IMPLEMENTATION OF THE U.S. DEPARTMENT OF JUSTICE'S SPECIAL COUNSEL REGULATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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IMPLEMENTATION OF THE U.S. DEPARTMENT OF JUSTICE'S SPECIAL COUNSEL REGULATION

TUESDAY, FEBRUARY 26, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:50 p.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Conyers, Sánchez, Johnson, Lofgren, Cannon, and Feeney.

Staff present: Eric Tamarkin, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing on the Committee of the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

I will now recognize myself for a short statement. In response to the Watergate scandal and President Richard Nixon's executive dismissal of independent special prosecutor Archibald Cox, the independent counsel provisions were originally enacted as Title VI of the Ethics and Government Act of 1978.

Specifically, the special prosecutor independent counsel provisions were adopted to deal with the unusual circumstance of an inherent conflict of interest that would arise when the Attorney General and the President, while supervising the Department of Justice and Federal prosecutors, would control the investigation and possible prosecution of allegations of their own criminal wrongdoing or other high-level officials in their administration.

During the nearly 21-year span of the law, 20 independent counsels were appointed at a cost of approximately $230 million to the American people. When the independent counsel law expired, regulations were promulgated concerning the appointment of outside temporary counsel.

According to the regulations, such special counsels are to be appointed by the Attorney General to conduct investigations and possible prosecutions of certain sensitive criminal matters where the Department may have a conflict of interest, and where the cir-

cumstances determine that such an appointment would be in the public interest.

These regulations make clear that the special counsel should come from outside of the Government. They also provide that at the conclusion of his or her work, the special counsel must produce a confidential report explaining the prosecutions or the decision not to prosecute.

Additionally, at the conclusion of the investigation, the Attorney General is obligated to notify the Chairman and Ranking minority Members of the House and Senate Judiciary Committee. This notification is essential if Congress is to fulfill its oversight duties and its constitutional obligation to provide a check on executive branch action.

Recently, these special counsel regulations have been all but ignored. Despite several opportunities to do so, Attorneys General in the Bush administration have yet to utilize the special counsel regulations. In the CIA leak matter, U.S. Attorney Patrick Fitzgerald was given the title of special counsel, but did not come from outside of Government and was not required to abide by the Department's special counsel regulations.

The practical implication of this arrangement was that Mr. Fitzgerald had significantly more power and less supervision than a special counsel under the regulation. Similarly, with regard to the detainee interrogation videotapes investigation, Attorney General Mukasey has appointed Assistant U.S. Attorney John Durham to be the acting U.S. attorney for the Eastern District of Virginia.

While Mr. Durham's qualifications and reputation are admirable, as are Mr. Fitzgerald's, I remain concerned about potential conflicts of interest and a lack of procedural safeguards in place for his appointment. I am also concerned about the scope of Mr. Durham's investigation. The Attorney General has indicated that Mr. Durham will investigate the destruction of the tapes. However, he has made clear that Mr. Durham will not investigate the activities recorded on the tapes, including the use of waterboarding.

Because of these concerns, I joined 18 of my colleagues on the Judiciary Committee in a letter to Attorney General Mukasey requesting that he appoint an outside special counsel in the videotapes case. To date, we have yet to receive a response to our request.

I am very interested in whether the special counsel regulations are functioning properly, and whether the Department should revise the regulations in light of Mr. Fitzgerald's experience. I am also interested in whether we should revisit the independent counsel statute, or whether we should consider a new legislative approach that strikes the proper balance of independence and accountability.

Although the Subcommittee examined the expiring independent counsel statute and newly promulgated special counsel regulations in several hearings during the 106th Congress, this is the first hearing that I am aware of that the Subcommittee has conducted regarding oversight of the implementation of the special counsel regulations.

Accordingly, I am very much looking forward to hearing from our witnesses on today's panel.

At this time I would now like to recognize my colleague Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening statement.

Mr. CANNON. Thank you, Madam Chair. This is, of course, a very complicated issue that has been dealt with in many different ways over time. I look forward to hearing our witnesses, and given the fact that we have votes coming up, I would ask unanimous consent that my opening statement be inserted into the record.

Ms. SÁNCHEZ. Without objection, so ordered.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Thank you Madame Chair and welcome to our witnesses.

I would like offer some perspective before we start. This subcommittee spent the better part of a year looking into the U.S. Attorneys' matter. The purported object of that investigation was to assure that the Department of Justice was "independent" of undue influence by Administration politics.

I don't think the predicates for the doubts about the Department's independence were true, but the U.S. Attorneys' investigation did bring us a new Attorney General and a new Deputy Attorney General who is waiting for Senate confirmation. And their independence is not subject to serious question.

So when the news of the destruction of CIA tapes broke, I would have thought we might hear the majority cry "We have an independent DOJ to investigate this!"

But we didn't.

Instead we heard we can't trust the new Attorney General and the Department of Justice to investigate and we have to have a special counsel, an outsider.

The disconnect is dizzying because layering the Department of Justice with political charges does nothing for the independence, confidence and reputation of the Department.

I fear we may be off to the same political start to this session as we were with the last, but I hope I am wrong.

In order to avoid the political temptation presented by this hearing the fair questions will be to extract information needed for oversight and will focus on the Special Counsel Regulations that replaced the old Independent Counsel Act—a piece of legislation that a bipartisan list of notables from Chris Dodd to Ken Starr, Cass Sunstein to Robert Bork, said had to be scrapped.

I look forward to learning more about whether the experience thus far under the Special Counsel regulations shows if there's anything really wrong with the regulations.

For example, whether infrequent decisions to appoint special counsels means the regulations aren't working or instead simply that hard-working career employees and appointed officials have routinely proved themselves capable of investigating politically charged cases, just as we expect them to be.

And, consistent with that, whether the Department's decision to investigate the CIA tapes matter itself—as it has investigated similar matters for over a century—was the right one.

I look forward to the testimony and yield back the remainder of my time.

Ms. SÁNCHEZ. And I appreciate your attempt to try to move this along. Without objection, other Members' opening statements will be included in the record; and without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I am now pleased to introduce the first witness panel for today's hearing. Our first witness is Carol Elder Bruce, a partner at Venable, LLP. Carol Elder Bruce is a litigator whose practice focuses on white-collar criminal defense and complex civil litigation. She represents individuals and corporations in criminal grand jury investigations and in criminal and civil trials and appeals. She also represents clients in hearings and proceedings before the U.S. House of Representatives, the United States Senate, and adminis-

trative proceedings within Federal agencies and in the conduct of internal corporate investigations.

Ms. Bruce served as the independent counsel appointed by a special panel of the U.S. Court of Appeals for the D.C. Circuit to investigate matters concerning Interior Secretary Bruce Babbitt. She previously served as the deputy independent counsel in the investigation of matters concerning Attorney General Edwin Meese, and also was assistant United States Attorney for the District of Columbia for 10 years, where she was lead counsel in over 115 jury trials, and managed a grand jury presentation of more than 100 additional case.

Ms. Bruce is a fellow of the American College of Trial Lawyers, and she has completed a 2-year tenure as chair of the college's International Committee. She is also a vice-chair of the white-collar committee of the National Association of Criminal Defense Lawyers. She serves on the honorary board of the Innocence Project of the national capital region and on the George Washington University Law School dean's board of advisors. Welcome to you, Ms. Bruce.

Our second witness is Neal Katyal. Did I pronounce that correctly? Professor Katyal is a professor at Georgetown University Law School. He is an expert in matters of constitutional law, particularly the role of the President and Congress in time of war, and theories of constitutional interpretation. His other primary academic interests are criminal law and education law.

Professor Katyal previously served as National Security Advisor in the U.S. Justice Department. He also served as Vice President Al Gore's co-counsel in the Supreme Court election dispute of 2000, and represented the deans of most major private law schools in the landmark University of Michigan affirmative action case, *Grutter v. Bollinger*.

Professor Katyal clerked for Supreme Court Justice Stephen Breyer as well as Judge Guido Calabresi of the U.S. Court of Appeals. Professor Katyal was named Lawyer of the Year in 2006 by Lawyers USA, and has also been awarded the town of Salem, Massachusetts prize for 2007. He has appeared on several major American nightly news programs as well as other venues such as the Colbert Report—a very brave man indeed.

Our third witness is Lee Casey, a partner at Baker & Hostetler, LLP. Mr. Casey focuses on Federal, environmental, constitutional, elections, and regulatory law issues, as well as international and humanitarian law. His practice includes Federal, district, and appellate court litigation, as well as matters before Federal agencies.

Prior to joining Baker & Hostetler, Mr. Casey was an associate with Hunton & Williams, practicing in international, environmental, and constitutional law. From 1986 to 1993, Mr. Casey served in various capacities in the Federal Government, including the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. In addition, from 1990 to 1992, Mr. Casey served as Deputy Associate General Counsel at the U.S. Department of Energy.

Before joining the Government in 1986, Mr. Casey was an associate in the Los Angeles firm of Mitchell Silberberg & Knupp, prac-

ticing in the litigation section with an emphasis on copyright, contract, and first amendment issues.

From 1982 to 1984 he practiced at the Detroit firm of Dykema Gossett, focusing on corporate securities, commercial, and intellectual property litigation.

From 1984 to 1985, Mr. Casey served as law clerk to the Honorable Alex Kozinski, then Chief Judge of the United States Claims Court.

Our final witness on our first panel is Barry Coburn. Mr. Coburn has been litigating complex criminal and civil cases for over 25 years. His experience encompasses several years with the United States Department of Justice Antitrust Division, where he served as the Special Assistant in the Office of Operations. Additionally, he served 4 years in the United States Attorney's Office for the District of Columbia, and has been in private practice for 18 years.

Mr. Coburn is a fellow of the American College of Trial Lawyers, and is a member of the District of Columbia Committee and Access to Justice Committee. He has taught continuing legal education courses in the areas of trial practice, the Federal sentencing guidelines, witness issues, securities fraud, and other subjects sponsored by the American Bar Association, the District of Columbia Bar, the American College of Trial Lawyers, and other entities.

Mr. Coburn has guest-taught at Georgetown University, George Washington University, and the University of Virginia law schools, and at the Department of Justice's National Advocacy Center, and authored numerous articles. I want to thank you all for your willingness to participate in today's hearing.

Without objection, your written statements will be placed into the record in their entirety, and we are going to ask that you please limit your oral remarks to 5 minutes. You will note that we have a lighting system there on the desk. When your time begins you will see a green light start; when you are 4 minutes into your time you will get the yellow warning light that you have a minute left; and alas, when the light turns red your time has expired. If you are in the middle of a sentence or a final thought we will, of course, allow you to complete that thought before we move on to our next witness.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit. With that made explicit, I would invite Ms. Bruce to please proceed with her testimony.

TESTIMONY OF CAROL ELDER BRUCE, ESQUIRE, VENABLE, LLP, WASHINGTON, DC

Ms. BRUCE. Thank you very much, Madam Chair. Good afternoon, Madam Chair, Mr. Cannon, and other Members of the Committee.

We probably would not be having this conversation today about whether, when, and how a special counsel should be appointed to conduct an investigation of possible criminal activity by public officials, if it were not for the latest decision of our new Attorney General to assign a Federal prosecutor, and not an outside special counsel, to the task of investigating whether any CIA or other Government officials committed obstruction of justice by destroying

videotapes of certain interrogation sessions involving waterboarding of certain detainees who were suspected al-Qaeda operatives.

The prosecutor selected, John Durham of Connecticut, apparently has an impeccable reputation as an honest, aggressive, no-nonsense investigator and prosecutor. He has quickly assembled a small but impressive team of current Federal prosecutors from Boston. He has been given the full authority of the U.S. attorney, for his appointment in this matter, as the acting U.S. attorney for the Eastern District of Virginia. This appointment has been applauded my many Members of Congress, newspaper editors, and legal commentators.

With respect, though, the appointment is flawed because Mr. Durham must conduct his investigation within the usual reporting and approval processes of the very department that was so deeply involved in supporting and sanctioning the waterboarding that took place, and that was videotaped by Government agents—the very department that apparently later gave the CIA advice about whether they must preserve the videotapes.

This is an extraordinarily important obstruction of justice investigation that should be handled by a special prosecutor outside of the usual reporting and approval channels within the Department of Justice.

Three things I would ask the Committee to consider as you deliberate on the question of whether, what, and how to enact new laws with respect to special counsel regulations. I believe it is clear, from internal Government memoranda and public statements, that high-level Justice Department and White House officials ignored the law, common sense, and decency to justify torturing terror suspects in order to extract confessions and intelligence from them. These approving officials included, among others, according to public accounts, the Vice President, his chief lawyer, David Addington, counsel to the President Alberto Gonzales, Office of Legal Counsel Chief Jay Bybee, who is now a Ninth Circuit judge, and his Deputy, John Yoo.

Second, it is also clear from public accounts that experienced CIA officials had doubts about the wisdom or effectiveness of torturing detainees. From a practical perspective, they questioned the value of the information obtained from enhanced interrogation techniques. After all, a man will say anything to stop being tortured, and certainly will say whatever he thinks his interrogators want him to say.

And many CIA interrogators worry that if we engage in such extreme practices, how can we complain when foreign tyrants torture our soldiers? Related to these concerns is the moral perspective—a perspective expressed so eloquently by Senator McCain—that it is not about who they are, it is about who we are.

But these well-founded reservations in the CIA were overridden by forceful White House pronouncements sanctioning controversial enhanced interrogation practices and by Justice Department memos solicited by and written to the then Counsel for the President, Alberto Gonzales.

We just learned recently that the Office of Professional Responsibility of the Justice Department has been reviewing the ethical im-

plications of these Justice Department memos for a number of years now.

Third, and finally, the pubic records already are full of reports of the countless meetings CIA officials, including the former head of the Clandestine Services, Jose Rodriguez, the man who apparently gave the order to destroy the tapes, had with high-ranking lawyers at the Justice Department, the White House, the CIA, among others—places to get advice and instructions about whether the recordings could be destroyed. These meetings all took place while court cases were progressing in which evidence preservation orders had been issued.

The 9/11 Commission was seeking evidence about the interrogations, and Congress was reviewing detainee treatment policies. With this context and this background, this is a case in which the prosecutor investigating the matter should be independent from the Justice Department's reporting and approval process. As things presently stand, Mr. Durham is not independent.

I respectfully submit that the Attorney General should appoint a new outside special prosecutor under the same provisions of the United States Code that Patrick Fitzgerald was appointed by acting Attorney General Comey—I see my light is expired. I just have a few sentences——

Ms. SÁNCHEZ. Please go ahead and finish your thought.

Ms. BRUCE [continuing]. In the Valerie Plame matter in 2003, and Robert Fiske was appointed 9 years earlier under the same provision by Attorney General Reno in the Whitewater investigation. I further submit that the special counsel should be a private lawyer, and not an employee of the Justice Department. Thank you.

[The prepared statement of Ms. Bruce follows:]

PREPARED STATEMENT OF CAROL ELDER BRUCE

Statement of Carol Elder Bruce
Partner, Venable LLP and
Former Independent Counsel
Before the
Subcommittee on Commercial and Administrative Law,
House of Representatives Committee on the Judiciary

February 26, 2008

Thank you for this opportunity to share with the Subcommittee my views on the "implementation of the U.S. Department of Justice Special Counsel regulations." I understand that the Subcommittee is reviewing the past and current regulatory and statutory framework for the appointment of special counsel from within and outside of the Department of Justice who can investigate and prosecute violations of federal criminal law by federal officials in certain cases. I understand that the question is motivated in part by Attorney General Mukasey's January 2008 appointment of a Connecticut Assistant United States Attorney John Durham, to be the Acting United States Attorney for the Eastern District of Virginia to investigate if a federal crime was committed in connection with the "destruction by CIA personnel of videotapes of detainee interrogations."

As you know, I am a former Independent Counsel, former Deputy Independent Counsel, former Assistant United States Attorney, and currently am a criminal defense attorney who also is representing Guantanamo detainees on a *pro bono* basis. My resume is attached hereto. I hope my observations will be helpful to you.

In his January 2, 2008 statement appointing Mr. Durham, the Attorney General reported that his conclusion that there was a basis for such an investigation was predicated on the results of a preliminary inquiry. That inquiry had been commenced just two days after the December 6, 2007 public disclosure by CIA Director Michael Hayden of the destruction of videotapes of interrogation sessions in 2002, in which "enhanced interrogation" techniques were employed on two senior al-Qaeda suspects: Zayn al Abidin Muhammed Hussein, known as Abu Zubaida, and Abd al-Rahim al-Nashiri.

In less than a month and over the Christmas holidays, then, the CIA's Office of Inspector General and the Department's National Security Division jointly conducted a so-called preliminary inquiry into the tapes matter. The Attorney General decided that the site of any further investigation would be the Eastern District of Virginia because that is the District where the CIA's headquarters are located and the place where such an investigation would "ordinarily" be conducted.

28 USC Sections 509, 510, and 515

No mention was made in the Justice Department press release concerning this new investigation of any consideration given to the possibility of appointing a Special Counsel under the general delegation provisions of 28 U.S.C. 509, 510, and 515, as was done four years earlier on December 30, 2003, by Deputy Attorney General James Comey, acting in his capacity as Acting Attorney General, when he appointed Patrick Fitzgerald, United States Attorney for the Northern District of Illinois, to investigate the alleged disclosure of CIA employee Valerie Plame's identity. In that delegation of authority, Acting Attorney General Comey stated that Mr. Fitzgerald was "to exercise that authority as Special Counsel independent of the supervision or control of any officer of the Department." As you know, that investigation culminated in the prosecution and conviction of the Vice President's Chief of Staff, Scooter Libby. And, as we all

also know, the President elected to commute Libby's *entire* 30 months of incarceration, because the President felt it was "excessive."

I expect that Attorney General Mukasey also considered and rejected appointing Durham under 28 C.F.R. Part Six (2003), which calls for an outside counsel to be appointed. More on that later. The Attorney General has simply assigned the case to an Acting U.S. Attorney (Durham) who is acting within all the normal reporting and case restraints that exist in the Department of Justice. Had the Attorney General used Chapter Five, as Acting Attorney General Comey had done in 2003, he could have explicitly or implicitly waived the special counsel provisions of 28 C.F.R. Part Six (2003), and given Mr. Durham much broader independence and authority.

That same Chapter Five authority – which often has been referred to as providing for regulatory independent counsel from outside the government -- was used by Attorney General Reno to appoint Robert Fiske, Jr. on January 24, 1994, to investigate matters concerning the Whitewater matter and the death of White House Counsel Vincent Foster, before the then-expired Independent Counsel provisions in the Ethics in Government Act was reinstated by Congress.

By using Chapter Five, Acting Attorney General Comey was able to give Mr. Fitzgerald plenary authority equal to that of the Attorney General, similar to the provisions of the now expired Ethics in Government Act. I believe Chapter Five also was the "other law" provision under which the Department of Justice was urging existing Independent Counsel in 1998, to accept "parallel appointments" to ensure the continuity of their investigations, when the Independent Counsel statute was under constitutional attack in *Morrison v. Olson*, before the Supreme Court's decision in that case upholding the statute's constitutionality.

By using these Chapter Five statutory provisions, the Acting Attorney General had Fitzgerald paid out of the permanent indefinite appropriation – the same fund out of which Independent Counsel were paid. The Department advised the General Accountability Office in 2004, that "the express exclusion of Special Counsel Fitzgerald from the application of 28 C.F.R. Part 600, which contains provisions that might conflict with the notion that the Special Counsel in this investigation possesses all the power of the Attorney General, contributes to the Special Counsel's independence." See September 30, 2004 letter from Anthony Gamboa, General Counsel, GAO, to the Honorable Ted Stevens, et al., (B-302582). "Thus, Special Counsel Fitzgerald need not follow the Department's practices and procedures if they would subject him to the approval of an officer or employee of the Department. For example, 28 C.F.R. 600.7 requires that a Special Counsel consult with the Attorney General before taking particular actions. The consulting requirement would seem to be inconsistent with the notion that Special Counsel Fitzgerald possesses the plenary authority of the Attorney General." Id.

Had Mr. Durham been appointed under Chapter Five with the same explicit broad mandate that Mr. Fitzgerald was given, there probably would be little to no objection to his appointment. Nor would there be any worry about his independence or the scope of his authority. He seems eminently qualified to handle this inquiry and he has brought on board at least two additional and equally qualified current Assistant U.S. Attorneys from Boston to assist him in his task. But the Attorney General chose not to use Chapter Five to appoint a regulatory independent counsel. He also did not use Part Six of the CFR – the regulations this Committee is now reviewing. The Attorney General simply assigned the case to an Acting U.S. Attorney – Mr. Durham. Accordingly, Mr. Durham does not have, I submit, sufficient independence in making important decisions in this significant inquiry concerning the conduct of government officials.

Part 600 of 28 CFR

The Attorney General in his January 2nd statement announcing Mr. Durham's appointment made it clear that Durham "will report to the Deputy Attorney General, as do all United States Attorneys in the ordinary course."

Perhaps it is noteworthy that nothing was said by the Attorney General in that press release about the scope of Mr. Durham's investigation and what freedom, if any, he has to determine the scope. One could interpret the press release as allowing Mr. Durham to follow all leads as he would in any other federal criminal case. Ergo, there may be no apparent or explicit limitation placed on the scope of Mr. Durham's investigation. We just don't know. But, it's conceivable that Mr. Durham could elect to investigate whether the waterboarding that was being recorded was, itself, a violation of federal anti-torture laws. And, if so, Durham could investigate the question of whether all those lawyers and supervisors who advised the CIA and the CIA interrogators that waterboarding was legal are just as complicit in violating anti-torture laws as the agents who conducted the waterboarding itself. The destruction of the tapes, under this analysis, would be just another crime to conceal evidence of the first crime. But, Mr. Durham is subject to all the reporting and approval requirements of a U.S. Attorney, making his discretion and decision-making less independent than it would be were he a true special counsel under Chapter Five.

While some Members of Congress and public commentators have hailed the announcement of the DOJ investigation as a positive development and have expressed understandable respect for Mr. Durham's apparently excellent reputation, others have not shared the enthusiasm. They have questioned the wisdom of conducting this particular investigation of possible obstruction of justice (a possible obstruction done with or without the knowledge and consent of high level government officials) as if it were an "ordinary" federal criminal matter.

The news media has done an effective job already in disclosing that high level officials within the CIA, the Department of Justice, and the White House, as well as the Director of National Intelligence, and Members of Congress, all rendered advice in connection with the question of whether the videotapes should be destroyed, many if not all allegedly counseling against such destruction. The Chair and Vice Chair of the 9/11 Commission jointly wrote an Op Ed in which they expressed the view that their Commission's investigation had been obstructed by the destruction of the tapes. And, the list goes on. The conduct under investigation impacts every single branch of government and a wide range of elected and appointed government officials at the highest level as well as other levels of government. And, most importantly, it also involves the Department of Justice itself.

As I indicated above, I represent two Egyptian detainees in Guantanamo Bay in habeas proceedings filed in the United States District Court for the District of Columbia. Our cases were first filed in February of 2005. They were dismissed by the District Court judge in the Spring of 2007, after the Supreme Court initially denied the petition for certiorari in the *Boumediene v. Bush* case, but our motion to reinstate our clients' cases is pending and the Supreme Court ultimately granted certiorari and heard oral argument in the *Boumediene* case, giving us hope that a favorable decision in *Boumediene* will result in our habeas cases being reinstated.

Other habeas counsel with active cases pending, have filed motions in their habeas cases in which they have sought a judicial inquiry into the tapes destruction and in which they specifically reject the notion that the Department of Justice can or should investigate the tape destruction, because, among other things, "[t]he Department of Justice may have authorized the destruction of CIA interrogation tapes, creating an inherent conflict of interest that cannot be overcome." *(Zalita, et al. v. Bush, et ai,* Civil Action No. 1 :05 CV 1220 (RMU), Motion for

Inquiry Concerning Destruction of Evidence Related to CIA Detainee Interrogations, filed (redacted, public copy) on January 15, 2008, in the United States District Court for the District of Columbia, a copy of which is attached hereto).

Habeas counsel have set forth a compelling series of events that warrant the conclusion that, at the very least, a federal crime of obstruction may have been committed in the tape destruction case for a number of reasons, all centered squarely on the government's obligation to preserve evidence in pending habeas cases, criminal prosecutions, and other judicial and legislative proceedings. The most important reason habeas counsel gave in the *Zalita* case for why the tapes should not have been destroyed is that the tapes may constitute proof that information about their individual clients was obtained through torture or coercion of the detainees videotaped and, therefore, such tainted information cannot and should not be used to justify their clients' further detention and certainly should not have been used to justify a client's designation as a so-called "enemy combatant."

In my view, the principal reason why the Department of Justice should not, itself, be investigating the CIA tapes destruction case relates directly to the GTMO cases, as they are called. The main reason the Department should not, itself, be investigating the tapes case is that the Department has been a fierce advocate for six years now of the proposition that this Administration can do whatever it wants to whomever it wants - to whomever it unilaterally determines to be an "enemy combatant;" and that its actions are unreviewable by a court of law or Congress. That message surely filtered down a long time ago to intelligence officers and supervisors at the CIA and other intelligence agencies who may have taken the action to destroy the tapes in question. More on this later.

28 USC 600.1 and 600.2

It takes nothing away from Mr. Durham to say that there are many equally competent lawyers who could have accepted and still can accept an appointment under 28 CFR 600.1. I suppose, also, that it is not out of the question for Mr. Durham, himself, to resign his appointment as Acting U.S. Attorney (with no assurances that he'll be rehired as a DOJ employee in the future) and then accept appointment as a private lawyer under Part 600 (or, like Mr. Fiske, under Chapter Five).

The Attorney General could have and still can take the position that, pursuant to Section 600.1(a) and (b), that the Administration's public policies as articulated by the Department of Justice in the courts, Congress, and in public on a daily basis in connection with the detention of persons believed to be "unlawful enemy combatants" in the "global war on terror" are such that the investigation by the Department or any of its U.S. Attorneys of the detainee CIA tape destruction case presents extraordinary circumstances and constitutes a foreseeable conflict of interest, and that, under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

From the Attorney General's press statement appointing Mr. Durham, there is no indication that the Attorney General has taken "appropriate steps ... to mitigate any conflicts of interest, such as recusal of particular officials." 28 CFR 600.2 Indeed, as will be discussed below, the Department's political appointees and many of its lawyers are so invested in this Administration's legal and policy arguments about this Administration's unilateral authority to treat detainees in any fashion it chooses, without review, that it would be difficult to properly mitigate many if not all potential conflicts of interest.

From the DOJ trial attorneys on the front line of the habeas and criminal cases up to the Solicitor General and through three Attorney Generals, the Department has maintained that the

CIA and the military were free to use "enhanced interrogation" techniques to obtain intelligence and case information from detainees. The Department has insisted that it may use whatever information it obtains from these "enhanced interrogation" sessions in making determinations about the custodial status and treatment of other detainees. And, as this Committee well knows, the "enhanced techniques" included practices condemned as torture and coercion by international human rights conventions and others.

Many of the positions that this Administration - through its attorneys in the Department of Justice -- has advocated have revealed a shocking disrespect for the humanity of the persons the U.S. has in its custody. By arguing that the detainees have no rights whatsoever other than what the U.S. deigns to give them; that they have no rights at all under traditional U.S. military or civilian justice systems (such as the right to be given notice of the charges against them and be allowed to see and challenge the evidence against them, or the right not to have evidence obtained by torture used against them), it very well may be that the Bush Department of Justice has sent a clear message to the military and the CIA intelligence personnel that traditional rules governing the preservation of records of interviews don't really matter here, despite formal memoranda or statements that may have been sent by sincere DOJ or CIA lawyers to the contrary.

I fear that an independent investigation may show that certain political appointees at the Department of Justice and in the White House in this Administration took the traditional, relatively uncontroversial concept of a "Unitary Executive" to such an extreme that it set the tone and the basis for the belief with some people within the CIA, that Agency employees were authorized to destroy interrogation videotapes. After all, it was the Administration's position that much of what the government did in the "global war on terror" was nobody's business. The Department of Justice took stances in open court and through its Attorney Generals that the U.S. government could do whatever it wanted to detainees - it could detain U.S. citizens and aliens alike -- whether captured on or off U.S. soil; whether a feeble, disabled old man or a juvenile - all in the name of the "global war on terror." What's the harm, then, in destroying graphic videotapes of extreme measures taken by some CIA interrogators against "the worst of the worst" in a misguided effort to gain intelligence and information to be used against other detainees?

On a related front, please note Exhibit E in the *Zalita* filing, attached hereto. Exhibit E relates to the *Zacarias Moussaoui* case in the Eastern District of Virginia. In that case, the judge twice ordered - once in May 2003 and once in November 2005 - that the U.S. government preserve and produce videotapes of interrogations of detainees by the Department of Defense or the CIA. It was the US Attorney's October 25, 2007 revelation in an *ex parte* letter to the Court (attached to the *Zalita* filing as Exhibit E and written approximately *40 days* before Director Hayden's public statements concerning the tape destructions) that, contrary to his earlier pre-sentencing representations that there were no such tapes, and "unbeknownst" to the US Attorney, there were, in fact, tapes of certain interrogations. According to US Attorney Chuck Rosenberg's letter, a CIA lawyer informed him on September 13,2007, of the existence of the tapes and of the fact that the tapes had been in existence at the time of the Court's Order for their production. This letter explains, in whole or in part, US Attorney Rosenberg's recusal in the CIA tape destruction inquiry. As long as this investigation is handled within the Department of Justice, though, whose recusal is next or should be, but isn't, next? What other records have been destroyed or withheld from the Justice Department or from the courts or Congress?

Section 600.3 - Qualifications of the Special Counsel

If the Attorney General were to appoint an outside special counsel under 28 CFR 600.1, that special counsel's qualifications should match the high expectations set in this section. I note

that this section also calls for the Attorney General to "ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. A Special Counsel shall be appointed as a "confidential employee" as defined in 5 U.S.C. 7511(b)(2)(C)." Query: If a special counsel is a partner in a large law firm, are his/her partners and associates barred from representing clients before the Department of Justice in grand jury investigations or barred from representing such clients in court against the United States in criminal or civil matters? Such a restriction was of great concern to Independent Counsels during the period of "parallel appointments" under Chapter Five of Title 28 of the United Sates Code, as such a restriction could seriously impact the business of the special prosecutor's law firm and discourage many highly qualified attorneys from serving as special counsel.

Section 600.4 – 600.10

The staffing provisions appear facially reasonable and are consistent with the last amendments to the independent counsel provisions of the Ethics in Government Act. Two of my best associate independent counsel in the Babbitt investigations were two Assistant U.S. Attorneys on detail. One of these Senior Associates went on to a very successful career at the Public Integrity Section, where she recently led the Department's investigation of the criminal conduct of lobbyist Jack Abramoff and others.

Further, my view is that the language in the "conduct and accountability" section of Chapter VI (Section 600.7) is very troubling with respect to the question of independence of the special prosecutor. I will be happy to highlight the differences between these very restrictive consulting and removal provisions and the more generous and hard won provisions of the expired Ethics in Government Act in my testimony. Of course, I acknowledge the prevailing view that some independent counsel under the Ethics Act proved to be essentially unaccountable to the public purse and failed to follow certain Justice Department policies. That problem and how to avoid it, deserves discussion, too.

Finally, I look forward to giving the Committee my views on the question of who controls the publication of a final report, especially where there has been a decision to decline prosecution. Having served for ten years as an Assistant United States Attorney before serving as a Deputy Independent Counsel in 1987, and as the Independent Counsel in 1998, I have developed some views on the matter that hopefully will be helpful to the Committee. The bottom line is that I believe the special prosecutor should draft a full report explaining the investigation and the decision not to prosecute and that the report should be confidential and directed to the Attorney General. An executive summary of this report should also be prepared. Then, at the Attorney General's discretion and with the consent and comments of those who were targets of the investigation or whose names and conduct were discussed in the report, the full and/or summary report could then be provided to appropriate Congressional Committees and/or the public.

Watergate and the Independent Counsel Provisions of the Ethics in Government Act of 1978

I had the honor and privilege, to be appointed in 1998, by the Special Panel of the United States Court of the D.C. Circuit under the Ethics in Government Act of 1978, as the independent counsel in the investigation of matters concerning Secretary of the Interior Bruce Babbitt. Previously, I also was honored to be selected in 1987, by Jim McKay, the independent counsel in the investigation of matters concerning Attorney General Edwin Meese, to be first an associate independent counsel and later Mr. McKay's Deputy in that investigation. So, I am well-acquainted with the Ethics Act requirements and its amendments with respect to the authority and responsibilities of the Attorney General, the independent counsel, and the Special

Panel of Judges. The independent counsel provisions of the Ethics Act expired in 1999, after 20 counsel were appointed under its provisions between 1978 and 1999.

As you know, the Ethics Act was amended a number of times during its life and it had expired once before in 1992, only to be reinstated by Congress in June 1994, after Attorney General Janet Reno used her regulatory powers under Chapter Five in January of 1994, to appoint Robert Fiske to mainly investigate a real estate investment (Whitewater) President Clinton and his wife, Hillary Clinton, had made years earlier when Bill Clinton was Governor of Arkansas. There were many proponents and detractors of the independent counsel system under the Ethics Act during its life. At its birth, after Watergate, the American Bar Association was one of its biggest champions. At the end, 20 years later and after the extraordinarily long and expensive Iran-Contra investigation and the controversial Whitewater and Monica Lewinsky investigations of independent counsel Ken Starr that ended with a presidential impeachment referral, the ABA passed a resolution opposing the renewal of the statute.

The Ethics Act was first enacted in 1978, after five years of congressional debates over how to institutionalize a system that would provide for a special prosecutor who would be truly independent of the Department of Justice and would not subjected to being fired "at will" as if he were a typical Department of Justice prosecutor. How can any of us who were alive in October 1973, forget the "Saturday Night Massacre?" I'd like to say I was in preschool at the time and was too young to remember, but, in truth, I was a third year law student. For a very scary, but thankfully brief, period of time, our nation was thrown into a constitutional crisis in October 1973, when President Nixon ordered the firing of the Special Watergate prosecutor, Archibald Cox. I remember it well: the resignation of Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus who both refused to carry out the President's order; followed by Solicitor General Bork, as Acting Attorney General, carrying out the firing of Cox. When I graduated from law school in 1974, I was pleased to introduce our graduation speaker at the commencement ceremonies, Leon Jaworski, the new Watergate special prosecutor.

The Ethics in Government Act had much to offer and some critical flaws that I will be happy to address in the hearing. In 1999, before the statute expired, I made some specific recommendations for changing the process of appointing an independent counsel and implementing an investigation with such a counsel. A copy of an article I wrote on the subject that was published in a George Washington University law school magazine in June 1999, is attached hereto.

I highly recommend a book which I regard to be the seminal work on the independent counsel under the Ethics in Government Act: Professor Katy Harriger's *The Special Prosecutor in American Politics,* (University Press of Kansas, Second edition, Revised, 2000). Professor Harriger interviewed me, my fellow independent counsels and many others in her research for this book in addition to her academic research. She asks important questions that I think the Committee should consider as you ponder the possibility of improving the existing statutory and regulatory provisions in this area. I will take the liberty, with apologies to the professor, to paraphrase just some of her questions that she asks in the context of a separation of powers discussion:

Independence is so critical for the appearance of impartiality. But, by insisting on independence, do we sacrifice accountability, which is so essential to a democratic government - a government dependent upon citizen support and confidence?

No matter how carefully you provide for financial, reporting, and other accountability measures, does an independent officer lack the constraints on power imposed on regular actors (e.g., regular DOJ prosecutors and U.S. Attorneys) in the separation of powers scheme?

And, Professor Harriger's bottom line question: "What's the best way to prevent, expose, and respond to the problem of official misconduct in a constitutional democracy?"

These are weighty public policy questions. My view is that, whatever direction this Committee takes, the Committee should consider the lessons learned from the Ethics Act independent counsel system. One of the enduring lessons for me was that both independence and accountability are important. Absent a direct, actual conflict of interest within the Department of Justice, an appointed outside special counsel should, as much as possible, interact with career lawyers within the Department of Justice, particularly within the Divisions ordinarily responsible for handling the types of matters the special counsel has been appointed to investigate. These interactions can be most productive for a special counsel and even necessary for the full performance of his/her duties.

Likewise, a special counsel should not be completely removed from the usual tensions that exist between the legislative branch of government and the Executive. Indeed, one of the healthier aspects of the Watergate experience was the active involvement of Congress in obtaining commitments from Elliott Richardson that the special prosecutor would truly be independent and not have to report case developments to or seek investigation approval from the Department of Justice. Likewise, from all I can glean from the historical record, both Archibald Cox and later, his immediate successor as Watergate Special Prosecutor, Leon Jaworski, had healthy interactions with Congress throughout their tenures. Such interaction with the Congress and with an active press, helps to ensure public confidence in the integrity of the work of a special counsel.

In the final analysis, the strongest source of support for and check on a special counsel's performance and the conduct of the Executive branch and, in particular, the Attorney General, vis-à-vis the special counsel, is a vigorous, engaged press, appropriate Congressional oversight, and the ballot box.

I hope my remarks have been helpful.

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EXHIBIT A

VENABLE LLP

VALUE ADDED, VALUES DRIVEN.

Carol Elder Bruce
Partner
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Practice Focus

Carol Elder Bruce is a litigator whose practice focuses on white collar criminal defense and complex civil litigation. She represents individuals and corporations in criminal grand jury investigations, and in criminal and civil trials and appeals. She also represents clients in hearings and proceedings before the United States Senate, the U.S. House of Representatives, in administrative proceedings within federal agencies, and in the conduct of internal corporate investigations.

Recent Significant Matters

Ms. Bruce is an active trial lawyer who most recently, in 2006, successfully defended two different men in two separate and significant federal and state bribery jury trials, in which "not guilty" verdicts were returned on all counts in one case and on all the public corruption counts in the other. Ms. Bruce served as the Independent Counsel appointed by a special panel of the U.S. Court of Appeals for the D.C. Circuit to investigate matters concerning Interior Secretary Bruce Babbitt. She previously served as the Deputy Independent Counsel in the investigation of matters concerning Attorney General Edwin Meese and also was an Assistant United States Attorney for the District of Columbia for ten years, where she was lead counsel in over 115 jury trials and managed the grand jury presentations of more than 100 additional cases.

Client Benefits

Ms. Bruce has been in private practice for over 15 years, where she has been lead counsel in many white collar criminal investigations, trials, and congressional investigations in which she not only has obtained good results for clients, but has jealously guarded her clients' confidences, privacy, and reputation during the process. Ms. Bruce also has extensive civil litigation experience in complex commercial disputes and other matters. And, she has had significant class action experience in that, during her career, she has managed or has had a lead counsel role on both sides of such law suits.

Clients benefit not only from Ms. Bruce's experience, but also from her national reputation as one of the nation's preeminent trial attorneys. She was ranked in 2006 and 2007, by one ranking service as one of the top ten criminal defense attorneys in the nation, and by other ranking services over the past four years as being one of the best white collar criminal defense attorneys and commercial civil litigators in the District of Columbia and in the United States (See "Distinctions" below).

Activities

Ms. Bruce is a Fellow of the American College of Trial Lawyers, widely considered to be the premier professional trial organization in America where Fellowship is extended by invitation only to experienced trial lawyers within the top 1% of the trial bar in the U.S. and Canada. Ms. Bruce just completed a two year tenure as Chair of the College's International Committee

(2005 – 2007). She also is a Vice Chair of the White Collar Committee of the National Association of Criminal Defense Lawyers. She serves on the Honorary Board of the Innocence Project of the National Capital Region and on the George Washington University Law School Dean's Board of Advisors. Ms. Bruce also is a charter member of and Master in the Edward Bennett Williams American Inn of Court.

Ms. Bruce's professional activities also have included two terms as an elected Board member of the D.C. Bar's Board of Governors, service as an appointed member of the D.C. Bar Ethics Committee during which she drafted legal ethics opinions for the D.C. Bar, and two terms as an elected member and later co-chair of the D.C. Bar Steering Committee on Courts, Lawyers, and Administration of Justice.

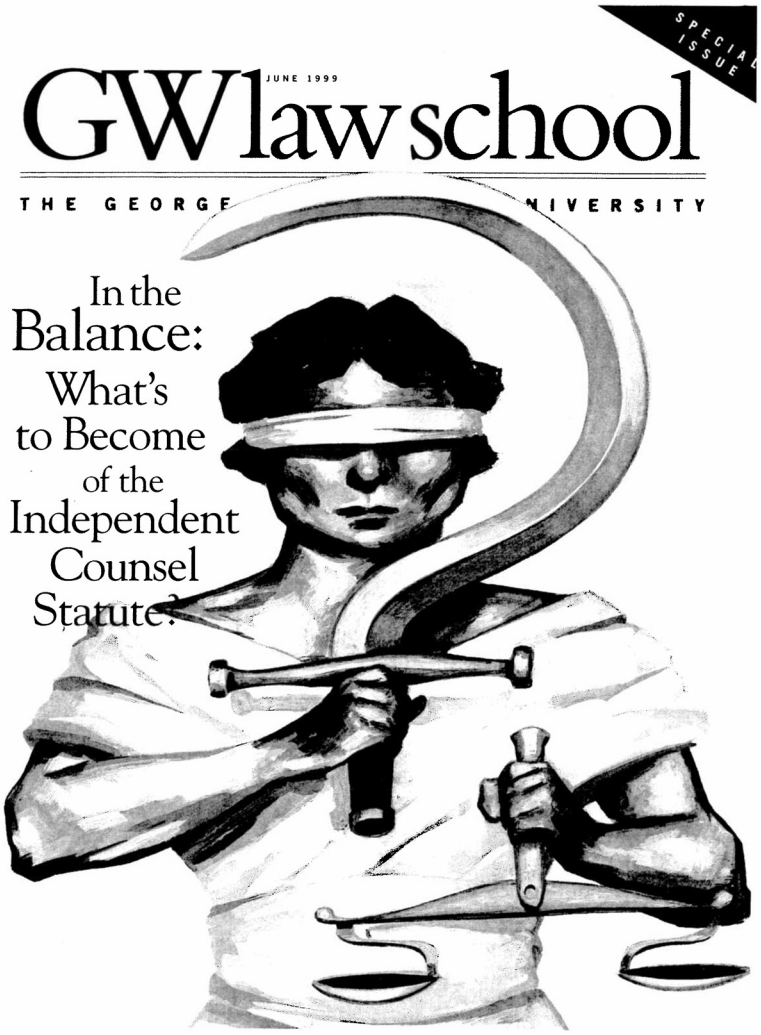
Distinctions

J.D., George Washington University Law School, 1974
B.A., George Washington University, 1971

Bar Admissions:
District of Columbia
United States Supreme Court
U.S. Court of Appeals for the District of Columbia Circuit
United States District Court for the District of Columbia
United States District Court for the District of Maryland
Pro hac vice admissions in numerous federal and state courts

- Ms. Bruce has been listed in The Best Lawyers in America (Woodward/White, Inc.), in the areas of white collar criminal defense and commercial litigation in the 2005, 2006, 2007 and 2008 editions.
- Ms. Bruce has been named to the United States Lawyer Rankings 2006 and 2007 Lists as one of the Nation's Top 10 Criminal Defense Lawyers.
- She was listed in the American Lawyer & Corporate Counsel Litigation Supplements in 2006 and 2007 as one of the nation's top commercial litigation lawyers.
- Ms. Bruce was named as one of the top 30 "Big Guns" lawyers in D.C. in the December 2007 Washingtonian magazine. She was listed as No. 8 of these top 30 "very best" Washington metropolitan lawyers from all general law practice areas, and she also was named in the same magazine edition as one of the "great criminal defense attorney(s)" in the D.C. area under "You're Under Arrest."
- She was named a "Top Washington Lawyer" in criminal defense by Washingtonian magazine in December 2004.
- She was one of only 20 trial lawyers named as the top D.C. litigation lawyers (both civil and criminal) in the Legal Times "Leading Lawyer" series in June 2003.
- Ms. Bruce has the highest peer review rating of "AV" in Martindale-Hubbell.
- Ms. Bruce received, on behalf of Venable, one of the 2007 Beacon of Justice Awards from the National Legal Aid & Defender Association for Venable's and Ms. Bruce's pro bono representation of Guantanamo Bay detainees.
- Ms. Bruce also received, with other Guantanamo Bay detainee lawyers, the Frederick Douglass Human Rights Award from the Southern Center for Human Rights (November 2007).
- In 2005, she received from George Washington University Law School the Belva Ann Lockwood award given to distinguished woman alumnae of the law school.

EXHIBIT B


SPECIAL ISSUE
JUNE 1999
GW law school
THE GEORGE NIVERSITY
In the Balance: What's to Become of the Independent Counsel Statute?

RESPONSIBLY INDEPENDENT

A Proposal for Revising the Independent Counsel Statute

I was a third-year GW law student in the fall of 1973. Having never seen the inside of a courtroom before attending school, I was now spending every available minute between classes and homework representing indigent criminal misdemeanor defendants in trials before the D.C. Superior Court as part of the school's new Law Students in Court program. I was fired up, eager to graduate and begin the full-time practice of law. I also was newly wed to my fellow third-year student, Jim Bruce (we're still married 26 years and three terrific kids later).

Jim and I, like many of our classmates in 1973, followed with great interest the events surrounding Watergate. We were horrified by the Saturday Night Massacre. The firing of Special Prosecutor Cox precipitated a constitutional crisis of epic proportions that was not easily forgotten. It proved a close call—too close for comfort.

BY CAROL ELDER BRUCE, JD '74

The independent counsel provisions of the 1978 Ethics in Government Act were the legislative response to the Saturday Night Massacre. They provided for court-appointed independent counsels who could only be fired for good cause by the attorney general, with a provision for judicial review of such a firing. They were an honest effort to restore public confidence in government and, specifically, in the proposition that high-level public officials are not above the law and will, instead, be investigated and prosecuted with the same vigor as any ordinary defendants by independent prosecutors who have no conflicts of interest and are not beholden to the public officials they are investigating.

Now, 21 years later, the American Bar Association, many bar leaders, and legislators have concluded that the independent counsel provisions of the Ethics in Government Act should be allowed to expire; that the pre-1978 system for appointing special prosecutors was sufficient after all; and that we should go back to the previous practice of the attorney general's deciding unilaterally when and under what circumstances a conflict of interest or the appearance of a conflict of interest warrants the appointment by the attorney general (and not by the court) of a special prosecutor. With certain modifications, I agree.

I believe that it would be unwise, however, simply to allow the independent counsel provisions of the Ethics in Government Act to expire on June 30, its current expiration date. Instead, I recommend amending the current statute to create a new statutory scheme that embraces the best of both the pre-act Cox-Jaworski model and the current law. Under my proposal, as outlined below, I would provide by statute that the attorney general should exercise her complete discretion to appoint an independent counsel outside the Justice Department whenever she perceives there is an actual conflict of interest in the department's conducting a particular investigation of a particular person or persons. Under this proposal, I would further provide by statute that, in situations where the attorney

general does not see an actual conflict, but recognizes that there may be an appearance of conflict, she would exercise care to appoint a special prosecutor from within or outside the department to conduct an investigation from within the department. Further, the attorney general should give that special prosecutor a wide berth to hire a team of lawyers to conduct the investigation under the ultimate and final supervision of the assistant attorney general for the Criminal Division. I will elaborate below.

We have resurrected an old paradigm by returning to the Cox-Jaworski model. As long as we don't fool ourselves into thinking we have rediscovered the panacea for all politically charged, high-level public corruption investigations, we will survive and we'll muddle through our next constitutional crisis with more realistic expectations. The rediscovered old system is not without its problems. After all, under the revived old system we still will have an independent counsel operating essentially untethered in an orbit outside of the Justice Department.

But we must learn to trust the competing forces within our political system. The independent counsel will be drawn more closely into the Constitution's healthy system of checks and balances and separation of powers if the executive and legislative branches of government take more responsibility for the independent counsel system. And, we should have confidence that public opinion stirred by vigilant, responsible investigative journalism will rule the day and will provide the best, albeit imperfect, assurance that full and fair criminal investigations of high-level public officials will take place. But, always, we need to be realistic in our expectations. As St. John's University law professor John Barrett recently testified before the U.S. Senate Committee on Governmental Affairs, "We should not pretend . . . that the existence of any independent counsel law or its demise will ensure investigations and outcomes that produce national unity and gratitude."

We have to be willing to sacrifice a reasonable level of independence for our independent counsels if we are to achieve a more appropriate level of accountability over them. We also have to be realistic and recognize that *no* threshold for triggering the statute or other statutory requirement will stop an attorney general determined to kill a worthy investigation before it begins. Similarly, no degree of independence will guarantee that good, apolitical, proportionate, and dispassionate prosecutorial judgment will prevail with each and every independent counsel.

I agree there are fundamental structural flaws in the current independent counsel system that were, in part, foreseen by Justice Scalia in his now famous dissent in *Morrison v. Olson*. These are flaws that make the appropriateness of an independent counsel's actions entirely too dependent on the individual judgment and wisdom of that particular independent counsel and his/her staff, exercised usually in isolation from the ordinary checks and balances of our systems of government and from the institutional safeguards of theJustice Department. But there also are very thoughtful provisions of the statute that should not be discarded in any new statutory scheme.

If I were asked to provide a broad outline of a new independent counsel law, I would offer provisions that would address the following:

1. Appointment of Independent Counsel – Actual Conflicts

The current independent counsel law does not make a distinction between actual conflicts of interest and appearances of conflict. Instead, the statute simply presumes that officials occupying certain high-level offices within the government (i.e., "covered persons") present a conflict of interest for the Justice Department, thus *requiring* the department to invoke the statute's procedures leading to the appointment of an independent counsel whenever federal felony allegations are made against these covered persons. The statute also has a catchall provision that allows for appointment of an independent counsel if the attorney general determines there may be a "personal, financial, or political" conflict of interest in DOJ handling the investigation.

PROPOSAL: It is axiomatic that a prosecutor should not proceed to investigate a case if she or her office has an actual conflict of interest, and that she should resolve that conflict of interest question at the earliest possible date. For example, I would adopt a *per se* conflict rule concerning the president, vice president, and attorney general. If allegations of criminal misconduct involving any one of these officials are brought to the attorney general's attention, she should (or if the allegations are about her, she should recuse herself and her deputy should) task her Public Integrity Section to quickly (although not within a proscribed time period) determine if the allegations are specific and credible and if further investigation is warranted. If further investigation is warranted, the attorney general should remove herself and the department from the actual conduct of further investigation by appointing an independent counsel.

Under current law, the attorney general does not make the appointment of an independent counsel and does not even recommend names for appointment. Instead, she is limited to

WE HAVE TO BE REALISTIC AND RECOGNIZE THAT NO THRESHOLD FOR TRIGGERING THE STATUTE OR OTHER STATUTORY GENERAL DETERMINED TO KILL A WORTHY INVESTIGATION BEFORE IT BEGINS. SIMILARLY, NO DEGREE OF INDEPENDENCE AND DISPASSIONATE PROSECUTORIAL JUDGMENT WILL PREVAIL WITH EACH AND EVERY INDEPENDENT COUNSEL.

referring the matter to a three-judge panel—of the Special Division for the Purpose of Appointing Independent Counsels of the U.S. Court of Appeals for the D.C. Circuit—for them to make the appointment. I would eliminate the judiciary's role in the selection process. Indeed, I would rescind the 1978 statute that created the special division. This recision would terminate the judiciary's role in the selection of an independent counsel, in the setting of the scope of the independent counsel's jurisdiction, and in all related roles. Of course, ordinary federal judicial review of grand jury investigation matters still would be available to independent counsels and their subjects.

2. Appointment of Special Prosecutor Within the Department of Justice – Appearance of Conflict Cases

As indicated above, the current independent counsel statute specifically identifies those persons—by office, position, and pay level—within the administration and the president's national campaign committee, who are automatically "covered persons" for purposes of the statute, necessitating the appointment of an independent counsel if a very low threshold of evidence is met. This "covered persons" provision is entirely too broad. It covers too many people. The Justice Department would not have an actual conflict of interest with investigating criminal allegations made against many of these so-called covered persons.

PROPOSAL: As indicated above, I would not use the current method of identifying a presumptive conflict through lists of categories of government officials. Instead, I would draw the distinction between actual conflict and appearance of conflict and leave it to the discretion of the attorney general to make that determination.

If the attorney general concludes that *no actual conflict of interest exists*, yet there is an appearance of conflict—a vague, subjective, and fluid concept—then the attorney general should appoint a special prosecutor from within or without the Justice Department to lead an investigation *within* DOJ's Public Integrity Section (similar to the current Campaign Finance Task Force).

If the attorney general chooses the latter course, she should give the special prosecutor exclusive authority to hire lawyers from outside or within the Justice Department to assist in the investigation. The special prosecutor would, in consultation with the attorney general, establish a one-year operating budget and would be subject to oversight by the chief of the Public Integrity Section and the assistant attorney general for the Criminal Division. Of course, legislating such a special prosecutor contingency must take into account several realities:

(A) That, except for the permanent cadre of experienced Public Integrity Section lawyers, the section may be in a constant state of flux—expanding and shrinking to accommodate the needs of perhaps numerous, overlapping cases that would otherwise have been referred out to independent counsels' offices under the current statutory regime;

(B) That Public Integrity's budget must anticipate the need for additional and sufficient appropriations to fund these important public corruption probes; and

(C) That the special prosecutors should be accorded more latitude in the conduct of investigations than ordinary Public Integrity Section lawyers in order to satisfy Congress, the public, and the special prosecutor that the investigation is not being hindered or influenced by inappropriate political considerations

EQUIREMENT WILL STOP AN ATTORNEY

ILL GUARANTEE THAT GOOD, APOLITICAL, PROPORTIONATE,

within the administration. In that regard, DOJ should implement restrictions on internal reporting practices within the department, much like those already in place for FBI special agents and assistant U.S. attorneys detailed to independent counsel offices.

3. Trigger Mechanism for Appointment of Independent Counsel in Actual Conflict Cases and Special Prosecutor in Appearance of Conflict Cases

The current statute is flawed in that it gives the attorney general very little discretion to decline an investigation of a covered person without referral to the Special Division of the Court for appointment of an independent counsel. Instead, the statute *requires* her to commence a preliminary investigation if she determines that she has received (1) credible and specific allegations (2) against a covered person (3) of possible violations of federal criminal law (other than most misdemeanors). It also limits what she can do in conducting the investigation and what she can consider in making her decision. Finally, and most significantly, the current statute creates an almost impossibly high standard for declination—that is, the attorney general must find that "*there are no reasonable grounds to believe that further investigation is warranted*" before she can close the file on a case and not seek the appointment of an independent counsel.

PROPOSAL: In conducting a preliminary investigation to determine if an independent counsel or a special prosecutor should be appointed, the attorney general should have the same restrictions on investigative methods and tools that exist in the current statute. That is, she should *not* be able to enter plea bargains, grant immunity, convene a grand jury, or issue subpoenas during her preliminary investigation. On the other hand, the attorney general should be able, through the Public Integrity Section, to gather evidence on a strictly voluntary basis from individuals and entities sufficient to satisfy her that further investigation is warranted.

In determining whether further investigation is warranted, the attorney general should be free to consider *all* the available evidence, however limited, and should be free to consider issues normally considered by prosecutors, such as criminal intent, state of mind, prosecutorial merit (including the usual practice of the Justice Department in similar cases, the serious or trivial nature of the allegation, the likelihood of success versus the cost of the investigation, etc.).

Finally, in determining whether further investigation is required, the attorney general should *not* have to establish that the evidence meets a certain threshold of proof and certainly should *not* have to make a finding approximating probable cause. Such a finding generally would require an inappropriate level of preliminary investigation within DOJ given the conflict situation and would unfairly stigmatize the targets of such an investigation even more than they are currently stigmatized by the judicial appointment of an independent counsel. The present statutory standard of referral for appointment of an independent counsel when the attorney general determines that there are "reasonable grounds to believe that further investigation is warranted" is appropriate for the attorney general to use under my proposal in actually appointing an independent counsel. However, if the attorney general determines *not* to appoint an independent counsel, the standard simply should be that the attorney general has concluded that no further investigation is warranted (not that "there are no reasonable grounds to believe that further investigation is warranted," as the current statute requires).

Archibald Cox and Elliot Richardson appear before the Senate Judiciary Committee on May 21, 1973.

4. Independent Counsel's Charter and Budget

Under the current statute, there is no provision for the independent counsel to have any input into his/her jurisdictional grant, nor is there any requirement that the independent counsel receive or live within a budget. This absence of financial accountability is one of the biggest and most justified criticisms of the current statute. After all, an independent counsel should not be the equivalent of a NATO commander who can summon whatever air power is necessary for air strikes over Serbia.

PROPOSAL: If the attorney general determines that an actual conflict exists and an independent counsel should be appointed, then the attorney general or her representative should meet with the prospective independent counsel and jointly draft a charter for the independent counsel's jurisdiction and budget for the first year of operation. The Justice Department should, as part of its annual budget process, seek sufficient appropriations to fund the first year of a number of possible independent counsel investigations. On completion of the first year of an independent counsel's investigation, the independent counsel should submit a budget to the appropriate committee of Congress and such a submission would be treated as a request for a supplemental Justice Department budget authorization and appropriation. Moreover, the same process should be followed in the succeeding years of an independent counsel's work. By establishing this supplemental budget and appropriation process, Congress and DOJ will share some level of responsibility and accountability for the spending that an independent counsel does during the course of his/her investigation.

The independent counsel should become subject to an annual budget and appropriation process, with the understanding that no confidential grand jury information or prosecution strategy will be divulged in describing the past expenditures or current budgetary needs of the independent counsel office.

5. Independent Counsel's Conduct of Investigation – General

The current statute places all administrative support for the operation of an independent counsel's office in the hands of the Administrative Office of the U.S. Courts (AOUSC)—i.e., in the judicial branch.

PROPOSAL: Under my new scheme, the independent counsel would obtain all of his administrative support from DOJ and not from AOUSC. With this one exception, all the same requirements that currently exist for support from government agencies would apply.

An independent counsel should have the same powers and duties and be subject to most of the same guidelines as set forth in the current independent counsel statute. It would be understood that an independent counsel would have to undertake the same task of assembling a team and office "from scratch" as current independent counsels and former special prosecutors have done.

E. BUTKOVSKAYA

Graduation Day 1974: Jim Bruce, Carol Elder Bruce, and commencement speaker Leon Jaworski

6. Special Prosecutor Conduct of Investigation – General

There is no provision under current law for a statutory special prosecutor.

PROPOSAL: Unlike an independent counsel, a special prosecutor would operate within the physical space and the management structure of DOJ with the only limitation being that he would enjoy more independence in decision making and action than normally accorded to DOJ investigations and would have specific restrictions on reporting requirements within DOJ. That is, the special prosecutor's work would be overseen only by the chief of the Public Integrity Section and the assistant attorney general for the Criminal Division. Under my proposal, then, Congress should pay particular attention during the confirmation process to the integrity, independence, and qualifications of nominees for the position of assistant attorney general for the Criminal Division.

7. Independent Counsel and Special Prosecutor Conduct of Investigation – Time Limits

The current independent counsel act imposes no time limits on independent counsel investigations, although there are reporting provisions, should an investigation extend beyond certain time periods.

PROPOSAL: An independent counsel and special prosecutor, as with any other prosecutor, should have no arbitrary, artificial deadlines or time limitations other than those provided by law (e.g., statute of limitations). The highly visible nature of most of these cases will be pressure enough to complete the task as quickly as possible.

8. Independent Counsel and Special Prosecutor Jurisdiction

Under the current statute, there are specific provisions requiring either the Justice Department or the Special Division of the Court to determine if certain areas an independent counsel ventures into are "related" to that counsel's core jurisdiction and, therefore, subject to investigation by the independent counsel. There also is a provision requiring Justice Department approval of any expansion of jurisdiction. My proposal would eliminate the option of having the court decide or participate in the decision of what matters are related to the independent counsel's core jurisdiction.

PROPOSAL: An independent counsel *must* consult with DOJ whenever his investigation leads into areas that are arguably unrelated to the independent counsel's core jurisdictional mandate. The independent counsel should obtain a written memorandum of understanding from DOJ to the effect that the department agrees with the independent counsel's determination that the matter is a related matter and that the independent counsel should investigate it. If the department determines that the matter is not related and not properly within the scope of the independent counsel's jurisdiction, then the attorney general may either decline to authorize the execution of a memorandum of understanding or may specifically expand the independent counsel's jurisdiction to encompass the unrelated matter. Any decision by the attorney general in this regard shall be non-reviewable in a court of law. These same requirements and restrictions should apply to a special prosecutor appointed within the department when there is an appearance-of-conflict matter.

9. Independent Counsel and Special Prosecutor Reporting Requirements

The current statute has multiple financial and case status reporting requirements, including the requirement of a final case report.

PROPOSAL: An independent counsel and a special prosecutor should have no reporting obligations to any court and no extraordinary or statutory reporting obligations to Congress beyond those required by the annual appropriations process.

If an independent counsel or a special prosecutor declines to prosecute, then he/she should be required to prepare a final report along the lines required by the current independent counsel act. In the case of an independent counsel investigation, the report should only be released if the independent counsel concludes such a release would be in the public interest. The report should not be released until all parties named in the report have had an opportunity to file comments with the independent counsel. The independent counsel should make public all such comments.

A limited report by the independent counsel should provide closure to the high visibility investigation and should avoid the necessity of any further substantive comment on the underlying facts of the case by the independent counsel or his/her staff.

In the case of a special prosecutor, the same reporting obligations should apply with the exception that the assistant attorney general for the Criminal Division should make the disclosure decision in consultation with the special prosecutor.

10. Removal of Independent Counsel and Special Prosecutor – For Good Cause Only

An independent counsel and a special prosecutor should be removable for good cause subject to judicial review, as is the requirement for independent counsels in the current statute.

* * *

These are just some of my thoughts on the subject of the independent counsel law. In closing, I am reminded of how I ended my third year at GW Law School. I was Student Bar Association president and introduced our commencement speaker, Special Prosecutor Leon Jaworski, at the May 1974 ceremony in Lisner Auditorium, just a few months before President Nixon's resignation.

I remember saying words to the effect that, as law students and aspiring young lawyers, we had watched how Mr. Jaworski had conducted himself in office and were inspired by the fact that he appeared to move forward with "deliberate resolve" to conclude his investigation in as professional and fair a manner as possible. I spoke of how we respected him for that and how it brought us renewed confidence in the rule of law

What more could you ask for, then or now?

Carol Elder Bruce, a partner with Tighe, Patton, Tabackman & Babbin, has been a white-collar criminal defense attorney in private practice for more than a decade and is the independent counsel investigating allegations concerning Interior Secretary Bruce Babbitt. She served as an assistant U. S. attorney for the District of Columbia for 10 years and as a deputy independent counsel in the second investigation of former attorney general Edwin Meese.

EXHIBIT C

[redacted] [redacted]

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU ABDUL RAUF ZALITA *et al.*, Petitioner, v. GEORGE W. BUSH *et al.*, Respondents.	No. 1:05 CV 1220 (RMU)

MOTION FOR INQUIRY CONCERNING DESTRUCTION OF EVIDENCE RELATED TO CIA DETAINEE INTERROGATIONS

Petitioner Abu Abdul Rauf Zalita, a.k.a., Abdul Ra'ouf Omar Mohammed Abu Al Qassim ("Petitioner" or "Qassim"), by and through the undersigned counsel, moves for hearing to inquire promptly into the government's destruction of documents related to Petitioner's Combatant Status Review Tribunal ("CSRT").[1] In particular, [redacted] Interrogations of Abu Zubaydah and other CIA prisoners were videotaped; and the government destroyed the tapes. Petitioner respectfully requests, therefore, that this Court inquire into the destruction of those tapes to determine whether they related to Petitioner.

[1] Pursuant to Local Rule 7(m), the undersigned counsel for Petitioner conferred with Respondents' counsel regarding the relief sought in this motion. Respondents oppose this motion.

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STATEMENT OF FACTS

Petitioner is a citizen of Libya who was kidnapped from his home in Karachi, Pakistan with his wife and child, handed over to U.S. military personnel and subsequently transferred to Guantanamo Bay Naval Station ("Guantanamo") in 2002. Petitioner has consistently maintained that he has never engaged in hostilities against the United States nor supports such acts. Despite Respondents' efforts since December 2006 to transfer Petitioner to the custody of the Qadhafi regime, where he faces certain persecution, torture or death, Qassim has remained imprisoned as an enemy combatant in Guantanamo for the past six years.

On September 29, 2004, following the Supreme Court's decisions in *Hamdi v. Rumsfeld*[2] and *Rasul v. Bush*,[3] Respondents convened a CSRT at Guantánamo to determine whether Petitioner was properly detained as an enemy combatant.

[2] 542 U.S. 507 (2004) (holding that U.S. citizens held as enemy combatants are entitled to due process that includes notice of the allegations against them and an opportunity to be heard before an independent tribunal).

[3] 542 U.S. 466 (2004) (holding that noncitizen enemy combatants, no less than American citizens, have a right to challenge their detention when imprisoned at Guantanamo).

[4] Incidentally,

Petitioner's CSRT thus made its final determination on January 23, 2005 that Petitioner was an enemy combatant properly detained in military custody at Guantánamo, and did not conduct any inquiry into whether

Beginning on March 7, 2005, in other habeas petitions brought by Guantanamo detainees, the Court ordered respondents to "preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantanamo Bay, Cuba." *See, e.g.*, *Al-Marri v. Bush*, Civil Action No. 04-2035 (GK) [dkt no. 25], and *Abdah v. Bush*, Civil Action No. 04-1254 (HHK) [dkt. no. 155], attached hereto as Exhibits A & B. *See* Declaration of Gitanjali S. Gutierrez, attached hereto as Exhibit C.

On June 22, 2005, Petitioner filed his petition for writ of habeas corpus and complaint for declaratory and injunctive relief challenging, *inter alia*, his detention as an "enemy combatant" at Guantánamo. [dkt. no. 1] After Respondents' attempt to send Petitioner to the custody of the

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Qadhafi dictatorship in December 2006, Qassim also moved for an injunction prohibiting Respondents from transferring him to the custody of Libya or any other country where he is more likely than not to be tortured or where he has a well-founded fear of persecution. This Court's denial of his motion on jurisdictional grounds was affirmed on appeal and Qassim's petition for certiorari in his interlocutory appeal is currently pending before the United States Supreme Court.[5]

On December 7, 2007, the *New York Times* reported that in November 2005, the CIA destroyed at least two videotapes documenting the interrogation of two detainees in the custody of the CIA, including videotapes of interrogations of Abu Zubaydah. *See* Mark Mazzetti, *Democrats Call for Inquiry Into Destruction of Tapes by C.I.A.*, NY Times, December 7, 2007. The Director of the CIA has acknowledged the destruction of the videotapes. *See* Exhibit D, Email from CIA Director Michael Hayden. At the same time, the government has not disclosed the content of the destroyed tapes or the content of what appears to be a significant number of remaining video or audio tapes in its possession.

Accordingly, Petitioner respectfully moves for a prompt hearing to determine whether evidence was destroyed that is relevant to the legal claims Petitioner raises in this matter.

ARGUMENT

I. Respondents Violated Their Existing Obligation to Preserve Recordings of Interrogations

Respondent's obligation to preserve documents and information concerning Guantánamo prisoners is not new. The obligation did not arise with the enactment of the DTA, the filing of this case or the ruling by the Court of Appeals for the District of Columbia in *Bismullah v. Gates*,

[5] On September 26, 2007, Petitioner also filed a petition under the Detainee Treatment Act, No. 07-1384 (D.C. Cir.), challenging the final decision of the Combatant Status Review Tribunal ("CSRT") that he is an "enemy combatant."

06-1197 & 06-1397 (D.C. Cir.), concerning the scope of the record on review in DTA actions. Since as early as February 2002 – before CIA interrogations of Abu Zubaydah and the unidentified CIA detainee – Respondents have had an obligation to preserve evidence justifying detentions of "enemy combatants" in Guantánamo, an obligation that has arisen as a direct result of ongoing litigation as well as congressional inquiries into CIA secret interrogation detention and "enhanced" interrogation practices.

In February 2002 several men detained at Guantanamo brought their first federal court challenge to their detention at Guantánamo.[6] Although not specific to Petitioner, these cases placed Respondents on notice that any information obtained from interrogations related to the detention of individuals at Guantanamo would be relevant to pending and future petitions for writ of habeas corpus and related litigation filed by detainees in Guantánamo.

This information was also relevant to ongoing federal criminal prosecutions. In the prosecution of Zacarias Moussaoui, for example, the government introduced into evidence statements that U.S. personnel derived from individuals detained as "enemy combatants" during interrogations in CIA and DOD custody. Beginning in 2003, the Moussaoui's defense lawyers requested access to any evidence related to these interrogations. In May 2003 and, again, in November 2005, the court in *Moussaoui* ordered the government to identify any videotapes or recordings of these interrogations by DOD and the CIA. *See* Letter from Chuck Robenberg, United States Attorney to Hon. Karen J. Williams and Hon. Leonie M. Brinkema, dated Oct. 25, 2007, attached hereto as Exhibit E.

Orders were also issued beginning in June 2005 by numerous judges in this Court requiring the government, which would include the CIA, to preserve all evidence and

[6] *See Rasul v. Bush*, 542 U.S. 466 (2004).

information related to the torture, mistreatment and abuse of detainees at Guantánamo.[7] The government has previously interpreted these preservations orders as applying to information "relating to all detainees *ever held* by the Department of Defense at Guantánamo Bay." *See* Memorandum for Secretary of Defense, et al., from Daniel J. Dell'Orto, Acting General Counsel, Department of Defense (Dec. 19, 2007) (emphasis added), attached hereto as Exhibit F. [redacted] Accordingly, these documents as well as any documents related to improper coercion or threats against the declarants should have been preserved for purposes of litigation.

In November 2005, the government indicted Jose Padilla, relying in part on information obtained through interrogations of individuals in CIA secret detention. *See* David Stout, *U.S. Indicts Padilla After 3 Years in Pentagon Custody*, NY Times, Nov. 22, 2005. These cases, while not specific to Petitioner, required Respondents to maintain the records related to the interrogations of Abu Zubaydah and the unnamed CIA detainee.

Developments in this case further required the government specifically to preserve evidence of the circumstances and details of interrogations [redacted] Respondents relied upon this information as early as September 2004,

[7] *See e.g.*, Order, *Al-Marri v. Bush*, No. 04-2035 (GK) (D.D.C. Mar. 7, 2005) [dkt. no. 25]; Order, *Al-Shiry v. Bush*, No. 05-490 (PFL) (D.D.C. Mar 23, 2005) [dkt. no. 14]; Order, *Anam v. Bush*, No. 04-1194 (HHK) (D.D.C. June 10, 2005) [dkt. no. 124]; Order, *Abdah v. Bush*, No. 04-1254 (HHK) [dkt. no. 155]; Mem. Op. & Order, *El-Banna v. Bush*, No. 04-1144 (RWR) (D.D.C. July 18, 2005) [dkt. no. 36]; Mem. Op. & Order, *Slahi v. Bush*, No. 05-881 (RWR) (D.D.C. July 18, 2005) [dkt. no.10]; Mem. Op. & Order, *Zadran v. Bush*, No. 2367 (RWR) (D.D.C. July 19, 2006) [dkt. no. 36]; *cf. Al-Anazi v. Bush*, No. 05-345 (JDB) (D.D.C. Oct. 28, 2005) (denying motion for preservation as moot because "respondents have a pre-existing duty to preserve the very information that this motion addresses").

[8] *See* Gutierrez Declaration, ¶ 3.

when Petitioner's CSRT was conducted a year and two months prior to the destruction of the videotapes of Abu Zubaydah. Respondents finalized Petitioner's CSRT in January 2005, and expressly stated that [redacted] Petitioner also filed this habeas petition in September 2005, challenging his detention as an enemy combatant as well as invoking his right to *nonrefoulement*.[9] Unquestionably, the details [redacted] are at issue in Petitioner's habeas case and this Court should determine if relevant evidence has been destroyed.

Respondents' obligation to preserve evidence of Abu Zubaydah and the unidentified CIA detainee's interrogations was also heightened by congressional inquiries and administration officials' guidance. As early as 2003, officials within the CIA suggested destroying video recordings of CIA enhanced interrogations. *See* Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, NY Times, Dec. 8, 2007. In response, in February 2003, the Chairman of the House Intelligence Committee and the ranking minority member of that committee expressly requested that the CIA preserve videotapes of its interrogations using enhanced techniques in secret facilities.[10]

Again, beginning in May 2005, a member of the Senate Select Intelligence Committee expressly requested that the CIA preserve over one hundred documents concerning the CIA

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[9] *Refoulement* is a State's expulsion or return of an individual to another State where the person is in danger of torture or persecution. Respondents' improper designation of Petitioner as an "enemy combatant" has also heightened his concerns that he will be tortured or persecuted by the Qadhafi regime if transferred there and has increased this risk of harm due to the stigma of his enemy combatant status.

[10] *See* Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*; Michael Isikoff & Mark Hosenball, *Who Authorized the CIA to Destroy Interrogation Videos?*, Newsweek, Dec. 11, 2007.

[redacted] [redacted]

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enhanced interrogation program. One of the requested documents is a report about the videotapes of interrogations and the possible illegality of the interrogation techniques the CIA employed. *See Chairman Rockefeller Says Intel Committee Has Begun Investigation into CIA Detainee Tapes*, Dec. 7, 2007, available at www.senate.gov/~rockefeller/news/2007/pr100707a.html.

Similarly, Administration officials sent requests to the CIA to preserve these records. *See, e.g.*, Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes* (White House Deputy Chief of Staff Harriet Miers repeatedly advised the CIA not to destroy the videotapes). Lawyers from the Department of Justice (DOJ) advised the CIA that it should not destroy any videotapes or recordings of detainee interrogations. *Id.* In mid-2005, the Director of National Intelligence "strongly advised" the Director of the CIA to forbid destruction of interrogation videotapes. *See* Isikoff & Hosenball, *Who Authorized the CIA to Destroy Interrogation Videos?*

Accordingly, without question, Respondents were under an obligation to preserve any evidence or information related to Petitioner that was derived from Abu Zubaydah or other CIA detainees. Respondents unquestionably violated that pre-existing obligation by destroying tapes in 2005.[11]

II. Respondents' Ongoing Investigation Is Insufficient to Determine Whether Respondents Destroyed Evidence Related to Petitioner

Although Respondents have urged the courts and Congress to permit it to investigate itself, any investigation conducted by Respondents is insufficient to determine whether evidence

[11] Judge Kennedy recently held a hearing in *Abdah* to determine if Respondents violated their pre-existing obligation to preserve evidence. Although Judge Kennedy has not yet ruled on the *Abdah* petitioner's motion, here Petitioner has shown that the government explicitly relied upon statements [redacted]

was destroyed that specifically related to Petitioner. The Department of Justice may have authorized the destruction of CIA interrogation tapes, creating an inherent conflict of interest that cannot be overcome.

Furthermore, CIA personnel have misrepresented the scope of the creation, preservation and destruction of recordings of CIA interrogations. Uncertainly exists, for example, concerning the public representations made by the Director of the CIA about the scope of the videotaping of CIA interrogations and the destruction and preservation of records. The Director recently asserted that "videotaping stopped in 2002." *See* Exhibit D. [redacted] The CIA has also not disclosed the content of the remaining videotapes or whether it destroyed videotapes of interrogations of other CIA detainees, [redacted]

Concerns regarding the government's failure to provide an accurate and full accounting of both its destruction and possession of evidence or information concerning [redacted] are also raised by the government's representations in the *Moussaoui* prosecution. In *Moussaoui*, the government informed the court via declarations from CIA officials submitted on May 9, 2003 and November 14, 2005 that the CIA did not videotape interrogations of CIA detainees whose statements were relied upon by the government in that prosecution. *See* Exhibit E. On October 25, 2007, the government notified the court that these declarations were inaccurate and that CIA interrogations were videotaped. The government explained that "[u]nbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted." *See id.*

Although the government's letter to the court is heavily redacted, it suggests that the relevant CIA component did not inform the declarants of its videotaping of interrogations. *See id.* As result of the compartmentalization of information within the relevant government agencies and the need for accurate representations to the Court and counsel, this Court should require Respondents to demonstrate the preservation of relevant evidence through verified representations to this Court by individuals with direct knowledge of the creation, preservation and destruction of documents. Further, these representations should identify the relevant content of any destroyed evidence as well as the relevant content of any preserved evidence.

* * *

The government's factual return establishes that during Petitioner's CSRT, [redacted] were the purported basis for any association between Petitioner and al Qaeda or jihadist activity that the government now cites as justification for Petitioner's detention and enemy combatant status. Yet, any information impermissibly obtained through torture or coercion cannot justify Petitioner's detention or designation.[12] In this litigation, Petitioner must be afforded an opportunity to challenge any

[12] Our Nation's fundamental legal traditions prohibit judicial reliance upon statements extracted through torture and other lesser forms of impermissible coercion to justify imprisonment of an individual. *See, e.g.*, James Heath, *Torture and English Law*, 178 (1982) (torture has been illegal under English Common Law for more than 350 years). Common law judges did not consider evidence against a defendant that investigators extracted through torture and unlawful coercion because the judges considered this information inherently unreliable and viewed judicial acquiescence in these practices as degrading the dignity of justice. Our Founders shared this revulsion of judicial reliance upon statements extracted by torture or impermissible coercion and embodied protections against this practice within the Constitution. The Fifth Amendment's protection against self-incrimination was a direct response to the historical experience of the Star Chamber and intended to prohibit judicial reliance upon statements extracted through unlawful

[redacted] UNCLASSIFIED [redacted]

impermissible reliance upon evidence obtained through or derived from torture to justify his detention. Accordingly, this Court should conduct an inquiry promptly to determine whether Respondents have destroyed evidence in a manner that eliminates Petitioner's ability to bring this challenge.

CONCLUSION

For the reasons stated above, this Court should conduct a hearing to determine whether Respondents destroyed evidence from Abu Zubaydah or other detainees in CIA custody related to Respondents' justification for detaining Petitioner and designating him as an "enemy combatant."

Respectfully submitted,

Gitanjali S. Gutierrez
J. Wells Dixon
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6485
Fax: (212) 614-6499

Counsel for Petitioner

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cruelty or coercion, including torture. *See Michigan v. Tucker*, 417 U.S. 433, 440 (1974) ("The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chambers proceedings occurring several centuries ago."). Further, constitutional prohibitions against unreasonable searches and seizures, cruel and unusual punishments, and the guarantee of due process, reflect the Founders' antipathy to government cruelty and undue coercion within our Nation's justice system. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment.") (citation omitted).

[redacted] [redacted]

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Exhibit A

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[redacted] UNCLASSIFIED [redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JARALLAH AL-MARRI, et al.,	:	
Petitioners,	:	
v.	:	Civil Action No. 04-2035 (GK)
GEORGE W. BUSH, et al.,	:	
Respondents.	:	

ORDER

On January 10, 2005, Petitioners filed a Motion for Discovery and for Preservation Order. Petitioners request that the Court order Respondents to preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees at Guantanamo Bay. Respondents, however, argue that Petitioners have failed to satisfy the standard for entering a preliminary injunction, which is required when considering a request for a preservation order.

"[A] document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing Mercer v. Magnant, 40 F.3d 893, 896 (7th Cir. 1994)). Thus, Petitioners need not meet such a standard when seeking a preservation order. Furthermore, Respondents represent that the information at issue will not be destroyed, so the Court finds that entering a preservation order

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will inflict no harm or prejudice upon them. Accordingly, it is hereby

ORDERED that Petitioners' Motion for Preservation Order is **granted**; it is further

ORDERED that Respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility.

March 7, 2005

/s/
Gladys Kessler
United States District Judge

Copies to: **Attorneys of Record via ECF**

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[redacted] [redacted]

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Exhibit B

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, et al., Petitioners, v. GEORGE W. BUSH, et al., Respondents.	Civil Action 04-1254 (HHK)

ORDER

On January 10, 2005, petitioners filed a Motion for Leave to Take Discovery and For Preservation Order [#96]. On February 3, 2005, the court (Green, J.) ordered that the proceedings in this and ten other coordinated cases be "stayed for all purposes pending resolution of all appeals in this matter." To the extent that petitioners seek to take discovery, their motion must be stayed in accordance with Judge Green's order.

Petitioners also seek a preservation order, which they argue is necessary to ensure that the government will maintain "the very sensitive evidence it now possesses about the torture, mistreatment, and abuse of the detainees now at Guantánamo." Pet'rs' Mot. for Disc./Protective Order at 8-9. Respondents counter that petitioners have failed to satisfy the four-part preliminary injunction standard, which they assert is required for entry of a protective order; that petitioners have not identified specific documents at risk for destruction; and that respondents are "well aware of their obligation not to destroy evidence that may be relevant in pending litigation." Resp'ts' Opp'n at 25.

While preservation orders take the form of an injunction, in that they order a party to perform or refrain from performing an act, petitioners need not meet the four-part preliminary injunction test in order to protect relevant documents from destruction. In fact, "a document preservation order is

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no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); *see also Ditlow v. Shultz*, 517 F.2d 166, 173-74, n.31 (D.C. Cir. 1975) (preservation order issued when moving party presented "sufficiently substantial" challenge on the merits, non-moving party agreed to maintain documents at issue, and preservation of documents presented only a "limited housekeeping burden").

Furthermore, in this case, all of the documents relevant to the adjudication of petitioners' claims, along with petitioner-detainees themselves, are in the sole custody and control of respondents. In addition, petitioners' counsel's access to their clients is quite restricted. It is almost inconceivable that within these confines, petitioners could identify specific instances of document destruction. Rather, the court finds entry of a preservation order appropriate in light of the purpose animating Judge Green's February 3, 2005 stay order, namely to preserve the status quo pending resolution of appeals. Finally, because respondents represent that they will not destroy the information at issue, a preservation order will not impose any harm or prejudice upon them. *See Al-Marri v. Bush*, No. 04-2035 (D.D.C. March 7, 2005) (preservation order). Accordingly, it is this 10th day of June, 2005, hereby

ORDERED, that petitioners' motion is **STAYED** insofar as petitioners seek discovery and **GRANTED** insofar as they seek a preservation order; and it is further

ORDERED, that respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba.

Henry H. Kennedy, Jr.
United States District Judge

[redacted] [redacted]

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Exhibit C

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[redacted] [redacted]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU ABDUL RAUF ZALITA, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.* Respondents.	)	Civil Action No. 05-1220 (RMU)

DECLARATION OF GITANJALI S. GUTIERREZ

I, GITANJALI S. GUTIERREZ, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney at the Center for Constitutional Rights, 666 Broadway, 7th floor, New York, New York, 10012 ("CCR"). CCR represents Abu Abdul Rauf Zalita, a.k.a. Abdul Rauf Omar Mohammed Abu Al Qassim, ("Petitioner"), Petitioner in the above-captioned matter. CCR also represents Guantanamo detainee Majid Khan ("Khan"), a U.S. asylee who was [redacted] imprisoned and tortured [redacted] operated by the Central Intelligence Agency ("CIA"). *See Khan v. Bush*, Civil Action No. 06-1690 (RBW) (D.D.C.); *Khan v. Gates*, No. 07-1324 (D.C. Cir.). On September 6, 2006, the CIA transferred Khan from secret detention to the custody of military authorities at Guantánamo, where he remains imprisoned without charge or trial. I have conducted attorney-client meetings with Majid Khan at Guantanamo in October and December 2007. I respectfully submit this declaration in support of Petitioner's Motion for Inquiry Concerning Destruction of Evidence Related to CIA Detainee Interrogations.

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[redacted] UNCLASSIFIED [redacted]

2. Since his arrival at Guantánamo the only prisoner Khan has had any direct contact with is [redacted] He and [redacted] are in neighboring cells and share recreation time. Both men speak English.

3. According to Khan, [redacted]

4. Khan was held in secret detention by or at the behest of the CIA from March 5, 2003 until on or around September 6, 2006. During his detention, CIA interrogators subjected him to enhanced interrogation techniques that amounted to torture.

[redacted]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: Washington, DC
December 27, 2007

Gitanjali S. Gutierrez

[redacted] [redacted]

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Exhibit D

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UNCLASSIFIED

Starks, Brent

From: Remes, David
Sent: Saturday, December 08, 2007 7:40 PM
To: 'mfalkoff@niu.edu'; 'jasonmknott@yahoo.com'; Lipper, Gregory; Starks, Brent; Armijo, Enrique; Braverman, Elizabeth; Shuford, David; Vernia, Benjamin; Perryman, Skye; Huber, Jonathan
Subject: Mot Ex D

----- Original Message -----
From: Remes, David
To: Remes, David
Sent: Sat Dec 08 18:52:00 2007
Subject: Hayden Email

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

Message from the Director: Taping of Early Detainee Interrogations

The press has learned that back in 2002, during the initial stage of our terrorist detention program, CIA videotaped interrogations, and destroyed the tapes in 2005. I understand that the Agency did so only after it was determined they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries-including the trial of Zacarias Moussaoui. The decision to destroy the tapes was made within CIA itself. The leaders of our oversight committees in Congress were informed of the videos years ago and of the Agency's intention to dispose of the material. Our oversight committees also have been told that the videos were, in fact, destroyed.

If past public commentary on the Agency's detention program is any guide, we may see misinterpretations of the facts in the days ahead.

With that in mind, I want you to have some background now.

CIA's terrorist detention and interrogation program began after the capture of Abu Zubaydah in March 2002. Zubaydah, who had extensive knowledge of al-Qa'ida personnel and operations, had been seriously wounded in a firefight. When President Bush officially acknowledged in September 2006 the existence of CIA's counter-terror initiative, he talked about Zubaydah, noting that this terrorist survived solely because of medical treatment arranged by CIA. Under normal questioning, Zubaydah became defiant and evasive. It was clear, in the President's words, that "Zubaydah had more information that could save innocent lives, but he stopped talking."

That made imperative the use of other means to obtain the information-means that were lawful, safe, and effective. To meet that need, CIA designed specific, appropriate interrogation procedures.

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Before they were used, they were reviewed and approved by the Department of Justice and by other elements of the Executive Branch. Even with the great care taken and detailed preparations made, the fact remains that this effort was new, and the Agency was determined that it proceed in accord with established legal and policy guidelines. So, on its own, CIA began to videotape interrogations.

The tapes were meant chiefly as an additional, internal check on the program in its early stages. At one point, it was thought the tapes could serve as a backstop to guarantee that other methods of documenting the interrogations-and the crucial information they produced-were accurate and complete. The Agency soon determined that its documentary reporting was full and exacting, removing any need for tapes. Indeed, videotaping stopped in 2002.

As part of the rigorous review that has defined the detention program, the Office of General Counsel examined the tapes and determined that they showed lawful methods of questioning. The Office of Inspector General also examined the tapes in 2003 as part of its look at the Agency's detention and interrogation practices. Beyond their lack of intelligence value-as the interrogation sessions had already been exhaustively detailed in written channels-and the absence of any legal or internal reason to keep them, the tapes posed a serious security risk. Were they ever to leak, they would permit identification of your CIA colleagues who had served in the program, exposing them and their families to retaliation from al-Qa'ida and its sympathizers.

These decisions were made years ago. But it is my responsibility, as Director today, to explain to you what was done, and why. What matters here is that it was done in line with the law. Over the course of its life, the Agency's interrogation program has been of great value to our country. It has helped disrupt terrorist operations and save lives. It was built on a solid foundation of legal review. It has been conducted with careful supervision. If the story of these tapes is told fairly, it will underscore those facts.

Mike Hayden

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Exhibit E

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[redacted] UNCLASSIFIED [redacted]

NOV – 9 2007

~~TOP SECRET//HCS//ORCON/NOFORN//MR~~

U.S. Department of Justice
United States Attorney
Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314
(703)299-3700

October 25, 2007

FILED WITH THE
COURT SECURITY OFFICER
CSO: MACISSO
DATE: 10/25/07

Hon. Karen J. Williams
Chief Judge
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Hon. Leonie M. Brinkema
United States District Judge
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314-5799

Hand-delivered via Court Security Officer

Re: United States v. Zacarias Moussaoui
Fourth Circuit Docket Nos. 03-4792, 06-4494
District Court Case No. 01-455-A

Dear Chief Judge Williams and Judge Brinkema:

The Government respectfully submits this letter to inform the Court that two *ex parte* declarations previously submitted by the Central Intelligence Agency ("CIA") in this case contain factual errors concerning whether interrogations of certain enemy combatants were audio or video recorded. The errors, described more fully below, do not prejudice the defendant in light of his guilty plea, extensive admissions in the penalty phase, and the jury's decision not to impose a death sentence. We advise both Courts because the declarations in question were filed in the District Court and included in appendices filed in the Fourth Circuit.

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1, Human~~

~~TOP SECRET//HCS//ORCON/NOFORN//MR~~

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Recently, we learned that the CIA obtained three recordings (two video tapes and one short audio tape) of interviews of [redacted] We are unaware of recordings involving the other enemy combatant witnesses at issue in this case [redacted] Further, the CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution.

On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape of the interrogation of [redacted] On September 19, 2007, we viewed the video tape and a transcript [redacted] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution.[2] The existence of the video tape, however, is at odds with statements in two CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [redacted] On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts

---

1 [redacted] was one of the enemy combatant witnesses whom Moussaoui wanted to call to testify on his behalf; [redacted]

2 The recording from [redacted]

3 [redacted]

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1 Human~~

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[redacted] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution — they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review *ex parte* a copy of the transcripts for the three recordings.[3]

At our request, CIA also provided us with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [redacted] videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question.

The fact that audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations dated May 9, 2003 (the "May 9 Declaration"), and November 14, 2005 (the "November 14 Declaration"). The May 9 Declaration arose after the Fourth Circuit directed the District Court to consider substitutions under the Classified Information Procedures Act ("CIPA") in lieu of enemy combatant testimony sought by the defendant. In an ensuing CIPA hearing, on May 7, 2003, Judge Brinkema ordered the Government to determine, *inter alia*, whether interrogations [redacted] were recorded. *See* 5/7/03 Tr. 11-13, 69. Two days later, the Government filed the May 9 Declaration, which was *ex parte* and accompanied by a motion under CIPA § 4 to make a limited disclosure to the defense of only the answers to the District Court's questions (but not the full explanations contained in the declaration). Judge Brinkema granted the § 4 motion, permitting the Government to make the following disclosure, among others, to the defense:

---

[4] The transcript of the audio tape previously existed and was contained within an intelligence cable.

[3] Although we have provided defense counsel with a copy of this letter, we have not provided them with a copy of the transcripts for two reasons. First, the interviews address other national security matters for which defense counsel lack a need to know. [redacted]

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Question: Whether the interrogations [redacted] are being recorded in any formal?

Answer: No.

See Docket No. 905 (Attachment A).[4]

The November 14 Declaration arose after the Fourth Circuit published its decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), and after Moussaoui pleaded guilty. Following these events, and in anticipation of the penalty-phase trial, the District Court ordered the Government to disclose various information [redacted] including whether interrogations were recorded. *See* 5/2/05 Order (Docket No. 1275). Judge Brinkema subsequently reconsidered most of that order, at the Government's request (*see* Docket No. 1282), but still directed the Government to "confirm or deny that it has video or audio tapes of these interrogations," *see* 11/3/05 Order (Docket No. 1359), at 4. The November 14 Declaration ensued, in which a CIA executive stated that the "U.S. Government does not have any video or audio tapes of the interrogations of [redacted]" *See* 11/14/05 Declaration (Docket No. 1369), at 3.

Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [redacted] As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [redacted] unknowing that a different component of the CIA had contact with [redacted]

As noted above, the errors in the CIA declarations at issue, although unfortunate, did not prejudice Moussaoui, who pled guilty, reiterated his guilt in substantial admissions in the penalty phase, and ultimately received a life sentence after the jury declined to sentence him to death.

---

[4] This response was cited by the District Court in an opinion, dated May 15, 2003. *See* Docket No. 925, at 9. Both the response and the May 15 opinion were included in the classified Supplemental Joint Appendix filed with the Fourth Circuit at the same time. *See* SC 249, 273. The May 9 Declaration was included in the classified Supplemental *Ex Parte* Appendix filed with the Fourth Circuit on May 23, 2003, in docket number 03-4162. *See* SGX, at 17-23.

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[redacted] [redacted]

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We bring the errors to the Court's attention, however, as part of our obligation of candor to the Court.

The Government will promptly apprise the Court of any further developments.

Sincerely,

Chuck Rosenberg
United States Attorney

By: David Novak
David Raskin
Assistant United States Attorneys

cc: Justin Antonipillai, Esq.
Barbara Hartung, Esq.
Appellate Counsel for Zacarias Moussaoui
(without transcripts)

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1 Human~~
~~TOP SECRET//CRU-GST/HCS//ORCON/NOFORN//MR~~

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UNCLASSIFIED

Exhibit F

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UNCLASSIFIED

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON DC 20301-1600

DEC 19 2007

MEMORANDUM FOR SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Preservation of Detainee Records

In August 2005, in response to several orders issued by federal court judges, the General Counsel of the Department of Defense directed that certain information relating to all detainees ever held by the Department of Defense at Guantanamo Bay be preserved and maintained (enclosure). Specifically, you were directed to preserve and maintain "all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is in, or comes into, your possession or control" relating to these detainees. Those directives remain in effect and must continue to be followed.

You are hereby directed that this requirement also applies to records relating to detainees who arrived at Guantanamo after August 2005 and to any detainees who may arrive at Guantanamo in the future.

Daniel J. Dell'Orto
Acting General Counsel

Enclosure
As stated

UNCLASSIFIED

Ms. SÁNCHEZ. Thank you so much for your testimony, Ms. Bruce. At this time I would invite Professor Katyal to provide us with his testimony.

TESTIMONY OF NEAL KATYAL, ESQUIRE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. KATYAL. Thank you, Chairwoman Sánchez, Representative Cannon, and Members of the Subcommittee, for inviting me here today and for this hearing, which has been a long time in coming. The special counsel regulations derive from two principles fundamental since our Nation's founding: accountability, and the need to take care that the laws be faithfully executed.

My job at the Justice Department, from 1998 to 1999, involved running a department-wide group to examine the Independent Counsel Act. Attorney General Reno then tasked me with drafting the Justice Department regulations that would replace this act. After a wide-ranging consultation, both within the Department and with this Committee and others in Congress, the special counsel regulations became effective in June 1999, when the Independent Counsel Act lapsed.

You have asked me here today to discuss the development of these regulations, and I have therefore prepared an extensive statement that walks the Committee through each aspect of the regulations, as well as discussing the recent appointments of Senator Danforth and Patrick Fitzgerald.

In the remaining minutes, I will discuss the recent investigation regarding the CIA's alleged destruction of the videotapes. I believe that the Attorney General's recent testimony stating that the Justice Department will not investigate the underlying conduct on the destroyed tapes, including confirmed instances of waterboarding, highlights a strong possible need for a special counsel.

The Attorney General told this Committee that waterboarding "cannot possibly be the subject of a criminal Justice Department investigation because that would mean the same department that authorized the program would now consider prosecuting somebody who followed that advice." This statement reflects the complicated institutional dynamics of this investigation—one in which the department must investigate not just the CIA, but also itself.

This underscores why a special counsel may be appropriate. Attorney General Mukasey took the position that he did not want to investigate waterboarding because the interrogators relied, in good faith, on legal opinions drafted by the Office of Legal Counsel in 2002. This position may very well be justified, depending on what the OLC opinions say, but it is literally impossible to assess this claim without seeing the opinions themselves.

I deeply believe the executive branch should have a zone of secrecy to operate, and that legal opinions that disclose the existence of secret war-fighting techniques should not be publicly disclosed except in extreme circumstances; but that claim cannot apply to waterboarding. After all, the OLC opinions on which the Attorney General claims officials relied have been withdrawn.

The use of this technique has also been recently confirmed by our Nation's top officials in recent sworn testimony. And most impor-

tantly, the Attorney General and the director of the CIA have both told this Committee that America is not now using waterboarding.

Given these facts and the important legislative interest in the issue, the Attorney General should, at a minimum, disclose the waterboarding opinions to this Committee. The Administration has elevated these OLC legal opinions into a status akin to law, using them as definitive interpretations of this Congress' work product. Just as our founders would not have tolerated secret laws made by Congress, they would not have tolerated a system of secret law made by the executive branch, particularly on an issue that is of utmost importance to our Nation's character.

The Attorney General's position, evidently, is that the law made by his department is so secret that even this body, the Congress of the United States, a body that article 1 of our Constitution vests with responsibility for making law, cannot be told about it. If the Attorney General does not disclose these opinions, he will essentially be asking Congress to let him shut down a potential criminal investigation on the basis of a putative good faith defense based on secret opinions that Congress has never seen.

If the Attorney General refuses to disclose these opinions to appropriate individuals in Congress, then Congress may very well be justified in questioning his conclusions about the good faith defense, and may instead insist on the appointment of a special counsel.

Regardless of what happens with the OLC opinions, at a minimum the reporting requirements to Congress that are embodied in the special counsel regulations should be applied to the tapes investigation immediately, and my statement goes through the reasons why.

In sum, given Attorney General Mukasey's well-deserved reputation for independence and honesty, I do not believe interference is likely. But our Government was founded on the idea that checks and balances must be laced into the system to guard against mistakes by well-meaning individuals. Applying the modest reporting requirements in the special counsel regulations will reassure the public that Congress will be informed about any interference with such a sensitive investigation.

As such, if Mr. Durham's investigation finds no crime has occurred, the reporting requirement will shield the Administration from accusations of impropriety. And if, as I predict, no interference by the Attorney General takes place, a reporting requirement to Congress will have little effect outside of the positive precedent it will set for other extremely sensitive investigations with future Attorneys General.

PREPARED STATEMENT OF NEAL KATYAL

Testimony of
Neal Katyal
Paul & Patricia Saunders Professor
Georgetown University Law Center

Before the
House Subcommittee on Commercial and Administrative Law
"Implementation of the U.S. Department of Justice's Special Counsel Regulations"
February 26, 2008

INTRODUCTION

Thank you Chairman Conyers, Representative Smith, and members of the House Subcommittee on Commercial and Administrative Law for inviting me to speak to you today. I appreciate the time and attention that your Subcommittee is devoting to the implementation of the U.S. Department of Justice's Special Counsel Regulations.

The Special Counsel Regulations derive from two principles fundamental to our nation's prosecutorial system since the Founding: accountability and the need to take care that the laws be faithfully executed. When I joined the staff of the Deputy Attorney General in 1998, I was asked to convene a department-wide group to develop a set of policy recommendations regarding the potential renewal of the Independent Counsel Act. After much internal debate, those recommendations (including the Department's position that the Independent Counsel Act be permitted to lapse) were announced in testimony to this Committee by the Deputy Attorney General on March 2, 1999. Subsequently, Attorney General Reno tasked me with drafting the internal DOJ regulations that would form the basis for the appointment of a Special Counsel. After a wide-ranging consultation, both within the Department and with this Committee and others in Congress, the regulations became effective on June 30, 1999.

You have asked me here to discuss the development and meaning of these Special Counsel regulations, as well as how they have been implemented since they have taken effect. I have therefore concentrated the bulk of my testimony on these matters, though I will also discuss the recent

investigation regarding Central Intelligence Agency (CIA) videotape destruction toward the end of my testimony.

With respect to the CIA tapes investigation, it is my view that recent testimony by Attorney General Mukasey, stating that the Justice Department will not investigate the underlying conduct on the destroyed tapes, including confirmed instances of waterboarding, highlights a strong possible need for a special counsel. The Attorney General told this committee that waterboarding "cannot possibly be the subject of a criminal – a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice."[1] This statement reflects the complicated institutional dynamics of the CIA tapes investigation, one in which the Department must investigate not just the CIA but also itself. And it underscores why the appointment of a Special Counsel may be appropriate in this case.

Attorney General Mukasey took the position that he did not want to open an investigation into waterboarding and other extreme interrogation techniques because interrogators relied in good faith on legal opinions issued by the Office of Legal Counsel (OLC) in 2002 holding that waterboarding was permissible. This position may be justified, depending on what the OLC opinions say. These opinions may indeed advise interrogators that waterboarding and other extreme interrogation techniques are legal in certain situations, but it is, quite literally, impossible to assess this claim without seeing the opinions themselves.

The Attorney General's decision to forbid prosecution of waterboarding or other extreme interrogation techniques, moreover, precludes an independent judicial examination into the OLC opinions. In many "good faith reliance" cases, an indictment is brought and the prosecutor and defendant battle over the reliance in court. A judge ultimately makes the decisions about whether the defendants have reasonably relied in good faith. In order to make that evaluation, the judge must consider the defendant's conduct in light of the specific authorization – in this case, the OLC opinions. Only by comparing the actual conduct to the

[1] Testimony of Attorney General Mukasey before the House Judiciary Committee, Feb. 7, 2008.

specific authorization can a proper determination be made as to whether the defendant reasonably relied on government authority. Here, the Attorney General is foreclosing that process. There very well may be legitimate grounds for this decision, since a prosecutor is obligated to consider good faith reliance before indicting an individual. But without knowing what the underlying legal opinions say, it is quite difficult to know whether the Department of Justice has taken the right course in this instance.

I deeply believe that the executive branch should have a zone of secrecy to operate, and legal opinions that disclose the existence of secret warfighting techniques should not be publicly disclosed except in extreme circumstances. But that claim does not, and cannot, apply to waterboarding. After all, the underlying legal opinions on which the Attorney General claims officials relied have now been withdrawn.[2] The use of this technique has already been confirmed by our nation's top intelligence officials in testimony to Congress. And, most importantly, the Attorney General and the Director of the CIA have both told this committee that America is not using waterboarding today. Given these facts, and the important legislative interest in the issue, the Attorney General should, at a minimum, disclose the waterboarding opinions to this Committee.

The Administration has elevated these OLC legal opinions into a status akin to law – using them as definitive interpretations of this Congress's work-product – legislation of the Congress of the United States. Just as our Founders would not have tolerated secret laws made by the Congress, they would not have tolerated a system of secret law by the Executive Branch – particularly on an issue of such utmost importance to our national character. The Attorney General's position, evidently, is that the "law" made by his Department is so secret that even this body, the

[2] Although the original OLC opinions authorizing waterboarding have been withdrawn, the Administration has not acknowledged that waterboarding is now unlawful. In fact, Stephen Bradbury, the Principal Deputy Assistant Attorney General, testified before the House Judiciary Committee on February 14, 2008, that there has not been a determination that waterboarding is unlawful. Accordingly, disclosure to this Committee of the OLC opinions related to waterboarding and other extreme interrogation techniques is not only necessary to this Committee's oversight responsibilities, but also its legislative role. In order to develop appropriate legislation in this area, Congress must know how the Administration has interpreted existing laws including the federal torture statue, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions, as codified in the Military Commissions Act.

Congress of the United States (a body that the Constitution vests with responsibility for making law in Article I), cannot be told about it.

If the Attorney General does not disclose these opinions, he will essentially be asking Congress to let him shut down a potential criminal investigation on the basis of a putative good faith defense based on secret opinions that Congress has never seen. If the Attorney General refuses to disclose these opinions to appropriate individuals in Congress, then Congress may very well be justified in questioning his conclusions about "good faith reliance," and may instead insist on the formal appointment of a Special Counsel to review the underlying OLC opinions.

Regardless of what course of action is ultimately pursued with respect to the OLC waterboarding opinions, at a minimum, the reporting requirements in the Special Counsel regulations should be made applicable to the CIA tapes case immediately. Those requirements direct the Attorney General to notify Congress when "the Attorney General [has] concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued."[3] While I am generally wary of "independent" and "special" investigations, I recognize that some extraordinary circumstances call for them.[4] And in some cases, even if there is no need for a fully independent investigation, there is still a need for the investigation to use procedures modeled on those in the special counsel regulations to protect against interference or conflict of interest. The CIA tapes matter appears to be one of those circumstances for which the reporting requirements in the DOJ regulations were designed. Specifically, the Attorney General should report to Congress about the scope of authority currently given to Mr. John Durham, and should also report if he rejects a proposed action by Mr. Durham or alters (or refuses to alter upon request) the scope of Mr. Durham's authority and mandate in this investigation.

Given Attorney General Mukasey's well-deserved reputation for independence and honesty, I do not believe that his interference (or that of his Deputy) is likely in the investigation now being undertaken by Mr.

[3] DOJ Special Counsel Regulations, 64 Fed. Reg. 37038-01, 37038 (July 9, 1999) (codified at 28 C.F.R. pt. 600.9).
[4] *See* Neal Katyal & Viet Dinh, *Let Justice Take Its Course*, N.Y. TIMES, Oct. 2, 2003, at A31.

Durham. But our government was founded on the idea that checks and balances must be laced into the system to guard against mistakes made by well-meaning individuals.[5] Applying the modest reporting requirement in the Special Counsel regulations will reassure the public that the Congress of the United States will be informed about any interference with such a sensitive investigation. As such, if Mr. Durham's investigation finds that no crime has occurred, the reporting requirement will shield the Administration from accusations of impropriety. And if, as I predict, no interference by the Attorney General takes place, the reporting requirement will have little effect, outside of the positive precedent it sets for other extremely sensitive investigations with future Attorneys General.

I. THE CURRENT REGULATIONS ACHIEVE THE PROPER BALANCE OF INDEPENDENCE AND ACCOUNTABILITY

After careful consideration based on the findings of a working group, the Department of Justice (DOJ) concluded in early 1999 that the Independent Counsel Act[6] should not be reauthorized. Led by Deputy Attorney General Eric Holder, the working group identified problems inherent in the Act and determined that the processes set forth in that Act did not materially enhance public confidence.[7] Although the Act increased the independence of Independent Counsels by removing many of the institutional constraints that ordinarily limit prosecutors, it failed to provide incentives to exercise restraint of this newfound power. As a result, the long-term interests of the DOJ were compromised.

The regulations promulgated in 1999 were the product of substantial input from Congress, including hearings led by Former Chairman Gekas and Senator Thompson. In March and April of 1999, both Mr. Holder and Attorney General Janet Reno testified before Congress, stating that the Department's position was that the Independent Counsel Act should not be renewed. Both of them stated that public confidence in the thoroughness, fairness, and impartiality of investigations of sensitive matters would be

[5] See Federalist Paper No. 51 (James Madison).
[6] 28 U.S.C. § 591-599 (2000).
[7] *See* Letter from Dennis K. Burke, Acting Assistant Attorney General, U.S. Department of Justice, to George W. Gekas, Subcommittee on Commercial and Administrative Law Chair, U.S. House of Representatives (Apr. 13, 1999) (on file with author).

significantly enhanced by the appointment of an individual, outside of the normal organization of the Department, who retains a substantial degree of independence from its supervisory structure.[8] After Congress stated its intent to allow the Independent Counsel Act to lapse, DOJ decided to amend its internal, existing regulatory regime which had been adopted in the mid-1980's as a reaction to judicial review of the Independent Counsel Act.[9]

The Special Counsel regulations enable the Attorney General to remain accountable in high-profile situations that require an investigation led by an individual with heightened independence, while also ensuring that the prosecution proceeds according to DOJ guidelines and regularized practices.[10] Although recent investigations have tested the viability of the regulations, I believe that they retain the proper balance of independence and accountability in sensitive investigations and serve to enhance public confidence in the rule of law.

The DOJ Special Counsel regulations avoid many of the pitfalls of the now-expired statute governing the appointment of an Independent Counsel. In the past, Independent Counsels have been criticized for excessive zeal in performing their duties. Without significant oversight, or meaningful limits on their budget or jurisdiction, Independent Counsels could simply keep digging until they found dirt. Moreover, the requirement to submit a final, public report created a heavy incentive to justify their often significant expenditures by producing at least some evidence of wrongdoing. Once appointed, they could, and often did, investigate their target until they found some sort of evidence of wrongdoing, whether or not it was related to their initial charge.

The Justice Department Special Counsel regulations have several safeguards meant to make Special Counsels more accountable than prosecutors acting under the old Independent Counsel law. The budget and jurisdiction of the Special Counsel is controlled by the Attorney General,[11] which operates as a check on the scope of the Special Counsel's

[8] *See* Letter from Burke to Gekas, *supra* note 7, at 2; *see also* Eric Holder, Deputy Attorney Gen., Announcement of the Special Counsel Regulations (July 1, 1999).
[9] *See* Letter from Burke to Gekas, *supra* note 7, at 3.
[10] "Special Counsel" is a term coined by the Department of Justice to distinguish the new position created in 1999 from the prior statutory Independent Counsels.
[11] 28 C.F.R. pt. 600.8(a)

investigation. In addition, the Attorney General may override the decisions of the Special Counsel. In practice, as discussed below, this will rarely happen, since the Attorney General will have to report any interference to Congress. However, this acts as another clear check on an independent counsel interpreting his mandate overly broadly. As a last resort, a Special Counsel may be removed by the Attorney General, subject to the limitations and congressional reporting requirement discussed below.

The Special Counsel also has less incentive to perform in the eyes of the public. Under Department regulations, the Special Counsel must still submit a final report, but it is a private report submitted to the Attorney General, who presumably will not be disappointed by a finding that no crime occurred. Thus, if the Special Counsel finds no evidence of wrongdoing, he does not have the Independent Counsel's incentive to justify his appointment by finding something – anything – amiss. The Attorney General may choose to submit this report to the public, if he feels that release would be in the public interest.[12]

I discuss in turn the provisions under each section of the regulations below.

§ 600.1 Grounds for Appointing a Special Counsel and
§ 600.2 Alternatives Available to the Attorney General

Sections 600.1 and 600.2 recognize that matters may arise in which public confidence in the thoroughness, integrity, and impartiality of an investigation would be significantly enhanced by the appointment of an individual outside of the normal organization of the DOJ. Situations in which this would be appropriate include allegations involving particular persons (such as the President, Vice President, or Attorney General) or situations where there is a potential for a significant conflict of interest (e.g. Watergate). When the facts create a conflict so substantial, or the exigencies of the situation are such that any preliminary investigation might taint subsequent investigation, it may be appropriate under these regulations for the Attorney General to appoint a Special Counsel immediately.[13]

[12] 28 C.F.R. pt. 600.9(c)
[13] 28 C.F.R. pt. 600.

Alternatively, the Attorney General can direct a preliminary investigation of the factual and legal circumstances of the matter to better inform the decision.[14] The regulations offer several viable approaches, even in cases where there seems an apparent conflict of interest, depending on the facts of the matter.[15]

The regulations do not require the appointment of a Special Counsel in every conflict of interest. Rather, the regulations make clear that only when there is conflict of a specific nature which makes it in the public interest to appoint an independent, outside investigator will a Special Counsel be appointed.[16] Other matters where there may potentially be a conflict of interest can be handled through recusals of certain DOJ officials, as is done with personal and financial conflicts.[17] (This is the case in the CIA tapes investigation, where the U.S. Attorney for the Eastern District of Virginia – who would ordinarily have handled the case – has been recused.) In addition, other conflicts may be so insubstantial that the Attorney General could conclude that the considerable cost of an independent Special Counsel investigation is not warranted. One such example would be a case in which the Attorney General personally knows the individual being investigated, but the individual is not a high ranking official.[18] This conflict could be eliminated by having the Attorney General recuse himself, so appointing a Special Counsel would not be necessary.[19]

The decision of whether or not to appoint a Special Counsel is generally best left to the Attorney General's discretion, guided by an assessment of how the public interest would be best served. This creates a clear line of accountability for the actions of the Special Counsel. If a corrupt Attorney General used his discretion to further personal motives, his decision could still be challenged by the Deputy Attorney General, other DOJ officials, the President (through Article II supervisory and removal powers), and Congress (through Article I oversight and impeachment powers), as well as the public. In addition, since the Attorney General is responsible for these regulations (in contrast to the Independent Counsel

[14] 28 C.F.R. § 600.2(b) (1999).
[15] DOJ Special Counsel Regulations, *supra* note 1, at 37038.
[16] *See* Letter from Burke to Gekas, *supra* note 7, at 2.
[17] *Id.* at 4.
[18] *See* Deputy Attorney General's Press Availability (July 1, 1999) (on file with author).
[19] *See* id.

Act, a statutory creation), he cannot blame Congress for the appointment of—or lack of—a Special Counsel since the choice is that of the Attorney General and his alone.[20]

Naturally, this leaves open the problem of how allegations against the Attorney General himself should be handled, as such a matter undeniably creates a stark conflict of interest. However, existing DOJ practice is for the Attorney General to be automatically recused from participation in a matter involving himself, and the next most senior DOJ official not implicated in the matter serves as Acting Attorney General for the purposes of the matter.[21] The Acting Attorney General is then endowed with the discretion over whether to appoint a Special Counsel.

§ 600.3 Qualifications of the Special Counsel

Section 600.3 recognizes that appointing individuals with strong credentials—a "reputation for *integrity* and *impartial decisionmaking*, and with appropriate experience"—serves to allay public concern that the Special Counsel will not investigate thoroughly or without bias, even in situations where the DOJ has an acute conflict of interest.[22] In order for the appointment of a Special Counsel to appease public concern, it is essential that the individual appointed be viewed by the public as impartial, unbiased, and experienced in high-level prosecutions. Since the Attorney General is fully accountable for the Special Counsel's actions, the Attorney General will strive to ensure that the individual handles his or her responsibilities with the utmost dignity.

The regulations provide that the Special Counsel should be selected from outside the U.S. government, and upon appointment, must agree that their Special Counsel investigation will take "first precedence in their professional lives."[23] However, Section 600.3 also reflects the fact that serving as Special Counsel is not always a full time position. A prosecutor rarely devotes all of his or her time to a single case; similarly, a Special

[20] *See* id.
[21] *See* Letter from Burke to Gekas, *supra* note 7, at 4.
[22] 28 C.F.R. § 600.3(a) (emphasis added).
[23] *Id.*

Counsel is not expected to devote one-hundred-percent of his or her time to the appointed investigation.

§ 600.4 Jurisdiction

Section 600.4(a) and (b) provide that the Special Counsel's jurisdiction must be stated as an investigation of particular facts. Therefore, the drafters of the regulations limited the power and authority of the Special Counsel to the particular problem that led to his or her appointment; all other criminal investigations are left to regular DOJ procedures. However, to ensure that the Special Counsel has enough persuasion to be effective, jurisdiction automatically includes "the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, [the primary investigation], such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."[24]

The drafters of the regulations also realized that situations in which Special Counsels are appointed are inherently fact specific and vary greatly from case to case, and so flexibility in jurisdiction would be extremely useful in solving problems. For example, the Special Counsel appointed to investigate an allegedly false statement about a government program may discover other allegations of misconduct with respect to that program, and may desire additional jurisdiction to investigate the new claims. As a result, § 600.4(b) acknowledges that the Attorney General may enlarge jurisdiction if it becomes "necessary in order to fully investigate and resolve the matters assigned." The regulations set forth both a process by which Special Counsels are provided with a description of the limitations of their investigation and allow for adjustments if later required.

§ 600.5 Staff

Regulation 600.5 provides assignment of necessary personnel to assist the Special Counsel, and includes assignment of essential investigative resources from the Federal Bureau of Investigation. Typically, assigned personnel are Department of Justice employees, but the regulation also allows for additional personnel from outside the DOJ if necessary.

[24] 28 C.F.R. § 600.4(a).

§ 600.6 Powers and Authority

Expanded in response to Congressional input, Section 600.6 makes clear that Special Counsels are not line attorneys within the DOJ, but rather possess the "full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."[25]

§ 600.7 Conduct and Accountability

Accountability of the Special Counsel for the decisions he or she makes is "inherently in tension" with independence.[26] The Special Counsel should be given a large amount of independence in which to operate, but unchecked power brings with it the possibility for abuse. Accordingly, some restrictions on, and accountability for, the Special Counsel's decisions are necessary. The regulations strike the proper balance between accountability and independence by making the Special Counsel similar in certain respects to a U.S. Attorney, free from the "day-to-day supervision of any [DOJ] official."[27] This enhances both the independence and the impartiality of an investigation in several ways: the Special Counsel will have no considerable interest in the Department; no long-term position at stake; and no "political identification" with the Administration currently in power.[28]

At the same time, §600.7(a) requires the Special Counsel to "comply with the rules, regulations, procedures, practices and policies" of the DOJ, and provides for review and approval procedures for Special Counsels similar to the procedures by which the DOJ addresses sensitive legal and policy issues facing its prosecutors.[29] Rather than imposing "mandatory substantive rules, the Department recognizes that even the most controversial and risky investigative or prosecutorial steps might in extraordinary circumstances be justified." These issues are generally handled by requiring "a variety of levels of review and approval" before the step can be taken.[30] If Special Counsels were exempt from these procedures, they

[25] 28 C.F.R. § 600.6.
[26] Letter from Burke to Gekas, *supra* note 5, at 9.
[27] 28 C.F.R. § 600.7(b).
[28] *See* Letter from Burke to Gekas, *supra* note 75, at 10.
[29] 28 C.F.R. § 600.7(a).
[30] *Id.*

would be without controls or Departmental guidance when dealing with the most sensitive situations. Therefore, the regulations require that Special Counsels seek consultation with "appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department, including ethics and security regulations and procedures."[31]

There are institutional reasons for supervisory review and approval provisions which transcend the merits of any one case. For example, when deciding whether to appeal a particular court decision, the DOJ may determine that long-term interests in case law development outweigh the benefit of any one prosecution. This interest is served by the DOJ's requirement that the Solicitor General personally approve Departmental appeals. And, requiring Special Counsel compliance with certain DOJ review and approval procedures ensures that the Department's institutional judgment will help inform the Special Counsel's decisionmaking process in the case at hand. Most review and approval procedures involve career DOJ officials who possess invaluable long-term institutional memory and experience.[32] Therefore, the regulations enable a "wide range of independent decisionmaking" by the Special Counsel, while simultaneously preventing the Special Counsel from becoming too "insulated and narrow in his or her view of the matter under investigation."[33]

Section 600.7(a) also allows the Special Counsel to proceed, in extraordinary circumstances, without complying with typical DOJ review and approval procedures, by consulting instead with the Attorney General. Bypass of standard DOJ procedures through direct consultation with the Attorney General affords the Special Counsel a substantial degree of independent decisionmaking, while simultaneously enhancing his or her accountability for the decision.[34]

Although the Special Counsel is not subject to day-to-day supervision, Section 600.7(b) permits the Attorney General to determine that an action taken by the Special Counsel is so "inappropriate or unwarranted under

[31] 28 C.F.R. § 600.7(a).
[32] *See* DOJ Special Counsel Regulations, *supra* note 3, at 37039–40.
[33] *Id.*
[34] *See id.*

established Departmental practices that it should not be pursued."[35] This is a high standard; the regulations specifically provide that the Attorney General's review is to give substantial deference to the "views of the Special Counsel."[36] Therefore, the Special Counsel is granted greater powers than that of a U.S. Attorney and the Attorney General remains accountable while still ensuring that the prosecution proceeds according to DOJ guidelines.

The regulations also protect the Special Counsel's actions by providing that he or she can only be removed for "good cause" by the "personal action" of the Attorney General.[37] The regulations offer several examples of good cause, including "misconduct, dereliction of duty, incapacity, [and] conflict of interest."[38] Although the good cause requirement is a departure from the standard for U.S. Attorneys in such a way that the Special Counsel is given heightened independence, it is not an absolute insulation and, as described in § 600.7(b) above, the Special Counsel remains accountable to the Attorney General.

The Special Counsel and his or her personnel are also subject to the same rules of ethical conduct and disciplinary procedures as other DOJ employees.[39]

§ 600.8 Notification and Reports by the Special Counsel

(a) Annual Report and Budget

Section 600.8(a)(1) provides that the Attorney General must review and approve the Special Counsel's budget proposal, which must include a request for personnel. This provision was developed in response to concern about the lack of an established budget as one of the "fundamental weaknesses of the operations" of Independent Counsels under the Independent Counsel Act.[40] However, the specific budgetary needs of any given investigation can be difficult to predict. Therefore, rather than listing specific requirements, the regulations provide that, with the assistance of the

[35] 28 C.F.R. § 600.7(b).
[36] *Id.*
[37] 28 C.F.R. § 600.7(d).
[38] *Id.*
[39] 28 C.F.R. § 600.7(c).
[40] Letter from Burke to Gekas, *supra* note 7, at 8.

Justice Management Division, a reasonable budget should be developed in a prompt fashion by any newly-appointed Special Counsel.

Section 600.8(a)(2) requires the Special Counsel to provide the Attorney General with an annual report on the status of the investigation and a budget request ninety days before the beginning of each fiscal year. The annual report is merely a "simple status report";[41] it is not meant as a mechanism for day-to-day supervision of Special Counsels, which is precluded by § 600.7(b). And, an annual report guarantees at least an annual opportunity for the Attorney General to review whether the investigation should continue and, if so, whether the budget should be maintained or supplemented for the coming year. Annual reporting also helps to ensure that the Special Counsel investigation does not continue indefinitely and better enables the Attorney General to determine whether the investigation has achieved its goals or should be terminated.

(b) Notification of Significant Events

This provision requires Special Counsels to notify the Attorney General of certain significant events occurring in the course of investigation. The circumstances for notification are defined using the same standard as that for U.S. Attorneys. Experience has dictated that sensitive, high-level prosecutions can lead to substantial political and legal repercussions; notification of proposed indictments and other important steps in the investigation is an essential mechanism through which the Attorney General can oversee the investigation.

(c) Closing Documentation

In drafting this provision, there was much concern that, like the Final Report requirement of the Independent Counsel Act,[42] a requirement for closing documentation could foster over-investigation and, since it could possibly become a public document, potentially harm legitimate privacy interests.[43] It is generally appropriate for a federal official to provide a written record upon completion of an assignment, for historical

[41] Letter from Burke to Gekas, *supra* note 7, at 11.
[42] 28 U.S.C. § 594(h)(1)(B).
[43] Letter from Burke to Gekas, *supra* note 7, at 11.

documentation purposes as well as to enhance accountability.[44] The need to enhance accountability is particularly acute here, where the federal official has worked in a substantially independent manner with little Department supervision. Likewise, federal prosecutors routinely document their decisions not to continue to pursue significant cases, explaining the factual and legal reasons for their conclusions.

The primary problem with the Final Report requirement of the Independent Counsel Act was that the report was frequently made public. This departs from DOJ's practice for dealing with closing documentation in all other types of criminal investigations; it is also the principal contributor to over-investigation by the Special Counsel in order to avoid any source of public criticism. Therefore, these regulations require only a *confidential,* limited summary report to be provided to the Attorney General at the conclusion of the Special Counsel investigation. The Special Counsel final report is treated as a confidential document, as is all other internal documentation relating to federal criminal investigations. Like other provisions of the regulations, § 600.8 strikes the proper balance between the need for written documentation to enhance accountability and the desire to avoid over-investigation and harm to privacy interests.

The public's interest in Special Counsel investigations is addressed in § 600.9, below.

§ 600.9 Notification and Reports by the Attorney General

The regulations impose reporting requirements on the Attorney General for the purpose of enhancing congressional and public confidence in the integrity of the process.[45] Section 600.9(a) requires that the Attorney General report to the Judiciary Committees of the Congress on three occasions: 1) the appointment of a Special Counsel; 2) the Attorney General's Decision to remove a Special Counsel; and 3) upon completion of the Special Counsel's investigation.

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[44] *See* DOJ Special Counsel Regulations, *supra* note 3, at 37041.
[45] *See id.*

The regulations also contain a tolling provision triggered by the Attorney General upon a finding that "legitimate investigative or privacy concerns require confidentiality."[46] However, the confidentiality may not be permanent; Section 600.9(b) clarifies that when it is no longer necessary, notification will be provided.

Lastly, Section 600.9(c) permits the Attorney General to determine whether release of these reports is in the public interest, to the extent that release complies with the applicable legal restrictions. All public statements with respect to any Special Counsel investigation or prosecution must still comport with established DOJ guidelines for public release of information concerning criminal investigations.

§ 600.10 No Creation of Rights

Section 600.10 provides that the regulations do not "create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative."[47]

II. RECENT INVESTIGATIONS

Within a few months of the effective date of the Special Counsel regulations, Attorney General Reno used them to appoint former Senator Jack Danforth to investigate allegations related to the siege of the Branch Davidian compound in Waco, Texas. Miss Reno's action contrasts markedly with the actions taken since her departure; to my knowledge, the Special Counsel regulations have not been used since she left office. In recent years, two potentially "outside" investigations have arisen: (1) U.S. Attorney Patrick Fitzgerald's investigation into the Valerie Plame identity disclosure matter, and (2) the recent CIA tapes investigation. The DOJ has not employed the Special Counsel regulations in either case. Instead, Mr. Fitzgerald was granted greater prosecutorial power than a Special Counsel would have under these regulations, while the CIA tapes matter did not utilize the Special Counsel model at all.

[46] 28 C.F.R. § 600.9(b).
[47] 28 C.F.R. § 600.10.

A. THE WACO INVESTIGATION

In August of 1999, a series of documents revealed that when the FBI raided the Branch Davidian compound, the FBI used flammable tear gas canisters. Since the FBI and the Department of Justice had earlier insisted that the government had done nothing that could have contributed to the start or spread of the fire, the documents raised serious questions about the Department's conduct and the possibility of a cover-up. Attorney General Janet Reno appointed former Republican Senator John C. Danforth, to study the raid on the compound to understand how the fire began and whether there was a cover-up.

On September 9, 1999, Attorney General Reno released a statement regarding her selection of John C. Danforth to head up the Waco investigation.[48] It provided:

> Senator Danforth will have the authority to investigate whether any government employee or agent suppressed information relating to the events on April 19th; made false statements or misleading statements concerning those events; used any pyrotechnic or incendiary devices, or engaged in gunfire on that day; and took any action that started or contributed to the spread of the fire. In addition, he is authorized to investigate whether there was any illegal use of the armed forces…
> Under the order[49] I have signed today, Senator Danforth will have the same authority as that which any Special Counsel would have under our new Special Counsel regulations.
> As for any limited role that I would otherwise have in supervising such an outside inquiry, I have asked Deputy Attorney General Eric Holder to handle those duties since he was not involved in any way with Waco.

Senator Danforth similarly stated that he would have broad discretion to conduct the investigation as he saw fit. Furthermore, Attorney General Reno

[48] The statement can be found at: http://www.usdoj.gov/opa/pr/1999/September/401ag.htm
[49] Order No. 2256-99.

announced that she would recuse herself from the probe, in which she expected to be called as a witness.

Attorney General Reno's order, Order No. 2256-99, dated September 9, 1999, expressly states that "Sections 600.4 through 600.10 of Title 28 of the Code of Federal Regulations are applicable to the Special Counsel."[50] These are the Special Counsel Regulations discussed in Part I of this testimony. "Danforth [was] the first 'special counsel' appointed under [the] rules issued by the Justice Department after the independent counsel law expired in June [1999]."[51]

Attorney General Reno's decision to appoint a Special Counsel and her decision to recuse herself were appropriate because the alleged crimes being investigated specifically involved her. In such a case, the Department's conflict of interest is obvious. At the same time, the narrow scope of the Special Counsel's jurisdiction and the maintenance of a DOJ reporting chain limited the risk of a runaway independent counsel.

B. THE VALERIE PLAME INVESTIGATION

After a CIA employee's name was disclosed to a journalist, the Justice Department began an investigation into the source of the leak. The employee, Valerie Plame, is married to former Ambassador Joseph C. Wilson. The accusation was, in part, that high-level officials leaked Plame's name in order to punish Ambassador Wilson for his critical stance on a statement in the President's State of the Union address concerning weapons of mass destruction in Iraq.[52]

On December 30, 2003, U.S. Attorney General John Ashcroft recused himself and his office staff from the investigation, and the Justice Department named a special prosecutor.[53] Deputy Attorney General James Comey appointed Patrick J. Fitzgerald, who at that time was the U.S. Attorney for the Northern District of Illinois, to lead the investigation.[54] To

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[50] The order can be found at: http://www.apologeticsindex.org/pdf/exhibits.pdf

[51] *Id.*

[52] Ashcroft Recuses Self from CIA Leak Probe (Dec. 31, 2003), http://www.foxnews.com/story/0,2933,106983,00.html

[53] Ashcroft Steps down from CIA Leak Probe (Dec. 30, 2003), http://www.cnn.com/2003/ALLPOLITICS/12/30/ashcroft.cia.leaks.reut/index.html

[54] John Padilla & Alex Wagner, *The "Outing" of Valerie Plame: Conflicts of Interest in Political*

be clear, Mr. Fitzgerald was not a Special Counsel within the meaning of the regulations; in fact, he was empowered with significantly broader authority than the regulations provide for.

Mr. Comey stated that the selection of Mr. Fitzgerald, a sitting United States attorney, would permit "this investigation to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation. In addition, in many ways the mandate that [he was] giving to Mr. Fitzgerald [was] significantly broader than [the mandate] that would go to an outside special counsel" under the DOJ regulations.[55]

During his press conference, Mr. Comey provided extensive detail about the power Mr. Fitzgerald was being given:

> I have today delegated to Mr. Fitzgerald all the approval authorities that will be necessary to ensure that he has the tools to conduct a completely independent investigation; that is, that he has the power and authority to make whatever prosecutive judgments he believes are appropriate, without having to come back to me or anybody else at the Justice Department for approvals. Mr. Fitzgerald alone will decide how to staff this matter, how to continue the investigation and what prosecutive decisions to make. ....
>
> [B]oth the attorney general and I thought it prudent -- and maybe we are being overly cautious, but we thought it prudent to have the matter handled by someone who is not in regular contact with the agencies and entities affected by this investigation. ...
>
> The regulations promulgated in 1999 by Attorney General Reno say that an outside special counsel should..."be a lawyer with a reputation for integrity and impartial decision-making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies."

Investigations after the Independent Counsel Act's Demise, 17 GEO. J. LEGAL ETHICS 977, 980 (2004).

[55] United States Information Agency, Transcript: Ashcroft Removes Himself From Probe Into Leak of CIA Agent Name (Dec. 30, 2003), *available at* http://www.globalsecurity.org/intell/library/news/2003/intell-031230-usia01.htm.

When I read that, I realized that it describes Pat Fitzgerald perfectly. ...My choice of Pat Fitzgerald, a sitting United States attorney, permits this investigation to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation. In addition, in many ways the mandate that I am giving to Mr. Fitzgerald is significantly broader than that that would go to an outside special counsel.

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. ....

[T]he regulations prescribe a number of ways in which they're very similar to a U.S. attorney. For example, they have to follow all Department of Justice policies regarding approvals. So that means if they want to subpoena a member of the media, if they want to grant immunity, if they want to subpoena a lawyer -- all the things that we as U.S. attorneys have to get approval for, an outside counsel has to come back to the Department of Justice. An outside counsel also only gets the jurisdiction that is assigned to him and no other. The regulations provide that if he or she wants to expand that jurisdiction, they have to come back to the attorney general and get permission.

Fitzgerald has been told, as I said to you: Follow the facts; do the right thing. He can pursue it wherever he wants to pursue it.

An outside counsel, according to the regulations, has to alert the attorney general to any significant event in the case; file what's called an "urgent report." And what that means is just as U.S. attorneys have to do that, he would have to tell the attorney general before he brought charges against anybody, before maybe a significant media event, things like that. Fitzgerald does not have to do that; he does not have to come back to me for anything. I mean, he can if he wants to, but I've told him, our instructions are: You have this authority; I've delegated to you all the approval authority that I as attorney general have. You can exercise it as you see fit.

And a U.S. attorney or a normal outside counsel would have to go through the approval process to get permission to appeal something. Fitzgerald would not because of the broad grant of authority I've given him.

> So, in short, I have essentially given him ...all the approval authorities that rest -- that are inherent in the attorney general; something that does not happen with an outside special counsel.[56]

Mr. Comey also granted the authority exercised by the Attorney General without the "limits" imposed by the special counsel regulations in the following letter to Mr. Fitzgerald:

> my ... delegation to you of "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" is plenary and includes the authority to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, your investigation, ... my conferral on you of the title of "Special Counsel" in this matter should not be misunderstood to suggest that your position and authorities are defined and limited by 28 CFR Part 600.[57]

Patrick Fitzgerald therefore had substantially more power and less supervision than a Special Counsel under the regulations. In general, I do not believe that this is a good model to follow. The Senate confirmed Mr. Fitzgerald as United States Attorney for the Northern District of Illinois. It did not confer upon him the full powers of the Attorney General, and that is effectively what Mr. Fitzgerald was delegated – "all of the authority of the Attorney General" to use Mr. Comey's words. At the same time, he was less independent from the DOJ than the Special Counsel Regulations require in the sense that he was selected from within the Department. The fact that Mr. Fitzgerald is such a conscientious prosecutor and an unparalleled dedicated government servant obviously mitigated the structural harm of the way in

[56] United States Information Agency, Transcript: Ashcroft Removes Himself From Probe Into Leak of CIA Agent Name (Dec. 30, 2003), available at http://www.globalsecurity.org/intell/library/news/2003/intell-031230-usia01.htm.

[57] Letter from James B. Comey, Acting Attorney General, U.S. Department of Justice, to Patrick J. Fitzgerald, U.S. Attorney, Northern District of Illinois (Feb. 6, 2004) (available at http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_feburary_06_2004.pdf).

which the appointment was made. But in future cases, America may not be so lucky.[58]

III. THE CIA TAPES

With this background on the origins of the DOJ Special Counsel regulations and the recent history of special counsels in mind, I turn to the current investigation into the destruction of the CIA tapes. I begin this section by addressing the provisions in the DOJ regulations dealing with the appointment of a Special Counsel and then apply that legal framework to the publicly reported facts concerning the DOJ's handling of its investigation into the destruction of the tapes. I then discuss what the possible advantages of appointing a formal outside Special Counsel might be, as well as whether there might also be disadvantages to using an outside Special Counsel for this investigation.

I conclude that the Justice Department appears to be compromised in its ability to oversee this investigation through normal prosecution channels. The Attorney General himself has subtly referenced this fact in recent testimony to this committee. He has testified that waterboarding

> cannot possibly be the subject of a criminal – a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.[59]

This statement underscores the complicated institutional dynamics of this investigation, one in which the Department is essentially being asked to investigate itself.[60] It is, quite literally, impossible to assess the Attorney General's claim without seeing those underlying opinions. These opinions

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[58] Neal Katyal & Viet Dinh, *Enough Already: It's Time to Reign in Special Prosecutors*, WALL ST. JNL., Oct. 27, 2005.

[59] Testimony of Attorney General Mukasey before the House Judiciary Committee, Feb. 7, 2008.

[60] The inquiry into the legal authorizations for waterboarding and other extreme interrogation techniques by the Department's Office of Professional Responsibility (OPR) is no substitute for an independent criminal investigation. *See* Dan Eggen, *Justice Probes Authors of Waterboarding Memos*, WASH. POST (Feb. 23, 2008), at A3. Although the inquiry by the OPR can lead to disciplinary actions by state bar associations, OPR has no prosecutorial authority and so cannot replace a Special Counsel. It might be appropriate for this Committee, in its oversight role, to seek the final report and recommendations of the OPR with respect to this matter.

must be released to appropriate individuals in Congress. If they are not, the case for a Special Counsel will become much stronger.

Moreover, at a minimum, I believe that Congress should ask the Attorney General to apply the reporting requirements of the Special Counsel regulations to the current investigation. If the Attorney General decides not to approve a proposed course of action by the Special Counsel, the Attorney General should notify the relevant officials in Congress of his decision. This is a "special counsel-lite" provision that I believe will help further the appearance of impartiality and provide a greater zone of comfort to prosecutors and investigators as they carry out their tasks. This measure would be appropriate in this case because the Attorney General's actions to date acknowledge the possibility of a conflict of interest with the Department, or at least the appearance thereof. And particularly in light of the bipartisan warning by the two Chairmen of the September 11 Commission, such a course of action is both prudent and appropriate: "What we do know is that government officials decided not to inform a lawfully constituted body, created by Congress and the president, to investigate one the greatest tragedies to confront this country. We call that obstruction."[61]

A. The DOJ Regulations on Grounds for Appointing a Special Counsel

The first section of the DOJ regulations, entitled "Grounds for appointing a Special Counsel," provide some limited guidance on when the Attorney General should consider a Special Counsel. There are three separate substantive prerequisites to the appointment of a special counsel: (1) the Attorney General determines a criminal investigation is warranted; (2) pursuing the investigation or prosecution through a U.S. Attorney's office or regular DOJ channels would present a conflict of interest; and (3) appointment of an outside Special Counsel would be in the public interest.

To my knowledge, the Justice Department has not explicitly commented on how its handling of the CIA tapes destruction fits into this regulatory framework. That is, nobody in the Justice Department has publicly stated either what substantive evaluations have been made by the

[61] Thomas H. Kean & Lee H. Hamilton, *Stonewalled by the CIA*, N.Y. TIMES, Jan. 2, 2008.

Attorney General as to whether a Special Counsel would be appropriate, or what procedural alternatives have been considered and chosen. We know that the Justice Department's National Security Division and the CIA's Office of Inspector General began a joint "inquiry" into the destruction of the tapes on December 8, 2007, in the immediate aftermath of General Hayden's announcement that they had been destroyed.[62]

We also know that Attorney General Mukasey initially rejected calls for a Special Counsel, writing in a December 14, 2007 letter to Senators Leahy and Specter that "with regard to the suggestion that I appoint a special counsel, I am aware of no facts at present to suggest that Department attorneys cannot conduct this inquiry in an impartial manner."[63] He added, however, "If I become aware of information that leads me to a different conclusion, I will act on it."

Then, on January 2, 2008, Attorney General Mukasey announced that, based on a preliminary inquiry, he had "concluded that there is a basis for initiating a criminal investigation of this matter."[64] As he explained, the joint preliminary inquiry itself was used "to gather the initial facts needed to determine whether there is a sufficient predication to warrant a criminal investigation of a potential felony or misdemeanor violation."[65]

On January 2nd, the Attorney General announced the opening of a formal criminal investigation into the destruction of the CIA tapes. He also announced the appointment of John Durham, the First Assistant United States Attorney in the District of Connecticut, to be the lead prosecutor on the case.[66] In technical terms, the Attorney General appointed Durham "to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter."[67] The Attorney General explained that "As the Acting United States Attorney for the purposes of this investigation, Mr. Durham will report to the Deputy Attorney General, as do all United States

[62] Pamela Hess, *CIA, Justice Probe Destruction of Tapes*, AP Dec. 8, 2007 (quoting a letter from Kenneth Wainstein to John Rizzo).
[63] Letter of Michael Mukasey, Attorney General, to Senators Patrick J. Leahy and Arlen Specter (Dec. 14, 2007).
[64] Statement of AG Mukasey, Jan. 2, 2008.
[65] Id.
[66] Id.
[67] Id.

Attorneys in the ordinary course."[68] The reason cited by the Attorney General for this appointment of Durham is that the Eastern District of Virginia's U.S. Attorney's office, which would normally handle an investigation relating to the CIA, "has been recused from the investigation of this matter, in order to avoid any possible appearance of a conflict with other matters handled by that office."[69]

B. DOJ's Investigation and the Special Counsel Regulations

I explained previously that there are three separate substantive prerequisites to the appointment of a special counsel: (1) the AG determines a criminal investigation is warranted; (2) pursuing the investigation or prosecution through a U.S. Attorney's office or regular DOJ channels would present a conflict of interest; and (3) appointment of an outside Special Counsel would be in the public interest. The Attorney General's actions and statements to date explicitly acknowledge only the first of these – that a criminal investigation is warranted in the matter of the destruction of the CIA tapes. But his recent statement about waterboarding suggests that the second, and possibly even the third, requirements may indeed be met in this case.

Attorney General Mukasey, however, has already limited the investigation by ruling out of bounds an investigation into the conduct that is depicted on the CIA videotapes. He has recently taken the position before this Committee that he did not want to open an investigation into waterboarding because individuals relied in good faith on legal opinions by the Office of Legal Counsel (OLC) from 2002 that waterboarding was permissible. The Administration has elevated these OLC opinions into a status akin to law – using them as definitive interpretations of this body's work-product – legislation of the Congress of the United States. Just as our Founders would not have tolerated secret laws made by the Congress, they would not have tolerated a system of secret law by the Executive Branch.

Congress has in the past been shown sensitive national security OLC opinions as part of its oversight responsibilities. As I understand it, for

[68] Id.
[69] Id.

example, the Administration has let some members of the Intelligence Committees review the underlying legal opinions on the National Security Agency's Terrorist Surveillance Program, a program described by some as among this nation's most sensitive secrets. In previous Administrations, such compromises have unfolded as well. As Justin Florence and Matthew Gerke, two Fellows from Georgetown's Center on National Security and the Law, have recently noted:

> In 1989, a similar conflict erupted between the House Judiciary Committee and the first Bush Justice Department over the FBI's kidnapping of criminal suspects abroad for prosecution in the United States. When news leaked out about a secret Office of Legal Counsel opinion saying that such kidnappings were legal, the Judiciary Committee asked for it, and the administration refused. The Committee issued a subpoena, the administration claimed executive privilege, and Committee threatened to hold DOJ in contempt. However, in the end, the Administration and the Committee eventually reached an 11th hour compromise, in which the Committee agreed to withdraw its subpoena and withdraw the threat of a contempt vote if several members of the committee were allowed to review the memo.[70]

There are other possible scenarios in which one can envision a conflict of interest that would make the appointment of a formal outside Special Counsel appropriate in this matter. For example, a conflict of interest would likely arise if top lawyers or officials within the Justice Department or the White House become targets of the investigation. News reports indicate that several such officials were, in the words of one newspaper, involved "in the discussions before the destruction of the tapes in November 2005."[71] In particular, according to these reports, White House Counsel and Attorney General Alberto Gonzales, counsel (and now chief of staff) to the Vice President David Addington, the senior lawyer at the National Security Council (and now in the State Department) John B. Bellinger III, and then-White House counsel Harriet Miers were involved in

[70] Justin Florence & Matthew Gerke, *A Tale of Two Investigations: Making the Best of the Destroyed CIA Tapes*, Jan. 16, 2008, available at http://www.law.georgetown.edu/cnsl/ATaleofTwoInvestigations.htm.
[71] Mark Mazzetti and Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes* N.Y. TIMES (Dec. 19, 2007).

these discussions. Anonymous former officials have told the press that some at the White House did advocate destroying the tapes, while others disagree with that account. At the least, according to the *New York Times*, multiple former officials have said that "no White House lawyer gave a direct order to preserve the tapes or advised that destroying them would be illegal."[72] Each of these officials is entitled to all the hallmarks of our American system of justice, including the presumption of innocence. It serves no purpose to convict by innuendo, either in this august body or in the media. And I, like every American, hope that there was no White House involvement in any criminal activity relating to the decision to destroy the tapes.

But if Mr. Durham's investigation into this matter determines that any of these individuals or other high-level White House or Justice Department officials did, in fact, order or authorize the destruction of the CIA tapes, then it would be appropriate to appoint an outside special counsel. If a White House or high-ranking Justice Department official becomes a target of investigation, it would present difficult questions about whether to prosecute that individual. For the reasons explained below, an outside Special Counsel would both be in a better position to make the decision about whether to prosecute one or more of these top Administration officials – and, if the outside counsel declined to prosecute, that decision would avoid the appearances of a conflict that would arise if a prosecutor within the Justice Department's normal channels declined to prosecute.

C. Safeguards in the DOJ Special Counsel Regulations

For the reasons I discussed above, appointing a formal Special Counsel under the DOJ regulations would have a number of clear advantages. The Special Counsel is free from any day-to-day management by the Department.[73] He or she must notify the Attorney General of any important events in the course of the investigation, in accordance with DOJ's guidelines with respect to Urgent Reports.[74] The Attorney General may review, and even overrule, actions by the Special Counsel. However, if the Attorney General overrules the Special Counsel, he or she must notify

[72] Id.
[73] 28 CFR 600.7(b)
[74] 600.8(b)

Congress. Thus, although the Attorney General technically has the power to reign in wayward Special Counsels, the reporting requirement provides a crucial political check on the Attorney General's ability to control the investigation.

Even if the Attorney General makes no attempt to influence the conduct of the investigation, it is possible that career considerations could influence a prosecutor's handling of a matter. In order to minimize this risk, the regulations require that the Special Counsel be a "lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience" and, more importantly, that he or she come from outside the government.[75] Once appointed, the Special Counsel may be removed only for good cause (such as "misconduct, dereliction of duty, incapacity, conflict of interest, or … violation of Departmental policies"),[76] and the Attorney General must notify Congress of the Special Counsel's removal.[77]

The jurisdiction of a Special Counsel is designated by "a specific factual statement of the matter to be investigated" and also includes criminal investigations into obstructing the investigation.[78] If his or her investigation brings up new matters that are outside the scope of his or her original jurisdiction, the Attorney General may expand the scope of the Special Counsel's jurisdiction or begin a new investigation elsewhere in the Department.[79] Within this jurisdiction, the Special Counsel wields the power of a United States Attorney.[80]

Mr. Durham's appointment has none of these safeguards. As Acting United States Attorney for the Eastern District of Virginia for this matter, Durham reports to the Deputy Attorney General, who may override his decisions without reporting to Congress.[81] He comes from within the Justice Department and will, in all likelihood, return to his old position in the U.S. Attorney's Office in Connecticut (or a new position in DOJ) after he completes his investigation. Durham serves in his present capacity at the

[75] 600.3(a).
[76] 600.7(d)
[77] 600.9(a)(2)
[78] 600.4(a)
[79] 600.4(b)
[80] 600.6
[81] Mukasey statement, January 2, 2008. http://www.usdoj.gov/opa/pr/2008/January/08_opa_001.html

pleasure of the Attorney General – and the next – who can terminate his appointment at will. It is important to note here again that I do not believe that Durham is likely to be influenced by these considerations; his record of conscientious independence speaks for itself. Nor is it likely that Attorney General Mukasey will deliberately attempt to influence the outcome of the investigation. These safeguards exist to protect the government – and the Attorney General – from the *appearance* of impropriety, in the event that the Department decides not to prosecute or to limit the scope of its investigation or prosecution. They mirror a key idea of our Founders, that our unique American government is based on the idea that checks and balances are laced into the system to guard against mistakes made by well-meaning individuals.[82]

D. A Modest, Important Policy Suggestion: Reporting Requirements

As discussed in Part I, a key advantage of the Special Counsel regulations is that they require that the Attorney General report to Congress whenever he overrules a decision of the Special Counsel. Specifically, the Attorney General must notify Congress when he has "concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued."[83] A provision modeled on the Special Counsel reporting requirement should be used to govern the CIA tapes investigation. The use of such a provision is justified by the high public interest in the matter and the publicly reported possibility of a conflict of interest with high level officials at the Justice Department and the White House.

Due to the unique circumstances of this case, I would urge that the reporting requirement also include notification to Congress about the initial scope of Mr. Durham's mandate, as well as about any subsequent decisions by the Attorney General to refuse to expand the scope of the investigation pursuant to a request from Mr. Durham. This is because the direct investigation is into the destruction of evidence, but further investigation into the underlying conduct revealed by that evidence may be appropriate and will require independent review of the underlying OLC opinions

[82] See Federalist Paper No. 51 (James Madison).
[83] DOJ Special Counsel Regulations, 64 Fed. Reg. 37038-01, 37038 (July 9, 1999) (codified at 28 C.F.R. pt. 600.9).

purportedly authorizing that conduct. The current Special Counsel regulations would require notification of the scope of the initial mandate in subsection 9(a)(1), and it is wise to mirror that decision in this specific matter. I would also urge that the reporting requirement in this case extend to reports about any subsequent decisions by the Attorney General where he refuses to expand the scope of the investigation pursuant to a request from Mr. Durham. The current Special Counsel regulations do not explicitly call for notification if the Attorney General refuses to expand the scope of the investigation, but in this unusual case, a reporting requirement of that nature is prudent as well.

I do not believe it wise for Congress to *require* such reporting via statute. Such a course of action would raise difficult questions about the President's "take care" power under Article II of our Constitution. But I believe that Congress should urge the Attorney General to commit to this course of action in this unique case, and that the Attorney General should accept this recommendation.

By "reporting to Congress," I mean only what the Special Counsel regulations require, that "[t]he Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House."[84] Given the classified and highly sensitive nature of these matters, limiting disclosure of such information to such individuals is appropriate.

Applying a modest reporting requirement will reassure the public that the Congress of the United States will be informed about any interference with such a sensitive investigation. And if, as I predict, no interference will occur, the reporting requirement will have little effect besides setting a precedent for how the Department should conduct other extremely sensitive investigations in the future.

CONCLUSION

Attorney General Mukasey's decision to appoint Mr. Durham is the first, not the last, step in the investigation process. It is appropriate for this body, and individuals at the Justice Department and elsewhere, to evaluate

[84] 28 C.F.R. pt. 600.9.

carefully whether a Special Counsel is warranted, particularly in light of the Attorney General's recent testimony that he will not permit an investigation into the conduct that is the subject of the CIA tapes, on the basis of secret opinions that the Congress of the United States has never seen. One modest way to help reassure the American public about the independence of the investigation is to insist that the Department of Justice follow the reporting requirements in the Special Counsel regulations in Mr. Durham's investigation. Indeed, the regulations' reporting requirement should be expanded slightly in this unique case to encompass decisions about the scope of the investigation as well.

I commend this subcommittee for holding this hearing today. The Special Counsel regulations provide an appropriate model for investigations where independent judgment is required, and Congress should urge the Department of Justice to apply, at a minimum, its principles to the CIA tapes investigation.

Thank you.

Ms. SÁNCHEZ. Thank you, Professor. Your time has expired. I would now invite Mr. Casey to please begin his testimony.

TESTIMONY OF LEE A. CASEY, ESQUIRE, BAKER AND HOSTETLER, LLP, WASHINGTON, DC

Mr. CASEY. Thank you, Madam Chairwoman, and thank you for inviting me today to address the Committee on this important subject. And I would also like to note that my remarks here are delivered on my own behalf, and not on behalf of my law firm or any of our clients.

In 1940, then Attorney General Robert Jackson warned that the greatest potential for prosecutorial abuse exists when individuals, rather than offenses, are targeted for investigation. If proof of this were needed, it was provided nearly 40 years later with the enactment of the independent counsel statute.

An ill-judged reaction to the Watergate affair, by its very nature the independent counsel law required a prosecutorial focus on individuals and not on offenses. Although that law was upheld against constitutional attack in *Morrison v. Olsen,* Justice Antonin Scalia challenged the majority's rule and reasoning in what must surely be rated one of the most prescient judicial dissents in our history.

Noting that issues like those raised by the independent counsel statute frequently "will come before the Court clad, so to speak, in sheep's clothing," he made clear that "this wolf comes as a wolf." As he explained later in his opinion, putting a finger precisely on that law's problematic core: "Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but in all probability, crooks.

And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution." Throughout the 1980's and 1990's, a series of relentless independent counsel investigations overwhelmed successive presidential Administrations.

The independent counsel law expired in 1999, and it was not reauthorized. If the special counsel regulations the Subcommittee is today considering have one great and indisputable virtue, it is that they are not the independent counsel statute.

Among their clear improvements are the following: They make clear that appointment of a special counsel should be an extraordinary act reserved for extraordinary circumstances where the public interest demands it, not a foregone conclusion simply because a high level official has been accused of criminal wrongdoing.

Appointment of a special counsel is truly within the Attorney General's discretion. Although a special counsel may hire staff, the regulation's clear import is that he or she should first and foremost depend on the Justice Department's existing staff and resources, including its experienced career prosecutors.

The special counsel's jurisdiction is established by the Attorney General, and only the Attorney General can expand that jurisdiction. The special counsel's annual budget is subject to review and approval by the Attorney General and, on an annual basis, the Attorney General must determine whether the investigation should continue.

Perhaps most significantly of all, the regulations require that the special counsel comply with "the rules, regulations and procedures and policies of the Department of Justice," and permit his or her removal for failing to follow those policies. A special counsel appointed under these rules is far more effectively subject to the Justice Department's overall resource constraints and perspective. It is that perspective, where consideration must be given to the importance of pursuing a particular investigation in the context of the department's other work, that can act as a most effective check on the potential for prosecutorial abuse.

With regard to the most recent calls for appointment of a special counsel to investigate the 2005 destruction of CIA tapes showing the interrogation of high-level Al Qaeda prisoners, there is no doubt that Attorney General Mukasey has made the right decision in not appointing a special counsel.

By designating an experienced career prosecutor to act in the matter, he has achieved the very kind of accommodation that is contemplated by 28 CFR 600.2, allowing the Attorney General to take "appropriate steps to mitigate any conflicts of interest such as recusal of particular officials." No individual should be above the law.

Neither, however, should any individual be subject to its particular prosecutorial focus merely because he or she holds public office. Allegations of criminal wrongdoing by Federal officials must be investigated, but in all but the most extraordinary of circumstances they should be pursued through the normal investigative and prosecutorial processes of the United States Department of Justice. Thank you.

[The prepared statement of Mr. Casey follows:]

PREPARED STATEMENT OF LEE A. CASEY

WRITTEN STATEMENT

OF

LEE A. CASEY

HEARING ON
THE IMPLEMENTATION OF THE U.S. DEPARTMENT OF JUSTICE'S SPECIAL COUNSEL REGULATIONS

BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

February 26, 2008

Lee A. Casey
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Thank you,

I very much appreciate the opportunity to address the subcommittee on this important subject, and would also like to note that my remarks here are delivered on my own behalf, and not on behalf of my law firm or any of its clients.

On April 1, 1940, Attorney General Robert H. Jackson stood before the Nation's chief prosecutors, the United States Attorneys, who were then assembled in the Great Hall of the Main Justice Department Building, only a few blocks from here. He delivered a speech titled "The Federal Prosecutor." In that address, Jackson warned that the greatest potential for prosecutorial abuse exists when individuals – rather than offenses – are chosen for investigation: "Therein," he explained,

> is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

If proof were needed that these sentiments are true, it was provided nearly forty years later with enactment of the independent counsel statute.

An ill-judge reaction to the Watergate Affair, and especially to President Nixon's dismissal of Special Counsel Archibald Cox in the 1973 "Saturday Night Massacre," the independent counsel statute first became law as part of the 1978 Ethics in Government Act. By its very nature, the independent counsel law required a prosecutorial focus on individuals and not on offenses. It established a system that required a special court to appoint an independent counsel to investigate alleged wrongdoing by certain high level Executive Branch officials, including the President, unless, after an initial inquiry, the Attorney General determined that there were no "reasonable grounds to believe that further investigation or prosecution is warranted." Although independent counsels were required by law to follow normal Justice Department policies, "except where not possible," there was no effective means of enforcing this requirement.

The law was upheld against constitutional attack in *Morrison v. Olsen*, 487 U.S. 654 (1988). In that case, the Supreme Court ruled that the independent counsel statute did not violate the Constitution's separation of power principles by permitting the Judiciary – in the form of a special division of the United States Court of Appeals for the District of Columbia Circuit – to select an Executive Branch official because (it concluded) the independent counsel was an "inferior," rather than a "principal" officer of the United States. In addition, the Court also concluded that the statutory limitations on an independent counsel's dismissal – for "good cause" only – did not trench upon the President's constitutional authority over the Executive Branch. It did not, they felt, undercut the President's ability to "perform his constitutionally assigned duties." *Id.* at 696.

Justice Antonin Scalia challenged the majority's rule and reasoning in what must surely be rated one of the most prescient judicial dissents in our history. Noting that issues like those

raised by the independent counsel statute frequently "will come before the Court clad, so to speak, in sheep's clothing," he made clear that "[t]his wolf comes as a wolf." 487 U.S. at 699. Justice Scalia, of course, was speaking to the separation of powers questions presented by the independent counsel statute – but his description was equally applicable to its practical force and effect. As he explained later in his opinion, putting a finger precisely on that law's problematic core:

> [N]othing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naïve, ineffective, but in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed.

Id. at 713-14. It is hardly surprising that, more recently, many of President George W. Bush's bitterest opponents waited anxiously for a "Fitzmas," as they termed Special Counsel Patrick Fitzgerald's expected indictments of Administration officials for allegedly "outing" a CIA employee, in the final weeks of 2005. An independent counsel investigation – and Fitzgerald operated very much as an independent counsel, if under a different name – can give uniquely effective political gifts. It is, however, a double-edge weapon.

Throughout the 1980s and 1990s, a series of relentless, costly and often fruitless independent counsel investigations overwhelmed successive presidential administrations. For Republicans, the low point doubtless came when an Iran-Contra independent counsel announced a second indictment of former Reagan-Bush Administration Secretary of Defense Caspar W. Weinberger on October 30, 1992 – four days before the November 3, 1992 presidential election.

For Democrats, the nadir of the independent counsel experience was surely in 1998, when the Whitewater independent counsel demanded a sample of President Clinton's "genetic material" to test against Monica Lewinsky's soiled dress. As the Subcommittee knows, that investigation – initiated to review the President and First Lady's involvement in certain real estate transactions – led to President Clinton's impeachment and a President's trial in the Senate for only the second time in our history.

The independent counsel law expired in 1999, and it was not reauthorized. Ironically, however, the last independent counsel report was submitted only two years ago, on January 19, 2006. This report was prepared by a special prosecutor appointed in 1994 to investigate claims that Secretary of Housing and Urban Development Henry Cisneros had lied to FBI agents, about payments to a onetime girlfriend, during his background investigation for appointment to that office by President Clinton. The investigation into this matter took more than a decade and cost in excess of twenty million dollars. Lying to federal investigators is a serious offense, and serious allegations that high level government officials have lied must be investigated. However, one can fully agree with these propositions and nevertheless question whether this independent counsel was a good use of our Nation's prosecutorial resources. Much the same could be said of other independent counsel investigations over the years.

The Subcommittee is doubtless familiar with the June, 2006, Report of the Congressional Research Service on Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations. In that document, CRS summarized the results of our national independent counsel experience as follows:

> Of the 20 independent counsel investigations, 12 of the investigations returned no indictments against those investigated. Of the eight investigations that did return at least one indictment, in three of those instances, there was no indictment brought against

> the principal government official originally named as the target of that independent counsel's investigation; in three other instances, the principal government official indicted was either acquitted or his conviction was overturned on appeal. Thus, of the 20 independent counsel investigations initiated, although several independent counsels obtained multiple convictions of certain persons relating to the original subject matter or peripheral matters (including convictions of several federal officials or former federal officials), only two federal officials who were actually the named or principal subjects of the 20 investigations were finally convicted of or pleaded guilty to the charges brought; in one of those two instances, that person was pardoned by the President.

At the same time, the report notes, the estimated costs of all 20 independent counsel investigations was approximately $228,712,589. *See CRS Report for Congress, Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations* (Updated, June 8, 2006). That, of course, is simply the monetary expense to the taxpayer. It does not account for the economic and personal costs imposed on those investigated, and on their families and friends, whether or not they were ever indicted, let alone convicted, of any offense.

If the special counsel regulations the Subcommittee is today considering have one great and indisputable virtue, it is that they are *not* the independent counsel statute. Among the other clear improvements made by these regulations are the following:

* The regulations make clear that appointment of a special counsel should be an extraordinary act reserved for extraordinary circumstances where the public interest demands it, not a foregone conclusion simply because a high level official has been accused of criminal wrongdoing. Most investigations of public officials can, and should, be handled through the Department of Justice's ordinary channels, including the United States Attorney offices and the Criminal Division's Public Integrity Section. Under 28

C.F.R. part 600, a special counsel is to be appointed only where a criminal investigation is warranted and (1) the Justice Department would have a conflict of interest or there are "other extraordinary circumstances;" and (2) the Attorney General finds that "under the circumstances it would be in the public interest to appoint an outside Special Counsel." 28 C.F.R. § 600.1.

* Appointment of a special counsel is truly within the Attorney General's discretion, a decision subject to the ordinary limitations of political accountability to the President, the Congress, and ultimately to the American people. 28 C.F.R. § 600.2. In particular, the Attorney General can also conclude that an investigation should go forward without appointment of a special counsel, but still take appropriate steps to "mitigate any conflicts of interest, such as recusal of particular officials," 28 C.F.R. § 600.2, that may be presented.

* Although a special counsel must be from outside the federal government and may hire staff, the clear import of the regulations is that he or she should first and foremost depend on the Justice Department's existing staff and resources – and particularly on its experienced, career prosecutors and investigators. 28 C.F.R. § 600.5; 64 Fed. Reg. 37038, 37039.

* The special counsel's jurisdiction is established by the Attorney General and only the Attorney General can expand that jurisdiction as the investigation continues. 28 C.F.R. § 600.4.

* The special counsel's annual budget is subject to review and approval by the Attorney General and, on an annual basis, the Attorney General must determine whether the investigation should continue. 28 C.F.R. § 600.8.

* Perhaps most significantly of all, the regulations require the special counsel to comply with "the rules, regulations and procedures and policies of the Department of Justice." 28 C.F.R. 600.7. If, in an extraordinary instance, a special counsel believes that an exception to this requirement is warranted, he or she may take this up with the Attorney General. Otherwise, while not within the day-to-day supervision of Justice Department officials, the office of the special counsel is subject to same disciplinary and ethical rules of other Department components.

* Finally, the Attorney General can remove a special counsel for good cause, *and that includes the special counsel's failure to follow Departmental policies.*

These provisions do not entirely alleviate the problems identified by Justice Jackson so long ago – especially since exceptions can, and have, been made to the rule requiring a special counsel to following normal Department of Justice procedures. Most significantly, Special Counsel Patrick J. Fitzgerald – who actually was appointed outside of the regulations published at 28 C.F.R. 600 – was granted "plenary" authority to pursue his investigation, effectively recreating an independent counsel. *See* Letter of James B. Comey, Acting Attorney General, to The Honorable Patrick J Fitzgerald (Feb. 6, 2004).

However, there is no doubt that the rules codified at 28 C.F.R. part 600 go a very long way in the right direction – perhaps as far as it is possible to go considering that all institutions are capable of abuse in some manner. At least it no longer is the case that a special prosecutor must be appointed unless the Attorney General can say that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," a standard of "practical compulsion" as noted by Justice Scalia. *Morrison*, 487 U.S. at 702. The special counsel regulations' stated purpose was "to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem." 64 Fed. Reg. 37038. In that, they were successful.

In particular, a special counsel – subject to jurisdictional and budgetary limits established by the Attorney General – is far more effectively subject to the Justice Department's overall resource constraints and perspective. It is that perspective, where consideration must be given to the importance of pursuing a particular investigation in the context of the Department's other important work, that can act as a most effective check on the potential for prosecutorial abuse. Again, to quote Justice Scalia's *Morrison* dissent:

> The mini-Executive that is the independent counsel . . . operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile – with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison,

> whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment.

Morrison, 487 U.S. at 732.

With regard to the most recent calls for appointment of a special counsel, to investigate the 2005 destruction of CIA tapes showing the interrogation of high level al Qaeda prisoners, there is no doubt that Attorney General Mukasey has made the right decision. He has not appointed a special counsel. Rather, he has designated Mr. John H. Durham, First Assistant United States Attorney for the District of Connecticut and a highly experienced prosecutor, to act as United States Attorney for this matter. It is this very kind of accommodation that is contemplated by 28 C.F.R. § 600.2, which permits the Attorney General to conclude that the public interest would not be served by removing an investigation from normal Justice Department processes, but which also allows him to take "appropriate steps . . . to mitigate any conflicts of interest such as recusal of particular officials." 28 C.F.R. § 600.2(c).

Here, Mr. Durham's appointment as acting United States Attorney was necessary because the United States Attorney for the Eastern District of Virginia, who would ordinarily handle the matter, asked to recuse his office. Although there appears to have been no actual conflict of interest here, the Attorney General acted in an "abundance of caution" to "avoid any possible appearance of a conflict with other matters handled by that office" – presumably a reference to the longstanding and close working relationship between the United States Attorney's office and the CIA on various anti-terrorism and counter-espionage cases in the Eastern District of Virginia.

By all accounts, Mr. Durham will operate as would any other United States Attorney, fully subject to the rules and regulations of the Department of Justice and reporting to the Attorney General through the Deputy Attorney General's office. There is every reason to believe that this investigation will be both searching and professional. If, as the matter

progresses, it appears that the Justice Department would have an actual conflict of interest, or other "extraordinary circumstances" appear, the Attorney General can revisit the question whether a special counsel should be appointed under the regulations.

It is axiomatic in our system of ordered liberty that no individual should be above the law. Neither, however, should any individual be subject to its particular prosecutorial focus merely because he or she holds public office. Allegations of criminal wrongdoing by federal officials must be investigated, but in all but the most extraordinary of circumstances they should be pursued through the normal investigative and prosecutorial processes of the United States Department of Justice.

Thank you.

Ms. SÁNCHEZ. Thank you, Mr. Casey. And I would invite Mr. Coburn to provide his testimony.

TESTIMONY OF BARRY COBURN, ESQUIRE, COBURN AND COFFMAN, PLLC, WASHINGTON, DC

Mr. COBURN. Thank you so much, Madam Chairwoman, and Mr. Cannon, and other Members of the Subcommittee. I am very honored to be asked to address you on this matter today.

I submit that what the Committee, or Subcommittee, is grappling with here, essentially, is a fundamental structural constitutional issue, which is a function—an inevitable function, if you will—of the fact that the executive branch, under the Constitution, is charged with the task of prosecuting Federal criminal offenses.

Hence, when the problem arises that potential Federal criminal offense may exist that has been committed, or allegedly committed, or possibly committed by someone within the executive branch, perhaps a key person in the executive branch, or, alternatively, the offense at issue is one in which the executive branch has a direct policy-related or personal interest, that is a problem which is not—in the most fundamental way, it is not addressed in the Constitution. And in some sense, it is not a perfectly soluble problem at all.

And hence, my submission to the Subcommittee is that the policy response to this problem—and it is not an easy problem at all, it is highly ambiguous—but it has fluctuated like a pendulum between extremes. And the extremes that have been adopted have been, essentially, a function of sort of the most recent stimulus, which is to say, most recent problem that has been perceived as a result of an attempt to deal with this kind of a problem, this kind of a prosecutorial imperative.

And the most recent problem, or set of problems, that have engendered, essentially, the response that we are seeing today are the ones that my colleague, Mr. Casey, was just alluding to. There is a perception that, pursuant to the Independent Counsel Act and the Independent Counsel Reauthorization Act of 1994, that the number, at least, of the particular independent counsel who fulfilled that engaged in excesses of one kind or another.

I am not here to suggest to this Subcommittee that the answer to the problem that was posed by the Chairperson in her opening remarks is some sort of a wholesale re-adoption of the Independent Counsel Act. I have the distinction, if it is indeed a distinction at all, I believe, of having actually prosecuted in a courtroom more independent counsel cases than anybody else.

And from my own experience as part of the In re Espy investigation, and also a very brief experience as an assistant, or deputy independent counsel, a—person in Ms. Bruce's In re Babbitt investigation, but particularly with respect to the former investigation, I can tell the Subcommittee that, I mean, there were some very significant issues, some very significant problems that were posed by the Independent Counsel Act.

But the answer to the problem here, I submit, is not just to look at that set of problems, because it is my submission to the Subcommittee that a much more serious set of problems, and a much more fundamental and critical set of problems, arose earlier, in 1973—particularly October 1973, which is what engendered the

Independent Counsel Act to begin with. And that, essentially, is the phenomenon that the Chairwoman alluded to in her opening remarks of the Saturday Night Massacre.

I think we all have a vivid recollection of the events of October 19th and 20th, 1973, when Archibald Cox, Professor from Harvard Law School who was conducting the Watergate investigation at that time, sought the White House tapes, and the Stennis Compromise was proposed; and he quite rightly rejected that compromise, and then a demand was made that he be fired. I see that my time is expiring quickly.

The problem that was engendered that is exemplified by the Saturday Night Massacre, and even before that in the early 1950's by the tax scandals—the problem of potential political interference with an investigation of this type is of critical, just fundamental constitutional importance. And I submit that it receives short shrift when one says that the answer to this problem is simply to have a line person within the Department of Justice conduct a highly sensitive investigation like this, because there is an inherent and essential conflict of interest in that solution.

That cannot be the answer. A much better answer is the appointment of a special counsel, or some other solution that the Subcommittee, or Committee, might explore that might take account of some of the issues that arose earlier.

Thank you very much. I don't know if that means my time has expired. [Laughter.]

[The prepared statement of Mr. Coburn follows:]

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STATEMENT OF BARRY COBURN TO THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES

"Books may be burned and cities sacked, but truth, like the yearning for freedom, lives in the hearts of humble men and women. The ultimate victory, the ultimate victory of tomorrow is with democracy.

– Franklin Delano Roosevelt

"When truth is in short supply, democracy is in danger."

– Paul K. McMasters
First Amendment Center, Arlington, VA

"If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

– Judge Learned Hand

Each of the quotations above reflects the close and enduring link between a thriving democracy and the search for truth in the public arena. Particularly in the context of our legal system, and especially as to investigations of possible criminal conduct, the public must have confidence that a prosecutor's search for the facts will be evenhanded, vigorous and unfettered by conflicting interests or loyalty.

Structuring a prosecutorial system to investigate politically sensitive alleged wrongdoing so that it achieves these objectives in a reasonable and effective way has never been, and will never be, an easy task. The separation of powers at the heart of our constitutional system ensures its difficulty. The executive branch, in nearly all cases, is the prosecutor of federal criminal

offenses, so prosecuting alleged offenses in which high-level personnel in the executive branch might be complicit presents an inherent, and not perfectly resolvable, problem. Our response has been, to some degree, to swing like a pendulum between imperfect solutions. Following the"Saturday Night Massacre" during the Watergate scandal, concern about executive branch conflicts of interest in criminal prosecutions was so acute that Congress passed the Ethics in Government Act, resulting in the appointment of a series of Independent Counsel to investigate executive branch officials. Calling in 1973 for a bill permitting judicial appointment of Independent Counsel, Senator Birch Bayh urged Congress to "set out as its first order of business, the difficult but . . . essential goal of reestablishing the public faith and confidence from which all else proceeds in a democracy." The authorization to appoint Independent Counsel was reaffirmed in the Independent Counsel Reauthorization Act of 1994. Following perceived excesses by several Independent Counsel, the statutory authorization for their appointment was allowed to lapse in 1999. In its place, the Attorney General promulgated regulations, codified at 28 CFR 600 *et seq.*, permitting the discretionary appointment by the Attorney General of "Special Counsel." This was deemed a compromise between the perceived difficulties engendered by statutory authorization of judicially appointed Independent Counsel versus the inherent conflict of interest in allowing the executive branch to investigate itself in politically sensitive matters. Now, however, in a highly politically sensitive matter where the Executive Branch may have had deep substantive involvement – the apparent destruction of videotapes of controversial "enhanced interrogations" of terrorism suspects by CIA personnel – the Attorney General has appointed a prosecutor with far less authority and independence than a Special Counsel, let alone an Independent Counsel. This, I submit, allows the pendulum to swing too far

away from where it was during Watergate, and ignores the substantial considerations that motivated congressional and regulatory authorization of both Independent Counsel and Special Counsel.

What we must do is to hold the pendulum steady, in a way that balances the various competing considerations in the appointment of an investigator in a context like this. An appropriate way must be found to balance the alleged inefficiencies, runaway costs and other perceived excesses of the independent counsel procedure against the critical need to ensure an objective, thorough, unblinking investigation of alleged criminal conduct in the executive branch. At this moment in our history, the best solution is the formal appointment by the Attorney General of a Special Counsel to conduct this investigation.

Watergate may seem a long time ago, but attention must be paid today to the fundamental concerns engendered by President Nixon's demand that Archibald Cox be fired, and the subsequent resignation of the Attorney General. This was as close to a true constitutional crisis as we have come in our recent history. Public trust in the government, particularly the executive branch, suffered in a way few of us alive at the time can forget. This concern was, at bottom, a concern about conflict of interest: a perception that the executive branch would not allow itself to be investigated in a fair and impartial manner, and that serious wrongdoing might never be ferreted out. Given its public policy implications, we should be at least as sensitive to this variety of conflict of interest as we are to garden-variety conflicts of interest in the legal representation of clients in private legal practice. By way of example, in the case of *United States v. Grass*, 93 Fed. Appx. 408 (3d Cir. 2004), *reversed on other grounds*, 543 U.S. 1112 (2005), the Court of Appeals affirmed a district judge's refusal to accept a waiver of a conflict of

interest in a criminal case, noting that

> the District Court noted that granting the waiver would raise serious concerns not only about defense counsel's ability to vigorously defend their client, but also about the public's confidence in the administration of justice.

And in *Lambert v. Blodgett*, 248 F. Supp. 2d 988 (E.D. Wash. 2003), *affirmed in part and reversed in part on other grounds*, 393 F.3d 943 (9th Cir. 2004), the District Court observed that an arrangement between defense counsel "with its potential conflicts of interest does not engender confidence in the indigent defense system and reflects poorly on the criminal justice system as a whole." *Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418 (D.N.J. 1998) states, along similar lines, that "courts have vital interests in . . . maintaining public confidence in the integrity of the bar [and] eliminating conflicts of interest." These are but a few examples of the level of concern expressed by courts and bar associations for generations about the critical need to avoid conflicts of interest. Seldom could the consideration be more acute than it is here. In 1975, testifying about the critical need for an independent investigator in certain highly politically sensitive cases, Professor Cox used language that is as compelling today as it was then:

> The pressure, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.

As recently as 1993, well before anyone had heard of Monica Lewinsky and years before Judge Kenneth Starr temporarily became a prosecutor, then-Attorney General Janet Reno eloquently endorsed the need for Independent Counsel when she testified before the Senate Governmental Affairs Committee in support of the reauthorization of the Independent Counsel

Statute:

> I'm pleased to announce that the department and the administration fully support re-enactment of the act and we will work closely with this committee and Congress to pass this very important piece of legislation. . . .
>
> While there are legitimate concerns about the costs and burdens associated with the act, I have concluded that these are far, far outweighed by the need for the act and the public confidence it fosters. . . . It is my firm conviction that the law has been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level executive branch officials. . . .
>
> The Iran-Contra investigation, far from providing support for doing away with the act, proves its necessity. I believe that this investigation could not have been conducted under the supervision of the attorney general and concluded with any public confidence in its thoroughness or impartiality.
>
> The reason that I support the concept of an independent counsel with statutory independence is that there is an inherent conflict whenever senior executive branch officials are to be investigated by the department and its appointed head, the attorney general. The attorney general serves at the pleasure of the president. . . .
>
> It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in the system, and you cannot do that when there is a conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . .
>
> The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level executive branch officials and to prevent, as I have said, the actual or perceived conflicts of interest. The act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters and to avert even the most subtle influences that may appear in an investigation of highly placed executive officials.

It would be hard to say it better today.

In 1999, following alleged excesses by several independent counsel, the Independent Counsel Reauthorization Act of 1994 was allowed to expire, and was replaced by regulations promulgated by the Attorney General authorizing his or her appointment of Special Counsel.

These regulations softened – some might say eviscerated – a number of the safeguards against conflicts of interest present in the Independent Counsel legislation. In particular, the appointment and retention of Special Counsel was entirely at the discretion of the Attorney General, a presidential appointee, rather than the courts. In contemporaneous commentary in the Federal Register, 64 Fed. Reg. 37038-37044, the Attorney General explained the considerations warranting the regulations:

> These regulations seek to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem. The balance struck is one of day-to-day independence, with a Special Counsel appointed to investigate and, if appropriate, prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice. The Special Counsel would be free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, within the context of the established procedures of the Department. . . .
>
> There are occasions when the facts create a conflict so substantial, or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel.

It is important to understand, then, that the regulatory scheme authorizing the appointment of a Special Counsel was intended to be a compromise solution, one designed to take account of some of the perceived excesses of the Independent Counsel legislation while addressing, at least to a degree, the inherent conflict of interest in allowing the executive to investigate itself in politically sensitive cases in which there is alleged wrongdoing by high-level administration officials. It is this compromise solution that our Attorney General has declined to invoke here.

The consequences of failing to appoint a Special Counsel in the CIA videotape matter are already being felt. An erosion of confidence in the independence and thoroughness of the CIA tapes investigation is evident from even a cursory perusal of mainstream press, political blogs and other internet journalism. One website, "buzzflash.com," published an article on January 3, 2008 entitled "Mukasey Seeks to Protect White House and DOJ With Durham 'CIA Torture Tape' Appointment." According to this article:

> Attorney General Mukasey has guaranteed both that the investigation will be narrow in focus (as you can bet it will stay within the CIA and at lower levels to boot), and far from independent of the compromised Department of Justice senior staff, including AG Mukasey. The scapegoating of lower level CIA officers seems a likelihood.

The article quotes a former Assistant United States Attorney, Elizabeth de la Vega, as stating:

> The major problem – a huge apparent and possibly actual conflict – is that information reported thus far about the destruction of the tapes implicates officials at the highest levels of the administration, possibly all the way up to Bush and Cheney. The administration cannot investigate itself and that is precisely what will necessarily be happening here.
>
> Unlike Patrick Fitzgerald, whose appointment placed him in the shoes of the Attorney General for purposes of the CIA leak investigation, Durham will have no independent powers whatsoever. . . . Durham will be reporting directly to the Deputy Attorney General. Because this is a case involving national security, that means, according to the U.S. Attorney's Manual, that Durham will have to receive prior express approval from the Deputy Attorney General . . . for doing just about anything in the case. . . .

Another website called Capitol Hill Blue, in an entry from January of this year, speculates that if Mr. Durham aggressively investigates the CIA-related misconduct within the scope of his charter, the White House could demand his firing, leading to another Saturday Night Massacre in which the Deputy AG and the Attorney General resign rather than fire him.

In a similar vein, in an article published on the internet in mid-February, the website

Salon.com notes that the Bush administration is seeking the death penalty against six Guantanamo detainees, even though some of the evidence against them was gathered through coercive interrogation tactics such as waterboarding. Waterboarding has been defended by CIA Director Michael Hayden, and Attorney General Mukasey's statements about it have been, at best, ambiguous. Given that Mr. Durham's investigation focuses upon the destruction of videotapes of precisely these kinds of so-called "enhanced interrogations," the Salon article argues that, for these reasons, "A special counsel is urgently needed, now more than ever." As Salon notes, Mr. Durham "reports to Mukasey, who to this day refuses to acknowledge that waterboarding is torture and has told Congress that the use of waterboarding by CIA interrogators "cannot possibly be the subject of a criminal" investigation. Salon says: "What is needed is a special counsel who is granted the same authority as the attorney general in matters pertaining to the investigation – like Patrick J. Fitzgerald on the disclosure of a CIA officer's identity. Considering what we already know of the Bush Administration's record on torture and prisoner abuse, investigative independence is essential."

Slate.com comes to similar conclusions. In a January 3, 2008 posting, Slate says: "Both the CIA and the White House will throw as much sand in the eyes as they possibly can, and if Harriet Miers can be prevented from testifying about fired U.S. attorneys, you can bet the White House won't make it easy for Durham to investigate allegations of lies and obstruction. The fact that Durham ultimately answers to Mukasey is hardly comforting, either."

Similarly, the group Human Rights First, based in New York City, issued a press release in January 2008 noting: "If the Attorney General were really interested in avoiding a conflict of interest, he would make Mr. Durham a Special Counsel and ensure his independence from an

internal reporting chain that is infected by multiple conflicts of interest." In support of this assertion, Human Rights First notes the legal opinions of the Office of Legal Counsel in support of harsh interrogation techniques, and Assistant Attorney General Alice Fisher's and former AAG Michael Chertoff's alleged participation in meetings relating to the appropriateness of these interrogation methods.

Certainly legitimate problems existed with Independent Counsel in the past. The prosecutive function is a delicate one. Prosecutors must be sensitive to motivations external to the facts under investigation, such as ego, ambition, vindictiveness, personal preconceptions and their own political leanings. There are times when any prosecutor – either within or outside the Department of Justice – can fail to exercise careful, seasoned judgment. USA Today notes some of these concerns in an editorial from January 4 of this year, entitled "Give Bull Durham a Chance." The editorial references the Independent Counsel investigation of Ken Starr, which, it says, "careened down endless detours into unrelated accusations against President Clinton. The inquiry cost $52 million, lasted more than six years and led to Clinton's impeachment on charges stemming from the Monica Lewinsky sex scandal." The same editorial refers to the investigation by David Barrett focused on Henry Cisneros, which cost $22 million and resulted in a guilty plea to a misdemeanor by Mr. Cisneros. Finally, the editorial lumps Patrick Fitzgerald into the same wide swath of criticism, saying that he "spent almost four years trying to find out who leaked the name of CIA employee Valerie Plame Wilson to reporters. Vice President Cheney's Chief of Staff was convicted of perjury, but no one ever was charged with the leak. The major result was to make it easier for public officials to intimidate potential whistle-blowers. Not exactly in the public interest."

With respect to the Durham inquiry, the USA Today editorial says: "Spy agencies need to learn that they can't flout laws. The public needs to regain confidence in intelligence agencies. The best way to do both is to find the facts quickly and punish any wrongdoing. That's what career prosecutors do best, as long as they remain free from political interference." But this last statement begs the crucial question. Allowing a prosecutor who must report "up the line" in the Department of Justice to investigate the kind of alleged misconduct at issue here raises fundamental, structural issues of conflict of interest, lack of impartiality and possible political interference in the investigation, the very concerns that led to the creation of the Independent Counsel Act and then the compromise Special Counsel regulations. These concerns fundamentally undermine public confidence in the results of the investigation, regardless of the best of intentions on the part of the particular prosecutor. It is for these reasons that members of this Committee have sought the formal appointment of a Special Counsel under Department of Justice regulations. In December 2007, Congressman Rush Holt (D-NJ), a member of the Select Intelligence Oversight Panel, wrote a letter to Attorney General Mukasey requesting the appointment of a Special Counsel. Congressman Holt noted that the CIA already had made what appeared to be false representations about the matter in connection with the Moussaoui prosecution in the United States District Court for the Eastern District of Virginia. Chairman

Conyers also has called forcefully for the appointment of a Special Counsel. For the reasons I have stated, I strongly agree that the appointment of a Special Counsel is needed.

Respectfully submitted,

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February 25, 2008

Ms. SÁNCHEZ. No, the red light rules here. That is really the signal that we are going to have votes across the way. In the effort to try to move this hearing along, I am going to go ahead and begin the round of questioning, and I will begin with myself and recognize myself for 5 minutes. After that, we will most likely need to head across the street to vote, but we will return to ask further questions of this panel and then we will let you go. But we will try to get this done as quickly as possible.

My first question is for Ms. Bruce. In your written testimony, you emphasize the importance of a requirement that a special counsel draw up the full report for the Attorney General explaining the investigation and the decision of whether or not to prosecute. Why do you think that a final report is so important?

Ms. BRUCE [continuing]. Madam Chair, so that there is a historical record. And I suggested it be directed to the Attorney General and to no one else because I do agree with some of what has been said today, that I don't think reviving the Independent Counsel Statute and the regime where there was a three-judge panel who appointed independent counsel is a wise move.

Instead, we should leave accountability with the Justice Department. But most prosecutors, and I was one as you indicated earlier for 10 years, when they decide not to prosecute a case, have to file a declination memo with their superiors. Usually those are one or two-page memos. But in a very significant public corruption, or public official investigation, such as the one that is being conducted now by Mr. Durham, there should be a full report as to what their findings were even if there is no prosecution.

Ms. SÁNCHEZ. With respect to the issue of accountability, I mean, then, do you think it would not be important to also allow that report be made available to Congress? Do you think it should solely rest within the Department of Justice?

Ms. BRUCE. It should be the discretion of the Attorney General. I say the discretion of the Attorney General because I really do believe that we should try, with any new set of regulations, to, as much as possible, give responsibility—principle responsibility—to the Justice Department, to ensure that the laws have been faithfully executed.

I do believe that there is shared responsibility with Congress, and so perhaps a summary report should be submitted to Congress that would summarize the reasons why. But I am real mindful, having served as a deputy and an independent counsel of the privacy issues with respect to individuals. If I am subject to an independent counsel, special counsel investigation, I don't want a whole story out there that I don't have a forum to respond to in the public domain.

Ms. SÁNCHEZ. I understand. Thank you.

Professor Katyal, in testimony before this Committee, and you alluded to it in your oral remarks, Attorney General Mukasey testified that waterboarding "cannot possibly be the subject of a criminal Justice Department investigation because that would mean that the same Department that authorized the program would now consider prosecuting somebody who followed that advice." Do you believe that Mr. Mukasey's testimony acknowledges that the Jus-

tice Department has a conflict of interest with respect to the CIA tapes investigation?

Mr. KATYAL. I do. And I think that if he does not disclose the tapes, the case for a special—disclose, excuse me, the written opinions by the Office of Legal Counsel, the case for a special counsel will become very strong indeed. I mean, after all, these legal opinions—the Office of Legal Counsel opinions—evidently say that waterboarding is permissible, back in 2002; and they have been withdrawn.

Now those are opinions about your law, the law that you wrote in Congress. They are defining the law. I didn't write them; Ms. Bruce didn't write them. You wrote them. And the Attorney General is saying you can't even see them. And that strikes me as a very, very dangerous road to go down. He is asking this Committee to say, "Trust me, not just about the investigation, but also about the underlying legal opinions." That, I think——

Ms. SÁNCHEZ. I would love to; I have limited amount of time and want to——

Mr. CANNON. I would certainly ask unanimous content to have your——

Ms. SÁNCHEZ. Okay, then I will yield to the gentleman.

Mr. CANNON. I am trying to follow your discussion, Mr. Katyal, and I think the point was well-made here. But you are saying that we should have a special counsel to investigate the decision not to prosecute based upon the opinions—are you saying that some Committee in this body of Congress should review those documents?

Mr. KATYAL. I am saying the latter, sir, that the Attorney General has said that he won't prosecute the underlying conduct on the tapes—the waterboarding—because of the inherent conflict of interest, that the department is essentially investigating itself if they investigate waterboarding——

Mr. CANNON. No, no. It is not saying that they are investigating themselves. It is saying that they would be investigating something that they had decided before the waterboarding was an acceptable activity.

Mr. KATYAL. Exactly.

Mr. CANNON. So, why could that be subject to a special prosecutor, as opposed to oversight of what the content of those opinions were?

Mr. KATYAL. I think it should be the subject of oversight. I am not saying that the Attorney General's decision to use a waterboarding investigation is itself grounds for a special counsel. What I am saying is, there is a very strong case to be made that the conduct on the tapes may have been criminal, and the only way to understand whether that conduct was criminal is to see those underlying legal opinions. And the only way to do that, I think, is for you to see them.

Mr. CANNON. Thank you. That would be not a special counsel, but an oversight action by this Congress——

Mr. CANNON [continuing]. That I support vastly. And by the way, Madam Chair, I yield back. But first let me ask unanimous consent that the Chair be granted an additional 2 minutes.

Ms. SÁNCHEZ. I appreciate that. If there is no objection, I will continue with my round of questioning. I think, Professor Katyal,

you have touched on what, as a Member of the Judiciary Committee, we find very troubling. It is this idea of: Trust us, this is what these, you know, opinions said, and that it is legal.

And therefore, because there was sort of, if you will, a detrimental reliance, people cannot be prosecuted for that. I have a hard time swallowing that, the, "Trust us," you know, and no oversight, no ability to look into the matter further than to just accept it at face value. And I, as a Member of Congress, and particularly a Member of the Judiciary Committee, find that extremely troubling.

Mr. Coburn, in your written testimony you indicate that there are consequences for failing to appoint a special counsel in the CIA tapes matter. And I would like for you to please describe some of the consequences that this Committee should be concerned with.

Mr. COBURN. Well absolutely, Madam Chairwoman. Thank you so much for asking me that question. The principle consequence, I think, is one that if we all think back to the date that I mentioned in my opening remarks, October 20, 1973, I think a lot of us—all of us, I would submit—have probably, many of us on both sides of the aisle, had this just sort of awful sinking feeling at the time that Professor Cox demanded access to what was obviously just sort of the most critical evidence—audiotapes, in that case, not videotapes in this case—that were made in the privacy of the Oval Office. And he was essentially stonewalled and then fired.

And, I mean, that really was, essentially, I think just sort of an unimaginable act. On which, I think, shaped a lot of people's perceptions about Government. And I think it was, frankly, a wonderful thing for the republic, that it responded the way that it did, and that the tapes ultimately did come to light, and that Elliot Richardson, I think, very much to his credit, who was the Attorney General at the time, resigned in protest, as did his deputy.

And eventually, of course, as we all know, the disclosure of those tapes led inevitably, just essentially in lockstep fashion, to President Nixon's resignation. But here we have a situation which, I would submit, is very similar.

And these situations arise periodically; and it doesn't, frankly, matter whether we are talking about a Democratic administration or a Republican administration. This kind of situation is inevitable, that there is going to be alleged misconduct within the context of the Administration—potentially criminal misconduct which has to be investigated—and it is a matter of fundamental public confidence in the process.

It is a matter of deep fundamental fairness. It is a matter of fairness to each and every individual who has ever, him or herself, been the subject of a criminal inquiry. It is just the most basic kind of right, as opposed to wrong, that an investigation like this be conducted in a full, fair, unfettered fashion, without conflict of interests.

And the kinds of conflict of interest that exist here, with respect to the alleged destruction of the CIA tapes, are just obvious. They are as plain as—I mean, anyone can see them, and they have been alluded to by my co-panelists, and the Administration's obviously kind of staked out as clear a position as it possibly could, with respect to this issue.

And so for the Administration, essentially, via the Department of Justice, and particularly given the reporting scheme that we have for Mr. Durham, where he has to report to the deputy Attorney General, he has to—I mean, if you think about the implications of this, you know, Mr. Durham, before he essentially does anything—before he issues a subpoena, before he seeks an indictment, before he does anything of consequence in this investigation, he must seek the approval of a political appointee within the Department of Justice.

That is grossly unacceptable, and what it does, just to respond directly to the Chairwoman's question, is it leads to a crisis of confidence. And it leads to a deep-seated sense of cynicism within the populous. And as I alluded to in my written testimony, I mean, the signs of this kind of cynicism—the same sort of cynicism that we saw during the Watergate era—are already, you know, they are particularly evident in the Internet. I mean, the various entities within the Internet: Salon and various other Web sites that I referred to, I mean, you know, the concerns—the kind of deep-seated, really, I would submit, not particularly partisan sort of concerns, but just fairness-related concerns—as to whether or not a real, unfettered, fair, unbiased investigation will be done here, as to this alleged criminal misconduct, is just rife.

It is obvious. And I submit it poses a very serious problem for all of us.

Ms. SÁNCHEZ. Thank you, Mr. Coburn. We have been summoned for votes, so we will stand in recess.

[Recess.]

Ms. SÁNCHEZ. I want to welcome everybody back, and again I want to apologize for the schedule that has kept you here well beyond, I am sure, when you imagined you would be. Since I finished my round of questioning, at this time I would like to recognize my Ranking Member for 5 minutes of questions. Mr. Cannon?

Mr. CANNON. Thank you, Madam Chair. It is odd to break such an intense discussion for so long, and then come back and pick up where we were. I can't remember where we were. I will have to rely on my notes.

I wanted to thank both Mr. Casey and Mr. Coburn, who I thought—this is a complicated issue. We have done the rounds on this, historically, and what we want to do is come down in the right spot. And that may not be a perfect spot, I think, Mr. Coburn, as you pointed out, there probably isn't a perfect solution to this issue, but it is an issue that deserves some thoughtful attention. I appreciate that.

On the other hand, while we have very esteemed witnesses across the board, I couldn't help thinking of the term Jeremiad, the difference being—that derives from the Old Testament prophet Jeremiah, whose intense expressions of concern about society were subsequently vindicated.

And as I listen to the testimony, I couldn't help but wonder what we are actually doing here, in this; and so I pulled out the memorandum for the hearing, which I have here someplace, yes. And what we are talking about is the—in light of the Bush administration's reluctance to appoint special counsels, under the regulations

members of the CAL Subcommittee may consider whether legislation in this area is appropriate.

And what I have heard is that the Administration's bad. And I am not sure, after some questioning, and I appreciate the Chair's indulgence in asking a clarifying question earlier, about what the bad is, I am not sure where we are is that bad.

And what I am actually really interested in, here, is: What should we do with legislation to improve the regulations, or the law under which we are currently doing special counsels?

And I take it, Mr. Coburn and Mr. Casey, you recognize the complexities of the system and you have not suggested—I don't think you have suggested—ways to improve current law. Do either of you have suggestions, or do you think that where we are right—I know, Mr. Coburn, that you are concerned about how it is being applied, but is there a way to improve the law itself?

Mr. COBURN. I think that is a very interestingly and well-posed question that you just stated, and it is a highly complex and ambiguous situation, as I alluded to before the break.

I guess I cannot honestly say that I have given great deal of intensive thought to precisely what the appropriate legislative solution is to this problem. But I guess I don't think that purely elective DOJ regulations, which can be invoked or not invoked at an Administration's discretionary pleasure, is the right answer.

Because I think the temptation in a situation like this, where you are dealing with a naturally highly-politically charged issue—one in which the Administration has staked out a position very forcefully in a number of different instances—the temptation, I think, not to want an independent, unfettered investigation into potential alleged criminal conduct is just too great.

And so I tend to be skeptical of the notion that a kind of a purely internal DOJ regulatory solution is the right answer. But in saying that, like I indicated in my earlier remarks, I do acknowledge that there were problems—and I think they were very real problems—in the prior Independent Counsel Act, and I think those problems should be addressed head-on.

Mr. CANNON. Isn't the very complexity of it what makes it so much more difficult to create an environment where there is less discretion to prosecute these issues that might be subject to prosecution under some circumstances? But didn't you argue—I thought you argued rather forcefully, or rather well—that the political environment has a tendency to take care of those excesses.

And do we want to have a less—do we want to have less discretion and take the pressure off politics, or do we want to have politics play a greater role in how we govern ourselves?

Mr. COBURN. Well that is, again, I think, a very interesting question. I guess the problem, from my point of view, with a purely political solution is that it is not, I guess, a purely political problem that we are dealing with. From my point of view, as somebody who practices largely in the criminal arena, allegedly criminal misconduct is something special.

And regardless of whether the alleged—and I don't mean to opine, here, on whether or not there is that kind of underlying conduct here or not. I think that would have to be the subject of, you know, the result of an actual investigation.

But if there is, that kind of conduct is something different from a purely political problem. And I guess, like I was alluding to earlier in response to the Chairwoman's question, if that is what we are looking at—if there is creditable allegations of potential criminal misconduct here—I tend to think that the political system is not adequate to address that, because there, you are dealing with kind of a deep fundamental problem of fairness.

If somebody who is politically involved, if you have a politically involved Administration official who is, in fact, complicit in that kind of conduct, they need to be investigated and prosecuted just as if I, or anyone on this panel, or anyone in the audience, or any other individual in the United States engaged in criminal misconduct.

And I think it is sort of just critical, fundamental to the system, that we all feel that everyone know that no matter who it is, no matter how politically, you know, connected, or involved, or what political role a person might play, that if they step over that line, that they are going to be subject to the same kind of investigation and prosecution as anybody else.

Mr. CANNON. If I might just add—I see my time is expired, Madam Chair—but let me just say I believe that the Justice Department guidelines focus on the person's status, so a politician is more likely to be prosecuted, generally speaking—not the President, particularly, or the Administration, but a politician—is more likely to be prosecuted because he is higher profile.

And so, in a world where we work very hard to have prosecutorial guidelines that make sense, I think part of your statement is answered; and I appreciate, though, the thoughtfulness of your responses. I yield back, Madam Chair.

Ms. SÁNCHEZ. Thank you. At this time, I would like to recognize the Chairman of the full Committee who has joined us, Mr. Conyers, for any questions he may have.

Mr. CONYERS. Thank you, Madam Chairwoman. And I am deeply regretful that I missed earlier testimony, but I consider this to be an important hearing called by the Chairperson of the Commercial and Administrative Law Subcommittee because we are examining a very vital area of the Department of Justice with regard to the utilization of special counsel regulations.

And I think we have got a hearing here that is going to help us in terms of how we move forward. The refusal to use the special counsel regulations has highlighted a recurrent theme of this Administration: that of a unitary executive, completely devoid—well, I won't say completely devoid of accountability. There are instances where they have had accountability.

The other thing that is important to me is that all the times we could have used special counsel and didn't—and I am going to put this in the record—but, one, two, three, four, five, six, seven, eight, nine instances that we could discuss at great, great length.

The next point I would like to make, and I invite all of your comments or observations, is that not withstanding having appointed attorney Patrick Fitzgerald, who was not appointed under the regulations to perform the Scooter Libby investigation, the Administration undermined any fruitful information that could have been acquired.

And the last point is that Attorney General Mukasey should have utilized the special counsel regulations to appoint outside counsel to investigate the CIA tapes destruction and related issues. In that regard, and I would like to get any comments that you might have, there are two letters that we sent to the Attorney General, Mr. Mukasey, one dated January 15, 2008, the other dated January 31, 2008, that deals with this question of how this special counsel concept is utilized.

Do any of you—would you like to give us a little opinion about the mental state of mind that I have as indicated by these comments? Professor?

Mr. KATYAL. Sure, I will take a stab at it. I, when you sent those initial letters, Mr. Chair, I thought that maybe they were a little premature—the idea of a special counsel at that early stage in the investigations. I now, since the Attorney General has testified before this Committee and has said that he can't investigate the underlying conduct, that is waterboarding, because of secret Office of Legal Counsel opinions that he says would provide a good faith defense for the officials who engaged in waterboarding, and so he says "The department can't investigate itself."

That strikes me as a very strong point in your favor, and suggests to me maybe another letter needs to be written to say: The Attorney General, himself, has pointed to the conflict of interest with this investigation, and therefore, a special counsel is looking more and more like an appropriate course of action.

That isn't—I don't think, the way Representative Cannon said it, I don't think this means that, you know, anyone is characterizing the Administration as being bad, or anything like that. I, personally, have deep respect for the Attorney General and think he is doing a good job. But good people——

Mr. CONYERS. I am glad that you do. That is very reassuring to me. I am feeling better already that you think that. But I should have his confidence. He should not have lost my confidence at this point.

Mr. KATYAL. Yes. Good people can make bad decisions, and this is one bad decision that strikes me, to say that we are not going to prosecute on the basis of a secret opinion that he won't even let you, in this body, see.

Mr. CASEY. If I could just say something with respect to the question of conflict of interest with this investigation, with the investigation of the tapes. I think we are kind of mixing and matching here.

As I understood the Attorney General, what he was saying is, the Justice Department could hardly go after the CIA agents for waterboarding because, to the extent it was engaged in, it was based upon Justice Department advice. I don't think that creates a conflict of interest for the department; it creates a serious due process problem in any prosecution to go after those individuals if they had relied upon department opinions.

Mr. CONYERS. But wouldn't that be a consideration that would come after you have appointed a special counsel? I mean, we are not asking for a judge and jury right out of the box, but to say that everything, in terms of special counsel, is out of the question because of—and then we get the legal response.

Don't you think, Mr. Casey, that we could have started an inquiry? This is unitary government again: Please, investigative arm of the Congress, Oversight Committee, don't bother us with this. There is no way we can look at it now. It is over and done with. It is closed. I forget all the reasons that he gave, but would you mind if we had a special counsel appointed?

Suppose he would say there are some very serious problems here? And I would be willing to go along with that. But to say it is out, period, don't even try it. Forget it. We know the law, we know our situation, and in our judgment, goodbye House Judiciary Committee, goodbye this Subcommittee on Commercial and Administrative Law

Ms. BRUCE. If I could, there is an analogy to recusal, and I think the Chairman hit the nail on the head. There should not have been a legal decision already made about the merits or the worthiness of an investigation or prosecution, saying there is no need to even go down this course, because the person making that decision is somebody who should recuse himself, or should—not because Mr. Mukasey himself is in any way involved in this matter that is under investigation—but the Justice Department should step back and have a special counsel investigate the case.

And just one other comment with respect to some of the earlier remarks: This isn't about a bad Justice Department. I would rival anyone with my affection and respect for the Justice Department. I served there for many years.

Mr. CONYERS. Is it about a good Justice Department?

Ms. BRUCE. What this is about is the judgment of individuals. And we are just taking issue with, Mr. Katyal and I, we are taking issue with, in our earlier testimony that you were not able to attend, Mr. Chairman, with the judgment call of not appointing a special counsel in this particular case. And on that score I would just like to say that all indications are that Mr. Durham is an extremely competent, capable, good person.

But this isn't about whether someone is a good person or a bad person; it is about whether or not he can—or anyone can—in the structure that is now being utilized, have a fully independent, as Mr. Coburn keeps saying, unfettered investigation where he will make the legal decisions about sovereign immunity, qualified immunity, advice of counsel defense, all of those things that a good prosecutor will have to determine.

Mr. CONYERS. You are helping me get my mental attitude corrected a bit here, because I am feeling better about our Department of Justice the more we talk about it.

In the January 31st letter, which I am going to give you all a copy as soon as we adjourn, here were the issues that were raised about, just a few: Politicization of the Department of Justice. Wouldn't you think that we would get a special counsel for the firing of nine U.S. attorneys? That is an in-house matter—that they will—Mr. Gonzales and now Mr. Mukasey will take care of themselves? I don't think so.

Waterboarding and torture. Assuming that this confuses—and by the way, my 12-year-old is not confused about waterboarding and whether it is legal or criminal or not—but waterboarding and torture, since the Attorney General has such a difficult time with this

subject that we have to look at it case by case, implying that there is some permissible waterboarding and then there is impermissible waterboarding. It depends on, as everything else in law, the facts.

Okay, what about selective prosecution? I would like you to examine that, and of course the investigation into the destruction of the tapes.

And then finally, voter suppression and civil rights enforcement. And there, Attorney Bruce, the accumulation of all these matters made me begin to question the Department and its leadership and its decisions. But you make me feel better. You say it is not about good or bad, Mr. Chairman, it is really about good people maybe making an error now and then.

But, you know, these errors accumulate. I mean, after they start rising off the table, and then others are talking about the unitary system of Government, and the Vice President has brought in all these neocons to infiltrate the Government, my patience is being taxed. Mr. Coburn?

Mr. COBURN. Yes, Mr. Chairman, I can easily understand that. And I have very similar feelings about a number of the issues that you just referred to, but specifically with respect to this question of the destruction of the CIA tapes. When you, Mr. Chairman, refer to this question of unitary government, or the question of the politicization of the Justice Department, I mean, here we have a situation in which, you know, you think about the notion of an entity investigating itself.

We have a prosecutor who was appointed—and really, I would submit, a fundamental structural problem that the Committee is dealing with here—a prosecutor who was appointed who essentially must report with respect to every piece of significant decision-making to the deputy Attorney General. And the deputy Attorney General is a political appointee; and in fact, he is a highly-political appointee.

And so the notion, you know, that we have here is one in which the Administration has staked out a position—a very clear and unambiguous position—with respect to the permissibility of the underlying conduct which is supposedly reflected in these destroyed videotapes.

That Administration is personified in the deputy Attorney General to whom the criminal investigator must report, and from whom the criminal investigator must, apparently, receive permission for seeking a grand jury subpoena, or certainly returning an indictment. I mean, that is a very serious fundamental, structural problem—one which, I think, would lead one not to feel too good about the current state of the way the Justice Department is handling these issues.

Thank you for your generosity, Chairman

Mr. SCONYERS. But Mr. Casey, my old apprehensions are returning. Can you make me feel better as we close this Subcommittee hearing down?

Mr. CASEY. Well, I will try. I think that there—if, to the extent there are systematic, fundamental problems, they are problems inherent in the constitutional system of separation of powers itself, yes. The executive branch has wide power, and it may be, on many

occasions, that both the Department of Justice and other departments take actions of which the Congress disapproves.

I would urge the Committee, to the extent that has been the case with the Justice Department, to use its oversight authority and the many other political measures that the Constitution—or powers—that the Constitution has given you, to yourself look at some of these things. I mean, I think the Constitution intends that ultimately you are the check. I mean, I disagree with what has been said about the individual issues, but ultimately, you are the check. You have the power.

Mr. CONYERS. Well, just remember when we talk about the issuing of contempt citations from the Congress that we have an Attorney General who announces, in advance of anything happening, that he will not honor the contempt citations.

Now, where do I go in the Constitution or in the decisions of the Federal court to say, "Well, this is a tension that our founding fathers anticipated"?

Mr. CASEY. I think exactly that. It is inherently the providence of the judiciary to say what the law is. You go to court and get a decision that supports your position, or not. But, I mean, that is where you go.

Ms. BRUCE. O you hire an independent counsel to—— [Laughter.]

Mr. CONYERS. Thank you so much for your generosity——

Ms. SÁNCHEZ. Time has expired, and I want to thank the witnesses for their patience. We are going to dismiss the first panel, and we are going to call the second panel. But know, too, that we will be submitting, also, questions in writing, and we would ask that you respond to those as soon as possible so that we can make those a part of the record as well. But thank you, again, for your testimony.

I am now pleased to introduce the witness for our second panel for today's hearing, but before I do that I wanted to check—I understand that you have a flight to catch, is that correct?

Mr. FITZGERALD. Yes, but I should be okay.

Ms. SÁNCHEZ. Okay. Our witness for this panel is the Honorable Patrick Fitzgerald. Mr. Ftzgerald began serving as United States Attorney for the Northern District of Illinois on September 1, 2001. He served on the Attorney General's Advisory Committee from 2001 to 2005, and was Chair of the Subcommittee on Terrorism.

He is also a member of the President's Corporate Fraud Taskforce. As a U.S. attorney, Mr. Fitzgerald served as his district's top Federal law enforcement official. His district, the Northern District of Illinois, covers 18 northern Illinois counties across the top tier of the state, with a population of approximately 9 million people.

During the last 4 years, Mr. Fitzgerald has provided leadership and played a personal role in many significant investigations involving terrorism financing, public corruption, corporate fraud, and violent crime including narcotics and gang prosecutions.

In December of 2003, he was named special counsel to investigate the alleged disclosure of the identity of a purported employee of the Central Intelligence Agency. Through this, Mr. Fitzgerald was delegated all the authority of the Attorney General in the mat-

ter, and that occurred under Department of Justice Regulation 28, CFR Part 600.

In February 2004, acting Attorney General Comey clarified the delegated authority and stated that Mr. Fitzgerald had plenary authority.

Prior to his service in Chicago, Mr. Fitzerald served as an assistant U.S. attorney in the United States Attorney's Office for the Southern District of New York for 13 years. He served as the Chief of the Organized Crime Terrorism Unit, in addition to holding other supervisory positions during his tenure in that office.

Among Mr. Fitzgerald's award and honors are the Attorney General's Award for Exceptional Service in 1996, the Stimson Medal from the Association of the Bar of the City of New York in 1997, and the Attorney General's Award for Distinguished Service in 2002. We want to welcome you, and again, thank you for your patience. At this time we would invite you to begin your testimony.

TESTIMONY OF THE HONORABLE PATRICK J. FITZGERALD, UNITED STATES ATTORNEY FOR NORTHERN DISTRICT OF ILLINOIS, FORMER SPECIAL COUNSEL, UNITED STATES DEPARTMENT OF JUSTICE, CHICAGO, IL

Mr. FITZGERALD. Thank you. And I appreciate the Chairwoman and the Ranking Member having me, and the Chairman of the Committee, and I am just here to answer questions, so I will be happy to take them.

Ms. SÁNCHEZ. Great, thank you. We appreciate your presence here, and we will begin our round of questioning. I will recognize myself for 5 minutes. Mr. Fitzgerald, do you believe that a President should consult with a special counsel when deciding whether to commute the sentence of an Administration official who was the subject of the special counsel's prosecution?

Mr. FITZGERALD. I wasn't anticipating that I would be testifying on the commutation issue today, and all I can say is I recognize the President has the power to pardon or commute, and I won't go beyond that.

Ms. SÁNCHEZ. Did the President or anyone with the Administration actually consult with you, as they would with the department generally, prior to the commutation of Scooter Libby's sentence?

Mr. FITZGERALD. I don't know what generally happens. I know that I was notified the day the decision was made before it was being announced—shortly before. But I was notified, not—I wasn't consulted in the decision, I was notified of it. But I hadn't anticipated testifying about that issue, so I don't want to go beyond that.

Ms. SÁNCHEZ. Okay. I appreciate that. With regard to your appointment as special counsel, you were told by Deputy Attorney General James Comey to follow the facts, do the right thing, and that you can pursue it wherever you want to pursue it.

Do you believe that all special counsels should be given the freedom to determine the scope of their investigation?

Mr. FITZGERALD. I think I would back up and say that I think the scope of my investigation, if you mean the subject matter, I was not given the freedom to do that. I think what Mr. Comey delegated to me was the power of the Attorney General to conduct an investigation into a subject matter.

I was not given the authority to expand the subject matter. I was not appointed as a counsel; I was effectively delegated the powers of the Attorney General.

So if I was looking at some conduct and for some reason began to suspect anyone had engaged in tax fraud, for example, that was outside the scope of my mandate. I could not decide, all of a sudden, that it was important for me to investigate tax fraud. I could go, in that circumstance, to the Attorney General, or in that case the acting Attorney General, and say, "I have reason to believe there is tax fraud," and they would decide what the scope of that was.

So I think that has been often misunderstood in the sense that the subject matter jurisdiction was given to me; it was not up to me to expand it. But in terms of following the facts wherever they took me within the subject matter, I had that authority. So I could go wherever the facts took me, in terms of what I was investigating, but I couldn't decide to expand my mandate beyond that.

Ms. SÁNCHEZ. Okay. I wanted to throw out a hypothetical situation for you here. If Assistant U.S. Attorney John Durham is given essentially the same authority that you were given in your role, do you think that it would be proper or improper for him to investigate the underlying conduct of the tapes?

Mr. FITZGERALD. I think I will conduct myself the way I did when I was special counsel, which is to stay within the lane of my authority, and I can answer what I know as special counsel, but I really don't feel comfortable opining about what someone else should do in another case that isn't under my authority. I really don't.

Ms. SÁNCHEZ. I will let you refuse to opine on that out of respect for the job that you do. By all accounts, you and your team that were investigating the CIA leak investigation expended significant time and energy on that case.

Do you think that you should have been required to submit a report to the Attorney General at the conclusion of your investigation explaining the prosecutions or the decision not to prosecute?

Mr. FITZGERALD. I have already answered this, so I can tell you I was not required to by—there was no statute in effect—and I think in terms of if you are asking submitting a report to the Attorney General, the Attorney General was recused and because a charge resulted, I think people learned a fair amount about what we did; they didn't learn everything.

But if you are talking about a public report, that was not provided for, and I actually believe and I have said it before, I think that is appropriate. I think that when a grand jury is used in an investigation, as it was in that case, we both expect everyone to come forward and cooperate with the grand jury, we expect them to be fully candid, and in fact, that is what led to a prosecution, when someone lied under oath to the grand jury. But we owe it back to people to respect the secrecy of the grand jury, and you can't tell people, "Come into the grand jury, it will remain secret," and then later, when people want you to explain what it is that you did, pull back the cloak of secrecy.

I think we have to—when we go down that road, we have to follow through the rules. So we did not reveal anything that had not

otherwise been revealed. So I don't think a public report was allowed, and I don't think it should have been called for.

Ms. SÁNCHEZ. Do you think a report to Congress is something that would be prudent in order to increase transparency, or do you think that that would be a bad idea as well?

Mr. FITZGERALD. Well, I don't want to speak outside my lane again. I fully recognize that the Congress has an appropriate role to play in oversight. I also recognize that the executive branch has to have space within which it can do business and confer amongst itself. And I also think there has to be an ability for prosecutors to make prosecutive decisions knowing that the discussion stays behind closed doors, and also knowing that the grand jury rules, which prohibit sharing of grand jury information that is not otherwise public, are not violated. So I see the concerns on both sides.

I know, just from my narrow point of view, we can't break the grand jury rules and do something that is not authorized. As to the larger tension between the executive branch's independence and confidentiality and the Congress' right to conduct oversight, I think I should not be the spokesperson for that.

Ms. SÁNCHEZ. Okay, thank you. My time has expired. At this time I will recognize Mr. Cannon for 5 minutes of questions.

Mr. CANNON. I am still puzzling over the Chair's distinction between a public report and a report to Congress.

Ms. SÁNCHEZ. Well——

Mr. CANNON. Just in jest.

Ms. SÁNCHEZ. There is a theoretical separation, at least.

Mr. CANNON. At least one more door that the information has to pass through, I suppose. I am intrigued by your testimony, Mr. Fitzgerald, and I appreciate your forthrightness. I wanted to have you talk, if you would, a little bit about the distinction, or not, between being a special prosecutor and the kind of prosecutions that happen every day in the Department of Justice and in the various U.S. Attorney's Offices.

And would you mind commenting—we have, in the guidance for U.S. attorneys, a great deal of material that is born of experience. Is it your sense, in the kind of stressful situation that you are in with Mr. Libby, that—or any other kind of situation like that—that we should use the same kind of guides that the Justice Department has in place?

Mr. FITZGERALD. You mean the Justice Department guidelines?

Mr. CANNON. Yes.

Mr. FITZGERALD. They were—yes, and in fact, I think one common misunderstanding about my role and the team's role in the investigation involving the Plame matter and the prosecution, is that people believe that we did not follow the Justice Department guidelines, or it has been said often enough that people start to believe it. That is not the case. As a Department of Justice official, I was bound by those guidelines.

Now what had happened was, I was delegated the authority of Attorney General; so many of the procedures that had to be followed, I was the decision-maker.

Mr. CANNON. Right.

Mr. FITZGERALD. But the guidelines were not abrogated for us. And so, when you prosecute as U.S. attorneys, you follow the DOJ

guidelines. When I was given the authority, in this matter, delegated from the Attorney General, I also followed those guidelines.

But to answer your first question, I think in an ordinary case a U.S. attorney has an awful lot of power. We can bring indictments, we can obviously issue most subpoenas without seeking approval from anyone, we can do lots of things, and in many cases—the volume of our cases—we can bring charges that could imprison someone for life without parole without ever going to main justice for approval.

It is in certain narrow areas that are important—and that comes up in a smaller fraction of the cases. We cannot seek a wiretap without getting the approval of main justice before going to court, we cannot seek transactional immunity—statutory immunity—for witnesses telling them they have to testify but won't be prosecuted, we can't authorize a Government appeal, we cannot subpoena an attorney, or subpoena a member of the media.

There are a number of things—we cannot file a racketeering charge. So in those cases, a U.S. attorney has to seek approval from the Department of Justice; often it is granted, but then sometimes there is a disagreement. But I think sometimes people can forget, but we try not to forget, that the power of a United States attorney is pretty strong, even in an ordinary case.

Mr. CANNON. So even in an ordinary case you have a great deal of power, and we have guidelines that have been developed over a great, long period of time about how to use that power. And so, I think your conclusion is that if you have a special circumstance, where you have a special prosecutor, those guidelines are very important in the process.

Mr. FITZGERALD. I think in the—as I understand it—the regulations part 600, which talks about special counsel outside the department of justice, requires that those special counsel have the powers of the United States attorney, but should confide, to the extent possible, with the Department of Justice guidelines. I was not appointed under that; I was inside the department, but I was bound by those guidelines.

So whether you are inside or outside, those rules should apply.

Mr. CANNON. Exactly. And we have had a number of cases where U.S. attorneys have pursued very high-profile political kinds of cases. Like in your district now, you are pursuing Mr. Tony Roscoe. You don't have to comment on that, but the comment that I would ask you about is: Is the Justice Department, generally speaking, capable of these high-profile kinds of cases, or do we need to have a whole new unit that would have special powers?

Mr. FITZGERALD. I would answer this way, not talking about a pending matter. In my tenure, my office indicted Governor Ryan—as United States Attorney's Office. We indicted his campaign fund while he was a sitting governor. We did not need authority to do the investigation, but we did need authority when we sought a racketeering charge because that is a racketeering statute. So I think in an ordinary case, even a politically-charged case with a high-level official, we have lots of power, but sometimes those powers are circumscribed when we use certain techniques.

Mr. CANNON. And among your guidelines, you do consider the public prominence of a potential person that may be charged with

a crime. And as I understand, your guidelines do include, for a political person, that that makes it more of a priority for prosecution, does it not?

Mr. FITZGERALD. I don't necessarily agree with that. What I would tell you is, it is the nature of the crime. Obviously, in the case of Governor Ryan, which is past history I can discuss, widespread corruption in the government of Illinois is something we ought to prosecute, not because he is a famous person, but because what he did corrupted Government at a high level, and it sends a strong deterrent message.

But that is no different than in a drug enterprise, or a gang. We will go after the most harmful gangs and the ones that are most visible to send a deterrent message. So I think we consider someone's position if they abused it because it makes it more of a crime, but not going after someone simply because they have a high profile——

Mr. CANNON [continuing]. Time has expired. Can I just follow up with one short question, which is: If you have guidelines that deal with—help you balance—those kind of priorities with the political—corruption, with the effective corruption, with the kind of gang—do you have guidelines that help you sort cases based on those issues?

Mr. FITZGERALD. There are lots of guidelines that we read, but I tell you, the most important thing that we do is sit in our U.S. Attorney's Office and take career prosecutors and vet the case: Can we prove it? Is it against the law? What is the harm? And we hash those out internally before we bring charges, looking to many of the considerations set forth in the guidelines. But our process really is to get a team of people who have experience and bat ideas around.

Mr. CANNON. Thank you, Mr.

Mr. FITZGERALD. Madam Chair, I yield back.

Ms. SÁNCHEZ. Thank you. At this time I would like to recognize Mr. Conyers for 5 minutes of questions.

Mr. CONYERS. Thank you, Madam Chair. Mr. Patrick Fitzgerald, we are honored that you would come before the Committee. We thank you for it.

Mr. FITZGERALD. Thank you. Thanks very kind of you.

Mr. CONYERS. Did the investigation that you pursued cost $1.5 million, or did it cost more than that?

Mr. FITZGERALD. That is a good question. I think the last number I saw, which doesn't account for the last 6 months or so, has a bookkeeping cost of something in the ballpark of $2.4 million. And I would say a bookkeeping cost because what they did in this case was, the salaries of all the people who worked on the case were counted as expenses, but none of us were paid, with the exception of one person who left the Government and received a nominal hourly rate.

So if I worked—if anyone on my team worked 50 hours on a special counsel matter, and 50 hours on either main justice business or the Chicago U.S. attorney's business, we still received the same paycheck.

But for bookkeeping purposes, they put that salary as a cost of the investigation. So if you back out, I think, the $1.5 million in salary, we actually—out-of-pocket, it was much less than that. I

think it was almost closer to—much closer to zero. The out-of-pocket cost of the investigation, I think, was around $550,000 by last count. And of that $550,000, I think $300,000 was just travel expenses, and I think another $100,000 was court reporter transcripts. We didn't have rent, since we used our existing offices and DOJ.

So one of the things that gets confusing is, for bookkeeping purposes it looks as if we spent $2.4 million, which I think compares favorably with many other investigations; but in fact, if you actually looked at what went out of pocket, it was in the ballpark of $550,000 as of the last accounting, which I think took us through the trial, but before sentencing.

Mr. CONYERS. Thank you for your detailed response. And finally, did we ever find out who leaked the name of a CIA agent?

Mr. FITZGERALD. I would say that the trial established that the name of Ms. Plame, without getting into the mental states, was discussed with reporters by three different officials, one of whom was charged with perjury. And that was the nature of what led the investigation to be appointed to a special counsel. But those names were publicly discussed.

Mr. CONYERS. Thank you very much. Thank you, Madam Chair.

Ms. SÁNCHEZ. Will the gentleman yield back the remainder of his time?

Mr. CONYERS. How much time do I have left? No, I yield back. [Laughter.]

Ms. SÁNCHEZ. Thank you, Mr. Chairman. There was just one question on my list that I was interested in asking you before we wrap up for the day. Do you believe that conflicts of interest subvert the confidence in the Justice Department and our judicial system?

Mr. FITZGERALD. That is a pretty broad question. All I can tell you is that everyone in the Department of Justice—everyone I work with—looks to avoid conflicts of interest; and we fill out conflict of interest forms in our cases, and if we see one we recuse ourselves——

Ms. SÁNCHEZ. And why do you do that when there are conflicts of interest?

Mr. FITZGERALD. We do that because——

Ms. SÁNCHEZ. What is the purpose?

Mr. FITZGERALD. So that you carry out justice both on a substantive level and create the appearance of propriety. And we are very diligent to make sure that if I am in—I don't have stocks that qualify, but if I had Federal stockholdings, I would make sure I am not investing in a company where it could affect my wealth. I am blessed with not having to be that concerned.

Ms. SÁNCHEZ. So there is a big concern for conflicts of interest because the appearance of them, for policy purposes, could undermine confidence?

Mr. FITZGERALD. There has always been concern in the Department of Justice to make sure we avoid anything that undermines confidence, including conflicts of interest.

Ms. SÁNCHEZ. Thank you. I appreciate your answer. I would like to thank you again for your witness, or for your testimony today. Without objection, Members will have 5 legislative days to submit

any additional written questions. And, Mr. Fitzgerald, because you are a Government employee, we are going to ask permission to submit written questions to you. Would that be acceptable?

Mr. FITZGERALD. Yes. And if I can answer them I will, and if won't I will politely advise you of that.

Ms. SÁNCHEZ. I appreciate that. And if you do choose to answer those, those will be made a part of the official record. Without objection, the record will remain open for 5 legislative days for the submission of any additional materials. Again, I want to thank everybody for their time and patience. This hearing on the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 4:29 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ANSWERS TO POST-HEARING QUESTIONS FROM CAROL ELDER BRUCE, ESQUIRE, VENABLE, LLP, WASHINGTON, DC

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20006-1872

QUESTIONS FOR CAROL ELDER BRUCE FROM
CHAIRWOMAN LINDA SÁNCHEZ AND RESPONSES BY MS. BRUCE

1. **Based on your experience as a former Independent Counsel and your review of the Department's implementation of the Special Counsel regulations, which framework is a better approach to investigate and prosecute violations of criminal law by federal officials in certain cases?**

   If neither of these approaches is ideal, is there an alternative approach Congress should consider?

My experience as a former Independent Counsel leads me to conclude that neither the expired Independent Counsel statute ("IC statute"), nor 28 CFR Part 600 -- the 1999 Special Counsel regulations {"Part 600") present an ideal framework for triggering and conducting the investigation and possible prosecution of certain federal officials in certain cases. Nor do I believe it is wise to assume that an Attorney General will unilaterally invoke the broad, statutory delegation of authority permitted by 28 USC 508, 509, 510, and 515, in all appropriate circumstances. (This, of course, was the statute under which Acting Attorney General Comey appointed U.S. Attorney Patrick Fitzgerald to investigate the alleged unauthorized disclosure of a CIA employee's identity).

I would recommend, instead, legislation that would embrace the best features of both the IC statute and Part 600 and would also reflect the lessons learned over the past ten years since the expiration of the Independent Counsel statute. As legislation, it would have the full force and effect of law and would not be merely an administrative regulation governing internal procedures at the Department that can be waived or ignored by the Attorney General, as happened in the Bush Administration.[1]

[1] See, GAO Decision B-302582, Special Counsel and Permanent Indefinite Appropriation (September 30, 2004), issued with respect to the appointment of Special Prosecutor Fitzgerald, in which the GAO noted that the "only statute cited as authority for 28 CFR Part 600 that expressly authorizes the Department to issue regulations is 5 USC 301 (2000)," and that latter provision only confers administrative, not legislative, power upon the Department, and thus "do not have the force and effect of law" and do not "act as a substantive limitation of the Attorney General's authority … ." See also the Department of Justice's characterization of the Part 600 regulations as not being a "substantive rule," citing 5 USC 553(d), 552(a)(1)(D). 64 Fed. Reg. 37038, at 37041 (July 9, 1999).

I would be happy to work with the Chairwoman and the Committee on the language of a new statute, but believe that no matter which political party is in the White House or who is Attorney General, the public is better served and will have greater confidence in the integrity and independence of a so-called "special counsel" investigation of high level or other government officials if the investigation is conducted by someone who functions truly independent of the Department of Justice, but in accordance with DOJ policies and procedures and accountable to the public purse.

In 1999, I set forth my views on what a statutory scheme should look like in an article for the GW Magazine before the IC Statute expired. A copy of that article was attached to my statement submitted to this subcommittee on February 26, 2008. My views are substantially the same as they were in 1999. However, the article was written before the promulgation of Part 600 that replaced the expired IC Statute.

I believe that Part 600 reflects too large a swing away from the full independence enjoyed by independent counsel under the IC statute and vests entirely too much supervisory oversight by the Department of Justice over the work of a special counsel. Acting Attorney General Comey saw the inappropriate limitations of Part 600 when he ignored them and delegated "plenary" authority to Mr. Fitzgerald ("all the authority of the Attorney General") with respect to the subject area of his investigation – an investigation in which it was clearly foreseeable that the Office of the Vice President was implicated. My only objection to Mr. Comey's decision is, as I will elaborate below, that he appointed a sitting political appointee to the role of special counsel and did not appoint someone outside of the Justice Department.

It is my view, Part 600 not only provides for too much supervision by the Department of Justice during the course of an investigation, it also gives the Attorney General too much discretion as to when to appoint a special counsel and, as stated above, gives the Attorney General no guidance from Congress because the regulations are merely internal administrative regulations, with no formal legislative imprimatur. It is true that the appointment sections, Sections 600.1 and 600.2, as my co-panelist, Professor Neal Katyal, noted in his written submission, "recognize that matters may arise in which public confidence in the thoroughness, integrity and impartiality of an investigation would be significantly enhanced by the appointment of an individual outside of the normal organization of the DOJ." However, the sections leave the appointment decision entirely in the discretion of the Attorney General when they, among other things, dispense with even a shorter version of the "covered persons" list provided for in the Independent Counsel statute.

Our democracy is a government built on public trust, where the presumption is that persons elected or appointed to public office will act with integrity and not break the law. When there's a chance that an official has broken the public trust and broken the law, it is imperative that the public have confidence in the way our government, especially our top law enforcement officers, including our Attorney General, handle an investigation of the matter. Our political history has shown that there are times when, in order to maintain this public trust, it is important in certain circumstances that such an investigation be removed from the normal executive branch investigative and prosecutorial processes so that any decision about whether to prosecute the official(s) in question will be made by a person independent from the government in power at the time.

The challenge, of course, is whether we should try, once again, to articulate in legislation a process for determining under what circumstances and from where a special counsel should be appointed, who should appoint her, and who should determine the scope of her investigative jurisdiction? What checks should be in place to hold the special counsel accountable to the normal processes, rules, and restraints that govern prosecutors, without compromising her independence? And, what, if any, reporting obligations should this special counsel and the Administration have to Congress, the courts, or the people concerning the results of the investigation of possible public misconduct or misdeeds? My view is that internal administrative guidelines (Part 600) have proven to be woefully inadequate and legislation is needed.

I believe Congress should enact legislation that would (1) continue to place the appointment power in the Attorney General, but would include a more robust role for and political accountability of Congress in supporting (if not formally confirming) or disapproving of the individual selected to be special counsel; (2) contain an appointment triggering mechanism that would <u>require</u> the appointment of an outside special counsel under extraordinary circumstances involving credible allegations that may implicate certain high level administration officials and/or events involving <u>actual conflicts of interest</u>, and a triggering mechanism that would allow for the discretionary appointment of someone from within or outside of the DOJ to conduct a special counsel investigation if there is a perceived, but no actual, conflict of interest; (3) ensure that the special counsel who is appointed in the actual conflict scenario is given the same level of plenary authority that existed under the IC statute and that was given Mr. Fitzgerald by Mr. Comey, with no internal DOJ reporting requirements or need to obtain any authorizations from "superiors" within DOJ and with removal of the special counsel only for good cause by the Attorney General or President; and (4) allow for the possibility of relatively traditional oversight, with appropriate recusals, of the work of the special prosecutor when there is no actual, but a perceived, conflict of interest.

2. In light of the fact that the Special Counsel regulations have not been used in over eight years, do they need to be changed? If so, how?

I recommend that they be scrapped altogether or effectively superseded by formal legislation that incorporates the general concepts set forth above, especially provisions requiring the appointment, under some clearly defined extraordinary circumstances, of special counsel with the plenary authority of an Attorney General to conduct a particular investigation.

3. Should Congress legislate in this area? If so, what provisions would be essential for a new statute? Please explain.

Please see above.

Given your experience with the Independent Counsel statute, are there aspects to that law that Congress should consider revisiting?

The appointment triggering mechanism was too complex in the IC statute and arguably forced the hand of the Attorney General in matters that could readily have been handled by the lawyers in the Public Integrity Section or by a DOJ lawyer who was given relative autonomy outside of the usual chain of command.

The appointment power should remain with the Attorney General and not be given again to any court within the judicial branch of government.

A new statute should be more discriminating and limiting with respect to which government officials are "covered persons" under the statute for whom a special prosecutor must be appointed.

Although there was a great deal of public and political dissatisfaction with the length, breadth, and expense of some of the independent counsel investigations, the provisions ensuring independence were fundamentally good provisions and, in very important ways, worked.

The statute should also, however, provide for more stringent financial accounting provisions as well as a more DOJ-like congressional oversight, as a special counsel should never be so independent that he/she lacks the constraints on power imposed on regular actors (e.g., regular DOJ prosecutors and U.S. attorneys) in our separation of powers scheme.

4. After comparing your authority as Independent Counsel to the authority granted to U.S. Attorney Patrick Fitzgerald as a Special Counsel outside of the Department's regulations, do you believe Mr. Fitzgerald acted more as an Independent Counsel pursuant to the expired statute or as a Special Counsel under the regulations?

Please explain.

He was clearly given authority more akin to an Independent Counsel than a special counsel, but I do not know how Mr. Fitzgerald *actually conducted* himself – that is, whether his decision-making and consultative process truly supported and guaranteed the independence of his judgment and action. Independent Counsel were encouraged by statute to consult with DOJ officials as needed and were supposed to follow Department policy whenever possible. Voluntarily and deliberately educating oneself about DOJ policy and then following it was a good thing under the IC statute. Conferring with DOJ lawyers, almost entirely on questions of law and policy, was often invaluable to me as an Independent Counsel. But our consultations and decisions were taken in a decidedly independent fashion without undue influence from the Department.

Given that the Vice President was apparently one of the targets of the Fitzgerald investigation, upon further reflection, it seems inappropriate to me that a sitting U.S. Attorney conducted this very sensitive investigation. A political appointee such as a U.S. Attorney, no matter how honorable and well-meaning a reputation he/she may have, should not be put in the position of investigating his/her President, Vice President, or Attorney General.

I do not know how his staffing decisions were handled, but it was clear that a senior DOJ Public Integrity lawyer was Mr. Fitzgerald's top trial lawyer in the trial of Scooter Libby. While there is no doubt but that the Libby case was vigorously pursued and won in court, I believe it would have been better to have an outside lawyer conduct this investigation and prosecution, perhaps lending more credibility to a decision not to pursue the Vice President himself. Decisions to decline prosecutions, whether made by independent counsel, special counsel, political appointees, or career federal prosecutors, should ideally always be perceived as being credible (and sometimes courageous) decisions based on the lack of evidence or prosecutorial merit for such a prosecution.

What concerns do you have if a Special Counsel is appointed outside of the regulations?

If a Special Counsel is appointed pursuant to the same provisions that Attorney General Reno appointed Robert Fiske, the original "Whitewater" special counsel, and Acting Attorney General Comey appointed Mr. Fitzgerald (28 USC 508, 509,510, and 515), I have much fewer concerns than I would have if that Special Counsel was appointed under Part 600. Nevertheless, I have some concerns, a few of which I have expressed above. As I see it, such a delegation of "plenary authority" is the only currently available appointment process outside of the Part 600 regulations. Here are some of my concerns:

1. It does not require that the person appointed be from outside the Department of Justice as he/she should be in certain circumstances.

2. A person appointed under the general delegation provisions can be terminated at will. So, even if it is a reputable person appointed from outside the Department of Justice like, for example, Professor Archibald Cox, we could find ourselves in another Saturday Night Massacre and constitutional crisis as we did in 1973, when a culpable President demanded the firing of Cox.

3. The general delegation provisions have no guidelines or requirements with respect to following, as best he/she can, DOJ policy; nor does it encourage or provide for Special Counsel consulting with DOJ attorneys on issues of his/her choosing, thus appearing to cast the Special Counsel as a total outsider, even if limited consultations might be to the great advantage of the Special Counsel and in the public interest.

4. The general delegation provisions say nothing about budget process or authority or about congressional oversight, thus failing to address the accountability questions that loomed so large over the Independent Counsels in 1999, when the statute expired.

5. The provisions do not speak to any need to prepare a report, even to just the Attorney General. In high level and sensitive investigations such as these, I believe it is imperative that there be a written record of the investigative steps taken, the decisions made and actions taken, even if the report is held in confidence for a period of time or for all time.

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6. In sum, the general delegation provisions of Title 28, Chapter Five, allow for the sort of independence that Part 600 restricts too much, but the provisions are too general and non-specific in providing guidance or protection to a special prosecutor selected to perform a sensitive investigation of certain high level government officials or of actions of others that may implicate such officials.

Thank you for giving me this opportunity to respond to your questions. I hope these answers are helpful to you and the Subcommittee on Commercial and Administrative Law.

Respectfully submitted,

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POST-HEARING QUESTIONS SUBMITTED TO NEAL KATYAL, ESQUIRE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Questions for Prof. Neil Katyal from Chairwoman Linda Sánchez

1. As the primary drafter of the Department's Special Counsel regulations, do you find it surprising that the Bush Administration has never appointed a Special Counsel under the regulations? Why or why not?

2. In light of the fact that the regulations have not been used in over eight years, do they need to be changed? If so, how?

3. Should Congress legislate in this area? If so, what provisions would be essential for a new statute? Please explain.

4. In your written testimony, you note that in the CIA leak investigation, U.S. Attorney Patrick Fitzgerald "had substantially more power and less supervision than a Special Counsel under the regulations."

   Do you think the model under which Mr. Fitzgerald served as Special Counsel should be followed in the future? Why or why not?

   What are the dangers of appointing Special Counsels outside of the regulations?

   Do you think Special Counsels should have the flexibility to choose which aspects of the regulations they have to follow?

Note: The Subcommittee had not received a response to these questions prior to the printing of this hearing.

Questions by Ranking Member Cannon for Prof. Neil Katyal, Georgetown University School of Law:

1. As you drafted the Special Counsel Regulations, what were the foremost defects of the Independent Counsel Act that you sought to avoid?

2. In your written statement, you describe communications you had with this Committee and others in Congress as you drafted the Special Counsel Regulations. Did Committee and congressional members on both sides of the aisle have a consensus view of what the Special Counsel Regulations should encompass?

ANSWERS TO POST-HEARING QUESTIONS FROM LEE A. CASEY, ESQUIRE, BAKER AND HOSTETLER, LLP, WASHINGTON, DC

Questions from Chairwoman Linda Sánchez:

1. In your written testimony, you express concern about U.S. Attorney Patrick Fitzgerald's appointment outside of the Special Counsel regulations – specifically noting that he "was granted plenary authority to pursue his investigation, effectively recreating an indpendent counsel."

Should a Special Counsel under the regulations have been appointed in the CIA leak investigation?

No, I do not believe that a Special Counsel would have been appropriate in that case.

In most circumstances, the Justice Department's regularly established components, including the Criminal Division, its Public Integrity Section, and the United States Attorneys' offices, are capable of fully and fairly investigating and, where necessary, prosecuting criminal offenses by government officials at all levels. The appointment of a Special Counsel, under the regulations published at 28 C.F.R. § 600 or otherwise, should be reserved for those extraordinary situations where Justice Department officials are themselves implicated and cannot be effectively screened – through recusal – from participation in such an investigation.

The CIA Leak investigation involved several White House officials (although, published reports suggest that a Department of State official was the original source of the leak). Acting from what the Justice Department described at the time as "an abundance of caution," Attorney General Ashcroft recused himself from the case. The Deputy Attorney General (proceeding under 28 U.S.C. § 508 as the acting Attorney General) was not subject to the authority or direction of any other official in the Executive Branch, save the President. That being the case, I believe that the Deputy Attorney General should have committed the matter to the Public Integrity Section, as the Justice Department component with the most expertise and experience in investigating and prosecuting wrongdoing by government officials.

Failing that, the Deputy Attorney General should have invoked the Special Counsel regulations, which I believe strike a proper balance between any need for day-to-day independence and the overall application of the normal ethical and procedural rules governing

Justice Department investigations. To this day, I do not see a justification for his having granted Mr. Fitzgerald "all the authority of the Attorney General with respect to the Department's investigation," and then confirming that this grant was "plenary." *See* Letter of James B. Comey, Acting Attorney General, to The Honorable Patrick J. Fitzgerald (Dec. 30, 2003); Letter of James B. Comey, Acting Attorney General, to The Honorable Patrick J. Fitzgerald (Feb. 6, 2004).

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

Although I believe that Mr. Fitzgerald's appointment as a "special counsel" outside of the Special Counsel regulations was ill-advised (for the reasons articulated in my written statement and above), it was nevertheless lawful pursuant to the provisions of 28 U.S.C. §§ 508, 509, 510, and 515. These provisions vest all of the Justice Department's authority in the Attorney General, permit him to delegate this authority to other Department officials, and permit the Attorney General to vest the authority to conduct legal proceedings in specially appointed attorneys. Moreover, the Special Counsel regulations do not create, nor were they intended to create, any rights in the individuals who might be the subject of an investigation. 28 C.F.R. § 600.10.

That being the case, I do not believe that Mr. Fitzgerald's appointment outside of the Special Counsel regulations will jeopardize any conviction on appeal. The Special Counsel regulations do not purport to offer the *only or exclusive* means by which the Attorney General may staff investigations and, in any case, could not override the statutory authority granted to him by Congress upon which Mr. Fitzgerald's appointment was based.

2. Do you find it surprising that the Bush Administration has never appointed a Special Counsel under the regulations? Why or why not?

Because I believe that the appointment of a Special Counsel is properly reserved for extraordinary circumstances, I do not find it surprising that the Administration has never utilized the regulations.

In this connect, however, I think it would be unfair to compare the number of appointments made under the Special Counsel regulations to the number of appointments sought under the Independent Counsel statute. That law, once certain predicates were satisfied, effectively required the Attorney General to seek appointment of an Independent Counsel *unless* he or she could say that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." This was a high standard and, as Justice Scalia explained in his *Morrison v. Olson* dissent, "[a]s a practical matter, it would be surprising if the Attorney General had any choice . . . but to seek appointment of an independent counsel . . . Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial." 487 U.S. at 702.

Because the Attorney General now genuinely has the discretion to determine whether appointment of a Special Counsel is in the public interest, it is not surprising that fewer special counsels have been appointed in the post-Independent counsel era. In most instances, the Department of Justice, whether in the United States Attorney offices or it the litigating divisions, is fully capable of handling criminal allegations against public officials or other politically sensitive cases.

In light of the fact that the regulations have not been used in over eight years, do they need to be changed? If so, how?

I do not believe that the regulations need to be changed. They provide for exceptional circumstances that have not arisen over the past eight years.

Should Congress legislate in this area? If so, what provisions would be essential for a new statute? Please explain.

I do not believe that Congress should legislate in this area. The regulations provide for the appointment of a Special Counsel if necessary. No additional legislative authority is necessary to effectuate such an appointment where appropriate.

Questions by Ranking Member Chris Cannon:

1. Some assert that Attorney General Mukasey went "outside" the Special Counsel Regulations to appoint John Durham to the CIA Tapes investigation. Aren't the processes Mr. Mukasey followed and the decision he made actually consistent with the Special Counsel regulations?

Yes, I believe that the process followed by Attorney General Mukasey was consistent with the Special Counsel regulations. Under 28 C.F.R. § 600.2, when matters are raised that might justify appointment of a Special Counsel, the Attorney General has the discretion to: (1) appoint a Special Counsel; (2) initiated a factual and legal inquiry as a means of further informing his decision whether to appoint a Special Counsel; or (3) conclude that the publc interest would best be served by permitting the approptiate Justice Department component to go forward with the investigation. However, if the Attorney General determines that a Special Counsel should not be appointed pursuant to the third option, the rule also states that "he or she may also direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials."

In the CIA document case, because the local United States Attorney (which would ordinarily have handled this investigation) determined to recuse his office, the Attorney General took the appropriate steps, as contemplated by 28 C.F.R. § 600.2, by appointing another Justice Department official (also an experience prosecutor) to serve as acting United States Attorney for this investigation. This was entirely consistent with the regulations.

2. The Special Counsel regulations institute a light-handed set of checks and balances, allowing for an outside counsel, but placing the appointment power and a limited veto power in the Attorney General's hands, subject to a reporting requirement to Congress. Is this mineature system of checks and balances sufficient to reconcile our needs for independence in special counsel cases with our needs to prevent temptations to prosecutorial excesses? Should we call for greater checks and balances instead?

I believe that the current regulations strike an appropriate balance between the potential need to insulate a particular investigation from the Justice Department's normal processes, and to nevertheless ensure that the procedures, considerations, and practical constraints of the

Department continue to apply as a means of ensuring against prosecutorial excesses. I do not believe that greater checks and balances are necessary at this time.

3. Patrick Fitzgerald's investigation of the Plame affair has come in for much criticism by those who think he fell into the trap of prosecutorial excess. Do you think that the Special Counsel Regulations, had they been followed, would have produced a better investigation of the Plame affair? If so, how?

It is entirely possible that, had a Special Counsel been appointed in accordance with the regulations, he or she would have handled the Plame case in very much the same manner as Mr. Fitzgerald did under his special appointment. However, under those regulations, the rules and procedures of the Justice Department would have been formally applicable, and the Attorney General (or the Deputy Attorney General in his acting capacity) would have had the actual and ultimate responsibility for determining whether – once it became clear that no one would be prosecuted for the leak itself – the matter was worth pursuing further, achieving an appropriate level of accountability.

4. The Congressional Research Service has reported that, out of the 20 independent counsel investigations initiated under the old Independent Counsel Act, "only two federal officials who were actually the named or principal subjects of the 20 investigations were finally convicted of or pleaded guilty to the charges brought." The price tag for those investigations, however, was over $200 million. Are you aware of any litigating division or U.S. Attorney's office at the Department of Justice where that kind of paltry return on prosecutorial investment would be regarded as even remotely acceptable? Would such a return be acceptable, for example, from the Department's Public Integrity Section?

Such comparisons are, of course, difficult because of the differences in complexity presented by individual cases and the span of time involved (over twenty years) during which the investigations under the Independent Counsel statute were carried out. However, there seems to be little doubt that these investigations were highly resource intensive when compared with the Justice Department's normal operations. For example, during 2006 alone, the Justice Department's Public Integrity Section reported 94 pending public corruption matters in its office. This included major portions of the Jack Abramoff investigation. In addition, that section also supervised or advised on 224 election crime matters nationwide in that, single year. *See* Report

to Congress on the Activities and Operations of the Public Integrity Section for 2006, *available at* http://www.usdoj.gov/criminal/pin/docs/arpt-2006.pdf. Moreover, in FY 2006, the entire Criminal Division (of which the Public Integrity Section is only a part) budgeted $115,229,000 for the "strategic goal" of "enforc[ing] federal laws and representing the rights and interests of the American people." *See* U.S. Department of Justice 2006 Budget and Performance Summary at 9, *available at* http://www.usdoj.gov/jmd/2006summary/.

5. Isn't that kind of greatly excessive amount of prosecutorial expense the direct result of the failure of regimes like the old Independent Counsel Act to lay down proper checks and balances on the exercise of prosecutorial discretion?

Yes, I believe so. By effectively removing the Office of Independent Counsel from the normal processes and procedures of the Department, the Independent Counsel statute eliminated many of the most important practical limitations on prosecutorial discretion. This is especially the case with regard to the need to judge the value of any particular investigation (and the resources it may command) against other investigations and the Justice Department's overall mission.

6. Some say the lack of special counsel appointments under the Bush administration is a sign that we should move back towards the old independent counsel regime. Isn't is just as easy – if not easier – to say that it is a sign that the Justice Department can be trusted to handle politically sensitive cases in all but the most extraordinary instances?

Yes. The Justice Department's experienced prosecutors, supported by the FBI's equally professional investigators, can and do handle politically sensitive cases on a daily basis. In all but the most extraordinary circumstances, such cases should be handled in accordance with the Department's normal processes – with modest adjustments where recusals may be necessary or advisable, as in the CIA document destruction case.

As I mentioned in answer to one of the Chair's questions, I think it is unfair to compare the Special Counsel regulations to the number of appointments sought under the Independent Counsel statute. That law, once certain predicates were satisfied, effectively required the Attorney General to seek appointment of an Independent Counsel *unless* he or she could say that "there are no reasonable grounds to believe that further investigation or prosecution is

warranted." This was a high standard and, as Justice Scalia explained in his *Morrison v. Olson* dissent, "[a]s a practical matter, it would be surprising if the Attorney General had any choice . . . but to seek appointment of an independent counsel . . . Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial." 487 U.S. at 702.

In short, because the Attorney General now genuinely has the discretion to determine whether appointment of a Special Counsel is in the public interest, it is not surprising that fewer special counsels have been appointed in the post-Independent Counsel era. In most instances the Department of Justice, whether in the United States Attorney offices or it the litigating divisions, is fully capable of handling criminal allegations against public officials or other politically sensitive cases.

7. The Committee just concluded an extensive investigation of the Department of Justice, much of which centered on allegations regarding the Department's independence. That investigation produced a new Attorney General, but also weakened public confidence in the Department. Doesn't it weaken public confidence even further to protest immediately that the new Attorney General isn't independent enough to handle one politically charged case? Have you seen any sign or heard any evidence that Attorney General Mukasey and his Department aren't independent enough to handle the CIA Tapes investigation?

I am unaware of any reason to believe that Attorney General Mukasey and the Justice Department aren't independent enough to handle the CIA Tapes investigation. Indeed, I believe that Attorney General Mukasey acted properly and responsibly in refusing to appoint a Special Counsel to review this matter, but in nevertheless accepting the wishes of the local United States Attorney to recuse his office. The compromise, appointing a senior and highly respected Assistant United States Attorney from another district to act as the United States Attorney in this matter, was sound both as a matter of law and policy. If, as the investigation progresses, further measures must be taken to guarantee a full and fair review of the matter, up to and including appointment of a Special Counsel, the Attorney General has the authority to take these actions.

ANSWERS TO POST-HEARING QUESTIONS FROM BARRY COBURN, ESQUIRE, COBURN AND COFFMAN, PLLC, WASHINGTON, DC

Questions for Barry Coburn from Chairwoman Linda Sánchez

1. Based on your experience working in several Independent Counsel investigations and your review of the Department's implementation of the Special Counsel regulations, which framework is a better approach to investigate and prosecute violations of criminal law by federal officials in certain cases?

Response: I am not sure that the correct response is to elect one approach to the exclusion of the other. When in the highly sensitive context of needing to initiate an investigation of a government official, it might be well to be able to choose between a number of alternatives. For example, when the individual to be investigated occupies a position like that of Lewis Libby, it might be felt that a DOJ Special Counsel is an adequate and appropriate choice. On the other hand, when the potential investigative target is a cabinet officer or the President or Vice-President, then it might be concluded that an Independent Counsel would be more appropriate.

If neither of these approaches are ideal, is there an alternative approach Congress should consider?

Neither approach is ideal, given the fundamental separation of powers problem that exists whenever an administration official is to be investigated, but I think that if both were available, and a mechanism fashioned for choosing between them in a given situation, that might be an adequate solution.

2. Should Congress legislate in this area? If so, what provisions would be essential for a new statute? Please explain.

I have never been comfortable with the complete repeal of the Independent Counsel statute and believe that it should be re-enacted in some form. However, I think that the problems identified in the

previous incarnation of the statute are very real and would need to be carefully addressed in any new version. Perhaps the most important aspect of any new Independent Counsel statute would be some form of reporting and oversight that should be required of Independent Counsel during the investigations, so that investigations do not become bogged-down, bloated, overly expensive and ego-driven.

3. Given your experience with the Independent Counsel statute, are there aspects to that law that Congress should consider revisiting?

Yes. Please see response immediately above.

ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE PATRICK J. FITZGERALD, UNITED STATES ATTORNEY FOR NORTHERN DISTRICT OF ILLINOIS, FORMER SPECIAL COUNSEL, UNITED STATES DEPARTMENT OF JUSTICE, CHICAGO, IL

"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.

SUPPLEMENT TO ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE PATRICK J. FITZGERALD, UNITED STATES ATTORNEY FOR NORTHERN DISTRICT OF ILLINOIS, FORMER SPECIAL COUNSEL, UNITED STATES DEPARTMENT OF JUSTICE, CHICAGO, IL

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 18, 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:

This supplements our letter, dated May 2, 2008, which provided 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." Mr. Fitzgerald's supplemental response to Question Eleven is set forth below:

> In my answers submitted on May 2, 2008, I noted in my response to Question Eleven that I omitted discussion of when I first learned that I might be asked to resign as United States Attorney. I declined to answer more fully due to the then pending trial of *United States v. Antoin Rezko* in the Northern District of Illinois. With that trial concluded, I can briefly elaborate further: I learned some time in or about early 2005 from agents of the Federal Bureau of Investigation ("FBI") that a cooperating witness (who later testified at the Rezko trial, but not about this topic) had advised the FBI agents that he had earlier been told by one of Mr. Rezko's co-schemers that it was the responsibility of a third person in Illinois to have me replaced as United States Attorney. I should be clear that I did not understand that any putative effort to replace me as United States Attorney was related to my conduct as Special Counsel but understood instead that it was related to the investigative activities of federal agents and prosecutors conducting a corruption investigation in Illinois.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Chris Cannon
Ranking Minority Member

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