



# Department of Justice

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**STATEMENT OF**

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ATTORNEY GENERAL  
UNITED STATES DEPARTMENT OF JUSTICE**

**BEFORE THE**

**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY**

**CONCERNING**

**“OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE”**

**PRESENTED**

**FEBRUARY 7, 2008**

Good morning, Chairman Conyers, Congressman Smith, and Members of the Committee. Thank you for the opportunity to testify before you today about the important work being carried out by the men and women of the Department of Justice.

I would like to highlight some of the Department's significant accomplishments this past year, and address issues of interest to the Committee. I will also discuss legislative priorities for the Department, most pressing, the urgent need to make permanent reforms in the area of foreign intelligence surveillance before such provisions expire. I am ready to answer your questions, and I look forward to a productive discussion.

My tenure at the Department began less than three months ago. Even in this short time, Mr. Chairman, I have confirmed what I had hoped and expected to find at the Department: men and women who are talented, committed, and dedicated to fulfilling its historic mission. That mission is to defend the interests of the United States according to the law; to ensure public safety against threats both foreign and domestic; to seek just punishment for lawbreakers; to assist our State and local partners; and to ensure fair and impartial administration of justice for all Americans, including protection of civil rights and civil liberties. The Department's employees pursue this mission every day. In my view, the Justice Department is the finest group of lawyers anywhere. For that, I can and do take absolutely no credit. They were at the Department, doing an outstanding job, before I arrived, and they will continue to serve the American people superbly long after I am gone.

As I have served, I have tried to look for opportunities to work with the Congress, and to keep the Congress informed about the Department's activities and policy positions where possible. The lines of communication must always remain open, and every effort be made to accommodate our respective interests. Of course, we will not always agree. There are policy initiatives that the Department supports that some members of this Committee vigorously oppose, and initiatives that some members support with which the Department takes issue. There may be different perspectives on how the Department should pursue particular cases. Although these tensions will never disappear, there are many areas of agreement where we can work together on behalf of our common clients, the people of the United States. I have tried to work with the Congress in this spirit.

I would like to use the remainder of my statement to highlight the Department's efforts and accomplishments in recent months in five critical areas: national security, violent crime, civil rights, immigration and border security, and public corruption. I then will turn to some of the high-priority legislative issues currently before the Congress. I will conclude with an area that has been of great interest to some Members of this Committee and to many in the public.

### **Protecting America's National Security**

I will tell you that the process of becoming familiar with the intelligence detailing the threats facing this country has been and continues every day to be a stark and sobering one for me. There is much that I did not expect, and no shortage of troubling

reports. Even unclassified reporting makes clear that America remains a primary target for Islamic terrorists. We have had substantial successes, but our enemy remains dedicated, persistent, and patient. That there has been no attack on American soil since 9/11 should not conceal a fundamental truth: we must remain vigilant in our efforts against al Qaeda.

As with other departments and agencies with national security responsibilities, much is now asked of the Department of Justice. All aspects of what we do, from budget, to allocation of resources, to policies and legislative priorities, must continue to reflect this aspect of our mission and the reality of the world in which we live.

As you well know, since the terrorist attacks of September 11, 2001, the first priority of the Justice Department has been to protect Americans from the threat of international terrorism. As the Attorney General, I plan to continue these efforts, working aggressively to investigate and prosecute terrorists while ensuring that the Department acts with scrupulous regard for the civil liberties and privacy of all Americans.

The Department has taken groundbreaking steps to pursue those who would threaten our national security. For example, in 2006, Adam Gadhan, also known as Azzam Al Amriki, was indicted on charges of treason and providing material support to terrorists for making a series of propaganda videotapes for al Qaeda – an effort that he has continued in recent weeks. We have also recently obtained convictions and guilty pleas from, among others, a former engineer with a United States Navy contractor

involved in a scheme to obtain and illegally export technical data about the United States Navy's current and future warship technology to China, and a leading manufacturer of night vision technology for illegally exporting restricted data to China, Singapore, and the United Kingdom. We also recently obtained a guilty plea from an individual who installed on a Chinese Navy site a commercial product used for military training. The Department continues to do excellent work in obtaining authorization under FISA to conduct electronic surveillance and searches related to suspected terrorists and spies.

In addition, the Department announced a significant new national security oversight and compliance effort last year. The implementation of a dedicated Oversight Section within the Department's National Security Division and the establishment of an Office of Integrity and Compliance within the Federal Bureau of Investigation involve important innovations in the way the Department conducts business. These efforts reflect a new level of internal oversight designed to ensure that our national security investigations are conducted in a manner consistent with all laws, regulations, and policies, in particular those designed to protect the civil liberties and privacy of Americans. National Security Division lawyers, working with the FBI, conducted 15 national security reviews in field offices across the country and a headquarters component since April 2007 and we plan to conduct a similar number in 2008. These reviews broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and Attorney General Guidelines, and its use of various national security tools, such as National Security Letters. The reviews are not limited to areas where shortcomings already have been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

In October, the Department also launched a nationwide export enforcement initiative that includes the formation of Counter-Proliferation Task Forces across the country, the expansion of export control training for investigators and prosecutors, and the appointment of a National Export Control Coordinator. This effort is designed to leverage the counter-proliferation assets of U.S. law enforcement, export control, and intelligence agencies to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations.

### **Reducing Violent Crime**

Violent crime remains near historic lows in the United States, in large part because of the hard work of our State and local partners, but also through federal law enforcement and initiatives like Project Safe Neighborhoods. Under Project Safe Neighborhoods, federal prosecutors and law enforcement focus their resources on the most serious violent offenders, taking them off the streets and placing them behind bars where they cannot re-offend. Since that project's inception, the number of federal firearms prosecutions has increased significantly, and defendants earn substantial sentences in federal prison. From FY 2001 to 2007, the Department filed 68,543 cases against 83,106 federal firearms offenders – more than a 100% increase over the prior seven-year period. Project Safe Neighborhoods' deterrence and prevention efforts complement this focus on enforcement. Last year new television and radio Public Service Announcements that were developed in partnership with the Ad Council and

Mullen Agency debuted. The television announcement, entitled “Babies,” demonstrates how the loss of a child to gun violence – whether to injury, death, arrest or jail time – deeply affects the family. The radio announcements similarly show the genuine pain inflicted upon real families when a family member is involved in a gun crime. Since 2001, Project Safe Neighborhoods has committed approximately \$2 billion to federal, state, and local efforts to fight gun and gang violence. These funds have been used to hire more than 700 federal, state, and local prosecutors; provide nationally sponsored training for more than 33,000 task force members, hire research and community outreach support, and develop and promote effective prevention and deterrence efforts. This past year, the Department awarded over \$50 million in grants among the 94 federal judicial districts in support of their Project Safe Neighborhoods programs to combat gangs and gang violence and to reduce and prevent criminal misuse of firearms.

In 2006, the Project Safe Neighborhoods program expanded to combat gangs and gang violence. The Department has taken a number of significant steps to address this problem both domestically and internationally. First, the Department established the Attorney General’s Anti-Gang Coordination Committee, to bring all of the Department’s wide-ranging efforts to bear in the focus on gangs. Second, each U.S. Attorney appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. Third, the Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, developed and are implementing comprehensive, district-wide strategies to address the gang problems in each of America’s districts. We

are working closely with our international partners, particularly in Central America, to prevent violent gangs in those regions from infiltrating our communities.

Last year, the Department announced the expansion of our “Comprehensive Anti-Gang Initiative” from six to ten sites nationwide. The initiative originally provided a total of \$15 million (\$2.5 million per site) to six jurisdictions experiencing significant gang problems: Los Angeles, Tampa, Cleveland, Dallas/Ft. Worth, Milwaukee, and the Eastern District of Pennsylvania’s “222 Corridor”, which stretches from Easton to Lancaster. Four additional sites will each receive \$2.5 million in targeted grant funding: Rochester, Oklahoma City, Indianapolis, and Raleigh-Durham. Through the new anti-gang initiative, each of the ten jurisdictions incorporates prevention, enforcement, and reentry efforts to reduce and prevent gang membership and violence in their communities. Focused enforcement efforts under the Comprehensive Anti-Gang Initiative are showing strong early results. In Cleveland, one of the most violent gangs and their associates, operating in and around the target area, has been dismantled through both federal and state investigations and prosecutions. These tough actions have resulted in more than 169 federal and state indictments. Through vigorous prosecutions, 168 defendants have been convicted and one awaits trial. In Cleveland’s target area, violent crime is down by more than 15 percent.

In November, in one of my first acts as Attorney General, it was my honor to personally help lead the opening of the new, joint headquarters of the Department’s two national anti-gang centers: the National Gang Targeting, Enforcement & Coordination



Center (GangTECC) and the National Gang Intelligence Center (NGIC). GangTECC is the national, multi-agency, anti-gang task force created by the Department in 2006. NGIC is an inter-agency law enforcement center, staffed by analysts and created by Congress in 2005, that focuses on information sharing and collaboration in support of the goal of reducing gang membership and violence. Together GangTECC and NGIC work in a unified, national effort to help disrupt and dismantle the most significant and violent gangs in the United States. The agents are supported in this mission by prosecutors across the country in the United States Attorneys Offices and the Criminal Division's new Gang Squad created in 2006, a specialized group of federal prosecutors charged with developing and implementing strategies to target, attack and dismantle the most significant national and transnational gangs operating in the United States. Last year, in the four major GangTECC coordinated takedowns (Baltimore, MD; Dallas, TX; Gadsden, Alabama; Trenton/Newark/Jersey City, NJ), which involved agents from DEA, USMS, FBI, ATF, and ICE, more than 1,480 defendants were arrested and more than 259 of them were documented gang members.

Building on Project Safe Neighborhoods, the anti-gang program and other efforts, in May 2007, the Department launched a series of new and comprehensive initiatives designed to expand and enhance federal law enforcement efforts aimed at reducing violent crime, providing assistance to state and local law enforcement, strengthening laws, and increasing funding. Through these initiatives, the Department, working with state and local law enforcement, has identified cases that focus on the "worst of the worst" offenders. The Department has conducted coordinated fugitive sweeps and

takedowns in cities such as Cleveland, Ohio; Modesto/Bakersfield, California; Trenton/Newark/Jersey City, New Jersey; Dallas, Texas; Gadsden, Alabama; and Los Angeles, California; and conducted Fugitive Safe Surrender operations in Akron, Ohio; Nashville and Memphis, Tennessee; and Washington, DC. Further, ATF expanded its violent crime impact teams to five additional cities, and the FBI has increased the number of safe streets task forces to 182. This fall the Department also awarded, on a competitive basis, \$75 million to local law enforcement task forces to target specific violent crime challenges; this is a down payment of sorts on the President's request for \$200 million in FY 2009 to support task force efforts in communities that need it the most. As I speak, in Chapel Hill, North Carolina, the Department is launching the Department's comprehensive anti-gang training for state and local law enforcement and other partners from across the country. This training will focus on prevention, enforcement and prisoner re-entry strategies. Besides the Chapel Hill training, the Department will conduct eleven additional training sessions that will take place regionally throughout the United States. These are just some of our efforts to combat violent crime. Overall, we have sought to direct funding where funding could best be used, and have sought to increase our ability to pinpoint those areas.

### **Protecting Civil Rights**

Late last year, we celebrated the 50th anniversary of the creation of the Civil Rights Division. I fully appreciate the history and legacy of this Division, as do all I have met within the Division. In the few months that I have been at the Department of Justice, I have taken a number of steps to promote the vigorous enforcement of the nation's civil

rights laws on behalf of all Americans. I met with civil rights leaders in my first month of office and spoke at Shiloh Baptist Church in Washington, DC as part of the commemoration of Reverend Dr. Martin Luther King, Jr.'s birthday. Just a few weeks ago, on January 18, 2008, as part of Operation Home Sweet Home, the Department initiated litigation against a landlord in Detroit, Michigan alleging that the landlord engaged in a pattern or practice of housing discrimination against African Americans. On January 22, 2008, Judge Stephen C. Robinson in White Plains, N.Y., ruled in the Department's favor in a voting rights case that held that the at-large system of election used by the Village of Port Chester, N.Y, to elect its trustees violates the Voting Rights Act because it discriminates against Hispanics.

Two weeks ago, on January 24, 2008, a federal grand jury indicted an individual for conspiring to threaten and intimidate African American marchers who participated in a civil rights rally in Jena, Louisiana and who were exercising a federally protected right to travel between states.

Overall, the Criminal Section of the Civil Rights Division has convicted a record number of defendants for the second year in a row, including *United States v. Seale*, where a former KKK member received three life sentences for his involvement in the brutal 1964 murder of two African-American young men in Mississippi.

Meanwhile, *The First Freedom Project*, which was launched last year, advances the Division's work in protecting against discrimination on the basis of religion through

the creation of a Department-wide Religious Liberty Task Force, a series of regional seminars, and a public education campaign. A First Freedom Seminar is being held today in Washington, D.C.

The President has made human trafficking, which is a form of modern day slavery, a priority for the Administration. A new Human Trafficking Prosecution Unit was created last year within the Criminal Section of the Civil Rights Division. The unit is staffed by the Section's most seasoned human trafficking prosecutors, who work with our partners in federal and state law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases. In the last seven years, the Civil Rights Division has increased human trafficking prosecutions by nearly 700 percent and has obtained four straight years of record high convictions. In addition, the Innocence Lost Initiative, in which the Criminal Division is deeply involved, focuses on child victims of interstate sex trafficking in the United States. Since 2003, 238 convictions have been obtained in the federal and state systems. Of those convictions, 106 were in Fiscal Year 2007.

The Disability Rights Section of the Division continues its important work under Project Civic Access – a wide-ranging initiative to ensure that people with disabilities have an equal chance to participate in civic life. To date, the Division has reached 155 agreements with 144 communities to make public programs and facilities accessible, improving the lives of more than 3 million Americans with disabilities. As we explained

in a recent letter to Congress, we support the idea of improving the Americans with Disabilities Act via legislation, though we strongly oppose the ADA Restoration Act.

In addition to supporting reauthorization of the Voting Rights Act, the Administration is currently defending the statute's constitutionality in federal court. Further, this Administration has initiated approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act. Moreover, the 18 new lawsuits filed by the Voting Section of the Civil Rights Division in CY 2006 is more than twice the average number of lawsuits filed by the Division annually during the preceding 30 years. For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access, coordinating the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

The Division also has sought proactively to provide information to members of the military about their civil rights, launching a website for service members explaining their rights under the Uniformed Service Employment and Reemployment Rights Act of 1994, the Uniformed and Overseas Citizen Absentee Voting Act, and the Servicemembers Civil Relief Act.

## **Combating Public Corruption**

Public corruption prosecutions remain a high priority for the Department. Our citizens are entitled to honest services from all public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests. The Department's achievements during the past year in this area show a steady commitment to fighting public corruption wherever it is found and on a non-partisan basis. The Department has devoted substantial resources to its efforts in this area. The FBI, for example, now has 639 agents dedicated to corruption matters, as compared to 358 in 2002.

The Department continues its vigorous pursuit of corruption within the Executive Branch. Recent cases have included a former Deputy Secretary of the Interior, J. Steven Griles, who obstructed a congressional investigation, to other executive branch officials, such as former Department of Health and Human Services Special Agent Scott Gompert, who stole \$1.1 million.

The Department has also devoted significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related endeavors. To date, these efforts have resulted in criminal charges against 40 individuals and two corporations for public corruption and government fraud involving government contracts valued at over \$269 million. This effort includes cases against U.S. military officials,

such as Major John Rivard, who pled guilty to accepting \$400,000 in bribes; Major John Cockerham, charged in August, 2007 for accepting \$9.6 million in bribes; and Captain Austin Key, charged in August, 2007 for accepting \$50,000 to steer contracts.

Additionally, in order to more effectively investigate and prosecute procurement fraud, the Department formed the National Procurement Fraud Task Force in October 2006. These efforts are just the latest manifestation of the Department's longstanding commitment to combating corruption both at home and abroad. The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law. In 2007, we brought 16 FCPA enforcement actions against individuals and corporations who violated the statute, including filed charges against seven individuals. These 16 enforcement actions represent a 100 percent increase over the 8 enforcement actions brought in 2006, which was itself the largest total in the FCPA's 30 year history.

Of course, public corruption is not limited by political party, or to Executive Branch officials. This Committee is well-aware of the Department's efforts to prosecute public corruption by Members of Congress and their staffs. You have my commitment that, where warranted, these investigations and prosecutions will continue without regard to politics or political affiliation.

The Department has also pursued corruption investigations at the state and local level. For example, the Department convicted three former Alaska state legislators in separate trials (the most recent occurring in November) as part of its Operation Polar Pen; two former state senators in Rhode Island have pleaded guilty as part of Operation Dollar Bill; and 16 defendants, including a state legislator, were indicted for extortion and other charges in Dallas, Texas.

In the area of election crimes, the Department continued its national educational and training programs for both prosecutors and FBI agents in the area of election law in 2007. Where willful violations of our election and campaign finance laws have occurred, the Department has brought charges.

### **Immigration and the Southwest Border**

Enforcing the Nation's immigration laws remains an important priority for the Department. Last month, I visited the Southwest Border and met with some of the prosecutors and law enforcement officers who serve on the front lines of the effort to secure our borders. They have a tough job to do, and they are doing it well. In the last seven years we've increased the total number of prosecutors in that region by 29 percent, leading to a dramatic increase in case filings and convictions. Nationwide, we've seen more than a 43 percent increase in immigration filings between 2001 and 2007. Our U.S. Attorneys' Offices have pursued not only immigration violations, but also serious immigration-related offenses such as aggravated identity theft and passport fraud.



With the \$7 million Congress recently appropriated to support our federal prosecutors on the Southwest Border we will be able to do more. We expect to use this funding to deploy up to 40 new prosecutors and 20 much-needed support staff, based upon the needs of the district. In addition, through funding provided by the Department of Homeland Security, 10 attorney positions and 10 contract support staff are being sent to the border offices in order to respond to civil litigation related to the border fence project. In total, up to 50 attorneys and 30 support positions will be deployed by December 2008.

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In addition to overseeing the Department's efforts in these and other priority areas, I have worked with the Committee on several legislative issues since my confirmation. I would like to address four of these issues today.

**Ensuring That Intelligence Tools Keep Pace With Emerging Threats**

First, in the area of national security, I urge you to work with me to pass long-term legislation to modernize the Foreign Intelligence Surveillance Act (FISA). S. 2248, the FISA Amendments Act of 2008, which originated in the Senate Select Committee on Intelligence, would include the authorities you provided in the Protect America Act—authorities that have allowed us to close critical intelligence gaps. And this bill contains immunity for those telecommunications companies who have been sued because they are believed to have responded to the Government's call for assistance in the aftermath of September 11. The Protect America Act is set to expire in just ten days, and it is vital

that Congress enact long-term FISA modernization legislation, with retroactive immunity, before that Act expires.

Since Congress passed the Protect America Act last year, officials from the Justice Department and the Intelligence Community have testified before Congress on many occasions about the needed authorities; we have held briefings on our implementation of the Act and oversight of our use of these authorities; and we have met with Members and staff on these issues, including providing substantial technical advice and comments on the text of the legislation. Long-term reauthorization of the Protect America Act's authorities allowing our intelligence professionals to surveil targets overseas without individual court orders is the top legislative priority of the Department of Justice.

In the Senate, this collaborative process has resulted in S. 2248, which is a strong bipartisan bill currently under consideration by that body. S. 2248 was reported out of the Senate Intelligence Committee on a strongly bipartisan 13-2 vote, and we believe it is a balanced bill that includes many sound provisions that would allow our Intelligence Community to continue obtaining the information it needs to protect the nation, while also protecting the privacy interests of Americans. The version of that bill now under consideration is a carefully crafted measure, which enjoys wide support, and we are optimistic it will lead to a bill the President can sign. I look forward to working with you and other members of the House of Representatives to achieve final passage of this important legislation.

I also want to make clear why it is our top priority. We have all seen what happens when terrorists go undetected. We must do everything possible, within the law, to prevent terrorists from translating their warped beliefs into deadly action. To stop them, we must know their intentions, and one of the best ways to do that is by intercepting their communications. Modernization of FISA is a critical part of that effort.

The Department would have grave concerns about any legislative proposal taking a short-term approach to modernizing FISA. Sunset provisions create uncertainty in the Intelligence Community regarding the rules governing critical intelligence collection practices. Intelligence professionals cannot focus on their work in protecting America from terrorist attacks while concentrating on learning new procedures and policies that may change in a few years. A sunset provision also burdens our private sector partners by requiring them to invest their limited resources in complying with a legal framework that is in constant flux. We need the help of these private partners to use these authorities effectively to keep the country safe. We should not be discouraging them from assisting us by burdening them with an ever-changing legal regime. The threat of terrorism to this country is persistent and ongoing, and we should strive for long-term institutional changes that increase our ability to meet that threat.

It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill. First, this is the fair and just thing to do. After reviewing the relevant correspondence between the Executive

Branch and the companies that assisted with communications intelligence activities after the September 11th attacks, the Senate Select Committee on Intelligence found that these companies acted on a good faith belief that their assistance was lawful. Second, retroactive immunity serves our national security interests. As the Senate Intelligence Committee determined, “without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future,” resulting in a “possible reduction in intelligence” that the committee concluded is “simply unacceptable for the safety of our Nation.”

The liability protection offered in S. 2248 bill is not blanket immunity, as it applies only in the limited circumstances where the Attorney General certifies to a court that the company either (1) did not provide the alleged assistance, or (2) did provide assistance between September 2001 and January 2007 with communications intelligence activities designed to detect and prevent a terrorist attack, and only after receiving a written request from a high-level Government official indicating that the activity was authorized by the President and determined to be lawful. A court must review this certification before an action may be dismissed, and the immunity does not extend to the Government, Government officials, or any criminal conduct. In short, the provision in the Intelligence Committee’s bill would provide protection only in circumstances where such protection is appropriate.

A proposal that would allow lawsuits to continue by substituting the Government as a defendant in place of the telecommunications company is an unsatisfactory solution.

Even if the Government is substituted for the company in the lawsuit, the company remains vulnerable to third party discovery requests, litigation costs, and reputational harm that could deter its future cooperation with the Intelligence Community. The information that comes to light through litigation—whether certain companies provided assistance, and, if they did, what that assistance entailed—would not only hurt the companies, it would threaten national security.

I also want to address a recent proposal that offers an alternative to the Congress deciding on the issue of immunity. This proposal would grant authority to the FISA Court to decide, under a multi-part test, whether the provider's assistance was appropriate. I know that some members of this Committee have expressed an interest in this proposal, and I have spoken personally with them about it. Respectfully, I think it is the wrong approach to the problem we face. Such a proposal would simply shift likely protracted litigation on these matters to another venue, with the companies still subject to the burdens of litigation to determine how and why they assisted the Government.

Transferring those cases to the FISA Court after the Congress's extensive review of the underlying facts could be read as sending a signal that Congress doubts the actions of the companies who are believed to have assisted us—the very sort of companies the Intelligence Committee recognized that we rely on to help us protect the Nation. The new proposal could also lead companies to feel compelled to make an independent finding through their own investigation before complying with a lawful Government request for assistance that the request is lawful. That could cause dangerous delays in critical

intelligence operations and put the companies in the impossible position of making the legal determination without access to the highly classified facts that they would need to do so.

I urge Congress, and the Members of this Committee, to pass long-term legislation to modernize the Foreign Intelligence Surveillance Act and to provide retroactive immunity. We must be able to continue to collect the foreign intelligence information necessary to protect the Nation. I am confident that we can achieve this laudable goal.

### **Media Shield**

I would also like to discuss the Department's position on proposed media shield legislation and its potential effect in the national security arena. I understand that a bill has already passed this House, but I think it critical that I explain my grave concerns with the approaches reflected both in that bill and in the version currently pending in the Senate. Having been a journalist, and having represented media entities in civil litigation, I understand the critical role that the media plays in our society. Nevertheless, the Department of Justice joins the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, and others in strongly opposing the Free Flow of Information Act of 2007.

First, in practical effect, either bill would eliminate our ability to prosecute leaks of classified information to the media. Certainly, throughout the last several years we

have seen significant leaks of classified information that have had a detrimental impact on national security. Particularly given the threats we face, and what seems to be a constant shrinkage in our inventory of useful strategies that remain useful because they remain secret, now is not the time to give license to those who leak classified information in violation of our laws, and place at risk our military and intelligence professionals.

Second, these bills would dramatically alter the appropriate balance between the prosecution of criminals and the needs of a free press that has been the standard in the Federal courts at least since 1972 when the Supreme Court decided *Branzburg v. Hayes*. Under the current system, DOJ guidelines determine in any specific case whether it is appropriate to issue a subpoena to a reporter. These internal guidelines provide a series of standards and checklists, including my specific approval, before any reporter is subpoenaed. As a result, since 1991, the Department has authorized the issuance of fewer than two dozen subpoenas seeking source-related information—an average of less than two per year. By contrast, under the Media Shield bills, even in an investigation of a past terrorist attack, the bills would have a judge decide whether the Department’s need for the information outweighs the “public interest” in the free flow of information. No standard for decision is provided in either bill. But even if one views these factors as capable of being balanced, this is not a determination that can reasonably be asked of a judge, particularly in cases involving national security.

Finally, although much of the discussion has centered on a few high-profile subpoenas to journalists, by their terms the media shield proposals have a much broader

reach. Their impact is not limited to subpoenas, but instead applies to core national security authorities, including FISA. I fear that these bills, rather than striking an appropriate balance between the interest of prosecutors and that of the press, would lead to unintended consequences, for example, impeding investigations of terrorists.

I am not alone in my concerns. Twelve key members of the Intelligence Community just sent a letter to the Senate. Each signed on because of the concerns about what this bill could do to our ability to safeguard critical information and the American people. I would urge that Members of this Committee carefully consider the concerns set forth in that letter, as well as concerns that the Department has expressed.

### **Whistleblower Protection Legislation**

I would also like to take this opportunity to reaffirm my concern, shared by the Director of National Intelligence, the Secretary of Defense, and the Secretary of Homeland Security, concerning recent bills addressing protections afforded to whistleblowers. First and foremost, we believe that these bills authorize disclosures that threaten not only the integrity of national security programs, but also the security of the people involved in such programs. The current bills would do far more than afford whistleblowers protection; instead, these bills would have the effect of increasing inappropriate disclosure of classified information. Moreover, we believe that the current statutory protections strike the appropriate balance between protecting whistleblowers and maintaining the long-recognized duty of the Executive branch to safeguard classified information and its authority and responsibility to manage its employees.



These bills would also raise serious constitutional concerns on fundamental separation of powers principles.

We would urge Members of this Committee and this House to consider carefully the concerns set forth in the letter sent January 22, 2008, by myself and others, before sending a bill to the President.

### **Protecting Communities from Violent Drug Offenders**

I would next like to ask Members of this Committee and the House as a whole to focus on another urgent issue: the decision of the U.S. Sentencing Commission to apply retroactively, effective March 3, 2008, a new -- and lower -- guideline sentencing range for crack cocaine trafficking offenses. Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for *immediate* release into communities nationwide. Overall, the Sentencing Commission estimates that retroactive application of these lower guidelines could lead to the resentencing of more than 20,000 crack cocaine offenders, any number of whom will be released early.

Retroactive application of these new lower guidelines will pose significant public safety risks; risks that will be disproportionately felt in urban communities. Many of these offenders are among the most serious and violent offenders in the federal system and their early release at a time when violent crime is rising in some communities will produce tragic, but predictable results. These individuals could very well be released without the benefit of appropriate re-entry programs, increasing the risks of recidivism

and further imperiling the safety of the communities to which they would return. Moreover, retroactive application of these penalties will be difficult for the legal system to administer given the large number of cases requiring resentencing and uncertainties as to certain key legal issues, such as the degree to which the prior sentence can be reduced. This increase would impose significant hardships on the federal judicial docket and risk delaying the timely administration of justice in both criminal and civil cases, while diverting law enforcement resources critically needed to fight violent crime. Prosecutors reasonably made their cases based on the sentences available at the time.

As a result, we think it is imperative for Congress to pass legislation to address the Sentencing Commission's decision. In calling for action, I emphasize that we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such as first-time, non-violent offenders. Instead, our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result from retroactive application of these lower guidelines. We would appreciate the opportunity to work with this Committee and this House to address the retroactivity issue in an expedient manner while beginning discussions on changes to the current statutory differential between crack and powder cocaine offenses.

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Despite disagreements we may have on any issue, I hope and expect that we will find common ground on many other matters of great importance to this Committee and to

the country—including, most importantly, our shared belief in the mission of the Department of Justice and the great work of its employees.

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today, and I look forward to working with you to advance the priorities and mission of the Department of Justice.