

**Responses to Written Follow-Up Questions from Senator Patrick Leahy
for Timothy E. Flanigan
Nominee to Position of Deputy Attorney General**

Trying Terrorism Suspects in Federal Courts

Q. Press accounts suggest that in your time as Deputy White House Counsel you argued forcefully against trying certain terrorism suspects in federal courts. Did you believe then that our federal prosecutors and our court system were inadequate to try these criminal suspects? Do you believe that now?

ANSWER: As I stated at my hearing, the United States has used military commissions since the Revolutionary War to bring our enemies to justice. The Supreme Court has repeatedly recognized the well-established power of the military to prosecute offenses against the laws of war through military commissions. Congress itself has recognized the propriety and importance of military commissions for the present war, as the Court of Appeals for the District of Columbia Circuit recently held in *Hamdan v. Rumsfeld*. In that case, the court of appeals upheld the establishment of military commissions in the current war on terrorism. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005). The court concluded that “it is impossible to see any basis for [the] claim that Congress has not authorized military commissions.” *Id.* Relying upon Supreme Court precedent, the congressional Authorization for Use of Military Force, and sections 821 and 836 of title 10, United States Code, the court held that “Congress authorized the military commission that will try” a Guantanamo detainee who admits to having been Osama bin Laden’s personal driver. *Id.* I believed then and believe now that military commissions are appropriate for trying enemy combatants while protecting classified information and avoiding placing an unreasonable burden and security risk upon federal courts. As I stated at my hearing, serious national security concerns would likely arise if, for example, Osama bin Laden were tried in a United States District Court.

Congressional Oversight

Q. In the hearing, you and Senator Specter engaged in extended discussion of congressional oversight. What is your understanding of your obligations to respond to Congressional oversight?

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

Q. Will you make yourself available for appearances before the Committee?

ANSWER: Yes. I am advised that, from time to time, Deputy Attorneys General have made themselves available for appearances before the Senate Judiciary Committee and, if confirmed, I will follow in that tradition.

Military Commissions

Q. Media accounts suggest that you were deeply involved in drafting the military order that the President signed on November 13, 2001. Many members of Congress, including myself, were disturbed by the extraordinary assertion of executive power it contains.

For example, the military order allowed for the arrest and indefinite detention of persons without charge and without legal recourse if they were held unlawfully. While paying lip service to a full and fair trial, there was no requirement of a presumption of innocence, or that defendants be granted access to the evidence submitted against them, or even that proof of guilt be established beyond a reasonable doubt. No protection was provided against forced confessions.

Did you support the use of military commissions as defined by this order when the order was issued? Would you support such commissions today?

ANSWER: I supported the creation of a framework for the use of military commissions in 2001, and I support their use today. As I stated at my hearing, the United States has used military commissions since the Revolutionary War to bring our enemies to justice. The Supreme Court has repeatedly recognized the well-established power of the military to prosecute offenses against the laws of war through military commissions. Congress itself has recognized the propriety and importance of military commissions for the present war, as the Court of Appeals for the District of Columbia Circuit recently held in *Hamdan v. Rumsfeld*. In that case, the court of appeals upheld the establishment of military commissions in the current war on terrorism. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005). The court concluded that “it is impossible to see any basis for [the] claim that Congress has not authorized military commissions.” *Id.* Relying upon Supreme Court precedent, the congressional Authorization for Use of Military Force, and sections 821 and 836 of title 10, United States Code, the court held that “Congress authorized the military commission that will try” a Guantanamo detainee who admits to having been Osama bin Laden’s personal driver. *Id.* The procedures for the present military commissions compare very favorably with those used in the past. The President’s Military Order, to which the question refers, must be considered in conjunction with the Secretary of Defense’s subsequent implementing order, given that the President’s order expressly charged the Secretary of Defense with establishing procedures for the military commissions that would ensure each defendant a full and fair trial. Each defendant enjoys the presumption of innocence; each defendant must be

found guilty beyond a reasonable doubt; each defendant is informed of all charges against him; each defendant has the ability to procure evidence in his defense; each defendant is provided capable military counsel; each defendant may obtain the additional assistance of civilian counsel; each defendant is guaranteed an appeal to a special panel of some of the most distinguished lawyers in America; and each case is reviewed either by the President or the Secretary of Defense.

“Enemy Combatants”

Q. Jose Padilla was arrested in Chicago’s O’Hare Airport on May 8, 2002, on a material witness warrant issued by a court in the Southern District of New York. Three weeks later, President Bush designated Padilla an “enemy combatant” and had him transferred to a naval brig in South Carolina. The central question in his case is still a matter of dispute in the courts. That question is whether the President has the constitutional or congressionally-provided authority to detain without charge so-called “enemy combatants” who are U.S. citizens detained on U.S. soil, far from any field of combat.

(A) As Deputy White House Counsel, were you involved in the decision-making process that led to Padilla’s designation as an “enemy combatant”?

ANSWER: No.

(B) It has been reported in the press that you argued against giving Padilla any access to counsel. Are such reports accurate?

ANSWER: Although I cannot comment on the specifics of internal deliberations, Padilla has received, and continues to receive, access to counsel.

(C) What distinguished the Padilla case from other terrorist cases that have been prosecuted in criminal courts?

ANSWER: I understand that Padilla trained with and was closely associated with al Qaeda both before and after September 11, 2001. Armed with an AK-47 assault rifle, he engaged in armed conflict against the United States and allied forces in Afghanistan. After eluding our forces on the battlefields of Afghanistan and escaping to Pakistan, he met with senior al Qaeda operatives, including Khalid Sheikh Mohammad and Mohammed Atef, and accepted a mission from al Qaeda to enter the United States and carry out attacks on our citizens within our own borders. He then came to this country intent on carrying out that mission.

The President based his decision to detain Padilla as an enemy combatant on written findings that Padilla: closely associated with al Qaeda; engaged in hostile and war like acts, including conduct in preparation for acts of international terrorism against the United States; possessed intelligence

about al Qaeda that would aid U.S. efforts to prevent attacks by al Qaeda on the United States; and represented a continuing, present, and grave danger to the national security of the United States, such that his detention was necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.

Q. In *Hamdi v. Rumsfeld*, the Court ruled 8-1 that a U.S. citizen captured in Afghanistan and labeled an “enemy combatant” could not be held indefinitely at a U.S. military prison without the assistance of a lawyer, and without an opportunity to contest the allegations against him before a court. Justice Sandra Day O’Connor in *Hamdi* made clear that the executive’s power is constrained by the Bill of Rights, finding that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.” Do you disagree with the Court’s decision in *Hamdi*?

ANSWER: *Hamdi* determined what the law of the land requires. I understand that the government has complied with that decision, and as Deputy Attorney General, I would expect the government to continue to do so.

Q. The U.S. Supreme Court also rejected the Administration view that those detained at Guantanamo Bay, Cuba, had no right to challenge the legality of their detention. The Court held 6-3 in *Rasul v. Bush* that the detainees were entitled to challenge the legality of their prolonged detention at Guantanamo in U.S. federal court. Do you disagree with the Court’s decision in *Rasul*?

ANSWER: *Rasul* held that, under the federal habeas corpus statute, federal courts have jurisdiction over suits brought by certain individuals challenging the legality of their detention at Guantanamo Bay. That decision determined what the law of the land requires. I understand that the government has complied with *Rasul*, and as Deputy Attorney General, I would expect the government to continue to do so.

August 1, 2002 OLC Memo

Q. In your confirmation hearing, you stated that the Central Intelligence Agency (CIA) made a direct request to the Office of Legal Counsel for a memorandum interpreting the torture statute. You said to Senator Hatch, “[T]he request for this advice came from-- directly to the Office of Legal Counsel from the CIA. The first that I heard that the question had been asked was when we were called by the Office of Legal Counsel and a briefing was proposed.” The memorandum itself is addressed not to the CIA but to then-White House Counsel Alberto Gonzales. Its opening lines read, “You have asked for our Office’s views regarding the standards of conduct under the Convention Against

Torture...” as implemented by 18 U.S.C. 2340-2340A. Can you explain this inconsistency? Who made the request to the Office of Legal Counsel?

ANSWER: I do not remember receiving the August 1, 2002, memorandum at that time. I came to learn through press reports, after I had left my employment at the White House, that OLC had prepared such a memorandum and that it was addressed to the then-Counsel to the President, Alberto R. Gonzales. I do not remember seeking, nor do I remember the then-Counsel to the President seeking, the memorandum—though a request for such guidance would have been consistent with our effort to ensure that the Executive Branch received appropriate guidance from the Department of Justice.

Sarbanes-Oxley

Q. When you joined Tyco International in late 2002, the company was still in turmoil. In June 2005, a Manhattan jury convicted two former Tyco executives - the CEO and the CFO -- of misrepresenting the company's financial condition and stealing millions of dollars of unapproved compensation. Having experienced first-hand the repercussions of these crimes to the company, its employees, and its investors, do you support the view expressed by some in the business community that the costs of Sarbanes-Oxley outweigh the benefits?

ANSWER: The Sarbanes-Oxley Act was passed in July 2002 with strong bipartisan support, in response to the President’s call for decisive action to ensure high ethical standards in American business and to combat corporate fraud. At the same time, the President created the Corporate Fraud Task Force, which is chaired by the Deputy Attorney General. Those measures were designed to prevent a recurrence of the type of corporate corruption that was revealed in a series of high-profile corporate scandals. Over the past three years, the Department of Justice has made corporate fraud enforcement a high priority and has built an impressive record of successful prosecutions.

The Sarbanes-Oxley Act imposed tougher penalties for fraud, obstruction of justice, and other crimes, and gave prosecutors important new tools to investigate and prosecute cases of corporate fraud, including the requirement that chief executive officers and chief financial officers personally certify corporate financial statements. The Act includes numerous measures designed to ensure auditor independence, to strengthen internal corporate controls, and to improve financial disclosure and reporting.

As with any regulation, the costs of compliance must be borne by businesses. In particular, Section 404 of the Act, which requires companies to audit and report on their internal controls, has imposed significant costs. From my current vantage point, I would say that the timing and magnitude of the changes mandated by Section 404 call into question whether Congress fully appreciated the complexity and cost of those changes, particularly in a global company that is

diverse in terms of languages, cultures, and geography. I am aware that the Administration has closely monitored those costs and has taken steps to reduce the burdens. For example, the Securities and Exchange Commission (SEC) has established an advisory committee to assess the costs of Sarbanes-Oxley compliance on small businesses.

The benefits of Sarbanes-Oxley have been substantial and, in my opinion, have far outweighed the costs. The Act has helped ensure that accountants, attorneys, and other professionals who act as the gatekeepers of the financial markets are independent and honest. It has helped ensure reliability and transparency in financial reporting. And it has helped prosecutors and regulators to uncover and punish those who commit corporate wrongdoing. I would caution, however, based on my experience in the corporate environment, that no set of improved internal controls, however extensive, will ever provide iron-clad protections against fraud. We can never abandon vigorous enforcement, nor can businesses ever cease to work on improving their ethical culture.

If confirmed as Deputy Attorney General, I would support the efforts of the Department of Justice to aggressively enforce the Sarbanes-Oxley Act and other laws against corporate fraud and white-collar crime.

Death Penalty

Q. If confirmed as Deputy Attorney General, you will have substantial responsibility over decisions involving the Federal death penalty, including the decision whether to accept a U.S. Attorney's request not to seek the death penalty, and the decision whether to accept a U.S. Attorney's request for authorization to enter a plea or cooperation agreement that requires withdrawal of a notice of intent to seek the death penalty. What deference do you believe is due to the recommendations of local prosecutors and U.S. Attorneys in death cases?

ANSWER: As an initial matter, I want to clarify what I understand to be the role of the Deputy Attorney General and the Office of the Deputy Attorney General in death penalty decisions.

The Department's death penalty protocol, set forth at USAM 9-10.000 et seq., establishes a standard review and decision-making process for any conduct being prosecuted in federal court for which a capital offense is or could be charged. The goal underlying the protocol is the consistent and fair application of federal capital statutes and procedures to prosecute the "worst of the worst" defendants nationwide, irrespective of the location of the offense or trial and local sentiment for or against the death penalty.

Under the protocol, it is the Attorney General's decision whether to seek the death penalty for a death penalty-eligible offender. After a case has been reviewed by the Attorney General's Review Committee on Capital Cases, it is forwarded to the Office of the Deputy Attorney

General, where a thorough review by staff informs the recommendation of the Deputy Attorney General. Thus, the role of the Deputy Attorney General in death penalty cases is potentially two-fold. The Deputy Attorney General and his Office provide an individual assessment and recommendation to the Attorney General regarding whether the death penalty should be sought. Second, when the Attorney General is unavailable, the Deputy Attorney General as Acting Attorney General may make the final death penalty decision.

I believe that the recommendation of the U.S. Attorneys should be given great weight but should not be dispositive if, for example, the recommended course of action would be inconsistent with decisions reached in other comparable cases.

Crack/Powder Sentencing Disparity

Q. What do you think should be done, if anything, to address the disparity between sentences for powder and crack cocaine offenses?

ANSWER: Federal law requires possession of 500 grams of powder cocaine to trigger a five-year mandatory minimum sentence but only five grams of crack cocaine to trigger the same sentence; similarly, possession of 5,000 grams of powder cocaine triggers a 10-year mandatory minimum sentence, while only 50 grams of crack are needed to trigger a 10-year mandatory minimum.

Congress created the current sentencing laws in the late 1980s. As you know, since then Congress has rejected a proposal by the Sentencing Commission that would have equalized penalties for powder and crack cocaine.

The differential between powder and crack cocaine sentences is based on several distinctions between the different forms of cocaine. Crack is more addictive than powder and creates a more intense high of shorter duration, requiring more frequent use to maintain the high. Crack users are more likely to overdose. Crack is also easier to conceal, transport, and distribute. It has also been much more closely associated with firearms use and with homicide trends. For these reasons, Congress imposed more severe penalties for crack trafficking and distribution.

I understand that the Administration conducted a policy review of the subject in 2002 and rejected recommending changes to the current system. Following that review, then-Deputy Attorney General Larry Thompson opined in testimony before the Sentencing Commission that “[c]urrent federal policy and guidelines for sentencing crack cocaine offenses are proper.” He also expressed the view that “[i]t would . . . be more appropriate to address the differential between crack and powder cocaine by recommending that penalties for powder cocaine be increased.” Further, he said that “[l]owering crack penalties now would simply send the wrong message – that we care less about the people and the communities victimized by crack.”

I have not studied this issue closely. The position that Congress and previous Administrations, in addition to this one, have taken to justify the differential is rational and justified by the evidence. On the other hand, if I am confirmed, I will be open to reviewing the issue again.

Judicial Philosophy

Q. In my opening statement, I quoted from your testimony in a 1997 hearing about the need for the Senate to vigorously investigate the judicial philosophy of those nominated to serve on the federal bench. You said that you would place the burden on the nominee to prove that he or she has a well-thought out judicial philosophy. You said to Senator Durbin in the hearing that you stand by those words. If the nominee cannot meet the burden of proof, what do you believe the Senate should do?

ANSWER: I continue to believe that judicial nominees should recognize the limited role of Federal judges under our Constitution and should demonstrate they have thought about that role and what it means with respect to the interpretation of statutes and the Constitution. If any individual Senator believes that the nominee has not demonstrated such an understanding or disagrees with the nominee, the Senator must determine whether to vote for or against the nominee.

AUSA Retirement Benefits

Q. In past Congresses, I introduced with Senator Hatch and others the bipartisan Federal Prosecutors' Retirement Benefit Equity Act. This bill would correct an inequity that exists under current law, whereby Federal prosecutors receive substantially less favorable retirement benefits than other nearly all other people involved in the federal criminal justice system. The bill would increase the retirement benefits given to Assistant United States Attorneys by including them as "law enforcement officers" ("LEOs") under the Federal Employees' Retirement System and the Civil Service Retirement System. The bill would also allow the Attorney General to designate other attorneys employed by the Department of Justice who act primarily as criminal prosecutors as LEO's for purposes of receiving these retirement benefits. The bill was last introduced in the 108th Congress as S.640. If confirmed, will you work with me and other senators to enact this important legislation?

ANSWER: If I am confirmed, I would be happy to engage in discussions with you on this matter and to review any legislation that may be introduced with regard to retirement benefits for Assistant United States Attorneys.