed information about the facts

and circumstances surrounding the proposed treatment. Moreover, the President has recently and repeatedly reaffirmed the longstanding policy that the United States will neither commit nor condone torture.

NSA Surveillance

10. During your hearing, you told me that you had "no knowledge" that any defendant in a case in your district has been subject to NSA surveillance. If a defendant was the target of NSA surveillance, would you be required to disclose this evidence to the defendant? Would you be required to disclose it to the court?

Answer: The government's obligations to disclose information to a defendant in a federal prosecution are governed by federal law, including Rule 16 of the Federal Rules of Criminal Procedure and the decisions construing the government's obligation to provide exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). If the activities of an intelligence agency result in the collection of information concerning a defendant that may be subject to disclosure, we would look to this body of federal law concerning disclosure and apply it to the facts of the specific case to determine our disclosure obligations.

In general, to the extent that classified information is otherwise subject to disclosure to the defendant, the mere fact that the information is classified does not extinguish our disclosure obligations. However, there are special procedures for the disclosure and handling of classified information. *See* Classified Information Procedures Act, 18 U.S.C. App. 3.

Civil Rights Division

11. You have served as Acting Deputy Attorney General since November 2005, and you have had supervisory authority over the Justice Department's Civil Rights Division. If you are confirmed, you will continue to supervise that critical component of the Justice Department.

In the last three months, there have been four front-page articles in the *Washington Post* documenting how Republican political appointees in the Civil Rights Division have been overruling the decisions of career civil servants when it comes to authorizing and pre-clearing changes in election procedures. The articles discussed how political appointees in the Civil Rights Division rejected the advice of career attorneys and precleared a voter ID law in Georgia and a redistricting plan in Texas drawn up by Rep. Tom DeLay, even though these laws discriminated against minority voters in violation of the Voting Rights Act.

At your nomination hearing, in response to questions about these preclearance decisions from Senator Kennedy and Senator Schumer, you suggested that political considerations were not behind the decisions. You testified: "I am aware that the section chief [of the Voting Section] is the person under the guidelines who's responsible for the pre-clearance authority. So when you see pre-clearance you know that a career person has made that decision. I think that sometimes gets lost in the process."

a. In the Texas redistricting matter, Joseph Rich, the Voting Section chief at the time and a career attorney, recommended that the Justice Department not preclear the Texas plan. This

recommendation was shared unanimously by a team of six career attorneys and two career analysts. Yet, Mr. Rich and his career staff were overruled by the political appointees in the Civil Rights Division, and the Texas plan was precleared in a letter signed by Principal Deputy Assistant Attorney General Sheldon Bradshaw, a political appointee. How do you reconcile this fact with your testimony that "when you see preclearance you know that a career person has made that decision"?

Answer: I apologize for any confusion my answer may have created. My statement was addressed to the preclearance decision in the Georgia identification matter, which was part of the question to which I was responding. Indeed, Principal Deputy Assistant Attorney General Bradshaw, and not the Section Chief, signed the Texas preclearance letter. As for the Texas redistricting matter, I understand that it was decided after a deliberate and careful review of every relevant fact. Subsequent events – including the decision by a three-judge panel finding no violation of the Voting Rights Act, and the 2004 elections held under the new plan that resulted in the election of an additional African American legislator – underscore that the preclearance decision was correct. Partisan considerations played no role in the Department's review of the Texas redistricting submission, nor should they.

b. Regarding the Georgia voter ID law – which a federal court called a "poll tax" and enjoined as unconstitutional – a majority of the career attorneys in the Voting Section recommended that the Justice Department object to this law. Moreover, a Justice Department spokesperson, Eric Holland, is quoted in a November 13, 2005 *Washington Post* article entitled "Civil Rights Focus Shift Roils Staff at Justice," as saying that "career and political attorneys together concluded" that the Georgia voter ID law would not harm minority voters. A January 23, 2006 *Washington Post* article entitled "Politics Alleged in Voting Cases" reports that "[o]ne of the officials involved in the [Georgia] decision was Hans von Spakovsky, a former head of the Fulton County GOP in Atlanta, who had long advocated a voter-identification law for the state and oversaw many voting issues at Justice." Mr. McNulty, how do you reconcile these facts with your testimony that "when you see pre-clearance you know that a career person has made that decision"?

Answer: The decision to preclear the State of Georgia's amendments to its voter identification statute was made by the Chief of the Voting Section, a veteran career attorney with more than 30 years of experience in the Civil Rights Division. The decision was well grounded in law and fact submission.

It is my understanding that the 2005 Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared after a careful analysis that lasted several months and took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards. That data supported the ultimate preclearance decision in this matter.

12. What role did Hans von Spakovsky play, either formally or informally, in drafting the Georgia voter ID law or consulting with those individuals in Georgia who did draft it?

Answer: I have never worked with Mr. Von Spakovsky, who now works in the Federal Election Commission. I am informed that he played no role in drafting or consulting in the drafting of the Georgia voter identification law.

13. Do you believe it is appropriate for the Civil Rights Division to hire individuals with strongly partisan backgrounds, like Hans von Spakovsky, to positions within the Civil Rights Division where they have supervisory authority over election decisions which have direct and lasting effects on political parties and electoral outcomes? If you believe it is appropriate, how do you reconcile that belief with your testimony that "I feel very strongly that politics can never play a role in what the Department of Justice does"?

Answer: The Civil Rights Division, like the rest of the Justice Department, employs a number of talented of attorneys with a wide variety of backgrounds. At no time during this Administration has any component within the Department of Justice imposed a political litmus test in its hiring decisions.

The individual referenced in your question, Hans von Spakovsky, was hired because of his experience in voting and election issues. However, Mr. von Spakovsky had no supervisory authority; he simply served as a counsel to the Assistant Attorney General for Civil Rights on voting matters. I would add that it is my understanding that many of the dedicated and professional attorneys in the Voting Rights Section have worked in partisan and other advocacy roles directly involving voting rights issues prior to their arrival at the Justice Department.

14. On December 16, 2005, President Bush nominated Hans von Spakovsky to the Federal Election Commission. Two weeks later – while the Senate was in recess and before the Senate had the chance to hold a nomination hearing for Mr. von Spakovsky – President Bush gave him a recess appointment to the FEC. What was your role in the decision to recess-appoint Mr. von Spakovsky? Do you agree it was appropriate to give Mr. von Spakovsky a recess appointment into this position? Why or why not?

Answer: I had no role in the appointment process. Such matters are handled by the White House.

15. According to a December 10, 2005 article entitled "Staff Opinions Banned in Voting Rights Cases" in the *Washington Post*, "Tensions within the voting section have been rising dramatically, culminating in an emotionally charged meeting last week in which [Voting Section chief John] Tanner criticized the quality of work done by staff members analyzing voting rights cases, numerous sources inside and outside the section said. Many employees were so angered that they boycotted the staff holiday party later in the week." The article also indicates that Mr. Tanner has made a sweeping change in the work of the Voting Section and has prohibited career attorneys from offering recommendations on preclearance decisions. Mr. Tanner is a career employee, but the *Washington Post* article suggests he has demoralized and mismanaged the Voting Section. What steps will you take to review the management of the Voting Section and to ensure that staff attorneys in that section are treated with fairness and respect?

Answer: There is emphatically no policy in the Civil Rights Division preventing staff attorneys from making recommendations. To the contrary, attorneys in the Voting

Section, as throughout the Department, are required to prepare detailed memoranda setting forth the facts and law on each proposed enforcement matter. There is always a full opportunity for lively debate. The Section Chief -- a veteran career attorney with 30 years of experience in the Civil Rights Division -- expects and encourages thoughtful and aggressive recommendations from Section staff, and this career official has decisional responsibility for many matters. When the Assistant Attorney General makes a decision, he also welcomes opposing views, and is always available for responsible, productive discussion. I subscribe to these same principles.

16. What other steps will you take to try and address the problems of the Civil Rights Division discussed in the four front-page *Washington Post* articles over the past three months?

Answer: I have always believed that the attorneys employed by the Department of Justice are among the brightest and most capable in the entire legal community, and my tenure in the Department during this Administration has only reinforced that belief. The attorneys of the Civil Rights Division are no exception. The work they have done has protected the rights of millions of Americans of every race, color, religion, and national origin. I have worked closely with Assistant Attorney General Wan Kim of the Civil Rights Division during my time as Acting Deputy Attorney General and, if confirmed, I look forward to continuing our close professional relationship and expanding the consistently impressive work of the Civil Rights Division.

Senator Richard J. Durbin
Questions for Paul J. McNulty
February 9, 2006

Deputy Attorney General's Independence

1. During your hearing and our meeting, we spoke about the need for the Deputy Attorney General to have the independence and integrity to stand up to the Attorney General and/or the President if he or she disagrees with the administration's position on an issue.

   You have spent the vast majority of your career in political positions in Congress or in the Executive Branch in Republican administrations. Can you please provide some examples of instances where you differed with the position of your employer?

Answer: A fundamental tenant of my moral framework is that political affiliation must never come before integrity and professionalism. On numerous occasions over the past five years, I have participated in discussions with colleagues at the Department of Justice and in the Administration where there has been a healthy debate over various matters. In my experience, it is a fairly routine matter for issues to be debated extensively before a decision is reached. In many of these discussions, my position has been adopted; in others, my position has not been adopted. There has been no instance where resistance to another person's position was viewed as in appropriate. The disclosure of the specific content of such discussions and internal deliberations, of course, would be inappropriate.

Detainee Abuse Investigations

2. I would appreciate if you could confirm for the record something that you told me during our meeting. You said that none of the 19 detainee abuse cases that have been referred to your office since mid-2004 involve the use of interrogation techniques that were authorized by the administration. Is that correct?

Answer: Because of the classified nature of some of the allegations, I would not have been in a position to respond to this question during our meeting. I recall indicating, however, that to date, in the course of these investigations, the use of authorized interrogation techniques has not become an issue.

3. In order to supervise the detainee abuse cases, have you been briefed on the interrogation techniques the administration has authorized?

Answer: No.

4. In how many of the 19 cases have grand juries been convened?

Answer: Grand juries are not convened to conduct a particular investigation. Additionally, as you know, Federal Rule of Criminal Procedure 6(e) prohibits the disclosure of information regarding matters occurring before a grand jury. Nonetheless, I can assure you that we have used various investigative tools in the course of pursuing these investigations, including grand juries.

5. Please provide information on the two cases which have been closed, including the identities of the victims, summaries of the allegations, whether grand juries were ever convened, and why you decided to decline prosecution.

6. Please provide an update on the status of the Manadel Al-Jamadi case, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

7. Please provide an update on the status of the Abed Hamed Mowhoush case, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

8. Please provide an update on the status of the so-called "Salt Pit" case, which reportedly involved a detainee's death from hypothermia, including whether this case was referred to your office, whether it is still pending or has been closed, when you expect a decision on whether to charge anyone, and any factors that have delayed the investigation.

Answer to 5 through 8: As the Department has explained in a January 2005 letter to you, 19 allegations of detainee abuse have been referred to my office and 17 remain open matters. Under long-standing Department policy, it would be inappropriate to provide detailed information about matters that may or may not be pending in my office. Moreover, some of the information you seek in these questions – even if it were appropriate to provide it – is classified, and, obviously, I cannot disclose that information in this manner. As I said during my confirmation hearing, the experienced prosecutors who are on the task force are pursuing these cases vigorously, and I expect each matter to be resolved either with charges or a declination as quickly as possible. I am confident that, if I am confirmed, my successor as U.S. Attorney also will make resolution of these matters a priority.

9. During your hearing, you told me that it is "the law of the land" that no American can legally engage in torture or cruel, inhuman, or degrading treatment. In light of this, please respond to the following questions.

    a. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding (simulated drowning)?

    b. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution?

    c. In your personal opinion, is it legally permissible for U.S. personnel to physically beat a detainee?

    d. In your personal opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period?

Answer: Without a doubt, there are specific practices that are legally prohibited. But it would be inappropriate for me to purport to give a definitive, considered legal judgment without the support of a thorough legal analysis and detailed information about the facts

and circumstances surrounding the proposed treatment. Moreover, the President has recently and repeatedly reaffirmed the longstanding policy that the United States will neither commit nor condone torture.

NSA Surveillance

10. During your hearing, you told me that you had "no knowledge" that any defendant in a case in your district has been subject to NSA surveillance. If a defendant was the target of NSA surveillance, would you be required to disclose this evidence to the defendant? Would you be required to disclose it to the court?

Answer: The government's obligations to disclose information to a defendant in a federal prosecution are governed by federal law, including Rule 16 of the Federal Rules of Criminal Procedure and the decisions construing the government's obligation to provide exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). If the activities of an intelligence agency result in the collection of information concerning a defendant that may be subject to disclosure, we would look to this body of federal law concerning disclosure and apply it to the facts of the specific case to determine our disclosure obligations.

In general, to the extent that classified information is otherwise subject to disclosure to the defendant, the mere fact that the information is classified does not extinguish our disclosure obligations. However, there are special procedures for the disclosure and handling of classified information. *See* Classified Information Procedures Act, 18 U.S.C. App. 3.

Civil Rights Division

11. You have served as Acting Deputy Attorney General since November 2005, and you have had supervisory authority over the Justice Department's Civil Rights Division. If you are confirmed, you will continue to supervise that critical component of the Justice Department.

In the last three months, there have been four front-page articles in the *Washington Post* documenting how Republican political appointees in the Civil Rights Division have been overruling the decisions of career civil servants when it comes to authorizing and pre-clearing changes in election procedures. The articles discussed how political appointees in the Civil Rights Division rejected the advice of career attorneys and precleared a voter ID law in Georgia and a redistricting plan in Texas drawn up by Rep. Tom DeLay, even though these laws discriminated against minority voters in violation of the Voting Rights Act.

At your nomination hearing, in response to questions about these preclearance decisions from Senator Kennedy and Senator Schumer, you suggested that political considerations were not behind the decisions. You testified: "I am aware that the section chief [of the Voting Section] is the person under the guidelines who's responsible for the pre-clearance authority. So when you see pre-clearance you know that a career person has made that decision. I think that sometimes gets lost in the process."

a. In the Texas redistricting matter, Joseph Rich, the Voting Section chief at the time and a career attorney, recommended that the Justice Department not preclear the Texas plan. This

recommendation was shared unanimously by a team of six career attorneys and two career analysts. Yet, Mr. Rich and his career staff were overruled by the political appointees in the Civil Rights Division, and the Texas plan was precleared in a letter signed by Principal Deputy Assistant Attorney General Sheldon Bradshaw, a political appointee. How do you reconcile this fact with your testimony that "when you see preclearance you know that a career person has made that decision"?

Answer: I apologize for any confusion my answer may have created. My statement was addressed to the preclearance decision in the Georgia identification matter, which was part of the question to which I was responding. Indeed, Principal Deputy Assistant Attorney General Bradshaw, and not the Section Chief, signed the Texas preclearance letter. As for the Texas redistricting matter, I understand that it was decided after a deliberate and careful review of every relevant fact. Subsequent events – including the decision by a three-judge panel finding no violation of the Voting Rights Act, and the 2004 elections held under the new plan that resulted in the election of an additional African American legislator – underscore that the preclearance decision was correct. Partisan considerations played no role in the Department's review of the Texas redistricting submission, nor should they.

b. Regarding the Georgia voter ID law – which a federal court called a "poll tax" and enjoined as unconstitutional – a majority of the career attorneys in the Voting Section recommended that the Justice Department object to this law. Moreover, a Justice Department spokesperson, Eric Holland, is quoted in a November 13, 2005 *Washington Post* article entitled "Civil Rights Focus Shift Roils Staff at Justice," as saying that "career and political attorneys together concluded" that the Georgia voter ID law would not harm minority voters. A January 23, 2006 *Washington Post* article entitled "Politics Alleged in Voting Cases" reports that "[o]ne of the officials involved in the [Georgia] decision was Hans von Spakovsky, a former head of the Fulton County GOP in Atlanta, who had long advocated a voter-identification law for the state and oversaw many voting issues at Justice." Mr. McNulty, how do you reconcile these facts with your testimony that "when you see pre-clearance you know that a career person has made that decision"?

Answer: The decision to preclear the State of Georgia's amendments to its voter identification statute was made by the Chief of the Voting Section, a veteran career attorney with more than 30 years of experience in the Civil Rights Division. The decision was well grounded in law and fact submission.

It is my understanding that the 2005 Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared after a careful analysis that lasted several months and took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards. That data supported the ultimate preclearance decision in this matter.

12. What role did Hans von Spakovsky play, either formally or informally, in drafting the Georgia voter ID law or consulting with those individuals in Georgia who did draft it?

Answer: I have never worked with Mr. Von Spakovsky, who now works in the Federal Election Commission. I am informed that he played no role in drafting or consulting in the drafting of the Georgia voter identification law.

13. Do you believe it is appropriate for the Civil Rights Division to hire individuals with strongly partisan backgrounds, like Hans von Spakovsky, to positions within the Civil Rights Division where they have supervisory authority over election decisions which have direct and lasting effects on political parties and electoral outcomes? If you believe it is appropriate, how do you reconcile that belief with your testimony that "I feel very strongly that politics can never play a role in what the Department of Justice does"?

Answer: The Civil Rights Division, like the rest of the Justice Department, employs a number of talented of attorneys with a wide variety of backgrounds. At no time during this Administration has any component within the Department of Justice imposed a political litmus test in its hiring decisions.

The individual referenced in your question, Hans von Spakovsky, was hired because of his experience in voting and election issues. However, Mr. von Spakovsky had no supervisory authority; he simply served as a counsel to the Assistant Attorney General for Civil Rights on voting matters. I would add that it is my understanding that many of the dedicated and professional attorneys in the Voting Rights Section have worked in partisan and other advocacy roles directly involving voting rights issues prior to their arrival at the Justice Department.

14. On December 16, 2005, President Bush nominated Hans von Spakovsky to the Federal Election Commission. Two weeks later – while the Senate was in recess and before the Senate had the chance to hold a nomination hearing for Mr. von Spakovsky – President Bush gave him a recess appointment to the FEC. What was your role in the decision to recess-appoint Mr. von Spakovsky? Do you agree it was appropriate to give Mr. von Spakovsky a recess appointment into this position? Why or why not?

Answer: I had no role in the appointment process. Such matters are handled by the White House.

15. According to a December 10, 2005 article entitled "Staff Opinions Banned in Voting Rights Cases" in the *Washington Post*, "Tensions within the voting section have been rising dramatically, culminating in an emotionally charged meeting last week in which [Voting Section chief John] Tanner criticized the quality of work done by staff members analyzing voting rights cases, numerous sources inside and outside the section said. Many employees were so angered that they boycotted the staff holiday party later in the week." The article also indicates that Mr. Tanner has made a sweeping change in the work of the Voting Section and has prohibited career attorneys from offering recommendations on preclearance decisions. Mr. Tanner is a career employee, but the *Washington Post* article suggests he has demoralized and mismanaged the Voting Section. What steps will you take to review the management of the Voting Section and to ensure that staff attorneys in that section are treated with fairness and respect?

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Section, as throughout the Department, are required to prepare detailed memoranda setting forth the facts and law on each proposed enforcement matter. There is always a full opportunity for lively debate. The Section Chief -- a veteran career attorney with 30 years of experience in the Civil Rights Division -- expects and encourages thoughtful and aggressive recommendations from Section staff, and this career official has decisional responsibility for many matters. When the Assistant Attorney General makes a decision, he also welcomes opposing views, and is always available for responsible, productive discussion. I subscribe to these same principles.

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Answer: I have always believed that the attorneys employed by the Department of Justice are among the brightest and most capable in the entire legal community, and my tenure in the Department during this Administration has only reinforced that belief. The attorneys of the Civil Rights Division are no exception. The work they have done has protected the rights of millions of Americans of every race, color, religion, and national origin. I have worked closely with Assistant Attorney General Wan Kim of the Civil Rights Division during my time as Acting Deputy Attorney General and, if confirmed, I look forward to continuing our close professional relationship and expanding the consistently impressive work of the Civil Rights Division.

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CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

2 February 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee to the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy,

I am writing on behalf of the membership of the Fraternal Order of Police to advise you of our strong support for the nomination of Paul J. McNulty to be the next Deputy Attorney General of the United States.

For the past four years, Paul has served as the United States Attorney for the Eastern District of Virginia. Confirmed just days after the devastating terrorist attacks on New York City and northern Virginia, Paul provided his outstanding brand of leadership to an office faced with investigating and prosecuting some of our nation's highest profile cases against terrorists, including that of the 19th hijacker, Zacarias Moussaoui.

The F.O.P. has worked closely with Paul in several capacities over his two decades of public service, beginning with the eight years he spent as chief counsel for the House Subcommittee on Crime. In this role, he met the challenge of reaching out to both sides of the aisle by working on issues of real concern to the law enforcement community--from firearms law to due process rights for police officers. Paul left Capitol Hill to direct President Bush's transition team for the U.S. Department of Justice and then served as Principal Associate Attorney General before being appointed to his current post.

He has earned the respect of the law enforcement community not just because he is receptive to their concerns and shares their mission, but also because he is driven by the same sense of justice--to see criminals punished, the public protected, and the officers get home safely. Paul has the knowledge, experience, and, perhaps more importantly, the character, to be an outstanding Deputy Attorney General. On behalf of the more than 321,000 members of the Fraternal Order of Police, I am proud to give him my highest endorsement. If I can provide any further recommendations for Paul, please do not hesitate to contact me or Executive Director Jim Pasco through my Washington office.

Sincerely,

Chuck Canterbury
National President

—BUILDING ON A PROUD TRADITION—

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
February 2, 2006

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

KENNEDY ON NOMINATION OF PAUL MCNULTY TO DEPUTY ATTORNEY GENERAL OF DEPARTMENT OF JUSTICE
(AS PREPARED FOR DELIVERY)

I welcome Mr. McNulty to the Committee, I congratulate him on his nomination, and I commend him for his long career in public service.

The Deputy Attorney General is one of the most important positions in the federal government. It involves overseeing the day to day functions of the Department of Justice, implementing policies and regulations, and seeing that our criminal and civil laws are enforced in a fair and impartial manner.

The nomination comes at a time when many of us are concerned that the White House is abusing its power, excusing and authorizing torture, spying on American citizens and undermining the rights and liberties of our people.

Prisoner abuse by military personnel is an important concern. The images from Abu Ghraib horrified us, and severely damaged our reputation in the Middle East and around the world.

President Bush promised accountability. Yet the only prosecutions we've seen have been of low-level soldiers involved in the abuse. Only one C.I.A. official has been charged.

The administration authorized many of these harsh techniques at the highest levels, under a radical new definition of Presidential power. Mr. McNulty, as the Deputy Attorney General, will be called on to assess the legality of such actions. His views on the reach of the President's power will be very important, and very relevant for this hearing.

Congress and the American people deserve full and honest answers about the Administration's domestic electronic surveillance activities. There is no legitimate purpose in denying access by Members of Congress to all of the legal analysis that the President relied upon when he authorized these activities. Instead of providing us with the documents the Administration relied upon, the Justice Department continues to circulate summaries and "white papers" on the legal authorities it purports to have to

ignore the law. It now appears that the President did so on at least thirty occasions after September 11th.

Next Monday, the Committee begins hearings on this issue, but the President continues to give press conferences rather than providing Congress with real information.

In 2001, the Administration sought a change to the law so that, in an emergency, they could wait 72 hours – instead of 24 – to notify a court about wiretapping activities. Now, the Administration claims that 72 hours is not enough, even though they asked for 72 hours in 2001.

The Administration has made a unilateral decision that Congressional and judicial oversight can be discarded, in spite of what the law obviously requires. This is about the fundamental values in our society – credibility, candor, competency and compliance with the law. We need a thorough investigation of these activities. Congress and the American people deserve answers, and they deserve answers now.

The Department of Justice also plays a vital role in enforcing civil rights, and anyone confirmed to a leadership position in the Department must understand the importance of that role. The passing of Coretta Scott King reminds us of how much was sacrificed to make progress on the civil rights, and how much must still be done to achieve true equality.

When the Department fails to do its job effectively, civil rights enforcement suffers, because private plaintiffs lack the resources, the expertise, and often the information that would enable them to bring cases successfully.

Today, however, the Department seems to have abandoned its enforcement duties in some of the most important areas of civil rights. We're disturbed by recent reports that the Department's enforcement of the Voting Rights Act has become politicized, particularly in decisions on pre-clearance of changes in state voting laws under Section 5 of the Act. In the past five years, it has filed only one case involving a pattern or practice of job discrimination based on race or national origin. It's brought only 3 cases under Section 2 of the Voting Rights Act, which prohibits denying or diluting the right to vote based on race, national origin, or language minority status – none of which were brought on behalf of African Americans. The Appellate Section of the Civil Rights Division has filed very few amicus briefs defending civil rights in the federal courts of appeals. If confirmed, ensuring fair and non-political civil rights enforcement must be among Mr. McNulty's top priorities.

Another concern is the disturbing changes in the immigration court system. Most of the problem results from streamlining regulations that have impaired due process rights. Public criticism of immigration judges has increased by federal court judges.

Immigration decisions can have a profound impact on human lives. The interests at stake are significant, especially for asylum seekers, who may face persecution or even

death. The Attorney General has asked the Deputy Attorney General to lead a comprehensive review of the immigration courts. I trust that if confirmed, Mr. McNulty will conduct a thorough review of the immigration courts and restore fairness and integrity in this important process.

I commend Mr. McNulty on his nomination and I look forward to his responses to these concerns.

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Statement on Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
On Nomination of Paul McNulty
To Be Deputy Attorney General
February 2, 2006

The Committee today will consider the nomination of Paul McNulty to the position of Deputy Attorney General. The Deputy Attorney General is the number two position at the Department of Justice, and in the absence of the Attorney General, the Deputy acts as the Attorney General.

The previous Deputies, including James Comey and his predecessor Larry Thompson, have had extensive experience as prosecutors. When the President nominated Tim Flanigan to this position, I and other senators raised questions about his lack of prosecutorial experience. It was of particular concern given that none of the top officials at the Department had experience prosecuting criminal cases. I noted that neither the current Attorney General, nor the Associate Attorney General, nor the Assistant Attorney General chosen to head the Criminal Division, nor even the Solicitor General brought that vital experience to the Department.

The President eventually withdrew Mr. Flanigan's nomination. Questions still remain about the circumstances of that nomination. I joined Senator Durbin in a letter just yesterday to the Attorney General about the role that Mr. Flanigan's dealings with Jack Abramoff and David Safavian played in that action. I look forward to thoroughly responsive answers to that letter.

With respect to prosecutorial experience, Mr. McNulty comes to us as the Acting Deputy Attorney General and U.S. Attorney for the Eastern District of Virginia, so he has had some supervisory experience with criminal matters. Being a U.S. Attorney is not like being a district attorney or local prosecutor, however, and I am not sure how many cases Mr. McNulty has personally prosecuted. As the Deputy Attorney General, prosecutorial experience and prosecutorial judgment will be sorely needed and tested in this Justice Department. He is overseeing delicate investigative and prosecutorial decisions. Situations will arise where prosecutorial experience will be beneficial and may be critical, especially given the lack of other experience in the top ranks of the Department.

This points to the bigger issue. We are faced with a President who holds an extreme and expansive view of his power. Within the Executive branch, the Department of Justice serves as an important check on Presidential power, corruption and illegality. The Justice Department must make independent decisions about sensitive criminal prosecutions and

must often tell the rest of the Federal Government, including the White House, what it may and may not legally do.

The most recent Deputy Attorney General, James Comey, a respected prosecutor and a long-time Republican, seemed to many of us to have taken this responsibility seriously. He appointed a committed, independent prosecutor to investigate potentially serious wrongdoing within the Bush Administration. According to recent press reports, Mr. Comey questioned the President's authority to conduct warrantless wiretapping and defended career attorneys who sought to put the brakes on over-expansive assertions of Executive power. It seemed to many of us and now appears from recent press accounts, that for his trouble, for refusing to be a "yes man," Mr. Comey was apparently drummed out of the Department of Justice. The Department of Justice should not be made up of "yes men." It needs to enforce the law and make sure that the law, including the laws that Congress enacts to protect the liberties and rights of ordinary Americans, are faithfully executed.

I voted against confirmation of the current Attorney General because I did not believe that he would act independently of the White House and serve the proper role of the Attorney General of the United States. Attorney General Gonzales has been a loyal friend and representative of the President and, regrettably in my view, he has continued to act like the President's in-house counsel. During the debate of his nomination one year ago, I noted the importance of having an Attorney General who would act as a check against presidential overreaching:

"Ultimately, the Attorney General's duty is to uphold the Constitution and the rule of law—not labor to circumvent it. Both the President and the nation are best served by an Attorney General who gives sound legal advice and takes responsible action, without regard to political considerations—not who develops legalistic loopholes to serve the ends of a particular President or Administration."

Those words hold just as true for the important position of Deputy Attorney General. At the time, I did not know how right I would turn out to be. The recent revelation that the Bush Administration has been conducting illegal spying on Americans for more than four years, while Mr. Gonzales served as White House Counsel and Attorney General, is the most serious of a series of wrongheaded legal rationalizations for illegal conduct that include the scandal of Abu Ghraib and the withdrawn torture memo, the extraordinary rendition and black site prisons in the former Soviet Union, and the Supreme Court having to reign in this President and remind him that even war time "is not a blank check for the President when it comes to the rights of the Nation's citizens."

Mr. McNulty has had a number of important Republican political jobs. I first met him when he was serving as staff for Republicans on the House Judiciary Committee. He is someone I like personally. Whether he will be able to follow Mr. Comey's example of independence and the examples of other Republicans like Elliot Richardson and William Ruckelshaus, who resigned or were fired rather than interfere with the investigation of wrongdoing of the Nixon Administration, is a critical question.

The Eastern District of Virginia, under Mr. McNulty, has been the "go-to" district for the Bush Administration for terrorism prosecutions, national security issues, and detainee abuse allegations. His work on these issues needs to be explored and explained. We need to understand how much he will be willing to question extreme assertions of Presidential power and to look out for the individual liberties of ordinary Americans and protect the rule of law.

According to a recent letter from the Department of Justice to Senator Durbin, since the beginning of the war on Afghanistan in 2001, 20 allegations of detainee abuse by American civilians have been referred to the Department of Justice, and all but one of these cases, have been assigned to a task force in the U.S. Attorney's Office for the Eastern District of Virginia, under Mr. McNulty's supervision. To date, only one of these allegations – the one that was not referred to his office – has resulted in an indictment.

These are instances of serious misconduct that have hurt American credibility in the world, potentially increased the risk to our troops abroad and undermined our ability to combat the threat of terrorism. Press reports say that these referrals include one case in which a detainee was killed in CIA custody within 45 minutes of the beginning of the interrogation and in that case the CIA's own Inspector General found the "possibility of criminality." It has been 18 months since former Attorney General Ashcroft announced the creation of the taskforce in Mr. McNulty's office to investigate these cases. We need to understand why, when the military has prosecuted detainee abuse cases and the Eastern District of North Carolina has returned the one civilian indictment thus far handed down for this type of conduct, Mr. McNulty's task force has not yet acted.

Finally, it will be important to find out what he knew and when about the President's warrantless domestic spying program and what he has done to make sure that the Government is not violating the law. We need to get to the bottom of this and understand how Mr. McNulty responded to these important issues.

I support aggressive action to protect against terrorism. I helped write and pass the USA PATRIOT Act. I am working hard to pass its reauthorization. But it is also important that the Department do its utmost to protect individual liberties and to make sure that the Government acts legally. I hope that Mr. McNulty can reassure us on these matters.

I welcome Mr. McNulty to the Committee today, and I hope that he will provide the Members of this Committee with candid responses and the information this Committee needs to conduct necessary oversight.

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