

SHELDON WHITEHOUSE
RHODE ISLAND

COMMITTEES:
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ENVIRONMENT AND PUBLIC WORKS
FINANCE
JUDICIARY

United States Senate

WASHINGTON, DC 20510-3905

February 4, 2019

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Mr. William P. Barr
Of Counsel
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005

Dear Mr. Barr:

I write to bring to your attention an exchange between Chairman Graham and myself at last week's Judiciary Committee business meeting. The Chairman recognized the importance of obtaining clarification to your written responses to my questions for the record on (1) the Mueller report and the role of executive privilege; and (2) how the DOJ policy against disclosing derogatory information about uncharged individual applies in cases where charges are prohibited by OLC's internal opinions.

I have attached your answers to my questions as well as the transcript of the above-mentioned exchange. Following the hearing, the Chairman requested that I reach out to you directly to request more fulsome answers to these questions, which I do so now through this letter. Please answer as soon as possible in light of the expected vote on your nomination this Thursday.

Sincerely,



Sheldon Whitehouse
United States Senator

Enclosures (2)

QUESTIONS FOR THE RECORD
WILLIAM P. BARR
NOMINEE TO BE UNITED STATES ATTORNEY GENERAL

QUESTIONS FROM SENATOR WHITEHOUSE

Protecting the Independence of the DOJ and Mueller Investigation

1. In October 1973, during the Watergate scandal, President Nixon ordered the firing of independent special prosecutor Archibald Cox, who was investigating Nixon's role in the scandal. Then-Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus refused to fire Cox and resigned in protest, but the next in command, Robert Bork, was willing to carry out the firing. This was the infamous Saturday Night Massacre, and the American people were rightly outraged by this attack on the rule of law. In the aftermath of that event, largely in response to that public outrage, acting Attorney General Bork agreed to enter into a written delegation agreement to ensure the independence of Cox's successor, Leon Jaworski. The Bork order contained much stronger provisions to protect the independence of the special prosecutor investigation than is now found in the Department of Justice guidelines that govern the Mueller inquiry. These included (1) protections against termination without cause; (2) limitations on the day-to-day supervision of and interference with the investigation, including with respect to the scope of the investigation; (3) assurances that the special prosecutor would have access to all necessary resources; and (4) assurances that the special prosecutor be permitted to communicate to the public and submit a final report to appropriate entities of Congress and make such a report public.

At your nomination hearing, you pledged a number of protections for the special counsel. Reviewing the Bork order, please identify any areas in which you intend to provide less protection or independence to the Special Counsel than was provided therein.

RESPONSE: As I explained at my hearing, the current Department of Justice regulations that govern the Special Counsel were enacted at the end of the Clinton Administration and reflected, to a certain extent, bipartisan dissatisfaction with certain elements of the previous independent counsel regime. If confirmed, I intend to follow the Special Counsel regulations scrupulously and in good faith. I believe that the current regulations appropriately balance the relevant considerations, although I would be open to considering how they can be improved. However, I do not believe that the Special Counsel regulations should be amended during the current Special Counsel's work. Any review of the existing regulations should occur following the conclusion of the Special Counsel's investigation.

2. Will you object to Special Counsel Mueller testifying publicly before Congress if invited (or subpoenaed)?

RESPONSE: I would consult with Special Counsel Mueller and other Department officials about the appropriate response to such a request in light of the Special Counsel's findings and determinations at that time.

3. Under the Special Counsel regulations, "at the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel." Subject to any claims of privilege, will you commit to producing the Special Counsel's concluding report in response to a duly issued subpoena from the Judiciary Committee of either the House or Senate?

RESPONSE: The applicable regulations provide that the Special Counsel will make a "confidential report" to the Attorney General "explaining the prosecution or declination decisions reached by the Special Counsel." See 28 C.F.R. § 600.8. The commentary to these regulations, which were issued by the Clinton Administration Department of Justice, explains that the Special Counsel's report is to be "handled as a confidential document, as are internal documents relating to any federal criminal investigation. The interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel will be addressed" through the Attorney General's reporting requirements. See 64 Fed. Reg. 37038, 37040-41. Under the regulations, the Attorney General must "notify the Chairman and Ranking member of the Judiciary Committees of each House of Congress . . . Upon conclusion of the Special Counsel's investigation." 28 C.F.R. § 600.9(a)(3). The regulations further provide that the Attorney General may publicly release the Attorney General's notification if he or she concludes that doing so "would be in the public interest, to the extent that release would comply with applicable legal restrictions." *Id.* § 600.9(c).

I believe it is very important that the public and Congress be informed of the results of the Special Counsel's work. For that reason, my goal will be to provide as much transparency as I can consistent with the law, including the regulations discussed above, and the Department's longstanding practices and policies. Where judgments are to be made by me, I will make those judgments based solely on the law and Department policy and will let no personal, political, or other improper interests influence my decision. As I stated during the hearing, if confirmed, I intend to consult with Special Counsel Mueller and Deputy Attorney General Rosenstein regarding any report that is being prepared and any disclosures or notifications that I make under applicable regulations as Attorney General.

4. Referring to former FBI Director Comey's conduct in the lead-up to the 2016 election, you testified that "if you are not going to indict someone, then you do not stand up there and unload negative information about the person. That is not the way the Department of Justice does business." As I told you during our private meeting, when it comes to ordinary prosecutorial decisions, I wholeheartedly agree. How does that general principle apply to the required report of the Special Counsel?
 - a. Is it your view that DOJ regulations, policy, and practice forbid public discussion of wrongdoing whenever the Department of Justice has declined to seek indictments related to such wrongdoing? Are there any differences in how those regulations, policies, and practice govern a Special Counsel report?
 - b. Is it your view that DOJ regulations, policy, and practice also forbid the indictment of a sitting president? If so, how can the policy obtain Article III review so that a court may "say what the law is"? Should OLC be the final arbiter of this controversial question?
 - c. What if there are grounds to indict and the sole reason for declination is the current DOJ policy against indicting a sitting president?
 - d. Should derogatory information against an uncharged president or other official subject to impeachment be provided to Congress? How is Congress to exercise its constitutional rights and carry out its constitutional obligations if such information is shielded?
 - e. Should we interpret your statements at the hearing that (1) derogatory information against an uncharged individual should not be disclosed and (2) a sitting president cannot be indicted to mean that you would not release to Congress any contents of the Mueller report that contain negative information about President Trump? If we should not, why not?
 - f. If the Mueller investigation uncovers evidence of criminality by the President, but DOJ declines to prosecute solely on the basis of the OLC memo prohibiting indictment of a sitting president, and DOJ policy meanwhile prohibits the disclosure of derogatory information about an uncharged individual, will you keep from Congress and the American people evidence that the President may have committed criminal acts?
 - g. With respect to OLC's conclusion that the president cannot be indicted under any circumstances while in office, is there any other person in the country who similarly cannot be indicted under any circumstances?
 - h. Do the public and Congress have a significant interest in facts indicating criminal wrongdoing by the President of the United States while in office?

- i. Do you agree that Congress has a constitutional responsibility to investigate and prosecute a President for high crimes and misdemeanors when warranted?
- j. Do you agree that, in order to carry out its constitutional responsibilities, Congress should be made aware by the executive branch of conduct potentially constituting high crimes and misdemeanors?

RESPONSE: The applicable regulations provide that the Special Counsel will make a “confidential report” to the Attorney General “explaining the prosecution or declination decisions reached by the Special Counsel.” See 28 C.F.R. § 600.8. The commentary to these regulations, which were issued by the Clinton Administration Department of Justice, explains that the Special Counsel’s report is to be “handled as a confidential document, as are internal documents relating to any federal criminal investigation. The interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel will be addressed” through the Attorney General’s reporting requirements. See 64 Fed. Reg. 37038, 37040-41. Under the regulations, the Attorney General must “notify the Chairman and Ranking member of the Judiciary Committees of each House of Congress . . . Upon conclusion of the Special Counsel’s investigation.” 28 C.F.R. § 600.9(a)(3). The regulations further provide that the Attorney General may publicly release the Attorney General’s notification if he or she concludes that doing so “would be in the public interest, to the extent that release would comply with applicable legal restrictions.” *Id.* § 600.9(c).

In addition, the Justice Manual, § 9-27.760, cautions prosecutors to be sensitive to the privacy and reputational interests of uncharged third parties. It is also my understanding that it is Department policy and practice not to criticize individuals for conduct that does not warrant prosecution.

An opinion issued by the Office of Legal Counsel held that an indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions. To the best of my understanding, the OLC opinion remains operative.

Congress can and does conduct its own investigations, and its right to do so is not precluded by the Department’s decision not to provide certain information about an uncharged individual gathered during the course of a criminal investigation.

As I testified before the Committee, I believe that it is very important that the public and Congress be informed of the results of the Special Counsel’s work. My goal will be to provide as much transparency as I can consistent with the law, including the regulations discussed above, and the Department’s longstanding practices and policies.

The Constitution grants the legislative branch the power to impeach for, and convict of, treason, bribery, or other high crimes and misdemeanors. I am not in a position to opine or speculate on the manner in which the Congress determines what constitutes a high crime or misdemeanor, or how the Congress gathers evidence in support of or in contradiction to that conclusion.

5. Please describe the nature of your relationship with White House Counsel Pat Cipollone, including any shared organizational affiliations.

RESPONSE: When I served as Attorney General, I hired Mr. Cipollone to serve as an aide in my office. We have been personal and professional acquaintances ever since. I am not aware of the full extent of Mr. Cipollone's organizational affiliations. However, to the best of my recollection and knowledge, we served together on the board of directors of the Catholic Information Center for a period of time, we both were affiliated with Kirkland & Ellis LLP for several months in 2009, and we are both members of the Knights of Columbus.

6. Deputy White House Counsel John Eisenberg, a former partner at your law firm Kirkland & Ellis, received a broad ethics waiver allowing him to "participate in communications and meetings where [Kirkland] represents parties in matters affecting public policy issues which are important to the priorities of the administration." What discussions, if any, have you had with Deputy Counsel Eisenberg since he received that waiver? Please identify any specific matter and/or client discussed, and the details of any such discussion.

RESPONSE: To the best of my recollection, I have not had any discussions with Mr. Eisenberg regarding any matters related to, or clients of, Kirkland & Ellis, LLP since he left the firm in 2017.

7. In your nomination hearing, you told me you would commit to complying with the existing DOJ policy limiting contacts between the White House and the DOJ regarding pending criminal matters, and would perhaps tighten those restrictions.
- Will you reaffirm that commitment?
 - In what circumstances would it be appropriate for you, if confirmed as AG, to discuss a pending criminal matter with the White House?
 - What is the goal of restrictions on communications between DOJ and the White House regarding ongoing investigations and prosecutions?

RESPONSE: The Department has policies in place that govern communications between the White House and the Department. If I am confirmed, I would act in accordance with applicable Department of Justice

protocols, including the 2009 Memo on communications with the White House issued by former Attorney General Holder. Consistent with the 2009 Holder Memo, initial communications between the Department of Justice and the White House concerning investigations or cases should involve only the Attorney General, the Deputy Attorney General, or the Associate Attorney General. The purpose of these procedures is to prevent inappropriate political influence or the appearance of inappropriate influence on Department of Justice matters. If confirmed, I will be reviewing many of the policies and practices of the Department and making adjustments as appropriate.

8. On February 14, 2018, the Washington Post reported that then-White House counsel Donald McGahn made a call in April 2017 to Acting Deputy Attorney General Dana Boente in an effort to persuade the FBI director to announce that Trump was not personally under investigation in the probe of Russian interference in the 2016 election.

On September 13, 2017, White House Press Secretary Sarah Huckabee Sanders suggested from the Press Secretary podium that the Department of Justice prosecute Former FBI Director James Comey.

On December 2018, CNN reported that President Trump “lashed out” at Acting Attorney General Whitaker on at least two occasions because he was angry about the actions of federal prosecutors in the Southern District of New York in the Michael Cohen case, in which SDNY directly implicated the president – or “Individual 1” – in criminal wrongdoing. According to reports, Trump pressed Whitaker on why more wasn't being done to control the prosecutors who brought the charges in the first place, suggesting they were going rogue.

Assuming these reports are accurate, did each of these contacts comply with the governing policy limiting DOJ-White House contacts regarding pending criminal matters, and would you permit them under your contacts rule?

RESPONSE: Because I am not currently at the Department, I have no knowledge of the facts and circumstances surrounding these issues beyond what I have seen reported in the news media. Therefore, I am not in a position to comment on this matter.

9. On January 3, 2019, CNN reported that Acting Attorney General Whitaker spoke in private with former Attorney General and Federalist Society co-founder Edwin Meese, who is now a private citizen. During that meeting, Whitaker reportedly told Meese that the U.S. Attorney in Utah is continuing to investigate allegations that the FBI abused its powers in surveilling a former Trump campaign adviser and should have done more to investigate the Clinton Foundation.
 - a. Do those communications seem proper to you?

RESPONSE: I am aware of the referenced conversation only through news media reports and do not know all of the facts and circumstances. Therefore, I am not in a position to comment.

- b. Under what circumstances would you allow officials of the Department to discuss a pending DOJ criminal investigation with a non-witness private citizen?

RESPONSE: Much of the Department's law enforcement work involves non-public, sensitive matters. Disseminating non-public, sensitive information about Department matters could invade individual privacy rights; put a witness or law enforcement officer in danger; jeopardize an investigation or case; prejudice the rights of a defendant; or unfairly damage the reputation of a person among other things. The Department's policies generally prohibit the unauthorized disclosure of such information to members of the public. See Justice Manual § 1-7.100.

Executive Power and Privilege

10. Do you believe that the Presidential Communications Privilege extends to the President's communications with the Attorney General?
- a. Are you bound by the D.C. Circuit holding that "the [Presidential Communications] privilege should not extend to staff outside the White House in executive branch agencies"? *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997).

RESPONSE: It is well established that the presidential communications privilege applies to communications between the President and the Attorney General. See generally *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481 (1982). In the course of holding that communications to and from "presidential advisers in the course of preparing advice for the President come under the presidential communications privilege," *In re Sealed Case*, 121 F.3d at 752, see also *id.* at 757, the D.C. Circuit cautioned (in the language quoted in the question) that "staff outside the White House in executive branch agencies" who may be preparing advice for the President should not be viewed as "presidential advisers" for purposes of the privilege. *Id.* at 752. The quoted language did not suggest that communications between executive branch agencies and White House staff are not subject to the privilege. To the contrary, a subsequent D.C. Circuit case, applying *Sealed Case*, held that communications between Justice Department officials and the President or his White House staff fall within the scope of the privilege. *Judicial Watch v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

- b. Under what circumstances would you fail to abide by the limitations on the Presidential Communications Privilege set forth in *In re Sealed Case (Espy)*?

RESPONSE: *In re Sealed Case* is an important precedent that the Justice Department regularly applies in its court filings. I cannot speculate on whether circumstances might arise where the Department might seek any modification of that precedent by the D.C. Circuit or the Supreme Court.

11. In our one-on-one meeting, you told me you would “not support the assertion of executive privilege if [you] concluded that it was designed to cover up a crime.”
- a. To be clear, would you support the assertion of executive privilege if asserted to cover up a crime?

RESPONSE: I stand by the statement I made in your office. It was based on my understanding that it has been the longstanding policy of the Executive Branch not to assert executive privilege for the purpose of covering up evidence of a crime.

- b. Would you support the assertion of executive privilege in order to cover up facts that amount to a chargeable crime but for the fact that the subject cannot under DOJ/OLC policy be indicted?

RESPONSE: Please see my response to Question 11(a) above. That response applies whether or not an individual is subject to indictment.

- c. If you conclude that the president is asserting executive privilege over, for example, evidence in the Mueller report in order to cover up a crime, what specifically would you do to stop it?

RESPONSE: Beyond observing that the hypothetical situation identified in this question seems unlikely to arise, I cannot speculate on how I might proceed other than to say that, as in all matters, I would look at the individualized facts of the situation and follow the law and any policies of the Department in determining what the next, appropriate steps might be.

- d. If an assertion of executive privilege is invalid as asserted to cover up a crime, is there any reason Congress should not be informed to accomplish its constitutional duties of oversight and/or impeachment?

RESPONSE: Please see my response to Question 11(c) above.

- e. If you conclude that the president has claimed executive privilege in order to cover up evidence of a crime over your objection, would you inform Congress about your conclusion?

RESPONSE: I would resign.

12. During the confirmation proceedings for Justice Kavanaugh, the Trump administration withheld tens of thousands of pages of relevant documents on the vague ground of “constitutional privilege.” Because the Judiciary Committee Chairman did not challenge that assertion, the administration never had to defend it. The administration also failed to produce a privilege log, which would have allowed us to understand the nature of the documents over which the administration was asserting privilege.

- a. If the president seeks to withhold information from Congress on grounds of privilege, will you commit to producing a privilege log that identifies, at a minimum, the participants/custodians of the document/exchange, as well as the basis for the privilege assertion (presidential communication, deliberative process, attorney-client, etc.)? If not, why not?

RESPONSE: I am committed to responding to Congressional requests and inquiries consistent with the law and Department policies and in good faith. Because many of the policies and practices regarding Executive Branch responses to Congressional requests for information have changed since I was Attorney General, I will need to review current practices. I understand that the current practice is that when the Executive Branch sends a congressional committee a letter informing it that the President has asserted executive privilege, the letter encloses a copy of the Attorney General’s letter advising the President that the assertion of privilege is legally permissible. The Attorney General’s letter typically provides a description of the categories of materials that are subject to the privilege assertion and the legal basis for the assertion. Prior to the assertion of the privilege, the Executive Branch will also have described the withheld information in letters to the committee and otherwise. In so doing, the Executive Branch will have made clear what categories of privileged information are involved and identified the confidentiality interests that ultimately were the basis for the executive privilege assertion. My understanding is that the Executive Branch has found that these procedures provide more useful and timely information to committees than a document-by-document privilege log.

13. Do you believe the President or DOJ can withhold information from Congress without a formal assertion of executive privilege, beyond the time nominally necessary for

review and decision as to whether the president shall assert the privilege?

RESPONSE: The Executive Branch engages in good faith negotiation with congressional committees in an effort to accommodate legitimate oversight needs, while safeguarding the legitimate confidentiality interests of the Executive Branch. This accommodation process has historically been the primary means for successfully resolving conflicts between the branches and has, except in extraordinary cases, eliminated the need for an executive privilege assertion. Because the effort to accommodate congressional requests for privileged information requires an iterative process, it will often be necessary to withhold information, without any invocation of privilege by the President, in order to permit continued negotiation and to preserve the President's ability to assert privilege.

Responsiveness to Congressional Oversight

14. Our committee has not received answers to questions for the record submitted to Attorney General Sessions after the DOJ Oversight hearing in October 2017. Over a year has passed since then.
- a. Do you think it is acceptable that DOJ has failed to respond to these oversight questions?
 - b. Will you commit to providing answers to those outstanding questions by March 1, 2019? If not, why not? And by when will you commit to answering them?

RESPONSE: I agree that it is important to be responsive to this Committee's requests in as timely a fashion as possible. I understand that the Department works to accommodate the Committee's information and oversight needs, including the submission of answers to written questions, consistent with the Department's law enforcement, national security, and litigation responsibilities. If confirmed, I will work with the relevant Department components, including the Office of Legislative Affairs, to see that the Committee's requests receive an appropriate response.

15. Will you commit to providing timely answers to questions for the record submitted in connection with future DOJ oversight hearings? What specific time frame will you commit to?

RESPONSE: Please see my response to Question 14 above.

16. Will you commit to responding to oversight requests submitted by the minority party?

RESPONSE: I agree that it is important to be responsive to Congress in a timely fashion as appropriate. I understand that the Department works to appropriately respond to all members of the Committee, consistent with the Department's law

enforcement, national security, and litigation responsibilities. If confirmed, I will continue this practice and will be pleased to work with Congress through the Department's Office of Legislative Affairs.

17. Under what circumstances do you think it would be appropriate for DOJ to take longer than six months to respond to an oversight request?

RESPONSE: I believe it is important to provide thorough and accurate responses to Congress, where appropriate. If confirmed, I will work with the Office of Legislative Affairs to respond in a timely manner to any inquiries from the Committee regarding the work of the Department.

June 8 Memo Regarding Special Counsel Mueller's Obstruction Theory and May 2017 Op-Ed Defending the Firing of FBI Director Comey

18. Did you have any communications prior to your nomination about Special Counsel Robert Mueller's investigation with any person who holds or has held a position in the Trump White House? With whom? When? What was the substance of the conversation?
- a. What, if anything, did the President's lawyers tell you about what Special Counsel Mueller and his office had conveyed to them about the Special Counsel's view of the obstruction of justice statutes?

RESPONSE: As I described in my testimony, in summer 2017, I met briefly with the President at the White House. Prior to the meeting, and again during the meeting, I indicated that I was not in a position to represent him in connection with the Special Counsel's investigation. During the meeting, the President reiterated his public statements denying collusion and describing the allegations as politically motivated. I did not respond to those comments. The President also asked my opinion of the Special Counsel. As I testified, I explained that I had a longstanding personal and professional relationship with Special Counsel Mueller and advised the President that he was a person of significant experience and integrity.

On November 27, 2018, I met with the President and then-White House Counsel Emmet Flood to interview for the position of Attorney General. After the President offered me the job, the conversation turned to issues that could arise during the confirmation process. I recall mentioning that I had written a memorandum regarding a legal issue that could arise in the Special Counsel's investigation, and that the memorandum could result in questioning during my confirmation hearing. I do not remember exactly what I said, but I recall offering a brief, one-sentence description of the memorandum. The President did not comment on my memorandum. There was no discussion of the substance of the investigation. The President did not ask me my views about any aspect of the investigation,

and he did not ask me about what I would do about anything in the investigation.

On December 5, 2018, following President Bush's funeral, President Trump asked me to stop by the White House. We spoke about a variety of issues, and were joined for much of the discussion by then-White House Counsel Emmet Flood and Vice President Pence. We have also spoken via phone several times as part of the selection and nomination process for the Attorney General position. In all of these conversations, there was no discussion of the substance of the Special Counsel's investigation. The President has not asked me my views about any aspect of the investigation, and he has not asked me about what I would do about anything in the investigation.

The Vice President and I are acquainted, and since the spring of 2017, we have had occasional conversations (sometimes joined by his chief of staff) on a variety of subjects, including policy, personnel, and other issues. Our conversations have included, at times, general discussion of the Special Counsel's investigation in which I gave my views on such matters as Bob Mueller's high integrity and various media reports. In these conversations, I did not provide legal advice, nor, to the best of my recollection, did he provide confidential information.

As discussed in my testimony, after drafting my June 8, 2018 memorandum, I sent a copy of the memorandum and discussed my views with White House Special Counsel Emmet Flood. I also provided a copy to Pat Cipollone, who now serves as White House Counsel, and discussed my views with him and others.

Finally, I have spoken with members of the White House staff about numerous issues, including paperwork and logistics, as part of the selection and nomination process for this position.

This answer relates the conversations responsive to the question to the best of my recollection. But I am acquainted with a number of people who serve or have served at the White House. As best I can recall, I have not spoken about the substance of the Special Counsel's investigation with those people, though the investigation is, of course, a constant topic of conversation in Washington legal circles and it may have arisen.

19. Did you have any communications prior to your nomination about Special Counsel Robert Mueller's investigation with any person who holds or has held a position on the President's personal legal team? With whom? When? What was the substance of the conversation?
 - a. What, if anything, did the President's lawyers tell you about what Special

Counsel Mueller and his office had conveyed to them about the Special Counsel's view of the obstruction of justice statutes?

RESPONSE: As I stated in my letter of January 14, 2019 to Chairman Graham, I sent a copy of my June 8, 2018 memorandum to Pat Cipollone and have discussed the issues raised in the memo with him, Marty and Jane Raskin, and Jay Sekulow. The purpose of those discussions was to explain my views. To the best of my recollection, the President's lawyers have not conveyed to me any information about the Special Counsel's view of the obstruction of justice statutes.

20. Did you have any communications prior to your nomination about Special Counsel Robert Mueller's investigation with any person who holds or has held a position in the Department of Justice? With whom? When? What was the substance of the conversation?
- a. What, if anything, did the President's lawyers tell you about what Special Counsel Mueller and his office had conveyed to them about the Special Counsel's view of the obstruction of justice statutes?

RESPONSE: To the best of my recollection, I had the following conversations with Department of Justice Officials about the Special Counsel's investigation. Before I began writing the memorandum, I provided my views on the issue discussed in the memorandum to Deputy Attorney General Rod Rosenstein at lunch in early 2018. Later, on a separate occasion, I also briefly provided my views on the issue discussed in the memorandum to Assistant Attorney General Steven Engel. After drafting the memorandum, I provided copies to both of them. I also sent it to Solicitor General Noel Francisco after I saw him at a social gathering, but he later indicated that he was not involved in the Special Counsel's investigation and would not be reading my memorandum. During my interactions with these Department officials, I neither solicited nor received any information about the Special Counsel's investigation.

21. On June 8, 2018, you sent a memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel titled "Mueller's 'Obstruction' Theory," in which you wrote that Special Counsel Mueller's "obstruction theory is fatally misconceived." You also stated your memo was unsolicited.

Please provide a full accounting of the preparation of that memo including:

- a. Why did you submit an unsolicited memo about a pending investigation to the Department of Justice?
- b. Why did you think your opinion was relevant if, as you acknowledged, you were "in the dark about many facts"?
- c. How did you know what Mueller's obstruction theory was? With whom did you

discuss that before you drafted your memo?

- d. At your confirmation hearing, you stated that you were “speculating” about Mr. Mueller’s interpretation of 18 U.S.C. § 1512. How did you know Mueller was contemplating a case under Section 1512? Did anyone tell you this? If so, who?
- e. Please list all persons with whom you had communications related to the memo before June 8, particularly any person at the Trump White House, on President Trump’s legal team, in the Department of Justice, or among Republican House committee members or staff?
- f. Please list all persons with whom you had communications related to the memo on or after June 8, particularly any person at the Trump White House, on President Trump’s legal team, in the Department of Justice, or among Republican House committee members or staff?
- g. Did you discuss the memo before June 8 with any person currently or formerly associated with the Federalist Society? If so, who?
- h. Did you receive assistance from anyone in writing or researching your memo?
- i. Who paid you for the time it took you to write and research this memo?
- j. How was the memo transmitted to the Department of Justice? Were there emails or other cover documents associated with its transmission? **If so, please attach these to your answer.**
- k. Discussing your memo, Rod Rosenstein was quoted in a December 20, 2018, *Politico* article as saying: “I didn’t share any confidential information with Mr. Barr. He never requested that we provide any non-public information to him, and that memo had no impact on our investigation.” Did you request that DOJ provide you any information about the Mueller investigation? If so, what did you request, from whom did you request it, and what was provided?

RESPONSE: As a former Attorney General, I am naturally interested in significant legal issues of public import, and I frequently offer my views on legal issues of the day – sometimes in discussions directly with public officials; sometimes in published op-eds; sometimes in amicus briefs; and sometimes in Congressional testimony.

In 2017 and 2018, much of the news media was saturated with commentary and speculation about various obstruction theories that the Special Counsel may have been pursuing at the time, including theories under 18 U.S.C. § 1512(c). I decided to weigh in because I was worried that, if an overly expansive interpretation of section 1512(c) were adopted in this particular case, it could, over the longer term, cast a pall over the exercise of discretionary authority, not

just by future Presidents, but by all public officials involved in administering the law, especially those in the Department of Justice. I started drafting an op-ed. But as I wrote, I quickly realized that the subject matter was too dry and would require too much space. Further, my purpose was not to influence public opinion on the issue, but rather to make sure that all of the lawyers involved carefully considered the potential implications of the theory. I discussed my views broadly with a number of lawyer friends; wrote the memo to senior Department officials and sent it to them via email; shared it with other interested parties; and later provided copies to friends.

I was not representing anyone when I wrote the memorandum, no one requested that I draft it, and I was not compensated for my work. I researched and wrote it myself, on my own initiative, without assistance, and based solely on public information.

To the best of my recollection, before I began writing the memorandum, I provided my views on the issue to Deputy Attorney General Rod Rosenstein at lunch in early 2018. Later, on a separate occasion, I also briefly provided my views to Assistant Attorney General Steven Engel. After drafting the memorandum, I provided copies to both of them. I also sent it to Solicitor General Noel Francisco after I saw him at a social gathering. During my interactions with these Department officials, I neither solicited nor received any information about the Special Counsel's investigation.

In addition to sharing my views with the Department, I thought they also might be of interest to other lawyers working on the matter. To the best of my recollection, I thus sent a copy of the memorandum and discussed those views with White House Special Counsel Emmet Flood. I also sent a copy to Pat Cipollone, who had worked for me at the Department of Justice, and discussed the issues raised in the memo with him and a few other lawyers for the President, namely Marty and Jane Raskin and Jay Sekulow. The purpose of those discussions was to explain my views. My letter of January 14, 2019 to Chairman Graham identifies other individuals with whom I can recall sharing the memorandum and/or discussing its contents.

22. On the first page of your June 8 memo, while criticizing Mueller's obstruction theory, you acknowledged that "[o]bviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction."
 - a. You've stated that you believe the OLC opinion that a sitting president cannot be indicted is correct. If that is the case, what would you do if the Mueller investigation presented you with evidence that led you to conclude President

Trump had committed obstruction of justice in, as you say, the “classic sense”?
How about treason?

RESPONSE: If confirmed, it is possible that I will be responsible for overseeing the Special Counsel’s investigation under applicable regulations. Accordingly, it would not be appropriate for me to speculate regarding hypothetical scenarios. As a general matter, if presented with novel legal questions of constitutional importance while serving as Attorney General, I would likely consult with the Office of Legal Counsel and other relevant personnel within the Department of Justice to determine the appropriate path forward under applicable law.

23. During your nomination hearing, as in your June 8 memo, you raised a point about the meaning of the word “corruptly” in the federal corruption statutes. You argued that “Mueller offers no definition of what ‘corruptly’ means,” and that “people do not understand what the word ‘corruptly’ means in that statute [18 U.S.C § 1512(c)]. It is an adverb, and it is not meant to mean with a state of mind. It is actually meant the way in which the influence or obstruction is committed. . . . [I]t is meant to influence in a way that changes something that is good and fit to something that is bad and unfit, namely the corruption of evidence or the corruption of a decisionmaker.” Later, you cited *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991) as having the “most intelligent discussion of the word ‘corruptly.’”
- a. How did Congress’s passage of the False Statements Accountability Act of 1996, as codified in 18 U.S.C § 1505, affect the *Poindexter* ruling? That Act provides that the term “‘corruptly’” means “‘acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.’”
 - b. While the False Statements Accountability Act of 1996, on its face, applies only to Section 1505, the legislative history makes clear that the bill’s goal was to align the construction of “‘corruptly’” in Section 1505 with interpretation of that term in the other obstruction statutes, including 18 U.S.C. § 1512. For example, Senator Levin, one of the bill’s sponsors, said that the bill would “bring [Section 1505] back into line with other obstruction statutes protecting government inquiries.” Do you believe that the meaning of the term “‘corruptly’” in Section 1512 should be different from the meaning of that identical term in Section 1505?
 - c. It is now the consensus view among courts of appeals and the position of the Department of Justice that the term “‘corruptly,’” including in 18 U.S.C. § 1512(c), means motivated by an “‘improper purpose.’”¹ Will you abide by that

¹ *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (“Acting ‘corruptly’ within the meaning of § 1512(c)(2) means acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct . . .” (internal quotation marks omitted)); *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007) (“‘corruptly’ as used in Section 1512(c)(2) means ‘with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct’ an

consensus position? Given the specific definition of “corruptly” set forth in the False Statements Accountability Act of 1996, what is now “very hard to discern” about the meaning of the term “corruptly” as used in the federal obstruction statutes? If confirmed, will you apply the definition of “corruptly” set forth in the False Statements Accountability Act of 1996 in enforcing the federal obstruction of justice statutes, including Section 1512(c)? If not, why not?

- d. Your June 8 memo includes no reference to the False Statements Accountability Act of 1996 or its definition of “corruptly.” Why?

RESPONSE: The memorandum that I drafted in June 2018 was narrow in scope. It addressed only a single subsection of one federal obstruction statute – namely, 18 U.S.C. § 1512(c). Nevertheless, the memorandum expressly discussed, and noted the relevance of, other federal obstruction statutes, such as 18 U.S.C. § 1505, to the interpretation of section 1512(c). Specifically, on page 17, the memorandum notes that “when Congress sought to ‘clarify’ the meaning of ‘corruptly’ in the wake of *Poindexter*, it settled on even more vague language – ‘acting with an improper motive’ – and then proceeded to qualify this definition further by adding, ‘including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.’ 18 U.S.C. § 1515(b).” Section 1515(b), in turn, provides the definition of “corruptly” that is used in § 1505, which you refer to as the “codification” of the False Statements Accountability Act of 1996. *See* 18 U.S.C. § 1515(b) (“As used in section 1505, the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” (Emphasis added)). As the memorandum explained, the “fact that Congress could not define ‘corruptly’” in § 1505 “except through a laundry list of acts of evidence impairment strongly confirms that, in the obstruction context, the word has no intrinsic meaning apart from its transitive sense of compromising the honesty of a decision-maker or impairing evidence.” In other words, when Congress attempted to define the term “corruptly” in § 1505, it could only do so by providing examples that relate to the suppression or impairment of evidence, which supports the conclusion that, outside of that context, it is difficult to define exactly what “corruptly” means.

official proceeding); *United States v. Arthur Andersen LLP*, 374 F.3d 281, 296 (5th Cir. 2004) (“Under the caselaw, ‘corruptly’ requires an improper purpose” (emphasis in original)), *rev’d and remanded on other grounds*, 544 U.S. 696 (2005); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (noting that “we have interpreted the term ‘corruptly,’ as it appears in § 1503, to mean motivated by an improper purpose,” and extending that interpretation to Section 1512); *Brown v. United States*, 89 A.3d 98, 104 (D.C. 2014) (“individuals act ‘corruptly’ when they are ‘motivated by an improper purpose.’”).

As noted above, my memorandum only addressed the scope of section 1512(c). It did not address the meaning or scope of other federal obstruction statutes. If such issues were to arise during my tenure as Attorney General, I would consult with the Office of Legal Counsel, the Criminal Division, and other relevant Department of Justice personnel to determine the best view of the law and proceed accordingly.

24. On May 12, 2017, you published an op-ed in the *Washington Post* defending President Trump's firing of FBI Director James Comey.
- Did anyone ask you to write that op-ed, or suggest that you write it? If so, who?
 - Did you have any communications related to the op-ed with any person at the Trump White House, President Trump's legal team, the Department of Justice, or Republican House committee members or staff?
 - Did you discuss the op-ed before its publication with any person currently or formerly associated with the Federalist Society?
 - Did you share any draft of your op-ed with any person prior to sending it to the Department of Justice? If so, with whom?

RESPONSE: To the best of my recollection, following the removal of former FBI Director Comey, my former Deputy Attorney General, George Terwilliger, asked me to join him in drafting an op-ed on the issue. During the course of drafting, we determined that I would submit the op-ed under my name due to Mr. Terwilliger's busy schedule. It is my understanding that Mr. Terwilliger had been contacted by a publicist who was working with the Federalist Society to assist in placing the op-ed with publications. Although I normally submit opinion pieces to the *Washington Post* directly, in this instance I provided a draft of the op-ed to the publicist, who eventually placed it with *Washington Post*. I also spoke with friends about submitting an op-ed on this topic, but do not recall sending a draft of the op-ed to any person at the White House, on President Trump's legal team, at the Department of Justice, or any Republican House committee members or staff.

Recusal and Compliance with Ethics Guidance

25. During your nomination hearing, I outlined for you my concern with Matthew Whitaker's (and other Trump appointees') failure to identify the sources of funding behind payments received for partisan activities before his appointment. Since 2015, Mr. Whitaker has received more than \$1.2 million in compensation from FACT, a 501(c)(3) organization promoting "accountability" from public officials. Between 2014 and 2016, FACT received virtually all of its funding—approximately \$2.45 million—from a donor-advised fund called DonorsTrust. DonorsTrust has been described as "the dark-money ATM for the right," which "allows wealthy contributors who want to donate millions to the most important causes on the right to do so

anonymously, essentially scrubbing the identity of those underwriting conservative and libertarian organizations.” During and after his tenure at FACT, the organization has filed at least fourteen complaints and requests for investigations with the Department of Justice, the Internal Revenue Service, and the Federal Election Commission against Secretary of State Hillary Clinton, various Democratic members of Congress, Democratic Party leaders, and Democratic candidates.

- a. How can DOJ recusal and conflict of interest policies be effective if appointees fail to disclose true identities in funding, payments they have received, or political contributions or solicitations they have made, as part of their financial disclosures in the ethics review process?

RESPONSE: If confirmed, I will be committed to ensuring that all appointees comply with the requirements of the financial disclosure reporting program. I understand that the Ethics in Government Act (EIGA) requires that filers of public financial disclosure reports (SF-278s) report the identity of each source of compensation in excess of \$5,000 in any of the two calendar years prior to the calendar year during which the individual files his first report. 5 U.S.C. app. §102(a)(6). The filer must provide: (1) the identity of each source of compensation, and (2) a brief description of the nature of the duties performed. 5 U.S.C. app. §102(a)(6)(B)(i) and (ii). EIGA does not require filers to report the underlying sources of income that were provided to the filers’ sources of compensation. EIGA specifically excludes from its reporting requirements any “positions held in any religious, social, fraternal, or political entity....” 5 U.S.C. app. §102(a)(6).

At the same time, as I said in my testimony, I understand the underlying concern and intend to explore this issue further with the Department’s ethics officials and the Office of Governmental Ethics.

- b. Where it appears that someone has made efforts to hide their identity, should ethics review make efforts to determine who the real party in interest is behind those efforts to hide their identity?

RESPONSE: If confirmed, I will ensure that the Department’s ethics review of financial disclosure reports is consistent with legal requirements. It is also my understanding that if the filer has properly reported all necessary entries on his or her SF-278, an ethics reviewer will not assume that efforts have been made to hide identities.

26. In your SJQ Questionnaire, you wrote “In the event of a potential conflict of interest, I will consult with the appropriate Department of Justice ethics officials and act consistent with governing regulations.” Unlike many other nominees, including AG Sessions, you did not say you would follow ethics officials’ recommendations with respect to conflicts of interest. You confirmed at your confirmation hearing that you would not

“surrender” your authority to make the ultimate determination.

- a. Have you already concluded whether you should be recused from the Mueller investigation if confirmed?
- b. Given that, as a private citizen, you gave unsolicited advice directly to the President’s legal team and to DOJ casting doubt on aspects of the Mueller investigation, do you understand public concern about your unwillingness either to agree to recuse from that investigation, or to follow the recusal guidance of career DOJ ethics officials, as past attorneys general have generally done?
- c. If you determine you will not comply with the recusal guidance of DOJ ethics officials, will you publicly explain your decision?

RESPONSE: I do not believe that it is possible to make a recusal decision unless and until I am confirmed and the specific facts and circumstances of any live controversy are known. If confirmed, I will consult with the Department’s career ethics officials, review the facts, and make a decision regarding my recusal from any matter in good faith based on the facts and applicable law and rules. I believe the ethics review and recusal process established by applicable laws and regulations provides the framework necessary to promote public confidence in the integrity of the Department’s work, and I intend to follow those regulations in good faith.

Though I am not familiar with the Department’s policies regarding the disclosure to Congress of ethics advice or recusal decisions, my goal is to be as transparent as possible while following the Department’s established policies and practices.

27. This month, my Judiciary Committee colleagues and I requested that OIG investigate the circumstances surrounding Acting AG Whitaker’s refusal to comply with guidance from career DOJ ethics officials. Will you interfere with OIG’s procedures concerning that requested investigation?

RESPONSE: I am not aware of the nature of the Inspector General’s review, should one be occurring, but I have no intent to interfere with the Inspector General’s work.

28. Please explain the commitments you made during the hearing to Chairman Graham that you will conduct DOJ investigations on specific issues he identified. Had you agreed with him in advance that the matters he raised should be investigated?

RESPONSE: I did not commit to conduct any investigations; I promised only to look into issues of concern to the Chairman and noted that investigations may be underway right now. In any event, I did not commit in advance to conduct any specific investigation.

In the hearing, Chairman Graham raised the issue of numerous inappropriate text messages exchanged by two FBI employees that appear to document personal or political bias for Secretary Clinton and prejudice against President Trump. Chairman Graham also spoke about the FBI's potential use of the Steele-authored "dossier" as a basis to obtain a Foreign Intelligence Surveillance Act (FISA) warrant from the FISA Court. FBI investigations must be based on the law and the facts and should be conducted without regard to political favoritism. If confirmed, I will seek to better understand what internal reviews of these and related matters were undertaken, including any investigations conducted by the Inspector General, United States Attorney John Huber, and the Department's ethics and professional responsibility offices.

29. What weight will you give the ethics advice of career DOJ officials regarding recusal and conflicts of interest? What explanations will you commit to provide in cases where you choose not to follow their advice?

RESPONSE: Please see my response to Question 26 above.

30. During your testimony, you described conversations you have had with Deputy Attorney General Rod Rosenstein about the terms and timing of his departure from DOJ if you are confirmed. Have you had any conversations with Matthew Whitaker about his future at DOJ if you are confirmed? If so, please describe those conversations, noting specifically whether you know whether Mr. Whitaker will remain at DOJ and in what role. If not, why haven't you spoken with him as you have with Mr. Rosenstein?

RESPONSE: Acting Attorney General Whitaker and I have had preliminary discussions to explore possible positions both inside and outside of the Department where he may best be able to continue to serve his country. No decisions have been made.

DOJ & OLC Duty of Candor

31. In our one-on-one meeting, you told me you would commit to ensuring that lawyers at DOJ, and at OLC specifically, would be held to the highest legal ethical standards, including a duty of candor. Will you reaffirm that commitment? How specifically will you implement it?

RESPONSE: If confirmed, I will ensure that all Department attorneys, including attorneys within the Office of Legal Counsel, are receiving the appropriate ethical and professional responsibility training. I will address any insufficiency in the current ethics training program, should I discover that one exists.

32. This month, the Washington Post published an op-ed by a former OLC attorney who

acknowledged that under the Trump Administration, OLC lawyers have advanced pretextual arguments to defend Trump's policies.² She identified OLC's traditional deference to White House factual findings as the biggest problem under Trump, and said that she saw "again and again how the decision to trust the president failed the office's attorneys, the Justice Department and the American people." She wrote that OLC routinely failed to look closely at claims the president makes, and that if a lawyer identified "a claim by the president that was provably false, [they] would ask the White House to supply a fig leaf of supporting evidence."

- a. Do you have any reason to doubt the allegations and admissions made in the Post op-ed?

RESPONSE: I know and have confidence in Assistant Attorney General Engel and in the Office of Legal Counsel. Indeed, I have known some of OLC's attorneys since I ran the office nearly 30 years ago. I do not know the author of the *Washington Post* op-ed, who works for an advocacy group espousing the notion that the United States has "seen an unprecedented tide of authoritarian-style politics sweep the country." However, the author's statement that "[w]hen OLC approves orders such as the travel ban, it goes over the list of planned presidential actions with a fine-toothed comb, making sure that not a hair is out of line" certainly reflects my experience with the Office.

- b. Is the OLC conduct described in the op-ed consistent with a lawyer's duty of candor?

RESPONSE: Please see my response to Question 32(a) above.

- c. How will you address the issue of deference to White House "fact-finding" given a president who, according to fact checkers, has lied more than 8,100 times since he took office?³

RESPONSE: In my experience, when OLC reviews proposed executive orders, it seeks, to the greatest extent possible, to verify the factual and legal predicates for the proposed action, relying upon the experience and expertise of others in the Executive Branch.

- d. Against that backdrop, under your leadership, will the Department continue its traditional practice of deferring to factual findings by the White House?

RESPONSE: Please see my response to Question 32(c) above.

² https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.b4a7e24ff5da

³ https://www.washingtonpost.com/politics/2019/01/21/president-trump-made-false-or-misleading-claims-his-first-two-years/?utm_term=.34e802aaa8b7

- e. Do you agree that the Post op-ed raises serious concerns about the possibility that OLC is complicit in creating pretextual justifications for proposed administration actions?

RESPONSE: No, I have no reason to believe that, and that is not consistent with my dealings with OLC.

- f. If confirmed, what will you do to address these concerns?

RESPONSE: As I stated in my confirmation hearing, "I love the department ... and all its components.... I think they are critical institutions that are essential to preserving the rule of law, which is the heartbeat of this country. And I'd like to think that there was bipartisan consensus when I was last in this position that I acted with independence and professionalism and integrity.... And I feel that I'm in a position in life where I can provide the leadership necessary to protect the independence and the reputation of the Department and serve in this Administration." As I further stated, "I am not going to do anything that I think is wrong and I will not be bullied into doing anything I think is wrong by anybody, whether it be editorial boards or Congress or the President. I'm going to do what I think is right."

Campaign Finance

33. Social welfare groups, organized under Section 501(c)(4) of the Tax Code, are required to report political spending to the Federal Election Commission (FEC). Social welfare organizations are also required to file reports with the Internal Revenue Service (IRS), detailing the groups' actual or expected political activity.
- Question 15 on IRS Form 1024 (application for recognition of tax exemption) asks, "Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, state, or local public office . . . ?"
 - Question 3 on IRS Form 990 (annual return of exempt organization) asks, "Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If 'Yes,' complete Schedule C, Part I."

Both IRS Forms 1024 and 990 are signed under penalty of perjury. Section 1001 of the criminal code, makes it a criminal offense to make "any materially false, fictitious or fraudulent statement or representation" in official business with the government; and Section 7206 of the Internal Revenue Code, makes it a crime to willfully make a false material statement on a tax document filed under penalty of perjury. In your view, if an organization files inconsistent statements regarding their political activity with the FEC and the IRS, can the group be liable under Section 1101 or 7206?

RESPONSE: Enforcement of our tax laws and the laws protecting the integrity and transparency of our election process must be a priority for the Department

of Justice. Determining whether there is criminal liability under specific statutes would require an individualized assessment of the facts presented in a specific case, consistent with the Principles of Federal Prosecution. As in all matters, if confirmed, I would look at the individualized facts and circumstances and follow the law and any policies of the Department.

- a. Should the Department concern itself with such inconsistent statements of which the Department of Justice becomes aware? Could that inconsistency provide predication for further investigation?

RESPONSE: If confirmed, I would evaluate any such situation based on actual facts and circumstances if and when presented.

34. Currently no jurisdiction in the United States requires shell companies to disclose their beneficial ownership. Terror organizations, drug cartels, human traffickers, and other criminal enterprises abuse this gap in incorporation law to establish shell companies designed to hide assets and launder money. At a February 2018 Judiciary hearing, M. Kendall Day, the then-Acting Deputy Assistant Attorney General for the Criminal Division, testified, "The pervasive use of front companies, shell companies, nominees, or other means to conceal the true beneficial owners of assets is one of the greatest loopholes in this country's AML [anti-money laundering] regime." The law enforcement community, including the Fraternal Order of Police, Federal Law Enforcement Officers Association; National Association of Assistant U.S. Attorneys; and National District Attorneys Association, have all called on Congress to pass legislation to help law enforcement identify the beneficial owners behind these shell companies.

- a. Do you agree that allowing law enforcement to obtain the identities of the beneficial owners of shell companies would help law enforcement to uncover and dismantle criminal networks?

RESPONSE: Yes. My understanding is that when bad actors exploit front companies, shell companies, other legal structures, and nominees, this creates challenges for prosecutors and investigators seeking to identify the true owners of these entities.

- b. In July 2018, Treasury Secretary Mnuchin told the House Financial Services committee that "We've got to figure out this beneficial ownership [issue] in the next six months." The Trump administration, however, has yet to endorse any beneficial ownership legislation introduced in Congress and has not put forth a proposal of its own. Will you commit to working with Congress and other relevant executive branch departments on legislation to give law enforcement the tools needed to more effectively untangle the complex web of shell companies criminals use to hide assets and launder money in the United States?

RESPONSE: If confirmed, I would be pleased to work with you and other Members of Congress, as well as others in the Executive Branch, to discuss ways to combat money laundering more effectively.

- c. Under current law, banks are required to undertake due diligence to ensure that their customers are not laundering funds. No similar anti-money-laundering standards apply to the attorneys who help set up the shell companies integral to criminal enterprises. Do you support extending anti-money-laundering due diligence requirements to attorneys?

RESPONSE: If confirmed, I will further familiarize myself with this issue and consult with the Department's subject matter experts.

Federalist Society and Involvement in Judicial Selection

35. Please describe the nature of your involvement with the Federalist Society, including your participation in any public or private events or meetings.

RESPONSE: As I stated in my January 3, 2019 letter to the Committee, I have never been a member of the Federalist Society, although I have intermittently participated in activities and events organized by the group, including as a speaker. Speeches I have given at Federalist Society events are listed in my answer to Question 12 on the Committee's questionnaire. In addition, as disclosed in my questionnaire, I served on the Federalist Society's 1987 Convention Planning Committee, though I do not recall specifics of my involvement.

36. Please describe the nature of your relationship with Leonard Leo, including any shared organizational affiliations beyond the Federalist Society.

RESPONSE: Mr. Leo is a longtime personal and professional acquaintance. We speak on occasion and see each other from time to time at events in and around Washington, D.C. While I do not know the full extent of Mr. Leo's organizational affiliations, I believe that we have both been affiliated with the Catholic Information Center. In addition, as noted above, I have from time to time attended events organized by the Federalist Society, for which Mr. Leo works. Although I do not at this time recall any other shared organizational affiliations with Mr. Leo, it is possible he has been involved with other groups with which I have been affiliated, including those identified in my Committee questionnaire.

37. Have you been involved in any way, formally or informally, with the selection, recommendation, or vetting of judicial nominees during the Trump administration, including Justice Kavanaugh? Please describe with specificity the nature of any such involvement, including the names of any judicial nominees on whose

nominations you worked.

RESPONSE: To the best of my recollection, my only involvement with judicial nominees during the Trump Administration was a brief, informal phone call with then-White House Counsel Donald McGahn in summer 2018 in which I expressed my views regarding then-Judge Brett Kavanaugh and Judge Thomas Hardiman. I do not recall any other involvement, but it is possible that I have expressed support for a judicial candidate at some point.

Domestic Terrorism

38. In 2017, the FBI concluded that white supremacists killed more Americans from 2000 to 2016 than “any other domestic extremist movement.” According to the FBI, law enforcement agencies reported that 7,175 hate crimes occurred in 2017, a 17 percent increase over the previous year. In a study titled “The Rise of Far-Right Extremism in the United States,” The Center for Strategic & International Studies found that terror attacks by right-wing extremists rose from around a dozen attacks a year from 2012-2016 to 31 in 2017. Meanwhile, the Trump administration has cut funding to programs, particularly the Department of Homeland Security’s Office of Community Partnership, designed to combat extremism and prevent people from joining extremist groups in the first case.
- a. You stated in your testimony that we must have a “zero tolerance policy” for people who “violently attack others because of their differences.” Please elaborate on the steps you plan to take at DOJ to combat the rise of hate crimes and right-wing extremism.
 - b. Is there value in using federal resources to prevent people from becoming radicalized?
 - c. What will you do if you feel the Trump administration is not devoting enough attention or resources to combatting domestic terrorism and right-wing extremism?
 - d. Would you support encouraging DOJ investigators and prosecutors to label all hate crimes meeting the federal definition of “domestic terrorism” so as to collect more accurate data about the number of violent hate crimes that occur around the country, particularly in states that do not have hate crimes laws?
 - e. Will you commit to treating hate crimes that meet the definition of “domestic terrorism” as a top priority given recent trends?

RESPONSE: If confirmed, I will vigorously enforce the nation’s hate crimes laws to protect all Americans from violence and attacks motivated by their differences. I have not studied the federal definition of “domestic terrorism” or its application to violations of the federal hate crimes laws. If confirmed, I will

be firmly committed to prosecuting all federal hate crimes where warranted by the facts, the governing law, and Department policy.

Accurate reporting of data regarding crime is vital to law enforcement. I understand from publicly available information that the Department has recently launched a new website and held a roundtable discussion with state and local law enforcement leaders aimed at improving the identification and reporting of hate crimes. If confirmed, I will be firmly committed to working with state and local law enforcement and to improving the reporting of crimes, including hate crimes.

Criminal Justice

39. As you are aware, Congress just passed—and the President just signed—the most sweeping criminal justice reform in decades. On both the sentencing and prison side, the FIRST STEP Act incorporates reforms that would seem to go against your previously stated policy views. Will you commit to implement the law faithfully and to let us know if you hit roadblocks or challenges?

RESPONSE: Yes, if confirmed, I will work with relevant Department components to ensure the Department implements the FIRST STEP Act and to determine the best approach to implementing the Act consistent with congressional intent.

40. As you know, in May 2017 Attorney General Sessions issued a memorandum on “Department Charging and Sentencing Policy” directing federal prosecutors to “charge and pursue the most serious, readily provable offense.” During your hearing, you told Senator Lee that you intended to continue that policy “unless someone tells me a good reason not to.”
- a. Do you believe that the core policy of charging the most serious, readily provable offense promotes public safety? What data supports your response?

RESPONSE: I firmly believe that prosecutors should enforce federal law as passed by Congress, while having the discretion to ensure that justice is done in every case. I also believe that the Department’s charging and sentencing decisions should, to the extent feasible, reflect uniform application of the laws. My understanding is that the current policy facilitates that goal while maintaining flexibility when it is warranted. In that way, we should expect to see similar cases treated similarly, regardless of the district in which the case is brought. I believe these fundamental principles – uniformity, fairness, justice – inure to the public good, promote respect for the rule of law, and promote public safety.

- b. Do you believe that the core policy of charging the most serious, readily

provable offense leads to fair outcomes? What data supports your response?

RESPONSE: Please see my response to question 40(a) above.

- c. In a blog post about the Sessions charging policy, the Cato Institute opined that the most serious, readily provable offenses “are so rigid that they too often lead to injustice—especially in drug cases where the quantity of drugs can be the primary factor instead of a person’s culpability. Low-level mules get severe sentences for example driving narcotics from one city to another.” Would this be a “good reason not to” continue the policy?

RESPONSE: I believe that law-abiding citizens in every community want to live their lives free from violent crime. Mandatory minimum sentences can be an effective tool to take the most violent offenders off the streets for the longest period of time, thereby increasing public safety. I also firmly believe that prosecutors should enforce federal law as passed by Congress, while having the discretion to ensure that justice is done in every case. It is my understanding that the Department’s charging policy allows prosecutors the discretion to deviate from the general requirement of charging the “most serious, readily provable offense” in cases where the prosecutor believes it is in the interest of justice to do so. If confirmed, I will ensure that the Department’s charging and sentencing policies demand a fair and equal application of the laws passed by this body, while providing the necessary flexibility to serve justice.

- d. If you do intend to continue the Sessions charging policy, is it your intent that the policy apply to white collar, financial crimes as well as to drug-related and violent crimes?

RESPONSE: It is my understanding that the Department’s charging policy applies to all charging decisions in criminal cases without regard to the nature of the crime(s) to be charged.

Civil Rights

41. Shortly before leaving office, Attorney General Sessions issued a memorandum sharply curtailing the use of consent decrees between the Justice Department and local governments. According to the memo, Sessions imposed three stringent requirements for the agreements: (1) Top political appointees must sign off on the deals, rather than the career lawyers who have done so in the past; (2) Department lawyers must present evidence of additional violations beyond unconstitutional behavior; and (3) the agreements must have a sunset date, rather than being in place until police or other law enforcement agencies have shown improvement.
- a. Is it your intent to continue the Sessions policy on consent decrees? Why or why not?

- b. If you intend to continue the Sessions policy, why is it good policy for political appointees rather than career prosecutors to sign off on these agreements?
- c. You told Senator Hirono that the notion that the Sessions policy made it “tougher” for DOJ to enter into consent decrees was her characterization of the policy. Based on the three new requirements, do you not agree that the Sessions policy makes it tougher for DOJ to enter into consent decrees?

RESPONSE: I take seriously the Department’s role in protecting Americans’ civil rights. As I stated during the hearing, I generally support the policies reflected in former Attorney General Sessions’ memorandum. However, because I am not currently at the Department, I recognize that I do not have access to all information. As in all matters, if confirmed, I would look at the individualized facts of the situation as well as the governing law and the policies of the Department in determining what the next, appropriate steps might be with respect to Attorney General Sessions’ memorandum.

42. In your April 2001 interview for the George H.W. Bush Oral History Project you indicated that the DOJ will/should defend the constitutionality of congressional enactments except when a statute impinges on executive prerogative.
- a. Do you still hold this belief? If so, what is an example of a statute that you feel “impinges on executive prerogative” that you therefore would not defend?

RESPONSE: Yes. My belief remains that the Department should defend the constitutionality of congressional enactments except when they are clearly unconstitutional or impinge on executive prerogative. The Metropolitan Washington Airports Act Amendments of 1991, Pub. L. No. 102-240, Title VII, 103 Stat. 2197 (Dec. 18, 1991), is an example of such a statute. When I was Attorney General, the Department declined to defend certain provisions of the statute because they raised serious separation of powers concerns and violated the Appointments Clause. On July 13, 1992, Stuart M. Garson, then-Assistant Attorney General for the Civil Division, sent a letter to Senator Robert C. Byrd, pursuant to 28 U.S.C. § 530D, explaining this decision.

- b. What is your view of the Department of Justice’s decision not to defend the Affordable Care Act against the challenge brought by several states in federal district court in Texas?

RESPONSE: Because I am not currently at the Department, I am not familiar with the specifics of this decision, and am not in a position to comment on it. As I stated at my hearing, if confirmed I will review the

Department's position in this case.

43. Do you believe that voter impersonation is a widespread problem? If so, what is the empirical basis for that belief?

RESPONSE: I have not studied the issue and therefore have no basis to reach a conclusion regarding it.

44. As Attorney General, in the aftermath of the *Shelby County v. Holder* decision, how specifically would you use the Department of Justice to protect racial and language minority voters from discriminatory voting laws? Can you provide an example of a case in which you believe Section 2 of the Voting Rights Act was used effectively?

RESPONSE: I cannot comment on a hypothetical question. If confirmed, I am firmly committed to protecting and upholding the civil rights and voting rights of all Americans. As with all matters, any decisions regarding whether to bring Section 2 enforcement actions will be based on a thorough analysis of the facts and the governing law.

45. In October, 2017, Attorney General Sessions issued a memo reversing federal government policy clarifying that discrimination against transgender people is sex discrimination and prohibited under federal law. The memo stated, among other things, that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status." As recently as October, 2018, DOJ filed a brief in the Supreme Court arguing that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination against transgender workers.

- a. Do you agree with Attorney General Sessions's interpretation of Title VII? Why or why not?
- b. Should you be confirmed as Attorney General, would DOJ continue to take the position that Title VII does not prohibit discrimination against transgender employees?

RESPONSE: I understand that the question of whether Title VII's prohibition on sex-based discrimination in the workplace covers gender identity is currently pending in litigation, and the Department's position is that it does not. Of course, the scope of Title VII and the question whether transgender individuals should be protected from workplace discrimination as a matter of policy are two different issues.

[Questions numbered 46 and 47 were missing in the submission of Questions for the Record that were received from the Senate Committee on the Judiciary.]

Religious Liberty

48. In a 1992 speech to the “In Defense of Civilization” conference, you called for “God’s law” to be brought to the United States. Reports said that you “blamed secularism for virtually every contemporary societal problem.” You said that secularism caused the country’s “moral decline,” and said that secularism caused “soaring juvenile crime, widespread drug addiction,” and “skyrocketing rates of venereal disease.”

- a. About a quarter of American adults today are not religious. Do you still think that those Americans are responsible for virtually every contemporary societal problem? If not, what changed your mind?
- b. Do you still believe that secularism causes juvenile crime and venereal disease? If not, what changed your mind?

RESPONSE: The reports you quote take substantial parts of my speech out of context and are inaccurate. Contemporary societal problems are complex and caused by many factors. I have never claimed that societal problems are caused by specific individuals or specific classes of individuals.

49. Given your stated views on the evils of secularism, what commitments will you make to ensure that non-religious career attorneys and staff at the Department are protected against disparate treatment on the basis of their secularism?

RESPONSE: If confirmed, I will be firmly committed to fostering a fair, open, and equitable workplace for all Department employees, including non-religious attorneys and staff, in accordance with all applicable laws and Department policies.

50. In 2017, Attorney General Sessions wrote a memo on “Principles of Religious Liberty,” which primarily addressed instances like those presented by the Supreme Court’s *Masterpiece Cakeshop* case, where someone wants an exemption to anti-discrimination civil rights laws because they are discriminating for religious reasons. You co-authored an article in the Washington Post that praised Sessions’s memo on religious liberty. Last year, Sessions created a “Religious Liberty Task Force” to carry out the memo, but little is known about who is on that task force and what exactly they are doing to implement the memo.

- a. If confirmed, what will you do with the Religious Liberty Task Force? If you decide to maintain the task force, will you commit making it transparent in terms of its membership and activities?

RESPONSE: I am not currently at the Department, and I am unfamiliar with the work of that Task Force, so I am unable to comment at this time.

51. At your confirmation hearing, responding to questions about our anti-discrimination laws, you spoke about the need for accommodation to religious communities. How

do you believe the law should strike a balance between the right of all people to be free from discrimination and the legitimate need to accommodate religious communities, to the extent those interests are sometimes in tension?

- a. Hypothetically, if a person had a sincerely held religious objection to hiring people of a certain race or gender, do you believe the First Amendment protects their right not to hire people on the basis of race or gender? Do you believe it should?

RESPONSE: I cannot speculate on a hypothetical question. I believe people should be hired based on their qualifications and performance, but I also believe it is vital that we not use governmental power to suppress the freedoms of religious communities in our country.

Environmental Enforcement

52. In 2017, Attorney General Sessions issued a memorandum implementing a ban on the practice of third party settlements.⁴ All too often, marginalized and disenfranchised communities bear the brunt of environmental harms caused by violations of federal clean air and water laws. Supplemental Environmental Projects, or “SEPs” included in DOJ settlements with polluters, have proved to be valuable mechanisms to accomplish environmental justice in these communities.

- a. Will you commit to ending the policy at DOJ of banning third party settlements in environmental enforcement cases?

RESPONSE: Because I am not currently at the Department, I am not familiar with all the circumstances referenced in your question and therefore am not in a position to make a commitment at this time. However, it is my understanding that the Environment and Natural Resources Division has issued guidance, available at <https://www.justice.gov/enrd/page/file/1043726/download>, on the implementation of Attorney General Sessions’ memorandum in environmental cases. That guidance indicates that the Sessions memorandum did not change preexisting policy regarding SEPs, as it “does not prohibit, as part of a settlement, a defendant from agreeing to undertake a supplemental environmental project related to the violation, so long as it is consistent with EPA’s Supplemental Environmental Projects (SEP) Policy, which already expressly prohibits all third-party payments.”

53. DOJ under Attorney General Sessions saw a 90% reduction in corporate penalties during the first year of the Trump Administration, from \$51.5 billion to \$4.9 billion.⁵

- a. Will you commit to investigate this dramatic drop-off in corporate fines for violations

⁴ <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>

⁵ Public Citizen 2018 report at 13 (see <https://www.citizen.org/sites/default/files/corporate-enforcement-public-citizen-report-july-2018.pdf>).

of federal law and commit to reversing these trends?

RESPONSE: I am not familiar with the source of these statistics, and so have no basis to agree or disagree with them. I am committed to the fair and evenhanded enforcement of the laws within the Department's jurisdiction, including by assessing appropriate penalties to punish and deter unlawful conduct.

General

54. As was noted at your confirmation hearing, the DOJ under the Trump administration has flipped its prior litigation positions in a number of high profile cases, many in the civil rights and voting rights arena.

- a. Are you concerned about the effect these reversals might have on the DOJ's institutional credibility before the courts and the American people?

RESPONSE: It is not uncommon for the Justice Department to change litigation positions in a small number of cases following a change in presidential administrations. The Department changed position in four significant cases during the Supreme Court's last term, and the Court ultimately agreed with the Department in each of those cases.

- b. Did DOJ reverse any prior litigation positions during your previous tenure as Attorney General?

RESPONSE: I do not recall any significant changes in litigation positions during my tenure as Attorney General, although I cannot say categorically that no changes occurred.

- c. If confirmed, what process will you use to determine whether the Department should reverse a prior litigation position?

RESPONSE: I believe the Justice Department should change litigating positions only after weighing the importance of the issue, how erroneous the prior position was, the Department's reasoning in reaching the prior position, and any other relevant factors depending on the facts of the case. If confirmed, I would consult with other members of the Department and the Executive Branch to ensure that those and any other relevant and appropriate factors are carefully considered before making any change in position.

55. In March 2017, Caterpillar Inc. announced that it had retained you and the law firm Kirkland & Ellis to bring a "fresh look" to the ongoing criminal investigation into the company's tax practices. Your work for Caterpillar began just weeks after agents with the Internal Revenue Service, U.S. Department of Commerce, and Federal Deposit Insurance

Corp. executed search warrants at Caterpillar's then headquarters and other facilities to seize documents related to Caterpillar's tax strategy and international parts business. This criminal investigation followed a 2014 Senate Permanent Subcommittee on Investigations report criticizing Caterpillar's tax practices, which allow the U.S.-based company to allocate significant profits to a low-tax Swiss subsidiary. The IRS has charged Caterpillar over \$2 billion in back taxes and penalties related to this matter.

- a. Will you commit to recusing yourself from any matters relating to Caterpillar?
- b. While representing Caterpillar, did you take any formal or informal actions to challenge the basis for the search warrants executed by the government or to challenge the documents collected during the search?

RESPONSE: When the President announced his intent to nominate me to serve as Attorney General, I stopped actively working on matters relating to Caterpillar. It is likely that my prior representation of Caterpillar will present conflicts, and it is my understanding that certain types of conflicts cannot be waived. If confirmed, I commit to following all applicable laws, regulations, and rules with respect to my prior representation of Caterpillar and, if necessary, recusing from any matters relating to the company. Other than information that is publicly available, I am unable to provide further details regarding the nature and specifics of my work for Caterpillar due to applicable privileges and confidentiality obligations.

56. If confirmed as Attorney General, will you commit to providing the resources necessary to pursue complex criminal tax abuse investigations and prosecutions?

RESPONSE: Tax enforcement, whether criminal or civil, is critical to both specific and general deterrence. When wrongdoers are held responsible for their misconduct it helps strength the compliant taxpayer's confidence in the fairness of the tax system. If I am fortunate to be confirmed I will seek to strategically deploy the Department's resources to ensure the equitable enforcement of our tax laws.

Exchange between Senator Whitehouse and Senator Graham Regarding Further Questioning of Attorney General Nominee William Barr on Executive Privilege, Indictment of a Sitting President and Releasing Derogatory Information

Senator Whitehouse: I wanted to make a point that follows on Senator Feinstein's point about the Attorney General Nominee's comments related to transparency and release of the special counsel report. As Senator Feinstein noted his top line was terrific. He wants to be as absolutely transparent as possible consistent with the law but we're both lawyers and we know that there are weasel words that can be put into sentences; and the question of what transparency is consistent with the law is a ginormous loophole in his transparency pledge. And there are two specific areas where we should have concern about that ginormous loophole. The first is the department's tradition that it does not release derogatory investigative information about an uncharged person. This is the rule that James Comey violated so flagrantly and so inexcusably. The question how that rule applies to this report is an interesting one. And the particular question that is of interest is, what if the reason that President Trump is an uncharged person within the meaning of that department's tradition is the OLC opinion that says 'you can't indict a sitting president.' What if there actually is an indictment worthy case to be made and they then take the position that, well he's an uncharged person and therefore this is derogatory information and we're not going to talk about it. There are a million reasons why in the special counsel context when the President of the United States is a target that rule creates, . . . there are a whole bunch of new considerations. But it ought to be a very simple one that if the only reason he is an uncharged person is because OLC's internal, untested, never signed off on by any judge policy it makes him an uncharged person. We got to get to the bottom of that. That's I think a worthy question for this committee to settle before we're asked to vote on this guy.

The second is what if the reason that he refuses to be transparent about the special counsel report by reason of the law has to do with an assertion of Executive Privilege by the White House. Particularly again, an assertion by the White House completely untested in any court. He just says we're going with it. That takes the transparency of the report out of the special counsel process and the hands of the Attorney General and moves it over to White House counsel. And I think we have a serious concern about that problem because in this committee we have seen such fragrant, sorry fragrantly false and bogus assertions of Executive Privilege by this administration already. So again, these are two enormous windows that could be closed with clear answers and I hope very much that we can get those answers before we're obliged to vote on Mr. Barr.

[...]

I think we need to get to the bottom of Executive Privilege and come up with a committee process and rule for when we'll accept the assertion and when we won't because we've been extraordinarily sloppy about allowing executive officials to get away with non-assertion assertions of the privilege.

[...]

Senator Graham : That's a good point I haven't thought about that. What if the legal counsel said OLC folks said, you can't indict a sitting president so therefore, yeah so we'll talk to . . . I think that's a good question to get an answer . . .

Senator Whitehouse: And I think getting a responsible review of the executive privilege assertion if that's going to be an assertion that prevents release of the transcript. I don't know why they're being dodgy about those answers but one looks suspiciously . . .

Senator Graham : We'll give him a call.

Senator Whitehouse: . . .at dodging those answers.

Senator Graham : We'll give him a call.

Senator Whitehouse: Thank you.

[. . .]

Senator Graham: Senator Durbin, Senator Whitehouse mentioned two things I haven't really thought about; we'll call Mr. Barr and see if we can get a phone call or maybe a meeting to ask about executive privilege and OLC determinations as a basis to deny transparency . . . see what he says.

[. . .]

Senator Graham: Thank you, and I'll just reiterate again that Russia did it along with other people could do it, but Russia did it. The emails were stolen by Russian operatives. Mr. Mueller in my view is not on a witch hunt. He'll be allowed to do his job and it'll be good for the country. When that report is finished I want to find out as much about it as you do. But the regulation doesn't prohibit him from giving us the report you're right. But he does have discretion and I just trust the guy to make good judgments. But I do want to talk to him about the OLC concept institution . . . that's a pretty interesting. . . If you don't . . .if you agree you can't indict the President that's probably not a good reason not to share with us the derogatory information. In executive privilege you have to really watch about that being used to deny transparency cause that's a pretty easy way to stop things. So we'll talk to Mr. Barr about that.

[. . .]

Senator Graham: I'll try to be fair, the best I know how to be the OLC office being used to knock out information to the public is really a legitimate question. Executive privilege claim by any White House has reason not to divulge information is a legitimate question. Because you could use those two things to really shut down what the public gets and I'll talk to Mr. Barr about that with some members of the committee here interested but we'll have a lively debate next Tuesday and hopefully we'll send the nominee to the floor but everybody's got to vote their conscious and I expect. . .and if you vote against him I'm not questioning your motives. The one thing that Senator Thurmond and Biden told me, which is pretty good advice. You can disagree violently with the conclusion but don't question people's motives.