

**Written Questions for Eric H. Holder Jr.  
From Senator Feingold**

**Racial Profiling**

- 1. We discussed my racial profiling legislation at the hearing. The Department of Justice's current guidelines prohibiting racial profiling by federal law enforcement appear to include an exception of sorts for federal law enforcement personnel who are protecting national security. Do you think such an exception is appropriate? Isn't it possible to protect our country without resorting to racial profiling?**

I believe that we can protect the national security while also adhering to our Constitution and the principles for which our nation stands. As the Attorney General of the United States, I commit to reviewing DOJ's policies to ensure that unlawful racial profiling is not permitted.

**Secret Law**

- 2. I held a hearing last year on what I have been calling the problem of "secret law." Our legal system is based on the premise that the public has a right to know what the law is. But we now know that for the past seven years, bodies of executive and judicial law were kept secret from the public, and too often from Congress as well. The prime examples of this were binding opinions of the Office of Legal Counsel, and decisions of the Foreign Intelligence Surveillance Court interpreting the Foreign Intelligence Surveillance Act. Certainly there are times when these opinions and decisions may discuss sensitive operational information, and this type of properly classified information should not be made public. But that shouldn't extend to an explanation of what the law is. Do you agree that, as a general matter, the Justice Department should be committed to more public access to OLC opinions and to FISA Court decisions? And will you work with me on legislation such as the OLC Reporting Act (S. 3501 in the 110<sup>th</sup> Congress) and Executive Order Integrity Act (S. 3405), to create some statutory protections against this problem?**

I firmly believe that transparency is a key to good government. Openness allows the public to have faith that its government obeys the law. Public scrutiny also provides an important check against unpersuasive legal reasoning – reasoning that is biased toward a particular conclusion. Once the new Assistant Attorney General in charge of the Office of Legal Counsel is confirmed, I plan to instruct that official to review the OLC's policies relating to publication of its opinions with the goal of making its opinions available to the maximum extent consistent with sound practice and competing concerns.

In that regard, I support the principles behind the proposed OLC Reporting Act. I believe that the Department should notify Congress when it concludes that a provision of a statute is unconstitutional or when it interprets a statute in a manner that is manifestly at odds with its intent. As your question indicates, such notice is subject to the legitimate privilege and other secrecy concerns of the executive branch. I will commit to work with

Congress to satisfy Congress's legitimate interest in notice and the executive branch's legitimate interests in efficiency and confidentiality.

### **State Secrets**

- 3. I'm concerned that the outgoing administration may have used the "state secrets privilege" to avoid accountability for potentially unlawful activities, including warrantless wiretapping and rendition. Courts tend to be very deferential to these privilege claims, so there's certainly room for abuse. Will you commit to reviewing all pending cases in which DOJ has invoked the state secrets privilege to make sure the privilege was properly invoked, and withdraw any claims of privilege that are not necessary to preserve national security?**

I will review significant pending cases in which DOJ has invoked the state secrets privilege, and will work with leaders in other agencies and professionals at the Department of Justice to ensure that the United States invokes the state secrets privilege only in legally appropriate situations.

- 4. One reason that the state secrets privilege is so vulnerable to abuse is that courts don't always use the tools that are at their disposal to review privilege claims, such as in camera review of the privileged evidence. I cosponsored the State Secrets Protection Act (S. 2533 in the 110<sup>th</sup> Congress), with Sen. Kennedy and Sen. Specter, to require courts to engage in meaningful review of these claims. Would you support enactment of this bill?**

I appreciate the Committee's concern about potential abuses of the state secrets privilege and will work to ensure that assertions of the privilege are made only when legally and factually appropriate. I will consult with appropriate career personnel at the Department of Justice and perhaps in other agencies, before making a final judgment on whether to support this or other particular legislation.

## Criminal Justice

- 5. Over the past several years, I have heard again and again that the federal government, and the Department of Justice in particular, simply has not provided the kind of crucial support to our state and local law enforcement partners in anti-crime efforts that they need. The outgoing administration repeatedly sought to slash important crime-fighting grant programs like the Byrne Justice Assistance program and the COPS program. In Wisconsin, these cuts have been devastating and have threatened important projects, such as a community prosecutor program in Milwaukee. Even beyond these grants, the Department has not been the leader in the development and dissemination of research on cutting edge law enforcement strategies that it should be. What role do you think the Department should play in providing crime-fighting and crime prevention help to its state and local partners?**

I believe the Department of Justice has a vital role to play in supporting state and local law enforcement. DOJ should be a leader and strategic partner with states and localities in addressing crime. It should reach out to state and local law enforcement officials to ascertain needs and figure out the best ways we can work together. The incoming administration is committed to restoration of Byrne / JAG funding and to the Biden COPS legislation – along with support for research and evaluation to ensure that what we are funding is effective in reducing crime.

- 6. A growing body of research shows that prevention and intervention programs and mental health and drug treatment services can help children move out of the juvenile justice system, return to school, and become responsible members of our communities. In the outgoing Administration, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) was widely criticized for failing to provide leadership and innovation in delinquency prevention policy and the effective administration of juvenile justice. How do you plan to prioritize youth and juvenile justice and delinquency prevention in the Department of Justice, and will you seek to restore OJJDP to its previous role as the leader and central resource for juvenile justice innovation?**

The federal government should be a leader in tackling the difficult questions surrounding juvenile delinquency. The President-Elect and Vice-President-Elect have supported a comprehensive public health approach to addressing youth crime. Community-based programs – employing the evidence-based strategies that you describe – have been shown to be most effective in steering young people away from a life of crime. If confirmed, I hope to restore the Department's Office of Juvenile Justice & Delinquency Prevention (OJJDP) to its former role as a leader in advancing these and other innovations. I also plan to give priority to juvenile justice and delinquency prevention issues in a number of ways: First, I will work with the President to identify a strong leader for OJJDP Administrator. Second, I will work with the new Administrator to reinvigorate the important work of OJJDP, especially in the area of delinquency. Third, I will ensure that OJJDP's professional staff is given senior leadership support within the Department. Fourth, the Department will reach out to constituent organizations to elicit their views on

what we can and should be doing. Finally, we will make it a priority to work with Congress on reauthorization of the JJDP Act.

- 7. The United States has the highest incarceration rate in the world; nearly 2.3 million Americans are held in federal or state prisons or local jails. Close to two thirds of those in prison are African American or Latino. Many of those who are currently incarcerated were sentenced under mandatory minimum sentencing laws. President-elect Obama has indicated that mandatory minimum sentencing, especially for non-violent offenders, is not only unfair in many cases, but is an unwise use of taxpayer dollars.**

Many respected jurists have spoken out against the wisdom of mandatory minimums, including Former Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Like many others, I believe that mandatory minimums take a “one-size-fits-all” approach to justice, and the results are sometimes irrational and unfair and that it is judges who are in the best position to fairly tailor the punishment to the crime. What is your position on mandatory minimums?

I agree that the Department of Justice needs to review the use of mandatory minimum sentences, especially for non-violent offenders. I am well aware of former Chief Justice Rehnquist’s and other experts’ views opposing the application of mandatory minimum sentences in certain contexts, and I am also well aware of our nation’s incarceration rates and the very troubling racial disparities in the criminal justice system. I intend to study this issue carefully, review the considerable amount of data that has been collected, solicit the views of members of Congress, consult with members of the bipartisan United States Sentencing Commission, law enforcement groups, and other important constituencies, and make recommendations that serve the interests of justice.

- 8. As Attorney General, would you consider recommending that the President use grants of clemency to certain non-violent, first time offenders serving lengthy mandatory minimum sentences to address the unfairness of their sentences and to send a message to Congress that it should reassess statutory mandatory minimums?**

I understand the significant potential for mandatory minimum sentences to reach an unjust result in some cases. The question of whether a mandatory minimum sentence has been imposed unjustly depends on the particular facts and circumstances of each case. Similarly, the President’s clemency power should be exercised based upon the particular facts and circumstances of each case.

### **Tort Reform**

9. I noticed that at least for a while you were on the Advisory Board of an organization called Common Good, which was founded by your law partner Phillip Howard, and which strongly supports so-called tort reform initiatives that seek to restrict the ability of injured people to gain redress in the courts. Mr. Howard’s writings in my view sometimes paint a distorted view of our legal system. I’m not looking to debate his views with you here, but I do want to ask you in light of your connection with that organization and your recent

background of representing corporate interests in private practice, as Attorney General, can you be a strong voice for consumers and those injured by corporate wrongdoing? Is there anything in your background and record that you would point to to balance your association with Mr. Howard's organization?

I will be a strong voice for consumers and I am committed to revitalizing the Department of Justice's role in protecting consumers and enforcing the law against corporate violators, especially in these difficult economic times. As a prosecutor in public integrity cases, as a judge, and as Deputy Attorney General I have demonstrated my willingness to enforce the law against powerful interests where appropriate.

### **Civil and Voting Rights Enforcement**

10. I was encouraged to see in your statement your commitment to reinvigorate enforcement of the civil rights and voting rights laws. The drop-off in cases brought by the outgoing Administration is truly disheartening: by some estimates there has a 40% overall drop in Title VII cases, a paucity of employment discrimination cases based on the disparate impact on minorities of employment practices, a significant decrease in employment cases brought on behalf of minorities and women, and a 40% drop in fair housing cases. With respect to voting rights, no cases were brought on behalf of African-American voters between 2001 and 2006, and in the entire administration not a single voting rights case has been brought on behalf of Native Americans. Do you agree that these statistics are probably not due to a marked decrease in discriminatory behavior taking place in this country? What will be your priorities in civil rights enforcement and how do you plan to go about repairing and reinforcing this part of the Department's historic mission.

As Attorney General, one of my highest priorities will be to restore the Civil Rights Division's tradition of vigorously enforcing all of the nation's civil rights laws. I will take steps to ensure that all components within the Division utilize fully available tools to combat discrimination, including lawsuits based on disparate racial impact. In the area of voting rights, this will mean protecting the voting rights of racial minorities by bringing lawsuits under Section 2 of the Voting Rights Act. This provision is one of the most powerful voting rights protection tools and I will not hesitate to use it. I will take seriously the mandate to protect the civil rights of all Americans.

### **Antitrust Enforcement**

**11. Yet another area where the outgoing administration's enforcement of the law has been dismal is antitrust. I have been particularly dismayed by increasing concentration in agriculture and its impact on farmers and consumers.**

**In September 2008, the Department issued a troubling report on single firm monopoly conduct. A majority of the Federal Trade Commission immediately issued a statement calling the report "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act." The FTC Commissioners described the report as being "chiefly concerned with firms that enjoy monopoly or near monopoly power, and prescribes a legal regime that places these firms' interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the**

**scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.”**

**The report and the FTC’s reaction confirmed my concern that misplaced priorities have been influencing Antitrust Division decisions for some time. What are your plans to rebalance the scales of antitrust enforcement to better protect the welfare of the public? And will you take a fresh look at cases that were either closed with no action or have been left open indefinitely?**

If confirmed, under my leadership, the Antitrust Division will work to enforce the antitrust laws and to protect the public against monopolistic conduct. We will review current cases and, as part of that review, may examine the history of relevant past cases.

### **Legal Representation in Immigration Proceedings**

**12. Just last week Attorney General Mukasey ruled that because noncitizens do not have a right to counsel in deportation proceedings, they cannot raise a constitutional challenge to a deportation based on claim of ineffective assistance by their lawyers. As I understand it, this is a departure from both longstanding established practice and legal precedent. The idea of someone being deported because of poor representation or even fraudulent actions by a lawyer is very troubling. Will you at least take a new look at this decision made by your predecessor in his last few weeks in office?**

The Constitution guarantees due process of law to those who are the subjects of deportation proceeding. I understand Attorney General Mukasey’s desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair. For this reason, I intend to reexamine the decision should I become Attorney General.

### **DOJ Employment Policies**

**13. Attorney General Mukasey committed to me at his confirmation hearing that he would end disparate treatment of the gay and lesbian employees’ organization at DOJ, called DOJ Pride. I’m happy to say that he kept his word on that. Do you see any reason not to continue his policies, and will you pledge to work cooperatively with DOJ Pride to resolve any additional concerns that they bring to your attention?**

I will continue Attorney General Muaksey’s policies on this topic. I will work with employee organizations to guarantee that there are equal opportunities for all to contribute to the mission of the Department of Justice.