does not rest with the President alone. It rests with all of us. Before Inauguration Day, there is the opening of this 111th Congress. This too is a great civic ritual. And this too should renew our optimism about the future of America and our optimism about achieving something important for the American people over these next 2 years. Now is our chance to deliver—not just in word, but in deed. This is a solemn charge. For some, it might cut against the grain. But if we are to have a future worthy of our past, it is a charge that must be kept.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

ERIC HOLDER CONFIRMATION HEARING

Mr. SPECTER. Mr. President, with the approaching hearings before the Judiciary Committee on the nomination of Eric Holder to be Attorney General, I thought it might be useful to frame some of the issues and put them into perspective, at least my perspective, in advance of the hearings, and to advise Mr. Holder in some greater detail than our brief meeting, when he paid his courtesy call a few weeks ago, to discuss some of those issues so he would be in a better position to respond.

I begin with the view that I wish to be helpful to President-elect Obama in his dealings with the enormous problems which face our Nation. I have come to know President-elect Obama in his capacity as Senator for the last 4 years. His office is right down the hallway. I consider him a friend, and certainly we are in need of action on some of the enormous problems our Nation faces. We approach these problems in the context of our constitutional roles. The Constitution, in article I, gives certain powers to the Congress and, in article II, certain powers to the executive branch. The core of our constitutional Government is checks and balances so we have that responsibility to have oversight and to give our candid judgments. Frequently, it is more helpful to say no than to say yes. When we deal with the position of Attorney General, we have a role which is significantly different from other Cabinet officers.

For example, Cabinet officers carry out the President's policies on a wide variety of issues and, to an extent, so does the Attorney General. But the Attorney General has a significantly different role in his responsibility to the people and to the rule of law. Senator LEAHY and I wrote extensively on this subject, published last October in Politico.

Some Attorneys General have been very compliant with the administration and have not fared very well historically. Attorney General Harry Daugherty was sullied by the Teapot Dome scandal. Although ultimately cleared, he resigned amid allegations of impropriety. We had the Attorney General during the administration of President Roosevelt, Attorney General Homer Cummings, who yielded to the court-packing plan, certainly not the sort of institutional integrity which we would look for in an Attorney General. Some Attorneys General have been very diligent. Perhaps the best example is Attorney General Elliot Richardson, who resigned rather than fire Special Prosecutor Archibald Cox during the administration of President Nixon, and Deputy Attorney General Bill Ruckelshaus followed suit.

In today's press, there are reports about the distinguished career of Attorney General Griffin Bell, who just died. One of the hallmarks of Attorney General Bell's career was his willingness to say no to President Carter, who had appointed him. President Carter, it is reported, wanted a certain prosecution brought. Attorney General Bell said that it wasn't an appropriate matter for a criminal prosecution. Attorney General Bell advised President Carter that the way he would get that prosecution brought would be to appoint a compliant Attorney General, that he would resign before he would undertake that prosecution.

We have seen, regrettably, with the administration of Attorney General Alberto Gonzales, yielding to the Executive will without upholding the rule of law; the hearings conducted by the Judiciary Committee, for which I was ranking member, over the termination of U.S. attorneys; the attitude of Attorney General Gonzales on habeas corpus, testifying that there was no positive grant of habeas corpus in the Constitution, notwithstanding the explicit clause which says habeas corpus may be suspended only in time of rebellion or invasion. So this is a very key and critical appointment.

The Attorney General also has enormous responsibilities in advising the President more generally on the scope of Executive authority. Mr. Holder will doubtless be questioned at some length on the issue of the terrorist surveillance program, warrantless wiretaps, and the meaning of the Foreign Intelligence Surveillance Act; and where does congressional authority under article I stop on the flat prohibition against wiretaps without warrants, contrasted with the Executive's power as Commander in Chief under article II; and what are the Attorney General designate's views on attorney-client privilege restrictions, a matter which he initiated in 1999 and which has seen further restrictions in the Thompson memorandum and subsequently. Last Congress I introduced legislation to try to deal with that. There is also the reporter's privilege issue, where the Department of Justice has opposed the privilege for reporters where they have been held in contempt. A New York Times reporter was held in jail for some 85 days after the source of the confidential disclosure had been addressed. These are just a few of the issues which we will be looking at in the confirmation hearings of Attorney General Holder.

With respect to Mr. Holder, specifically, he has had an outstanding academic and professional record—I acknowledged that early on—prestigious college and law school, Columbia; a judge of the District of Columbia Superior Court; involved in Department of Justice prosecution teams; and later served as Deputy Attorney General. But aside from these qualifications on Mr. Holder's resume, there is also the issue of character. Sometimes it is more important for the Attorney General to have the stature and the courage to say no instead of to say yes.

There are three specific matters which will be inquired into during the course of Mr. Holder's confirmation hearing. The first one involves a highly publicized pardon, the Marc Rich pardon. Mr. Holder testified he was "not intimately involved" in the Rich pardon and he assumed that regular procedures were being followed. But when you take a look at some of the details as to what was disclosed in the hearing by the House of Representatives and in the hearing in the Senate Judiciary Committee, which I chaired 15 months after the pardon, Mr. Holder met privately with Mr. Rich's attorney. According to Mr. Holder's own testimony, he tried to facilitate a meeting between the prosecutors in the Southern District of New York and Rich's attorney. Rich's attorney, Mr. Quinn, testified that Mr. Holder advised him to go straight to the White House rather than through the pardon office, which is the regular procedure. Mr. Quinn produced an e-mail from himself to a colleague with the subject line "Eric," in which he noted that "he says go straight to the WH, also says timing is good. We should get it in soon."

That is not conclusive, but these are matters to be inquired into. The pardon attorney was opposed to the pardon, but he never issued a recommendation because he didn't think the pardon was under serious consideration. Then the White House requested Mr. Holder's opinion, and he is quoted as saying that he was "neutral, leaning towards favorable" on the pardon.

On this case of the record, with the very close connections between Mr. Rich and very sizable contributions to the Clinton library and very sizable contributions to President Clinton's party, these questions inevitably arise and have not been answered satisfactorily. During the course of the hearings, both in the House and in the Senate, where I chaired the full committee hearing, the claim of executive privilege was made. We face a little different situation when we are looking at a confirmation hearing for Attorney General, in terms of the legitimate scope of Senators' inquiry which will be pursued. It ought to be focused on the fact that the charges against Rich were very serious. They involved tax evasion, fraud, trading with the enemy,

with Iran. It should also be emphasized that the U.S. attorney who prosecuted the case was opposed to the pardon and, in fact, refused to meet with Mr. Rich.

The second issue which requires a hearing on the issue of character and the determination as to whether Mr. Holder was yielding to the President to give him or the Vice President a conclusion they wanted to hear was the issue of the appointment of an independent counsel on the allegations that Vice President Gore engaged in fundraising from the White House in violation of Federal law.

Mr. Holder, in his capacity as Deputy Attorney General, was advising Attorney General Reno. Attorney General Reno came to the conclusion that independent counsel ought not to be appointed. The House of Representatives committee filed this report:

> . . . the failure of the Attorney General to follow the law and appoint an independent counsel for the entire campaign finance investigation has been the subject of two sets of Committee hearings. FBI Director Louis Freeh and the Attorney General's handpicked Chief Prosecutor, Charles LaBella, wrote lengthy memos to the Attorney General advising her that she must appoint an Independent Counsel under the mandatory section of the Independent Counsel Statute. . . .

That mandatory section does not leave it to the discretion of the Attorney General, but the Attorney General declined to appoint independent counsel.

In hearings conducted before the Senate Judiciary Subcommittee, which I chaired, Attorney General Reno was questioned extensively on the evidence, which showed that hard money was being discussed as the matter of fundraising to be undertaken by Vice President Gore.

Attorney General Reno did not consider a very critical piece of evidence written by a man named Strauss who had attended the meetings. The Strauss memo contained the notation of a certain percentage of hard money and a certain percentage of soft money. Attorney General Reno did not consider that because, as she testified, it did not refresh the recollection of Mr. Strauss.

Well, there are a number of exceptions to the hearsay rule. One is when a piece of paper is reviewed by a witness and it refreshes his prior recollection, and another is when the witness testifies that the notes were made contemporaneously with the discussion and it constitutes prior recollection recorded, which is an exception to the hearsay rule and the witness does not have to remember what had occurred.

That critical piece of evidence was not considered by Attorney General Reno. So here again are issues which are appropriate for inquiry on the character issue.

On the issue of whether Mr. Holder will exercise sufficient independence, Vice President Gore sought to explain to the FBI that he was out of the room a good bit of the time of the discussion because, as he had put it, he had consumed a lot of iced tea on that occasion. Well, these are matters which the independent counsel statute was designed to deal with, to conduct a further investigation, to consider all of the ramifications, and not to show favoritism because the subject of an investigation happened to be the Vice President of the United States. Mr. Holder's role in advising the Attorney General on that matter, his role as Deputy Attorney General, is an appropriate matter for inquiry.

The third issue to be inquired into involves the hearings on the so-called FALN organization, the Armed Forces of Puerto Rican Nationalists. The FALN was an organization linked to over 150 bombings, threats, kidnappings, and other events which resulted in the deaths of at least six people and the injuries of many more between 1974 and 1983. Four of the persons who received clemency were convicted of involvement in the $7 million armed robbery of a Wells Fargo office.

In the face of this kind of conduct, and in the face of a report by the pardon attorney in the Department of Justice, the actions of Deputy Attorney General Holder were very extensive in what eventuated in the granting of clemency.

The Department of Justice sent the matter back for another evaluation, apparently dissatisfied with the recommendation of the pardon attorney that the clemency application ought to be denied.

On this second occasion, according to press accounts, the submission by the pardon attorney ''made no specific recommendation'' regarding clemency, but it did reflect that the FBI and two U.S. attorneys' offices opposed clemency. Notwithstanding that record, clemency was granted. It is an appropriate matter for inquiry to see specifically what role Mr. Holder played.

Senator HATCH, who was the chairman of the committee at that time, had this to say about the conclusion:

> President Clinton, who up to this point had only commuted three sentences . . . offered clemency to 16 members of FALN. This to me, and really almost every Member of Congress, was shocking.

Senator LEAHY joined in the criticism of the grant and raised the question about the failure of the Department of Justice to contact the victims. The matter came before the Senate, which rejected and criticized the grant of the clemency by a vote of 95 to 2.

All of these matters relate to judgment and relate to whether Mr. Holder had the kind of resoluteness displayed by Attorney General Griffin Bell or Attorney General Elliot Richardson to say no to his superior.

In raising these concerns, I am raising questions. I will approach these hearings next week—a week from Thursday—with an open mind to give Mr. Holder an opportunity to explain his conduct and his actions and to see if, on the totality of the record, he displays the requisite character and judgment and can justify the actions in these sorts of matters which would warrant the confidence of the Judiciary Committee, really representing the confidence of the American people.

After our experience with Attorney General Gonzales, and given the experience of other Attorneys General in the past and the very critical role which they play in upholding the rule of law, these are the sorts of issues which ought to be aired. Mr. Holder ought to have his day in court, so to speak—the hearing before the Judiciary Committee—to see if he can state the case which would warrant his confirmation.

Mr. President, I ask unanimous consent that a detailed statement be printed in the RECORD at this point in full. What I have tried to do is to summarize a more detailed statement.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HOLDER FLOOR STATEMENT

With the Judiciary Committee hearings approaching on the nomination of the Attorney General-designate Eric H. Holder, Jr., I think it would be useful to put some of the issues into perspective, at least my perspective. I begin with the view to help President-elect Obama deal with the enormous problems facing our nation. I worked with then-Senator Obama; I had an office close to his on the 7th floor of the Hart Building, and consider him a friend. I sent a congratulatory letter after the election and was pleased to get his telephone call to discuss working together in the new year.

The fundamentals of our continuing relationship will be governed by the Constitution. Separation of powers and checks and balances are the basic precepts of dealings between the Congress (Article I) and the Executive (Article II). My record demonstrates my willingness to cross party lines when I consider it appropriate—frequently to my own political disadvantage.

The Constitution requires the President's choice for Attorney General to be confirmed by the Senate—specifically, with the Senate's ''advice and consent.'' On June 13, 2005, in the context of a possible Supreme Court nomination, Senator Leahy described his opinion of the role of the Senate as prescribed by this clause stating: ''The Constitution provides that the President 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint' judges. For advice to be meaningful it needs to be informed and shared among those providing it. . . . Bipartisan consultation would not only make any Supreme Court selection a better one, it would also reassure the Senate and the American people that the process of selecting a Supreme Court justice has not become politicized.'' (Cong. Rec. S6389) Senator Leahy's statement is at least relevant, if not equally applicable, to Mr. Holder's nomination. History demonstrates that presidents who seek the advice of members of the Senate prior to submitting a nomination frequently see their nominees confirmed more quickly and with less controversy than those who do not. A recent example is that of President Clinton who consulted with then-Chairman Hatch prior to nominating Justice Ruth Bader Ginsberg and Justice Stephen Breyer to the Supreme Court. Both nominees were confirmed with minimal controversy.

In contrast, on the nomination of Mr. Holder, President-elect Obama chose not to

seek my advice or even to give me advance notice, in my capacity as Ranking Republican on the Judiciary Committee, which is his prerogative. Had he done so, I could have given him some facts about Mr. Holder's background that he might not have known, based on my experience on the Senate Judiciary Committee. For example, in 1999, I chaired a Senate Judiciary Committee oversight task force that investigated whether the Department of Justice fulfilled its responsibilities in investigating the Waco siege, Chinese nuclear spying, and alleged campaign-finance abuses by Democrats during the 1996 elections. As part of that investigation, I chaired six hearings before the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, during which we heard from numerous witnesses and reviewed many documents. The insight gained during that investigation might have been valuable to President-elect Obama, because Mr. Holder was Deputy Attorney General (DAG) of the Justice Department from 1997 until 2001 and, therefore, played a pivotal role in determining the level and scope of the Justice Department's investigation of these important matters. I also chaired the Senate Judiciary Committee's 2001 hearing on the controversial pardons of international fugitives Marc Rich and Pincus Green. During that hearing, the Committee heard testimony from Mr. Holder on his role in those pardons. I will describe some of the details on those matters shortly. Based on my role on those investigations, I could have provided President-elect Obama with information on Mr. Holder that he might not otherwise have had and might have found useful.

Seeking to be helpful to the new administration does not necessarily mean agreement on all matters. Sometimes saying ''no'' may be more helpful, but may not appear to be at the time.

I acknowledge the many good features about Mr. Holder's education and professional background. He received his B.A. from Columbia University in 1973 and his J.D. from Columbia Law School in 1976. Following law school, Mr. Holder pursued a career in public service, first as a trial attorney in the Public Integrity Section of the Department of Justice, then as an Associate Judge for the Superior Court of the District of Columbia, next as the United States Attorney for D.C., and then as Deputy Attorney General and, for a short period, as Acting Attorney General. Following his tenure at the Department of Justice, Mr. Holder joined the D.C. office of Covington & Burling, LLP as a partner.

In addition to the accomplishments on a nominee's resume, however, there is a critical qualification of character in upholding principles when tempted to yield to expediency by being a ''yes man'' to please a superior or to accommodate a friend. As Chairman Leahy and I noted in an op-ed we co-authored last October and published in Politico, ''[I]ndependence is also an indispensable quality in an attorney general. . . . Regrettably, we have seen what happens when an attorney general ignores this basic tenet and considers the president, not the American people, as his principal. We must ensure that the rule of law never plays second fiddle to the partisan desires of political operatives.''

American history provides several examples of Attorneys General whose independence was tested; some succumbed to being ''yes men'' and some resolutely said ''no.'' One example of an Attorney General who may have been swayed by political pressure was Harry M. Daugherty (51st Attorney General under Presidents Harding and Coolidge, 1921–1924). In 1924, the Senate launched an investigation into the failure of the Attorney General to prosecute those implicated in the Teapot Dome Scandal, which was headed by Democratic Senator Burton K. Wheeler of Montana. The investigation included an examination of Mr. Daugherty's involvement in the scandal and why he failed to prosecute the Secretary of the Interior and others implicated. Although Mr. Daugherty was eventually cleared of all charges, his failure to aggressively prosecute those involved, combined with allegations that he obstructed justice by trying to block the congressional investigation, resulted in a loss of confidence in him. Mr. Daugherty resigned in March 1924, prior to the conclusion of the investigation.

Another example is that of Homer S. Cummings (55th Attorney General under President Franklin Roosevelt, 1933–1939). Frustrated with several Supreme Court decisions declaring New Deal programs unconstitutional, President Roosevelt asked Mr. Cummings to secretly draft a bill that would have added one new judge for every judge who refused to retire at age 70. This proposal, which came to be known as the ''court-packing plan,'' could have created as many as six vacancies on the Supreme Court as well as a number of lower court vacancies. The resulting legislation was widely criticized as an overt political plan to circumvent the Supreme Court. The plan was never enacted, in part, because Justice Owen Roberts, who had traditionally voted against New Deal legislation, started voting with the ''liberal'' wing and upholding such measures. Justice Roberts' apparent about-face in jurisprudence is known as ''the switch in time that saved nine.''

A third and possibly the most egregious example is that of John N. Mitchell (67th Attorney General under President Nixon, 1969–1972). In 1974, Mr. Mitchell was indicted for conspiracy, obstruction of justice, giving false testimony to a grand jury, and perjury, for his role in the Watergate break-in and cover-up. He was convicted of these charges in 1975 and sentenced to two-and-a-half to eight years in prison.

In contrast, probably the most memorable example of an Attorney General who did not bend to political pressure is that of Elliot L. Richardson (69th Attorney General under President Nixon, 1973). On October 20, 1973, Nixon ordered Richardson to fire Watergate special prosecutor Archibald Cox. Mr. Richardson and his deputy attorney general, William D. Ruckelshaus, resigned rather than carry out the order.

Another example is President Lincoln's attorney general, Edward Bates (26th Attorney General, 1861–1864). Even in the midst of the Civil War, Bates did not hesitate to express independent judgment. Bates disagreed with President Lincoln on a number of issues that arose from the war, including Lincoln's desire to allow West Virginia to be admitted as a state. In part because he was unable to convince Lincoln to agree with him, Mr. Bates resigned from office.

The Attorney General is unlike any other cabinet officer whose duty it is to carry out the President's policy. The Attorney General has a corollary, independent responsibility to the people to uphold the rule of law. Chairman Leahy and I mentioned this responsibility in the aforementioned Politico op-ed stating, ''[t]he attorney general's duty is to uphold the Constitution and the rule of law, not to circumvent them. The president and the American people are best served by an attorney general who gives sound advice and takes responsible action, rather than one who develops legalistic loopholes to serve the partisan ends of a particular administration.''

After our recent experience with Attorney General Gonzales, it is imperative that the Attorney General undertake and effectuate that responsibility of independence. Mr. Gonzales left office accused of politicizing the Justice Department, failing to restrain Executive overreaching, and being less than forthcoming with Congress. Even before becoming Attorney General, we now know that he pushed Attorney General Ashcroft to approve the President's surveillance program over the objections of high-level Justice Department officials. Once in office, he either abdicated his responsibility to subordinates or was complicit in the questionable firings of several U.S. Attorneys, depending on which of his statements one accepts as true. And, he repeatedly defended aggressive Administration positions that appeared dismissive of Congress and the Courts. Indeed, in his zeal for the Administration's policy on detainees, he even questioned the constitutional basis for habeas corpus review. On January 18, 2007, when he testified before the Judiciary Committee, it was astounding to hear his claim that ''there is no express grant of habeas in the constitution.'' When I pressed him on the point, he replied ''the constitution does not say every individual in the United States or every citizen is hereby granted or assured the right to habeas. It simply says the right of habeas corpus shall not be suspended.'' Later, the Detroit Free Press editorialized: ''The moment when Alberto Gonzales proved he was just wrong for the job of U.S. attorney general came . . . after Sen. Arlen Specter, R-Pa., asked him about the constitutional guarantee of criminal due process, known as habeas corpus.'' I am convinced that many of Attorney General Gonzales' missteps were caused by his eagerness to please the White House.

Similarly, when Mr. Holder was serving as DAG to President Clinton, some of his actions raised concerns about his ability to maintain his independence from the president. The most widely reported incident involved the aforementioned controversial pardon of fugitive Marc Rich. Mr. Rich fled the country in 1983 after a federal grand jury in New York returned a 51-count indictment against him, his partner, and his company, which included allegations of tax evasion, fraud, and trading with the enemy (Iran, during the hostage crisis). Those charges carried a maximum sentence of 300 years in prison. On January 20, 2001, President Clinton granted Rich a pardon that did not follow the regular pardon procedures. Mr. Rich never appeared for trial, had attempted to ship subpoenaed documents out of the country, and was still a fugitive. Prior to his pardon, he had been listed on the FBI's ''Ten Most Wanted'' fugitives list. Further tainting his pardon was the fact that his ex-wife wife had donated large sums to the Democratic Party ($867,000), to the Clinton Library ($450,000) and had donated $66,300 to individual Democratic candidates.

On February 8 and March 1, 2001, the House Committee on Government Reform held two hearings on the pardons of Rich and others made during President Clinton's final days in office. On February 14, 2001, I chaired a full Judiciary Committee hearing on the controversial pardons. At the Judiciary Committee hearing, Roger Adams, DOJ's Pardon Attorney, testified that ''none of the regular procedures . . . were followed'' with regard to the Rich and Green pardons.

Mr. Holder testified that he was not ''intimately involved'' in the Rich pardon, and that he assumed that the regular procedures were being followed. Mr. Holder said that, the night before the pardon was granted, White House Counsel Beth Nolan contacted him to ask his position on the pardon request. Mr. Holder stated that he had reservations about the pardon request since Mr. Rich was still a fugitive and because it was clear that the prosecutors involved would

not support the request, but he ultimately told Ms. Nolan that he was ''neutral, leaning towards favorable'' on the request. He testified that one factor influencing his decision was the assertion that Israeli Prime Minister Ehud Barak had weighed in strongly in favor of the request; therefore, the granting of the request might have foreign policy benefits. He made no inquiry, however, as to whether that was true.

Notwithstanding, based on these hearings, serious questions have been raised regarding Mr. Holder's candor while testifying before Congress. (Jerry Seper, Holder Testimony on Pardon Questioned, The Washington Times, Dec. 18, 2008) In response to a question from Congressman Burton, Mr. Holder testified that he had ''only a passing familiarity with the underlying facts of the Rich case.'' (The Controversial Pardon of International Fugitive Marc Rich: Hearing Before the House Comm. on Govt. Reform, 107th Cong. 193 (2001) (statement of Mr. Eric Holder)) Despite this assertion, correspondence with the Justice Department obtained by the House Committee and testimony from other witnesses shows that, 15 months before the pardon, Mr. Holder met privately with Mr. Rich's attorney and received a presentation about what Mr. Rich's defense believed were flaws in the government's case. (Id. at 175–76) Further, according to Mr. Holder's own testimony, he tried to facilitate a meeting between the prosecutors in the Southern District of New York and Rich's attorney, Mr. Jack Quinn, over a year before the pardons were granted. (President Clinton's Eleventh Hour Pardons: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 31 (2001))

Allegations have also been raised that Mr. Holder was responsible for the deviation from normal pardon procedures. Allegedly, Mr. Quinn wrote to and spoke with Mr. Holder several times between November 2000 and the night of January 19, 2001, and primarily relied on him for guidance and information rather than the pardon office. Mr. Quinn testified that Mr. Holder advised him to go straight to the White House rather than through the pardon office, and Mr. Quinn produced an email from himself to a colleague with the subject line ''eric'' in which he noted that ''he says go straight to wh. also says timing is good. we shd get in soon.'' (The Controversial Pardon of International Fugitive Marc Rich: Hearing Before the House Comm. on Govt. Reform, 107th Cong. 640 (2001) (email from Jack Quinn)) Mr. Holder denied that he told Mr. Quinn to go straight to the White House (Id. at 204) and maintained that he thought the regular pardon procedures were being followed; however, he admitted that he never spoke to anyone either in the pardon office or in his own office about whether the Rich pardon petition had been received. (President Clinton's Eleventh Hour Pardons: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 30 (2001).

Finally, Mr. Holder testified that he had at least one conversation with Mr. Quinn about a potential Attorney General position in Al Gore's possible administration while the Rich pardon was pending, and that he was sending Mr. Quinn the resumes of people on his staff and asking for his help in finding them jobs after Clinton left office. (The Controversial Pardon of International Fugitive Marc Rich: Hearing Before the House Comm. on Govt. Reform, 107th Cong. 202 (2001)) Mr. Holder noted, however, that the actions he took with regard to the Rich pardon were done after the election had been decided in favor of President George W. Bush when the Attorney General position was no longer an option.

While serving as DAG, Mr. Holder also was intimately involved in the decision-making process that resulted in Attorney General Janet Reno rejecting the Department of Justice and FBI task force's recommendation to appoint an independent counsel to probe the allegations of fund-raising abuses by Vice President Al Gore during the 1996 presidential campaign. (David Johnston, Reno Aides Recommend Against Outside Counsel, Austin American-Statesman, Nov. 22, 1997; Deputy Attorney General Holds Justice Department Weekly Media Availability, FDCH Political Transcripts, Dec. 18, 1997; US Seeks to Verify Chinese Campaign Influence, The Bulletin's Frontrunner, Feb. 13, 1998; John Bresnahan, Hatch May Hold New Hearings to Pressure Reno on 1996 Campaign Finance Violations, Roll Call, May 11, 1998; Michael Kirkland, Reno Gets Advice from Freeh on Gore Probe, United Press International, July 27, 2000) The House Committee on Government Reform and the Senate Committee on Governmental Affairs both conducted extensive investigations of the fund-raising activities. Both Committees found significant evidence of wrongdoing and recommended that the Attorney General appoint an independent counsel to investigate further. In its report on the investigation, the House Committee wrote: ''the failure of the Attorney General to follow the law and appoint an independent counsel for the entire campaign finance investigation has been the subject of two sets of Committee hearings. FBI Director Louis Freeh and the Attorney General's hand-picked Chief Prosecutor, Charles La Bella, wrote lengthy memos to the Attorney General advising her that she must appoint an Independent Counsel under the mandatory section of the Independent Counsel Statute. . . . Until an independent counsel is appointed in this matter, the American people cannot be assured that the same standards of justice will be applied to the President and Vice-President as apply to every other citizen.'' (Investigation of Political Fundraising Improprieties and Possible Violations of Law, Interim Report, H.R. Rep. No. 105–829, Sixth Rep., Vol. 1, at 3 (1998))

Following these two Committees' investigations, I chaired a special task force to examine whether the Justice Department fulfilled its responsibilities in investigating these matters. That lengthy investigation of the campaign finance scandal included six hearings before the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts and brought to light important, previously unknown information, including the fact that campaign task force head Robert Conrad (who replaced Charles LaBella as the head of the task force) also had recommended that Attorney General Reno appoint a special prosecutor in addition to the prior recommendations of FBI Director Louis Freeh and Mr. LaBella.

After reading Mr. Conrad's report, which was only provided to the Committee pursuant to a subpoena, I discovered that Mr. Conrad also had recommended the appointment of a special counsel. I questioned Attorney General Janet Reno during a Judiciary Committee hearing about a number of Mr. Conrad's findings to determine whether a special prosecutor was required. For example, Mr. Conrad's report raised questions as to the veracity of Vice President Gore's statements about fund raising telephone calls he made from the White House. According to federal law, if the money Gore raised through the calls was so-called ''soft money,'' it was not a contribution and was not prohibited from being raised on federal property. But, if it was so-called ''hard money,'' then Gore may have violated the law. Mr. Conrad had questioned Gore about the issue, and Gore contended that he did not know that hard money was to be raised. But, the question remained as to what Gore knew when he made the calls.

I questioned the Attorney General at some length about the specific facts that had been produced in the investigation of Gore's statements. For example, there was evidence that four witnesses testified abouta meeting on November 21, 1995, where Gore was in attendance, where they discussed raising hard money. Evidence of this meeting supported the conclusion that Gore knew hard money was the objective prior to making the phone calls. (The 1996 Campaign Finance Investigations: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 107–09 (2000)) I questioned Reno extensively about the fact that she discounted the evidence from David Strauss, who was the deputy Chief of Staff for Gore, who had made contemporaneous notes at this November 21, 1995 meeting about the discussion. Strauss had written: ''Sixty-five percent soft, thirty-five percent hard,'' showing that hard and soft money had been discussed at the meeting. Strauss later said he could not remember what was discussed at the meeting. Reno did not consider Strauss' notes because he said they did not refresh his recollection. (Id. at 108) I pointed out to Reno that Strauss' notes constituted competent evidence as an exception to the hearsay rule as ''prior recollection recorded.'' It was not determinative that Strauss said he did not remember even after he looked at his notes since the notes were valid evidence of ''prior recollection recorded.'' (Federal Rule of Evidence 803(5)) I asked Reno if she was familiar with the rule of evidence ''prior recollection recorded'' and her responses indicated that she was not. (The 1996 Campaign Finance Investigations: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 108–09, 112–113 (2000)) She apparently did not understand the difference between ''recollection refreshed'' and ''prior recollection recorded.''

In my legal judgment, the evidence supported the appointment of Independent Counsel as recommended by Freeh, LaBella, and Conrad—especially if the Straus's notes had been considered. Further investigation by Independent Counsel was warranted to determine if favoritism had been shown to the Vice President. Press reports indicate that Reno consulted Holder throughout the investigation. (David Johnston, Reno Aides Recommend Against Outside Counsel, Austin American-Stateman, Nov. 22, 1997; Deputy Attorney General Holds Justice Department Weekly Media Availability, FDCH Political Transcripts, Dec. 18, 1997; US Seeks to Verify Chinese Campaign Influence, The Bulletin's Frontrunner, Feb. 13, 1998; John Bresnahan, Hatch May Hold New Hearings to Pressure Reno on 1996 Campaign Finance Violations, Rollcall, May 11, 1998; Michael Kirkland, Reno Gets Advice from Freeh on Gore Probe, United Press International, July 27, 2000) The Judiciary Committee should question Mr. Holder on the issue of his independence in following the facts without a political bias in favoring Gore.

A third controversial matter with which Mr. Holder was involved was President Clinton's granting of clemency to 16 members of the terrorist organization FALN (an acronym which translates to the Armed Forces of Puerto Rican Nationalists) on August 11, 1999. The FALN organization had been linked to over 150 bombings, threats, kidnappings, and other events which resulted in the death of at least six people and the injury of many more between 1974 and 1983. (Clemency for FALN Members: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 1 (1999) (statement of Chairman Hatch)) For example, four of the persons who received clemency were convicted of involvement in the $7.2 million armed robbery of a Wells Fargo office in 1983 (half of the money reportedly ended up with the Cuban Government and

was used to train and finance the robbers). (Edmund H. Mahony, Clinton-Era Sentence Reductions Could Trip Holder's Confirmation, The Hartford Courant, Dec. 28, 2008) The grant of clemency was opposed by the FBI, the Federal Bureau of Prisons, the Fraternal Order of Police, victims of the FALN bombings, and two United States Attorneys. (Clemency for FALN Members: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 1 (1999) (statement of Chairman Hatch)) In addition to the concerns over granting clemency to persons convicted of being involved in terrorist activities, serious allegations have been raised that the normal clemency process was not followed.

The FALN pardon process had an unusual beginning. In 1993, a mass letter writing campaign was started to urge the release of the FALN terrorists. The imprisoned terrorists did not recognize the right of the U.S. government to hold them in custody and refused to personally petition for clemency; therefore, their attorneys petitioned on their behalf. One of these attorneys was Dr. Luis Nieves-Falcón, who was later identified as an FALN member. (Threat Assessment, U.S. Dept. of Justice, Federal Bureau of Prisons, FBI Counterterrorism Center, June 30, 1999. See also Draft Threat Assessment, U.S. Dept. of Justice, Federal Bureau of Prisons, FBI Counterterrorism Center, July 22, 1998) Although prisoners typically file individual petitions for clemency, then-DAG Philip Heymann's office agreed to treat the attorney-signed petitions as valid petitions.

The White House received thousands of letters from the Puerto Rican community advocating for the release of the terrorists, and three Puerto Rican Members of Congress, Jose Serrano, Luis Gutierrez, and Nydia Velaquez, pushed for a meeting with the White House to advocate for clemency. In July 1994, then-Pardon Attorney Margaret Colgate Love met with pro-clemency attorneys, and in 1995, she met with religious leaders seeking clemency. In the spring and fall of 1996, Jack Quinn, the White House Counsel, also met with pro-clemency activists.

In December 1996, Margaret Love sent a report to the White House recommending against clemency for the FALN prisoners. (Hearing on Clemency for FALN Members Before the Senate Judiciary Committee, 105th Cong. 149 (Appendix, Letter from Margaret Colgate Love to Charles F.C. Ruff, July 25, 1997)) Later that month, White House officials met with pro-clemency religious leaders. White House and DOJ officials continued to meet with pro-clemency activists and the lawyers for the terrorists throughout 1997, 1998 and 1999, until they were pardoned on August 11, 1999.

Mr. Holder met with the Puerto Rican Members of Congress on November 5, 1997. At the meeting, Mr. Holder asked how the prisoners had changed. Congressman Gutierrez promised to supply in writing a statement from the prisoners on that subject. After the meeting, Mr. Holder directed the Pardon Attorney who replaced Margaret Love in November, Roger Adams, to follow-up with Congressman Gutierrez's staff, since, according to the Pardon Attorney's notes, ''[w]e are getting ready to finish up our report and recommendation fairly soon, and would like to have the statement on repentance to include.'' (Roger Adams' Notes on DAG Holder's Meeting with Puerto Rican Congressmen, Nov. 5, 1997. Roger Adams' follow-up telephone call notes for Enrique Fernandez and Doug Scofield.)

Mr. Holder had at least two additional meetings with pro-clemency advocates. On March 26, 1998, he met with President Carter's pro-clemency representative, and on April 8, 1998, he met with pro-clemency religious leaders. According to notes from this meeting, the religious leaders provided a mixed message as to whether the FALN terrorists had renounced the use of violence. (Memorandum to file from Roger Adams on meeting with FALN supporters, April 8, 1998) The leaders provided Mr. Holder with a statement that the prisoners would sign to show how they had changed. The statement, however, did not contain a clear renunciation of violence. (SJC Archive Document: Statement from the Puerto Rican Political Prisoners)

In the summer of 1999, Pardon Attorney Roger Adams allegedly submitted to the White House a second document on the FALN clemency, referred to as the ''options paper.'' According to press accounts, this paper ''made no specific recommendation'' regarding clemency, but it did reflect that the FBI and two U.S. Attorney's Offices opposed clemency. (Hearing on Clemency for FALN Members Before the Senate Judiciary Committee, 105th Cong. 94–95 (statement of Chairman Hatch); David Johnston, Clinton Went Against Advice on Clemency, Orlando Sentinel, Aug. 27, 1999) A recent press report cites an unnamed administration official who states that Mr. Holder recommended the grant of clemency and asserts that Mr. Holder's recommendation in favor of commutation accompanied Mr. Adams' ''options paper.'' (Edmund H. Mahony, Clinton-Era Sentence Reductions Could Trip Holder's Confirmation, The Hartford Courant, Dec. 28, 2008) Mr. Holder's alleged recommendation in favor of the commutations contrasted with opposition by the FBI, the Federal Bureau of Prisons, the Fraternal Order of Police, victims of the FALN bombings, and two United States Attorneys. In August, the terrorists were granted clemency.

On September 14, 1999, the Senate passed a joint resolution by a vote of 95–2 stating that President Clinton should not have made this grant. (S.J. Res 33, 106th Cong. (1999)) The House passed a similar resolution on September 9, 1999, by a vote of 311–41. (H. Con. Res. 180, 106th Cong. (1999))

The Senate Judiciary Committee held two hearings on the FALN commutations, one on September 15 and another on October 20, 1999. At these hearings, ten members of the Committee, both Republicans and Democrats, expressed their concern over these grants of clemency. Chairman Hatch stated in his opening statement before the Committee: ''President Clinton, who up to this point had only commuted three sentences since becoming President, offered clemency to 16 members of the FALN. This to me, and really almost every Member of Congress, was shocking. And, quite frankly, I think I am joined by a vast majority of Americans in my failure to understand why the President, who has spoken out so boldly in opposition to domestic terrorism in recent years, has taken this kind of an action.'' Clemency for FALN Members: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 1 (1999) (statement of Chairman Hatch) Then-Ranking Member Leahy agreed stating: ''I did not agree with the President's recent clemency decision . . . (Id. at 6 (statement of Sen. Leahy))

Mr. Holder testified at the October 20th hearing, but he refused to answer a number of questions citing executive privilege. As summarized in recent press accounts, he ''conceded that bombing victims were not consulted about clemency, but declined to answer substantive questions, including why the Office of the Pardon Attorney issued two inconsistent reports and why those getting sentence commutations were never pressed to provide information about fugitive co-defendants.'' (Edmund H. Mahony, Clinton-Era Sentence Reductions Could Trip Holder's Confirmation, The Hartford Courant, Dec. 28, 2008) Mr. Holder did testify, however, that the 1996 recommendation against clemency existed and that following the report there were ''subsequent communications'' between DOJ and the White House. (Clemency for FALN Members: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 97, 122 (1999) (statement of Eric Holder, Deputy Attorney General)) Asserting executive privilege, he would not discuss the ''options paper'' or state if that document contained a recommendation. (Id. at 97, 120–21)

During the hearing, the Judiciary Committee also learned that victims and groups opposing clemency were not consulted prior to the grant of clemency. A number of Senators articulated their concern over this lack of consultation, which prompted Senator Leahy to send a letter to Attorney General Reno after the hearing expressing his concern over the clemency process and, in particular, his alarm that the victims of the FALN terrorists were not contacted prior to the grant of clemency. He wrote: ''I was troubled to learn through both press reports and testimony at a recent committee hearing that victims of some of the bombings perpetrated by the FALN were not consulted or even contacted with regard to the clemency offers made to some members of that organization. Indeed, one victim reported that he learned of the clemency offers through a relative who had heard media reports.'' (Id. at 139 (letter from Senator Leahy to Attorney General Reno))

The timing of the FALN clemency was especially curious given then-recent threat assessments issued by the Justice Department. In October 1999, Attorney General Reno released a five-year interagency counterterrorism and technology crime plan that acknowledged the threat posed by the FALN terrorists. The report stated that, ''Factors which increase the present threat from these groups [the FALN and Los Macheteros] include . . . the impending release from prison of members of these groups jailed for prior violence.'' (Five-Year Interagency Counterterrorism and Technology Crime Plan, Unclassified Edition, Department of Justice, Sept. 1999) Since this report was issued by the DAG's office, Mr. Holder was questioned about the report at a press conference. He stated that the report was talking about ''the possibility that people from among other groups, the FALN, were going to be released over the next few years.'' (Email from Patrick O'Brien with Talking Points and Press Conference Excerpts, Oct. 21, 1999)

Another matter worthy of consideration during the hearing concerns the circumstances of Margaret Love's departure from the Pardon Office. Margaret Love served as Pardon Attorney from 1990 to November 1997. Ms. Love, 20-year veteran of the Department, was removed from office by Mr. Holder based on charges of mismanagement after she recommended against the commutations of the FALN terrorists and shortly after Mr. Holder was confirmed as DAG in July 1997. She was replaced by Roger Adams, a member of Mr. Holder's staff. I believe questions surrounding her removal from office should be raised with Mr. Holder.

It is significant that, on these three matters, Mr. Holder overruled the advice of career professionals. With regard to the Rich and Green pardons, Mr. Holder told White House counsel Beth Nolan that he was ''neutral, leaning towards favorable'' on the pardon despite the express opposition of the U.S. Attorney for the Southern District of New York, the career attorneys who prosecuted the case, and the FBI. Further, prior to Mr. Holder's statement to Ms. Nolan, pardon attorney Roger Adams had contacted Mr. Holder to express his concerns regarding

Rich's fugitive status and the charges for arms trading.

In the FALN commutations matter, press accounts indicate the Mr. Holder submitted a recommendation in favor of those clemency requests even though the initial recommendation by Pardon Attorney Margaret Love opposed the commutations and the grants were opposed by the FBI, the Federal Bureau of Prisons, the Fraternal Order of Police, victims of the FALN bombings, and two United States Attorneys.

Finally, while the record is unclear as to Mr. Holder's precise role in the campaign finance investigation, it is clear that Attorney General Reno consulted Mr. Holder on these matters and that the recommendations of the heads of the campaign finance special task force, Charles LaBella and Robert Conrad, as well as the recommendation of FBI Director Louis Freeh, for the appointment of Independent Counsel were overruled.

These matters require further questioning. In two of them, Mr. Holder appears to be serving the interests of his superiors. There is an underlying issue about Mr. Holder not following the recommendations of career attorneys. As Senator Leahy and I noted in our op-ed "the attorney general must be someone who deeply appreciates and respects the work and commitment of the thousands of men and women who work in the branches and divisions of the Justice Department day in and day out, without regard to politics or ideology, doing their best to enforce the law and promote justice." It is to be expected that politically appointed federal officers will not always follow the advice of career staff, but this pattern is troubling.

In raising these concerns, I am not passing judgment on the nominee. I am prepared to give Mr. Holder a full opportunity to explain his past actions and convince the Committee and the Senate that his record warrants confirmation. Indeed, it may be helpful for him to have advance notice of these specific concerns of mine to give him notice so he can prepare for the hearing. With considerable experience in confirmation hearings, including eleven Supreme Court nominations, I have learned to keep an open mind without prejudgment until the nominees have had their "day in court"—that is in the Judiciary Committee hearing.

SEC INVESTIGATION INTO PEQUOT CAPITAL MANAGEMENT TRADING

Mr. SPECTER. Mr. President, the Finance Committee, under the chairmanship of Senator GRASSLEY in the 109th Congress, and the Judiciary Committee, under my chairmanship in the 109th Congress, conducted an extensive inquiry into allegations of insider trading. The issue is succinctly framed in a letter which I wrote to Christopher Cox, Chairman of the Securities and Exchange Commission, in a letter dated December 24, 2008. I ask unanimous consent that the full text of this letter be printed in the RECORD at the conclusion of my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

Mr. SPECTER. The matter could be most succinctly articulated by quoting from parts of this letter as follows:

Dear Chairman Cox:

Senator Charles Grassley and I have already issued public findings concerning the Securities and Exchange Commission's . . . investigation into Pequot Capital Management's . . . suspicious trading.

Referring to insider trading.

These findings also criticized the original Office of Inspector General's report, which essentially ignored former SEC investigator Gary Aguirre's complaints of political influence in the Pequot investigation . . . after the new SEC Inspector General, David Kotz, largely agreed with our findings and recommended disciplinary action against Mr. Aguirre's supervisors up to the Director of Enforcement, the SEC selected an initiating official who, in a matter of days, found that disciplinary action was unwarranted. That official was described in press accounts as an Administrative Law Judge, and it was not until further inquiry that the SEC admitted she was not acting in a judicial capacity in issuing her decision. I am now writing because recent events provide the SEC with an opportunity to make good on its Pequot investigation, despite having . . . closed the case in November 2006.

. . . The investigation centered, in part, on evidence that David Zilkha, a Microsoft employee who joined Pequot in April 2001 and separated from Pequot in November 2001, may have given Arthur Samberg, Pequot's CEO, inside information regarding Microsoft.

Documents recently filed in a Connecticut divorce case (Zilkha v. Zilkha) disclose that Pequot has made or promised to make payments of $2.1 million to Mr. David Zilkha. On December 1, 2008, and December 16, 2008, Pequot and Pequot CEO Arthur Samberg filed motions for protective orders, and the state court has scheduled the hearing on those motions for January 16, 2009.

On December 10, 2008, Senator GRASSLEY and I requested from Pequot and Mr. Samberg all records related to the payments to Mr. Zilkha, as well as an explanation of the payments. On December 17, 2008, Mr. Samberg responded that the payments to Mr. Zilkha were for the purpose of "settling a civil claim related to his employment and termination by Pequot." Mr. Samberg enclosed a few documents, but we have requested additional records, and have asked for a complete production.

Given the troubled history of this case, the SEC should also be seeking answers as to any payments made to Mr. Zilkha by Pequot. I therefore write to strongly urge the SEC to consider filing pleadings in the Connecticut action, so that the court will have all relevant information when it considers the Pequot and Samberg motions for protective orders.

In essence, we have serious allegations of insider trading. We have the Inspector General of the SEC recommending serious disciplinary action. We have the matter being papered over by the SEC on what purported to be new conclusions reached by the administrative law judge where, in fact, the individual was not an administrative law judge. And now we find $2.1 million in payments or promised payments to an individual who may have been in the position to provide insider information. The matter is coming before a court in a domestic relations case, but that provides an opportunity to find those facts.

This letter has not been answered, and I am taking this occasion to put it into the CONGRESSIONAL RECORD in the hopes that we may have some action by the SEC which will be calculated to get to the bottom of this matter. Certainly, this is something that ought to be of major concern to the Securities and Exchange Commissioners, to the Chairman, and to the SEC, generally.

The Finance Committee and the Judiciary Committee, through the efforts of Senator GRASSLEY and myself, have gone to very substantial lengths to deal with this issue. Oversight by the Congress is very hard to pick up these complex matters and get into them, but a lot of work has been done, and we are still undertaking to try to get to the bottom of the allegations of insider trading. The issue now has turned to be greater than insider trading on one specific matter, but to the integrity of the SEC itself, in pursuing these kinds of allegations and in following the facts wherever they may lead.

Chairman Cox has limited additional tenure, but there is sufficient time for him to act if he will, and if he will not, Senator GRASSLEY and I may seek to intervene ourselves. This is something which is the primary responsibility of the SEC, and it would be my hope that Chairman Cox would act on this matter to intervene, file an amicus brief, find out what the facts are on that $2.1 million to get to the bottom of these serious allegations of insider trading.

EXHIBIT 1

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, December 24, 2008.

Hon. CHRISTOPHER COX,
Chairman, U.S. Securities and Exchange Commission, 100 F. Street, N.E., Washington, DC.

DEAR CHAIRMAN COX: Senator Charles Grassley and I have already issued public findings concerning the Securities and Exchange Commission's ("SEC") bungled investigation into Pequot Capital Management's ("Pequot") suspicious trading. These findings also criticized the original Office of Inspector General's report, which essentially ignored former SEC investigator Gary Aguirre's complaints of political influence in the Pequot investigation. You welcomed our findings and worked to implement our recommendations. Nonetheless, after the new SEC Inspector General, David Kotz, largely agreed with our findings and recommended disciplinary action against Mr. Aguirre's supervisors up to the Director of Enforcement, the SEC selected an initiating official who, in a matter of days, found that disciplinary action was unwarranted. That official was described in press accounts as an Administrative Law Judge, and it was not until further inquiry that the SEC admitted she was not acting in a judicial capacity in issuing her decision. I am now writing because recent events provide the SEC with an opportunity to make good on its Pequot investigation, despite having precipitously and unjustifiably closed the case in November 2006.

In 2006, the SEC closed its investigation of April 2001 trading by Pequot in Microsoft stock. The investigation centered, in part, on evidence that David Zilkha, a Microsoft employee who joined Pequot in April 2001 and separated from Pequot in November 2001, may have given Arthur Samberg, Pequot's CEO, inside information regarding Microsoft.

Documents recently filed in a Connecticut divorce case (*Zilkha* v. *Zilkha*) disclose that Pequot has made or promised to make payments of $2.1 million to David Zilkha. On December 1, 2008, and December 16, 2008, Pequot and Pequot CEO Arthur Samberg filed motions for protective orders, and the state court has scheduled the hearing on those motions for January 16, 2009.

On December 10, 2008, Senator Grassley and I requested from Pequot and Mr. Samberg all