
From: Colborn, Paul P
Sent: Wednesday, June 23, 2010 6:26 PM
To: Cedarbaum, Jonathan; Rhee, Jeannie
Cc: Barron, David
Subject: Fw: QFRs for DAG nominee --

Fyi

From: Weich, Ron
To: Wroblewski, Jonathan (CRM); Delery, Stuart F. (ODAG); Burton, Faith; Colborn, Paul P; Schools, Scott (ODAG); Chipman, Jason; Baker, James A. (ODAG); Vieira, Donald; Hinnen, Todd (NSD); Moran, Molly; De, Rajesh; Abt, Thomas (OJP); Martinez, Brian (CIV); Barron, David; Buchanan, David (COPS)
C : Weich, Ron; Aguilar, Rita C.; Appelbaum, Judy; Botello, Lucas; Burrows, Charlotte; Greenfeld, Helaine; Moran, Molly; Scott-Finan, Nancy; Redding, Michael; Schmalder, Tracy
Sent: Wed Jun 23 18:22:31 2010
Subject: Fw: QFRs for DAG nominee --

<<DAG SJC QFRs 061510 - Incoming Questions 062310 .doc>>

All – The Deputy Attorney General nominee has received the attached written questions from Senate Judiciary Committee members following his confirmation hearing last week. We would appreciate your assistance in providing guidance to the nominee as he formulates his responses. Assignments are below.

Your suggested responses should contain public record information only, as the nominee is not a DOJ employee. The suggested responses should be from the perspective of someone who is not currently a Department official. Please send your suggested responses to Nancy Scott-Finan in OLA by 5pm on Friday, June 25.

Leahy

- Q. 1 (public corruption) – Jonathan Wroblewski
- Q. 2 – (intellectual property) -- Stuart Delery
- Q. 3 – (congressional investigations) Faith Burton/Paul Colborn

Whitehouse

- Q. 4 – (OLC-OPR) -- Scott Schools
- Q. 5 – (cyber) -- Jason Chipman/Jim Baker

Sessions

- Q 6-14 (war on terror) – Don Vieira/Todd Hinnen
- Q 15-19 (AIG) – Molly Moran

Grassley

Q 20a-l (AIG) -- Molly Moran

Q 21a-d (obscenity prosecutions) -- Jonathan Wroblewski

Q 22a-d (Heller) -- Raj De/Robyn Thiemann

Q 23a-c (oversight) -- Faith Burton/Paul Colborn

Q 24-26 (whistleblowers) -- Faith Burton

Q 27a-e (grant management) -- Thomas Abt

Q 28a-d (OLC opinion on ranking member access) -- Paul Colborn/Faith Burton

Q 29a-g (false claims act) --Brian Martinez

Coburn

Constitutional interpretation and federalism

Q.30-33 -- David Barron

Q 34 a-b -- David Buchanan/COPS

Q. 34c --David Barron

Terrorism

Q. 35-- Don Vieira/Todd Hinnen

Role as DAG

Q 36-40-- Molly Moran

AIG

Q40-45-- Molly Moran



DAG SJC QFRs
061510 - Incomin...

Questions for the Record
James Michael Cole
Nominee to be Deputy Attorney General
Executive Nomination Hearing
Senate Judiciary Committee
June 15, 2010

QUESTIONS POSED BY CHAIRMAN LEAHY

Fraud and Public Corruption

1. The recent financial meltdown and the failures of government regulation that contributed to it have made it abundantly clear that there is a pressing need for stronger criminal enforcement of fraud and corruption. As a long-time public corruption prosecutor, you understand the need to hold accountable those people who purposefully defraud investors, destabilize the economy, and take advantage of hard working taxpayers, as well as those public officials who violate the public trust.

I have worked hard with Senator Grassley, Senator Kaufman, and others to pass key anti-fraud legislation in this Congress, and we hope to strengthen fraud laws still further. Senator Cornyn and I have introduced a bi-partisan anti-corruption bill, the Public Corruption Improvements Act, which gives prosecutors important new legal tools to fight corruption, and provides resources to key federal agencies for the investigation and prosecution of public corruption offenses.

If confirmed, will you support Congressional efforts to strengthen fraud enforcement and to give federal investigators and prosecutors the tools and resources they need to effectively combat public corruption?

Response:

Intellectual Property Enforcement

2. I was pleased that the Attorney General recently formed a Task Force on Intellectual Property as part of an ongoing effort to combat intellectual property crime, which threatens consumer safety and costs American jobs. The Deputy Attorney General chairs this Task force. Will you work with me and other Members of the Committee on possible legislative approaches to prevent intellectual property theft?

Response:

Congressional Investigations

3. Congress has a constitution obligation to perform oversight and hold the executive branch accountable for its actions. The Senate Judiciary Committee plays an important role in the oversight of the Department of Justice. I have conducted vigorous oversight, working to ensure the Department's independence and integrity. When you were appointed to serve as special counsel to the House of Representatives Committee on Standards of Official Conduct, you worked to hold elected officials accountable by spearheading a congressional investigation into allegations that a member of Congress used tax-exempt money for political purposes. As you noted in your testimony, the investigation led to a bipartisan resolution of the matter. If confirmed, will you continue to support vigorous Congressional oversight and cooperate with Congressional investigations?

Response:

QUESTIONS POSED BY SENATOR WHITEHOUSE

4. As I stated at your confirmation hearing, I disagree with portions of the analysis performed by David Margolis in his review of the Office of Professional Responsibility's investigation into the work performed by the Office of Legal Counsel during the Bush Administration.

One, I found it curious that Mr. Margolis sought to excuse the Office of Legal Counsel's failure to cite *U.S. v. Lee*, 744 F.2d 1124 (5th Cir. 1984), on the basis that the *Lee* opinion does not spell out the precise method of the waterboarding at issue in that case. The absence of such a description from the opinion only has meaning if (a) the court did not know what type of waterboarding was at issue, making its opinion of little precedential value; or (b) the technique could not be discerned from the record, so no one could tell whether it was pertinent to the technique evaluated by the Office of Legal Counsel. A quick study of the briefs in that case makes clear that the court and the parties (including, specifically, the Department of Justice) knew very well the details of the waterboarding in that case. Indeed, it was almost identical to the waterboarding evaluated by the Office of Legal Counsel. Mr. Margolis' excuse was thus logically meaningless.

Two, I have pointed out that the standard for candor of Office of Legal Counsel attorneys, who often opine in secret to non-lawyers, surely must be higher than that applicable to a workaday local lawyer appearing in court before a judge and against an adversary who can point out omissions in his argument. I believe that the Department would be well served by making clear that Rule of Professional Conduct 3.3, which governs candor to a tribunal, represents a minimum standard expected of attorneys in the Office of Legal Counsel.

- a. If confirmed as Deputy Attorney General, will you take appropriate steps to ensure that the Department, in evaluating the legality of conduct undertaken by the executive branch, will pay all proper attention to prosecutions the Department itself has brought against third parties who have undertaken the same conduct?

Response:

- b. Will you reconsider what the standard should be for candor in Office of Legal Counsel opinions, and whether Rule of Professional Conduct 3.3 should provide a minimum standard?

Response:

5. The United States faces serious and growing cyber security threats. Many of my colleagues in the Senate realize, as I do, that Congress must act. Indeed, there are over thirty five cyber bills currently under consideration in this body. Clearly an important national debate must take place on the proper approach to addressing

the cyber security threats we face.

Senators engaging in such a debate must be informed about the true nature of the threats our nation faces. Moreover, for our democratic process to work effectively, it is vitally important that the public also understand the threats we face so that Americans can weigh in on the proper response to those threats. Unfortunately, however, much of the information necessary to inform the public is either proprietary information owned by corporations or classified information withheld by the government.

As a Senator, existing law does not allow me to release important classified information to the public. The Justice Department, on the other hand, does have the authority to declassify information that would greatly inform the upcoming public debate on cyber security. If confirmed as Deputy Attorney General, will you conduct a review to ensure that information relating to cyber security is not needlessly classified, but rather that it is publicly released as often as is appropriate so that Congress and the American people can have an informed debate on American cyber security policy?

Response:

QUESTIONS POSED BY SENATOR SESSIONS

War on Terror:

6. At your hearing, you and I discussed the Department of Justice's decision to impose a presumption that all the prisoners at Guantanamo Bay will be tried in civilian courts. This presumption is embodied in the administration's July 2009 protocol entitled, "Determination of Guantanamo Cases Referred for Prosecution," which states that "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution." Your 2002 op-ed also argued in favor of prosecuting the 9/11 terrorists based on traditional principles of federal prosecution, correct?

Response:

7. Is it correct to assume, based on your op-ed, that you personally agree with the Attorney General's decision, as head of the Task Force that established the protocols, to impose this presumption? Please explain.

Response:

8. Under the July 2009 protocol, the presumption in favor of a traditional Article III prosecution is not fully determinative, but there must be "other compelling factors" that make it appropriate to overcome the presumption in favor of a military commission trial. Given that Khalid Sheikh Mohammed and the other 9/11 plotters were held at Guantanamo Bay and were, at least as of November 2009, assigned a civilian criminal trial, it appears that insufficient "compelling factors" existed to prosecute the case before a military commission. Do you believe there were insufficient "compelling factors" in this case given the circumstances of the 9/11 attacks, including the targeting of civilian structures, the involvement of a foreign terrorist organization harbored by a foreign government, and roughly 3,000 civilian deaths?

Response:

9. Did you personally agree with Attorney General Holder's announcement in November 2009 to transfer Khalid Sheikh Mohammed and the other 9/11 plotters to Manhattan for trial? Please explain.

Response:

10. If Osama bin Laden were captured tomorrow, would you personally favor trying him in a civilian criminal court? Please explain any hesitancy you would have regarding such a trial and why or why not such hesitancy would not also apply to the trial of Khalid Sheikh Mohammed.

Response:

11. How do you reconcile the administration's July 2009 protocol involving two venues and procedures for terror trials – as well as your hearing testimony regarding the use of both civilian trials and military commissions – with the claim in your 2002 op-ed that the protections of the criminal justice system “must be applied to everyone to be effective[?]”

Response:

12. You suggest in your September 2002 op-ed that the government was somehow “ignoring the core constitutional protections ingrained in our criminal system” in its approach to terrorism prosecutions.
 - a. Do you believe military commission trials violate either the Fifth or Sixth Amendments of the Bill of Rights, which articulate the Constitution's core procedural rights in criminal cases?

Response:

- b. Which “core constitutional protections ingrained in our criminal system” did you believe our government was “ignoring” in September 2002?

Response:

13. According to a November 2001 article in the *Washington Post*, you criticized the use of military commissions, saying, “the Bush Administration is invoking an emergency as a pretext for actions ‘contrary to the spirit and letter of the Constitution.’”
 - a. Do you stand by this statement?

Response:

- b. Do you believe, as your 2001 statement suggests, that President Bush intentionally invoked the emergency of 9/11 to violate specific parts of the Constitution?

Response:

- i. If so, which specific provision of the Constitution do/did you believe President Bush was trying to avoid by “pretext?”

Response:

14. Your 2002 op-ed makes no reference to the long history of military commissions in American wars, including the commissions approved by the Supreme Court in *Ex Parte Quirin*. It also fails to note that the November 13, 2001 military

commissions order signed by President Bush was modeled on the President Roosevelt's order in World War II. Jack Goldsmith writes in his book *The Terror Presidency*:

“Military commissions were used extensively in World War II, the Spanish-American War, the Civil War, the War of 1812, and the Revolutionary War. Relying on legal advice provided by Patrick Philbin in OLC, Bush's military commission order was modeled on Roosevelt's order creating the commission that tried eight Nazi saboteurs. The Supreme Court had unanimously approved the commission trial of the out-of-uniform Nazis, which included one American. This was a powerful precedent for trying out-of-uniform alien enemy fighters in a military commission on Guantanamo. ‘We relied on the same language in FDR's order, the same congressional statute that FDR did, and we had a unanimous Supreme Court decision on point,’ Brad Berenson, a White House lawyer who worked on the commission in the fall of 2002, later told me.”

- a. Do you disagree with Professor Goldsmith's description of the precedent for the November 13, 2001 military commission order?

Response:

- b. Was it improper for Bush Administration legal advisors to rely upon previous executive and Supreme Court precedent to craft the November 13, 2001 military commission order?

Response:

- c. How are the September 11th attacks any different than the actions of the 8 Nazi saboteurs who came to the U.S. to destroy American factories and were not part of the uniformed German military?

Response:

- d. Do you believe that any provision of the Military Commissions Act of 2009 is unconstitutional or otherwise contrary to law?

Response:

AIG Compliance Monitor

15. Regarding your responsibilities as independent consultant to AIG, were you asked or assigned any responsibility to review or make recommendations regarding any

aspect of the derivatives transactions structured by AIG-Financial Products group (AIG-FP)?

Response:

16. Did you make a recommendation while serving as independent consultant at AIG that the independent review of derivatives transactions or programs within AIG-FP should be conducted by AIG-FP itself?

Response:

17. In retrospect, what do you think you could have done to have prevented – or at least lessened – the impact of AIG’s collapse in 2008?

Response:

18. Several articles have cited to your role in AIG as an argument against compliance monitoring. Sue Reisinger, stated:

“It’s as though Cole were spackling cracks in the compliance walls and never noticed that AIG’s financial foundation was crumbling beneath his feet.”

- a. How do you respond to Ms. Reisinger’s characterization? If you believe it is inaccurate, please explain.

Response:

19. Beatrice Edwards of the Government Accountability Projected wrote of your role at AIG:

“Cole came into AIG as the independent monitor . . . But gradually . . . he seemed to weaken and adapt. For one thing, we hear, Cole allowed AIG management to revise his quarterly reports to the SEC, and unexpectedly collaborative practice for an independent monitor.”

- i. Did you allow AIG management to revise your quarterly reports to the SEC? If so, please explain how this practice was consistent with your role and independence as an outside monitor.

Response:

QUESTIONS POSED BY SENATOR GRASSLEY

American International Group (AIG)

20. American International Group (AIG), entered into a Deferred Prosecution Agreement (DPA) with the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) in 2004. As part of that settlement, AIG agreed to have the AIG Financial Products Corp.—the same AIG subsidiary responsible for derivative transactions that led to the \$182 billion bailout by taxpayers—pay \$80 million in penalties and submit to monitoring by an independent consultant. You were selected by DOJ, SEC and AIG as the independent consultant to monitor operations at AIG and among other duties, were tasked with reviewing the policies and procedures at AIG to ensure the integrity of transactions—including those at AIG Financial Products Corp.

In the Fall of 2008, AIG collapsed as mortgage backed securities failed and derivative contracts that AIG wrote effectively insuring those transactions were due. Ultimately, AIG required a \$128 billion bailout from the American taxpayers. The American taxpayers could lose billions of dollars as a result of this bailout. I have concerns about your role as the independent consultant and the failure to foresee the problems with AIG's Financial Products Corp. Accordingly, I ask that you respond to the following questions and requests for information:

- a. Provide a detailed explanation of your work as independent consultant to AIG based upon the 2004 Deferred Prosecution Agreement. This explanation should include a breakdown of all work you personally performed; all work you tasked to subordinates; all official documents produced—including reports, analyses, summary documents, findings, or recommendations—that were submitted to DOJ, SEC, or AIG; and a discussion of the scope of your work under the 2004 DPA.

Response:

- b. Provide a detailed explanation of your work as independent consultant to AIG based upon the 2006 Deferred Prosecution Agreement. This explanation should include a breakdown of all work you personally performed; all work you tasked to subordinates; all official documents produced—including reports, analyses, summary documents, findings, compliance reports, financial reports, or recommendations—that were submitted to DOJ, SEC, or AIG; and a discussion of the scope of your work under the 2006 DPA.

Response:

- c. It has been reported that during your time as the independent consultant,

you allowed AIG Management to revise quarterly reports to the SEC. Did you ever allow AIG Management to revise or review any of your reports as independent consultant prior to submission to the SEC or DOJ? If so, please describe each instance and whether any findings or recommendations were modified in any manner.

Response:

- d. Your written testimony states that under the 2004 DPA, you were tasked, “by court order to look at five years of transactions to determine if AIG assisted any of its clients to ‘cook the books’ through the use of complex transactions.” The DPA specifically outlines the prosecution of AIG-FP was deferred relating to aiding and abetting securities fraud via complex transactions using special purpose entities (SPEs) that violated GAAP requirements. In order to review these transactions, you would have had access to AIG-FP’s financial information for the past five years. Provide a detailed explanation of the transactions that you reviewed in this timeframe. Did you have concerns with these transactions? If so, what were they? If not, why not?

Response:

- e. In the course of your review did you ever become concerned that AIG-FP may be using similar practices that led to the DPA in other transactions? If so, did you look into the possibility that SPEs were abused in other transactions? If not, why not?

Response:

- f. The 2004 DPA requires AIG-FP to “truthfully disclose to the Department and the SEC all information with respect to the subject matters about which the Department or the SEC shall inquire, and shall continue to fully cooperate with the Department and the SEC.” In your opinion, did AIG-FP act truthfully on all matters? If not, what action did you take?

Response:

- g. In your role as independent consultant, were you ever denied access to documents, information, or witnesses? If so, did you report this to DOJ and SEC? Was any corrective action taken? If so, what action?

Response:

- h. It has been reported that one of your duties as independent consultant under the DPAs was to establish and develop “Best Practice” recommendations for compliance with regulatory requirements. It has been reported that you provided some best practices in August and

September 2007. However, one recommendation, “EC2” relating to the Derivatives Committee expressly states that a Derivatives Committee should be responsible for providing an independent review of proposed derivative transactions or programs entered into by AIG entities. However, this same recommendation expressly exempts AIG Financial Products Corp. from oversight by the Derivatives Committee. Given that AIG Financial Products Corp. was the unit responsible for many of the derivatives contracts that went sour and led to the \$128 billion taxpayer bailout, why did you exempt AIG Financial Products Corp. from the review of the Derivatives Committee?

Response:

- i. Specifically, Recommendation EC2 states that “For derivatives transactions or programs entered into by AIG-FP, the appropriate independent review of the proposed derivative transactions or programs should be conducted by AIG-FP.”
 - i. Why did you make this recommendation?

Response:

- ii. Who was involved in assisting you with making this recommendation?

Response:

- iii. Was this recommendation discussed with representatives at the SEC and DOJ? If so, who was it discussed with?

Response:

- j. Why even bother creating a Derivatives Committee to oversee derivatives contracts if you would exempt the subsidiary that wrote most of these contracts?

Response:

- k. In hindsight, was this exemption a bad idea? Why or why not?

Response:

- l. In your written testimony, you stated that you “developed financial reporting and regulatory compliance programs” and that “[t]he company resisted some of [your] efforts, but [you] insisted on tough measures.” However, a March 2009 report to the SEC and DOJ describes a scenario where the independent consultant had discussions with the Audit

Committee of the AIG Board of Directors and AIG's General Counsel and determined that, "in light of the heightened demands being placed on key employees in the management, regulatory/compliance, and financial reporting areas, it was appropriate for us to review and scale back our recommendations until the Company determine what its future course would be."

- i. Did you participate in drafting the March 2009 report to the SEC and DOJ?

Response:

- ii. If so, how do you reconcile your statement in the written testimony that you "insisted on tough measures" despite having agreed to "scale back" recommendations at AIG?

Response:

- iii. How many recommendations were scaled back during your time as independent consultant at AIG?

Response:

Obscenity Prosecutions

21. In 2005, DOJ established the Obscenity Prosecution Task Force (OPTF) to "exclusively protect America's children and families through the enforcement of our Nation's obscenity laws." This task force was designed to coordinate prosecutions of obscenity related crimes among the 93 United States Attorney's offices and DOJ. The FBI also created an obscenity task force following the confirmation of then Attorney General Ashcroft in 2001. These task forces were designed to step up prosecutions for those who violated Federal obscenity laws.

The DOJ's own website states, The Task Force is strongly committed to protecting free speech, as well as prosecuting obscenity crimes. The right of ordinary citizens - and of the press - to speak out and express their views is one of the greatest strengths of our Country, but the Supreme Court has ruled that the First Amendment does not protect obscene materials and federal law makes it a felony to use the streams of commerce for trafficking in obscenity. The U.S. Supreme Court has stated, "This much has been categorically decided by the Court, that obscene material is unprotected by the First Amendment. (*Miller v. California*, 413 U.S. 15, 23 (1973). Enforcement is necessary in order to protect citizens from unlawful exposure to obscene materials. The welfare of America's children and families demands the vigorous enforcement of obscenity statutes, as traffickers in illegal adult obscenity employ advancements in technology and marketing to extend their unlawful and harmful influence."

I asked AG Holder similar questions about obscenity during his confirmation. I was somewhat disappointed with his non-specific answers regarding the prosecution of these serious cases.

- a. If confirmed as Deputy AG will you promote vigorous enforcement of federal obscenity laws? If not, why not?

Response:

- b. Protecting children and families from obscenity is a worthwhile objective. Do you concur that the DOJ must continue to aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? If not, why not?

Response:

- c. Will obscenity prosecutions remain a top priority at the Department of Justice should you be confirmed as Deputy Attorney General?

Response:

- d. Do you support the work of special taskforces such as the Obscenity Prosecution Task Force? If not, why not?

Response:

- e. If confirmed, do you plan to recommend disbanding this task force?

Response:

Supreme Court Decision in *Heller*

22. In 2008, the Supreme Court held in the *Heller* case that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." President Obama stated that he supported an individual's right to possess a firearm and signaled his support for the *Heller* decision.

- a. What is your personal opinion on the rights afforded by the Second Amendment?

Response:

- b. What is your personal opinion on the *Heller* case?

Response:

- c. What is your personal opinion on how the Supreme Court should rule on *McDonald v. Chicago*, a decision which could come down from the court any day?

Response:

- d. If confirmed as Deputy AG, will you promise to protect an individual's right to possess a firearm? If so, how?

Response:

- e. Will you respect the Supreme Court's holding in *Heller* and *McDonald* even if you disagree with the outcome?

Response:

Congressional Oversight

23. I ask every nominee that appears before a Committee I'm on about their willingness to cooperate with and respect the role of Congress in conducting Congressional oversight. I have made Congressional oversight a top priority. I have requested documents, information, and access to DOJ personnel for interviews and have learned that oversight works best when the agency provides full cooperation to Congress. Unfortunately, agencies are all too often untimely in responding to Congress and in the worst cases, unresponsive at all. This is completely unacceptable and I've worked with my colleagues on both sides of the aisle in spite of any change in Administration to get the answers the American taxpayers deserve.

- a. If confirmed, will you pledge to be responsive to all Congressional requests for information in a timely manner? Including requests for documents and witnesses for interviews?

Response:

- b. Will you work to ensure that responses are not held up do to lengthy "clearance" processes at subordinate agencies such as the FBI?

Response:

Whistleblowers:

24. Will you provide Congress with accurate and timely information regarding any action taken, administrative or criminal, against individuals who retaliate against whistleblowers?

Response:

25. I have closely monitored the treatment of whistleblowers by the FBI over the years. Could you please address what safeguards you will put in place to ensure that all FBI whistleblowers are not subject to retaliation, be it from the Office of Professional Responsibility or elsewhere within the FBI or DOJ?

Response:

26. What actions will you personally take to abate any fears of retaliation against individuals who are critical of procedures, practices or policies that do not guarantee or execute the primary mission and goals of both the FBI and DOJ?

Response:

DOJ Grant Management

27. For the past nine years, DOJ's Inspector General has identified the grant award process and oversight of grant funding as major challenges to preventing fraud, waste, and abuse. It seems that year after year, the Inspector General's audits of grantees point to unallowable and unsupported costs, awards to grantees and sub-grantees based upon connections and not merit, failure of grantees to comply with grant requirements, and little or no oversight by the Office of Justice Programs (OJP)—the entity overseeing grants. With DOJ awarding billions of dollars a year in grants, any failure in adequately managing and monitoring grants could lead to millions of taxpayer dollars lost to fraud, waste, or abuse.
- a. Given the serious financial difficulties facing the Government, what is your plan for revamping grant management at DOJ to consolidate overlapping grant programs to ensure that federal funds expended by DOJ are free from duplication and waste?

Response:

- b. How do you plan to ensure accountability and transparency in the grant making process?

Response:

- c. Do you have any specific recommendations for reforms?

Response:

- d. If you are confirmed, will you undertake a top to bottom review of all grant programs at DOJ to determine what works, what doesn't work, and where savings can be achieved? If not, why not?

Response:

- e. The Congressional authorization for the Department of Justice needs to be reauthorized. What reforms to grant management at the Office of Justice Programs would you recommend for Congress to consider for inclusion in any reauthorization? Provide a detailed list of all recommendations and the basis for inclusion of such a reform.

Response:

Office of Legal Counsel Opinion on Ranking Member Access to Documents and Information

28. On December 5, 2001, the Office of Legal Counsel (OLC) issued a Letter Opinion to the General Counsel at the Department of the Treasury. The Letter Opinion was titled “Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members.” The Opinion concludes that the Privacy Act “prohibits the disclosure of Privacy Act-protected information to the ranking minority member” of a congressional committee of jurisdiction that requests information from a Federal agency. The Opinion reached this conclusion despite the fact that the Privacy Act allows disclosures, “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.” Nowhere in the statute does it define “committee” to mean only the Chairman and not the Ranking Member.

Courts have also held views contrary to that of the Opinion. For instance, the D.C. Circuit Courts of Appeal held that members of Congress have “constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information.” *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979). Further, the 2nd Circuit held that information sent to a congressman in his official capacity as a *member* of a subcommittee fell “squarely within the ambit of § 552a (b) (9)”. *See Devine v. United States*, 202 F.3d 547, 551 (2nd Cir. 2000).

Despite the plain language and the court interpretations, this opinion is used as a shield to prevent disclosure of information to Ranking Members. It erroneously relies upon the “longstanding executive branch practice on this question,” and, perhaps more surprisingly, the dicta from Congressional Research Service memorandum, to reach this conclusion. I believe this opinion is a detriment to the American people who have a right to know what goes on in the Government.

- a. Do you support the position taken by DOJ in this OLC Letter Opinion?

Response:

- b. Do you believe that, as a general matter, Ranking Minority members of a Committee should be prohibited from obtaining information from an agency absent the approval of the Chairman? If so, why?

Response:

- c. In your opinion, couldn't the wording of the Privacy Act that allows disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof" be construed to allow disclosure to Ranking Members if the Administration was willing to do so? Please explain why or why not.

Response:

- d. Will you pledge to work with Ranking Minority Members of Committees on any oversight request, regardless of the OLC Letter Opinion?

Response:

False Claims Act

29. During my years in the Senate, I've been committed to combating fraud, waste, and abuse in the government and government programs. I believe that the False Claims Act has proved to be the most effective tool in the effort to prevent fraud and abuse against the government and has enabled the government to recover over \$22 billion since 1986. The *qui tam* provisions of the False Claims Act encourage citizens, who have knowledge and evidence of false claims of fraud, to report the illegal activity. These patriotic whistleblowers are the federal government's greatest allies in the fight against fraud.

As the Senate author of the 1986 Amendments to the False Claims Act, I'm one of the Act's biggest supporters and defenders. Mr. Ogden, it is my hope that as the Deputy Attorney General, you'll also vigorously support the False Claims Act and its *qui tam* provisions.

- a. As Deputy Attorney General, will you vigorously enforce the False Claims Act?

Response:

- b. Do you have any question as to the constitutionality of the FCA and the *qui tam* provisions?

Response:

- c. Can you inform the Judiciary Committee of your experience with the False Claims Act?

Response:

- d. Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the False Claims Act and the *qui tam* provisions of the FCA?

Response:

- e. Do you anticipate any decrease in the budget for the Commercial Litigation branch which is responsible for false claims prosecutions? In previous years, the Department has specifically requested litigation support funds, including funding for accounting experts, for the false claims cases pending. Are you committed to securing the funding necessary to successfully litigate FCA cases?

Response:

- f. Will you ensure that Civil Division attorneys aggressively enforce the False Claims Act, and will you work with the U.S. Attorneys to ensure their vigorous support and enforcement of the False Claims Act and the *qui tam* provisions of the FCA?

Response:

- g. Will you agree to promote a close working relationship between *qui tam* relators' counsel and the Justice Department for the purpose of establishing the public/private relationship envisioned when the FCA was signed into law by President Reagan?

Response:

QUESTIONS POSED BY SENATOR COBURN

Constitutional Interpretation and Federalism

30. Mr. Cole, as Deputy Attorney General, you will have extensive power within the Department of Justice. As DAG, you will have “all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally.”¹ You will also “assist the Attorney General in formulating and implementing Department policies and programs.”²

- a. What role will international law and the decisions of foreign courts have on your policy development at the Justice Department?

Response:

31. Given the divergent legal systems in countries around the world, as well as societal and cultural differences, in what situations (if any) do you believe the United States should adopt the laws and values of another country?

Response:

32. Does social science play a role in the interpretation of the Constitution, or any other statute? If so, why? How significant is that role?

Response:

33. What theory of Constitutional interpretation do you believe is appropriate? In your role as Deputy Attorney General, will you use that theory to evaluate cases and determine whether they are appropriate for prosecution?

Response:

34. You note in your testimony that one of your goals for the Justice Department, if confirmed, is to assist state and local law enforcement. In your hearing, when asked about the COPS program by Senator Kohl, you stated it is a “very important part of a holistic law enforcement approach to crime throughout the country and to helping state and local law enforcement achieve some real gains and goals in the fight against crime.”

- a. Do you believe the COPS program has been successful? Why or why not?

Response:

¹ Code of Federal Regulations, Title 28, Section 0.15 (2007).

² *Id.*

- b. Do you believe there is a direct correlation between the COPS program, particularly the hiring grant, and any decrease in crime that may occur across the nation? Why or why not?

Response:

- c. In Madison's Federalist No. 45, he states, "the powers delegated...to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." In light of this statement and the 10th Amendment, what is your view on the extent to which the Justice Department should support state and local law enforcement activities?

Response:

Terrorism

- 35. According to the Code of Federal Regulations (CFR), the DAG also "coordinates[s] and control[s] the Department's reaction to civil disturbances and terrorism."³

- a. Will international law and the decisions of foreign courts play a different or more authoritative role in your decisions affecting counterterrorism policy or sentencing of prisoners held at Guantanamo Bay? If so, how?

Response:

- 36. Mr. Cole, it is clear that, in your role as DAG, you will have considerable influence over the policy of the Justice Department, particularly as it relates to terrorism. I am concerned by statements you have made in the past that seem to indicate you do not believe we are engaged in a war against terrorism. In an article for the *Legal Times*, you noted several actions then-Attorney General Ashcroft had taken in the aftermath of 9/11. Specifically, you noted that he "facilitated the implementation of military tribunals to try noncitizens for terrorist crimes, instituted the use of the classification 'enemy combatant'...All these things are being done in the name of fighting the war against terrorism."

You went on to say that "for all the rhetoric about war, the Sept 11 attacks were criminal acts of terrorism against a civilian population...our country has faced many forms of devastating crime, including the scourge of the drug trade, the reign of organized crime, and countless acts of rape, child abuse, and murder. The acts of Sept. 11 were horrible, but so are these other things."

- a. Do you believe the United States is currently at war? Why or why not?

³ 28 C.F.R. §0.15 (2007).

Response:

- b. As noted in the Code of Federal Regulations (CFR), one of the responsibilities of the Deputy Attorney General is to “coordinate and control the Department’s reaction to civil disturbances and terrorism.”⁴ The CFR specifically lists civil disturbances and terrorism separately. Do you believe the United States should have different standards for addressing crimes of civil disturbance and those of terrorism? Why or why not?

Response:

- i. More specifically, should the United States process differently those arrested for domestic crime, such as rape or murder, and those who are prisoners of war or terrorists? Why or why not?

Response:

- ii. Should those who are enemy combatants get the same protection as U.S. citizens who have committed domestic crimes? Why or why not?

Response:

- iii. Do you believe terrorism suspects, particularly those with overseas ties, should be Mirandized, or should they be treated as enemy combatants? Why or why not?

Response:

37. I am also a member of the Intelligence Committee, so I am concerned about the consistency, accuracy and timeliness of the Justice Department’s provision of documents related to terrorist activities, particularly the recent incidents on Christmas Day and in Times Square. In fact, often intelligence community agencies and some foreign partners have access to intelligence reports before Congress receives them.

- a. What are your views regarding how and when information on national security investigations should be provided to Congress?

Response:

38. What, in your opinion, is the proper role of the FISA Court?

⁴ *Id.*

Response:

- a. With the FISA Amendments Act, Congress gave the Court, for the first time, a role in approving procedures for targeting foreign terrorists overseas. Do you believe this is appropriate? Where, if any, would you draw the line?

Response:

- b. How much should the FISA Court be delving into national security matters, particularly in a time of war?

Response:

Role as Deputy Attorney General

39. Mr. Cole, do you recognize that your position as Deputy Attorney General, if confirmed, is not to advocate for or against a particular issue, but rather to enforce the law as it is written?

Response:

- a. Can you effectively do this?

Response:

40. The Deputy Attorney General is also tasked with assisting the Attorney General “in formulating and implementing Department policies and programs and in providing overall supervision and direction to all organizational units of the Department.”⁵ What management experience in your background has prepared you to lead the Justice Department in this manner?

Response:

Role as Independent Consultant at AIG

41. The Deputy Attorney General has numerous oversight responsibilities pertaining to his supervisory role over all of the organizational units within the Justice Department. I realize that you have had significant experience performing oversight, particularly in your role as Independent Consultant at AIG. In fact, you were twice appointed to this position, is that correct?

Response:

⁵ 28 C.F.R. §0.15 (2007).

42. In my role as a United States Senator, I take particular interest in oversight of federal government agencies, including the Justice Department. I also believe vigorous oversight should be performed internally by Justice Department officials, and your role as DAG, if confirmed, would put you at the helm of such supervision. As a result, I am concerned about your performance as Independent Consultant at AIG, particularly your level of concern, or lack thereof, for AIG's vast compliance problems, and whether that indicates you will assign a lower priority to internal oversight and compliance at the Justice Department.

- a. Recently, in her findings as Chairwoman of the Congressional Oversight Panel on TARP, Elizabeth Warren stated, "The company [AIG] was a corporate Frankenstein, a conglomeration of banking and insurance and investment interests that defied regulatory oversight." Yet, your reports did not elicit such a response to AIG's woes. In fact, they seem to have no concern for structural problems with regulatory oversight or legal compliance at AIG. Were you ever, at any point, concerned with the internal operations of AIG, particularly the way the AIG Financial Products Division (AIG-FP) was performing?

Response:

- i. In your 5 years inside AIG, did you ever see any indications of the financial collapse it would ultimately experience in 2008? Why or why not?

Response:

- b. It appears that your reports did address the use of derivatives products at AIG. A Congressional Research Service (CRS) evaluation of your reports notes, "AIG's crisis in 2008 was triggered in substantial part by failure to measure risk in credit derivatives...however...[your reports] *did not address the inability to measure the value of a derivative, but merely the correct application of the standard that governs the accounting treatment of changes in derivatives' value.*"

For approximately 5 years, you were basically a "fly on the wall" inside AIG. I find it hard to believe that, while you may not have been able to unravel all the details of what was going on inside AIG-FP, you only found problems with the accounting treatment of these products, and not their overall risk—a risk that brought down the entire company on the backs of American taxpayers to the tune of a \$182 billion bailout.

- i. According to Ms. Warren, it appears AIG-FP "enjoyed an unusual degree of autonomy within AIG's overall corporate structure."⁶ Was AIG-FP, the division that primarily generated and traded the

⁶ Beatrice Edwards, *James Cole Overlooked Monster Debt at AIG*, The Whistleblower Blog, June 7, 2010.

credit default swaps, exempted from compliance obligations and oversight during your tenure? Why or why not?

Response:

- ii. Was AIG-FP subject to a different type of oversight than other AIG divisions? Why or why not?

Response:

- iii. If AIG-FP was subject to some form of oversight, did you notice anything unusual regarding AIG-FP's use of derivatives beyond its accounting treatment of those products?

Response:

- iv. If you did notice questionable behavior, why did you not do anything about it given your role as an Independent Consultant who was there to get the company back on track and in compliance with the SEC and DOJ?

Response:

- v. At any time during your time at AIG, did you believe AIG had a lax or indifferent attitude toward regulation and oversight? Why or why not?

Response:

43. During your tenure as Independent Consultant, it appears you issued several reports. In particular, your September 30, 2007 Report specifically mentions AIG-FP. Considering the proximity to the 2008 collapse of AIG, I find it concerning that your report specifically exempts AIG-FP from independent review. In fact, the CRS Report notes, "one recommendation raises interesting issues about the relationship between AIG and AIG-FP...The Independent Consultant recommends that the Derivatives Committee provide an independent review of derivatives transactions entered into by all AIG entities, *except AIG-FP. The report then calls for an 'appropriate independent review' of proposed AIG-FP contracts, to be conducted by AIG-FP itself.*"

- a. CRS notes your report "suggest[s] that AIG-FP enjoyed an unusual degree of autonomy within AIG's overall corporate structure."⁷ Why would AIG-FP be accorded special treatment different from the other divisions within AIG?

⁷ Congressional Research Service, *Independent Consultant Reports on AIG Accounting Reforms*, prepared for the House Committee on Oversight and Government Reform, May 5, 2009, at 8.

Response:

- b. Why did your report fail to include any explanation for this separate treatment of AIG-FP?

Response:

- c. Do you believe that AIG-FP could perform a truly independent review of its own activities? Would it not have been more effective for you, as the Independent Consultant, to conduct appropriate oversight?

Response:

- 44. What role, if any, did AIG management play in the publication or content of the reports you prepared for the SEC? Do you believe it is appropriate for management to play any role in these reports, given they were supposed to be your own, independent evaluation?

Response:

- 45. Why did your reports focus only on accounting for the risk of these products, rather than the risk of the products themselves? Isn't it true that in derivatives trading, the two cannot be separated?

Response:

From: Cedarbaum, Jonathan
Sent: Thursday, June 24, 2010 6:58 PM
To: Barron, David; Koffsky, Daniel L
Subject: FW: NYT

Could we discuss briefly off-line. Thanks.

From: Miller, Matthew A
Sent: Thursday, June 24, 2010 6:56 PM
To: Cedarbaum, Jonathan
Subject: NYT

So he took my general remarks and wrote it as if I was speaking specifically. That said, I don't think I want to add any clarity to it. And I suppose it is not technically untrue to say you are free to deal with detainee matters more generally, even if you are recused from Gitmo.

The Fox report characterized Mr. Cedarbaum's involvement in advocating for detainees as "minor" and "short-lived." At a partner at the WilmerHale law firm, he was one of several lawyers whose name appeared on a Supreme Court brief in a case involving six Algerian detainees who had been arrested in Bosnia, and who were seeking a right to a habeas-corpus hearing.

Matthew Miller, a Justice Department spokesman, said that Mr. Cedarbaum is recused from matters arising from one of the Algerian-Bosnian detainees, but is free to deal with detainee legal policy matters more generally.

June 24, 2010, 6:09 pm

Key Job Changing Hands at Justice

By [CHARLIE SAVAGE](#)

David J. Barron, the acting head of the Justice Department's powerful Office of Legal Counsel, will step down next month and be replaced by one of his current deputies, Jonathan G. Cedarbaum, the department said Thursday.

Mr. Barron has run the office, which advises the president and executive branch whether proposed actions would be lawful, since January 2009. He is returning to Harvard Law School, which limits tenured professors to two years of leave, and he said in an interview that wants to move back to Massachusetts before the start of the school year because he has three young children.

Much of the work of the Office of Legal Counsel is confidential, but over the past 18 months Mr. Barron has handled a variety of issues including wartime questions like how much involvement with Al Qaeda is necessary to make a terrorism suspect subject to detention without trial and domestic matters like whether stalking and domestic violence laws apply to same-sex couples.

"I don't think I'll ever have a better job again," Mr. Barron said. "If you like the law and you care about these issues, it's just a tremendous opportunity to be able to have worked here."

Mr. Barron's replacement, Mr. Cedarbaum, came to public attention earlier this year after Fox News named him as one of several Justice Department lawyers who had previously advocated for detainees.

Those lawyers had been attacked as the “Al Qaeda Seven” by a group led by [Liz Cheney](#), the daughter of former Vice President [Dick Cheney](#), and Bill Kristol of the Weekly Standard. The Cheney and Kristol group was in turn accused of McCarthyism by critics from across the political spectrum.

The Fox report characterized Mr. Cedarbaum’s involvement in advocating for detainees as “minor” and “short-lived.” At a partner at the WilmerHale law firm, he was one of several lawyers whose name appeared on a Supreme Court brief in a case involving six Algerian detainees who had been arrested in Bosnia, and who were seeking a right to a habeas-corpus hearing.

Matthew Miller, a Justice Department spokesman, said that Mr. Cedarbaum is recused from matters arising from one of the Algerian-Bosnian detainees, but is free to deal with detainee legal policy matters more generally.

The Office of Legal Counsel was once obscure, but it drew attention during the Bush administration after the disclosure of secret memorandums in which politically appointed lawyers had asserted that the president, as commander-in-chief, could lawfully override statutes and treaties limiting torture and domestic surveillance.

Mr. Barron was among a group of Clinton administration veterans of the office who criticized those memorandums and proposed a set of operating principles they said would restore the office’s traditional independence and professionalism.

That effort was organized by [Dawn Johnsen](#), an Indiana University law professor, whom Mr. Obama nominated to lead the office. She in turn selected Mr. Barron to be her principal deputy. But when Ms. Johnsen’s nomination got bogged down and eventually failed, Mr. Barron found himself unexpectedly running the agency.

Mr. Barron said that part of his task was to re-establish a sense of normalcy following the intense controversy it had engendered in recent years. To accomplish that, he said, he insisted on a cautious approach of accepting only narrowly focused questions, consulting widely, and writing narrow rather than broad opinions.

The first five months or so were particularly intense, as he and a handful of colleagues had to quickly sort through secret Bush-era advice to decide what to keep and what to change, while also helping craft new national-security policies along with a range of issues related to the financial crisis, like how the “TARP” bailout fund could be used.

In one early opinion, Mr. Barron decided to affirm a Bush-era opinion that it would be unconstitutional for Congress to grant the District of Columbia voting rights in the House of Representatives. But, as the Washington Post later disclosed, Attorney General [Eric H. Holder Jr.](#) overruled Mr. Barron’s pronouncement. The issue became moot when the bill did not pass.

On Thursday, officials with whom he worked closely attested to his performance in a difficult role and lamented his departure.

Among them, Harold Koh, the top lawyer at the State Department, said: “In a difficult period, he restored his office’s reputation for fidelity to the rule of law.”

Jeh Johnson, the Pentagon general counsel, said: “I always found his approach to be careful and balanced. I think we are in a better place because of David’s contributions.”

[President Obama](#) has not yet submitted a new nominee to the Senate to lead the office following the withdrawal of Ms. Johnsen, and it was not clear whether Mr. Cedarbaum was under consideration for that selection.

Matthew Miller
Director, Office of Public Affairs
United States Department of Justice
(b) (6) (office)
(b) (6)

From: Monaco, Lisa (ODAG)
Sent: Thursday, June 24, 2010 8:32 PM
To: Barron, David
Subject: RE: NYT

Nice piece.

From: Barron, David
Sent: Thursday, June 24, 2010 7:38 PM
To: Monaco, Lisa (ODAG)
Subject: Fw: NYT

From: Miller, Matthew A
To: Barron, David
Sent: Thu Jun 24 18:54:46 2010
Subject: NYT

Not bad:

June 24, 2010, 6:09 pm

Key Job Changing Hands at Justice

By [CHARLIE SAVAGE](#)

David J. Barron, the acting head of the Justice Department's powerful Office of Legal Counsel, will step down next month and be replaced by one of his current deputies, Jonathan G. Cedarbaum, the department said Thursday.

Mr. Barron has run the office, which advises the president and executive branch whether proposed actions would be lawful, since January 2009. He is returning to Harvard Law School, which limits tenured professors to two years of leave, and he said in an interview that wants to move back to Massachusetts before the start of the school year because he has three young children.

Much of the work of the Office of Legal Counsel is confidential, but over the past 18 months Mr. Barron has handled a variety of issues including wartime questions like how much involvement with Al Qaeda is necessary to make a terrorism suspect subject to detention without trial and domestic matters like whether stalking and domestic violence laws apply to same-sex couples.

"I don't think I'll ever have a better job again," Mr. Barron said. "If you like the law and you care about these issues, it's just a tremendous opportunity to be able to have worked here."

Mr. Barron's replacement, Mr. Cedarbaum, came to public attention earlier this year after Fox News named him as one of several Justice Department lawyers who had previously advocated for detainees.

Those lawyers had been attacked as the "Al Qaeda Seven" by a group led by [Liz Cheney](#), the daughter of former Vice President [Dick Cheney](#), and Bill Kristol of the Weekly Standard. The Cheney and Kristol group was in turn accused of McCarthyism by critics from across the political spectrum.

The Fox report characterized Mr. Cedarbaum's involvement in advocating for detainees as "minor" and "short-lived." At a partner at the WilmerHale law firm, he was one of several lawyers whose name appeared on a Supreme Court brief in a case involving six Algerian detainees who had been arrested in Bosnia, and who were seeking a right to a habeas-corpus hearing.

Matthew Miller, a Justice Department spokesman, said that Mr. Cedarbaum is recused from matters arising from one of the Algerian-Bosnian detainees, but is free to deal with detainee legal policy matters more generally.

The Office of Legal Counsel was once obscure, but it drew attention during the Bush administration after the disclosure of secret memorandums in which politically appointed lawyers had asserted that the president, as commander-in-chief, could lawfully override statutes and treaties limiting torture and domestic surveillance.

Mr. Barron was among a group of Clinton administration veterans of the office who criticized those memorandums and proposed a set of operating principles they said would restore the office's traditional independence and professionalism.

That effort was organized by [Dawn Johnsen](#), an Indiana University law professor, whom Mr. Obama nominated to lead the office. She in turn selected Mr. Barron to be her principal deputy. But when Ms. Johnsen's nomination got bogged down and eventually failed, Mr. Barron found himself unexpectedly running the agency.

Mr. Barron said that part of his task was to re-establish a sense of normalcy following the intense controversy it had engendered in recent years. To accomplish that, he said, he insisted on a cautious approach of accepting only narrowly focused questions, consulting widely, and writing narrow rather than broad opinions.

The first five months or so were particularly intense, as he and a handful of colleagues had to quickly sort through secret Bush-era advice to decide what to keep and what to change, while also helping craft new national-security policies along with a range of issues related to the financial crisis, like how the "TARP" bailout fund could be used.

In one early opinion, Mr. Barron decided to affirm a Bush-era opinion that it would be unconstitutional for Congress to grant the District of Columbia voting rights in the House of Representatives. But, as the Washington Post later disclosed, Attorney General [Eric H. Holder Jr.](#) overruled Mr. Barron's pronouncement. The issue became moot when the bill did not pass.

On Thursday, officials with whom he worked closely attested to his performance in a difficult role and lamented his departure.

Among them, Harold Koh, the top lawyer at the State Department, said: "In a difficult period, he restored his office's reputation for fidelity to the rule of law."

Jeh Johnson, the Pentagon general counsel, said: "I always found his approach to be careful and balanced. I think we are in a better place because of David's contributions."

[President Obama](#) has not yet submitted a new nominee to the Senate to lead the office following the withdrawal of Ms. Johnsen, and it was not clear whether Mr. Cedarbaum was under consideration for that selection.

Matthew Miller
Director, Office of Public Affairs
United States Department of Justice

(b) (6) (office)

(b) (6)

From: Wardzinski, Karen (ENRD)
Sent: Friday, June 25, 2010 3:49 PM
To: Hirsch, Sam; Miguel, Amy (JMD); Paisner, Michael; Atsatt, Mikki
Cc: Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David; Martinez, Brian (CIV); Temple Claggett, Karyn; Hines, Rachel; Appelbaum, Judy; Scott-Finan, Nancy
Subject: RE: Oil-spill related: draft responses to Hill questions re: Administration proposal

Will do

From: Hirsch, Sam
Sent: Friday, June 25, 2010 3:16 PM
To: Miguel, Amy (JMD); Paisner, Michael; Atsatt, Mikki
Cc: Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David; Wardzinski, Karen (ENRD); Martinez, Brian (CIV); Temple Claggett, Karyn; Hines, Rachel; Appelbaum, Judy; Scott-Finan, Nancy
Subject: Re: Oil-spill related: draft responses to Hill questions re: Administration proposal

Duplicative Material - Previously Processed by OLC

From: Cedarbaum, Jonathan
Sent: Tuesday, June 29, 2010 11:01 AM
To: Barron, David
Subject: FW: House Update: S J Res 33

Importance: High

I may rope you in to this. Thanks.

From: Aguilar, Rita C.
Sent: Tuesday, June 29, 2010 11:00 AM
To: Cedarbaum, Jonathan; Rhee, Jeannie; Price, Zachary; Burton, Faith
Cc: Siegel, Nicole (OLA)
Subject: House Update: S J Res 33
Importance: High

FYI

From: Modeste, Brian [mailto:(b) (6)]
Sent: Tuesday, June 29, 2010 10:56 AM
To: Aguilar, Rita C.
Subject: RE: S J Res 33

Rita – the Parliamentarian is telling us that they can't give us a definitive answer at this moment; they have to do more research into their precedents because what constitutes a legislative day can sometimes be tricky to determine. My bosses are however, taking the position that by the action we are taking today we have met the deadline for Congressional action under the statute and feel confident that our position would be upheld by a court if it ever came to that. So we are going forward. In the meantime we will continue to press the Parliamentarian to give us a definitive answer as soon as they can. If they concur with our position and read the statute to mean concurrent legislative days, by our count today would the 57th legislative day that both House were in session at the same time since the Senate noted its receipt of the proposed constitution on March 1st.

I am sorry we couldn't be more definitive at this point.

Brian Modeste

Staff Director | Insular Affairs
Subcommittee on Insular Affairs, Oceans and Wildlife
Committee on Natural Resources | 1337 Longworth HOB
((b) (6) | (f (b) (6)
<http://resourcescommittee.house.gov/>

From: Aguilar, Rita C. [mailto:(b) (6)]
Sent: Tuesday, June 29, 2010 10:21 AM
To: Modeste, Brian
Subject: Re: S J Res 33

Please let me know as soon as you can.

From: Modeste, Bria (b) (6)
To: Aguilar, Rita C.
Sent: Tue Jun 29 10:13:07 2010
Subject: RE: S J Res 33

Nothing yet.

Brian Modeste

Staff Director | Insular Affairs
Subcommittee on Insular Affairs, Oceans and Wildlife
Committee on Natural Resources | 1337 Longworth HOB
(o (b) (6) | (f (b) (6)
<http://resourcescommittee.house.gov/>

From: Aguilar, Rita C. [mailto:(b) (6)]
Sent: Tuesday, June 29, 2010 10:14 AM
To: Modeste, Brian
Cc: (b)(6) (Allen Stayman, Senate)
Subject: Re: S J Res 33

Any word?

From: Modeste, Bria (b) (6)
To: Aguilar, Rita C.
Cc: (b)(6) (Allen Stayman, Senate) (b) (6) >
Sent: Tue Jun 29 08:57:11 2010
Subject: S J Res 33

Rita – the House change its schedule and will now convene for Legislative business at 10:30 a.m. instead of noon. We plan on making the argument to the Parliamentarians that we should use legislative days when the House and Senate were in session “concurrently” to determine when the 60 legislative days expires because the enabling statute speaks to legislative days for “Congress” to act and does not specifically refer to either House. CRS is researching whether there are any precedents to support this position.

I will keep you posted.

Brian Modeste

Staff Director | Insular Affairs
Subcommittee on Insular Affairs, Oceans and Wildlife
Committee on Natural Resources | 1337 Longworth HOB
(o (b) (6) | (f (b) (6)
<http://resourcescommittee.house.gov/>

From: Siegel, Nicole (OLA)
Sent: Wednesday, June 30, 2010 11:46 AM
To: Aguilar, Rita C.; Bies, John; Delery, Stuart F. (ODAG); Burrows, Charlotte; Cedarbaum, Jonathan; Burton, Faith
Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG); Weich, Ron; Appelbaum, Judy
Subject: RE: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution
Attachments: Views Letter to OMB on SJR 33 Virgin Islands Constitution (29 Jun 10).doc

As requested - attached is the WORD version of the views letter that went out to OMB last night.

Thanks again!

From: Aguilar, Rita C.
Sent: Wednesday, June 30, 2010 11:33 AM
To: Bies, John; Delery, Stuart F. (ODAG); Burrows, Charlotte; Cedarbaum, Jonathan; Siegel, Nicole (OLA); Burton, Faith
Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG); Weich, Ron; Appelbaum, Judy; Aguilar, Rita C.
Subject: RE: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

As promised, here is the PDF. Nicole learned from OMB that the President has signed S.J.Res. 33 into law. Thanks, again, for your help in expediting this one.

From: Aguilar, Rita C.
Sent: Tuesday, June 29, 2010 8:27 PM
To: Bies, John; Delery, Stuart F. (ODAG); Burrows, Charlotte; Cedarbaum, Jonathan; Siegel, Nicole (OLA); Burton, Faith
Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG); Weich, Ron; Appelbaum, Judy
Subject: RE: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

Looping in Ron and Judy. Thankfully, we caught Ron before he left so that he could sign this and Nicole was faxing over to OMB. Eric, we also caught and removed the brackets per your email exchange. We'll be able to scan and circulate in the morning when we have support staff back in the office. We greatly appreciate everyone's attention on this.

From: Bies, John
Sent: Tuesday, June 29, 2010 7:16 PM
To: Delery, Stuart F. (ODAG); Burrows, Charlotte; Cedarbaum, Jonathan; Siegel, Nicole (OLA); Aguilar, Rita C.; Burton, Faith
Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG)
Subject: Re: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

I also think the letter looks fine. Thanks.

John

From: Delery, Stuart F. (ODAG)
To: Burrows, Charlotte; Cedarbaum, Jonathan; Siegel, Nicole (OLA); Aguilar, Rita C.; Burton, Faith; Bies, John
Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG)

Sent: Tue Jun 29 18:31:22 2010

Subject: RE: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

I also think the letter looks fine. Thanks.

From: Burrows, Charlotte

Sent: Tuesday, June 29, 2010 6:30 PM

To: Cedarbaum, Jonathan; Siegel, Nicole (OLA); Aguilar, Rita C.; Burton, Faith; Delery, Stuart F. (ODAG); Bies, John

Cc: Barron, David; Rhee, Jeannie; Price, Zachary; Columbus, Eric (ODAG)

Subject: Re: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

I'm fine w the draft letter. Nicole, do you know i (b) (5)

From: Cedarbaum, Jonathan

To: Siegel, Nicole (OLA); Aguilar, Rita C.; Burton, Faith; Delery, Stuart F. (ODAG); Bies, John; Burrows, Charlotte

Cc: Barron, David; Rhee, Jeannie; Price, Zachary

Sent: Tue Jun 29 18:06:31 2010

Subject: Draft Enrolled Bill Letter for US Virgin Islands Joint Resolution

Duplicative Material - Previously Processed by OLC

From: Monaco, Lisa (ODAG)
Sent: Wednesday, June 30, 2010 5:58 PM
To: Baker, James A. (ODAG); Chipman, Jason; Grindler, Gary (ODAG); Barron, David
Subject: Fw: Toronto Star: Al Qaeda branch inspired to launch English magazine

----- Original Message -----

From: Office of the Director of National Intelligence - News Alert List (b) (6) >
To: (b) (6) (b) (6) >
Sent: Wed Jun 30 17:56:12 2010
Subject: Toronto Star: Al Qaeda branch inspired to launch English magazine

Al Qaeda branch inspired to launch English magazine

June 29, 2010

Michelle Shephard, Toronto Star

They call it Inspire, and Al Qaeda is hoping it will.

Al Qaeda's media-savvy branch in the Arabian Peninsula has announced this week in an online advertisement that they will publish the group's first English magazine.

Featuring guest writer Anwar al Awlaki — the American cleric blamed for inciting violence among Western Muslims youth, including members of the so-called Toronto 18 — the magazine Inspire is an extension of an already popular online Arabic magazine Sada al-Malahim (Echo of the Battle).

Simply the idea of Al Qaeda churning out a magazine while supposedly dodging drone attacks and security forces in Yemen's tribal areas has led to ridicule in the past.

Articles in the Arabic magazine have included profiles of terrorist leaders or suicide bombers, an analysis of the role of women in jihad and helpful tips of how to not divulge information if caught and interrogated.

"In some ways, Sada al-Malahim isn't all that different from Slate," wrote Brian Palmer in a piece for his current affairs online magazine, noting that both publications separate content into rubrics, "like Martyr Biographies," and often run pieces in installments.

But noted Yemen scholar Gregory Johnsen says the new magazine is worrying because it confirms a presence of western, English-speaking members of Al Qaeda in the Arabian Peninsula (AQAP) beyond Awalki.

"This is something myself and others have long suspected, but the magazine is the first real evidence we have a core group of these type of individuals, many of whom likely possess western passports," he said.

The magazine will also likely be powerful online tool of recruitment, says Johnsen.

"The idea here is that AQAP can reach, influence and inspire other like-minded individuals in the west. No longer do these individuals need to travel to Yemen or read Arabic in order to take instructions from AQAP. Now they can just download and read the magazine in English."

That is bad news for western security services that are often playing catch-up with the spread of Internet recruitment, which appeals to disenfranchised Muslims angered by the wars in Iraq or Afghanistan or the presence of Guantanamo Bay.

It is this greater war of words — far from the battlefields in Afghanistan and Pakistan — that has western intelligence agencies focusing hard on the messages sent by Yemen's AQAP and Al Qaeda's arm in Somalia, Al Shabaab.

Al Shabaab managed to recruit at least six Toronto-area young men to Mogadishu to fight against the UN-backed transitional federal government, in part through online propaganda.

AQAP, which formed in January 2009 when factions in Yemen and Saudi Arabia merged, jumped to the top of Washington's agenda after the group was linked to the failed Christmas Day attempt to down a Detroit-bound flight, allegedly by Nigerian "underwear bomber" Umar Farouk Abdulmutallab.

And even though the plot may have failed, the group got the fame it sought.

"They're trying to be the new Al Qaeda, the headquarters of Al Qaeda," said Charles Schmitz, professor of geography at Maryland's Towson University.

The magazine is another attempt to show their international reach, said Schmitz.

"These guys are capable. They're not backwater, underprivileged folks who have been drawn into the battle. These are educated folks who know about the world and have seen how the media works and want to imitate it for their own cause.

"They want whenever possible to just stick it in the eye of the American administration."

But Schmitz and Johnsen, both of whom have travelled extensively in Yemen and are fluent in Arabic, caution that sometimes the reaction to arrests or attacks makes the jobs of online recruiters' easier.

New Mexico-born Awlaki, for instance, was not considered among the hierarchy of AQAP or well known to Yemenis until the failed Christmas Day plot and the White House confirmed he was on the CIA's hit list.

CIA director Leon Panetta said Sunday that Awlaki has "declared war" on the United States.

"Awlaki is a terrorist, and, yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist."

"Awlaki gets defended because they say America's trying to act above the law," said Schmitz. "So we play into their hands by appearing to be above the law in that sense."

As Johnsen argued recently in Newsweek, the U.S. administration's argument is based more on "frustration and assumption than real strategy."

"Inside that organization, (Awlaki) is a nobody — at best, a mid-level functionary in a local branch," Johnsen wrote. "There are dozens of men who could do more harm to the United States, and killing Awlaki would only embolden them and aid in recruitment.

"Assassinating Awlaki may make us feel safer, but it won't make us safer."

In the first 12 editions of AQAP's Arabic magazine Awalki's name is mentioned only once, and then only to dispute claims he had been killed in a U.S. drone attack.

Judging by the slick online promotion of the new English magazine — advertised as "A special gift to the Islamic Nation" — guest writer Awlaki appears to have become the group's rising star.

You are currently subscribed to the Office of the Director of National Intelligence News Alert List.

To unsubscribe, forward this e-mail to (b) (6) with the words 'UNSUBSCRIBE' in the subject line.

Wed, 30 Jun 2010 17:56:16

From: Monaco, Lisa (ODAG)
Sent: Wednesday, June 30, 2010 6:10 PM
To: Barron, David
Subject: Fw: AP: Terror chief defends targeting rebel US cleric (UPDATE)

----- Original Message -----

From: Office of the Director of National Intelligence - News Alert Lis (b) (6) >
To: (b) (6) (b) (6) >
Sent: Wed Jun 30 17:51:44 2010
Subject: AP: Terror chief defends targeting rebel US cleric (UPDATE)

Terror chief defends targeting rebel US cleric (UPDATE)

By KIMBERLY DOZIER, The Associated Press

June 30, 2010

ASPEN, Colo. — A top counterterrorism official on Wednesday defended the government's right to target U.S. citizens perceived as terror threats for capture or killing, citing the example of the renegade al-Qaida-linked cleric Anwar al-Awlaki.

Michael Leiter, director of the National Counterterrorism Center, would not say whether al-Awlaki is on a U.S. targeting list, but a senior U.S. counterterrorism official has previously confirmed that the cleric is among terror targets sought to be captured or killed.

Speaking at the Aspen Security Forum, Leiter justified the targeting with "all elements of U.S. national power" those plotting to kill U.S. citizens.

The remarks amounted to a rare glimpse into the secret decision-making process among top U.S. counterterror officials who oversee drone missile strikes against terrorists in Pakistan and other battle zones abroad.

In its first year, The Obama administration has nearly doubled the use of airborne attacks in Pakistan's lawless frontier areas, where U.S. officials say al-Qaida chief Osama bin Laden is hiding.

Leiter also said that al-Awlaki had a "direct operational role" in the plot that allegedly sent Christmas Day bombing suspect Omar Farouk Abdulmutallab to attack a Detroit-bound airliner packed with nearly 300 passengers.

Acknowledging the hard choices involved in targeting someone to be killed, Leiter said such a decision "certainly gives me pause." He added that President Barack Obama and CIA Director Leon Panetta also wrestle with similar deliberations "to issue orders to end an individual's life."

But he insisted the U.S. is well within its rights to defend itself.

"If someone like Anwar al-Awlaki is responsible" for part of a plot "to kill more than 300 people over the city of Detroit," Leiter said, "I think it would be wholly irresponsible for citizens like me, Leon Panetta, Defense Secretary (Robert) Gates, and ultimately the president, not to at least think about and potentially direct all the elements of national power to try to defend the American people."

CIA director Leon Panetta, speaking to ABC on Sunday, similarly would not confirm a kill order on Awlaki, but said Awlaki is on a CIA terrorist list.

Leiter pointed to the recent missile strike that killed Sheikh Saeed al-Masri, al-Qaeda's number three in command, as an example of the success of the drone strike program. Panetta was the first to confirm that killing this past weekend.

A woman in the crowd who identified herself as an American Civil Liberties Union member, asked why there was no judicial review of such kill orders, citing the standard warrant requirements facing a policeman before entering a citizen's home.

Leiter explained that while "a police officer does need a court order to go after a house," the lawman "has a right of self defense if someone pulls out a gun." The U.S. government, Leiter insisted, has the same right. He added that there is congressional oversight of such actions.

Leiter also said that the government learned strong lessons after the failed Christmas Day bombing attempt in re-crafting its no-fly list, but added that officials still face a deluge of information each day in trying to prevent terror threats from boarding planes bound for the U.S.

Leiter's agency came under attack after the bombing for failing to "connect the dots" of information that would have identified Abdulmutallab as a terror suspect.

He said since the bombing, he set up new groups of analysts that led to a doubling of the no-fly list since Christmas Day. Leiter said as many as 400 suspects are being added every day to the watch list (also called the terror screening database), under new guidelines after the Abdulmutallab attack that lowered the threshold of how much intelligence it takes to rate someone as a threat.

Late last year there were about 3,400 names on the list, but in the wake of the Christmas Day airliner attack it grew to about 6,000, as authorities added names of people associated with al-Qaida groups in Yemen and Africa.

In a separate action Wednesday, the ACLU said it was preparing to file a lawsuit charging that the no-fly list has illegally kept innocent citizens or legal residents from traveling and violates their constitutional rights.

The lawsuit, which the group said would be filed in federal court in Oregon on behalf of 10 individuals, says the system of determining who should or should not be allowed to fly is broken, and has left people stranded as they traveled abroad.

Leiter appealed to the American public to trust his agency and others to protect their privacy while sharing that data between intelligence agencies.

You are currently subscribed to the Office of the Director of National Intelligence News Alert List.

To unsubscribe, forward this e-mail to (b) (6) with the words 'UNSUBSCRIBE' in the subject line.

Wed, 30 Jun 2010 17:51:44

From: Silas, Adrien
Sent: Thursday, July 01, 2010 1:05 PM
To: McKay, Shirley A
Cc: Forrester, Nate; Taylor, Velma; Siegel, Steven N. (FBI); Rhee, Jeannie; Cedarbaum, Jonathan; Anderson, Trisha; Price, Zachary; Lederman, Marty; Barron, David
Subject: FW: July 2 - Attorney General Questions for the Record Responses

Shirley, could you guide us to the people drafting a response to the letter referenced below?

From: Forrester, Nate
Sent: Thursday, July 01, 2010 12:59 PM
To: Silas, Adrien; Taylor, Velma; Siegel, Nicole (OLA)
Cc: Rhee, Jeannie; Cedarbaum, Jonathan; Anderson, Trisha; Price, Zachary; Lederman, Marty; Barron, David
Subject: FW: July 2 - Attorney General Questions for the Record Responses

It appears Doug is out of town; can one of you help with this question?

From: Forrester, Nate
Sent: Thursday, July 01, 2010 12:58 PM
To: Levine, Doug
Cc: Rhee, Jeannie; Cedarbaum, Jonathan; Anderson, Trisha; Price, Zachary; Lederman, Marty; Barron, David
Subject: FW: July 2 - Attorney General Questions for the Record Responses

Doug: We've been asked to draft the response to the following questions, but we are uncertain who is working on the response to the September 17 letter. Whoever is doing so ought to draft the response to these questions initially and then we can of course consult. Can you track down where that letter stands?

Office of Legal Counsel Memorandum On RFRA:

On September 17, 2009, 57 religious, education, civil rights, labor, and health organizations wrote to Attorney General Eric Holder, asking him to review and withdraw a Bush-era, June 29, 2007 Office of Legal Counsel Memorandum ("OLC Memo"). The OLC Memo at issue determined that the Religious Freedom Restoration Act of 19932 ("RFRA") provides for a blanket override of binding, statutory nondiscrimination provisions for religious organizations that provide government funded social service programs, such as Head Start and the Workforce Investment Act. The OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal statutory nondiscrimination provision tied to a grant program. The Memo has been criticized by many legal scholars as fundamentally unsound. Many civil rights organizations – including those that supported the passage of RFRA – never foresaw that RFRA would be used as a weapon to overturn decades-old statutory civil rights protections.

17. Do you know whether the Office of Legal Counsel is reviewing the Memorandum at issue?

Response: OLC

18. Do you have a position on whether the Memorandum should be sustained, reformed, or overturned?

Response: OLC

19. Will the Justice Department respond to the letter signed by the 57 organizations?

Response: OLC

From: Levine, Doug

Sent: Monday, June 21, 2010 8:04 PM

To: Overmann, Lynn; Schools, Scott (ODAG); Delery, Stuart F. (ODAG); Bollerman, Kerry A. (CIV); Cummings, Holly (CIV); Buchanan, David (COPS); Long, Shannon (COPS); Hendley, Scott (CRM); Jones, Gregory M. (CRM); Lofton, Betty (CRM); Opl, Legislation (CRM); Wroblewski, Jonathan (CRM); Lee, Connie (CRT); Nosanchuk, Matt (CRT); Policy, CRT (CRT); Boobar, Jeffrey R. (DEA-US); Johnson, Robert A. (DEA-US); Perkins, Keith C (DEA-US); Shoemaker, Sheldon R (DEA-US); Sparks, Stacy E. (DEA-US); Stolaruk, Lisa J. (DEA-US); Strait, Matthew J. (DEA-US) (b) (6), (b) (7)(C) (FBI); (b) (6), (b) (7)(C) (FBI) (b) (6), (b) (7)(C) (FBI) (b) (6), (b) (7)(C) (FBI) (b) (6), (b) (7)(C) (FBI); Atwell, Tonya M; Faulkner, Lila; Hitch, Vance (OCIO); Lauria-Sullens, Jolene; Lofthus, Lee J; Long, Mariana; Michaelson, Melanie (CIV); Miguel, Amy (JMD); Murphy, Justin; Rodgers, Janice; Schultz, Walter H Per NSD (b) (6), (b) (7)(C) (NSD); NSD LRM Mailbox; Sittner, Rebekah; Bernhardt, Gena (OJP); Brien, Peter (OJP); Carradini, Rosemary Cavanagh (OJP); Dirham, Sue (OJP); Duncan, Summer (OJP); LaTour, Angella (OJP); Lowry, Kim (OJP); Matz, Sarah (OJP); Ridgway, George (OJP); Searby, Susan (OJP); Solomon, Amy (OJP); Spector, Adam; Anderson, Trisha; Cedarbaum, Jonathan; Forrester, Nate; Mitchell, Dyone; Price, Zachary; Rhee, Jeannie; Beamon, Vivian C. (USTP); Figueroa, Linda (USTP); Rose, Megan (USTP); Salahuddin, Saleela (USTP); Tracy, Lisa (USTP)

Cc: Weich, Ron; Agrast, Mark D.; Appelbaum, Judy; Burton, Faith; Wade, Jill C; Clifton, Deborah J; Freeman, Andria D; Burrows, Charlotte; Columbus, Eric (ODAG); Luck, Stacey (ODAG); Hauck, Brian; Hirsch, Sam; Adiga, Mala; Greenfeld, Helaine

Subject: Due: July 2 - Attorney General Questions for the Record Responses

Dear All,

We are in receipt of questions for the record (QFRs) from several members of the House Judiciary Committee (see attachment below) arising from a May 13th hearing in which the Attorney General testified. Accordingly, we are soliciting your draft responses to these QFRs by **close of business Friday, July 2, 2010**. All responses should be cleared by your respective front offices, inserted directly into the attached document, and submitted to OLA/Doug Levine. The specific assignments for each question (and sub-question) are listed below. If you believe a QFR should be re-assigned to another component, please let me know no later than **COB Wednesday, June 23rd** so that any newly assigned component will have ample time to draft a response.

Assignments for the QFRs are as follows:

ATJ/Overmann - 28

BOP - 29

CIV - 55

COPS – 45, 46, 47

CRM – 6abc, 23, 24, 25, 26, 27, 31, 32

CRT – 12abc, 13, 14, 15, 16, 20, 21, 33, 34, 35, 43, 44, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64

DEA – 37, 38, 39, 40

FBI – 1b (plus 24 and 48a with OJP)

JMD – 1a, 2a and b

NSD – 8a, b, and c, 11, 22

ODAG/Delery - 5

ODAG/Schools – 9ab

OJP – 3ab, 30ab, 36, 48b, 49 (plus 24 and 48a with FBI)

OJP and FBI – 24, 48a

OLA – 4, 7

OLC – 10, 17, 18, 19

UST – 41, 42

Thank you for your assistance and please don't hesitate to get in touch with any questions.

Doug Levine

<<AG QFRs May 13, 2010 HJC Oversight Hearing (22JUN10).doc>>

Doug Levine

Office of Legislative Affairs

U.S. Department of Justice

(b) (6) (Office) (b) (6) (Cell)



AG QFRs May 13,
2010 HJC Overs...

Questions for the Record
Attorney General Eric H. Holder, Jr.
House Judiciary Committee
Thursday, May 13, 2010

QUESTIONS POSED BY CHAIRMAN CONYERS, JR.

1. In March, 2009, the Inspector General issued a report of an audit concerning the Convicted Offender Backlog Reduction Program covering the years FY 2005 to FY 2007. The IG found that while the program had resulted in increased analysis of DNA samples, several financial awards went to state laboratories for which no activity pursuant to the Backlog Reduction Program had occurred and additional funding was granted to laboratories that had not used all of the previous' year's award.

- a. What steps is the Department taking to ensure that Backlog Reduction Program financing is properly used?

Response: **JMD**

- b. During the hearing, Mr. Schiff discussed a pilot program in Los Angeles that would allow for private companies to analyze DNA samples among those in the backlog, and provide for them to be uploaded into CODIS after a technical review by a public lab. Does the Department have plans to implement a pilot program like the one Mr. Schiff described, either in Los Angeles or elsewhere, to improve the DNA backlog reduction efforts?

Response: **FBI**

2. According to the IG's 2009 management assessment, DOJ's lack of a uniform financial management system, which has been the case for many years, presents a continuing challenge to meeting the demand for improved financial transparency and accountability.

- a. When will DOJ's Unified Financial Management System (UFMS) be implemented fully throughout the Department?

Response: **JMD**

- b. What, if any, additional resources are required to complete the UFMS implementation?

Response: **JMD**

3. A September 2009 OIG report raised concerns about the fairness and openness of grants made by the National Institute of Justice (NIJ) during fiscal years 2005 through 2007, including the possibility of conflicts of interest involving NIJ employees reviewing certain grant applications. The Inspector General has identified grant management as a high-priority challenge for the Department each year since 2000 and in early 2009, issued a list of 43 specific recommendations for improving the grant management process across the Department.
 - a. What steps is the Department taking to implement the Inspector General's recommendations for improving grant management?

Response: OJP

- b. What changes have been made in the NIJ grant management system to avoid the possibility of conflicts of interest for grant reviewers in the future?

Response: OJP

QUESTIONS POSED BY REPRESENTATIVE NADLER

4. In September 2009, you issued an internal policy governing invocation of the state secrets privilege. This was an important first step, but it is not enough. The courts still need guidance and the policy is voluntary and for this Administration only. That is why my bill, and legislative reform, remain critical.

Can you commit to a concrete timeline within which we might identify any areas of concern for the Administration and obtain an answer on whether the Administration will support my bill (H.R. 984)?

Response: OLA

5. When you issued the internal policy governing invocation of the state secrets privilege, there was an announcement that a full report detailing task force findings and recommendations regarding the state secrets privilege would be forthcoming. Please confirm whether and when that report will be finalized and provided to Congress.

Response: ODAG/Delery

6. The Department recently obtained an indictment of former National Security Agency (NSA) executive Thomas Drake for leaking information regarding the NSA's warrantless surveillance program. Three federal judges, most recently Judge Walker in the Al-Haramain case, have found that the warrantless surveillance program itself was unlawful.

- a. Has the Department opened an investigation or appointed a special counsel to investigate the underlying surveillance, which has been found unlawful, as well?

Response: CRM

- b. If not, how do you possibly reconcile the failure to investigate the warrantless surveillance itself with the aggressive investigation and prosecution of a whistleblower who provided information about it?

Response: CRM

- c. Will you appoint a special counsel, or expand the scope and authority of an existing counsel, to investigate the NSA's terrorist surveillance program?

Response: CRM

7. By letter dated August 6, 2009, asked the Department to investigate and answer some questions in the cases of two individuals – Maher Arar and Binyam Mohamed. Please provide a response to that letter or indicate a reasonable time within which I will receive a response.

Response: OLA

8. In my August 6, 2009 letter, I asked for an explanation of our national security objection to publication by a court in the United Kingdom of seven paragraphs that allegedly described Binyam Mohamed’s treatment while in US custody. The UK court has since published those paragraphs, over our continued objection.

Those paragraphs reveal that Mr. Mohamed was interviewed “as part of a new strategy designed by an expert interviewer” sometime prior to May 2002. That his treatment in the course of these interviews included “continuous sleep deprivation,” threats that he would be removed from US custody and disappeared, and shackling. The UK court concluded that this treatment was “at the very least cruel, inhuman and degrading treatment by the United States authorities.”

- a. Having seen the 7 paragraphs, it is unclear how they pose any national security threat. Instead, it seems that the US objected because the information is embarrassing and reveals unlawful conduct. This Administration promised it would not use claims of secrecy to cover-up conduct that is embarrassing or unlawful. Yet even after the UK court published these, a spokesman (Ben LaBolt) for President Obama reiterated the threat that the US would re-think intelligence sharing with the UK. What is the possible justification for such threats?

Response: NSD

- b. In Mr. Mohamed’s case in the United Kingdom, the court recently denied the British Government’s argument that information related to his treatment must be kept secret and declared that the British public has a right to know about its government’s alleged complicity in mistreatment of Mr. Mohamed while he was in US custody. Isn’t the US public equally entitled to know what its government has done and how would you propose that we achieve this?

Response: NSD

- c. The interviews of Binyam Mohamed described in the recently released paragraphs apparently took place prior to May 2002 and the techniques used on Mr. Mohamed, as set forth by D.C. Circuit Court

Judge Gladys Kessler, C. went well beyond anything outlined and approved as lawful in the OLC memos that we've seen. According to Judge Kessler, Binyam Mohamed "was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell."

One rationale given for failing to investigate credible allegations of torture is that DOJ lawyers approved techniques as lawful.

- (1) Was legal advice sought and provided regarding the specific interrogation techniques used in Binyam Mohamed's interviews? Who asked for and who provided that advice? To the extent written advice was provided, please also provide a copy of that advice.

Response: NSD

- (2) If legal advice was not provided, what possible justification exists for failing to investigate Mr. Mohamed's allegations of torture while being by or at the behest of the United States?

Response: NSD

9. More generally, I and several of my colleagues repeatedly have called for appointment of a special counsel authorized to investigate allegations regarding the torture of detainees held in connection with counter-terrorism operations in the aftermath of the September 11, 2001 terrorist attacks on the United States.

- a. Please confirm whether special counsel has been appointed and authorized to conduct such an investigation.

Response: ODAG/Schools

- b. If a special counsel has not been authorized to conduct such an investigation, please detail the steps that the Department itself has take to conduct that investigation.

Response: ODAG/Schools

10. In disagreeing with the Office of Professional Responsibility (OPR) conclusion that Office of Legal Counsel lawyers violated their ethical duties in rendering advice regarding harsh interrogation techniques, Associate Deputy Attorney General David Margolis relied heavily on the fact that OLC

lawyers Jay Bybee and John Yoo gave advice with regard to a particular detainee – Abu Zubaydah – and specific techniques to be used only for that detainee.

Did OLC or other lawyers provide similar, specific advice and approval for all interrogation? Who asked for and who provided that advice? To the extent written advice was provided, please also provide a copy of that advice.

Response: OLC

11. Lawrence Wilkerson, Secretary of State Colin Powell’s former Chief of Staff, has alleged that former high-ranking Administration officials knew that many individuals shipped to and held at Guantanamo Bay were innocent.

He also makes several additional allegations – that 50-60% of the individuals detained at Abu Ghraib also were likely innocent, and that – as he put it – the Administration “tortured and abused those it detained at the facilities at Guantanamo Bay and elsewhere and indefinitely detained the innocent for political reasons.”

Have Mr. Wilkerson’s claims been investigated? If so, please provide an explanation of the results of that investigation. If not, will you pledge to do so and inform us of the results?

Response: NSD

12. In the past, many duly qualified voters have been purged from the voting rolls.
- a. What steps are you taking to ensure that no duly qualified voter is purged from the voting rolls?

Response: CRT

- b. Will you be reviewing the lists that federal agencies are preparing for matches to ensure that they cannot be used to disenfranchise duly qualified voters?

Response: CRT

- c. In the current anti-immigrant climate, what steps will you be taking to ensure that racial profiling and harassment will not be used to disenfranchise voters?

Response: CRT

13. In the prior administration, the Civil Rights Division was politicized and its resources severely depleted. In light of the approaching redistricting, I am concerned about the current state of the Voting Section.

What steps are you taking to ensure that there will be adequate personnel and resources to protect the rights of voters during redistricting?

Response: CRT

QUESTIONS POSED BY REPRESENTATIVE SCOTT

Faith Based Initiative:

The Bush-Cheney Administration changed a decades-old policy to allow religious organizations to utilize the Title VII exemption to permit them to discriminate on the basis of religion in hiring for federally funded programs and positions. Religious organizations are entitled to the Title VII hiring exemption when they are using their own funds, but the government cannot and should not allow them to discriminate in hiring when using government funds. The current Director of the White House Office of Faith-Based and Neighborhood Partnerships has reported that the hiring issue has been assigned to the Department of Justice, which, he says, engages in a “case-by-case” analysis each time a religious organization receiving federal funding wishes to discriminate in hiring.

14. Are the civil rights policies in the Faith-Based Initiative currently under review by the Justice Department? Which components of the policy are the Department looking into?

Response: CRT

15. Is it legal for Faith Based organizations administering federally funded programs to have an articulated policy of not hiring Catholics and Jews or a policy of only hiring active Members of a particular church? If so, will the Administration change its policy to conform to the statement of then Presidential candidate Obama – “... I believe deeply in the separation of church and state, but I don’t believe this partnership will endanger that idea – so long as we follow a few basic principles. First, if you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them – or against the people you hire – on the basis of their religion. Second, federal dollars that go directly to churches, temples, and mosques can only be used on secular program.”

Response: CRT

16. Has the Justice Department been engaged, to your knowledge, in a “case by case” adjudication of whether government funded religious organizations can discriminate in hiring? If so, who is making decisions? What standards are being applied in making these decisions?

Response: CRT

Office of Legal Counsel Memorandum On RFRA:

On September 17, 2009, 57 religious, education, civil rights, labor, and health organizations wrote to Attorney General Eric Holder, asking him to review and withdraw a Bush-era, June 29, 2007 Office of Legal Counsel Memorandum (“OLC Memo”). The OLC Memo at issue determined that the Religious Freedom Restoration Act of 1993 (“RFRA”) provides for a blanket override of binding, statutory nondiscrimination provisions for religious organizations that provide government funded social service programs, such as Head Start and the Workforce Investment Act. The OLC Memo wrongly asserts that RFRA is “reasonably construed” to require that a federal agency categorically exempt a religious organization from an explicit federal statutory nondiscrimination provision tied to a grant program. The Memo has been criticized by many legal scholars as fundamentally unsound. Many civil rights organizations – including those that supported the passage of RFRA – never foresaw that RFRA would be used as a weapon to overturn decades-old statutory civil rights protections.

17. Do you know whether the Office of Legal Counsel is reviewing the Memorandum at issue?

Response: OLC

18. Do you have a position on whether the Memorandum should be sustained, reformed, or overturned?

Response: OLC

19. Will the Justice Department respond to the letter signed by the 57 organizations?

Response: OLC

Civil Rights Division:

Under the Bush Administration, the Civil Rights Division, through the Employment Litigation Section, filed an amicus brief in *Lown v. Salvation Army*. In that brief the United States contended that, even though the Salvation Army receives direct government funding, it could not be a state actor and therefore could not violate the Establishment and Equal Protection Clauses in discriminating on the basis of religion in government-funded Salvation Army jobs. This marked the first time that the Civil Rights Division has ever filed a brief in federal court contending that government-funded religious discrimination is lawful and does not implicate Establishment Clause concerns.

20. Would your Civil Rights Division take a position like that which was taken in the Salvation Army amicus brief?

Response:

21. What are the priorities of the Civil Rights Division?

Response: CRT

Crime:

22. What is the statute of limitations for the federal offense of torture? What is the statute of limitations for conspiracy to commit torture? What is the statute of limitations for acting as an accessory after the fact with respect to torture? What is the statute of limitations for conspiracy to commit torture, if the torture takes place and kills the person or persons who were tortured? What is the statute of limitations for acting as an accessory after the fact, if the tortured person is killed by the torture?

Response: NSD

23. Please identify the amount of funding requested by the Justice Department for FY 2011 for investigating and prosecuting financial crimes generally and consumer financial crimes, such as identity theft, in particular.

Response: CRM

24. Please identify the amount of funding requested by the Justice Department for FY 2011 for the analysis of DNA samples in rape kits.

Response: OJP and FBI

25. When you testified before the Committee last year, you said you directed that a task force be established in the Department to examine sentencing laws and how to make them more equitable, including looking at mandatory minimums. Please tell us what the task force has concluded.

Response: CRM

26. Over the past few years, the Crime Subcommittee has learned a lot about the serious threat to our retail industry posed by Organized Retail Theft. I am not talking about local, small-time shoplifting. I am talking about large, sophisticated, interstate crime rings that cost retailers tens of billions of dollars per year. We have reached out to the Department and the FBI to ask that you work with us in establishing a more robust federal role in targeting these rings, even if much of that role is in an intermediary capacity between law enforcement and retailers. And this could be subject to our giving you additional funding for this purpose.

Response: CRM

27. We understand that the DOJ recently held its human trafficking conference. Significant emphasis was placed on the trafficking of individuals across international boundaries. Several cases of American girls who were trafficked across state lines for coerced prostitution, whose traffickers solicited customers on the internet, via Craigslist and other web sites have recently been brought to my attention. What is DOJ doing to ensure that sites like this do not facilitate the trafficking of children?

Response: CRM

28. I commend the Department for creating the Access to Justice Office and appointing Lawrence Tribe to head the office. What specific measures will the Access to Justice Office take to address the indigent defense crisis that states are facing?

Response: ATJ/Overmann

29. As you know the Federal Prison Industry program provides federal inmates with critical job experience to prepare them for reentry back in to their communities. In July 2009, BOP announced that it has begun closing FPI factories at 14 prisons and scaling back operations at four more. What can this Administration do to demonstrate support for FPI and the employment opportunities it provides to prisoners?

Response: BOP

30. Extensive research has revealed that misguided policies purporting to be “tough on crime” in fact increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate the problem of gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse disorder into the justice system, and often make communities less safe. Meanwhile, research from top scholars in a variety of fields including criminal justice, economics, education, psychology, and public health reveals that public dollars spent on effective prevention and education programs are far more effective in stemming violence, curtailing crime and delinquency, and discouraging gang affiliation than broadening prosecutorial powers or stiffening criminal penalties for young people accused of crimes.
- In light of this research,
- a. What steps will the Department of Justice take to prioritize juvenile justice and youth violence prevention in this Administration?

Response: OJP

- b. Will the Department support legislation and policies that invest in effective prevention and education programs designed to stem violence, curtail crime and delinquency, and discouraging gang affiliation, including the Youth PROMISE Act, Reauthorization of the Juvenile Justice and Delinquency Prevention Act and Reauthorization of the Juvenile Accountability Block Grant?

Response: OJP

- 31. An abundance of research reveals widespread, racially disparate treatment across the entire spectrum of America's juvenile and criminal justice systems. Poor and minority youth and adult criminal defendants receive disproportionately severe treatment at every stage of the system – from the initial law enforcement contact, through sentencing. The perpetuation of such racial disparity in the criminal justice system threatens to undermine the principle of equal justice under the law, and challenges the notion of our criminal justice system as fair, effective and just.

In his testimony before the United States Senate Judiciary Committee, Subcommittee on Crime and Drugs, in the hearing on “Restoring Fairness to Federal Sentencing,” Assistant Attorney General Lanny Breuer testified that “Ensuring fairness in the criminal justice system is ... critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.”

What steps will the Department of Justice take to address racial disparity in the criminal justice system?

Response: CRM

- 32. On September 22, 2003, then-Attorney General John Ashcroft ordered federal prosecutors to seek the maximum penalties against defendants and to limit the use of plea bargains.[2] The tough new Department policy was outlined in a memo distributed to all 93 U.S. attorneys, dramatically reducing prosecutors' discretion in federal criminal cases ranging from drug trafficking to money laundering to terrorism. Under former Attorney General Janet Reno, prosecutors were given greater discretion to assess individual cases and determine the most appropriate charge for each offense. Will you maintain the policy implemented by former Attorney General

Ashcroft, or will you return to the flexibility and discretion provided for by Attorney General Reno?

Response: CRM

QUESTIONS POSED BY REPRESENTATIVE LOFGREN

33. In August 2008, a man named Hiu Lui Ng died in the custody of U.S. Immigration and Customs Enforcement (ICE) under extremely troubling circumstances. Mr. Ng was a computer engineer who owned a home, was married to a U.S. citizen, had no criminal history and posed no danger to the community. At the time, Chairman Conyers and Chairwoman Lofgren sent a letter to the Secretary of Homeland Security calling for an investigation, and ICE subsequently terminated its agreement to house detainees at the facility in question, the Donald W. Wyatt Detention Facility in Central Falls, Rhode Island. According to public reports, the Department of Justice initiated a criminal investigation into violations of Mr. Ng's civil rights, some of which were reportedly recorded by the facility's security cameras. What is the status of that criminal investigation and when do you expect it to be completed?

Response: CRT

34. What role do you expect the Department of Justice to play in addressing future violations of civil and constitutional rights that take place in immigration detention settings?

Response: CRT

35. On February 12, 2009, the Judiciary Committee called for an investigation into reports of misconduct by the Maricopa County Sheriff's Office (MCSO), including racial profiling and unlawful detention. The Department of Justice initiated an investigation one month later into alleged civil rights violations committed by the MCSO, and the investigation remains pending to date. What is the status of the investigation into MCSO and when do you expect that investigation to be completed?

Response: CRT

QUESTIONS POSED BY REPRESENTATIVE COHEN

Youth Violence:

As you know, the Department of Justice has recently partnered with the Department of Education and the City of Memphis to develop strategies for reducing youth violence in Memphis. I want to personally thank you for this initiative and I'm very excited by the work you're doing.

One thing that concerns me in our approach to communicating with young people is how negative the tone often takes. Too often we just try to scare them into shaping up rather than offering a positive message of hope and the value of education. To combat this negativity, I introduced legislation called the Positive Reduction of Incarceration by Maximizing Education (PRIME) Act of 2010, which would establish national, regional, and local public awareness campaigns focused on promoting the advantages of continued education among youth.

36. Do you think that we would benefit from a public service campaign of positive messages directed toward youth?

Response: OJP

Medical Marijuana:

As we discussed, marijuana is considered a Schedule I drug under the Controlled Substances Act. The Merck Manual describes Schedule I drugs as "substances [that] have a high potential for abuse, no accredited medical use, and a lack of accepted safety. They can be used only under government-approved research conditions."

While I agree that the federal government should work to reduce the violence caused by drug cartels, my question was focused on whether marijuana meets the criteria for Schedule I drugs, particularly in light of the evidence that it has medicinal value and low potential for abuse.

Marijuana is currently being prescribed in 14 states plus the District of Columbia to relieve nausea, increase appetite, reduce muscle spasms, relieve chronic pain, and relieve anxiety in association with such conditions as Cancer, Glaucoma, HIV/AIDS, Crohn's Disease, Hepatitis C, and Multiple Sclerosis.

37. Why should marijuana continue to be considered a Schedule I drug when there is ample evidence that it has medical use?

Response: DEA

38. Given the years of experience with medical marijuana and the lack of any evidence that addiction has increased as medical marijuana has become more widely available, shouldn't the Department of Justice move marijuana off of Schedule I so that it can use its limited law enforcement and correctional resources on greater priorities?

Response: DEA

39. Do you agree that since 14 states plus the District of Columbia have approved of medical marijuana, the people of those 14 states plus the District of Columbia have found that there is a medical use for marijuana and therefore labeling it as having no medical use is per se invalid?

I am not advocating legalization of marijuana, but millions of people each year are being deprived of their liberty because of arrests for possession of small amounts of marijuana.

Response: DEA

40. Do you agree that our limited law enforcement and correctional resources would be better spent if marijuana were shifted away from Schedule I so that law enforcement resources and correctional facilities could be used for citizens that are selling and becoming addicted to drugs that have a high potential for abuse, no accredited medical use, and a lack of accepted safety?

Response: DEA

U.S. Bankruptcy Trustee Program:

The U.S. Trustee Program is charged with ensuring the fair administration of the bankruptcy system. But particularly under the prior Administration, I heard many complaints about the program devoting disproportionate attention to debtor conduct without equal attention to creditor conduct.

41. Can you tell me what efforts the Trustee Program has undertaken or plans to undertake to ferret out creditor abuse and to ensure that honest debtors obtain the bankruptcy relief they're entitled to?

Response: UST

42. Will there be any efforts to replace Bush era appointees whose actions are not consistent with the priorities of this Administration to ensure that debtors are treated fairly in the bankruptcy system?

Response: UST

Accommodations for Liberty Bowl:

We have had discussions before about the Liberty Bowl, which is the football stadium in Memphis, and the negotiations over expanding its ADA-compliant seating. This is a stadium that never sells out and has never come close to using all of the accessible seats it already has.

43. What is the status of these negotiations?

Response: CRT

44. Shouldn't there be some recognition of how a facility is actually used when determining its ADA compliance?

Response: CRT

QUESTIONS POSED BY REPRESENTATIVE WEINER

45. The administration through the annual budget has stated that your goal is to hire 50,000 new police officers through the COPS program but has failed to provide a timeline for hiring these new officers. What is the timeline that the administration is using for hiring these officers?

Response: COPS

46. As part of the COPS Hiring Recovery Program, the COPS office capped the maximum number of officers at 50 per jurisdiction. I believe that this cap discriminated against large cities, such as New York and instead the department should institute a cap based on a percentage of the total sworn police force. Have you reviewed the impact of this numerical cap on COPS awards to large cities and what has the department done to fix this situation?

Response: COPS

47. What percent of the sworn police force did the COPS Hiring Recovery Program provide in the top 10 largest cities? How many officers would have been provided to the top 10 largest cities had there not been a 50 officer cap per jurisdiction?

Response: COPS

48. At a recent Crime Subcommittee hearing, members heard testimony on the importance of testing all rape kits. One witness was a rape victim who testified that her rape kit was untested and that a major obstacle to the kit being tested was funding to state labs.

a. What is the current status of the backlog?

Response: OJP and FBI

b. Does the administration support increased funding to state and local crime labs for DNA testing?

Response: OJP

49. How many rape kits are untested by state and local enforcement and crime labs each year?

Response: OJP

QUESTIONS POSED BY REPRESENTATIVE KING

50. At a press conference in Phoenix on March 25, 2010, you said, “Our Civil Rights Division is working on [the investigation of Maricopa county Sheriff Joe Arpaio] in conjunction with the U.S. Attorney's office here in Arizona. And I expect we will produce results.” What did you mean by the comment that the investigation “will produce results”?

Response: CRT

51. Your comments suggest that the Civil Rights Division will file a complaint and that the grand jury will issue an indictment even though both investigations are ongoing. Your comments appear to violate Federal regulations, the U.S. Attorney’s Manual, and ethical rules that bar an attorney from opining on pending cases. Do you think it’s appropriate for the sitting U.S. Attorney General to comment publicly on an ongoing investigation?

Response: CRT

52. Are you concerned that your comments could unfairly pressure Department lawyers into seeking an indictment and filing a lawsuit?

Response: CRT

53. How else could the Department’s lawyers and the grand jurors interpret your comments other than as an instruction to bring an indictment and file a lawsuit?

Response: CRT

54. As shown by the overwhelming support for Arizona’s immigration law, the public is fed up with the problem of illegal immigration. Sheriff Joe Arpaio is doing his best to combat illegal immigration, yet the Justice Department has spent more than a year investigating him. Why is DOJ concentrating so many resources on Sheriff Joe Arpaio rather than fighting illegal immigration? Are you concerned that your activities could deter other law enforcement agencies from fighting illegal immigration?

Response: CRT

55. In your written testimony, you listed a number of ways in which the Justice Department provides assistance to state and local law enforcement officers to ensure our laws are enforced. You mentioned OJP and COPS, Byrne-JAG and even mortgage fraud. How can you support our state and local law

enforcement while threatening to sue the State of Arizona for helping to enforce our federal immigration laws?

Response: CIV

56. There have been several cases that demonstrate the Department of Justice's politicization. In 2008, by a 2 to 1 margin, the City of Kinston, North Carolina voted to end the practice of noting the party affiliation of candidates in local elections. But, in August 2009, as The Washington Times reported, Acting Assistant Attorney General for Civil Rights, Loretta King, informed the City that the removal of party affiliations in its city council and mayoral elections violated the Voting Rights Act. Ms. King is quoted as stating, "Removing the partisan cue in municipal elections will, in all likelihood, eliminate the single factor that allows black candidates to be elected to office." Based on this statement, is it true that the VRA requires "partisan cues" on the ballot because only partisan cues will allow African-American candidates to get elected? What if African-American voters, themselves, voted overwhelmingly to get rid of partisan elections? Isn't the Department pushing a racially motivated ballot? How can stopping African-Americans from adopting a nonpartisan election system further the goal of racial equality?

Response: CRT

57. Further politicization arises in relation to the dismissal of the case against the racist hate group, the New Black Panther Party. The Justice Department has refused to answer many of the questions raised by the U.S. Commission on Civil Rights. It is also reported that the Department is not allowing the lawyers who have been subpoenaed by the Commission to testify about the case. Have you invoked executive privilege as to the documents the Department has not produced and the questions the Department has not answered?

Response: CRT

58. On November 4, 2008, three members of the New Black Panther Party intimidated voters outside a polling location in Philadelphia. These individuals were wearing paramilitary-style uniforms, waving weapons, and uttering racial epithets. Only one of the three individuals received a penalty for his actions. Mr. Shabazz received narrow injunction against him, which prohibits him from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia. Isn't it true that a broad injunction against Mr. Shabazz could have been sought prohibiting him from displaying a weapon within a 100 feet of any open polling location across the United States?

Response:

59. Is it true that this narrow injunction against Mr. Shabazz does not prohibit him from carrying weapons to any open polling location if the weapons are hidden under his paramilitary uniform?

Response: CRT

60. Is it true that this narrow injunction does not prohibit Mr. Shabazz from making intimidating comments to potential voters outside any open polling location in the United States?

Response: CRT

61. Is it true that the initial case against all three members of the New Black Panther Party sought a broad injunction that would prohibit these individuals from intimidating voters outside any polling location in the United States?

Response: CRT

62. So, the maximum penalty under Section 11 of the Voting Rights Act was not sought or obtained for Mr. Shabazz?

Response: CRT

63. Can you explain why the Department changed course and only secured a very narrow injunction against the fourth, in what was a clear and obvious case of voter intimidation?

Response: CRT

64. It is my understanding that Judicial Watch was able to obtain documents from DOJ through FOIA that demonstrated the suppression of voter registration fraud. The documents show that the FBI and DOJ opened investigations into this issue, but the Obama Administration closed down the investigation in March 2009 claiming ACORN broke no laws. Are you aware that ACORN admits to over 400,000 fraudulent voter registrations? Does this not concern you as the Attorney General of the United States? Are you concerned that this corrupt criminal enterprise could be damaging the integrity of our elections?

Response: CRT

From: Barron, David
Sent: Tuesday, May 18, 2010 8:15 PM
To: Dreeben, Michael R; Caproni, Valerie E. (FBI); Schroeder, Christopher H.; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: Re: Miranda/Presentment -- Next steps

On first thought [REDACTED] (b) (5)

[REDACTED] (b) (5)

----- Original Message -----

From: Dreeben, Michael R
To: Caproni, Valerie E. (FBI); Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Sent: Tue May 18 20:11:11 2010
Subject: RE: Miranda/Presentment -- Next steps

(b) (5)

-----Original Message-----

From: Caproni, Valerie E. (FBI)
Sent: Tuesday, May 18, 2010 8:02 PM
To: Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Dreeben, Michael R; Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: Re: Miranda/Presentment -- Next steps

(b) (5)

:)

----- Original Message -----

From: Schroeder, Christopher H (b) (6)
To: Barron, David (SMO); Caproni, Valerie E.; Monaco, Lisa (ODAG) (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)
Cc: Stemler, Patty (CRM); Dreeben, Michael R (SMO); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Sent: Tue May 18 19:54:31 2010
Subject: Re: Miranda/Presentment -- Next steps

Yes from me as to 1 and 3 for the reasons provided by David and Val.

Chris

----- Original Message -----

From: Barron, David
To: Caproni, Valerie E. (FBI); Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie

Cc: Stemler, Patty (CRM); Dreeben, Michael R; Schroeder, Christopher H.; Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Sent: Tue May 18 19:46:45 2010
Subject: RE: Miranda/Presentment -- Next steps

On one [REDACTED] (b) (5)

On three [REDACTED] (b) (5)

-----Original Message-----

From: Caproni, Valerie E. (FBI)
Sent: Tuesday, May 18, 2010 7:38 PM
To: Monaco, Lisa (ODAG); Barron, David; Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Dreeben, Michael R; Schroeder, Christopher H.; Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: RE: Miranda/Presentment -- Next steps

I have 3 thoughts:

1. W [REDACTED] (b) (5)

2. While I thin [REDACTED] (b) (5)

-- I think.

3. I thin [REDACTED] (b) (5)

(b) (5)

-----Original Message-----

From: Monaco, Lisa (ODAG) [[mailto:\[REDACTED\]](#)] (b) (6)
Sent: Tuesday, May 18, 2010 6:34 PM
To: Caproni, Valerie E.; Barron, David (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)
Cc: Stemler, Patty (CRM); Dreeben, Michael R (SMO); Schroeder, Christopher H. (SMO); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Subject: RE: Miranda/Presentment -- Next steps

All -- attached is a redline that seeks to consolidate the comments/redlines received in response to my email last night. I plan to provide this draft to the AG for his review.

thanks

-----Original Message-----

From: Caproni, Valerie E. (FBI)
Sent: Tuesday, May 18, 2010 9:37 AM

To: Barron, David; Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Dreeben, Michael R; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: RE: Miranda/Presentment -- Next steps

(b) (5)

-----Original Message-----

From: Barron, David [mailto:(b) (6)]

Sent: Tuesday, May 18, 2010 8:46 AM

To: Hinnen, Todd (NSD) (SMO)

Cc: Caproni, Valerie E.; Stemler, Patty (CRM); Dreeben, Michael R (SMO); Schroeder, Christopher H. (SMO); Monaco, Lisa (ODAG) (SMO); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John

Subject: RE: Miranda/Presentment -- Next steps

Todd or anyone else - (b) (5)

-----Original Message-----

From: Hinnen, Todd (NSD)

Sent: Tuesday, May 18, 2010 8:15 AM

To: Barron, David

Cc: Caproni, Valerie E. (FBI); Stemler, Patty (CRM); Dreeben, Michael R; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)

Subject: FW: Miranda/Presentment -- Next steps

All -

Sorry for the late intervention - I was omitted from the original e-mail chain.

We've given some thought to (b) (5)

Todd

-----Original Message-----

From: Barron, David

Sent: Tuesday, May 18, 2010 7:29 AM

To: Caproni, Valerie E. (FBI); Stemler, Patty (CRM); Dreeben, Michael R; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)

Cc: Grindler, Gary (ODAG)

Subject: Re: Miranda/Presentment -- Next steps

In that regard (b) (5)

From: Caproni, Valerie E. (FBI)

To: Stemler, Patty (CRM); Barron, David; Dreeben, Michael R; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)

Cc: Grindler, Gary (ODAG)

Sent: Tue May 18 06:00:20 2010

Subject: Re: Miranda/Presentment -- Next steps

PS (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

From: Stemler, Patt (b) (6)
To: Barron, David (SMO); Dreeben, Michael R (SMO); Caproni, Valerie E.; Schroeder, Christopher H. (SMO); Monaco, Lisa (ODAG) (SMO); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Cc: Grindler, Gary (ODAG) (SMO)
Sent: Mon May 17 23:27:40 2010
Subject: Re: Miranda/Presentment -- Next steps

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally (b) (5)

[REDACTED]

[REDACTED]

From: Barron, David (b) (6)
To: Dreeben, Michael R <Michael.R.Dreeben@SMOJMD.USDOJ.gov>; Caproni, Valerie E. (FBI); Schroeder, Christopher H. (b) (6); Monaco, Lisa (ODAG) (b) (6); Olsen, Matthew (ODAG) (b) (6); Kris, David (NSD) (b) (6); Jeffress, Amy (OAG) (b) (6); Stemler, Patty; Carlin, John (FBI)
Cc: Grindler, Gary (ODAG) (b) (6)
Sent: Mon May 17 22:21:21 2010
Subject: Re: Miranda/Presentment -- Next steps

Meant to send this earlier on michael's point about (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]?

From: Dreeben, Michael R
To: Caproni, Valerie E. (FBI); Barron, David; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Stemler, Patty (CRM); Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Sent: Mon May 17 20:03:57 2010
Subject: RE: Miranda/Presentment -- Next steps

What is (b) (5)

[REDACTED]

[REDACTED]

[REDACTED].

From: Caproni, Valerie E. (FBI)
Sent: Monday, May 17, 2010 7:59 PM
To: Dreeben, Michael R; Barron, David; Schroeder, Christopher H.; Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Stemler, Patty (CRM); Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Subject: Re: Miranda/Presentment -- Next steps

I thin (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

From: Dreeben, Michael (b) (6)
To: Barron, David (SMO); Schroeder, Christopher H. (SMO); Caproni, Valerie E.; Monaco, Lisa (ODAG) (SMO); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Stemler, Patty (CRM); Carlin, John
Cc: Grindler, Gary (ODAG) (SMO)
Sent: Mon May 17 19:54:15 2010
Subject: RE: Miranda/Presentment -- Next steps

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Barron, David
Sent: Monday, May 17, 2010 7:47 PM
To: Schroeder, Christopher H.; Caproni, Valerie E. (FBI); Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Dreeben, Michael R; Stemler, Patty (CRM); Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Subject: Re: Miranda/Presentment -- Next steps

I agree , plu (b) (5)

[REDACTED]

[REDACTED]

From: Schroeder, Christopher H.
To: Barron, David; Caproni, Valerie E. (FBI); Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Dreeben, Michael R; Stemler, Patty (CRM); Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Sent: Mon May 17 19:32:10 2010
Subject: RE: Miranda/Presentment -- Next steps

From: Barron, David
Sent: Monday, May 17, 2010 6:54 PM
To: Caproni, Valerie E. (FBI); Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Dreeben, Michael R; Stemler, Patty (CRM); Schroeder, Christopher H.; Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Subject: RE: Miranda/Presentment -- Next steps

From: Caproni, Valerie E. (FBI)
Sent: Monday, May 17, 2010 5:48 PM
To: Monaco, Lisa (ODAG); Olsen, Matthew (ODAG); Barron, David; Kris, David (NSD); Jeffress, Amy (OAG); Dreeben, Michael R; Stemler, Patty (CRM); Schroeder, Christopher H.; Carlin, John (FBI)
Cc: Grindler, Gary (ODAG)
Subject: RE: Miranda/Presentment -- Next steps

On scope (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

Document ID: 0.7.4618.5264

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

VC

From: Monaco, Lisa (ODAG) [[mailto:](#)(b) (6)]
Sent: Monday, May 17, 2010 3:37 PM

To: Olsen, Matthew (ODAG) (SMO); Barron, David (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Dreeben, Michael R (SMO); Stemler, Patty (CRM); Schroeder, Christopher H. (SMO); Carlin, John; Caproni, Valerie E.
Cc: Grindler, Gary (ODAG) (SMO)
Subject: Miranda/Presentment -- Next steps

All - Attached is the next iteration of the legislative language. Due to the number of unforeseen press stories about these efforts I've been asked not to distribute this widely and/or beyond this group. I've reviewed the attached quickly and it appears to incorporate many of our changes from last week. Of note, however, is the absence of our suggested language (b) (5)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Please provide comments on the attached by tomorrow morning.

Als (b) (5)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] If folks could give any thoughts they have on this issue by tomorrow morning as well, I'd appreciate it.

Thanks,

Lisa

From: Monaco, Lisa (ODAG)
Sent: Tuesday, May 18, 2010 9:57 PM
To: Barron, David
Subject: Re: Miranda/Presentment -- Next steps

(b) (5)

----- Original Message -----

From: Barron, David
To: Monaco, Lisa (ODAG)
Sent: Tue May 18 21:27:08 2010
Subject: Fw: Miranda/Presentment -- Next steps

Just to you (b) (5)

?

----- Original Message -----

From: Kris, David (NSD)
To: Caproni, Valerie E. (FBI); Dreeben, Michael R; Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Jeffress, Amy (OAG); Carlin, John (FBI)
Sent: Tue May 18 20:56:51 2010
Subject: Re: Miranda/Presentment -- Next steps

(b) (5)

(b) (5)

."

Alternatively, I suppose we could (b) (5)

"

Anyway, again, I know that it may be too late to do this intelligently, but I'd welcome any thoughts.

Thanks.

----- Original Message -----

From: Caproni, Valerie E. (FBI)
To: Dreeben, Michael R; Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Kris, David (NSD); Jeffress, Amy (OAG); Carlin, John (FBI)
Sent: Tue May 18 20:44:06 2010
Subject: Re: Miranda/Presentment -- Next steps

I could live w/ that. Only problem i (b) (5)

----- Original Message -----

From: Dreeben, Michael (b) (6) v>
To: Caproni, Valerie E.; Schroeder, Christopher H. (SMO); Barron, David (SMO); Monaco, Lisa (ODAG) (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Sent: Tue May 18 20:40:35 2010
Subject: RE: Miranda/Presentment -- Next steps

I'm ok with that too (b) (5)

-----Original Message-----

From: Caproni, Valerie E. (FBI)
Sent: Tuesday, May 18, 2010 8:28 PM
To: Dreeben, Michael R; Schroeder, Christopher H.; Barron, David;
Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Kris, David (NSD);
Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: Re: Miranda/Presentment -- Next steps

Why can't w (b) (5)

----- Original Message -----

From: Dreeben, Michael R (b) (6)
To: Caproni, Valerie E.; Schroeder, Christopher H. (SMO); Barron, David (SMO); Monaco, Lisa (ODAG) (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)
Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG) (SMO); Kris, David (NSD) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Sent: Tue May 18 20:11:11 2010
Subject: RE: Miranda/Presentment -- Next steps

Duplicative Material, Document ID: 0.7.4618.5264

From: Caproni, Valerie E. (FBI)
Sent: Wednesday, May 19, 2010 8:25 AM
To: Kris, David (NSD); Dreeben, Michael R; Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie
Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Jeffress, Amy (OAG); Carlin, John (FBI)
Subject: RE: Miranda/Presentment -- Next steps

Looks better. (b) (5)

-----Original Message-----

From: Kris, David (NSD) [mailto:(b) (6)]
Sent: Tuesday, May 18, 2010 9:32 PM
To: Caproni, Valerie E.; Dreeben, Michael R (SMO); Schroeder, Christopher H. (SMO); Barron, David (SMO); Monaco, Lisa (ODAG) (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Subject: Re: Miranda/Presentment -- Next steps

I guess that's right -- mayb (b) (5)

Thanks.

----- Original Message -----

From: Caproni, Valerie E. (FBI)
To: Kris, David (NSD); Dreeben, Michael R; Schroeder, Christopher H.; Barron, David; Monaco, Lisa (ODAG); Hinnen, Todd (NSD); Rhee, Jeannie

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG); Jeffress, Amy (OAG); Carlin, John (FBI)
Sent: Tue May 18 21:07:50 2010
Subject: Re: Miranda/Presentment -- Next steps

David,
I wonder i (b) (5)
VC

----- Original Message -----

From: Kris, David (NSD) (b) (6)
To: Caproni, Valerie E.; Dreeben, Michael R (SMO); Schroeder, Christopher H. (SMO); Barron, David (SMO); Monaco, Lisa (ODAG) (SMO); Hinnen, Todd (NSD) (SMO); Rhee, Jeannie (SMO)

Cc: Stemler, Patty (CRM); Olsen, Matthew (ODAG) (SMO); Jeffress, Amy (OAG) (SMO); Carlin, John
Sent: Tue May 18 20:56:51 2010
Subject: Re: Miranda/Presentment -- Next steps

Duplicative Material, Document ID: 0.7.4618.5326

From: Thompson, Karl
Sent: Monday, May 24, 2010 10:20 AM
To: Raab, Michael (CIV); Overton, Spencer; Tyrangiel, Elana; Aguilar, Rita C.; Burrows, Charlotte
Cc: Ellman, Lisa; Baker, Lamar W.; Lederman, Marty; Stewart, Malcolm L; Bagley, Nicholas (CIV); Barron, David
Subject: RE: Committee Report on HR 5175 DISCLOSE Act
Attachments: CU -- Committee Report Redline 1.docx

Here are some comments from me in redline, to be incorporated into the draft OLP will circulate. (I worked off a draft that accepted the Hill's tracked changes, but showed in redline some (though not all) OLP's changes – I think my changes are in blue.)

From: Raab, Michael (CIV)
Sent: Monday, May 24, 2010 9:59 AM
To: Overton, Spencer; Thompson, Karl; Tyrangiel, Elana; Aguilar, Rita C.; Burrows, Charlotte
Cc: Ellman, Lisa; Baker, Lamar W.; Lederman, Marty; Stewart, Malcolm L; Bagley, Nicholas (CIV)
Subject: RE: Committee Report on HR 5175 DISCLOSE Act

We had a few quick thoughts on the draft Committee Report. First (b) (5)

[REDACTED]

Second, (b) (5)

[REDACTED]

Third (b) (5)

[REDACTED]

From: Overton, Spencer
Sent: Saturday, May 22, 2010 10:02 PM
To: Thompson, Karl; Tyrangiel, Elana; Aguilar, Rita C.; Burrows, Charlotte
Cc: Ellman, Lisa; Raab, Michael (CIV); Baker, Lamar W.; Lederman, Marty; Stewart, Malcolm L
Subject: Re: Committee Report on HR 5175 DISCLOSE Act

I think that would be fine, although if other components have comments or thoughts on the existing draft please submit before 10 am Monday morning.

Spencer

From: Thompson, Karl
To: Tyrangiel, Elana; Aguilar, Rita C.; Overton, Spencer; Burrows, Charlotte
Cc: Ellman, Lisa; Raab, Michael (CIV); Baker, Lamar W.; Lederman, Marty; Stewart, Malcolm L
Sent: Sat May 22 18:28:37 2010
Subject: Re: Committee Report on HR 5175 DISCLOSE Act

Copying Malcolm and Marty. So the idea is OLP will redline its collective additions into this House draft and then circulate Mon around noon for quick review by CIV, OSG, OLC, and ODAG by Mon afternoon? That would work for me.

From: Tyrangiel, Elana
To: Aguilar, Rita C.; Overton, Spencer; Burrows, Charlotte
Cc: Ellman, Lisa; Thompson, Karl; Raab, Michael (CIV); Baker, Lamar W.
Sent: Sat May 22 17:02:01 2010
Subject: Re: Committee Report on HR 5175 DISCLOSE Act

Would it make sense for everyone to redline this copy and submit to OLP for aggregation no later than 10 am Monday; OLP could then recirculate the composite for review around noon (so we can get our final edits to Hill Monday evening or Tuesday morning)? Lamar and I, per our mtg on Friday, could simply insert our paragraphs on disclosure and foreign control, respectively, into the redlined versions for the group's review, if that's workable. Happy, of course, to participate in a conference call or defer to others (I know Spencer will be back on-line after 9 tonight). Also, Karl, would you be able to get this to the right person in OSG?

From: Aguilar, Rita C.
To: Overton, Spencer; Burrows, Charlotte
Cc: Tyrangiel, Elana; Ellman, Lisa; Thompson, Karl; Raab, Michael (CIV); Baker, Lamar W.; Aguilar, Rita C.
Sent: Sat May 22 14:47:14 2010
Subject: Committee Report on HR 5175 DISCLOSE Act

Attached is the Committee Report on HR 5175 DISCLOSE Act.

Please review and let me know if you all would like to jump on a conf call later today or tomorrow to discuss further, assign/delegate tasks, etc.

I spoke with Spencer to let him know that we received this and confirmed with Jim that the Committee's deadline is COB Monday (Tuesday am at the latest).

The instructions are to treat this like I described with the Native Hawaiian bill committee report -- as an opportunity to offer recommendations that make the report stronger for future litigation.

Please let me know if you have any questions. Thanks, Rita (B (b) (6))

From: Papa, Jim (b) (6)
To: Aguilar, Rita C.; Eisen, Norman L. (b) (6) >; Verrilli, Donald B.
(b) (6) Bassin, Ia (b) (6); Loeb, Emily M.
(b) (6)
Cc: Overton, Spencer
Sent: Sat May 22 13:51:09 2010
Subject: Fw: Committee Report on HR 5175 DISCLOSE Act

No specific instructions from me other than to treat this as we did the Native Hawaiian bill committee report -- as an opportunity to offer recommendations that make the report stronger for future litigation.

Looping others.

From: Aguilar, Rita C (b) (6)
To: Papa, Jim
Sent: Sat May 22 13:44:23 2010
Subject: Fw: Committee Report on HR 5175 DISCLOSE Act

Jim, does this mean I can circulate internally for input? Do you have any specific instructions?

From: Daehn, Jennife (b) (6)
To: Hicks, Thoma (b) (6); Fleet, Jami (b) (6); Pinkus, Matt (b) (6) > (b) (6) >; Aguilar, Rita C.
Cc: Daehn, Jennife (b) (6) >; Hu, Janell (b) (6) Favarulo, Daniel (b) (6) > (b) (6) (b) (6)
Sent: Sat May 22 13:13:09 2010
Subject: Committee Report on HR 5175 DISCLOSE Act

Attached is the draft Committee Report on HR 5175. Please make all revisions to this draft.

Thank you,

Jennifer

Jennifer Daehn
Elections Counsel
Committee on House Administration
1309 Longworth Building
Washington, DC 20515-6157

(b) (6)

Ce (b) (6)

From: Colborn, Paul P
Sent: Tuesday, May 25, 2010 10:37 AM
To: Barron, David
Cc: Rhee, Jeannie
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

David, you'll see that Lisa has forwarded to OLA the email you asked me to send to Stuart. I guess the net of this will be that the meeting you want with Gary will include OLA. Not necessarily a problem – just a bigger meeting.

From: Burton, Faith
Sent: Tuesday, May 25, 2010 10:30 AM
To: Colborn, Paul P
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

What is your thinking here? Loop in Fed Programs for what?

From: Monaco, Lisa (ODAG)
Sent: Tuesday, May 25, 2010 9:11 AM
To: Weich, Ron; Burton, Faith
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

Ron, Faith – This was forwarded to me from Stuart, I think we should discuss what our strategy will be. Will ask Charles to set something up

From: Delery, Stuart F. (ODAG)
Sent: Monday, May 24, 2010 6:33 PM
To: Monaco, Lisa (ODAG)
Subject: Fw: Ft. Hood: Lieberman/Collins letter to SecDef/AG

FYI.

From: Colborn, Paul P
To: Delery, Stuart F. (ODAG)
Cc: Barron, David; Rhee, Jeannie
Sent: Mon May 24 18:09:35 2010
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

Stuart, I just talked with David about this. He asked me to forward this and to say that we think it would be a good idea to schedule soon the meeting with Gary that we had previously suggested.

From: Colborn, Paul P
Sent: Monday, May 24, 2010 5:59 PM
To: Barron, David; Rhee, Jeannie; LeBlanc, Travis
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

This letter from Senate HSGAC puts the AG and SecDef on notice that the Committee will consider them in default on the subpoenas if they don't comply by next Wednesday, June 2nd; that the Chairman and Ranking Member will then rule on that default and issued an order of production; and if that order is not complied with, they "would then convene the Committee on the earliest date practicable to consider measures for enforcing the subpoenas, including holding [the AG and SecDef] in contempt of Congress."

The letter also rejects Jeh Johnson's offer of briefings that were conditioned on the Committee's withdrawal of the subpoenas, saying that they are willing to do the briefings and that they might modify their requests based on the briefings, but they "will only accept such briefings without prejudice to our rights under the subpoenas."

This might be a good time to loop in Fed Programs.

From: Burton, Faith
Sent: Monday, May 24, 2010 5:41 PM
To: Colborn, Paul P
Subject: FW: Ft. Hood: Lieberman/Collins letter to SecDef/AG

From: Lederman, Gordon (HSGAC) [[mailto:](#) (b) (6)]
Sent: Monday, May 24, 2010 4:23 PM
To: 'Johnson, Jeh Charles, Hon, DoD OGC'; King, Elizabeth L, HON OSD LA; 'Lettre, Marcel Mr. (SES) OSD LA' (b) (6)
(b) (6), DoD OG (b) (6) Lt Col OSD LA'; Weich, Ron (b) (6), (b) (7)(C) (FBI); Burton, Faith
Cc: Alexander, Michael (HSGAC); Milhorn, Brandon (HSGAC); Neven, Teresa (HSGAC)
Subject: Ft. Hood: Lieberman/Collins letter to SecDef/AG

Please see attached. Thank you.



5.24.10 Gates
Holder.pdf

CARL LEVIN, MICHIGAN
DANIEL K. AKAKA, HAWAII
THOMAS R. CARPER, DELAWARE
MARK L. PRYOR, ARKANSAS
MARY L. LANDRIEU, LOUISIANA
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
ROLAND W. BURRIS, ILLINOIS
EDWARD E. KAUFMAN, DELAWARE

SUSAN M. COLLINS, MAINE
TOM COBURN, OKLAHOMA
SCOTT BROWN, MASSACHUSETTS
JOHN MCCAIN, ARIZONA
GEORGE V. VOINOVICH, OHIO
JOHN ENSIGN, NEVADA
LINDSEY GRAHAM, SOUTH CAROLINA

MICHAEL L. ALEXANDER, STAFF DIRECTOR
BRANDON L. MILHORN, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

May 24, 2010

The Honorable Robert M. Gates
Secretary
U.S. Department of Defense
1000 Defense Pentagon, Room 3E718
Washington, DC 20301

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
905 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Secretary Gates and Attorney General Holder:

We are writing in response to the failure of the Departments of Defense and Justice (DOD and DOJ) to comply with the subpoenas issued by the Senate Committee on Homeland Security and Governmental Affairs to compel production of documents critical to our investigation of how the government handled information concerning the alleged assailant, Major Nidal Malik Hasan, prior to the November 5, 2009, attack at Fort Hood, Texas. Our issuance of the subpoenas came after five months of unsuccessful efforts to obtain the Administration's cooperation with our requests for documents and interviews. It has now been more than one month since the subpoenas were served on you, and yet you have failed to produce to the Committee all the responsive materials sought in the subpoenas or to assert any legal basis for withholding the materials. While the two communications sent from your Departments to the Committee in response to the subpoenas (the Departments' April 27, 2010, letter and the DOD General Counsel's May 12, 2010, letter) explain the Departments' defiance of the subpoenas, neither letter offers any supportable legal ground for refusing to produce materials required by the subpoenas.

As explained below, the Committee rejects the Departments' offer to provide briefings for the Committee as a substitute for providing the documents sought by the subpoenas, and the Committee hereby puts you on notice that by Wednesday, June 2, 2010, you will be considered in default of the subpoena if the Departments have not produced the outstanding materials sought by the subpoenas or provided the Committee with legal defenses for not complying with the subpoenas.

I. Your Departments Have Failed To Comply With The Subpoenas' Request For Materials And To Assert Any Legal Defenses To Justify Such Defiance.

Your Departments are not in compliance with the subpoenas' requests for materials. Specifically, the Departments have failed to provide the materials sought by requests numbers 3 and 4 in the subpoena to Secretary Gates and request number 1 in the subpoena to Attorney General Holder. Those requests seek: (1) documents containing the names of front-line DOD and DOJ law enforcement and intelligence agents who reviewed Major Hasan's communications prior to the attack, and (2) the transcripts or summaries of prosecutorial interviews provided to

DOD's internal review conducted by former Secretary of the Army Togo West and retired Admiral Vern Clark. Your Departments' April 27 letter conveyed your refusal to provide these materials.

DOD and DOJ are also not in compliance with the subpoenas' requirement to specify a privilege as a basis for withholding the requested documents. Instruction (i) of the subpoenas directs DOD and DOJ to submit a privilege log that identifies information regarding each record withheld, including the privilege being asserted, in order for the Committee to rule on the validity of that privilege. As DOJ's Office of Legal Counsel has recognized, executive privilege – when properly asserted – is the sole privilege that is legally sufficient to justify non-compliance with a Congressional subpoena. 6 Op. Off. Legal Counsel 782, 784 n.5 (1983) (“As the doctrine is currently implemented, executive privilege may be formally invoked to prevent disclosures to Congress only by the President personally. Absent such formal invocation, executive officers are obliged to comply with all congressional requests for information in a manner consistent with their duty to execute the law.”) The consistent practice of every President since 1982 has been that only the President asserts executive privilege; a Department asserting executive privilege must indicate that the President himself has so authorized.

DOD and DOJ have not asserted executive privilege as a defense for their failure to produce the documents as required by the subpoenas. Instead, the Departments have offered weak and unsupported explanations for why they would prefer not to provide the Committee with the documents. Not only are such explanations unconvincing, but also they do not qualify as legal bases for withholding documents sought by Congressional subpoena. While we address these excuses at length in the attached annex, the following three points underlie the unpersuasive nature of the explanations you have offered:

- Our investigation's purpose is not to assess Major Hasan's culpability for the attack on November 5 or the conduct of the prosecution but rather to determine what information the government knew about Major Hasan before the shootings and what actions the government took as a result.
- Not only is there precedent for Congress interviewing front-line agents even when such agents are potential witnesses in a prosecution, but also a senior Federal Bureau of Investigation official has already interviewed some of the agents whom we wish to interview.
- Your Departments' putative concerns regarding pretrial publicity ignore the fact that (1) your Departments have repeatedly spurned our offer to negotiate protocols governing our disclosure of information that we would obtain, and (2) there has already been substantial publicity concerning the attack, with numerous Department officials having spoken to the media.

Simply put, the Departments are required to produce documents responsive to the subpoenas or to assert executive privilege as a basis for withholding them. You have done neither.

II. The Departments' Offer That The Committee Waive Its Right To The Requested Documents And Accept Senior-Level Briefings Is Unsatisfactory.

The DOD General Counsel's May 12 letter offered to provide the Committee with briefings by senior DOD and DOJ officials as a substitute for fully complying with the subpoenas. While the Committee is open to receiving briefings from Department officials as part of its investigation, the Departments' offer is unacceptable because it requires us to withdraw the subpoenas *before* receiving such briefings. The Committee surely cannot determine beforehand whether any briefing will provide it with a sufficient substitute to the information sought in the subpoenas. Accordingly, we cannot possibly agree to withdraw our subpoenas – or even, as the May 12 letter requested, provide a “reasonable degree of assurance” that we would do so – before receiving the briefings.

- It is highly unlikely that senior officials' briefings can substitute for direct interviews of the agents involved in reviewing and acting upon Major Hasan's communications prior to the attack. We would not expect briefings by senior officials to provide the sort of spontaneous interaction, including the ability to ask follow up factual questions and pursue lines of factual inquiry raised by unforeseen responses, that comes from directly interviewing the agents who have direct, factual knowledge of the actions that are the subject of the Committee's inquiry.
- Your Departments cannot offer any principled reason why DOD's internal review was permitted to examine the transcripts and summaries of prosecutorial interviews but Congress is blocked from doing so.

No DOJ or DOD investigators would ever be satisfied with second-hand briefings as opposed to interviewing actual witnesses and examining primary documents. Congress cannot fulfill its Constitutional responsibility to conduct oversight of the Executive Branch by accepting such second-hand information from the Departments.

We are not seeking a confrontation, and we are willing to consider other avenues for resolving this dispute short of enforcement of the subpoenas. For example, we have made clear that we are willing to accept briefings without pre-conditions. In the event that these briefings did provide us with some of the in-depth and detailed information that we expect to receive from reviewing documents and interviewing witnesses, we would be willing to modify our requests as appropriate; however, we will only accept such briefings without prejudice to our rights under the subpoenas. Furthermore, we have offered numerous times to negotiate protocols with your Departments in an effort to ensure that our Committee may access the information needed for our investigation while ameliorating any legitimate concerns that your Departments may have regarding the conduct of interviews and the use of information gleaned from the interviews and documents. Yet your Departments have refused to negotiate such protocols with us – even ignoring draft protocols that our staff submitted to your Departments in a good faith effort to open discussion.

*

*

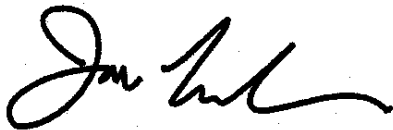
*

Accordingly, to come into full compliance with your legal duties under the subpoenas, you must, by Wednesday, June 2, 2010 at 10 a.m., either (1) produce all outstanding materials

required by the subpoenas or (2) comply with Instruction (i) in the subpoenas and provide a privilege log regarding any responsive documents that have not been produced and specifying whether executive privilege is being asserted as to that document and whether the President has personally authorized the assertion of the privilege. The privilege log should contain sufficient information for the Committee to determine the legal and factual basis supporting any such assertion of privilege.

We, on behalf of the Committee, will rule expeditiously on any failure to produce materials required by the subpoena or on any assertions of privilege made by the Departments, and order the production of any materials that have been withheld without adequate legal justification. Should you fail to comply with any such order from the Committee, we would then convene the Committee on the earliest date practicable to consider measures for enforcing the subpoenas, including holding you in contempt of Congress.

Sincerely,



Joseph I. Lieberman
Chairman



Susan M. Collins
Ranking Member

**Response to Reasons Given by the Departments of Defense and Justice for Defying
Subpoenas Issued by the Senate Homeland Security and Governmental Affairs Committee
Concerning the Government's Conduct Prior to the Attack at Fort Hood, Texas**

This annex responds to the reasons given by the Departments of Defense and Justice (DOD and DOJ) for failing to comply with the subpoenas issued by the Senate Committee on Homeland Security and Governmental Affairs for documents critical to our investigation of events leading up to the November 5, 2009, attack at Fort Hood, Texas. Ultimately, the excuses offered by DOD and DOJ are not just unconvincing on their face but also do not constitute a legal privilege. Moreover, only executive privilege, when properly asserted, can justify the Executive Branch in failing to comply with the subpoenas, but the Administration has not asserted executive privilege as of yet.

As the Committee conveyed many times to the Departments, the Committee's investigation seeks to determine why the U.S. Government failed to detect and prevent this act of homegrown terrorism in which thirteen Americans died. The Committee has sought – and its subpoenas demand – the production of material reflecting *what the government knew* about Major Hasan's views, associations, and actions prior to the November attack, not *what Major Hasan did on November 5* nor *how the Departments are conducting the prosecution of Major Hasan*.

After five months of unsuccessful efforts to obtain the Administration's cooperation, the Committee was compelled to issue subpoenas to DOD and DOJ on April 19, 2010. Subsequently, the Committee Chairman, Senator Joseph I. Lieberman (I-CT), and Ranking Member, Senator Susan M. Collins (R-ME), held telephone discussions with each of Deputy Secretary of Defense William Lynn III and Acting Deputy Attorney General Gary Grindler and reached an accommodation on a portion of the documents that were subject to the subpoenas. The Departments then sent a letter to the Committee on April 27, 2010, and the DOD General Counsel sent an additional letter on May 12, 2010, conveying their intent to defy the subpoenas.

I. The Administration Continues To Withhold Information From The Committee Without Any Convincing Reason Or Legal Defense.

The Administration has neither produced key information covered by the subpoenas nor provided any persuasive reason – let alone a legally valid privilege – to justify its refusal to comply fully with the subpoenas. Instead, the Departments have provided a series of shifting rationales for their failure to provide the documents and witnesses that the Committee requested.

The Departments initially argued that they could not produce interviews and documents to the Committee because Congressional working papers concerning the investigation would be discoverable by Major Hasan's defense. However, the Departments eventually dropped that claim after the Committee noted that the Constitutional Speech or Debate Clause protects Congress's working papers from discovery. Since then, the Departments have focused on the supposed effect of Congressional access to documents and witnesses on pretrial publicity and witnesses' recollections and the supposed Departmental policy of not permitting Congress to interview front-line agents.

In an attempt to justify its argument that providing the outstanding subpoenaed material would interfere with the prosecution, the DOD General Counsel's May 12, 2010, letter to the Committee included a two-paragraph letter signed by Judge Advocate General officers from the Military Services who are members of the Joint Service Committee on Military Justice. The officers' letter stated that the Committee's access to the witnesses and documents outstanding from the subpoena would interfere with the prosecution. However, attached are analyses from two of the preeminent civilian experts on military law – Eugene Fidell, president of the National Institute for Military Justice, and Professor Steven Saltzburg of the George Washington University Law School – as well as from Charles Doyle of the independent and nonpartisan Congressional Research Service supporting the Committee's position and rejecting the arguments set forth in the Joint Service Committee's memorandum.

Finally, it should be noted that the Departments have also refused the Committee's repeated offers to negotiate protocols that would enable the Committee to access the information it needs while ameliorating any Department concerns regarding the conduct of interviews and the use of information gleaned from the interviews and documents. The Departments have even refused to negotiate such protocols with the Committee – ignoring draft protocols that Committee staff submitted to the Departments in a good faith effort to open discussion.

A. Information Regarding The Agents Involved In The Pre-November 9, 2009, Inquiry Into Major Hasan.

DOD refuses to produce the names and other identifying information for DOD investigative or intelligence personnel who either (1) served on Federal Bureau of Investigation (FBI) Joint Terrorism Task Forces (JTTFs) in San Diego, CA, or Washington, DC, or on the National JTTF when information linked to Major Hasan came to those entities, or (2) had knowledge of Major Hasan prior to November 5, 2009. DOJ, in turn, refuses to produce the names and other identifying information for FBI personnel and personnel from other federal departments or State and local governments who were assigned to JTTFs in San Diego, CA, or Washington, DC, or on the National JTTF and who had (1) knowledge of Major Hasan's communications with known or suspected terrorists or (2) other knowledge of Major Hasan prior to November 5, 2009.

The Committee seeks the names and other identifying information of these personnel to enable it to determine which individuals should be interviewed concerning the facts of the government's conduct regarding Major Hasan. Without the direct testimony of these agents, the Committee cannot discharge its investigation's primary task: ascertaining what the U.S. Government knew and what actions it took concerning Major Hasan before the attack.

As noted above, the Administration has argued that providing that information to Congress would threaten the criminal case against Major Hasan by causing pre-trial publicity and influencing the testimony of the agents whom the Committee would interview, and more generally that Congressional interviews would chill the work of its front-line agents. Neither argument has any merit, even leaving aside that the Committee's inquiry focuses on an issue entirely marginal to the criminal case.

With respect to pretrial publicity, the Committee cannot accept the Departments' assertion that the Committee's inquiries into the government's actions would harm the prosecution. Both on and after November 5, a multitude of press coverage has described the attack, linked Major Hasan to those killings, and even quoted DOD officials. Even the nationally televised and pervasive Congressional Watergate hearings did not suffice to prejudice the criminal cases against any of the many high-level officials prosecuted for Watergate-related offenses.

It is hard to imagine how the Committee's investigation can cause publicity approaching the public attention already given to Major Hasan's alleged actions. Moreover, as Mr. Fidell and Professor Saltzburg discuss in their analyses, even if the Committee's investigation did result in overwhelming publicity, the military justice system has a variety of mechanisms for neutralizing that publicity's effect on a trial – including *voir dire* examination and both peremptory challenges and challenges for cause of potential jurors, as well as *voir dire* examination of the Army officer who would be selected as the judge for the trial. Both Mr. Fidell and Professor Saltzburg dismiss the Departments' claims that the Committee's investigation will result in pretrial publicity that has even the remotest chance of interfering with the trial.

With respect to the effect on agents' recollections and Congressional interviews of agents generally, Congressional factual inquiries of government performance must focus – and long have focused – on government personnel who know the facts first-hand. (In contrast, Congressional policy reviews focus on government personnel who make policy.) Congress cannot fulfill its Constitutional responsibility to conduct independent oversight of the Executive Branch by being forced to rely upon information that is packaged and sanitized by senior Department officials. Moreover, there is ample precedent of Congress directly interviewing government front-line agents, even in cases in which those agents may well testify in a criminal case relevant to the Congressional inquiry. For example, the Congressional Joint Inquiry into 9/11 interviewed FBI agents who were potential witnesses in the trial of the so-called “20th hijacker,” Zacarias Moussaoui.

The Departments have also failed to explain how the FBI and DOD agents who reviewed Major Hasan's communications and then took or failed to take actions to inquire further concerning him would be witnesses at the trial. As Mr. Fidell notes, it is difficult to imagine why these agents would be called to testify at the court-martial. In any event, as Professor Saltzburg points out, the Committee's purpose in speaking with these agents is to obtain their recollections of the governments' actions in reviewing Major Hasan's communications and in inquiring further into his activities before the shooting, including how their conduct would have been affected by factors such as greater information-sharing and clearer roles and missions within the government. As Professor Saltzburg concludes, the risk of this type of discussion compromising or adversely affecting such highly trained agents' recollection of matters relevant to the prosecution of Major Hasan is minimal. And, as Professor Saltzburg observes, even in the unlikely event that these agents make inconsistent statements in Committee interviews as compared to what they may have told the prosecutors after the shooting, Committee staff's notes or transcripts of any interviews are covered by the Constitution's Speech or Debate Clause and thus are not discoverable for purposes of the court martial proceedings.

Finally, at least some of the agents with whom the Committee wishes to speak have already been interviewed by the FBI Deputy Director. (These agents will also likely be interviewed by the FBI's internal review led by former FBI Director Judge William Webster if that review is to have any credibility or utility.) Thus, if the Departments were truly concerned about affecting the agents' independent recollections, then such interviews would not have occurred.

B. Transcripts Or Summaries Of Prosecutorial Interviews Of Witnesses Provided To The West/Clark Review.

The second set of documents covered by the subpoenas that the Departments still refuse to provide covers transcripts or summaries of prosecutorial interviews of witnesses provided to the DOD internal review led by former Secretary of the Army Togo West and retired Admiral Vern Clark (hereinafter "the West/Clark Review"). The Committee's objective in requesting these documents is to enable the Committee to obtain information from Major Hasan's associates and superiors contained in pre-existing documents while enabling the Committee to narrow its need for interviews of such individuals.

DOD's claim that releasing such transcripts or summaries of prosecutorial interviews of witnesses to Congress would interfere with the prosecution is belied by the fact that DOD already provided these documents to the West/Clark Review – another body not involved with the prosecution. As Professor Saltzburg writes, the prosecutors are already required to disclose all relevant transcripts of interviews of Major Hasan's associates and superiors to Major Hasan's defense. Thus, the Committee cannot accept the Departments' argument that disclosure of information to the Committee would somehow harm the prosecution. Furthermore, the Constitution's Speech or Debate Clause prevents defense counsel from obtaining these documents from the Committee. The Departments have failed to offer a coherent rationale for why providing these documents to the West/Clark Review is acceptable but providing them to Congress – which has a Constitutional responsibility to conduct independent oversight of the Executive Branch – is not.

C. The Departments Must Assert Executive Privilege To Withhold This Material.

Thus far, the Departments have not offered a legally valid privilege as a justification for defying the subpoenas. Instruction (i) of the subpoenas directs DOD and DOJ to submit a privilege log that identifies information regarding each withheld record, including the privilege being asserted and the date and subject matter of the material, to enable the Committee to rule on the validity of that privilege. Pursuant to the Executive Branch's own legal authority, DOJ's Office of Legal Counsel, the Executive Branch has available to it only one legal privilege that can justify a failure to comply with a Congressional subpoena: executive privilege. 6 Op. Off. Legal Counsel 782, 784 n.5 (1983) ("As the doctrine is currently implemented, executive privilege may be formally invoked to prevent disclosures to Congress only by the President personally. Absent such formal invocation, executive officers are obliged to comply with all congressional requests for information in a manner consistent with their duty to execute the

law.”).¹ If the Administration asserts executive privilege, then it should also state whether the President has personally authorized that assertion – pursuant to Executive Branch policy established during the Reagan Administration that only the President can assert executive privilege.

The various excuses offered by the Departments – including potential interference with the prosecution, and that front-line agents are exempt from direct Congressional oversight – do not constitute an assertion of any legally valid privilege, let alone Executive privilege. If the Administration seeks to rely on a legal privilege to justify its defiance of the subpoenas, then the Administration should assert Executive privilege and the Committee will subsequently rule on its validity.

II. Conclusion.

As reviewed above, the Departments have offered only flimsy excuses for defying the subpoenas and for failing to provide the witnesses and documents critical to our investigation. These excuses have been dismissed by two of the most nationally prominent experts on military justice in the United States. These excuses also defy precedent, especially the Congressional Joint Inquiry’s interviews of FBI agents who were involved with the arrest of Moussaoui even as such agents were potential witnesses at his ongoing prosecution. In addition, these excuses defy common sense, especially the provision of transcripts and summaries of prosecutorial interviews of witnesses to DOD’s internal West/Clark Review but not to Congress. Finally, the Departments have refused the Committee’s repeated offers to negotiate protocols to govern Committee access to documents in a manner that resolves any Department concerns.

We also note that the Committee has reviewed the restricted and classified documents produced by the Departments in response to the subpoenas very carefully.

The combination of the patent hollowness of the Departments’ excuses and our review of documents to date confirms the criticality of Congress’s independent oversight of the Executive Branch in general and this Committee’s independent investigation of the Departments’ conduct concerning Major Hasan prior to the attack in particular. As Supreme Court Justice Louis Brandeis once wrote, “Sunshine is the greatest disinfectant.”

¹ See also 13 Op. Off. Legal Counsel 153, 154, 162 (1989) (noting that Executive Branch’s interest in keeping information confidential in the face of a Congressional subpoena takes the form of an assertion of Executive privilege, and stating that when the process of accommodation between the Executive Branch and the Congress “breaks down” in the face of a Congressional subpoena, and “further negotiation is unavailing, it is necessary to consider asking the President to assert executive privilege”).



Memorandum

April 30, 2010

TO: Senate Committee on Homeland Security and Governmental Affairs
Attention: Gordon Lederman

FROM: American Law Division

SUBJECT: Assertions of Pretrial Publicity Relating to the Committee's Inquiry into the Shooting at Fort Hood

This is in response to your request relating to Department of Defense and Department of Justice (DoD/DoJ) response to the Committee's subpoena for information sought in conjunction with its investigation of the shooting at Fort Hood, Texas. The DoD/DoJ response expressed a concern that full compliance might generate adverse pretrial publicity and jeopardize prosecutorial efforts.

You have inquired as to (1) the state of law on pretrial publicity; (2) the risks that pretrial publicity might pose for a successful prosecution in this case; (3) whether convictions are commonly overturned on the basis of pretrial publicity; (4) whether the concerns asserted in the letter might be overstated; (5) whether pretrial publicity concerns would ordinarily be implicated by disclosure of investigating agents' names; and (6) whether it matters that the case arises in a military context.

As explained more fully below, criminal tribunals – military as well as civilian – have a variety of safeguards designed to ensure that pretrial publicity does not deny an accused the right to a trial by impartial jury – voir dire, jury instructions, continuances, change of venue, etc. Convictions are overturned and new trial ordered only in those rare instances when a tribunal fails to make adequate use of these protective mechanisms. It is virtually unheard of for an appellate court to do so based on pretrial publicity relating to a Congressional investigation.

The DoD/DoJ letter states in pertinent part:

DoD will make the redacted personnel, credentialing and training files, and the redacted annex from the DoD review on Fort Hood by Secretary Togo West and Admiral Vern Clark (ret.), *Protecting the Force: Lessons from Fort Hood – Annex: Oversight of the Alleged Perpetrator* (West-Clark) available to Committee members, the full committee staff directors, one counsel and one additional staff person each for the majority and minority. In addition, the documents will remain in the control of DoD, but we will work with the Committee to provide your staff with adequate access for your oversight needs. Notes regarding the comments are permissible, although there should be no disclosure of information from these

documents due to risk of pre-trial publicity and other adverse impacts on the criminal trial. We make these offers based . . . on your assurances of protections against the release of any of this information prior to trial.

. . . [D]isclosure of the names and Committee interviews of line agents could compromise the criminal prosecution. The agents are potential witnesses at the criminal trial, and congressional interviews prior to the trial could compromise the independent recollections of the agents and provide an opportunity outside the criminal proceedings to question the credibility and reliability of any potential testimony. Moreover . . . such access to line agents would be inconsistent with long-standing Department of Justice policy to protect line agents from the chilling effects on the impartial performance of their law enforcement responsibilities that would inevitably result from questioning by a congressional committee.

We ask that you accept the totality of this information and work with us to answer your questions regarding what happened prior to the events of November 5 in a manner that does not compromise our pending military judicial proceeding . . . However, we do not believe we can go beyond this point without incurring significant risk to [a] successful prosecution. . . .

Prejudicial Pretrial Publicity

The Sixth Amendment declares that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . U.S. Const. Amend. VI. The Supreme Court has indicated that intense, pervasive, prejudicial pretrial publicity may threaten the process of selecting an impartial jury panel, *Murphy v. Florida*, 421 U.S. 794, 803 (1975) (“Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice”). The Court has noted as well that “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another [locale] not so permeated with publicity,” *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

In federal court, an accused may petition for a change of venue if he feels his right to an impartial jury is threatened, and “[u]pon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there,” F.R.Crim.P. 21(a). “Cases presenting this scenario are very rare, however, and have been characterized . . . as ‘extreme situations,’” *United States v. Sabhnani*, 599 F.3d 215, 233 (2d Cir. 2010), citing *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998), and *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006)(en banc).

Trial courts initially rely on questionnaires returned by those called to jury service, voir dire, and instructions to ensure the selection of an impartial jury. An appellate court called to review a denial of a change of venue “evaluates the voir dire testimony of the impaneled jury in order to determine whether an impartial jury was selected, thus obviating the necessity for a change of venue,” *United States v. Rodriguez*, 581 F.3d 775, 786 (8th Cir. 2009).

Rare are the occasions when pretrial publicity warrants a change of venue. More rare still are the occasions when an appellate court will order a convicted defendant retried, because the trial court failed to protect him from the prejudicial impact of pretrial publicity, *Mu’Min v. Virginia*, 500 U.S. 415, 427 (1991) (“[O]ur cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity. . . . Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense”). Most uncommon of all are instances when an appellate

court will order a convicted defendant retried, because the trial court failed to protect him from the prejudicial impact of pretrial publicity generated by a Congressional investigation. The only such example we have been able to locate is *Delaney v. United States*, 199 F.2d 107 (1952). There, the federal appellate court ordered a new trial for convicted defendant whose request for a continuance the trial court had denied, *id.* at 116. In the few cases where the precedent is relevant, defendants' efforts to claim its benefits have been unavailing, *Beck v. United States*, 298 F.2d 622, 628-29 (9th Cir. 1962); *Silverthorne v. United States*, 400 F.2d 627, 633-34 (9th Cir. 1968); *United States v. Ehrlichman*, 546 F.2d 910, 916 n.8 (D.C. Cir. 1976); see also, *United States v. North*, 910 F.2d 843, 909-10 (D.C. Cir. 1990), other portions of the opinion withdrawn and replaced, 920 F.2d 940 (D.C. Cir. 1990)(en banc).

Pretrial Publicity and Military Justice

The suspect in the Fort Hood shooting is apparently going to be tried by court martial. Congressional inquiry seems no more likely to risk loss of a conviction in a military context than in a civilian one. The Sixth Amendment guarantees apply to federal criminal prosecutions; they do not apply to court martial proceedings, *Welch v. McDonald*, 340 U.S. 122, 127 (1951); *Sanford v. United States*, 586 F.3d 28, 35 (D.C. Cir. 2009). However, "the military defendant does have a right to [court martial] members who are fair and impartial. This right is the cornerstone of the military justice system," *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004)(internal quotation marks and citations omitted); *Dmendrano v. Smith*, 797 F.2d 1538, 1545 (10th Cir. 1986); *Sanford v. United States*, 586 F.3d at 36.

Moreover, the standards and safeguards applied in courts martial are comparable to those used in civilian criminal trials, *United States v. Gray*, 51 M.J. 1, 28 (C.A.A.F. 1999) (using Sixth Amendment standards to assess a claim of prejudicial pretrial publicity and noting that the trial judge permitted extensive voir dire of panel members concerning exposure to pretrial publicity); *United States v. Lutz*, 18 M.J. 763, 766-68 (C.G.C.M.R. 1984) (holding the military judge correctly denied a change of venue request in the absence of evidence of a pervasive, hostile atmosphere towards the accused and extensive opportunity for voir dire afforded); *Calley v. Callaway*, 519 F.2d 184, 205-13 (5th Cir. 1975)(reversing, on the basis of Sixth Amendment jurisprudence, a lower court decision that had concluded that the defendant had been convicted by a court martial panel tainted by pretrial publicity).

Committee Identification and Examination of FBI Agents

The tenor of the joint letter suggests that identification and examination of FBI agents with respect to their investigation of the suspect prior to the shooting would engender prosecution-imperiling pretrial publicity. This seems unlikely for two reasons. First, because as noted above, the trial judge has ample authority to ensure the selection of an impartial panel even in the face of the most inflammatory, pervasive pretrial publicity. Instances of a judge's failure to do so are rare.

Second, the Committee's inquiries seem unlikely to substantially enhance the public prejudice. The agents' identities can hardly be considered incendiary. The focus of the Committee's inquiries is upon the agents' activities, not upon those of the accused, and seems likely to generate little information prejudicial to the accused that has not already

come to light through prior media coverage of the case or through the DoD's *Protecting* report.

The joint letter may be read to broach other objections, which the Committee may or may not find compelling. They fall into two categories. One speaks of a possible threat to the government's case; the other to the Justice Department's practice of initially responding to the Congressional requests for information:

Having raised the issue of pretrial publicity, the joint letter goes on to claim that "disclosure of the names and Committee interviews of line agents could compromise the criminal prosecution. The agents are potential witnesses at the criminal trial, and congressional interviews prior to the trial could compromise the independent recollections of the agents and provide an opportunity outside the criminal proceedings to question the credibility and reliability of any potential testimony."

As to a potential compromise of the agents' independent recollection, any such potential compromise would presumably have attended the interviews of the agents conducted by the authors of DoD's *Protecting* report. As to the agents' credibility and reliability, the Committee may feel that its investigation is no more likely to undermine them than has DoD's *Protecting* report or than would cross examination during the court martial, should they be called as witnesses for the government.

The joint letter refers to the Justice Department's long-standing preference to initially respond to Congressional requests for information through spokesmen rather than through those with first-hand knowledge. In the past, however, when further inquiry is required, the Department has generally acknowledged its obligation to comply.

In summary, it would be virtually unheard of for the Committee's inquiry to result in an overturned conviction. The Justice Department may be concerned about the independent memory and credibility of its agents. If DoD's internal report and the prospect of cross examination at trial pose no such risk, then neither should the Committee's investigation.

Charles Doyle
Senior Specialist
American Law Division
7-6006



Yale Law School

April 28, 2010

Hon. Joseph I. Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510-6250

Re: *Ft. Hood Investigation*

Dear Mr. Chairman:

Your staff has asked whether, in my opinion, the Committee's effort to determine what the government knew about Dr. Hasan before the shooting at Ft. Hood, as opposed to whether he is guilty or innocent, is likely to put at risk the fair administration of justice. Speaking only for myself and expressing no position on his guilt or innocence, I am satisfied that the Committee's investigation can proceed and would not interfere with the prosecution.

I have been involved with military justice in one capacity or another for 40 years. I was a trial counsel (prosecutor) and defense counsel in the U.S. Coast Guard. I teach military justice and have written extensively on the subject. I have served as a public member of the statutory Code Committee on Military Justice and have represented members of every branch of the service.

Congress should never interfere with pending courts-martial and related military justice investigations. Attempts by legislators to exert influence over the disposition of individual cases, such as occurred in the recent Navy SEALs cases, cast a shadow over the military justice system. They detract from public confidence in the administration of justice just as unlawful command influence exerted from within the military can do. However, the Committee's efforts do not raise any such concern because they focus on the government's activities prior to the shooting.

Nothing unique to the military justice system precludes access to the kinds of information the Committee has sought. The Committee's limited goal, as I understand it, is to examine how Executive Branch systems functioned in the face of information suggesting that Dr. Hasan may have presented a risk. So long as the inquiry does not address his potential guilt or innocence or seek to probe military decision making with respect to whether he should be charged or tried, I do not see why the Committee should be denied the information it seeks.

There is no question that a prosecution of Dr. Hasan will raise a host of issues. His military and civilian counsel can be counted on to be zealous in his defense. Nonetheless, I do not see how affording the Committee the information it seeks concerning the government's conduct before the shooting would adversely affect the course of justice, particularly if the Committee handles that information with discretion.

Certainly a public Congressional hearing or release of a public report on a matter such as this is likely to generate significant public interest. But public attention to the case is already high and will remain so given the circumstances. There will presumably be some difficulty ensuring that the members of the court-martial (military jurors), if one is convened, are impartial and able to render a judgment based on the evidence adduced in court and to follow the military judge's instructions on the law. This difficulty arises from the publicity surrounding the attack, and any public Congressional activity will increase this difficulty only marginally, if at all. In any event, the military justice system has protections built in to guard against the effect of adverse publicity. These include changes of venue (moving any trial away from Ft. Hood) and, above all, careful "voir dire" examination of potential court-martial members (jurors). The system provides for unlimited challenges for cause to ensure that only those who can be impartial will serve. There is also provision for peremptory challenge of court-martial members.

Making Department of Defense and Federal Bureau of Investigation agents available to the Committee should have no impact on a trial. Based on what I have gleaned from news accounts and given the evidentiary standards prescribed in the *Manual for Courts-Martial*, I find it difficult to imagine why the trial counsel would have any occasion to call such agents to the witness stand in the event of a court-martial. If they were called, for example, during the sentencing phase (if the case were to reach that point), the defense could attempt to examine them as to any interviews they had with the Committee or staff. I offer no opinion as to how the Speech or Debate Clause of the Constitution might affect the defense's ability to do so, but even if the defense could, I find it equally difficult to see this as a serious concern. At worst, it might slightly prolong direct or cross-examination.

Please let me know if I can be of further assistance.

Very truly yours,

/s/ 

Eugene R. Fidell
Senior Research Scholar in Law and
Florence Rogatz Lecturer in Law
Yale Law School



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MAY 12 2010

GENERAL COUNSEL

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Minority Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Collins:

I write to follow up on the April 27 letter from Deputy Secretary Lynn and Acting Deputy Attorney General Grindler concerning the Committee's Fort Hood subpoenas. I write on behalf of the Department of Defense (DoD) and the Department of Justice (DOJ).

Following the April 27 letter, I have had three conversations with Mr. Alexander and Mr. Lederman. Though we have, for the moment, agreed to disagree on the issue described below, I believe our discussions have been productive and will result in an arrangement that will resolve the subpoenas. As I understand it, you have agreed to accept, and have accepted, the opportunity to review Major Hasan's personnel file (DoD subpoena item #1), the restricted annex (DoD #2), and the JTTF emails (DOJ #2). The remainder of our disagreement concerns DoD #3 and DOJ #1 (JTTF witnesses), plus DoD #4 (transcripts, reports, and summaries of prosecutorial interviews).

Please understand that our objections to all of the outstanding items are based on the need to protect the integrity of the military justice investigation and prosecution of Major Hasan; everyone agrees this is paramount. DOJ item #1 and DoD items #3 and #4 go to the heart of that concern. The JTTF witnesses sought in DOD #3 and DOJ #1 are potential trial witnesses in this case. As set forth in our previous letters, we believe that affording the Committee access to the JTTF agents and the transcripts, reports, and summaries that were generated in the course of the pending criminal investigation would pose risks to our law enforcement efforts, particularly our pending prosecution of Major Hasan. Additionally, enclosed is a memorandum to me from the Joint Service Committee on Military Justice, which is composed of the chiefs of the criminal law divisions of the Army, Navy, Air Force, Marine Corps, and Coast Guard. The memorandum sets forth their views about the dangers of unfair pre-trial publicity, and subjecting potential trial witnesses to extrinsic information, repeated examinations and interviews before they testify in the case. We also note that the Department of Justice has a long-standing policy to protect this type of non-public information relating to pending criminal investigations.

In an effort to resolve the outstanding subpoena items, and in lieu of the identity of potential first-hand trial witnesses and the records of interviews of trial witnesses, we offer the Committee briefings by appropriate senior officials to provide the information responsive to your

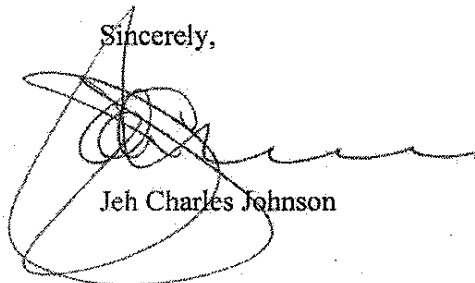


interests. Specifically, I propose that the Committee staff provide us in advance with the topics and questions you would like to see covered in the briefings, and we will then proffer to you the identity of the briefers and the substance of what they would say. Our hope is that, at that point, you will provide us with a reasonable degree of assurance that, if we proceed to brief the Committee along the lines of the proffer, this will satisfy the subpoenas.

It is my understanding that you will not accept this, and that you will only inform us whether briefings will satisfy the subpoenas after those briefings have occurred. Please understand why this arrangement is unacceptable to us. Before undertaking additional efforts to satisfy the Committee's subpoenas, we would like some reasonable degree of assurance that those efforts will actually result in resolution of the subpoenas -- we do not require a firm commitment, only a reasonable degree of assurance. At this point, we propose that the Committee staff proceed to provide us with the topics and questions, and we will then respond with our proffer. Once those two things occur, we can then revisit the discussion of whether a reasonable degree of assurance can be provided. Taking the next two steps in this process fully preserves our respective positions, while providing the Committee with a better understanding of how and what we propose to satisfy the subpoenas.

We hope you will find our positions and our proposal to be reasonable and acceptable, and that our discussions with Committee staff will continue to be productive.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeh Charles Johnson", is written over a large, loopy circular flourish.

Jeh Charles Johnson



DEPARTMENT OF DEFENSE
JOINT SERVICE COMMITTEE ON MILITARY JUSTICE
1254 CHARLES MORRIS STREET SE SUITE 801
WASHINGTON, DC 20374-5124

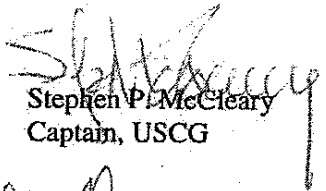
IN REPLY REFER TO:
6 May 2010

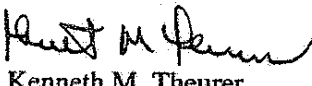
MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: External Influences to the Military Justice Process

This responds to your request for the Committee's view on the potential effects of permitting persons outside of the military justice system to question potential witnesses or access evidence that relates to a pending or ongoing military justice proceeding. It is the Committee's view that providing access to witnesses or evidence involved in such a proceeding for the express purpose of examining that witness or evidence, outside of the procedures set forth in the Manual for Courts-Martial and other Departmental regulations, may adversely impact those military justice proceedings. Adverse impacts may include affecting the decisions or conduct of those commanders authorized to exercise court-martial jurisdiction, witness testimony or court-martial member impartiality. Anything that calls into question the fairness or integrity of the military justice system must be avoided.

This Committee views it as paramount that all individuals having a legal duty to participate in the military justice system should be allowed to perform their duties free from outside influence extraneous to their military justice responsibilities. Evaluation of evidence or examination of witnesses, and attendant publicity, in a forum external to the military justice process may have an unintended influence on these individuals and their functions at a later date in the military justice proceeding. Pretrial publicity, such as public comment, pronouncements or debate, resulting from external examinations could influence, or give the appearance of influencing, military justice disposition decisions. This may include disposition at nonjudicial punishment, Article 32 pretrial investigation or court-martial. Further, pretrial publicity may affect the function and conduct of all personnel having an official role in a military justice proceeding, including counsel, military judge, members and witnesses. Preventing premature disclosure and possible interference with witnesses or evidence in military justice proceedings is fundamental to ensuring the integrity and fairness of the military justice system.


Stephen P. McCleary
Captain, USCG


Kenneth M. Theurer
Colonel, USAF


David M. Harrison
Commander, JAGC, USN


Christopher D. Carrier
Lieutenant Colonel, USA


Leon J. Francis
Lieutenant Colonel, USMC



Yale Law School

May 13, 2010

Hon. Joseph I. Lieberman
Chairman
Hon. Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510-6250

Re: *Ft. Hood Investigation*

Dear Chairman Lieberman and Ranking Member Collins:

Yesterday Committee staff furnished me a copy of the May 6, 2010 memorandum from the Joint Service Committee on Military Justice ["the JSC"] to the General Counsel of the Department of Defense concerning "External Influences to [sic] the Military Justice Process." I imagine that letter was intended to respond to my letter of April 28 concerning your Committee's pending investigation.

The JSC's memorandum is, in my opinion, completely unpersuasive. It lacks any kind of specificity but simply repeats one or two assertions without coming to grips with the points made in my letter.

There is no basis for concern that the access your Committee seeks will influence convening authorities, court-martial members, or any other participants in the military justice process. The convening authority in the Ft. Hood case is a general officer who has the assistance of a senior military lawyer as his staff or command judge advocate. I am unwilling to assume such an officer would permit his quasi-judicial functions to be influenced simply by the fact that a committee of the United States Senate was conducting an investigation whose purpose is to help prevent future failures in the personnel management system or security risks.

The JSC's memorandum warns that your Committee's investigation might adversely affect decision making on whether to dispose of the pending charges under Article 15, UCMJ. That provision governs nonjudicial punishment and is intended for the disposition of minor offenses. It has obviously nothing to do with the matter at hand, which involve potential capital charges. The fact that Article 15 was even mentioned makes one wonder about the remainder of the memorandum.

P.O. BOX 208215 • NEW HAVEN, CONNECTICUT 06520-8215
COURIER ADDRESS 127 WALL STREET • NEW HAVEN, CONNECTICUT 06511

To its credit, the Army was the first of the armed forces to afford its military judges the protection of fixed terms of office. That act of leadership—not compelled, unfortunately, by either the Constitution or the UCMJ—deserves recognition. (The Navy, Marine Corps, and Air Force have refused to afford this protection to their military judges.) The judge who presides over any trial that flows from the Ft. Hood shootings will almost certainly be an Army judge. That official will be subject to voir dire examination to ensure that he or she is impartial and in a position to do justice. The JSC's memorandum does not explain why these protections are insufficient.

Similarly, there is no danger that your Committee's investigation will frustrate or impede the fair conduct of the Article 32, UCMJ, hearing. That hearing is being presided over by an experienced and well-regarded Army military judge. Counsel for the defense will have a continuing opportunity to question him to ensure that he is in a position to act impartially.

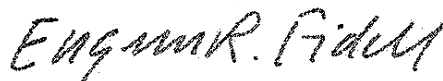
I know of no basis for the JSC's concern about "possible interference with witnesses or evidence." It is intolerable in a democratic society to assume, as the memorandum appears to do, that members of the Legislative Branch or staff will engage in witness- or evidence-tampering. Perhaps "interference" means something else. If it does, the memorandum does not explain.

Finally, my letter explained that the UCMJ provides for voir dire examination and both peremptory challenges and challenges for cause, as well as changes of venue. There is no question that the Ft. Hood case has generated tremendous publicity already; there will be more. But the protections I have mentioned leave me confident that even if your Committee obtains the information it seeks to perform its legislative function, the military justice system will remain fully capable of conducting a Ft. Hood trial that will be fair and that will foster public confidence in the administration of justice. I am surprised that the JSC does not share my confidence.

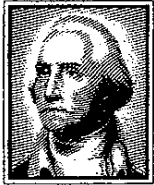
The military justice system has a right to be free from either unlawful command influence or improper legislative meddling. It does not, however, have a right to insist that Congress go into hibernation until this trial is over.

Please let me know if I can be of further assistance.

Very truly yours,

A handwritten signature in dark ink, reading "Eugene R. Fidell". The signature is written in a cursive, slightly slanted style.

Eugene R. Fidell
Senior Research Scholar in Law and
Florence Rogatz Lecturer in Law



THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON DC

Stephen A. Saltzburg
Wallace and Beverley Woodbury
University Professor of Law
Tel: (202) 994-7089 Fax: (202) 994-7143
E-Mail: ssaltz@law.gwu.edu

May 19, 2010

Hon. Joseph I. Lieberman
Chairman
Hon. Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510-6250

Re: *Ft. Hood Investigation*

Dear Chairman Lieberman and Ranking Member Collins:

Yesterday, Committee staff furnished me a copy of both a May 12, 2010 letter from the General Counsel of the Department of Defense ["the DOD"] to you both along with the May 6, 2010 memorandum from the Joint Service Committee on Military Justice ["the JSC"] to the General Counsel addressing "External Influences to the Military Justice Process." Committee staff also provided me with an April 28, 2010 letter to Chairman Lieberman from Eugene Fidell, Esq. Committee staff invited me to offer my views on several issues, which I do in this letter.

My views are my own and do not purport to represent the views of any other person or organization. I have been involved with military issues since the early 1980's. I was appointed by Secretary of Defense Weinberger to be a civilian member of the Military Justice Act of 1983 Commission and by Secretary of Defense Cheney to be a member of the statutory Code Committee on Military Justice. I am the co-author of *Military Rules of Evidence Manual* and of *Military Evidentiary Foundations*.

As I understand it, the disagreement between your Committee and the DOD concerns two principal topics: (1) intelligence/information-sharing, namely FBI/DOD agents' review of Hasan's communications (reportedly with notorious cleric Awlaki) and decisions on whether and how to investigate Hasan, and (2) the reaction of Hasan's superiors and colleagues to his apparent display of Islamist extremist sympathies.

I have the greatest respect for General Counsel Jeh Charles Johnson, and I think there are genuine reasons to be concerned about certain disclosures, but I disagree with the ultimate conclusion that the material you have subpoenaed cannot be revealed without an undue risk to military justice -- provided that certain procedures are in place.

As I understand the DOD's concerns, as expressed in the General Counsel's letter and in the JSC memorandum, they are that disclosure of information could:

Letter to Hon. Joseph I. Lieberman
and Hon. Susan Collins
Committee on Homeland Security and
Government Affairs
May 19, 2010
Page 2

1. Adversely affect the decisions of commanders and thereby prejudice Major Hasan's rights.
2. Have an adverse effect or interfere with evidence that might be offered or witnesses who may testify at a trial in the case-in-chief, in rebuttal, or at sentencing.
3. Result in pretrial publicity and influence, or give the appearance of influencing, military justice disposition decisions.

I address each of these points below.

First, I agree with Mr. Fidell that there is no basis for concern that the access your Committee seeks will influence convening authorities, court-martial members, or any other participants in the military justice process. I see no reason to believe that the general officer who serves as the convening authority in the Ft. Hood case and who has the assistance of a senior military lawyer would be improperly influenced by your Committee receiving certain information that has already been gathered and that has been shared with an internal DOD review. As I understand your Committee's interest, it is solely to examine whether the Army, the FBI and the DOD adequately responded to information in ways that might have prevented the shooting that occurred. As long as your Committee makes clear that it does not intend to address or comment upon the charges that are brought against Major Hasan or the disposition of his case, it is difficult to believe that any convening authority's judgment would be affected, even slightly, by knowledge that the Committee was examining events that preceded and were independent of the crimes charged and was not reviewing events that post-dated the shootings (which include the charging decision).

Although the JSC's memorandum might be relevant in a highly publicized case in which a convening authority might be torn as to whether to dispose of a matter under Article 15, UCMJ or by court-martial, it is not relevant to Major Hasan's case. No one has ever suggested that the potential capital charges he faces might better be disposed of by non-judicial punishment.

As long as your Committee commits that it will not address or comment on the charging and decision and subsequent proceedings, there is no reason to believe that its actions would have an impact on a military judge who has a term of office in the Army or on members who will judge the evidence that comes before them. Similarly, there is no danger that your Committee's investigation will frustrate or impede the fair conduct of the Article 32, UCMJ, hearing. That hearing will focus on what crimes were committed, not whether the Army or the FBI should have taken action that would have prevented a shooting from occurring.

Second, what about "possible interference with witnesses or evidence?" As a threshold matter, the Committee and the Congress have legitimate responsibilities and concerns -- e.g., to protect the safety and lives of men and women in the armed forces and to ensure that our nation is protected against terrorism at home and abroad -- and need not concede that those responsibilities and concerns are less important than those of DOD.

Letter to Hon. Joseph I. Lieberman
and Hon. Susan Collins
Committee on Homeland Security and
Government Affairs
May 19, 2010
Page 3

It is difficult to conceive of a situation in which disclosure of information already obtained and already reviewed by an internal DOD or FBI investigation could result in any serious interference with witnesses or evidence. I do not believe that disclosure of information to your Committee realistically could prejudice the fairness of proceedings. Prosecutors will disclose all relevant transcripts of interviews of Major Hasan's associates and superiors or of DOD or FBI agents or other individuals as well as any relevant reports and other knowledge to the defense. This means that whatever transcripts of interviews already exist or whatever Major Hasan's associates or superiors or DOD or FBI agents have put in writing or know that is relevant will be available at trial for use by either side – whether or not your Committee sees documents. The fact that your Committee sees documents should not affect the trial in any way.

With respect specifically to interviews of DOD and FBI agents who reviewed Major Hasan's communications before the attack, the argument that Congressional interviews will affect their recollection is belied by that fact that, as I understand it, FBI agents have already been interviewed by the FBI Deputy Director for the FBI's internal review. I also understand that your interest in speaking with these highly trained FBI and DOD agents is to obtain their recollections of the governments' actions in reviewing Major Hasan's communications and in inquiring further into his activities before the shooting, including how their conduct would have been affected by factors such as greater counterterrorism information-sharing or clarity in roles and missions within the government. In my view, the risk that this type of discussion would compromise or adversely affect such highly trained agents' recollection of matters relevant to the prosecution of Major Hasan is minimal. Finally, in the unlikely event that these agents make inconsistent statements to your staff as compared to what they may have told the prosecutors after the shooting, your staff's notes or transcripts of any interviews are covered by the Constitution's Speech and Debate Clause and thus are not discoverable by Major Hasan's defense. Therefore, inconsistent statements would not affect a trial.

Third, no one can doubt that the Ft. Hood shootings have generated massive publicity, and for good reason given the tragedy that occurred there. Undoubtedly, there will be more publicity. But, there is no reason to believe that interviews of agents by staff will result in pretrial publicity. Moreover, even if word is leaked that your staff is interviewing agents, it should be clear that your Committee's focus is on what did or did not occur before the shootings took place. The military justice proceedings will exclusively focus on Major Hasan's conduct while your examination will focus on the conduct of what others did or did not do with respect to Major Hasan. This strongly suggests that, even if there is some additional publicity associated with your work, it is unlikely to be prejudicial to a fair trial that focuses on the shootings. Mr. Fidell has addressed the fact that the UCMJ provides for voir dire examination and both peremptory challenges and challenges for cause, as well as changes of venue. These protections should be sufficient to guarantee that any pretrial publicity, whether it has occurred already or will occur in the future, will deny Mr. Hasan a fair trial.

In short, I am confident that your Committee can obtain the information it seeks to perform

Letter to Hon. Joseph I. Lieberman
and Hon. Susan Collins
Committee on Homeland Security and
Government Affairs
May 19, 2010
Page 4

its legislative function, while leaving the military justice system fully capable of conducting full and fair proceedings involving Major Hasan.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen A. Saltzburg", written in a cursive style.

Stephen A. Saltzburg

From: Simms, Donna Y. (SMO) (b) (6)
(b) (6) > on behalf of
Delery, Stuart F. (ODAG) (b) (6)
(b) (6)
To: Delery, Stuart F. (ODAG)
(b) (6) >; Golder,
Chad (ODAG) (b) (6)
(b) (6); Barron, David
(SMO) (b) (6)
(b) (6) Colborn, Paul
P (SMO) (b) (6)
(b) (6) Shapiro,
Elizabeth (CIV) (b) (6)
(b) (6)
Schools, Scott (ODAG) (b) (6)
(b) (6); Snead,
Jacqueline Coleman (CIV) (b) (6)
(b) (6)
Kirschner, Daniel (SMO) (b) (6)
(b) (6) >
Cc:
Bcc:
Subject: Yoo FOIA
Date: Thu Jun 03 2010 09:22:23 EDT
Attachments:

When: Friday, June 04, 2010 1:00 PM-1:30 PM (GMT-05:00) Eastern Time (US & Canada).
Where: RFK 4133 (ODAG Conf Rm)

Note: The GMT offset above does not reflect daylight saving time adjustments.

~~*~*~*~*~*~*~*

Golder, Chad (ODAG); Delery, Stuart (ODAG); Snead, Jacqueline Coleman (CIV); Barron, David;
Kirschner, Daniel; Colborn, Paul P; Shapiro, Elizabeth (CIV); Schools, Scott (ODAG)

From: Miguel, Amy (JMD)
Sent: Friday, June 25, 2010 3:17 PM
To: Hirsch, Sam; Paisner, Michael; Atsatt, Mikki
Cc: Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David; Wardzinski, Karen (ENRD); Martinez, Brian (CIV); Temple Claggett, Karyn; Hines, Rachel; Appelbaum, Judy; Scott-Finan, Nancy
Subject: RE: Oil-spill related: draft responses to Hill questions re: Administration proposal
Attachments: Rep qas on oil spill Justice comments.docx

[Here is the document with OLC's revisions included \(page 6\).](#)

From: Hirsch, Sam
Sent: Friday, June 25, 2010 3:16 PM
To: Miguel, Amy (JMD); Paisner, Michael; Atsatt, Mikki
Cc: Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David; Wardzinski, Karen (ENRD); Martinez, Brian (CIV); Temple Claggett, Karyn; Hines, Rachel; Appelbaum, Judy; Scott-Finan, Nancy
Subject: Re: Oil-spill related: draft responses to Hill questions re: Administration proposal

No, let's not have different components sending different edits to OMB. Please send all edits to Karen Wardzinski and Brian Martinez, who will create (by 4:00) one document containing all DOJ edits. I'll send the final to OMB at 5:00.

Thanks,

Sam

From: Miguel, Amy (JMD)
To: Paisner, Michael; Atsatt, Mikki
Cc: Hirsch, Sam; Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David
Sent: Fri Jun 25 14:52:41 2010
Subject: RE: Oil-spill related: draft responses to Hill questions re: Administration proposal

[Thank you very much! I'll pass these along to OMB.](#)

From: Paisner, Michael
Sent: Friday, June 25, 2010 2:50 PM
To: Miguel, Amy (JMD); Atsatt, Mikki
Cc: Atsatt, Mikki; Hirsch, Sam; Koffsky, Daniel L; Bulman-Pozen, Jessica (OLC); Barron, David
Subject: FW: Oil-spill related: draft responses to Hill questions re: Administration proposal

Amy, OLC has the following comment. We would tweak the second of the proposed responses on page 6 in the following way:

A. (b) (5)

[REDACTED]

The purpose of these edits would (b) (5) [REDACTED], and we leave it to your discretion whether to implement them.

Michael Paisner
Attorney-Adviser
Office of Legal Counsel

(b) (6) [REDACTED]

(b) (6) [REDACTED]

From: Koffsky, Daniel L
Sent: Friday, June 25, 2010 12:15 PM
To: Bulman-Pozen, Jessica (OLC); Paisner, Michael
Subject: Fw: Oil-spill related: draft responses to Hill questions re: Administration proposal

Could you both take a look? Thanks.

From: Miguel, Amy (JMD)
To: Koffsky, Daniel L
Cc: Atsatt, Mikki
Sent: Fri Jun 25 11:37:56 2010
Subject: FW: Oil-spill related: draft responses to Hill questions re: Administration proposal

Hi Dan,

Pam Jadwin suggested I reach out to you to see whether OLC had either drafted or reviewed the two proposed QFR responses below (and attached, on p6), which are being circulated by OMBGC. Please let me know if you have any edits/concerns, and I'll relay them back to OMB. Please note that OASG (Sam Hirsch) has been copied on the incoming from OMBGC as well.

Thank you,
Amy Miguel
JMD Budget Staff

From: Jadwin, Pamela J
Sent: Friday, June 25, 2010 11:25 AM
To: Miguel, Amy (JMD); Johnson, Hurley; LaCour, David (JMD); Thompson, John E.; Frisch, Stuart
Cc: Atsatt, Mikki; Schultz, Walter H; O'Leary, Karin
Subject: RE: Oil-spill related: draft responses to Hill questions re: Administration proposal

Amy – John and I took a look at this and we don't have any comments, but we wondered if OLC drafted the responses on p. 6 (below) and if not they should be consulted on these responses. Pam

Q. Has the Justice Department or other legal advisers within the Administration considered the potential Constitutional implications of retroactive application of the limits? What were the conclusions?

A. (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

(b) (5)

Q. Have the potential implications of the Supreme Court's Mobil decision been considered in relation to this retroactive section? If so, what were the conclusions?

A. (b) (5)

From: Miguel, Amy (JMD)
Sent: Friday, June 25, 2010 10:19 AM
To: Johnson, Hurley; LaCour, David (JMD); Jadwin, Pamela J; Thompson, John E.; Frisch, Stuart
Cc: Atsatt, Mikki; Schultz, Walter H; O'Leary, Karin
Subject: FW: Oil-spill related: draft responses to Hill questions re: Administration proposal

All,

Please take a look at the attached responses to QFRs on the oil spill, which OMBGC has compiled and for which they are seeking review and comment by DOJ. OMBGC e-mailed these directly to ENRD and CIV, but our branch examiners have passed them along to us as well.

Hurley and David, please coordinate any edits you have through the respective component, and cc me.

Pam, Stu and John, if you have any edits/comments, I'd be happy to send them back to OMB, or if its easier to communicate directly with Boris, please do so, and cc me so I can give our branch examiners a heads up that we have provided comments.

Please note this afternoon's 5pm deadline.

Thanks.
Amy

From: Bershteyn, Boris
Sent: Friday, June 25, 2010 1:25 AM
To: Hirsch, Sam; Payne, James (ENRD); Wardzinski, Karen (ENRD); Martinez, Brian (CIV); Graber, Geoffrey (CIV); Sorgente, Natalia (ENRD)
Cc: Espinel, Zulima L.
Subject: Oil-spill related: draft responses to Hill questions re: Administration proposal

DOJ Colleagues:

Various agencies have submitted to OMB their proposed responses to questions from the Hill on the Administration's legislative proposal for the oil spill. A compilation of the proposed responses is attached. Although, as you'll see, it's still a bit rough and there are still a few placeholders, folks thought it would be helpful for DOJ to have an opportunity to review and comment at this point.

If possible, please send me any comments by **5pm on Friday, June 25.**

For ease of reference, the Administration's legislative proposal is at this link: http://www.whitehouse.gov/omb/assets/budget_amendments/supplemental_05_12_10.pdf

Many thanks,
Boris

P.S. Incidentally, I just noticed that the answer to the first question uses (b) (6) where (b) (6) " may be more appropriate. Do you agree?

Boris Bershteyn
Deputy General Counsel
Office of Management and Budget
(b) (6)

Questions submitted by House Budget Committee (Jim Herz)

[illegible]

A. (b) (5) [REDACTED]

Q. Re: Section 10, will any of the \$29 M for DOI funding be used to pay for the Secretary's announced plan to reorganize the Minerals Management Service?

A. (b) (5) [REDACTED]

A (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

Q. Will funds offset by cost recovery be returned to the taxpayers or retained by the Department?

A. (b) (5)

Q. Will a report be submitted to Congress, for this and other spill response appropriations, detailing how the funds are spent?

A. (b) (5)

Section 11. Amends the Outer Continental Shelf Lands Act to extend the time for “environmental, safety or other” review of an offshore oil and gas exploration plan (from 30 to 90 days, plus an open-ended extension). The amendment applies to leases issued after March 17, 2010. For those issued on or before that date, the consent of the lessee is required to go beyond 90 days.

Q. Is this increase due to the emergency demands for personnel to be reallocated to other duties? If so, is this a temporary request to accommodate spill response? Or is this a permanent change in the law unrelated to emergency need to allocate personnel?

A. (b) (5)

Q. This proposal removes a firm date and replaces it with an open-ended timeframe – as the law clearly provides for certainty under the law, is there not a set period of time during which the Administration believes plans can be properly reviewed?

A. (b) (5)

Q. The MMS already has the authority to ask for additional information and revisions to exploration plans. Why does DOI need an open-ended time frame for initial response?

A (b) (5) [REDACTED]

Q. Why is the distinction made between leases before and after March 17th?

A (b) (5) [REDACTED]

Q. Is there any concern that the change proposed for pre-March 17th could be considered a substantial breach of contract under the Supreme Court's *Mobil* decision?

A (b) (5) [REDACTED]

Q. Has any analysis been conducted on the potential impacts on domestic production, cost or otherwise for these extended timelines?

A (b) (5) [REDACTED]

Q. Will the non-producing lease fee proposed in the President's FY2011 budget submission apply during the time the Department is reviewing plans?

A (b) (5) [REDACTED]

Section 14. Amends the OPA Oil Spill Liability Trust Fund to allow the Coast Guard to advance itself \$100M increments for response activities relating to the Horizon spill.

Q. Will this impact the viability of the fund?

A. (b) (5) [REDACTED]

Section 15. Amendments to Internal Revenue Code (IRC) and OPA.

Questions on Trust Fund Changes

Q. How does increasing the per incident amount improve the ability for the fund to respond to a large incident?

A (b) (5)

[REDACTED]

Q. Will this have any impact on the ability of the fund to meet the needs of multiple incidents?

A (b) (5)

[REDACTED]

Questions on OPA Liability increases

Q. Has the Administration measured or analyzed the potential impacts of liability increases on domestic oil and gas production? Domestic shipping and port operations? Existing jobs and future jobs? On the availability of insurance? If not, is the Administration conducting such analysis? Please provide details on any such information.

(b) (5)

[REDACTED]

[REDACTED]

(b) (5)

Q. Is there independent information or analysis that has been conducted or is being conducted? Please provide any such information.

A. (b) (5)

Retroactivity

Q. As written, this section appears to capture any incident where the liability cap was exceeded, possibly allowing funds to be collected on past incidents. Has the impact of this been considered? Please provide details on the approximately 50 incidences where the liability cap was exceeded, as cited by staff at the briefing.

A. (b) (5)

(b) (5)

Q. Why was this retroactive approach selected – was it preferred over other alternatives (such as the Menendez and Holts bills that set a specific effective date)?

A. (b) (5)

Q. Has the Justice Department or other legal advisers within the Administration considered the potential Constitutional implications of retroactive application of the limits? What were the conclusions?

A. (b) (5)

Q. Have the potential implications of the Supreme Court's *Mobil* decision been considered in relation to this retroactive section? If so, what were the conclusions?

A. (b) (5)

Section 16. Amends IRC to increase the per barrel of tax assessment (used to fund the Oil Spill Liability trust Fund) by one cent per barrel (8¢ to 9¢ for oil received at a U.S. refinery or petroleum products imported into the U.S. before 1/1/17, and 9¢ to 10¢ for oil received or imported after 12/31/16).

Q. How much will changes to the tax increase revenues for the trust fund? What are estimated future year balances based upon the requested increase? What are the projected balances based on an increase to \$0.32 per barrel?

A. (b) (5)

Q. Will these increases impact consumers?

A. (b) (5)

[REDACTED]

From: Delery, Stuart F. (ODAG)
Sent: Friday, May 21, 2010 4:38 PM
To: Colborn, Paul P
Cc: Rhee, Jeannie; Barron, David
Subject: Re: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Mike Davidson's email below suggests that a decision to withhold and litigate would defuse the issue. As we discussed earlier, I would be reluctant to go too far down an MOU/letters path before we see whether the other track will work. I have a call in to Don to update him on the CIA position, an (b)(3), (b)(6) already knows it from an earlier discussion.

From: Colborn, Paul P
To: Delery, Stuart F. (ODAG)
Cc: Rhee, Jeannie; Barron, David
Sent: Fri May 21 16:11:52 2010
Subject: FW: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Stuart, I think Bob forgot to put you on this email.

From (b)(3), (b)(6) [mailto:(b)(3), (b)(6)]
Sent: Friday, May 21, 2010 4:07 PM
To: Colborn, Paul P (b) (6) (b) (6) (b)(3), (b)(6) (b)(3), (b)(6)
(b)(6) (Donald B Verrilli (WHO) email) (b)(6) (Kathryn H Ruemmler (WHO) email) (b)(6) (Mary B DeRosa (NSC) email)
(b)(3), (b)(6); Weich, Ron; Barron, David
Subject: FW: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Paul, Don (b)(3), (b)(6) et al. -

(b)(5) per NSC; WHCO

(b)(5) per NSC; WHCO(b) (5)

(b) (5)

(b) (5)

(b)(5) per NSC; WHCO

(b) (5)

Bob

PS I don't have Kim Harris's email address so would appreciate if someone can forward this to her.

From: Davidson, M (Intelligence) [mailto: (b) (6)]
Sent: Friday, May 21, 2010 2:07 PM
To: Robert Litt; DARRIAH; Delery, Stuart F. (ODAG)
Cc: (b)(3), (b)(6); WILLICD2; Weich, Ron; 'Agrast, Mark D.'; Livingston, J (Intelligence)
Subject: FOIA, MFRs, etc.

Bob and I had a good conversation on Wednesday about how the Committee and the Community (DOJ is clearly an indispensable party) will approach future note taking at Committee hearings and MFR production and use by OLA/OCA personnel.

As all may now be aware, there is an instruction here, in light of the position so far taken in the Executive Branch about FOIA production of transcript-like MFRs of closed hearings, that notes not be taken. (b)(3), (b)(6) and Bob have expressed their concern about the impact of that. Everyone wants to find a solution. We have two hearings scheduled for next week, one on Tuesday and another on Thursday.

A decision by Justice to defend, and thereby obtain a judicial ruling, on whether the FOIA requires production of these transcript-like MFRs of closed hearings will, I believe, allow everyone to await the judicial determination.

Absent that, we'll need, on an accelerated basis, to come to an understanding whether there is a mutually satisfactory alternative to a ban on note taking. Bob and I discussed a couple of possibilities: (b) (5)

A DOJ defense focused on the records involved in this matter – transcript-like MFRs of closed hearings – has the virtue of not only lifting the immediate tension and having a court decide, but it would also allow having the matter considered narrowly in relation to a particular circumstance. In *United We Stand*, the court emphasized: "We express no view about the sufficiency of congressional manifestations of intent to control documents that are created in other circumstances." 359 F.3d at 605. That's a strong invitation to look at these matters in specific circumstances. The circumstance here would be the historical understanding manifested in Senate and committee rules and in practice about closed hearings.

(Once it is described that the documents being withheld are MFRs of closed hearings -- rather than MFRs of the briefings of individual members or pairings of them, especially in the early part of the program -- I wonder whether it will turn out that neither Judicial Watch nor Landmark have an interest in litigating the closed hearing question.)

If we could be in communication on Monday, in advance of our Tuesday hearing, that would be helpful.

Many thanks.

Mike

From: Weich, Ron
Sent: Friday, May 21, 2010 7:06 PM
To: (b) (6) (b)(3), (b)(6); Colborn, Paul P;
(b) (6) (b) (6) (b)(3), (b)(6)
(b)(3), (b)(6) (b) (6) (b) (6)
(b)(3), (b)(6); Barron, David (b) (6)
(b)(3), (b)(6); Delery, Stuart F. (ODAG); Agrast, Mark D.
Subject: Re: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Adding Stuart Delery + Mark Agrast.

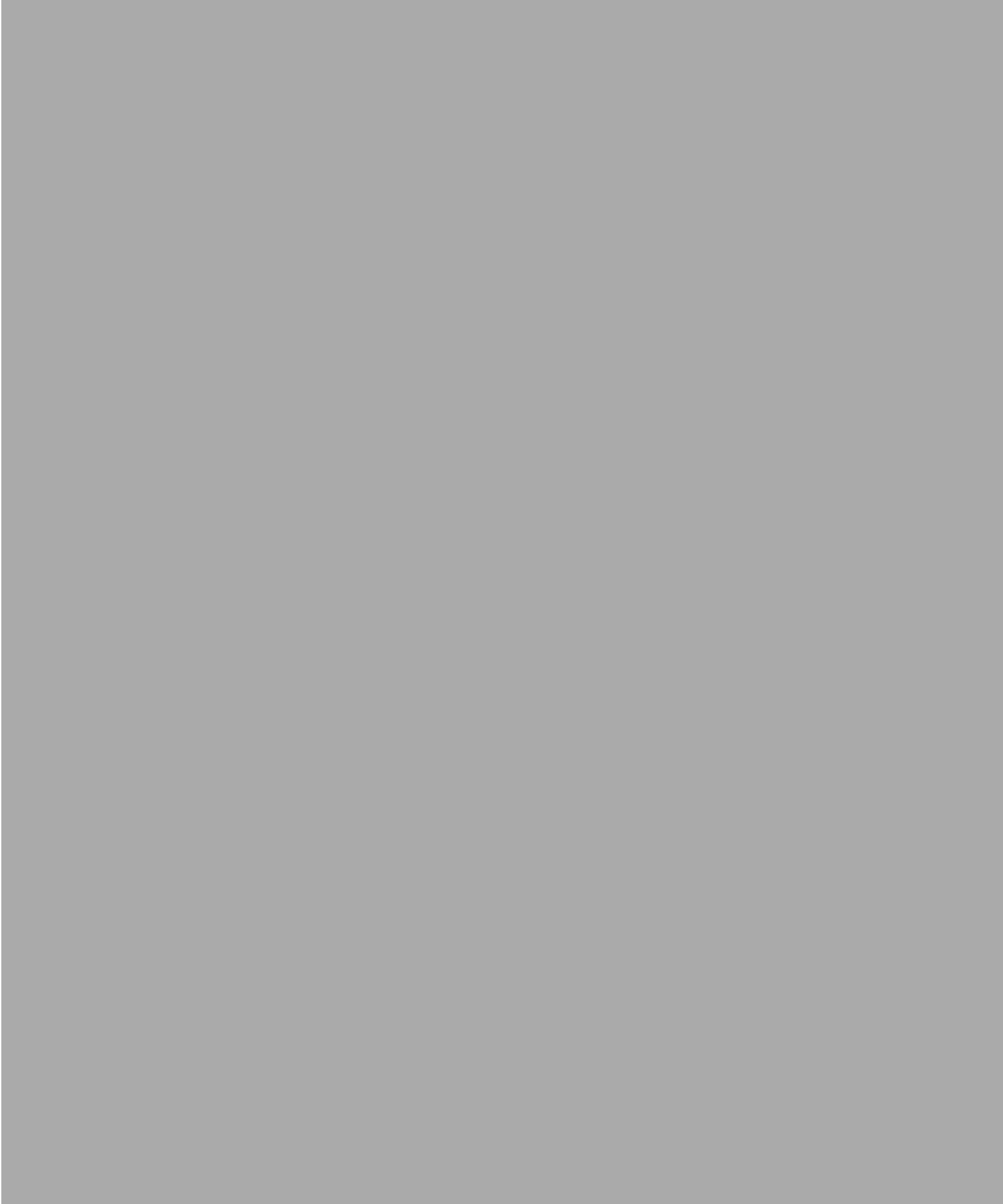
From: Ruemmler, Kathryn H (b) (6) >
To: (b)(3), (b)(6) (b)(3), (b)(6) > (b)(3)/(b)(6) - per CIA (b)(3)/(b)(6) - per CIA ;
(b)(3)/(b)(6) - per CIA (b)(3), (b)(6) (b)(3), (b)(6) > (b)(3), (b)(6)
(b)(3), (b)(6) >; Verrilli, Donald B (b) (6) >; DeRosa, Mary B.
(b) (6) > (b) (6) (b) (6) >; Weich, Ron; Barron, David;
Harris, Kimberley D (b) (6) >
S nt: Fri May 21 18:44:33 2010
Subj ct: Re: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Adding Kim.

From: (b)(3), (b)(6) (b)(3), (b)(6) >
To: (b) (6) (b) (6) > (b)(3)/(b)(6) - per CIA
(b)(3)/(b)(6) - per CIA (b)(3), (b)(6) (b)(3), (b)(6) > (b)(3), (b)(6)
(b)(3), (b)(6) v>; Verrilli, Donald B.; Ruemmler, Kathryn H.; DeRosa, Mary B. (b) (6)
(b) (6) (b) (6) (b) (6) > (b) (6)
(b) (6)
S nt: Fri May 21 16:07:28 2010
Subj ct: FW: FOIA, MFRs, etc. - QUICK RESPONSE REQUESTED

Duplicative Material, Document ID: 0.7.4618.5503

Duplicative Material, Document ID: 0.7.4618.5503



From: Barron, David
Sent: Sunday, May 23, 2010 3:40 PM
To: (b)(3), (b)(6); Colborn, Paul (b)(6) (b)(6)
(b)(3)/(b)(6) - per CIA Delery, Stuart F.
(ODAG) (b)(3), (b)(6) (b)(3), (b)(6)
(b)(3), (b)(6) (b)(6) (b)(6)
Subject: Re: FOIA, MFRs, etc. - ATTORNEY CLIENT PRIVILEGED/DELIBERATIVE

I have not had a chance to review the language bob proposes but th (b)(5)

From (b)(3), (b)(6) (b)(3), (b)(6) >
To: Colborn, Paul P; Barron, David (b)(6) (b)(6) >;
(b)(6) (b)(6) > (b)(3)/(b)(6) - per CIA
(b)(3)/(b)(6) - per CIA >; Delery, Stuart F. (ODAG (b)(3), (b)(6)
(b)(3), (b)(6) (b)(3), (b)(6) (b)(3), (b)(6) (b)(3), (b)(6)
(b)(3), (b)(6) > (b)(3), (b)(6) (b)(3), (b)(6);
(b)(6) (b)(6) >
Sent: Sun May 23 14:29:09 2010
Subject: RE: FOIA, MFRs, etc. - ATTORNEY CLIENT PRIVILEGED/DELIBERATIVE

Unless someone feels differently I believe th (b)(5). I have tried my hand at drafting something that could go in a letter from ODNI to the Committee. I am doubtful that thi (b)(5). I am interested in the views of others as to whether this is a proposal that we could live with.

(b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Robert Litt
Sent: Friday, May 21, 2010 6:39 PM
To: Colborn, Paul P; Barron, David; 'Ruemmler, Kathryn H.'; Verrilli, Donald B. (b)(3)/(b)(6) - per CIA; DARRIAH; Delery, Stuart F. (ODAG); (b)(3), (b)(6)
Subject: FW: FOIA, MFRs, etc.

Further to the email I forwarded you yesterday (b)(5)

[REDACTED]

From: Davidson, M (Intelligence) [mailto: (b)(6)]
Sent: Friday, May 21, 2010 6:34 PM
To: Robert Litt (b)(3)/(b)(6) - per CIA; 'Delery, Stuart F. (ODAG)'
Cc: (b)(3), (b)(6); WILLICD2; 'Weich, Ron'; 'Agrast, Mark D.'; Livingston, J (Intelligence)
Subject: RE: FOIA, MFRs, etc.

Here it is in Word, in case you can't open the WordPerfect copy --

From: Davidson, M (Intelligence)
Sent: Friday, May 21, 2010 6:20 PM
To: 'Bob Litt' (b)(3)/(b)(6) - per CIA; 'Delery, Stuart F. (ODAG)'
Cc: (b)(3), (b)(6); 'Bill Danvers'; 'Weich, Ron'; 'Agrast, Mark D.'; Livingston, J (Intelligence)
Subject: RE: FOIA, MFRs, etc.

Ron relates that he does not expect DOJ to change its position. That means it will be important to consider alternatives. Please take a look at the attached.

As mentioned, Committee Rule 9.10 provides, in relation to closed meetings of the Committee, that "The Security Director of the Committee may require that notes taken at such meetings by any person in attendance shall be returned to the secure storage area in the Committee's offices at the conclusion of such meetings, and may be made available to the department, agency, office, committee, or entity concerned only in accordance with the security procedures of the Committee."

(b) (5)

[REDACTED]

And then there is the hope, which I'll continue to have until next Friday, that the ODNI and the CIA will say to Justice that the underlying matter should be decided by a judge.

Best wishes for a good weekend to all.

Mike

From: Davidson, M (Intelligence)
Sent: Friday, May 21, 2010 2:07 PM
To: 'Bob Litt' (b)(3)/(b)(6) - per CIA; Delery, Stuart F. (ODAG)
C: (b)(3), (b)(6); 'Bill Danvers'; Weich, Ron; 'Agrast, Mark D.'; Livingston, J (Intelligence)
Subject: FOIA, MFRs, etc.

Duplicative Material, Document ID: 0.7.4618.5503

