

Edited Transcript of  
The Attorney General's Testimony before the Senate Judiciary Committee  
"DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism."

December 6, 2001

Senator Leahy Chairing the Committee.

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**ATTORNEY GENERAL ASHCROFT:** Thank you, Mr. Chairman, Senator Hatch, and members of this committee. I am grateful for the opportunity of appearing to testify before you today. It's a pleasure to be back in the United States Senate, and I am grateful. On the morning of September 11th, as the United States came under attack, I was in an airplane with several members of the Justice Department en route to Milwaukee, in the skies over the Great Lakes. By the time we could return to Washington, thousands of people had been murdered at the World Trade Center, 189 more were dead at the Pentagon, 44 had died in the crash to the ground in Pennsylvania. From that moment, at the command of the president of the United States, I began to mobilize the resources of the Department of Justice toward one single overarching and overriding objective: to save innocent lives from further acts of terrorism.

America's campaign to save innocent lives from terrorists is now 87 days old. It has brought me back to this committee to report to you in accordance with Congress's oversight role. I welcome this opportunity to clarify for you, and for the American people, how the Justice Department is working to protect American lives while preserving American liberties.

Since those first terrible hours of September the 11th, America has faced a choice that is as stark as the images that linger of that morning. One option is to call September 11th a fluke, to believe it could never happen again, and to live in a dream world that requires us to do nothing differently. The other option is to fight back, to summon all our strength and all of our resources, and devote ourselves to better ways to identify, disrupt and dismantle terrorist networks.

Under the leadership of President Bush, America has made the choice to fight terrorism -- not just for ourselves, but for all civilized people. Since September 11th, through dozens of warnings to law enforcement, a deliberate campaign of terrorist disruption, tighter security around potential targets, and a preventative campaign of arrest and detection of law-breakers, America has grown stronger, and safer in the face of terrorism. Thanks to the vigilance of law enforcement and the patience of the American people, we have not suffered another major terrorist attack. Still, we cannot -- we must not allow ourselves to grow complacent.

The reasons are apparent to me each morning. My day begins with a review of the threats to Americans and to American interests that have been received in the previous 24 hours. If ever there were proof of the existence of evil in the world, it is in the pages of these reports. They are a chilling daily chronicle of the hatred of Americans by fanatics who seek to extinguish freedom, enslave women, corrupt education, and to kill Americans wherever and whenever they can.

The terrorist enemy that threatens civilization today is unlike any we have ever known. It slaughters thousands of innocents, a crime of war and a crime against humanity. It seeks weapons of mass destruction, and threatens their use against America. No one should doubt the intent nor the depth of its continuing, disruptive hatred.

Terrorist operatives infiltrate our communities, plotting, planning, waiting to kill again. They enjoy the benefits of our free society, even as they commit themselves to our destruction. They exploit our openness -- not randomly or haphazardly, but by deliberate premeditated design.

This is a seized al Qaeda training manual -- a "how-to" guide for terrorists that instructs enemy operatives in the art of killing in a free society. Prosecutors first made this manual public in the trial of the al Qaeda terrorists who bombed U.S. embassies in Africa. We are posting several al Qaeda lessons from this manual on our website today so that Americans can know about the enemy.

In this manual, al Qaeda terrorists are now told how to use America's freedom as a weapon against us. They are instructed to use the benefits of a free press, newspapers, magazines, broadcasts, to stalk and to kill victims.

They are instructed to exploit our judicial process for the success of their operations. Captured terrorists are taught to anticipate a series of questions from authorities and in each response to lie -- to lie about who they are, to lie about what they are doing, to lie about who they know in order for the operation to achieve its objective. Imprisoned terrorists are instructed in this manual to concoct stories of torture and mistreatment at the hands of our officials. They are directed to take advantage of any contact with the outside world. This manual instructs them, and I quote, "Communicate with brothers outside prison and exchange information that may be helpful to them in their work. The importance of mastering the art of hiding messages is self-evident here." Closed quote.

Mr. Chairman, and members of this committee, we are at war with an enemy that abuses individual rights as it abuses jetliners. It abuses those rights to make weapons of them with which to kill Americans.

We have responded by redefining the mission of the Department of Justice. Defending our nation and its citizens against terrorist attacks is now our first and overriding priority. We have launched the largest, most comprehensive criminal investigation in world history to identify the killers of the September 11th tragedy and to prevent further terrorist attacks.

Four thousand FBI agents are engaged with other international counterparts in an unprecedented worldwide effort to detect, disrupt and dismantle terrorist organizations. We've created a national task force at the FBI to centralize control and information sharing in our investigation. This task force has investigated hundreds of thousands of leads, conducted over 500 searches, interviewed thousands of witnesses, and obtained numerous court-authorized surveillance orders. Our prosecutors and agents have collected information and evidence from countries throughout the Middle East and through Europe.

Immediately following the September 11th attacks, the Bureau of Prisons acted swiftly to intensify security precautions in connection with al Qaeda and other terrorist inmates, increasing perimeter security at a number of key facilities.

We have sought, and we received additional tools from Congress for which we are grateful. You have cited them, and they were important. Already we have begun to utilize many of these tools. Within hours of the passage of the USA Patriot Act, we made use of its provisions to begin enhanced information sharing between the law enforcement and intelligence communities. We have used the provisions allowing nationwide search warrants for e-mail and subpoenas for payment information. We have used the act to place those who access the Internet through cable companies on the same footing as other individuals. Just yesterday, at my request, the State Department designed 39 entities as terrorist organizations pursuant to the USA Patriot Act.

We have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets. Currently we have brought criminal charges against about -- well -- against, pardon me, 110 individuals, of whom 60 are in federal custody. The INS has detained 563 individuals on immigration violations, has in detention today.

We have investigated more than 250 incidents of retaliatory violence and threats against Arab-Americans, Muslim-Americans, Sikh Americans, and South Asian-Americans. Since September 11th, the Customs Service and Border Patrol have been at their highest state of alert. All vehicles and persons entering this country are subjected to the highest level of scrutiny.

Working with the State Department, we have imposed new screening requirements on certain applicants for non-immigrant visas. At the direction of the president, we have created a Foreign Terrorist Tracking Task Force to ensure that we do everything we can to prevent terrorists from entering the country and to locate and remove those who are already here.

We have prosecuted to the fullest extent of the law individuals who waste precious law enforcement resources through anthrax hoaxes. We have offered non-citizens willing to come forward with a valuable -- pardon me, willing to come forward with valuable information a chance to live in this country and one day to become citizens.

We have forged new cooperative agreements with Canada to protect our borders and the economic prosperity that our borders and the appropriate maintenance of the flow of commerce across those borders sustains. We have embarked on a war-time reorganization of the Department of Justice. We are transferring resources and personnel to field offices where citizens are served and protected. The INS is being restructured to better perform its service and border security responsibilities. Under Director Bob Mueller, the FBI is undergoing an historic reorganization to put the prevention of terrorism at the center of its law enforcement and national security effort.

Outside Washington, we are forging new relationships of cooperation with state and local law enforcement. We have created 93 anti-terrorist task forces across the country, in each U.S. attorney's district, to integrate the communications and activities of state, local and federal law enforcement.

In all of these ways and more, the Department of Justice has sought to prevent terrorism with reason, careful balance, and excruciating attention to detail. Some of our critics, I regret to say, have shown less affection for details. Their bold declaration of so-called facts have quickly dissolved upon inspection into vague conjecture. Charges of kangaroo courts and shredding the Constitution give new meaning to the term "fog of war." Since lives and liberties depend on clarity, not obfuscation, and upon reason, not hyperbole, let me take this opportunity to be clear. Each action taken by the Department of Justice, as well as the war crimes commissions considered by the president and the Department of Defense, is carefully drawn to target a narrow class of individuals -- terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists. Our prevention strategy targets the terrorist threat.

Since 1983, the United States government has defined terrorists as those who perpetrate premeditated, politically motivated violence against non-combatant targets. My message to America this morning then is this: if you fit this definition of a terrorist, fear the United States, for you will lose your liberty. We need honest, reasoned debate, and not fear-mongering. To those who pit Americans against immigrants and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of goodwill to remain silent in the face of evil.

Our efforts have been crafted carefully to avoid infringing on constitutional rights while saving American lives. We have engaged in a deliberate campaign of arrest and detention of law-breakers. All persons being detained have the right to contact their lawyers and their families.

Our respect for their privacy and concern for saving lives motivates us not to publicize the names of those detained. We have the authority to monitor the conversations of 16 of 158,000 federal inmates and their attorneys because we suspect these communications could facilitate acts of terrorism. Each such prisoner has been told in advance his conversations will be monitored. None of the information that is protected by attorney-client privilege may be used for prosecution. Information will only be used to stop impending terrorist acts and to save American lives.

We have asked a very limited number of individuals, visitors to our country holding passports from countries with active al Qaeda operations, to speak voluntarily with law enforcement. We are forcing them to do nothing. We are merely asking them to do the right thing, to willingly disclose information they may have of terrorist threats to the lives and safety of all people in the United

States. Throughout all our activities since September the 11th, we have kept Congress informed of our continuing efforts to protect the American people.

Beginning with a classified briefing by Deputy -- pardon me, by Director of the FBI Mueller and me on the very evening of September 11th, the Justice Department has briefed members of the House, the Senate and their staffs on more than 100 occasions. We have worked with Congress in the belief and the recognition that no single branch of government alone can stop terrorism.

We have consulted with members out of respect for the separation of powers that is the basis of our system of government. However, Congress's powers of oversight -- Congress's power of oversight is not without limit. The Constitution specifically delegates to the president the authority to, and I quote, "take care that the laws are faithfully executed," closed quote. And, perhaps most importantly, the Constitution vests the president with the extraordinary and sole authority, as commander-in-chief, to lead our nation in times of war.

Mr. Chairman and members of this committee, not long ago I had the privilege of sitting where you now sit. I have the greatest reverence and respect for the constitutional responsibilities you shoulder. I will continue to consult with Congress so that you may fulfill your constitutional responsibilities. In some areas, however, I cannot and will not consult with you. The advice I give to the president, whether in his role as commander-in-chief when at war or in any other capacity, is privileged and confidential. I cannot and will not divulge the contents, the context, or even the existence of such advice to anyone, including Congress, unless the president instructs me so to do.

I cannot and will not divulge information, nor do I believe that anyone here would wish me to divulge information that would damage the national security of the United States, the safety of its citizens, or our efforts to ensure the same in an ongoing investigation.

As attorney general, it is my responsibility, at the direction of the president, to exercise those core executive powers the Constitution so designates. The law enforcement initiatives undertaken by the Department of Justice, those individuals we arrest, detain or seek to interview, fall under these core executive powers.

In addition, the president's authority to establish war crimes commissions arises out of his power as commander-in-chief. For centuries, Congress has recognized this authority, and the Supreme Court has never held that any Congress may limit it.

In accordance with over 200 years of historical and legal precedent, the executive branch is now exercising its core constitutional powers in the interest of saving the lives of Americans. I trust that Congress will respect the proper limits of executive-branch consultation that I am duty-bound to uphold. I trust as well that Congress will respect this president's authority to wage war on terrorism and to defend our nation and its citizens with all the power vested in him by the Constitution and entrusted to him by the American people.

I thank you for your willingness to allow me to complete this statement.

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SEN. LEAHY: Thank you. General, you've stated that the authority for the military order arises out of the president's position as commander-in-chief, and the Supreme Court has never held that the Congress may limit it. But the fact is that the Supreme Court has never upheld the president's authority extending so far as to allow him to unilaterally set up military tribunals absent congressional authority. So, basically, this is a calculated risk that the Supreme Court would uphold something it has not upheld before. I mention that because I look at Ex Parte Milligan, for example, which says that military tribunals for non-military personnel cannot be justified under the mandate of the president because he is controlled by law. His sphere of duty is to execute, not to make the laws, and there is no unwritten criminal code to which resort (to be had?) as the (source?) of

jurisdiction, thus raising a very highly questionable -- saying it's highly questionable that he could do this, absent congressional authority.

Now, there is interest in the Congress in defining what a military tribunal could be, what would be his authority. Administration officials have stated the planned scope of military tribunals was far narrower than had been suggested by the original order. More recent assurances that they would be applied sparingly have been very helpful. So I wanted to see how the administration would use the military order.

First, as written, the military order applies to non-citizens of the United States. That would cover about 20 million people here in the United States legally today. But the president's counsel now says military commissions would not be held in the United States but rather close to where our forces may be fighting. And then an anonymous administration official said there's no plan to use military commissions in this country but only for those caught in battlefield operations.

Secondly, while the military order is essentially silent on the procedural safeguards that would be provided at military commission trials, the White House counsel has now explained that military commissions would be conducted like courts-martial.

Third, nothing in the military order would prevent commission trials from being conducted in secret, which was done, for example, of the eight Nazi saboteurs after World War II, most often cited by the administration.

But now Mr. Gonzalez says that trials before military commissions would be as open as possible. Mr. Chertoff said something similar. Now, this is in sharp contrast to the statements before our hearings that, quote, from the administration, "Proceedings promise to be swift and largely secret, with one military officer (stating?) that the release of information might be limited to various facts, like defendants' name." Finally, the order expressly states that the accused in military commissions shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, at any court. But now the administration says this is not an effort to suspend habeas corpus.

So now, with the explanations that have come out subsequently, I understand, first, that the administration does not intend to use military commissions to try people arrested in the United States; secondly, the military commissions will follow the rules of procedural fairness used for trying U.S. military personnel; and thirdly, the judgments of the military commissions will be subject to judicial review. Is that your understanding also?

ATTY. GEN. ASHCROFT: Well, you've given me a lot to think about in that question.

SEN. LEAHY: Well, let me -- I --

ATTY. GEN. ASHCROFT: You've spoken of a number of things that I'd like to comment on.

SEN. LEAHY: Sure.

ATTORNEY GENERAL ASHCROFT: First of all, about the authority of the president of the United States to wage war under the Constitution and to address war crimes in the process of waging war, I believe that's clearly the power of the president and his power to undertake that unilaterally. The Supreme Court did address, in the Quirin case 60 years ago, the issue of war crimes commissions. And in that case, it cited the authority of the congressional declaration of war as language recognizing the president's power to create war crimes commissions, but I don't believe that the court indicates that, or predicates its assumption and accordance of the president that power, upon that particular authority.

Nevertheless, the identical authority found in the article of declaration of war in the Second World War is now the authority which is listed in the Uniform Code of Military Justice at 10 USC Section 821, and it is my position that the president has an inherent authority and power to conduct war and to prosecute war crimes absent that indication in the code of Military Justice. But for those who

would disagree with that, the identical provision authority that was existent and was present in the Quirin situation is now present in the U.S. Code of Military Justice.

SEN. LEAHY: But General, if I might just for a moment, the Quirin case did not address the question of whether the president could set up a military tribunal absent congressional authority. They did not address that question. and the previous, Ex Parte Milligan, apparently did.

ATTORNEY GENERAL ASHCROFT: Well --

SEN. LEAHY: But my question still goes to this, aside from -- and understand, there are members on both sides of the aisle who are willing to work with you to try to establish an authority, a congressional authority for military tribunals, but in a certain framework. But with all the changes and switchbacks and everything else in the statements that have come from different parts of the administration, my question is still, basically, does the administration -- whether these are legal or not, is my understanding correct that the administration, one, does not intend to use military commissions to try people arrested in the United States; two, the military commissions would follow the rules of procedural fairness used for trying U.S. military personnel; and three, the judgments of the military commissions will be subject to judicial review. Are those three points -- is that understanding correct? Is that your understanding?

ATTORNEY GENERAL ASHCROFT: I cannot say that I have that understanding in the way that you have it. I do not know that the United States would forfeit the right to try in a military commission an alien terrorist who was apprehended on his way into the United States from a submarine or from a ship carrying explosives or otherwise seeking to commandeer an American asset to explode or otherwise commit acts of terror within the United States.

SEN. LEAHY: But not my question, General.

ATTORNEY GENERAL ASHCROFT: Your question asked about people arrested in the United States; it would be possible for that person to be so arrested. I think -- I don't -- let me just indicate this; two points. One, I want to mention that Ex Parte Milligan was limited in the Quirin case; limited to its facts, and the Quirin case upheld the use of commissions in the United States against enemy belligerents. And number two, the president's order, which I believe to be constitutional, assigns to the Department of Defense the development of a framework that would answer many of these questions, but it's premature to try and anticipate exactly what that framework would be, in my judgment. I stand ready, as provided in the president's military order establishing commissions to try war crimes, to assist the Department of Defense. And frankly, I would stand ready to convey, if you wanted me to be the conduit, to convey suggestions from the Congress to the Department of Defense, although you all have complete access to the Department of Defense for the achievement of those purposes.

SEN. LEAHY: Just so the members of the committee will understand, originally -- I am advised that we're going to have three votes beginning at 11:00 on three federal judges, one being a courts of appeal judge, the other two being district judges. I have asked, I have sent word to the floor and asked if they might do by voice vote the two district judges, because they are both ones that we voted unanimously to pass out of the Judiciary Committee. The court of appeals judge would be then done by a roll call, and if that procedure is followed, which I understand they will, we would not have that first vote until -- (aside) -- when, 10:40? Eleven? Eleven-forty. So with that, I yield to Senator Hatch.

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SEN. KENNEDY: Thank you very much. Thank you, general. General, like Senator Leahy, I am profoundly concerned about the administration's broad plan on the military tribunals, and the plan raises extremely serious questions about fundamental civil liberties, questions that have not yet been satisfactorily answered by the administration's officials defending it.

History has shown that the military courts have been effective. But they have also shown that they have been abused. And this time we want to try and get it right. And it is of profound importance to the country that we defend our ideals and our security.

President Bush's executive order is a broad proposal that has enormous potential for abuse. There are few if any due process rights granted to defendants, and the trials may occur in complete secrecy. So constitutional experts have told us, however, that we can implement fair military trials that ensure fundamental civil liberties. We know it can be done, we know it should be done, but we have not heard that it will be done. So I am interested in what steps are being taken to give meaning to the principle -- you know, you reference here yourself this morning of full and fair trial military tribunals, and how the administration will work with the Congress to protect the constitutional ideals. And when will we hear this? What can you tell us about the scope?

ATTORNEY GENERAL ASHCROFT: Well, I am pleased to say that the president's order requires that there be full and fair trial proceedings. Those are the kinds of descriptive terms that have governed the development of war crimes commissions and have govern the proceedings of war crimes commissions that operate today.

The president has ordered -- and it is a military order to the Department of Defense -- it's out of his responsibility as commander and chief of a nation in conflict -- that he ordered that the Defense Department develop a framework that would provide full and fair proceedings. There are obviously some hints in the president's order that indicate a level of fairness that I think is clearly understood. He has indicated that the hearing should be closed when it's in the national interests to close them.

And when -- and I think the administration has made clear its desire not to close hearings when they are not in the national interests. It is to be noted that every judicial or adjudicatory process that I know of has some provision for closing hearings, to protect the system and to protect the integrity of the operation. Our courts provide for sealed orders. They sometimes even have gag orders. They have in certain areas plans to protect the identify of witnesses.

Similarly, the ongoing war crimes efforts in The Hague that relate to war crimes have those kinds of similar procedures. I believe that the Department of Defense, which has over 3,000 active full-time working lawyers, and which conducts a wide variety of military operations that relate to the adjudication of charges, has the capacity to develop a plan and framework that will work effectively. And I expect it to do so -- we'll stand ready to assist them in doing so.

SEN. KENNEDY: Can you give us some idea when that will be announced? And can you be any more precise in terms of the scope? Or is that the way you want to leave it?

ATTORNEY GENERAL ASHCROFT: Well, senator, I cannot. I just don't have specific information about the timeline. I would mention that the time of this setting is one where the president has sought to create a tool to protect American lives through his conduct of the war, and to create it in advance, and to make it known to the Congress and the people of this country well in advance of any demand for its services. In the Roosevelt administration 60 years ago we didn't have the luxury of that kind of commentary, and I am sure contributions made by the Congress and those in the culture would be welcomed by the secretary of Defense.

SEN. KENNEDY: Well, I would have liked to have gotten into the questions on the automatic -- the administration's automatic stays of immigration judges' release orders, and the attorney-client communications. But let me in the time that I do have left just get into one area, and that is in reference to the New York Times story this morning. Last month, a manual entitled, "How I Trained Myself for Jihad" -- it's a manual very similar to the one that you mentioned here -- was found in a terrorist safe house in Kabul. And it states, "In other countries, some states of U.S., it is perfectly legal for members of the public to own certain types of firearms. If you live in such a country, obtain an assault weapon legally --prefer AK-47 or variations -- learn how to use it properly, and go and practice in the areas allowed for training."

In September, a federal court convicted a number of members of the terrorist group Hezbollah on seven counts of weapons charges, and conspiracy to ship weapons and ammunition to Lebanon. He had purchased many of the weapons at gun shows in Michigan. We have been trying to deal with this problem for many months -- potential terrorists can walk into a gun show, walk out with a gun, no questions asked.

The report in today's New York Times that officials at the Department of Justice refused to let the FBI examine its background checklist to determine whether any of the 1,200 people detained following the September 11th attacks recently bought guns. Why is the department handcuffing the FBI in its efforts to investigate gun purchases by suspected terrorists?

ATTORNEY GENERAL ASHCROFT: Thank you, Mr. Senator, for that inquiry. The answer is simple: The law which provided for the development of the NIC, the National Instant Check system, indicates that the only permissible use for the National Instant Check system is to audit the maintenance of that system. And the Department of Justice is committed to following the law in that respect. And when --

SEN. KENNEDY: Do you think it ought to be changed?

ATTORNEY GENERAL ASHCROFT: When the request first came, obviously the instinct of the FBI was to use the information to see. When they were advised by those who monitor whether or not we are following the congressional direction, we stopped. And I believe we did the right thing in observing what the law of the United States compels us to observe. The list --

SEN. KENNEDY: Do you think it ought to be changed in that provision? The FBI obviously wants that power in order to try to deal with the problems of terrorism. Do you support it?

ATTORNEY GENERAL ASHCROFT: I won't comment on specific legislation in the hypothetical.

SEN. KENNEDY: But would you submit legislation to do what the FBI wants to have done? Would you work with the FBI and submit legislation to deal with this?

ATTORNEY GENERAL ASHCROFT: I will be happy to consider any legislation that you would propose.

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SEN. ARLEN SPECTER (R-PA): Thank you. Attorney General Ashcroft, the regulations which you promulgated for detention of aliens provides that even after the immigration judge orders release, that is stayed by an appeal, and even after the appellate tribunal orders release, that is stayed automatically if it's certified to you as attorney general. But there are no standards set forth as to why the person would be detained further. There is a generalized requirement that these detention rules are articulated for national security, but even after releases by two courts, the detention contains -- remains automatic, without any procedure, or establishment, or articulation of standards as to why. Shouldn't there be some standard? And how do you make that determination for continued detention in the face of the two judicial orders?

ATTORNEY GENERAL ASHCROFT: Well, in the cases which we -- which prompted us to embark upon this procedure, we came to the conclusion that it may be necessary for us from time to time to ask for the detention of an individual pending the final outcome and adjudication of the charges against that individual, and they have to do with national security.

SEN. SPECTER: But what is the -- what is the standard for detention after two judges have ruled that he should be released?

ATTORNEY GENERAL ASHCROFT: Well, those judges are part of the process that is assigned to the Immigration and Naturalization Service function, which is a process which is overseen by the attorney general. And if the attorney general develops an understanding that it's against the national

interest and -- and would in some way potentially violate or jeopardize the national security, then those orders are overruled.

SEN. SPECTER: Attorney General Ashcroft, let me ask you to supplement your answer in writing. What you just said is very generalized. I would like you to provide to the committee what standards the attorney general uses and how that ties into the statute which requires release after seven days. The statute, of course, would take precedence over a regulation. But I want to move on to another question now, and if you would supplement that in writing --

ATTORNEY GENERAL ASHCROFT: I'd be happy to do that. The statute requiring release after seven days is -- I believe the statute says that can be held without charges for seven days. We're talking about individuals against whom charges remain.

SEN. SPECTER: Well, there appears to me, at least on the face, to be some inconsistency, but if you would address that in writing --

ATTORNEY GENERAL ASHCROFT: I'd be very happy to do so. Thank you for the opportunity.

SEN. SPECTER: -- specifying why your decision is to keep him in detention after those two judicial orders, I would appreciate it.

The Constitution provides, Article 1, Section 8, Clause 14, empowering Congress to establish courts with exclusive jurisdiction over military offenses. There has been a statute, which was referred to in the executive order, which delegates certain authority to the president, providing that procedures may be prescribed by the president by regulations which shall so far as he considers practicable apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts. Now, under that statute, there's a pretty plain presumption of using the regular rules of law and rules of evidence unless the president makes the determination that it's not practicable.

When you commented that you were not going to notify the Congress when you have conversations with the president, I agree with you totally. I think that's a privileged communication. And that's the same kind of privilege which some of us are looking toward on an examination of monitoring attorney-client conversations. Any person in the United States has the same attorney-client privilege that the president does. And I appreciate your determinations and respect that. But, we're not really talking about notifying Congress on something you talked to the president about. We are talking about consulting with the Judiciary Committee -- you used to sit next to me right here --

ATTORNEY GENERAL ASHCROFT: It was a pleasure. SEN. SPECTER: You have --

ATTORNEY GENERAL ASHCROFT: It's easier on that side. (Laughter.) SEN. SPECTER: -- pleasure both ways. But you get more than five minutes. (Laughter.) ATTORNEY GENERAL

ASHCROFT: What makes you think that's a pleasure? (Laughter.) SEN. SPECTER: But the question -- the question that I have for you -- my red light is on -- is given the Congress' Congressional authority, and this is not your fault, when Assistant Attorney General Michael Chertoff testified, he told us that the Department of Justice wasn't even involved in this executive order, and that the regulations for the implementation go to the Department of Defense, which was a little surprising, since it's the Department of Justice which has the institutional knowledge and experience.

I note that in the brochure you passed out, that the executive order is on paper with the masthead of the Department of Justice. But as I understand it, DOJ didn't have anything to do with the executive order. What I'd like you to address is your sense as to the appropriate relationship between the Judiciary Committee, the Senate, and the promulgation of the executive order, and the role that the Department of Justice ought to have in rules to implement the generalizations of the executive order.

ATTORNEY GENERAL ASHCROFT: Well, that's a very, very interesting question. And, first of all, it's not -- I don't believe this is an executive order. I believe this is an order of the commander-in-chief and it's a military order. And in as much as it is, many times I think a number of us have slipped to call it an executive order. But the president operates in two ways to deal with crime. It's

his responsibility in the criminal justice system to have as his administration the prosecution of crime, but in his conduct of his responsibility to pursue the war powers and to defend the United States in those settings, he has the right to call forth through the military order the development of a way to adjudicate war crimes, which are separate and distinct from the criminal justice system. I believe that the president indicated in the order which he issued establishing war crimes commissions, that the practicability, I believe is the word that is in the statute, if it were to be applied to this particular commission order, does not exist which would require adherence to those rules. SEN. SPECTER: Thank you very much.

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SEN. FEINSTEIN: Thank you very much, Mr. Chairman. Mr. Attorney General, I'd like you to know personally that I am very supportive of what your department is doing and what you are trying to do. Perhaps as a member of the Intelligence Committee, we learn things about what is happening that we can't really disclose. But I'm convinced that there is reason for deep concern and there are good reasons for doing what the president has proposed. It was interesting for me to read through the al Qaeda manual, the translation of which you just distributed to us. And so that everybody might know, I just want to read one small part. It's under "Principles of Military Organization," and it says, "Missions required of the military organization: The main mission for which the military organization is responsible is the overthrow of the godless regimes and their replacement with the Islamic regimes. "Other missions consist of the following: Gathering information about the enemy - the land, the installations and the neighbors; kidnapping enemy personnel, documents, secrets and arms; assassinating enemy personnel as well as foreign tourists; freeing the brothers who are captured by the enemy; spreading rumors and writing statements that instigate people against the enemy; blasting and destroying the places of amusement, immorality and sin, not a vital target; blasting and destroying the embassies and attacking vital economic centers; blasting and destroying bridges leading into and out of the cities." That's a pretty clear statement of military mission.

Having said that, and just following up on Senator Kennedy's questioning, I'm also aware that many people who may well be associated with terrorist organizations, how they buy their weapons -- and the manual also speaks to that, how to buy these weapons. And I would -- you very nicely offered to look at any proposal.

I'd like this afternoon to send you a proposal which Senators Corzine, Inouye and Reed and I will shortly introduce which is for a universal background check for the purchase of weapons and which is modeled after the Pennsylvania law, which I believe was signed by Governor Ridge. I'd like to ask that you take a good look at that proposal and tell me what you think about it.

Also, having participated in the other hearings, I want to express one thought to you. The resolution the Congress passed authorizing the president to use force was quantified, and it was quantified because a country, as in a full declaration of war, isn't what we're fighting against. So no country was named. But the president was authorized to use all military force against the perpetrators of 9/11, and where that would take him in terms of using that military force.

Now, it may or may not have the same legal standing as a full declaration of war, but I think there is room for some problems here. So I am of the opinion that we should pass an authorizing resolution that really gives you, as the executive branch, the authority to do what you need and also states some things like the standard of proof, like whether it's open or partially closed, the right to counsel, those kinds of things in that declaration. And I have a series of questions, and I won't have time to ask them all, about where you stand with respect to precise points that would be in that declaration. But I'd like to ask one question, because I think it's the heart of a lot of the concern, at least on this side of the aisle.

The White House counsel, Alberto Gonzales, wrote an op-ed for the New York Times recently in which he explained some of the legal provisions in the president's November 13th order. And I'd like

to state this. Mr. Gonzales, and I quote: "The order covers not only foreign enemy war criminals. It does not cover United States citizens or even enemy soldiers abiding by the laws of war."

Now, two days ago, Ambassador Prosper testified that he interpreted this sentence to mean that only those who commit, and I quote, "grave violations that require organization, leadership, promotion of purpose," end quote, will be tried by a military commission. However, the order is sufficiently broad to leave open the concern that this order could cover many people who have a very peripheral relationship to the September 11th attack.

Does the order -- and this is getting at the intent -- does the order only apply to the leaders of al Qaeda and those directly involved in the September 11th attacks and other international terrorist attacks, or will it also apply to those only peripherally involved in criminal activity?

**ATTORNEY GENERAL ASHCROFT:** I think it's, first of all, important to note that it does not apply to American citizens, nor does it apply to people who violate the criminal law of this country generally.

**SEN. FEINSTEIN:** Is that legal aliens.

**ATTORNEY GENERAL ASHCROFT:** This is -- legal aliens are obviously subject to this order. But the point is that the commissions were called into existence by issuing a military order by the president that would try war crimes. So individuals who have committed war crimes in the context of this time of conflict are subject to this order unless they are United States citizens. And technically, in that respect, the universe of individuals eligible for coverage is a large number.

But similarly, every criminal law that we pass in the United States has a potential coverage of 280 million people. That's the population of individuals. And we see those laws as protecting the 280 million people, not putting them in jeopardy.

Similarly, I believe the president's purpose in this war crimes commission which he has issued -- and obviously it calls for the right to counsel and things in the commission order -- is to protect people, not to place them in jeopardy; and obviously the 20 million people in the United States that it would protect, even though the fact they would be eligible for prosecution here, are people who also fear the kind of terrorism that destroyed a number of individuals, not citizens of the United States, in the World Trade Center bombing and in the other incidents that related to September 11th.

It is important that the president's directive that we have a full and fair hearing be reflected in what the Department of Defense eventually details as the procedures. And I would -- I think it'd be appropriate for discussion and contribution to be substantial in that regard to the department.

**SEN. FEINSTEIN:** I know my time has expired. Let me just clear this up. You're saying, then, that the military tribunal will only be used for those who would be prosecuted for war crimes.

**ATTORNEY GENERAL ASHCROFT:** War crimes. And the order limits the jurisdiction of the commission to the commission of war crimes.

**SEN. FEINSTEIN:** Thank you.

**SEN. LEAHY:** I think it also says those who harbor or assist or anything else. Is that correct?

**ATTORNEY GENERAL ASHCROFT:** When it talks about the trials to be conducted, it talks about trials to be conducted for war crimes.

**SEN. LEAHY:** But General -- and I don't expect that you've had time to see this -- I faxed down to your office yesterday some proposed legislation, and I'm not asking questions on that because it wouldn't be fair; you've just gotten it. But I wish you and your experts would look at some proposed legislation. I know Senator Feinstein has raised this issue with me, I think, several days ago, actually, and Senator Schumer and others have.

Members in both parties of the Armed Services Committee raised the issue. I've got to tell you, I think, from a constitutional and an historical point, the president, you, the secretary of Defense and

others will be strengthened in your resolve, but also in your abilities, by having a congressional mandate and framework for these military tribunals.

Nobody up here has questioned the fact that you can have military tribunals, but as an op-ed piece in the Post and others said today, very special circumstances where they are done. But if you have congressional framework, congressional approval, a lot of the questions that are being asked would stop. And I really think, as the senator from California and others have suggested, you should do that.

Please take a look at some of the ideas I've sent and others will send you, because ultimately we work better when we work together. We do not give the best image to the rest of the world when we work apart.

SEN. FEINSTEIN: Mr. Chairman?

SEN. LEAHY: Yes.

SEN. FEINSTEIN: Would you just allow me, because the order is a little different from what the attorney general said. The order states, "To be tried for violations of the laws of war and other applicable laws by military tribunals." So you're saying, "Strike the other applicable laws."

ATTORNEY GENERAL ASHCROFT: I believe that the correct construction of the order would indicate that only individuals who had committed war crimes would be subject to the jurisdiction of the commission.

SEN. LEAHY: Again, I think that's why we should have it laid out very specifically in the law, not by executive order but in the law, what is and what is not allowed.

ATTORNEY GENERAL ASHCROFT: I guess I would refer you to Section 4, Part A: "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission, that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment and/or death." I don't think that's instructive. I've been handed something that is --

SEN. LEAHY: Well, General --

ATTORNEY GENERAL ASHCROFT: It must be in response to some other question.

(Laughter.)

SEN. LEAHY: General, this is not a game -- this is not a game of "gotcha."

ATTORNEY GENERAL ASHCROFT: I'm informed that it is instructive and this is more --

SEN. LEAHY: I thought you were going to say you were informed it is a game of "gotcha."  
(Laughter.)

ATTORNEY GENERAL ASHCROFT: I'll be glad to confer with you about this. Thank you.

SEN. LEAHY: The point is, we're laying down not only a legal history; we're laying down an historical history here. So I would ask, in reviewing the transcript, certainly if there's additions, changes you want to make, do so. And I would say the same for members of the panel.

...

SEN. FEINGOLD: The detention of hundreds of individuals, mostly of Arab or Muslim backgrounds, and many if not most for minor immigration violations. So far, Mr. Attorney General, you have refused to provide a full accounting of these individuals. At first you said that the law prevented you from disclosing the identities of the roughly 550 individuals held on immigration charges.

When I asked Mr. Chertoff last week to cite the law that prevents the department from releasing the information, he confirmed that there is no such law. You also stated that you did not want to help

Osama bin Laden by releasing a list of the detainees. Yet you and Mr. Chertoff have said nothing prevents the detainees from self-identifying. Now this it strikes me just entirely undercuts the argument that giving out this information will help bin Laden, because if you really thought it would you wouldn't permit self-identification; you wouldn't have released the names of 93 individuals who have been charged with federal crimes.

Moreover, as the hearing of the committee held on Tuesday showed, saying detainees can self-identify is sometimes questionable at best. Mr. Al Maqtari, a former detainee who testified, was allowed one phone call of no longer than 15 minutes a week for almost the entire two months he was held in detention. So I would like to specifically ask you about the right of the people being detained to consult an attorney. Mr. Chertoff testified before this committee last week that every one of these individuals has a right to counsel; every person detained has a right to make phone calls to family and attorneys. But the right to an attorney is meaningless if in practice it's impossible for an individual in custody to contact his attorney.

And we heard testimony in the committee Tuesday of at least two instances where individuals were unable to speak with their lawyers for days or even weeks after they were detained. We know that these are not the only such instances. Furthermore, it became clear that the roadblocks to individuals consulting with counsel not only caused great hardship to the clients and violate their rights, but it also hinders the investigation and wastes the resource of law enforcement on people who it turns out have no connection to terrorism.

So I'd like you to answer two questions in this regard. Will you commit to this committee today that the Department of Justice will take immediate steps to assure that every detainee is made aware of his right to be represented by counsel, and made aware of organizations or groups that will represent him without charge if he can't afford a lawyer; that counsel are able to locate and consult with their clients without difficulty; that detainees are permitted to contact their attorneys as often as they need to, and receive or return all calls from their attorneys without interference?

And, second, until the full disclosure requested in my October 31st letter is made, I would request that the Department of Justice determine if any of the people currently held in detention are not represented by counsel. Will you do that?

ATTORNEY GENERAL ASHCROFT: I think I can promise I can do virtually everything you've said. You've made a pretty particular and detailed proposal. You've said that they would be able to return every phone call. And there are reasonable limits that I think have to be imposed, even on those individuals who have violated the law and want to confer with their attorneys. I believe it is the right, and will take steps to make sure again that every detainee understands that we believe it to be his or her right that they have counsel for those for whom government counsel is not provided; in other words, that there is not a government-funded counsel, we have a practice of providing pro bono counsels. And we have been bringing people of those pro bono counsels into the detention facilities regularly, so that individuals who are being detained can have an opportunity to see an attorney if they haven't called them or haven't chosen to. They still have a chance to confer.

I want to do that, and I do not intend to hold individuals without access to counsel. And we will take steps to make sure that we don't. I don't believe that we are. And I will make available to individuals an understanding of pro bono counsel or free counsel in the event that they are not classified as individuals entitled to an attorney at government expense.

I would -- let me clarify a couple of things, if I might -- and I will try not to take too much time. When Mr. Chertoff was answering the question, he said, "I don't know that there is a specific law that bars the disclosure of the names." That was his testimony. And let me just tell you what the frame of reference is when I talk about the law regarding detainees. The law varies in relation to the nature of the detainee. If a detainee is a permanent resident but an alien to the United States, the law prohibits the disclosure of his name or her name. If the person is not a permanent resident but is

here on another kind of visa or authority, the law recognizes the duty of the attorney general or the authorities to protect prosecutions and investigations by not providing lists of the names.

These laws are basically summed up in the FOIA legislation, which talks about freedom of information. And one of the considerations I have is that the privacy rights of individuals in this setting should be respected, that people should not be labeled as "terrorists" while we are still investigating any connections they might have to terrorism. With that in mind, I have -- as in addition to protecting from disclosing information about who we have in custody or don't have in custody as a coordinated list, I have refrained from developing the list, and frankly don't intend to develop such a list.

You mentioned that each of these individuals has had the right to self-disclose their incarceration. Each of these individuals obviously has had the right to contact a lawyer -- you have cited some who have said that their contact hasn't been with free enough access, and I will look carefully into that. I know that one of the individuals that I believe you had at your hearing was an individual that I had, immediately when I had heard that there may have been an irregularity regarding his detention, sent FBI members to his home the minute -- when I heard about that, upon his release. And our report was that he didn't allege a problem at that time. But I am eager -- was then, remain eager -- to reserve these rights.

It is with that in mind that I would say that we have detained about 500 -- we have in detention about 563 individuals who are being detained on Immigration and Naturalization Service items related to the events of 9-11.

We have a total of about 20,000 people detained in the Immigration and Naturalization detention program. We have about 54 people detained on criminal charges, and those individuals obviously, unless the court has sealed the nature of the charge, there is a public record of their detention, although it is not a coordinated list. We have detained some other individuals, and I am not at liberty to discuss their detentions, because they are the subjects of material witness warrants.

SEN. FEINGOLD: Sorry, Mr. Chairman, I know my time is up, but let me just say quickly in response that there still has been no law cited for us that suggests that the law prohibits the disclosure. We have no citation to that effect. And we are still wondering what that is. And, Mr. Chairman, I appreciate the attorney general describing the practice with regard to right to counsel. But I want your commitment, Mr. Attorney General, that everyone in detention will get a lawyer, and will be able to consult with them. Can you give me that commitment?

ATTORNEY GENERAL ASHCROFT: Well, no I can't. I cannot force lawyers on individuals who refuse lawyers. I can make a lawyer available to every person in detention. In terms of the availability to lawyers for calling them, I am not authorized to provide lawyers for those in the INS detention at public expense, but I will promise you I will do everything --

SEN. FEINGOLD: But you commit to making a lawyer available to every person in detention?

ATTORNEY GENERAL ASHCROFT: If lawyers are willing to provide service to those individuals, and we are helping generate those lawyers, we will do that.

SEN. FEINGOLD: Thank you, Mr. Chairman.

SEN. LEAHY: Thank you.

ATTORNEY GENERAL ASHCROFT: I might -- if I might --

SEN. LEAHY: Yes, go ahead --

ATTORNEY GENERAL ASHCROFT: -- I would cite privacy Act 5, U.S. Code 562(a) --that's paren (a), paren (2), as -- and the FOIA 5 U.S. Code 552(b)(6), especially as the prohibition regarding naming legal permanent residents.

SEN. FEINGOLD: You are citing this as a prohibition on disclosing any of the names of those in detention?

ATTORNEY GENERAL ASHCROFT: Not any of the names of those in detention. As I indicated earlier, senator, I -- there is a varying legal standard, depending on the status of the individual. The prevention is on a narrow group of individuals that are permanent residents. The authority not to disclose relates to those who are not permanent residents, but disclosure of which, in the judgment of law enforcement authorities would be ill advised as it relates to aiding the enemy or interfering with the prosecution.

SEN. FEINGOLD: Well, Mr. Chairman, I would simply add that this confirms that there simply is no blanket prohibition in the law of disclosure, and I would just like that on the record.

ATTORNEY GENERAL ASHCROFT: I -- I can agree with the senator, and would stipulate to the fact that there is no blanket prohibition.

SEN. FEINGOLD: Thank you, Mr. Chairman.

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SEN. SCHUMER: Thank you, Mr. Chairman. And thank you for holding these hearings. And I want to thank you, Mr. Attorney General, for being here. And we understand the large job you have ahead of you, and appreciate all your efforts -- whether we agree with all of them or not -- on that behalf.

Let me say that you gave a strong, eloquent statement about the danger before us when you opened, and how you needed to get every tool that you could to fight terrorism. I think that's something that most Americans, in one degree or another, would agree with. But it seems to me that there's one place where you're not seeking that tool at all, and that is the right of illegal immigrations, or whether -- to find out whether illegal immigrants have guns, particularly the people on your detainee list.

Now, there was an article in the New York Times that said that the people in the FBI want this power, want this ability, and the Justice Department has overruled them. I was troubled to read that when the FBI ran an initial check as to whether some of these detainees, 186 of them, had purchased guns, that two had. And when the ATF checked its database, they found that 34 had purchased guns. I don't have to tell you that for all illegal immigrants and for most legal immigrants, they have no right to a gun. And this would seem to somebody, to most with any knowledge of law enforcement, to be an important tool that you could use in helping make us safe.

And so my questions are going to be all about this, because I'm a little befuddled. You're looking for new tools in every direction. I support most of those. But when it comes to the area of even illegal immigrants getting guns and finding out if they did, this administration becomes as weak as a wet noodle. And the question is why, and how we can change that.

So, I'd like to ask you a few questions about that. I would note that most people read the law to allow you to do this right now. In the Federal Register of November 25th, 1998, it says, routine use C -- C is the category that deals with -- provides the necessary authority for further coordination among law enforcement agencies for the purpose of investigating, prosecuting and/or enforcing violations of criminal or civil law, or regulation that may come to light during NICS, during NICS operations. That seems pretty clear. And so I just want to ask you a couple of questions about that.

The first is, do you believe that you do not have the right right now to ask for checks? We ask for checks of these illegal immigrants' immigration status, and we look if they violated other laws. Do you believe you don't have the right to ask, to check whether they have purchased a gun illegally?

ATTORNEY GENERAL ASHCROFT: I believe I could ask an immigrant whether or not he or she has purchased a gun illegally. I don't think there's any problem with me asking any citizen, whether or not they've purchased a gun illegally, or an permanent resident alien, or an illegal alien.

SEN. SCHUMER: Do you believe -- then if you could do that, is there anything wrong with checking the database you now have, the NICS system to see if they've done it, to see if they're telling the truth?

ATTORNEY GENERAL ASHCROFT: It's my belief that the United States Congress specifically outlaws and bans the use of the NICS -- NICS database, and that's the use of approved purchase records for weapons checks on possible terrorist or anyone else. That the --

SEN. SCHUMER: I would say most, in all due respect, Mr. Attorney General, most disagree with you. But let's just assume that's the case. Why didn't you ask us for, when you asked us for a whole lot of things in the anti-terrorism bill, a whole lot of different things that you said new circumstances required us to need? A, why didn't you ask us for that authority, if you believe you don't have it, which most people do?

And B, would you support legislation that I will drop in tomorrow to give you that authority?

ATTORNEY GENERAL ASHCROFT: Well, I would be very pleased if you would send me legislation. I'll review it. If Congress passes a law to help us fight terrorism by keeping guns out of the hands of illegal aliens and other individuals that should not have guns in their possession, I will fight to sustain the law, and I will enforce the law.

SEN. SCHUMER: In all due respect, sir, I'm asking you a slightly different question -- two slightly different questions. Number one, why wasn't this asked for in the counter-terrorism bill, a bill I supported? In fact, I took your side against my chairman on some of the issues there. Why didn't we ask for it then if it was at least ambiguous? And B, why not support it right now?

I appreciate the fact that you would review it if I sent it to you, but let's assume that it's very simple legislation that simply allows NICS checks of illegal immigrants, of those, for instance, that you have detained? Why can't you just tell us right now that you would support such legislation? It seems perfectly logical to do. It seems, as you said, and I agree with you, that illegal immigrants here don't have more rights or even the same rights as American citizens. Why couldn't we just make that simple proposition and solve this problem right now? Because, at least according to the New York Times, and I realize the difficulty in dealing with unnamed sources, there are large numbers of people in your own FBI who believe that would be a very important power for them to have. So, again, would you be willing to support such legislation, or the concept? I'm not saying we could draft it together.

ATTORNEY GENERAL ASHCROFT: I will say again to you that I don't want to make a commitment to legislation without seeing it. If you will send me legislation like that, I will review it. And I would, upon passage by the Congress of the United States, enforce it vigorously.

...

SEN. SCHUMER: I'm sorry, please --

ATTORNEY GENERAL ASHCROFT: The only recognized use of -- use now of approved purchaser records is limited to an auditing function. And I believe that my responsibility, which was rather forcefully provided as sort of a -- to me an admonition as I took this job and took the oath of office, is to enforce the law. And I believe that the law prohibits, in its current state, any other use of approved purchaser records. That's a subcategory of data used by the FBI. So, if you will send me legislation, I'll review it. And we can confer about it.

SEN. SCHUMER: But you're certainly allowed to use the system, because these people don't have the right to have a gun.

ATTORNEY GENERAL ASHCROFT: I believe that the United States Congress, in enacting the law which created this database, limits the lawful use of this database. And I believe that it is my responsibility to live within the law. I don't want to hear two messages from this committee -- not both in the same day, or not on a variety of different days -- not that you want me to enforce some laws and not other laws, and you want me to ignore laws, or respect some rights and not other rights. I'm very pleased to tell you that if you send me the legislation I'll review it, and if you pass the legislation, I'll enforce it.

SEN. SCHUMER: Thank you, Mr. Chairman.

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SEN. CANTWELL: Thank you, Mr. Chairman. And, General Ashcroft, thank you for your patience and testimony today. Hopefully I can bring up a few subjects that haven't been discussed, and appreciate your help in getting through a few questions, if we could.

Obviously the cumulative nature of the department's actions over the past few months -- the expansion and the eavesdropping authority in the terrorism bill, the expansion of use of e-mail searching, with technologies like Carnivore; the compilation of data bases on Arab Americans; and just this week a request made to the Intelligence Committee to broaden the FISA wiretap authority even further -- brings a lot of questions in America that maybe we may just be going too far too fast.

And given that, I guess my first question is -- and given that really the safeguards and judicial review that have been in place before on some of these wiretap and eavesdropping measures are being eased -- what do you really -- should be the process of oversight? And to be specific, if I could, if we are expanding the watching capacities of the FBI and the Justice Department, who should be watching the watchers in our oversight?

ATTORNEY GENERAL ASHCROFT: You remind me of a spate of cartoons that has appeared in the last week, and it's generally a kid sitting on Santa's knee, and Santa saying, "I know when you've been sleeping, I know when you've been awake, I know when you've been bad or good" -- and the kid looks up and says, "Who are you, John Ashcroft?" (Laughter.)

SEN. CANTWELL: I'm not sure everybody in America is laughing at that.

ATTORNEY GENERAL ASHCROFT: Well, let me apologize if that's offensive to you. I don't take it lightly. I have -- I do know that the things that I do are serious, although I try not to take myself too seriously. I think this committee is a valuable -- has a valuable and an appropriate oversight responsibility. That's why I was eager to respond to the committee. I volunteered to come in on Thursday of last week, and was told that Thursday would be an inappropriate day last week. So I am here this week.

I don't take lightly your responsibility, and I don't take lightly the responsibilities that we have to enforce the law. But neither do I take lightly the responsibility we have to safeguard the liberty of individuals. That's why when we want additional authority, and when we want and we seek additional authority, we don't take it lightly. An authority that we do not have, we come and ask this Congress for and work with them on.

The Intelligence Committee has recently sought to make four adjustments in the law. Two of them are really the corrections of what have to be viewed as almost typographical sorts of housekeeping things that were with the U.S.A. Patriot Act, and another two are minor adjustments that the Intelligence Committee believes would be appropriate. But I fully agree, if you are suggesting, that you have a solemn responsibility to see to it that we don't go too far. And I think that is always an appropriate question, and it's a question that I never want to fail to ask myself.

SEN. CANTWELL: Well, in following that line of questioning, particularly in the areas and use of Carnivore and Magic Lantern, which is technology that I believe that the FBI is using, and in our

expansion in the anti-terrorism bill. I mean, I just want you to know voting for that legislation, giving my constituents the assurance that we were going to monitor carefully and have oversight -- I am asking you know if the Department of Justice will meet with Congress on a regular basis -- maybe four times a year, in closed-door session if necessary -- and provide information to us on the usage of Carnivore and Magic Lantern as eavesdropping on electronic mail, that I think America is concerned about.

**ATTORNEY GENERAL ASHCROFT:** I need to try to clarify something. Carnivore was a proposal which has been very significantly adjusted to meet a number of concerns expressed I think by the people who have dealt with you, and I have dealt with, and I dealt with when I was in the Senate. And it is now with those adjustments been referred to by a different name, DCS 1000 I believe is the name of it.

I am interested in working with the Congress to make sure that that law is appropriately -- that capability is appropriately deployed and respectfully deployed, and would be pleased to find a way to do that, and will work with you to get that done.

**SEN. CANTWELL:** So you think possibly meeting four times a year for reports on the usage of that technology? I know that you mentioned earlier -- and I know that sometimes headlines can be unfair, but and probably the category of headlines that John Ashcroft would hate -- yesterday's ZDNet on-line publication had: "Warning: We know what you are typing, and so does the FBI." And the article goes on to talk about how the expanded authority under the Patriot could mean that the FBI would be using the Magic Lantern technology, which really creates a worm if you will on an e-mail, so that the suspect who may be your target then sends an e-mail to another individual, thereby sending this worm and virus, and then leaving them open to having their keystrokes monitored. And I think in the interest of not wanting to have more headlines like this, if we can work more closely together to understand how this technology is used, and making sure that Americans' e-mails under this broad expansion of powers to catch terrorists aren't being overly used in invading U.S. citizens' rights to communicate electronically.

**ATTORNEY GENERAL ASHCROFT:** I welcome the opportunity for the department to work with you toward these objectives.

**SEN. CANTWELL:** Thank you. And, if I could, I'd appreciate your signing of the U.S.-Canadian agreement on cooperation on immigration and asylum. Obviously we are in the last days here working very diligently on the northern border issues. And one of the concerns that we have -- in the anti-terrorism bill we authorized the tripling of northern border inspectors, INS, Customs agents. And yet in the supplemental that has been submitted by the administration, there's very few dollars for those activities. So I am asking whether you support the homeland defense measures here in the Senate that would appropriate dollars for that effort that we did authorize in the Patriot Act.

**ATTORNEY GENERAL ASHCROFT:** Senator, I believe we need additional resources along the northern border. We have about 5,500 miles of border with Canada. Even with the assignment of National Guard troops to try to backfill some of the overstressed individuals there, we are at a very low number. In some respects we have less -- I think it's about one person for every hundred miles, if we count the way the shift would have to be so that people don't work full-time all the time. And I will urge upon the administration the devotion of the appropriate resources to provide us with not only a secure border, but with a border that gives us the facility and flow necessary to keep commerce going, and the valuable trade between our countries.

I was in Detroit and Ottawa both this week earlier, and we have about \$1.3 billion a day that crosses our borders in trade between the United States and Canada. About one out of every five dollars of trade the United States does anywhere in the world is with Canada. And if we don't have the capacity to move that trade expeditiously, we hurt ourselves economically very badly. That's the basis for our effort to provide additional cooperation. And this president has instructed me in the homeland

defense and security arena to work with the Canadians to the advantage of both of our countries, and I'll try to work with you in the same respect.

SEN. CANTWELL: And I know my time has expired, Mr. Chairman, but if I would I think I will submit one last question on the U.S.- Canadian agreement as it relates to biometrics. There's a mention in there of agreement working with Canada on the permanent residency -- you know, green card status -- and the use of biometrics. And I think what our language in the anti-terrorism bill envisioned is more working on visas of people seeking to come into the country on a temporary basis, and using some sort of biometrics standard there to positively identify people that we don't want into the country, as opposed to people who are working here on a permanent basis having to submit when they actually already do for those green card standards. But I'll submit a question on that. Thank you.

ATTORNEY GENERAL ASHCROFT: Thank you.

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SEN. EDWARDS: Thank you, Mr. Chairman. Good afternoon, Mr. Attorney General.

ATTORNEY GENERAL ASHCROFT: Good afternoon.

SEN. EDWARDS: Appreciate your patience. I know this has been a long hearing. We want very badly to make sure that you have the tools you need to protect the American people, including new laws and new measures. But while we are protecting American lives we also need to be certain that we protect American values and American principles. And it seems to me that these times of crisis and times of war are times when those principles and values are most at risk, when people get caught up in the passion of doing what's necessary under the circumstances. We have seen in the past during World War II the internment of over 100,000 Japanese Americans by a great president.

And I am sure at that time that was a very popular move. But it is not something I don't think that we are very proud of today. And I am not suggesting that these military tribunals are equivalent to that, but whatever we do I want to make sure that your children and mine and our grandchildren will be proud of what we have done. And my concern about the whole issue of military tribunals is not the notion of using them. I can easily see that there would be circumstances in which it would make sense to use them. My concern is that this directive, this order, is extraordinarily broad. And I want to ask you about three or four areas, if I can, to see if we can make sure that some of the things that the order would appear to allow in fact are not something that you intended or intend to do.

Number one, the order says that a person who is subject to the order shall be detained. And then goes on to say if that individual is tried. So subject to the order, you shall be detained if you are tried. So on the face of the order, it would appear to allow unlimited detention without trial.

First, can you tell us today that that is not something that will happen under this order?

ATTORNEY GENERAL ASHCROFT: Senator, I believe -- and I am trying to recreate some of this order in my mind -- but I believe that when you get to the trial part it talks about "when tried." And I think that's the intent of the order.

SEN. EDWARDS: Well, I'm looking -- excuse me for interrupting you -- I'm looking at the language right now. "If the individual is tried" is the language of the order, at least the language that I have in front of me.

ATTORNEY GENERAL ASHCROFT: I, I think there's another part of the order.

SEN. EDWARDS: Without getting caught up on the semantics stuff, it is not -- you do not intend to use this order to detain people and detain them for an unlimited period of time without trial. Is that true?

ATTORNEY GENERAL ASHCROFT: I believe it's completely fair to say that.

SEN. EDWARDS: Okay. Second, there's a provision in the order that says, "The president or the secretary of defense makes the final decision." I believe you're familiar with that provision.

On the face of the order, that would allow the president or the secretary of the defense to in fact overturn an acquittal by a tribunal. In other words, to come in after the case has been tried, there has been an acquittal, and the secretary of defense decides, "We don't agree with that, we're going to overturn it," and in fact on the face of the order, it would allow the secretary of defense alone to impose the death penalty.

What I want to know is, is that the intent of the order, or can you tell us today that if in fact there is an acquittal at the tribunal level, that that would not be overturned by the secretary of defense?

ATTORNEY GENERAL ASHCROFT: I believe it's a settled practice of war crime commissions that you can't overturn a committal. I can -- I feel confident in telling you that's not the intention --

SEN. EDWARDS: And that will not -- that will not occur?

ATTORNEY GENERAL ASHCROFT: I do not believe that to be intended by the order.

SEN. EDWARDS: Third, burden of proof. There's nothing in -- nothing in the order that deals with the issue of burden of proof. That, on its face, would allow someone to be convicted and in fact receive the death penalty on a greater weight of the evidence standard, or a preponderance of the evidence standard, 51 percent versus 49 percent.

Can you tell us that in order for someone to be convicted under this order, and for the death penalty to be imposed against them, that you will require a significantly higher burden of proof than preponderance of the evidence or greater weight of the evidence, which is only used in civil cases in this country?

ATTORNEY GENERAL ASHCROFT: I think it's pretty clear that the president has asked the secretary of defense to develop a set of regulations and procedures governing the war crimes commissions that are full and fair. Admission of such evidence would have -- would be evidence of probative value. There is a provision for the accused to be represented by counsel. The conviction and sentence would be upon two-third majority vote.

SEN. EDWARDS: Mr. Attorney General, excuse me for interrupting you, but the only thing I'm asking you about -- I'm not asking you about any of those thing, I'm only asking you about the burden of proof -- are will you require, in order for somebody to be convicted and the death penalty be imposed against them, that the burden of proof be more than just a preponderance of the evidence?

ATTORNEY GENERAL ASHCROFT: I think that's an issue which is still to be determined. And it would be beyond my power to speculate on that. The secretary of defense is formulating the procedures, and among those procedures may be items like appeals procedures and other instructions to those conducting the trials, but I cannot provide further information than to say that at this time.

SEN. EDWARDS: Well, you are the attorney general of the United States. You are an experienced lawyer. I'm asking you whether you believe it is appropriate for somebody to be convicted and receive the death penalty based on 51 percent of the evidence? Do you or do you not? You, just you personally?

ATTORNEY GENERAL ASHCROFT: I'm not going to try and -- to develop a set of rules or regulations on that evidentiary standard or other standards at this time. That's the responsibility of the secretary of defense in regard to this very serious matter. And I would expect him to very carefully make judgments in this arena. And I -- I personally am not -- have not given that the kind of thought at this moment to say what exactly I would do were I to have the responsibility, which I don't have.

SEN. EDWARDS: Now, you just mentioned a provision in the order that says that the conviction can occur on a two-thirds vote as opposed to a unanimous vote. Does that mean that under this order, if there's a three person tribunal, that somebody could be convicted, receive the death penalty, and be executed based upon a 2-to-1 vote?

ATTORNEY GENERAL ASHCROFT: I would believe that this states a minimum standard in its direction to the secretary of defense. I means that two out of three of the triers of fact have to come to a conclusion before a sentence could be imposed.

SEN. EDWARD: Which means that if the tribunal is composed of three people, the case is presented, two of the three say that the death penalty should be imposed, one says it should not, it could be imposed and the person could be executed. Is that what you're saying?

ATTORNEY GENERAL ASHCROFT: If this were to be -- if you're talking about a two-thirds rule, and if that's the rule that eventually is adopted by the secretary of defense, two out of three is two-thirds. And I agree with that.

(Laughter.)

SEN. EDWARDS: All right.

ATTORNEY GENERAL ASHCROFT: U.N.-sponsored tribunals allow conviction on a simple majority, like the ones at The Hague and the ones in -- that are litigating and adjudicating the atrocities against those in Central Africa.

SEN. EDWARDS: Do those -- excuse me, Mr. Attorney General -- do those allow the death penalty?

ATTORNEY GENERAL ASHCROFT: I don't know.

SEN. EDWARDS: I don't believe they do. Let me ask you one last area --the area and the whole question of appeals. We've seen, in our court system, which most of believe is one of the best if not the best in the world, over the last two decades people who, based on later-found evidence, DNA evidence, for example, have absolutely been found to -- it could not have been possible that they committed the crime. The White House counsel has said that a challenge can be made to the jurisdiction of the court.

Now, you and I understand that the jurisdiction is very different than whether, in fact, the person committed the crime, whether they're guilty, whether evidence should have been admitted that would have shown that the person couldn't have committed the crime. All those issues that go to the basic question, which I think most Americans are concerned about, about these kinds of issues, is did this person do it? Did they in fact do what they've been accused of doing. Do you believe that there needs to be a process that allows some appeal that looks at the fundamental question of how the trial was conducted, whether evidence was properly considered by the court, and whether, in fact, there's evidence that was not considered by the court that would have shown this person, in fact, did not do it, did not commit this crime?

ATTORNEY GENERAL ASHCROFT: In the president's order to the secretary of defense to develop procedures here, I believe there is adequate latitude for the secretary of defense to develop a potential and a framework for appeals.

SEN. EDWARDS: But isn't that something you believe should be done?

ATTORNEY GENERAL ASHCROFT: I believe that the president and the secretary of defense both, according to the order, constitute appellate authorities. And I think those appellate authorities are consistent with systems that -- that provide the kind of justice that is likely -- less likely to have error.

SEN. EDWARDS: But the president and the secretary of defense are the people who decided the prosecution should be brought in the first case. Do you believe there needs to be an objective third

party that looks at the trial, looks at the conviction, looks at the imposition of the death penalty, if that in fact has occurred, and looks at whether it should have happened?

**ATTORNEY GENERAL ASHCROFT:** The secretary of defense would have the authority to develop appellate procedures under the order, military order for the development of war commissions issued by the president. And I believe that that authority is available to him. And if he chooses to confer with me about that, I'll provide advice to him regarding appellate procedures.

**SEN. EDWARDS:** Do you believe in fact there needs to be a review, an objective review by a third party? That's what I'm asking you.

**ATTORNEY GENERAL ASHCROFT:** I'm going to reserve my comments to provide advice to the president and the secretary of defense regarding any questions they have for me regarding what should be or should not be added in terms of procedures for this order.

**SEN. EDWARDS:** Thank you, Mr. Attorney General. Thank you, Mr. Chairman.

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