

**Hearing Before the Senate Judiciary Committee On
“Executive Nomination”
January 6, 2005**

**WRITTEN QUESTIONS FROM SENATOR PATRICK LEAHY
FOR THE HONORABLE ALBERTO R. GONZALES**

Treatment of Detainees

1. You testified at the hearing, “It has always been the case that *everyone* should be--that *the military* would treat detainees humanely, consistent with the President’s February order” (emphasis added). (A) Does the President’s February 7, 2002, directive regarding humane treatment of detainees apply to the CIA or any other non-military personnel? (B) Has the President ever directed or otherwise instructed the CIA and other non-military personnel to treat detainees humanely? (C) Are the CIA and other non-military personnel under any legal obligation to treat captured al Qaeda and Taliban humanely and, if so, what is the source of that legal obligation?
2. The President’s February 7, 2002, directive stated that humane treatment should be accorded as a matter of values and policy, including to “those who are not legally entitled to such treatment.” Is it your view that some detainees are not legally entitled even to humane treatment?
3. When you were asked at the hearing if other world leaders might have the authority to authorize the torture of American citizens if they deemed it necessary for their national security, you stated that you did not know what laws they might be bound by. (A) Do you believe that neither the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, nor the International Covenant on Civil and Political Rights, nor the Geneva Conventions, nor any other law absolutely prohibits other nations from torturing an American citizen, regardless of whether such nations deem it necessary for their national security? (B) If you believe that such treaties and laws do absolutely prohibit the torture of Americans abroad under any and all circumstances, do you acknowledge that they bind the President of the United States as well?
4. On December 2, 2004, in a case reviewing the detention of foreigners as enemy combatants at Guantanamo Bay (*Boumediene v. Bush, et al.*, CV04-1166), U.S. District Court Judge Richard J. Leon asked if a detention would be illegal if it were based solely on evidence gathered through torture. According to the press, the government attorney responded that “nothing in the due process clause prohibits” military combatant status tribunals “from relying on it.” (A) Do you agree that evidence obtained through torture may be relied upon to detain enemy combatants, even when the torture-generated

evidence is the *only* evidence against the detainee? (B) As Attorney General, would you support the position articulated by the government in the *Boumediene* case, regarding the use of evidence obtained through torture?

5. Numerous press articles have discussed memoranda that authorize the transfer or rendition of terrorist suspects and other detainees to third nations or other secret locations for interrogation. (A) On December 27, 2004, the *Washington Post* reported that the CIA has the authority to carry out renditions under a presidential directive. Did President Bush sign or renew a presidential directive or other document authorizing rendition? If so, please provide this document to the Committee. If not, under what authority is the CIA and/or other government entities transferring, or rendering, individuals. (B) On January 6, 2005, the *Washington Post* described an OLC memo dated March 13, 2002, titled "The President's Power as Commander-in-Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." The article states that you were involved in the development of the policy reflected in the memo. Will you provide us with a copy of that OLC memo? What did OLC conclude, and do you agree with its conclusion(s)?
6. As you noted in your testimony, several DOD investigations into U.S. detention policies are now complete. However, the narrow mandates and limited scope of these investigations prevented them from addressing critical issues. Key inquiries into issues like contractor abuses and "ghost detainees" were left unexplored. The on-going investigations are similarly constrained. In a letter to President Bush dated September 7, 2004, eight retired generals and admirals called for a comprehensive, independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib and other U.S.-operated detention facilities. Do you support the creation of such a commission? If not, why not?
7. *Newsweek* reported on January 8, 2005, that the Defense Department was considering a plan to recruit, train and deploy "death squads" as part of a decapitation operation targeting Iraqi insurgents. Under the proposed plan, insurgents could be assassinated or targeted in so-called "snatch" operations, in which the individuals are sent to secret facilities for interrogation. (A) Were you consulted about this plan? (B) Did the President make a determination of any kind authorizing assassinations in Iraq? (C) Was there an amendment or modification to Executive Order 12333 to implement this program or any other program authorizing assassinations?

Geneva Conventions

8. You implied at the hearing that had the United States applied the Geneva Conventions to the conflict in Afghanistan, as Secretary Powell recommended, all persons detained there, including members of al Qaeda, would have been entitled to all the benefits of POW status. (A) Do you

acknowledge that had the United States applied Geneva broadly to the conflict, it could still have denied suspected terrorists the privileges of POW treatment, even while retaining its legal obligation to treat them humanely?

(B) What advantage did we gain as a nation in not going through the process set forth by Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War ("GPW") and U.S. military regulations for affording or denying POW status to individual detainees?

9. What were the practical consequences of the President's different determinations regarding the applicability of GPW to captured members of al Qaeda and the Taliban? Must al Qaeda and Taliban detainees be treated any differently as a result of the decision to apply GPW to the latter and not the former? Have they been treated any differently in fact?
10. In your draft memo to the President dated January 25, 2002, you identified a number of "positive" ramifications of a presidential determination that GPW does not apply to the Taliban, including "[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." Elaborating on this ramification, you wrote, "[I]t is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." What did you mean by that? Please give examples of "needs and circumstances" that could, in your view, justify violations of the War Crimes Act by U.S. personnel.
11. Defense Secretary Rumsfeld and former CIA Director Tenet have admitted to hiding individuals from the Red Cross in Iraq. (A) Would you agree that this practice violates GPW? (B) Do you believe that those who willfully violate GPW should be punished for doing so? (C) When did you first learn that U.S. forces were hiding prisoners from the Red Cross? What did you do about it?
12. You testified that you relied upon OLC in advising the President because it had "the expertise, the institutional history, [and] the institutional knowledge about what the law is." In January 2002, who did you think had greater expertise and experience in interpreting the Geneva Conventions: John Ashcroft and the lawyers at OLC, or Colin Powell and the lawyers at the State Department? Who did you rely upon more in advising the President regarding GPW's applicability in Afghanistan?
13. In response to a question by Senator Coburn, you indicated that OLC had issued guidance with respect to whether non-Iraqis who came into Iraq as part of the insurgency would enjoy the protections of GPW. Will you provide us with a copy of that OLC guidance? What did OLC conclude and do you agree with its conclusion(s)?
14. During the hearing, you denied responsibility for the OLC opinion dated August 1, 2002, interpreting the anti-torture statute, stating repeatedly that it is

OLC's responsibility to say what the law requires. (A) Would you agree that the President could have asked the Attorney General to reconsider that opinion if he disagreed with the legal analysis? Isn't that what eventually happened? (B) As White House Counsel, isn't it your job to question a legal analysis that you requested if you believe that it may be erroneous, especially if you know that the President or other senior Administration officials may rely upon it in formulating national policy?

Enemy Combatants and Military Commissions

15. Please explain your assertion in a *New York Times* op-ed published November 30, 2001, that the President's Military Order "preserves judicial review in civilian courts." What civilian court judicial review did you believe the Order preserved? If your response is federal habeas corpus review, how do you reconcile your assertion with the Government's position in *Rasul* -- rejected by the Supreme Court -- that federal courts lacked jurisdiction to issue a writ of habeas corpus to individuals detained at Guantanamo Bay?
16. In your remarks to the ABA in February 2004, you identified three available options for dealing with a U.S. citizen captured within the United States who may be an al Qaeda operative: "[C]riminal prosecution, detention as a material witness, and detention as an enemy combatant." (A) Under what circumstances do you think it is appropriate to detain suspected terrorists as material witnesses? Isn't the purpose of the material witness statute, 18 U.S.C. §3144, to compel testimony from reluctant witnesses? (B) Is it your view that Section 3144 may appropriately be used as a broad preventative detention law, to hold suspects indefinitely while investigating them, without filing charges? If not, would you support amending Section 3144 to limit the "reasonable period of time" that a witness may be detained to a time certain (e.g., no more than 3 days, consistent with the requirements of Section 3142(f)(2)) or, alternatively, to require that the witness's testimony be taken, whether by grand jury or deposition, at the first available opportunity?

Acree v. Republic of Iraq

17. I am sure you are aware that the Senate has twice unanimously requested the Administration to sit down and negotiate with 17 POWs who were brutally tortured by Saddam Hussein during the first Gulf War (*see* S.Amdt. 1836 to S.1689, and S.Amdt. 2194 to H.R.2861). I, along with many Americans, continue to be dismayed that this Administration has led the fight against their effort in court (*Acree v. Republic of Iraq*). (A) As Attorney General will you pledge to at least meet with these brave men so that we can honor their commitment to this country and better hold Iraq accountable for its actions? (B) Do you support the use of civil litigation against terror states as provided by Congress in its 1996 anti-terror legislation? (C) Article 131 of the Third Geneva Convention provides that no state party -- including the United States

– can “absolve” a torturing state of “any liability” for the torture of prisoners of war. As Attorney General, will you fully support our national obligation under this provision to hold states that torture American service personnel accountable for their torture of Americans?

Executive Power

18. The Administration sought to have included in the recently-passed Intelligence Reform and Terrorism Prevention Act a provision stating that all of the oversight provisions for covert actions and other intelligence activities in Title V of the National Security Act of 1947 were applicable only to the extent that they did not interfere with the President’s constitutional authority for national defense and foreign affairs. Do you view any of these oversight provisions, such as requiring that Congress be notified of covert actions, as unconstitutional? As Attorney General, would you ever advise the President that he is not bound by any of the requirements in Title V of the National Security Act?

Role of OLC

19. I attach to these questions a memorandum dated December 21, 2004, prepared by former senior Justice Department lawyers, setting forth ten guiding principles for the Office of Legal Counsel (“OLC”). (A) Do you agree with the principle that states: “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients’ desired actions, inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.” (B) Do you agree with the principle that states: “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”

Legal Experience

20. In your questionnaire responses, you say that with one exception, during your years working as counsel to then-Governor Bush and now as White House Counsel for President Bush, you did not personally appear in court. What was that one exception? Please describe in detail the subject and substance of that court appearance. Why did you feel it was necessary to handle this particular matter personally?

Death Penalty

21. In 2001, Attorney General Ashcroft changed the Department’s death penalty protocol to require that U.S. Attorneys clear all plea bargains with him. (A) As Attorney General, would you continue that policy, or would you restore

the former policy whereby U.S. Attorneys had autonomy in this area? (B) If you plan to continue the policy, how would you decide whether to accept a U.S. Attorney's recommendation against the death penalty in cases where the defendant agreed to plead guilty? To what extent would you defer to the U.S. Attorney's recommendation? (C) What if the defendant also agreed to cooperate with the government? Would your policy be any different?

22. Attorney General Ashcroft also changed the Department's death penalty protocol with respect to cases in which concurrent jurisdiction exists with a State or local government. Before 2001, the protocol protected the interests of non-death penalty states like Vermont by ensuring that the absence of a state death penalty statute did not by itself establish a sufficient federal interest for capital prosecution. (A) In deciding whether to authorize a U.S. Attorney to seek the death penalty, what consideration if any will you give to the fact that the offense occurred in a state that does not have capital punishment? (B) Would you consider restoring the pre-2001 version of section 9-10.070 of the U.S. Attorney's Manual? If not, why not?
23. As General Counsel to then-Governor Bush, you exchanged correspondence with the U.S. State Department in June 1997, in connection with the impending execution of Mexican national Irineo Tristan Montoya. You informed the State Department that local officials in Brownsville, Texas, never notified Montoya of his rights under the Vienna Convention on Consular Rights; that at the time of Montoya's arrest in 1985, there were no guidelines in place in Brownsville relative to the Convention's consular notice requirements; and that were still no guidelines in place. You added that approximately 1,200 to 1,500 Mexican nationals were arrested in the Brownsville area every month, and noted the "serious implications associated with concluding that a violation of ... the Vienna Convention alone could serve as a basis to reverse or remand a criminal conviction," as it could call into question the arrests and convictions of many other Mexican nationals. Upon learning of the systematic failure of Texas law enforcement authorities to comply with the Vienna Convention, did you advise the Governor to take steps to correct the problem? If not, why not? If so, what steps did you propose, and were those steps taken?
24. As General Counsel to then-Governor Bush you helped devise a two-part standard for considering clemency in capital murder cases. Under this standard, Governor Bush would consider clemency only where there was evidence of innocence or evidence that the defendant had not had full access to the courts. (A) Is this the standard that you would use as Attorney General in advising the President on matters of clemency? (B) Under what circumstances would you say that a defendant has not had full access to the courts? For example, has a defendant had full access to the courts if his lawyer missed a filing deadline that caused the courts to dismiss his claims on procedural grounds, without considering the merits? (C) According to the U.S. Attorney's Manual, appropriate grounds for considering clemency have traditionally included "disparity or undue severity of sentence, critical illness

or old age, and meritorious service rendered to the government by the petitioner.” Would you agree that these and other equitable factors may provide a basis for recommending clemency, regardless of any doubts about the defendant’s guilt or the fairness of the legal proceedings in the case?

Drug Policy/Mandatory Minimums

25. Under current law, someone who is apprehended with 5 grams of crack cocaine faces the same five-year mandatory minimum sentence as someone with 500 grams of powder cocaine. This 100:1 disparity in threshold quantity creates a gulf between sentences for powder and crack cocaine offenses. Two days before taking office in 2001, President Bush said we should address the cocaine sentencing issue “by making sure the powder cocaine and the crack cocaine sentences are the same.” He also said, “I don’t believe we ought to be discriminatory.” The Justice Department, however, took the position once President Bush was in office that current criminal penalties for crack offenses are appropriate, even as the US Sentencing Commission unanimously recommended substantial changes to reduce the disparity. (A) What changes do you believe should be made to our cocaine sentencing laws, if any? (B) Do you believe that current penalties for powder cocaine offenses are inadequate?
26. As you know, the Supreme Court recently heard arguments in a case challenging the authority of the Federal government to regulate marijuana grown to be used for medicinal purposes. This case stems from the repeated attempts by the Department of Justice to arrest and prosecute the users and distributors of medical marijuana in states that have chosen to legalize the practice. (A) Do you believe that the Drug Enforcement Administration should use its limited resources to mount raids targeting the medicinal use of marijuana over the objections of local law enforcement officials? (B) Will you pledge at least to conduct a review of the DEA’s medical marijuana enforcement practices and consider whether any changes would be appropriate?

Immigration

27. The asylum case of Rodi Alvarado, known as *Matter of R-A-*, is today on the desk of the Attorney General. Ms. Alvarado fled brutal spousal abuse in Guatemala, a country where she was unable to gain the protection of the authorities. The issue presented by her asylum claim is whether the United States will offer asylum protection to women fleeing severe human rights violations in their home countries. It will affect not only Ms. Alvarado and other victims of spousal abuse, but also women and girls fleeing trafficking for prostitution, sexual slavery, ‘honor’ killings and other serious harms. The Department of Homeland Security has filed a brief with the Attorney General asking him to support its position that Ms. Alvarado is a refugee, and support for her case comes from such diverse organizations as Concerned Women for America, Human Rights First and the Anti-Defamation League. I and many other Senators have written to urge the current Attorney General to concur in

the DHS position – including colleagues across the aisle such as Senators DeWine, Collins and Brownback. (A) Are you aware of the Alvarado case? Do you believe that victims of domestic violence are eligible for asylum under U.S. law? (B) Will you pledge to work closely with DHS to finalize regulations that have been in the works now for years to ensure that women who flee from domestic abuse can, in appropriate cases, receive asylum in the United States?

28. If confirmed as Attorney General, you would oversee the Executive Office of Immigration Review, including the Board of Immigration Appeals and the immigration courts. One of the highly controversial policies that the Department of Justice used for the “special interest” immigration detainees who were detained in the wake of the 9/11 attacks involved overriding judicial decisions to release detainees on bond after an individual hearing. This policy remains in place in the form of a rule authorizing the automatic stay of decisions by immigration judges to release an individual detainee. The policy gives the Department veto power over the decisions of judges who have heard individualized evidence before arriving at their decision. The Department’s own Inspector General issued a highly critical 200-page report on the Department’s treatment of these detainees. Will you keep this flawed “automatic stay” rule in place? If so, how do you justify overriding an immigration judge’s decision that is based on individualized evidence, and can you explain why you believe the current standard for release on bond in immigration proceedings – risk of flight or danger to the community – would not be adequate to address concerns about the detention of a suspected terrorist who is charged with immigration violations?

Civil Rights

29. The nonpartisan Transactional Records Access Clearinghouse at Syracuse University found last November that the number of defendants prosecuted for criminal violations of our civil rights laws dropped from 127 in FY 2000 to only 84 in FY 2003. Meanwhile, civil suits dropped from 740 in calendar year 2001 to 644 in 2002 to 576 in 2003. These reductions occurred even as complaints to DOJ about civil rights violations remained constant. What, if anything, would you do if confirmed to increase the number of civil rights cases brought by the Department?
30. National Public Radio reported last November on the physical and mental abuse of DHS immigration detainees housed at two state-run facilities in New Jersey, including the use of dogs for intimidation. The Justice Department is authorized under the Civil Rights of Institutionalized Persons Act to investigate and, where appropriate, prosecute such cases. (A) What is the appropriate role for DOJ to play in investigating allegations of abuse of federal detainees being held in state detention facilities? (B) Would you pledge to look into this matter, and ensure that DOJ either opens an investigation or coordinates with state authorities to ensure that appropriate charges are brought against anyone determined to have violated the detainees’ rights?

31. Ralph Boyd, who was the head of the Justice Department's Civil Rights Division for two years under Attorney General Ashcroft, stated early in his tenure that the Civil Rights Division would not bring disparate impact cases unless it had "additional evidence that is indicative of—or reflects disparate treatment, that is to say: intentional discrimination." This is contrary to the statutory language of Title VII, which says that disparate impact practices can be illegal even if they are not intentionally discriminatory. The effects of Mr. Boyd's hostility towards the disparate impact test were visible in the Department's record: during President Bush's entire first term the DOJ brought only one disparate impact Title VII case. This failure to enforce the law gives employers the wrong message, and lets them off the hook for an entire class of discriminatory actions. (A) Do you agree with Mr. Boyd that, despite the statutory language of Title VII, disparate impact cases should not be brought unless there is also "additional evidence" of "intentional discrimination?" (B) Can you assure me that as Attorney General you would vigorously pursue disparate impact cases?
32. Do you believe that private employers with 15 or more employees – who are already prohibited from discriminating in employment decisions based on race or gender – should also be prohibited from discriminating against employees based on their sexual orientation?

FBI Investigations

33. There is deep concern that the Justice Department has cast an overly broad net in investigating potential terrorist leads, resulting in home raids and individual detentions that do not produce any evidence of wrong-doing, terrorist connection, or prosecution. In some cases the negative impact on these targeted individuals continues long after the investigation ends. The mere fact that they were once investigated becomes a basis for future denial of liberties – for example, being detained or delayed when they travel, ostracized by their communities, or fired from their jobs. I know of one person who – despite being a top municipal health official who has worked with the Centers for Disease Control and the U.S. military – has been routinely escorted from the plane at the end of international flights, which naturally causes him great embarrassment, and detained until calls are placed to FBI agents who then verify that he is not a terrorist suspect and free to go. What will you do to put a system in place for officially clearing, in a timely manner, individuals who have no proven terrorist connection and are no longer under investigation – and I do not mean the Department simply saying "he's under investigation" year after year without ever producing any evidence – so their liberties are not indefinitely impinged for no legitimate reason?

Juvenile Justice

34. If confirmed, what will you do to support, and evaluate the effectiveness of enforcing, the four core protections Congress has provided for youth in the juvenile justice system: (a) keeping youth under juvenile court jurisdiction

out of adult jails; (b) sight and sound separation from adult inmates for whatever brief period of time youth may be held there; (c) not incarcerating youth for status offenses such as truancy and running away; and (d) addressing the disproportionate contact of minority youth with the juvenile justice system?

35. Last November, an independent panel convened by the National Institute of Health found that group detention centers, boot camps, and other "get tough" programs are not only ineffective, but may actually be counter-productive. Last week, an Arizona boot camp director was convicted of second degree manslaughter for the death of 14 year-old Anthony Haynes. Meanwhile, the Justice Department continues to provide federal funds to juvenile residential programs. (A) Do you agree that no federal funds should be expended for the placement of juveniles in boot camps and other facilities where they are subjected to physical, mental, or sexual abuse? (B) If so, what steps would you be prepared to institute to ensure that no such expenditures occur?
36. While many juvenile residential facilities do receive federal funds, most do not. Tragically, many of these facilities have subjected juveniles to beatings, abusive treatment and other acts at the hands of ill-trained and poorly supervised staff. I am aware that Congressman George Miller wrote Attorney General Ashcroft urging a federal investigation into such facilities. The Attorney General denied the request on the ground that Department of Justice lacked authority to investigate "purely privately-owned facilities." (A) What is the appropriate role of the Justice Department in protecting American children in such situations? (B) If you believe that further authority is required by the Department of Justice in order to intervene in such circumstances, would you support such legislation?

Reproductive Rights

37. With regard to *Roe v. Wade*, you testified at the hearing, "As far as I'm concerned, it is the law of the land, and I will enforce it." (A) Can you identify a single nominee for a judicial vacancy that you recommended to President Bush who was pro-choice? (B) Would you ever support such a nomination as Attorney General? (C) Do you believe *Roe v. Wade* was correctly decided? (D) Will the Justice Department under your leadership urge the Supreme Court to overturn *Roe*?

Freedom of Information Act

38. In October 2001, Attorney General Ashcroft reversed the prior Attorney General's Freedom of Information Act (FOIA) policy, which had directed that, where discretion allowed, agencies should make information available under FOIA unless disclosure would cause harm. Attorney General Ashcroft asserted the opposite position, informing agencies that the Department of Justice would defend the use of FOIA exemptions resulting in the greater

withholding of unclassified documents. If confirmed as Attorney General, will you order a reverse in the Ashcroft FOIA policy and revert to a policy presumption based upon disclosure?

39. In the summer of 2002, Senators Bennett, Levin, and I agreed on language governing the protection of Critical Infrastructure Information ("CII"). That language was endorsed by the White House, and Senator Bennett stated at the time that industry groups had agreed that the compromise language would allow them to share information with the government without fear of the information being released to competitors or to other agencies that might accidentally release it. In the fall of 2002, however, an extremely broad exemption to FOIA for CII was quietly tucked into the Homeland Security Act, resulting in the greatest single rollback of FOIA in history. In the 108th Congress, with several other senators, I introduced S.609, the Restoration of Freedom of Information Act. The text of the bill is identical to the text of the compromise reached on CII in the summer of 2002. I will introduce an identical bill in the 109th Congress. If confirmed as Attorney General, will you support this legislation?

Privacy

40. The Consolidated Appropriations Act of 2005 requires that "[e]ach agency shall have a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy," including "assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection and disclosure of information in an identifiable form" and annual reporting to Congress. In addition, the recently-passed Intelligence Reform and Terrorism Prevention Act, included a sense of Congress that each Department with law enforcement or antiterrorism functions should create a privacy and civil liberties officer. (A) Will you include as one of your top priorities the designation of a Chief Privacy Officer (CPO) for the Department of Justice, in keeping with the responsibilities and requirements outlined in these legislative actions? (B) Do you agree that the Department's responsibilities with respect to protecting privacy encompass, but extend beyond, implementation of the Privacy Act of 1974, and will you support the CPO in carrying out those responsibilities, including by involving the CPO in the deliberations and decision-making regarding Department policies and practices that will impact privacy?

CALEA

41. In 1994 Congress passed the Communications Assistance for Law Enforcement Act (CALEA) to require telephone companies to design their networks in a way that ensured the technical feasibility of carrying out the wiretap authority Congress granted to law enforcement. Last year, the FBI petitioned the FCC to apply CALEA broadly to information services providers, arguing that such an application was necessary to ensure the FBI's ability to intercept Internet communications. (A) Do you agree that CALEA should not be applied in a manner that allows law enforcement to exceed the

wiretap authority granted by Congress, and that, if any additional wiretap authority is necessary, the legislative process should be used to extend that authority and oversee its use? (B) Do you agree that to the extent Congress considers the application of CALEA (or a similar statute) to the Internet, Congress should be very careful to ensure that technical innovation is allowed to continue on the Internet, and that it is important to protect our country's leadership position in the development of new Internet technology?

Antitrust

42. The Department of Justice has made it a priority, at least since the Clinton Administration, to work with other countries in an effort to help create a global collaboration on promoting healthy and competitive markets, with clear and consistent rules on which businesses can rely. That effort has taken various forms, including assistance to countries that are just beginning to develop competition codes and agencies, as well as collaborative efforts with nations that have had more experience in this realm. The 1991 Antitrust Comity Agreement between the Department and the European Union stands as an obvious testament to this effort at collaboration, but it is not entirely clear that the comity envisioned has been achieved. In the last few years, we have seen several significant cases in which conduct or contracts are approved as lawful by the Department of Justice, but later condemned by regulators elsewhere. The European Union's rejection of the Boeing-McDonnell Douglas and GE-Honeywell mergers may be the harbingers of a troubling divergence in competition policy, and we have seen similar signs more recently in the EU's competition case against Microsoft. As Attorney General, would you reinvigorate the effort to work for greater coordination with the nations of the world in the area of antitrust enforcement? What steps will you take to defend determinations by the Department of Justice, and decisions of the United States courts, respecting the conduct or contracts of U.S. firms when that same conduct or contract is later subject to antitrust review by foreign regulatory authorities?

McCarran-Ferguson Act

43. The Congress, and particularly the Senate, has long been embroiled in a troubling debate about the purported "crisis" of medical malpractice. While some who are claiming that awards to victims in medical malpractice suits are a cause of higher medical costs, the real problem is the fact that insurance companies are – thanks to the McCarran-Ferguson Act – largely exempted from the federal antitrust laws. These laws are designed and operate to create and maintain competitive markets, but the antitrust enforcers must stand aside, as it is left entirely to the States to regulate the "business of insurance." As Attorney General, will you cooperate with efforts to ensure that the insurance industry is not permitted to continue to operate without the oversight of the federal antitrust enforcers?

Clean Air Act

44. Last fall, the Environmental Protection Agency referred 22 new cases to the Department for further prosecution of alleged power plant violations of New Source Review ("NSR") requirements. When combined with the ongoing NSR enforcement cases involving seven major utility companies and the Tennessee Valley Authority, these NSR actions have the potential to significantly reduce emissions faster and more deeply than the Administration's regulatory or legislative approaches. Please provide an update on the status of Department's NSR caseload, including a list of referrals where complaints have not yet been filed that includes both the date and the claims in the referrals. Also, please provide an estimate of how much it would cost for the Department to pursue these cases compared to the current budget for environmental enforcement.