U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 2, 2008

The Honorable Linda Sánchez
Chair
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam Chair:

Please find enclosed the responses of United States Attorney Patrick Fitzgerald to your questions arising from his appearance before the Subcommittee on February 26, 2008, at a hearing entitled "Implementation of the U.S. Department of Justice's Special Counsel Regulations".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Chris Cannon
Ranking Minority Member

"Implementation of the U.S. Department of Justice's Special Counsel Regulations"
House Judiciary Subcommittee on Commercial and Administrative Law

February 26, 2008

Questions for the Hearing Record
for
Patrick Fitzgerald
United States Attorney
Northern District of Illinois

Questions for Patrick Fitzgerald from Chairwoman Linda Sánchez:

1. What were the main distinctions between the authority you had during the CIA leak investigation and the authority granted a Special Counsel under the Justice Department's regulations?

On December 30, 2003, Acting Attorney General James B. Comey signed a letter delegating to me "all the authority of the Attorney General with respect to the Department's investigation into the alleged unauthorized disclosure of a CIA employee's identity." This delegation was made pursuant to the express authority of Title 28, United States Code, Section 510, which provides that "[t]he Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice any function of the Attorney General." At the time I was delegated authority as Special Counsel, I was serving as United States Attorney for the Northern District of Illinois, and therefore was an officer of the Department of Justice to whom authority may be delegated under Section 510.

As the members of the Subcommittee know, I was not appointed under the regulations promulgated by the Attorney General in 1999 that allow the appointment of a Special Counsel from *outside* the Department. Those regulations, found in 28 C.F.R. Part 600, were designed to provide a procedure for the appointment of special prosecutors from outside the Department of Justice to fill the gap left by the expiration of the Independent Counsel statute, Title 28, United States Code, Section 591 *et seq*. At the time the delegation of authority to me was announced, the Acting Attorney General explained that the delegation was not being made pursuant to the regulations, and in a letter of February 6, 2003 he reiterated that my position and authority as Special Counsel was not defined or limited by 28 C.F.R. Part 600. At the time I was named as Special Counsel, the Acting Attorney General explained at a press conference that he had considered appointing someone from outside the Department under the regulations, but chose instead to use his statutory authority to delegate the responsibility to an existing officer of the Department because it permitted the investigation "to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel

operation." The Acting Attorney General stated: "In short, I have concluded that it is not in the public interest to remove this matter entirely from the Department of Justice, but that certain steps are appropriate to ensure that the matter is handled properly and that the public has confidence in the way in which it is handled. I believe the assignment to Mr. Fitzgerald achieves both of those important objectives." I believe, as Acting Attorney General Comey expected, that my status as an officer of the Department of Justice did allow the investigation to proceed significantly faster and at a significantly lower cost than appointment of an outside special counsel in the CIA leak case.

During the course of the investigation and the prosecution of the Libby case, there were a number of misstatements and misunderstandings concerning my authority as Special Counsel. I appreciate this opportunity to set the record straight. In the Libby case, after the defense made a motion challenging my authority as Special Counsel, the district court carefully examined the legal basis for the delegation to me and concluded that the delegation was constitutional and authorized by statute. The district court also concluded that the delegation of authority was not in any way in conflict with 28 C.F.R. Part 600, which allows the appointment of Special Counsels from outside the Department of Justice. *See United States v. Libby*, 429 F. Supp.2d 27 (D.D.C. 2006)(Judge Walton's denial of defendant's motion to dismiss the indictment); *United States v. Libby*, 498 F. Supp.2d 1 (D.D.C. 2007)(Judge Walton's denial of defendant's motion for bail pending appeal and concluding that denial of defendant's motion to dismiss the indictment did not present a "substantial question" on appeal).

In response to your question, I would like to address several aspects of my authority as Special Counsel and then compare my authority to that of an outside Special Counsel appointed under 28 C.F.R. Part 600. First, my delegation was clearly authorized by statute. The district court concluded that 28 U.S.C. § 510 expressly authorized the delegation of authority to me as Special Counsel and that the delegation did not violate any statutory provision. *United States v. Libby*, 429 F. Supp.2d at 29-34. Second, my jurisdiction as Special Counsel was limited to the subject matter in the letters memorializing the delegation, and I had no authority as Special Counsel to expand my jurisdiction or continue beyond the completion of the assigned investigation. The district found that my authority as Special Counsel was limited and temporary. *United States v. Libby*, 429 F. Supp.2d at 40-42. Third, as an officer of the Department of Justice I was obligated to follow the policies and regulations of the Department of Justice. The delegation to me of authority of the Attorney General for the handling of the defined matter granted me the Attorney General's decision-making authority under Department policies and regulations, but did not allow me to ignore those policies and regulations. The district court not only concluded that I was obligated to follow Department policies and regulations but stated that "it appears to this Court that the Special Counsel has not violated any of those regulations." *United States v. Libby*, 429 F. Supp.2d at 41-42. Fourth, while the Acting Attorney General's delegation to me intended that as Special Counsel I not be subject to ongoing supervision or required to make reports to the Acting Attorney General, that delegation could be rescinded or modified at any time at the will of the Acting Attorney General. The district court found that the Acting Attorney General's continuing ability to remove the Special Counsel or revise his

authority at any time "demonstrates that the Special Counsel was and is clearly a subordinate within the Department of Justice, even if he has not been closely supervised or directed on a day-to-day (or even week-to-week) basis in a manner that might cause his independence and impartiality, so necessary in an investigation of this type, to legitimately be questioned." *United States v. Libby*, 498 F. Supp.2d at 20. Finally, as an officer of the Department of Justice handling the Special Counsel matter, I was required to abide by the rule of grand jury secrecy in Federal Rule of Criminal Procedure 6 and was provided no special statutory authority to issue a public report concerning my investigation.

Having discussed several aspects of my role as Special Counsel, I will compare those aspects of my position as Special Counsel from within the Department of Justice to an outside Special Counsel appointed under 28 C.F.R. Part 600. The bottom line is that in certain respects I had greater authority than an outside Special Counsel appointed under Part 600, but the delegation of greater authority to me was for the purpose of promoting the perception of the independence of the investigation, and in any event the delegation was at all times subject to revocation or modification. Consider the following points of contrast and comparison:

First, the obvious distinction is that the regulations in Part 600 authorize the appointment of a Special Counsel from outside the Department, whereas 28 U.S.C. § 510 permits the delegation of the Attorney General's power to a person from within the Department. *See* Part 600.1(b), 600.3(a). A Special Counsel under Part 600 is described as having the power and authority of a United States Attorney, *see* Part 600.6, while my delegation as Special Counsel allowed me to exercise the authority of the Attorney General for the case. It is important to note that there is nothing inconsistent with the delegation to me pursuant to 28 U.S.C. § 510 and the regulations in Part 600, which "applies only to Special Counsel who have been appointed from positions *outside the federal government*." *United States v. Libby*, 498 F. Supp.2d at 10 (emphasis in original). Indeed, Part 600.2(c) expressly contemplates that the Attorney General (or Acting Attorney General) may conclude that the public interest would be served by delegating authority to an official within the Department, and if so, that "he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials." Thus, the action of the Acting Attorney General in delegating authority to me as an inside Special Counsel is completely consistent with Part 600.

Second, the jurisdiction of an outside Special Counsel appointed under Part 600 is limited in subject matter and duration, and expansions of jurisdiction are only allowed with the approval of the Attorney General. *See* Part 600.4. On this score, as a Special Counsel from within the Department, I was on equal footing with an outside Special Counsel appointed under Part 600.

Third, an outside Special Counsel under Part 600 is required to comply with all policies and regulations of the Department, just as I was as Special Counsel from within the Department. *See* Part 600.7(a). A Special Counsel under Part 600 is required to seek approvals from Department components as required in various regulations, unless the Attorney General grants an exemption with respect to a approval of a particular decision. *See* Part 600.7(a). In this respect, the delegation to me as Special Counsel was broader.

Fourth, a Special Counsel under Part 600 is not subject to day-to-day supervision, but the regulations require the Special Counsel to make reports to the Attorney General of significant events in the investigation (*see* Part 600.8(b)) and the Attorney General may request an explanation from the Special Counsel for an action and may override an action determined to be "so inappropriate or unwarranted under established departmental practices that it should not be pursued." *See* Part 600.7(b). While these provisions, by their terms, subject a Special Counsel under Part 600 to greater ongoing supervision than I was subject to as Special Counsel, it must be remembered that it was the Acting Attorney General's stated intent that the terms of the delegation to me maximize the perception of independent decision making. That said, the terms of the delegation to me as Special Counsel, as discussed above, allowed the delegation to be revoked or modified at will, including by requiring reports or consultations. In contrast, a Special Counsel appointed under Part 600 may be removed by the Attorney General only "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." *See* Part 600.7(d). With respect to removal, a Special Counsel under Part 600 therefore would be harder to remove than I would have been as a Special Counsel delegated authority under 28 U.S.C. § 510.

Finally, Part 600 does not exempt Special Counsels from compliance with grand jury secrecy rules, nor does it authorize a public final report. Part 600 does require an outside Special Counsel to submit a confidential report to the Attorney General "explaining the prosecution or declination decisions reached by the Special Counsel." *See* Part 600.8(c). (I note, however, that such a report is not a public report as was provided for by the Independent Counsel statute.) Such closing documentation was not required of me as Special Counsel under the terms of the delegation of authority.

2. Your appointment as Special Counsel has been criticized because you were granted unprecedented powers as a "de facto Attorney General" where you could choose whether or not "to abide by the regulations."

How do you respond to that critique?

Do you believe that the regulations should be changed to reflect your experience as Special Counsel? If so, please explain how they should be changed.

As discussed above, while the delegation to me of the authority of the Attorney General granted me decision-making authority under certain Department regulations and policies, it did not empower me to choose whether or not to abide by such policies and regulations. Indeed, not only did Judge Walton find that I was obligated to follow Department regulations and policies, he also found that I in fact did so. *United States v. Libby*, 429 F. Supp.2d at 41-42 (concluding that the Special Counsel was required to follow Department policies and regulations and noting that "it appears to this Court that the Special Counsel has not violated any of those regulations.") A second court specifically found that I and my team "fully satisfied" Department regulations – specifically, those pertaining to the issuance of subpoenas to members of the news media. *See In*

re Grand Jury Subpoena, Miller, 438 F.3d 1141, 1152 (D.C. Cir. 2006)(noting that the district court had determined that the DOJ guidelines had been"fully satisfied," but finding it unnecessary to address the issue on appeal.) Therefore, criticisms based on my purported authority to disregard Department of Justice policies and regulations have no merit whatsoever.

Based on my experience as Special Counsel, I have no suggestions to offer regarding possible changes in the regulations bearing on such appointments.

3. Are there any requirements in the Special Counsel regulations that you believe would have been appropriate for your investigation? If so, which requirements?

I do not think that there were any additional requirements that needed to be incorporated in my delegation.

4. In your press conference on October 28, 2005, you said, "one day I read that I was a Republican hack, another day I read I was a Democratic hack." Critics of your investigation also called it a "political witch-hunt."

How do you respond to these allegations?

What, if any, policy changes can be implemented to avoid this perception for future counsel in similarly situated positions?

The investigation which resulted in the indictment and conviction of Mr. Libby was anything but a "political witch hunt." The investigation was carried out by career investigators and prosecutors who were determined to find out what the relevant facts were and make appropriate determinations as to what, if any, criminal charges should be filed. As part of that investigation, Mr. Libby was interviewed by the Federal Bureau of Investigation and asked to testify before a grand jury. Mr. Libby, represented by counsel, agreed to be interviewed by the FBI and testified under oath before the grand jury. Unfortunately, Mr. Libby chose to do something the law forbade: he made false statements to the FBI and lied under oath to the grand jury on two separate occasions.

The investigation, including that part of the investigation focused on Mr. Libby's obstruction of justice, was carried out entirely properly, with particular respect for the obligations of secrecy regarding the grand jury. Mr. Libby was represented prior to, during, and after trial by several of the most prominent law firms in the country. At the end of the trial, each and every juror was convinced of Mr. Libby's guilt beyond a reasonable doubt, as was the trial judge who stated so at sentencing. Regardless of the party affiliation of the President who appointed them, all of the judges who reviewed the steps taken in the investigation and prosecution found that the prosecution team conducted itself appropriately.

I would note that the propriety of pursuing a prosecution for perjury and obstruction of justice when a high-ranking government official lies under oath repeatedly is not open to serious question. People who do not hold public office are routinely prosecuted for such violations when the evidence will sustain the charge. Those prosecutions are brought because our government cannot function properly without a fair judicial system, and we cannot have a fair judicial system if perjury and obstruction of justice are countenanced. When high level officials testify falsely under oath about matters of public importance, they should not be treated more leniently. Holding public officials to the standards of criminal law that ordinary citizens must obey is not a "political witch hunt."

Of course, there is nothing to stop people from making unwarranted allegations. Realistically, there are no policy changes that can eliminate such criticisms. That is often the nature of high profile cases. Some people will form the view, based on factors other than the relevant facts or the law, that an individual should or should not be investigated or prosecuted, and then assume that anyone who does not see things their way is politically motivated or biased. Any kind of special counsel or independent counsel must accept the inevitability of such criticism as a reality. As long as an investigation is conducted without political influence or motivation, there is little more that the investigative team can do than attempt to dispel false allegations in the courtroom and accept that pundits, commentators and editorial pages are not bound by the facts established in court.

5. When Scooter Libby's attorneys discussed appealing his conviction, they argued that his conviction should be overturned because the Justice Department gave you more authority than you should have been granted. They also noted that you were "expressly exempted from ... following DOJ policy and procedure."

How do you respond to those arguments?

In your view, could appointment of a Special Counsel outside of the regulations jeopardize a conviction on appeal? If so, how?

As discussed above, I was not exempted from following Department of Justice policies and procedures. Instead, the delegation to me only stated that I was not appointed under Part 600. Thus, I was not subject to the regulations applicable to Special Counsels appointed under that Part, including the regulations that require compliance with Department of Justice regulations and require reports to be provided to the Attorney General regarding the progress of the investigation. As indicated above, it was unnecessary to subject me to a regulation requiring me to abide by Department of Justice regulations, as I was already under such an obligation as a Department employee. It would have been inappropriate to subject me to regulations requiring that I submit reports to the Attorney General, given that the Attorney General had recused himself from the investigation to avoid any actual or apparent conflict of interest, and that the purpose of my appointment was to ensure that the investigation was conducted in a manner that was, and appeared to be, fair and unbiased.

Moreover, in my view, the appointment of a Special Counsel outside of the regulations would not jeopardize a conviction on appeal. The regulations in 28 C.F.R. Part 600 are not the exclusive basis for making a lawful delegation of authority to an independent prosecutor. Based on court decisions involving my tenure as Special Counsel, as well as earlier cases, the courts have approved a delegation of authority of an official of the Department of Justice pursuant to 28 U.S.C. § 510 that: sets forth jurisdiction limited as to subject matter and duration, requires the Special Counsel to follow the substantive regulations of the Department, and allows the delegation to be subject to revocation or modification at will. As pointed out in the response to question #1, the district court found the delegation to me as a Special Counsel from within the Department consistent with the constitution and relevant statutes and in no way inconsistent with the regulations for appointing an outside Special Counsel. *See United States v. Libby*, 429 F. Supp.2d 27 (D.D.C. 2006). Not only did the district court reject the defendant's constitutional and statutory challenges to the terms of the delegation to me as Special Counsel, it held that the denial of the defendant's motion to dismiss the indictment on those grounds did not constitute a "substantial issue" for appeal that is a prerequisite for bond pending appeal. *United States v. Libby*, 498 F. Supp.2d 1 (D.D.C. 2007). When the defendant appealed the district court's determination that the challenge to my appointment as Special Counsel was not a "substantial issue" for appeal, the United States Court of Appeals for the District of Columbia Circuit rejected the defendant's argument. Order of July 2, 2007. The district court's rejection of the defendant's legal challenges to the Special Counsel is supported by precedents of the Supreme Court and the D.C. Circuit. *See United States v. Libby*, 429 F. Supp.2d at 29-45(citing and discussing cases) The D.C. Circuit did not have the opportunity to rule on Libby's appeal because Libby voluntarily dismissed his appeal on December 11, 2006, leaving the judgment of criminal conviction on four counts of obstruction of justice, perjury, and false statement in place.

6. Do you believe that the Department's Special Counsel regulations should be changed to require a President to consult with a Special Counsel when deciding whether to pardon the Administration official who was the subject of the Special Counsel's prosecution? Please explain.

I would not propose that a consultation requirement be added to the regulations. As an initial matter, there would be a serious question as to the constitutionality of imposing that limitation on the ability of any President to exercise the power to pardon. Additionally, I am not aware of a consultation requirement imposed on the President in any federal criminal prosecution. For example, the Department of Justice's Rules Governing Petitions for Executive Clemency do not contain such a requirement. Even assuming that such a requirement would be constitutional, imposing a consultation requirement only in Special Counsel cases could create the appearance that defendants in such cases are treated differently than those in other prosecutions.

7. **Are there any pending matters in the CIA leak investigation? If so, please describe those matters. If not, please indicate the date in which the investigation was concluded.**

With the withdrawal of Mr. Libby's appeal, this matter is effectively concluded. The only matters pending involve participation in providing appropriate responses to Congressional requests. The investigation was effectively concluded with the end of the Libby trial in March 2007, though it was substantially concluded prior to the trial.

8. **Should a Special Counsel make all grand jury material public once a Special Counsel investigation has concluded? Why or why not?**

> **If a Special Counsel should not make all grand jury material available at the conclusion of a Special Counsel investigation, under what conditions should a Special Counsel be required to turn over that material: a provision in the Department's Special Counsel regulations, a statutory mandate, a vote of the Committee on the Judiciary, a vote of the House of Representatives, a court order, or by any another method?**

Attorneys for the government, including both prosecutors in ordinary criminal investigations and prosecutions and Special Counsels, are generally prohibited from disclosing matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(2)(B). This is the rule under which I operated in my role as Special Counsel.

Rule 6(e) does not permit prosecutors to make grand jury information public at the conclusion of an investigation; rather, they are required to maintain the secrecy of grand jury material unless disclosure is authorized under Rule 6(e)(3), such as, for example, when the prosecutor asks a witness to publicly repeat testimony given to the grand jury in the course of a criminal trial.

As the Supreme Court consistently has recognized,"the proper functioning of our grand jury system *depends* upon the secrecy of the grand jury proceedings." *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958)(emphasis added). It is vital because:

> (1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1 at 1151-52 (D.C. Cir. 2006)(quoting *In re North (Omnibus Order)*, 16 F.3d 1234, 1242 (D.C. Cir., Spec. Div., 1994) and *Douglas Oil*

Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 218 n. 9 (1979))(quotation marks omitted). Judge David S. Tatel of the D.C. Circuit Court of Appeals recently elaborated on the need for grand jury secrecy as a means of promoting the grand jury's ability to obtain truthful testimony from witnesses:

> Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth.

See In re Grand Jury Subpoena, Judith Miller, 405 F.3d 17, 19 (D.C. Cir. 2005)(Tatel, J., concurring)(citation omitted).

And the need for grand jury secrecy does not necessarily end after an investigation is concluded. To the contrary, as the Supreme Court explained in *Douglas Oil*:

> [I]n considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties.

441 U.S. at 222. Moreover, continued grand jury secrecy ensures that persons who were under suspicion but ultimately not charged are protected from public ridicule and embarrassment. *Douglas Oil Co.*, 441 U.S. at 219 (footnote omitted).

The reasons for requiring grand jury secrecy apply with equal, if not greater, force in the context of criminal investigations and prosecutions conducted by Special Counsels. The highly sensitive nature of many such investigations, as well as the natural reluctance of many witnesses to cooperate in such investigations, may make it even more difficult to encourage witnesses to come forward without the protections that grand jury secrecy affords.

In my view, if the circumstances under which grand jury material may be made public were to be expanded, an amendment to Fed. R. Crim. P. 6(e) would be necessary. Any suggestions for, or arguments against, an amendment to the Federal Rules of Criminal Procedure properly should be made by the Department of Justice, rather than by me.

9. When a Special Counsel is appointed from within the Department and concurrently serves as a U.S. Attorney, is there a greater risk of pressure and intimidation from the Administration because the U.S. Attorney serves at the pleasure of the President? Please explain.

Did you ever feel intimidated or pressured during the CIA leak investigation. If so, please explain.

In your view, would a Special Counsel appointed from outside of the government be better insulated from undue pressure or intimidation? Please explain.

Do you agree that if the CIA leak investigation, or any other highly sensitive investigation, had been handled by an outside Special Counsel, such threats could not be credibly made or carried out? Please explain.

I never received any threats during the investigation, nor was I pressured in any way, shape or form by the Administration. I would hope and expect that any prosecutor, whether appointed from within or outside the Department of Justice, would take appropriate action in response to any inappropriate threats.

10. When a U.S. Attorney concurrently serves as a Special Counsel, is it appropriate for the Justice Department or White House to rank the performance of that U.S. Attorney? Please explain.

While you were in the midst of leading the CIA leak investigation, you were ranked among the U.S. Attorneys who had "not distinguished themselves" on a Justice Department list sent in an email from Kyle Sampson, Chief of Staff to the Attorney General, to White House Counsel Harriet Miers on March 2, 2005. Was your ranking while in the midst of the CIA leak investigation appropriate? Please explain. Please respond to your rank of "not distinguished themselves."

When did you learn that you were ranked on this list?

How did you learn that you were on the list? Please explain.

Do you know who put the list together? If so, please identify the individual(s).

Do you know who provided input for the list? If so, please identify the individual(s) and explain how the information was collected.

When did you learn that the firings of U.S. Attorneys was under consideration? Please explain the circumstances.

Do you know why certain U.S. Attorneys were ranked the way they were on the list? Please explain.

What was your view of the performance of each U.S. Attorney that was fired in 2006: H.E. "Bud" Cummins III (E.D. Ark.); John McKay (W.D. Wash.); David Iglesias (D.N.M.); Paul K. Charlton (D. Ariz.); Carol Lam (S.D. Cal.); Daniel Bogden (D. Nev.); Kevin Ryan (N.D. Cal.); Margaret Chiara (W.D. Wash.); and Todd Graves (W.D. Mo.). Please explain.

In your view, did the performance of the nine fired U.S. Attorneys justify their terminations? Please explain.

Every prosecutor should expect to have his or her performance appropriately evaluated by his superiors. Where a United States Attorney performs a separate function, that should not insulate him or her from appropriate evaluation.

I first learned about an evaluation of me by Mr. Sampson at the time of an inquiry by the media to the Department of Justice indicating that the media was aware of such evaluation. A colleague from the Department of Justice told me about the media inquiry and the substance of the document inquired about. There were press accounts that immediately followed.

I have no special insight into the creation of the referenced "list."

I do not think it appropriate for me to answer questions in my capacity as United States Attorney concerning my former colleagues or their termination. I understand from public sources that the relevant matters are being examined by the Office of Inspector General and the Office of Professional Responsibility in the Department of Justice.

11. When one U.S. Attorney concurrently serves as a Special Counsel, is it appropriate for the Justice Department or the White House to consider firing all 93 U.S. Attorneys? Please explain.

National Public Radio has reported that, according to "someone who's had conversations with White House officials, the plan to fire all 93 U.S. Attorneys originated with political adviser Karl Rove. It was seen as a way to get political cover for firing the small number of US Attorneys the White House actually wanted to get rid of." Ari Shapiro, *Documents Show Justice Ranking US Attorneys*, NPR, April 13, 2007. Many have speculated that Mr. Rove's goal in proposing the U.S. Attorney firings was to pressure and

intimidate you. When Mr. Rove made the suggestion to fire the U.S. Attorneys, he had already been before the grand jury several times in the Scooter Libby case. To your knowledge, is this account correct? Please explain why or why not.

During the CIA leak investigation, were you aware of any conversations that you might be asked to resign? If so please describe all such conversations, including the substance of the conversations, when they occurred, and the names of those who participated.

I do not know if the referenced account of events is correct or not.

As to whether I was aware during the relevant time period of the investigation that I might be asked to resign, I will respectfully decline to discuss matters currently at issue in a trial ongoing in the Northern District of Illinois.

12. Under what circumstances would it be appropriate for the President to fire a Special Counsel appointed from inside the government and who is not subject to the Department's regulations? Please explain.

It is my understanding that while the President has the authority to relieve a United States Attorney of his duties, any such action would usually be carried out by the Attorney General, Deputy Attorney General or other designee. It is my further understanding that a Special Counsel could be removed at will by the Attorney General, the Acting Attorney General or his or her designee in a case such as mine where the Special Counsel received a delegation of power, not an outside appointment. Moreover, it would be entirely appropriate for such a delegation to be revoked if it were believed that a Special Counsel was not exercising his or her duties faithfully (e.g. if the Special Counsel engaged in unethical conduct such as leaking grand jury information or otherwise violating the law) and indeed the ability to revoke the delegation of power is necessary so as not to render the delegation an unconstitutional appointment. On the other hand, revocation of a Special Counsel's delegation for the purpose of interfering with an investigation would be entirely inappropriate and under some circumstances might constitute criminal conduct.

13. If you had been fired as a U.S. Attorney, what impact would that have had on the CIA leak investigation? What impact would that have had on your appointment as Special Counsel?

During my tenure, this question did not present itself. It is not clear to me what the legal implications would have been had I been relieved of command as United States Attorney while serving as Special Counsel. (This might be an issue that should be specifically addressed if there is a delegation of power to a sitting United States Attorney in the future as it is entirely possible that a United States Attorney could be asked to resign after a change in administration.) It would

appear that unless the United States Attorney were specifically retained in some other capacity (such as a Special Assistant United States Attorney), he or she could no longer serve as a Special Counsel who was employed by the Department of Justice and whose authority had been delegated by the Attorney General. It would be possible that a new appointment could be made for such a former United States Attorney which would provide that he or she would serve as a Special Counsel from outside the Department of Justice pursuant to the appropriate regulations.

Had I been relieved of command as United States Attorney while conducting the CIA leak investigation, even if a legal basis were established for me to continue as Special Counsel or in some other proper capacity, I would nevertheless have had to determine whether it would be appropriate for me to continue representing the government under all of the circumstances. I would have had to consider whether my ability to be effective had been undercut and whether any decision I made to prosecute or not prosecute a case (or whether to further investigate any matter) might reasonably subject the investigative team to the criticism that I (or others on the team) might harbor a bias against the administration which had relieved the prosecutor of his Presidential appointment. This would be a determination heavily dependent on the particular factual circumstances which led to the termination of my appointment as United States Attorney.