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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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WEDNESDAY, NOVEMBER 18, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:37 a.m., in room G–50, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everyone. I would note for Senators, this is the first hearing to be held in this room now that it has been rebuilt and reconstituted. Those of you who have been here a long time know this thing was sort of like the dark hole. It was probably the worst place to have to ever have a hearing because it was so dark and awful, and now it—and I commend the Architect of the Capitol and the Sergeant at Arms and everybody else who put this together and have made it better.

Attorney General Holder, welcome. Glad to have you here.

I commend the Attorney General for moving forward last week with plans to proceed on several cases against those who seek to terrorize the United States. He is using the full range of authorities and capabilities available to us. Just as President Obama is using our military, diplomatic, legal, law enforcement, and moral force to make America safer and more secure, the Attorney General is exercising his responsibilities in consultation with the Secretary of Defense to determine where and how best to seek justice against those who have attacked Americans here at home and around the world. And after nearly 8 years of delay, we may finally be moving forward to bring to justice the perpetrators and murderers from the September 11 attacks. I have great confidence in our Attorney General, the capability of our prosecutors, our judges, our juries, and in the American people in this regard. I support the Attorney General's decision to pursue justice against Khalid Sheikh Mohammed and four others accused of plotting the September 11 attacks and to go after them in our Federal criminal court in New York.

They committed murder here in the United States, and we will seek justice here in the United States. They committed crimes of murder in our country, and we will prosecute them in our country.

We are the most powerful Nation on Earth. We have a justice system that is the envy of the world. We will not be afraid. We will still go forward, and we will prosecute them.

War crimes, crimes of terror, and murder can successfully be prosecuted in our Federal courts, and we have done it over and over and over again. America's response to these acts is not to cower in fear, but to show the world that we are strong, resilient, and determined. We do not jury-rig secret trials or kangaroo courts, as some of our adversaries do. We can rely on the American justice system. I urge this Committee and the American people to support the Attorney General as this matter proceeds and urge the Congress to provide such assistance as will be needed, including providing the victims of those events the ability to participate. As many surviving family members of those killed that day have said, after years of frustration, it is time to have justice. And I will work with the Department of Justice and our court system as I did in the trial of Timothy McVeigh to make sure that there are ways that the victims can watch these trials.

Federal courts have tried more than 100 terrorism cases since September 11—more than 100 since September 11. They have proved they can handle sensitive classified information, security, and other legal issues related to terrorism cases. And since the beginning of this year, more than 30 individuals charged with terrorism violations have been successfully prosecuted or sentenced in Federal courts. The Federal courts located in New York City tried and convicted the so-called Blind Sheikh for conspiring to bomb New York City landmarks and Ramzi Yousef for the first World Trade Center bombing.

New York was one of the primary targets of the September 11 attacks. Those who perpetrated the attacks should be tried there. They should answer for their brutality and for the murder of thousands of innocent Americans. Like Mayor Bloomberg, I have full confidence in the capacity of New York, and I have full confidence in Commissioner Ray Kelly and the finest police officers I have ever known and the New York City Police Department.

The Attorney General personally reviewed these cases and, along with Defense Secretary Gates and based on the protocol that they announced this summer, determined to use our full array of powers by proceeding against the September 11 plotters in Federal court. And those charged with the attack on the U.S.S. Cole outside this country will be tried before a military tribunal, and he determined to go against Major Hasan in a court-martial for the deadly attack at Fort Hood just 2 weeks ago.

I think the three different venues used for these three sets of crimes are appropriate, and I commend you for that.

The President spoke at Fort Hood last week in a tribute to the brave men and women of our armed forces there, and he expanded on that matter in his weekly address over the weekend. Every Member of Congress—every Member—joins the President and the military community in grieving for the victims and their families, and we pray for the recovery of those who were wounded. Nidal Hasan has been charged with 13 counts of premeditated murder. The Army is leading the investigation with the support of the FBI,

and the President has ordered a review of what was known ahead of time, and I think that is appropriate.

And I look forward, as this Committee conducts appropriate oversight, to finding out exactly what happened, where steps were taken, and especially where steps were not taken. But I would caution everybody to do it in a manner that does not interfere with the investigation and prosecution of this case. We want the prosecutors to be able to go forward with the case and not have anything we do interfere with it.

I have already written to John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, on behalf of this Committee. I have asked him to provide us the results of the internal investigation by the FBI, Army, and intelligence agencies that is underway. In the interim, on classified matters, both Senator Sessions and I should be informed, and I have spoken both with the Attorney General and with FBI Director Mueller, and yesterday the Ranking Member and I, as well as the Chairman of the Intelligence Committee Senator Feinstein, were briefed on the status of the investigation. We should and we will conduct responsible oversight. We will try not to do it in a reckless fashion because we should not take steps that will interfere with the ongoing investigation or stand in the way of military prosecutors. I want them to be able to compile a thorough and complete case.

Also yesterday, the Attorney General and Treasury Secretary Geithner announced the creation of a financial fraud task force. This is a significant step in our efforts to strengthen fraud prevention and enforcement. It uses the authority we provided in the Fraud Enforcement and Recovery Act. I worked hard with Senator Grassley and Senator Kaufman to draft this act and get it passed. I was pleased to be there when the President signed it into law. He gives law enforcement new tools and resources to investigate and prosecute the kinds of financial frauds that are undermining our country. We are now hard at work on measures that can help find, deter, and punish health care fraud as well. Just the week, we learned that the Government has paid more than $47 billion in questionable Medicare claims, because as we prepare to consider health reform legislation, we have to address these issues of health care fraud. I hope that our new act that we worked on a bipartisan way will help that. We have to complete our legislative work on a media shield bill and the USA PATRIOT Act Sunset Extension Act. And on these matters, I appreciate the support we have from the Attorney General.

So, with that, let me yield to Senator Sessions and then Attorney General Holder.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and I am glad we could have this hearing today. We agree on a number of things. On the matter of the prosecution of Khalid Sheikh Mohammed and the 9/11 terrorists we do not agree.

Mr. Attorney General, I appreciate you, enjoy working with you. You have got a tough job. When I complain to my wife about this or that, she looks me straight in the eye and says, "Don't blame

me. You asked for the job." So you have got a tough job, but you asked for it. With your experience, you knew what you were asking before you got it.

Let me acknowledge several people in the audience today. David Beamer from Florida and Alice Hoagland from California are here. They came here for the hearing today. David lost his son, Todd, and Alice lost her son, Mark, on Flight 93. Lisa Dolan is here. She lost her husband, Navy captain Robert Dolan, at the Pentagon on September 11th. Debra Burlingame I believe is here. She lost her brother, a pilot. Also, we are honored that Tim Brown from the New York Fire Department is here. Tim worked night after night on the rescue and recovery efforts of the World Trade Center. So it is a privilege to have each of you with us today.

On September 11, 2001, our Nation was attacked by a savage gang of terrorists, people who had previously stated, as bin Laden did, that they were at war with the United States. Their intent was to kill innocent Americans and bring ruin to the United States. The death and destruction they caused in New York, Washington, and Pennsylvania was an act of war.

Now, at the time that was crystal clear to us. If there is now among some folks in Washington any confusion on that point, it is because time, I think, has dulled their memory or because other matters have clouded their judgment.

But the American people remember that day well, and they know that the facts have not changed. President Bush responded to the 9/11 terrorist acts swiftly and forcefully, and we have been blessed that the dedicated work of millions of Americans has prevented similar attacks of that scale.

Today we remain engaged in the two long struggles in Afghanistan and Iraq. We wish the work there was easy, but it is not, and this effort is not. As we sit in this chamber, 188,000 American men and women in uniform fight tirelessly to root out terrorism from foreign battlefields. Our military and intelligence personnel are, in fact, at war this very day, 7 days a week, under dangerous and adverse conditions, because this Congress has authorized and asked them to go there, and we sent them there.

The best way to honor these men and women is to work just as hard and just as smartly to ensure that what we do supports them and the goals that we have set for them. Regrettably, when I look at the policies taking shape under the new administration, I fear that that is not the case. I just am worried about those decisions.

Over the past 9 months, we have seen the administration continue to delay providing clear leadership to our troops in Afghanistan, call for an investigation and potential prosecution of CIA agents who risked their lives to capture dangerous terrorists and who previously had been cleared of an investigation. They have cut a deal on a media shield legislation to protect individuals when they leak classified information to the mass media in a way that I think is not good. They concede to a weakened form of the PATRIOT Act, a vital legislative tool for our intelligence community, and declined to provide basic information, to date at least, that we are going to have to have as we go forward with the Fort Hood investigation, and now announce that they will bring Khalid Sheikh

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Mohammed, the self-proclaimed mastermind of 9/11, back to Manhattan to be treated as a common criminal in U.S. courts.

Taken together, I think these policies signal to our people, to our country, and to our military, and to the international community that for the United States fighting global terrorism is not the priority it once was, that we can return to a pre-9/11 mentality.

The problem is this: al Qaeda does not agree. They continue to seek to do us harm, as we all well know, and we must continue to be vigilant as we track down these terrorists and bring them to justice. And we must use all lawful tools to do so. Lives are at stake.

Today's hearing will focus on, among other issues, the Attorney General's decision to prosecute Khalid Sheikh Mohammed and four other terrorists in U.S. courts rather than in military courts. I believe this decision is dangerous. I believe it is misguided. I believe it is unnecessary. It represents a departure from our longstanding policy that these kinds of cases should be treated under the well-established rules of war.

Khalid Sheikh Mohammed is a terrorist, is alleged to be a terrorist. He is alleged not to be a common criminal, but who has a desire not for ill-gotten gains but for the destruction of our country. The correct way to try him is by military tribunal. This distinction is important because the military courts and civilian courts have different functions. The United States court system was not designed to try unlawful enemy combatants.

And, Mr. Holder, I do not think these are normal defendants. These are people we are at war with, and we are dropping bombs on them this very day, attacking their lairs wherever they hide. The fabulous policewoman who went straight to Hasan at Fort Hood firing her weapon was, in effect, participating in a war effort. The enemy who could have been obliterated on the battlefield on 1 day but was captured instead does not then become a common American criminal. They are first a prisoner of war once they are captured. The laws of war say, as did Lincoln and Grant, that the prisoners will not be released until the war ends. How absurd is it to say that we will release people who plan to attack us again?

Second, as part of their military activities, if they violate the laws of war, then and only then may they be tried for crimes. That is what happened to the Nazi saboteurs in the *Ex Parte Quirin* case in World War II when they were tried by military commissions. Military commission trials are fair. They are recognized not only by our country but by nations all over the world. Far from seeing our actions as some sort of demonstration of American fairness, I suspect our cold-blooded enemies and our clear-eyed friends both must wonder what is going on in our heads. Are we, they must ask themselves, still serious about this effort?

As former Attorney General Michael Mukasey wrote in 2007, "Terrorism prosecutions in this country have unintentionally provided terrorists with rich sources of intelligence."

Mr. Attorney General, we are concerned about what is happening today. We respect and like you, but this is a serious question, and we will raise a number of issues as we go through the hearing.

Thank you.

Chairman LEAHY. Well, obviously, Senator Sessions and I have a differing view on this, but there will be differing views here, and

that is why we thank you for coming here—although I must admit, Senator Sessions, that I am delighted to hear somebody from Alabama quote approvingly Ulysses S. Grant and Abraham Lincoln. The world has come full circle.

Senator SESSIONS. And they were winners, too.

Chairman LEAHY. Well, I appreciate that acknowledgment, too, but we probably best leave this one alone.

I would put in the record the letter I sent to John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, asking when they finish their investigation that this Committee be able to see what we have found, both what went right and what went wrong.

[The letter appears as a submission for the record.]

Chairman LEAHY. Attorney General Holder, thank you for being here. Please go ahead, sir.

STATEMENT OF HONORABLE ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES

Attorney General HOLDER. Thank you, Mr. Chairman, Senator Sessions, and other members of the Committee.

When I appeared before this Committee in January for my confirmation hearing, I laid out several goals for my time as Attorney General: to protect the security of the American people, to restore the integrity of the Department of Justice, to reinvigorate the Department's traditional mission, and, most of all, to make decisions based on the facts and on the law, with no regard for politics.

In my first oversight hearing in June, I described my early approach to these issues. Five months later, we are deeply immersed in the challenges of the day, moving forward to make good on my promises to the Committee and the President's promises to the American people.

First and foremost, we are working day and night to protect the American people. Due to the vigilance of our law enforcement and intelligence agencies, we have uncovered and averted a number of serious threats to domestic and international security. Recent arrests in New York, Chicago, Springfield, and Dallas are evidence of our success in identifying nascent plots and stopping would-be attackers before they strike.

Violence can still occur, however, as evidenced by the recent tragic shootings at Fort Hood. We mourn the deaths of the 13 brave Americans, including Dr. Libardo Caraveo, a psychologist with the Justice Department's Bureau of Prisons, who had been recalled to active duty. The Federal Bureau of Investigation is working diligently to help gather evidence that will be used by military prosecutors in the upcoming trial of the individual who is alleged to have committed this heinous act.

We are also seeking to learn from this incident to prevent its reoccurrence. Future dangerousness is notoriously difficult to predict. The President has ordered a full review to determine if there was more that could have been done to prevent the tragedy that unfolded in Texas 2 weeks ago. We have briefed the Chairman and Ranking Member of this Committee and other Congressional leaders on our efforts and will continue to keep Congress abreast of this review.

Now, my written statement addresses a number of other issues before the Department, but I would like to use the rest of my time allotted to me today to address the topic that I know is on many of your minds: my decision last week to refer Khalid Sheikh Mohammed and four others for prosecution in Federal courts for their participation in the 9/11 plot.

As I said on Friday, I knew this decision would be a controversial one. This was a tough call, and reasonable people can disagree with my conclusion that these individuals should be tried in Federal court rather than a military commission. The 9/11 attacks were both an act of war and a violation of our Federal criminal law, and they could have been prosecuted in either Federal courts or military commissions. Courts and commissions are both essential tools in our fight against terrorism.

Therefore, at the outset of my review of these cases, I had no preconceived notions as to the merits of either venue. And, in fact, on the same day that I sent these five defendants to Federal court, I referred five others to be tried in military commissions.

I am a prosecutor, and as a prosecutor, my top priority was simply to select the venue where the Government will have the greatest opportunity to present the strongest case and the best law. I studied this issue extensively. I consulted the Secretary of Defense. I heard from prosecutors in my Department and from the Defense Department's Office of Military Commissions. I spoke to victims who were on both sides of this question. I asked a lot of questions, and I weighed every alternative. And at the end of the day, it was clear to me that the venue in which we are most likely to obtain justice for the American people is in Federal court.

Now, I know there are members of this Committee and members of the public who have strong feelings on both sides. There are some who disagree with the decision to try the alleged Cole bomber and several others in a military commission, just as there are some who disagree with prosecuting the 9/11 plotters in Federal court.

Despite these disagreements, I hope we can have an open, honest, and informed discussion about that decision today, and as part of that discussion, I would like to clear up some misinformation that I have seen since Friday.

First, we know that we can prosecute terrorists in our Federal courts safely and securely because we have been doing so for years. There are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons' custody, including those responsible for the 1993 World Trade Center bombing and the attacks on our embassies in Africa. Our courts have a long history of handling these cases, and no district has a longer history than the Southern District of New York in Manhattan. I have talked to Mayor Bloomberg of New York, and both he and Commissioner Kelly believe that we can safely hold these trials in New York.

Second, we can protect classified material during trial. The Classified Information Procedures Act, or CIPA, establishes strict rules and procedures for the use of classified information at trial, and we have used it to protect classified information in a range of terrorism cases. In fact, the standards recently adopted by the Congress to govern the use of classified information in military com-

missions are based on and derived from the very CIPA rules that we would use in Federal court.

Third, Khalid Sheikh Mohammed will have no more of a platform to spew his hateful ideology in Federal court than he would have had in a military commission. Before the commissions last year, he declared the proceedings an "inquisition." He condemned his own attorneys and our Constitution and professed his desire to become a martyr. Those proceedings were heavily covered in the media, yet few complained at that time that his rants threatened the fabric of our democracy.

Judges in Federal courts have firm control over the conduct of defendants and other participants in their courtrooms, and when the 9/11 conspirators are brought to trial, I have every confidence that the presiding judge will ensure appropriate decorum. And if Khalid Sheikh Mohammed makes the same statements he made in his military commission proceedings, I have every confidence that the Nation and the world will see him for the coward that he is. I am not scared of what Khalid Sheikh Mohammed has to say at trial, and no one else needs to be afraid either.

Fourth, there is nothing common—there is nothing common—about the treatment the alleged 9/11 conspirators will receive. In fact, I expect to direct prosecutors to seek the ultimate and most uncommon penalty for these heinous crimes. And I expect that they will be held in custody under special administrative measures reserved for the most dangerous criminals.

Finally, there are some who have said the decision means that we have reverted to a pre-9/11 mentality or that we do not realize that this Nation is at war. Three weeks ago, I had the honor of joining the President at Dover Air Force Base for the dignified transfer of the remains of 18 Americans, including three DEA agents, who lost their lives to the war in Afghanistan. These brave soldiers and agents carried home on that plane gave their lives to defend the country and its values, and we owe it to them to do everything we can to carry on the work for which they sacrifice.

I know that we are at war. I know that we are at war with a vicious enemy who targets our soldiers on the battlefield in Afghanistan and our civilians on the streets here at home. I have personally witnessed that somber fact in the faces of the families who have lost loved ones abroad, and I have seen it in the daily intelligence stream that I review each day. Those who suggest otherwise are simply wrong.

Prosecuting the 9/11 defendants in Federal court does not represent some larger judgment about whether or not we are at war. We are at war, and we will use every instrument of national power—civilian, military, law enforcement, intelligence, diplomatic, and others—to win.

We need not cower in the face of this enemy. Our institutions are strong, our infrastructure is sturdy, our resolve is firm, and our people are ready.

We will also use every instrument of our National power to bring to justice those responsible for terrorist attacks against our people. For 8 years, justice has been delayed for the victims of the 9/11 attacks. It has been delayed even further for the victims of the attack

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on the U.S.S. *Cole*. No longer. No more delay. It is time. It is past time to finally act.

By bringing prosecutions in both our courts and military commissions, by seeking the death penalty, by holding these terrorists responsible for their actions, we are finally taking ultimate steps toward justice. That is why I made the decision.

Now, in making this and every other decision I have made as Attorney General, my paramount concern is the safety of the American people and the preservation of American values. I am confident that this decision meets those goals and that it will also withstand the judgment of history.

Thank you.

[The prepared statement of Attorney General Holder appears as a submission for the record.]

Chairman LEAHY. Thank you, Attorney General, and as you know, I have discussed with you several times that my belief is that when people commit murder, commit murder here in the United States, commit murder on this scale, they should be prosecuted, and I would hope they would be convicted. I am glad to see finally, after all these years, that they are being prosecuted in the same way Timothy McVeigh, who committed mass murder in this country, was prosecuted.

Let me go to another horrific tragedy. We have the murder of 13 individuals, including 12 soldiers, the wounding of more than 30 others on the Fort Hood Army Base in Texas. Our thoughts and prayers are with these people. In my church on Sunday, they prayed for the families—for those who died but for the families left behind. And that is why I sent this letter to John Brennan to find out what happened. I want the results of the investigation ordered by the President. Several of us were briefed yesterday morning—Senator Feinstein, Senator Sessions, myself, and others—on what is happening. I think—in fact, I know that you want to find out everything that happened, not only what happened there but what may have gone right and what may have gone wrong prior to that. We are both former prosecutors, so we do not want to compromise a prosecution.

What resources is your Department using to learn whether steps were missed that could have been taken to avert this tragedy?

Attorney General HOLDER. Well, the FBI is certainly intimately involved in the investigation and working with the military investigators and military prosecutors who will ultimately try the case. All of the resources of the Justice Department that have been requested have been made available and will be made available in order to determine exactly what happened at Fort Hood, and also to try to determine how we can prevent future incidents like this from occurring.

Chairman LEAHY. Certainly when the court-martial goes on, the evidence will come out, and the American people will learn, we will all learn more facts about what happened. I am mostly interested in knowing if there were things that were overlooked that could have been avoided it. Will you commit to share with this Committee, if in your investigation—yours, the Justice Department—you find that there were things that were missed that should have been picked up prior to this tragedy?

Attorney General HOLDER. The President has directed that we conduct exactly such an inquiry, and it would be our intention to share the results of that inquiry. My only cautionary note would be that we sequence this in such a way so that we do not interfere with the ongoing investigation and the potential prosecution. But, clearly, that information needs to be shared with Congress generally and with this Committee specifically.

Chairman LEAHY. I can assure you as Chairman of this Committee that I want a successful prosecution. I also want to know what happened. And I think we can sequence it in such a way that we do not interfere with the prosecution.

The members of the Senate—incidentally, your letter supporting the PATRIOT Act reauthorization bill that we passed from this Committee is very helpful, and I appreciate that. We have requested that the administration work with us to provide more information on classified issues related to PATRIOT Act authority. We sent a letter to the Department in June and again this week. I am saying this rather broadly because you know the particular classified areas we are looking for. Will the Department schedule a briefing in the coming days so Senators can be briefed fully on this prior to the debate on the floor?

Attorney General HOLDER. Yes, Mr. Chairman, we are working on ways in which we can make available to Senators and Congressmen who will be asked to vote on the reauthorization of the PATRIOT Act, and that information will be made available in a way that is consistent with the protection of those very important tools that must remain classified. But that information will be made available.

Chairman LEAHY. On the PATRIOT Act, Senator Sessions and I and others have been working on a managers' amendment to address a few remaining issues in the reported version of the bill. These do not concern operational matters, and I hope that we can circulate that to the members of this Committee. Are you satisfied that nothing in the bill reported by the Committee endangers your ability to use those tools effectively to keep us safe and secure?

Attorney General HOLDER. Yes, I am confident, based on my own examination and my interaction with members of the intelligence community, talking also to FBI Director Mueller, that the reauthorization of those provisions in the way in which it has been proposed will not have any negative impact on our ability to use them in an effective way.

Chairman LEAHY. And I think I know the answer to this next one, but would you agree that it is important that we get the bill reauthorized?

Attorney General HOLDER. It is absolutely important. These are vital tools that we have to have in this fight against those who would do us harm.

Chairman LEAHY. Now, when the President first took office in January, I encouraged the Obama administration and the many supporters of a Federal shield law to work together to reach consensus, and I congratulated the Department of Justice, in fact, all the shareholders, for working together in good faith to reach this consensus. We have a compromise bill that restores important pro-

tections that I helped craft to protect bloggers and freelance journalists.

Attorney General Holder, in the letter you and Director of National Intelligence Blair, Admiral Blair, sent to me earlier this week, you said that the compromise Federal shield bill provides "appropriate protection for national security." Do you support the compromise bill?

Attorney General HOLDER. I do. I think that it is a better version than that which had previously been considered. There were a number of concessions made with regard to the concerns that I raised, that were raised by the intelligence community, and I think that the bill we have strikes a good balance. It is a compromise between the concerns that we had in law enforcement, in the intelligence side, and the legitimate interests, I think, of the media.

Chairman LEAHY. Because we have so many, I want to try and make sure we stay within the time. My last question is this—I have a lot more questions, but my last one is this: In 2004, Democrats and Republicans worked together to pass the Justice For All Act to try to make our criminal justice system more efficient, effective, and fair. Now, a key component of that was the Debbie Smith Rape Kit Backlog Reduction Act, significant funding for the testing of—or to reduce the backlog of untested rape kits so victims do not have to live in fear of while these kits languish in storage. I have worked to make sure it is consistently and fully funded.

Now, I have been disturbed to learn recently in our hearings that, despite the legislation and the hundreds of millions of dollars in funding, substantial backlogs remain in communities around the country, and victims still face inexcusable delays in seeking justice. We have found 12,500 untested rape kits in the Los Angeles area, with other cities reporting almost as severe. You found in the Justice Department that in 18 percent of open, unsolved rape kit cases, evidence had not even been submitted to a crime lab.

Can we work together in your Department and find out what went wrong, find out how we get these rape kits tested, how we do it in a way that protects the victims and gives us a chance to prosecute the people who committed the rapes?

Attorney General HOLDER. Mr. Chairman, I not only pledge that we should, we have to work on this. For every crime that remains unsolved, there is a rapist who is potentially still out there and ready to strike again.

The Justice Department looks forward to working with this Committee to come up with a way in which we do away with that backlog and fully comply with the intent of what I think was a very good piece of legislation 5 years ago.

Chairman LEAHY. Thank you very much.

Senator Sessions, and then Senator Kohl.

Senator SESSIONS. Thank you, Mr. Chairman.

These are very, very important issues, this decision on how to try the people who attacked us on 9/11. It has ramifications. It is not cowering in fear of terrorists to decide the best way for this case to be tried is to be tried by military commission.

You have indicated that military commissions can be used, that, therefore, I assume you believe, Mr. Holder, that a military commission can fairly and objectively try certain of these cases.

Attorney General HOLDER. Yes, I think that is right, and that is why I sent five of those trials to military commissions. I expect that as I make further determinations, I will be sending other cases to the military commissions as well.

Senator SESSIONS. So military commissions are a legitimate way, historically, that other nations have used, as well as the United States, to try people who have violated the rules of war. Is that right?

Attorney General HOLDER. That is correct and, when appropriate, I will make use of those commission?

Senator SESSIONS. Well, I just want to tell you, I think this is causing quite a bit of concern. I see today that Governor Thomas Kean of New Jersey, who chaired the 9/11 Commission, says he thinks this is a mistake, that it will provide Khalid Sheikh Mohammed the position to be a martyr and a hero among al Qaeda sympathizers around the world.

I would note that Mary Jo White, New York United States Attorney under President Clinton, said it may take 3 years to try these cases, and the decision has been strongly criticized, as you know, by Rudy Giuliani, who was mayor of New York when the attack occurred, who also served as Associate Attorney General, was a Federal prosecutor himself, and United States Attorney in Manhattan. I take his views seriously. I served under him when he was Associate Attorney General, and he has complained about—Attorney General Mukasey, former Attorney General Mukasey has also criticized this decision.

I do not think the American people are overreacting. I do not think they are acting fearfully. I think they think that this is war and that the decision you have made to try these cases in Federal court represents a policy or a political decision. Wouldn't you agree?

Attorney General HOLDER. No.

Senator SESSIONS. Well, it is a policy decision at least, is it not?

Attorney General HOLDER. It was a policy decision. It was a decision that was case driven. It is a decision based on the evidence I know that, frankly, some of the people who have criticized the decision do not have access to. The decision I made was based on my judgment looking at all of the evidence, talking to the people who have gathered that evidence, and the determination made by me as to where we can best prosecute these cases and come up with the best chances for success. There was not a political component to my decision.

Senator SESSIONS. I would offer for the record, also, Mr. Chairman, a statement from the 9/11 family members and New York firefighters strongly opposing this decision.

Chairman LEAHY. Without objection.

[The letter appears as a submission for the record.]

Senator SESSIONS. You indicated in one of your factors—well, first of all, President Obama and you have established a review committee. As I understand it, that committee—the Detainee Policy Task Force I guess is the correct name of it—concluded that there is a "presumption that, where feasible, referred cases will be prosecuted in an Article III court"—that is, a Federal criminal

court. Is that still the policy of the Department of Justice that there is a presumption that the cases will be tried in Federal court?

Attorney General HOLDER. That is the presumption, but it is also clearly a presumption that can be overcome, as evidenced by the fact that five of the people about which I made the determination and announced last Friday will be going to military commissions. We make these decisions on a case-by-case basis using the protocol that you mentioned, and a part of that is this presumption. But it is not an irrebuttable presumption. It is a presumption, and only that.

Senator SESSIONS. Well, that has baffled me from the beginning. I know that was part of the last campaign, and the President criticized President Bush continuously—and many of his allies did—for his conduct of the war on terrorism. But I think the idea that a captured combatant who, if eligible to be tried because they have committed violations of the laws of war, would be tried in military commissions is only common sense and part of our history.

Isn't it true that to avoid the presumption, your task force said it would take compelling factors to change that?

Attorney General HOLDER. I am not sure I would say compelling factors. There are a variety of circumstances that have to be examined, but I also think we have to look at the history of these military commissions that are held out as these shining examples of what ought to be done.

There were, as I count, three trials, three proceedings brought before these military commissions over the great many years that they existed. They had to be reformed as a result of the way in which they were initially set up. We have the Article III courts that have tried these matters before. We have judges who I have great confidence in, prosecutors who I have great confidence in. I also have confidence in the people of New York to sit down and fairly judge these cases and to mete out the appropriate punishment.

Senator SESSIONS. I do not think the people are happy with the decision. I think there are clear advantages to trying cases by military commission as opposed to what can become a spectacle of a trial with high-paid defense lawyers and others focused on using that as a forum. There are a lot of reasons that I think are compelling that these commission cases can be tried fairly and effectively without many of the problems of the public normal trial.

With regard to the specific decision that you made, I noticed you referred to the Cole and to another case in which a military person was killed. But isn't it true that on 9/11 the United States Pentagon, the center of our defense establishment, was directly attacked by the people who had declared war upon us?

Attorney General HOLDER. Yes, there is no question that is true. That is one of the factors I considered in making this determination. The people who were killed on 9/11 were largely civilians. There was obviously a very grievous and heinous act that occurred at the Pentagon. But because of the fact that this was an act that occurred on our shores with a victim population that was largely civilian, among other things, including the admissibility, my desire to ensure that certain evidence would be admitted, it was my determination that bringing that case in an Article III court made the most sense.

Senator SESSIONS. Well, certainly military personnel were killed on 9/11. They attacked our Pentagon, and I do not think we should give a preference to military commission trials simply because the enemy attacked civilian people rather than military people.

Thank you very much.

Chairman LEAHY. Thank you.

I will also put in the record a number of items in support of what you are doing, a whole lot of names—I will not read them all—ranging from a former Ambassador to the United Nations to Barry Goldwater, Jr., to John Whitehead, the President of Rutherford Institute, and so forth. That will be placed in the record in support of what you are doing.

I would also place in the record a letter from a number of people, including a former Commandant of the Marine Corps and other military people, in support of what you are doing.

I will put into the record a group including Bob Barr, David Keene, Chairman of the American Conservative Union, Grover Norquist, and others in support of what you are doing. And a letter from a number of the families of those who were killed on 9/11 in support of what you are doing, and I will place that in the record also.

[The information referred to appears as a submission for the record.]

Chairman LEAHY. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, last January, I was pleased by your commitment to close the detention center at Guantanamo Bay. For too long, it has tarnished our image around the world and complicated our efforts to combat terrorism. Although you have faced greater than expected hurdles, you have made significant progress in closing the facility. Nevertheless, I am disappointed that this morning President Obama said that we would not meet his goal of closing Guantanamo Bay by January 22, 2010.

I would like to get an update on where you are in this process. Currently 215 detainees remain at Guantanamo. Administration officials have said that 40 to 50 will be transferred to the United States to face prosecution in Federal courts or military tribunals and about 100 will be transferred to other countries. What is your timeline for accomplishing these goals? What will you do with the remaining detainees? And when do you think that we will meet our goal of closing Guantanamo?

Attorney General HOLDER. Yes, the President did announce today that we will not be able to meet that deadline. We had unexpected difficulties in trying to reach that goal.

We have made tremendous progress in closing Guantanamo. We have more than 100 detainees who have been approved for transfer; 25 have been transferred overseas to date. More than 40 detainees have been referred for prosecution, and we will be making additional forum decisions on the remaining detainees in the near future.

The decisions for the remaining detainees are still pending approval, but we expect to have decisions for all detainees well before even the January 22nd deadline. It will be a question of trying to, among other things, determine where those people who have been

approved for transfer can be placed. I think that is going to be our biggest problem in ultimately closing Guantanamo.

Senator KOHL. Do you have some idea of when that may finally arrive at its conclusion?

Attorney General HOLDER. Well, I saw a report on what the President indicated during his remarks, and I think he says sometime this year we ought to be able to do that.

Senator KOHL. Wisconsin lost two brave service members during the shooting rampage at Fort Hood. It is a tragedy that while preparing to defend us from threats around the world, these brave soldiers face danger here at home.

As you know, Major Hasan came to the attention of the FBI last December because of e-mails that he had written to a known terrorist suspect. But the FBI did not pursue an investigation of him because they concluded that the e-mails were consistent with his research at Walter Reed and no contact was made with the Department of Defense.

I understand that a thorough investigation will take time to complete, but we need to protect our troops now, as I am sure you would agree. Going forward now, what changes have you made or will you make to prevent something like this from happening again?

Attorney General HOLDER. Well, I think what we have to do is understand exactly what happened that led to that tragedy. Were there flags that were missed? Were there miscommunications or was there a lack of communication? And once we have a handle on that, I think that we can propose and work with this Committee on ways in which we can prevent such a tragedy from occurring again.

We are at close to the beginning stages of this inquiry, and I think we have to determine on the basis of a sound investigation exactly what happened. I will say that on the basis of what I know so far, it is disturbing to know that there was this interaction between Hasan and other people. That I find disturbing.

Senator KOHL. But you do recognize, I am sure, that there is an urgency about that mission to arrive at some decisions with respect to better protecting our troops?

Attorney General HOLDER. Yes, there is certainly an urgency, and the President has given us, I guess, another 2 weeks or so—until the end of November—to come up with some findings, some determinations, and so I think that is an indication of how serious we take this and how quickly we want to try to get to the bottom of it.

Senator KOHL. Thank you.

Mr. Holder, last week, you announced that the Department will bring the Guantanamo detainees accused of planning the 9/11 attacks to trial in Federal court in New York, as we have talked about this morning. On Friday, you said that you would not have authorized prosecution if you were not confident that the outcome would be successful.

However, many critics have offered their own predictions about how such a trial might well play out. One concern we have heard from critics of your decision is that the defendants could get off on legal technicalities, in which case these terrorists would walk free.

Does this scenario have any merit? If not, why? And in the worst-case scenario that the trial does not result in a conviction, what would be your next steps?

Attorney General HOLDER. Many of those who have criticized the decision—and not all, but many of those who have criticized the decision have done so, I think, from a position of ignorance. They have not had access to the materials that I have had access to. They have not had a chance to look at the facts, look at the applicable laws, and make the determination as to what our chances of success are.

I would not have put these cases in Article III courts if I did not think our chances of success were good—in fact, if I did not think our chances of success were enhanced by bringing the cases there.

My expectation is that these capable prosecutors from the Justice Department will be successful in the prosecution of these cases.

Senator KOHL. But taking into account that you never know what happens when you walk into a court of law, in the event that, for whatever reason, they do not get convicted, what would be your next step? I am sure you must have talked about it.

Attorney General HOLDER. What I told the prosecutors—and what I will tell you—is that failure is not an option. Failure is not an option. These are cases that have to be won. I do not expect that we will have a contrary result.

Senator KOHL. Well, that is an interesting point of view. I will just leave it at that. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Kohl.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

It is good to see you again, General, and I appreciate the work you are trying to do down there, although I have a lot of problems with what you have just done in this area.

Several events have transpired since your last appearance before this Committee, and I hope to cover hopefully all of them in my short time. In my opinion, a significant event was the FBI's disruption of three separate terror plots in Texas, Illinois, Colorado, and New York. To me, these plots and the men who were eager to carry them out remind me that we are still engaged in this war against terror.

You will recall that at your confirmation hearing you expressed your belief that the United States is currently engaged in a war. But last week, during your press conference to announce the transfer of Khalid Sheikh Mohammed, KSM, you referred to the actions of KSM and his co-conspirators as "extraordinary crimes."

Now, you made reference to the attacks of 9/11 as an act of war and a "violation of Federal law." Last week, during your announcement, you referred to the actions of KSM as an "extraordinary crime."

Do you still believe that the United States is engaged in a war on terror?

Attorney General HOLDER. As I indicated in my opening remarks, the United States is at war. There is no question about that. And the acts that Khalid Sheikh Mohammed perpetrated are

not only crimes, they are acts of war. I do not think—there is no question about it.

Senator HATCH. OK. I just wanted to establish that. As I just referenced, last week you announced the Justice Department's intent to bring Khalid Sheikh Mohammed, KSM, to the United States to stand trial in New York City. Now, I do not agree with that decision, I want you to know right off the bat, not because I do not think the Federal Government can detain dangerous terrorists, not because bringing them to a metropolitan area will create an even bigger bull's eye on that city; it is because I believe, as the longest-serving person on the Senate Select Committee on Intelligence, that military commissions are the preferable venue to protect national security information and prevent disclosure of sources and methods.

Now, that is not to say that Article III courts cannot handle terrorist prosecutions for providing material support of terrorism. That same conclusion was reached by the 9/11 Commission. In its findings, the Commission concluded that an "unfortunate consequence" of excellent investigative and prosecutorial efforts in the initial 1993 al Qaeda attack on New York created an impression that the law enforcement and criminal justice systems were well equipped to cope with terrorism. But let us just examine the overall record of "successful prosecutions."

There are some numbers floating out there that some 195 terrorists have been "successfully" prosecuted since 9/11. However, I believe that the actual number is a fraction of that. Since 9/11, approximately 26 terrorist attacks have been disrupted.

So what is the actual number of successful Justice Department prosecutions of persons convicted of providing material support to al Qaeda since 9/11? And how many of those defendants were investigated and captured on U.S. soil?

Attorney General HOLDER. Well, I know that we have over 300 people who are in our prisons at this point who have been convicted of either domestic or international——

Senator HATCH. I am talking about those convicted of providing material support to al Qaeda, not other categories.

Attorney General HOLDER. I was going to say who have been convicted of domestic or international terrorism, and that would include people who were convicted of material support charges. I do not have at my fingertips the numbers of people who have been convicted of material support, but that information I can get to you, Senator.

Senator HATCH. I believe that number is probably closer to 50 than it is the 195 that has been bandied about. And I would like to have that answer, Okay?

[The information referred to appears as a submission for the record.]

Senator HATCH. I would like to shift to what is considered a "successful prosecution." In June, you announced the transfer of Ahmed Ghailani from Guantanamo to stand trial for his role in the bombings of the U.S. embassies in Kenya and Tanzania. As you are aware, Ghailani was previously indicted for this international terrorist act by a Federal grand jury in New York, and during your

announcement you mentioned that four co-defendants in this case were already "successfully prosecuted."

However, I would not exactly characterize these prosecutions as "successes." I base this on the fact that these terrorists were not given the death penalty. The Government did, in fact, seek the death penalty, but a juror, despite knowing that he was deciding a capital case, later disclosed that he could not, in fact, support a verdict that would result in imposing the death penalty on the four terrorists, and because of this, the Government was not able to obtain a sentence of death after conviction. And for reasons that escape me, the Government has not chosen to seek the death penalty against Mr. Ghailani.

So will the Government seek the death penalty in the trials of Khalid Sheikh Mohammed and his co-conspirators? And I would also add: Why did the Government not elect to seek the death penalty in the case of Ghailani?

Attorney General HOLDER. As I have indicated, it is my intention, after the processes are gone through at the Department, to seek the death penalty with regard to the 9/11 plotters. We made the decision not to seek the death penalty with regard to Mr. Ghailani. There were four defendants in that case. The prior administration decided not to seek the death penalty with regard to two, did seek the death penalty with regard to the other two, and a jury made the determination not to impose the death penalty.

As we looked at Mr. Ghailani's role, it seemed to us that his role was more consistent with that of the two defendants in which the prior administration decided not to seek the death penalty, and on that basis we decided not to seek the death penalty for Mr. Ghailani.

Senator HATCH. Former Attorney General Michael Mukasey was the trial judge in the prosecution of the blind sheikh, Omar Abdel Rahman and also heard motions in the Jose Padilla case.

Now, Judge Mukasey, an experienced Federal judge, has always asserted that the trials of the conspirators in the 1993 World Trade Center bombing damaged national security. For example, the prosecution is compelled by the rules of discovery to provide a list of unindicted co-conspirators to the defendants. In 1995, this list made it all the way to Sudan and into the hands of Osama bin Laden.

During the trial of Ramzi Yousef, the nephew of KSM and mastermind of the 1993 World Trade Center bombing, testimony about a cell phone tipped off terrorists that their communications had been compromised. The end result was the disclosure of a source and method and the loss of useful intelligence. Now, I could go on and on and cite numerous other examples from these trials, and I know you are familiar with them, having been at the Department of Justice back then.

What I would like to know—and my time is just about up, but let me just ask this last question. What I would like to know is: How do you intend to ensure that sensitive national security information does not end up in the hands of terrorists or their associates, especially if KSM or other detainees decide to represent themselves? Is the Classified Information Procedures Act, CIPA, really

sufficient to safeguard classified information if these detainees do or do not have counsel?

Attorney General HOLDER. Well, it has been argued that bringing these cases in Article III courts will somehow reveal information that otherwise might not be revealed or could be better protected in the military commissions. The reality is that the Information Protection Act that exists in military commissions is based on CIPA that we use in Article III courts.

If I might, there have been misinformation with regard to this whole question of this co-conspirator list and about the phone records allegation. The co-conspirator list was not a classified document. Had there been a reason to try to protect it, prosecutors could have sought a protective order, but that was not a classified document.

With regard to the phone record allegations, during the embassy bombings trial, the admission of phone records—the allegation is that the admission of these phone records alerted bin Laden to the fact that his cell phone was monitored and then he stopped using it. This allegation is simply wrong. Bin Laden stopped using the phone long before that information was disclosed in court proceedings. The phone records were used in the embassy bombing trials, not the Ramzi Yousef trial, as has been reported. Bin Laden's phone was not used after October the 9th of 1998. Production of discovery in the embassy bombings case did not begin until December 17th of 1998, and the phone records were not disclosed in court until March 20th of 2001.

So with regard to those allegations and those contentions, there is a factual problem. There are factual inaccuracies that deal with—that underlie those contentions. And it is my firm belief that through the use of CIPA we can protect information in Article III courts in the same way that they can be protected in military commissions.

Chairman LEAHY. Thank you.

Senator HATCH. If I could just add, there is no question that in the Federal courts there will be much more information that will be revealed that would not be revealed in a——

Chairman LEAHY. Well, if you want to add that, I would just note that Patrick Fitzgerald, whom we all acknowledge was a good prosecutor in the embassy bombing case, he said, "When you see how much classified information was involved in that case and when you see that there weren't any leaks, you get pretty darn confident the Federal courts are capable of handling these prosecutions." That is what U.S. Attorney Fitzgerald said.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Welcome, General. I have thought quite a bit about your decision to try these five people in Federal court, and I just want you to know that I fully support it. I have been on this Committee for 17 years now. I happen to believe that our Federal courts are our finest. I happen to believe that our Federal judges are our best. And I happen to believe that New York City is able to handle this in a very professional and definitively legal manner.

In my service on Intelligence, I have watched the failure of the military commissions for the past 7 years. As you have pointed out,

only three cases have essentially been tried, and there has been a great deal of controversy surrounding those decisions.

The attack in New York, as you point out, was both a major attack of war and a major and horrific criminal event. It is something none of us in America ever thought could happen, but it did. And I think the fact that these men are going to be tried in the finest of the American judicial system by strong prosecutors and by a fair judge is really very, very important.

I assume that the reason that you made the decision is because you believe that there is sufficient untainted evidence to obtain a conviction. Is that correct?

Attorney General HOLDER. That is correct, and that was one of the main drivers in my decision, to deal with what evidence could I present or could we present in whatever forum and to try to minimize the chances that we would have to deal with this issue of tainted evidence.

Senator FEINSTEIN. Thank you very much. Let me move to another subject.

In August, President Obama announced the creation of the High-Value Detainee Interrogation Group, known in this city of acronyms as HIG. It would be made up of experts from several intelligence and law enforcement agencies. The interrogation unit will be housed at the FBI, but will be overseen by the National Security Council.

Can you describe with some specificity the role that the FBI will be playing in this effort and the type of oversight that will be placed on interrogation?

Attorney General HOLDER. Well, what we have come to call the HIG is an effort to gather people in anticipation of the capture of high-value detainees, to have a group of people who are steeped in who these people are, and have determined how we can successfully interrogate them using methods that are consistent with our values as an American Nation. The FBI, along with the members of the intelligence community, will play a part in acquiring this information and also devising interrogation techniques that will be effective with regard to the specific person that is in front of them. There will be a team of people for each of those potential high-value detainees.

Senator FEINSTEIN. When could we expect the announcement of the director? And when will it be operative?

Attorney General HOLDER. I am not sure what our timeframe is. I know that we are in the process of gathering the people. The underlying work is underway, and I would hope that we would have an ability to identify perhaps not the members of it but certainly the people who would be running it relatively soon.

Senator FEINSTEIN. And I would assume the auspices that they would follow would be the Army Field Manual plus any additions that the task force has made?

Attorney General HOLDER. Right. Those are the conditions under which they will be operating as set out by President Obama.

Senator FEINSTEIN. Thank you. Let me go to another subject.

In 2008, the Federal Bureau of Prisons staff confiscated 1,519 cell phones from Federal prisons and 255 cell phones from secure Federal institutions. I was in San Diego talking with an FBI agent,

and he pointed out that most of the narcotics trafficking is actually done out of the prison system in the United States, particularly the California prison system, and he mentioned one prison, Pelican Bay, in specific. And then I came back and I found that there are all these cell phones in prisons which enables a group—namely, the Mexican mafia—to essentially use cell phones to give directives right out of prisons, on hits, on territories, on dealers. And I think this is a very serious thing.

I have introduced legislation that would make cell phones contraband in Federal prisons with possession punishable by up to an additional year in prison. What do you think of this? What are you doing? It is a real problem, Mr. Attorney General.

Attorney General HOLDER. It is a real problem, Senator. I had experience with that when I was the United States Attorney here in Washington, D.C. Rayful Edmond, who was a very notorious and large drug dealer in Washington, D.C., was convicted, sent to jail, and then continued to run his drug enterprise from prison, and was convicted again for that.

The maintenance of cell phones in prison I think is unacceptable, and I think we have to find ways in which we confiscate them. I think you are right, they ought to be considered contraband, and I think we ought to also look at what technological means we have that might possibly block the use of cell phones in prison for those that, for whatever reason, we are unable to get from prisoners.

Senator FEINSTEIN. Would you take a look at my legislation? And your support would be appreciated.

Attorney General HOLDER. I certainly will do that.

Senator FEINSTEIN. Thank you.

Attorney General HOLDER. I think the idea that you have, though, and the concern that you have is a very legitimate one and one that we have to deal with.

Senator FEINSTEIN. Thank you.

In June of 2009, the GAO released a report indicating that individuals on terrorist watchlists succeeded in purchasing guns an astonishing 865 times between 2004 and 2009. This dangerous loophole in Federal law is known as "the terror gap," and it has continued to allow the individuals on the FBI's terrorist watchlist to purchase guns, despite the fact they are not allowed to fly on an airplane.

The Bush administration's Justice Department drafted and supported Federal legislation to close this gap in the 110th Congress, and identical legislation has been introduced in the 111th Congress.

Does the Justice Department support closing this gap? And will you support that legislation?

Attorney General HOLDER. Yes, we will support that legislation. It seems incongruous to me that we would bar certain people from flying on airplanes because they are on the terrorist watchlist and yet would still allow them to possess weapons. I think that the legislation that was initially proposed by the Bush administration was well conceived, and we will continue to support that.

Senator FEINSTEIN. Excellent. Thank you very much, General.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Feinstein.

Senator Grassley.

Senator GRASSLEY. I have an observation and a couple questions.

My observation, which I do not want you to respond to, is I do not know how you can make a statement that failure to convict is not an option when you have got juries in this country. I think a lot of Americans thought O.J. Simpson ought to be convicted of murder rather than being in jail for what he is in jail for now. It seemed to me ludicrous. You know, I am a farmer, not a lawyer, but I just want to make that observation.

A question: You previously pledged——

Chairman LEAHY. I think it is only fair he ought to be able to respond to that.

Senator GRASSLEY. OK, but as long as it does not come out of my time.

Attorney General HOLDER. Well, that is fine, and maybe I should have been more—maybe I should have been more expansive in my response to the question that Senator Kohl put to me. I mean, certainly we have thought, I have thought about that possibility. And one of the things that this administration has consistently said, in fact, Congress has passed legislation that would not allow for the release into this country of anybody who was deemed dangerous. And so that if there were the possibility that a trial was not successful, that would not mean that that person would be released into our country. That is not a possibility.

But, again, I want to emphasize that I am confident that we will be successful in the trial of these matters.

Senator GRASSLEY. Yes, and it is my understanding that if he is not convicted and somehow the judge lets him off on a technicality or something, then he becomes an enemy combatant, and you are right back where you started. So what do you gain? But, anyway, you understand the law. I do not. I am just trying to bring a little common sense to this.

You previously pledged to respond "fully and in a timely fashion" to Judiciary Committee inquiries. Senator Leahy and I wrote you in October with a list of outstanding unanswered requests. I do appreciate your courtesy reply and your willingness to have your staff meet with mine to work out this backlog of requests. But I am disappointed that your reply to Chairman Leahy and me indicates that you are considering not answering pre-2009 Committee questions to the Department. This position is completely unacceptable to me. These unanswered questions deal with serious matters such as national security, whistleblower law enforcement. You are not upholding your pledge to respond to all outstanding requests as you told me you would when you came to my office prior to confirmation? I even tried to help you by giving you a big, thick file of things that were unanswered from the previous administration. I wanted to save you an embarrassment, I wanted to save President Obama any embarrassment for what the previous administration did not do right in responding to proper requests.

So why are you and the Department not willing to answer these questions?

Attorney General HOLDER. Well, what we have tried to do is certainly answer all of those questions that have been propounded to

us that pertain to this administration, and I think we are up to date in that regard.

I do remember that booklet that you gave me, and I think that we have done a pretty good job in responding to those. I know our staffs are meeting, I believe on Monday or Tuesday of next week, to try to discuss this. It is our hope that we can find a way to stay current with the questions that are given to us and also deal with the backlog that you are discussing.

It is not a question of us not trying to do that. We really were trying just to prioritize the way in which we responded to these questions. And I hope our staffs will be able to work together and find a way through this.

Senator GRASSLEY. Well, Senator Leahy has committed to me that he will work with me to get that job done, and thank you very much, and I hope we will be successful.

On Guantanamo, the decisions to bring detainees to the United States and afford them civilian trials is highly questionable. I want to know more about who is advising you on these decisions. There are attorneys at the Justice Department working on this issue who either represent Guantanamo detainees or work for groups who advocated for them. This prior representation I think creates a conflict of interest problem for these individuals.

For instance, Principal Deputy Solicitor General Neil Katyal represented Osama bin Laden's driver and bodyguard in his case challenging the earlier versions of the Military Commissions Act that Congress passed on a bipartisan basis. I am quoting National Journal: "Mr. Katyal has not recused himself and is still working on detainee matters at the Justice Department." The article indicates that other attorneys with previous involvement in detainee issues are also on detainee issues at the Department.

Another example, the New York Post reported that your Department hired Jennifer Daskal to serve in the National Security Division. She also serves on a task force deciding the future of terrorist detainees. According to the article, Ms. Daskal has no national security experience and no prosecutorial experience. She has, however, a background of advocating for detainees. One example of her advocacy is from a 54-page report that criticized Guantanamo Bay's treatment of the terrorist detainees where she stated one detainee described as a self-styled poet "found it was nearly impossible to write poetry anymore because the prison guards would only allow him to keep a pen or pencil in his cell for short periods of time."

As a consequence of these three examples, I want to know more about these potential conflicts. Would you provide me and members of the Committee with the following information: the names of political appointees in your Department who represent detainees or who work for organizations advocating on their behalf; the cases or projects that these appointees worked with respect to detainees prior to joining the Justice Department; and the cases or projects relating to detainees that have worked on since joining the Justice Department? Would you please provide that information to me and the Committee?

Attorney General HOLDER. I will certainly consider that request, but I want to make sure that you understand that the people in the Department understand their ethical obligations, and to the ex-

tent that recusals are appropriate on the basis of prior representations or prior connections, people in the Department have recused themselves from specific cases.

I have been recused from a couple of the habeas cases that are pending here in the district court of the District of Columbia because my firm—not because I did, but because my firm represented or had some connection to the person who was subject of that habeas proceeding.

So we are very sensitive to that concern and are mindful of it, and people who should not be participating in certain decisions do not do so.

Senator GRASSLEY. But I asked you for information. Will you provide it?

Attorney General HOLDER. I will consider that request.

Senator GRASSLEY. Well, let me tell you then, I think your Department probably is doing what is usual, but let me quote a law professor, dean of college of law, Don Burnett: "What is unusual is the size of the cluster of the individuals who are affected." And so, you know, you have got a big job ahead of you that you have taken on, moving this stuff from military commissions. It seems to me we need to know who is involved in it and what their predilections are.

I yield back.

Attorney General HOLDER. Well, let me say this about the people who work in the Justice Department and who work on these cases. They are fine public servants who have sacrificed a great deal to work in the Department. They apply the law as best they can. They are patriots. They are concerned about the security of the American people. And whatever their previous roles, I am confident that they can put those aside or recuse themselves, and I am confident that the people who I am speaking with and relying on have the best interest of the American people, including the national security, uppermost in their minds.

Senator GRASSLEY. The very least you can give me is a list of the recusals.

Attorney General HOLDER. I will consider that.

Chairman LEAHY. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

General, I want to commend you for your decision to try Khalid Sheikh Mohammed and other 9/11 plotters in Federal court. It is about time that we bring these criminals to justice, and your decision shows the world that this country stands firmly behind its legal system and the Constitution.

As you know, I do not agree with every decision you have made in this area. I remain skeptical about the decision to try five other Guantanamo detainees in military commissions. But too much of the criticism directed at using our Federal courts has not been based in fact. Some conservative commentators have gone so far as to call it scare-mongering, and they have called for it to stop.

More than 200 terrorism defendants have been prosecuted in our Federal court system since 9/11, and Federal prisoners securely hold more than 300 inmates whose cases were terrorism related. Zacarias Moussaoui was successfully prosecuted and convicted in Federal court of conspiring with al Qaeda on the 9/11 attacks and is serving a life sentence. And yet I do not remember hearing the

kind of uproar about the decision to try Moussaoui in Federal court that we are hearing now. So it is a little disheartening that critics of your decision seem to have so little faith in our system of justice.

So, Mr. Attorney General, how does your decision to seek justice in Federal court support our fight against terrorism?

Attorney General HOLDER. Well, I have great faith in our system, and it is not a speculative faith. It is based on experience. The cases that you mentioned, the familiarity I have from the Federal courts, having been a prosecutor in those courts, gives me the belief that we are going to have an ability to maintain courtrooms in a way that is consistent with what I think we want. There will be a level of decorum. I think that we will have an ability to introduce the evidence that we seek to introduce, and that our courts are capable of handling this whole concern that people have expressed about the dispersal of classified information. We have done it in the past, and I am confident that we can do it with regard to these five individuals.

Senator FEINGOLD. I have been raising concerns for a while now about the possibility of establishing a so-called indefinite detention regime. Recently, a statement rejecting indefinite detention without charge was issued by more than 130 former Members of Congress, diplomats, Federal judges, prosecutors, high-level military officers, and national security experts representing the full political spectrum. The declaration said this: "Instituting a system of indefinite determination without charge in the United States for terrorism suspects would threaten the constitutional protections enshrined in our justice system and is simply bad policy."

General, can you tell us yet whether there will be any Guantanamo detainees who will be neither prosecuted nor transferred to another country? And is the administration currently contemplating holding some detainees without trial for an indefinite period of time?

Attorney General HOLDER. The possibility exists that at the conclusion of our review with regard to the detainees, the people who are held at Guantanamo, that there will be a number of people whom we will seek to detain under the laws of war. We will do so in a way that is consistent with due process to make sure that those determinations are made in a way, as I said, that ensures that the decision is based in due process and that reviews are done on a periodic basis to ensure that anybody held under that regime remains a danger to the country and should continue to be held. But that possibility does exist.

Senator FEINGOLD. In a status other than as prisoner of war?

Attorney General HOLDER. No. Under the laws of war, these would be people who would be held under the laws of war.

Senator FEINGOLD. We will need to pursue this at greater length later, but I want to flag my concern again.

As several Senators have already discussed, we were all devastated by the tragedy at Fort Hood. It has been especially hard for Wisconsin, and Senator Kohl mentioned two brave Wisconsin soldiers who were murdered and several more were injured. And I know that the President has ordered a thorough governmentwide review of what the U.S. Government knew and what went wrong, and I am sure my colleagues on the Committee will be very inter-

ested in the outcome of that. I appreciate that there is not a lot you can say in public now, and it is important not to jump to conclusions, and especially not to jeopardize the murder prosecution. But I hope the review will be expedited.

You discussed with Senator Leahy sharing the results of your review with members of this Committee which I appreciate, but I want the record to be clear. Will you commit to making public to the greatest degree possible the conclusions the executive branch reaches so that the American people—most of all, the families who lost loved ones—have an opportunity to understand what, if anything, could have been done to prevent this tragedy?

Attorney General HOLDER. Yes, in a way that is consistent with ensuring that we do not do harm to the potential trial, I think it is our obligation to make clear to this Committee and to the American public what the results of our investigation are so that we have a way in which, working with this Committee, we prevent further tragedies like that which occurred at Fort Hood.

Senator FEINGOLD. General, during town hall meetings and other exchanges I have had with a lot of Wisconsin law enforcement people over the last several years, I have heard that progress has actually been made in combating methamphetamine production and use, which is good news. Unfortunately, there has also been a significant increase in heroin coming into the State quite possibly as a replacement for meth, and this heroin is often very pure and, therefore, very dangerous.

Wisconsin law enforcement reports not only that there is increasing violent crime associated with heroin trafficking, but there has also been a disturbing increase in heroin-related deaths. Rock County, my home county in south central Wisconsin, has already had 12 heroin-related deaths this year, and I am concerned this may be part of a larger nationwide trend. Senator Kohl and I have addressed this increase in Rock County by requesting that it receive funding through the High-Intensity Drug-Trafficking Assurance Program. We would like to know whether this trend is emerging in other States. And what steps is the Department taking to reduce heroin trafficking in Wisconsin and elsewhere?

Attorney General HOLDER. Well, we certainly have seen an increase, chiefly from Mexico, in the movement of heroin into the United States. The problem that you have identified in Wisconsin is one that we see in other parts of the country. I know that Baltimore has a particular heroin problem, but we see it in other States as well.

The Department of Justice, in conjunction—well, the DEA is part of the Justice Department—is using all of the tactics we have, all of the skills we have, to try to get at that emerging heroin problem.

I think a lot of people thought that heroin was a problem of the past, but the concern that you are raising is a very, very legitimate one and one that we are focusing on. We have to combat heroin yet again, and we are doing so.

Senator FEINGOLD. Thank you, General.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Kyl.

Senator KYL. Thank you. Mr. Chairman, first of all, Senator Grassley asked me just one thing here.

Attorney General Holder, is my understanding correct that you will not commit to providing Senator Grassley a list of your recusals?

Attorney General HOLDER. A list of my recusals?

Senator KYL. Yes. The list of recusals that he was requesting when he examined you just a moment ago.

Attorney General HOLDER. What I said was that I would consider that request.

Senator KYL. Yes. So my understanding is correct that you are not committing to provide that for him. Is that correct?

Attorney General HOLDER. I said I would consider it.

Senator KYL. You have repeatedly said that your decision to try Khalid Sheikh Mohammed in Article III courts is because that is where you have the best chance to prosecute, that the chances of success are enhanced in Article III courts, and that you have access to all the evidence so you are in a better position to judge than those who are ignorant of that evidence are.

How could you be more likely to get a conviction in Federal court when Khalid Sheikh Mohammed has already asked to plead guilty before a military commission and be executed? How could you be more likely to get a conviction in an Article III court than that?

Attorney General HOLDER. Well, Senator, you are dealing with——

[Applause.]

Chairman LEAHY. We will have order in these hearings. As I always do, whether people are supportive or opposed to any position I take, we must have order, we will have order. The police will remove those who do not——

Senator KYL. Mr. Chairman, let me say that your request for order is exactly appropriate, and I concur with that.

Can you answer my question, Mr. Attorney General.

Attorney General HOLDER. The determination that I make on where I think we can best try these cases does not depend on the whims or the desires of Khalid Sheikh Mohammed. He said he wanted to do that then. I have no idea what he wants to do now with regard to these military commissions that, as a result of the work that this Committee did and this Congress did, now has enhanced protections and I think are better than they once were before. He may still want to do that in the military commission. I have no idea. My job is to look at the possibilities—Article III, military commission. Where is my best chance of success? And——

Senator KYL. If I could interrupt, it would seem to me that given the fact——

Attorney General HOLDER.—I decided that Article III courts were the best place to do that.

Senator KYL. Right, I know that is what you——

Attorney General HOLDER. Khalid Sheikh Mohammed is not making this decision. The Attorney General makes——

Senator KYL. Of course he is not. Mr. Attorney General, you have based this on where you think you are more likely to get a conviction. He talked about the best chance to prosecute, the chances of success are enhanced, and so on. One of the factors has to be the

fact that he has at least at some time to plead guilty. I mean, you had to have taken that into account.

Attorney General HOLDER. That was then. I do not know what Khalid Sheikh Mohammed wants to do now, and I am not going to base a determination on where these cases ought to be brought on what a terrorist, what a murderer wants to do. He will not select the prosecution venue. I will select it. And I have.

Senator KYL. But my understanding is that one of the key reasons for your decision is where you think you are going to have the best chance of success. One would think that his express desire to plead guilty in the military commission would have some effect on your decision.

Attorney General HOLDER. Well, Senator Kyl, with all respect, today is—I do not know—November 16th, 17th—I am not sure what the date is. Do we know as a fact right now that that is, in fact, what he wants to do? Do we know that? Do I have some special information, do you have some special information that is what Khalid Sheikh Mohammed is planning to do or continuing to plan to do?

Senator KYL. Why is it more likely that he will be convicted in a Federal court than he would before a military commission, particularly given the fact—surely you are not arguing that it is easier to get evidence in to an Article III court than it is in a military commission. I mean, you have made the point that you are aware of a lot of evidence in this case that others are not, of course. But the rules for admitting evidence are more lenient before military commissions than in Article III courts. So that cannot be the basis for your decision, is it?

Attorney General HOLDER. That is not necessarily the case. With regard to the evidence that would be elicited in a military commission, evidence elicited from the detainees, from the terrorists as a result of these enhanced interrogation techniques, it is not clear to me at all that information would necessarily be admitted in a military commission, even with the use of a clean team, or that it would withstand appellate scrutiny. And on the basis of that concern and other things, my desire to go to an Article III court and to minimize the use of that kind of information, that kind of evidence, I thought was paramount.

Senator KYL. Suppose that another terrorist of the same kind as KSM argues that he, too, should be tried in an Article III court, but he is one of the ones destined for a military commission. On what basis do you argue against that request since this appears to be simply a subjective judgment on your part as to which court it is easier to get a conviction?

Attorney General HOLDER. It is not a question of where I think we can get an easier conviction. It is a question of looking at the protocol that exists, talking to the Secretary of Defense and other people in trying to make determinations of where cases are more appropriately held.

The case, for instance, involving the Cole that involves Mr. Nashiri, an attack on an American warship, it seems to me is something that is uniquely situated for a military commission as opposed to an Article III court.

Senator KYL. But how do you answer the rationale that the more heinous crime is the killing of civilians and, therefore, is more ripe for resolution in a military commission than in an Article III court?

Attorney General HOLDER. I am not making value judgments about which case is more heinous or which lives are more valuable. I am looking simply at the facts and at the protocols and trying to make determinations as to where cases are appropriately sited.

Senator KYL. It is hard to understand a rationale, though, that when you kill 3,000, almost, civilians that that, therefore, calls for Article III as opposed to a military commission. The logic of that escapes me. Let——

Attorney General HOLDER. Well, the Federal law that governs the administration of the death penalty dictates that cases should be brought in the place where the offense occurred. So that is at least another factor that I think has to be used in trying to determine where the cases should be brought.

Senator KYL. Well, that assumes that the person is in the United States for one thing, and he is not.

Let me just close with this point. You said—and this really bothers me, Mr. Attorney General, with all due respect: "For 8 years, justice has been delayed for the victims of the 9/11 attacks."

I want to put in the record, Mr. Chairman, ask unanimous consent to insert in the record an article called "Justice Delayed," by Andrew McCarthy.

Chairman LEAHY. Without objection.

Senator KYL. I will just quote two paragraphs from this. "This is chutzpah writ large," he writes. "The principal reason there were so few military trials is the tireless campaign conducted by leftist lawyers to derail military tribunals by challenging them in the courts. Many of those lawyers are now working for the Obama Justice Department. That includes Holder, whose firm, Covington & Burling, volunteered its services to at least 18 of America's enemies in lawsuits they brought against the American people."

And he concludes, "...within 2 years...KSM and four fellow war criminals stood ready to plead guilty and proceed to execution. But then the Obama administration blew into Washington. Want to talk about delay? Obama shut down the commission despite the jihadists' efforts to conclude it by pleading guilty. Obama's team permitted no movement on the case for eleven months and now has torpedoed a perfectly valid commission case—despite keeping the commission system for other cases—so that we can instead endure an incredibly expensive and burdensome civilian trial that will take years to complete."

[The article appears as a submission for the record.]

Senator KYL. The witness can surely respond to what I said.

Attorney General HOLDER. I do not even know where to begin, other than to say that, you know, this notion of "leftist lawyers" somehow prolonging this, the vast majority of the time in which these matters were not brought to trial, to fruition, happened in the prior administration. The Supreme Court—not, I think, a group of leftist lawyers—had concerns about the way in which the commissions were constructed.

The Congress reenacted, and I think appropriately so, the way in which the commissions were constructed. This is not a Congress peopled only with leftist lawyers, as Mr. McCarthy would say.

So, you know, that makes for nice rhetoric, and it makes for, you know, good fodder on the talk shows and all of that stuff. But I am here to talk about facts and evidence, real American values, and not the kinds of polemics that he seems prone to. So, you know, that is——

Chairman LEAHY. Thank you.

Attorney General HOLDER.—about Mr. McCarthy.

Chairman LEAHY. I would put into the record the statistics since 9/11. Since September 11, 2001, the Department of Justice has brought 119 terrorism cases in Federal court with a conviction rate of over 90 percent. Since January 1, 2009, more than 30 individuals charged with terrorism violations have been either successfully prosecuted and/or sentenced in Federal courts nationwide. And there are currently more than 200 inmates in Bureau of Prisons custody who have a history of or a nexus to international terrorism that were convicted by Federal courts.

Our next——

Senator SESSIONS. Mr. Chairman, I would just add that I do not doubt that you can try people successfully in Federal court, but there are other issues that have been raised here about that. And I would—I understand Senator Kyl has asked for the names of these cases and the defendants but has not received information on that. Will you provide that?

Attorney General HOLDER. The names of?

Senator SESSIONS. The names of the cases and defendants that you say are pending or have been tried and convicted and what they have been tried and convicted of.

Attorney General HOLDER. Of the material support charges? Is that——

Senator SESSIONS. You said there are 300 cases. I would like all 300 of them, when they were tried, when they were convicted, and what they were charged with.

Attorney General HOLDER. What I said was that there were 300 people in the Federal system, the Federal Bureau of Prisons——

Senator SESSIONS. Well, will you provide the names and what they have been charged with and why they are being detained? If you haven't done so, with Senator Kyl's request——

Chairman LEAHY. I think we can let the witness——

Senator SESSIONS. No. I would just like a yes or no.

Chairman LEAHY.—answer the question. Well, then——

Attorney General HOLDER. I do not think that was necessarily a request that was made, but I will certainly—at least I think Senator Kyl, I thought, was asking what Senator Grassley had asked about. That was not quite the same thing.

Senator SESSIONS. Well, my understanding is previous to that——

Attorney General HOLDER. I will supply you with those 300 names and what they were convicted of. I will be glad to do that.

Senator SESSIONS. Thank you.

[The information referred to appears as a submission for the record.]

Chairman LEAHY. The only member of this Committee who actually lives in New York City is——

Senator SCHUMER. Brooklyn.

Chairman LEAHY. In Brooklyn, and proudly so. I have visited there with you.

Senator SCHUMER. Yes, you did.

Chairman LEAHY. Is Senator Schumer, and I yield to Senator Schumer.

Senator SCHUMER. Thank you, and thank you, Mr. Attorney General. I also want to thank the families from New York who are here who have been such strong advocates on this and so many other issues. We all deeply live with the losses that New York and the rest of the Nation suffered in 2001.

My first question relates to the practical matters of the trial in New York City. I spoke with Commissioner Ray Kelly yesterday about the strain that conducting trials in New York City will place on local law enforcement. Obviously, it is a large burden, which Commissioner Kelly willingly and Mayor Bloomberg willingly accept. Rough estimates from the city of New York which I received yesterday place the added cost of moving the trials of Khalid Sheikh Mohammed and the other terrorist suspects to New York somewhere in the ballpark of $75 million. That is a minimum. That is just for the year of the trial. The figure does not include costs of ramping up personnel, placing additional perimeter units around the courthouse and the Metropolitan Correctional Center in Lower Manhattan, and other consistent demands that will be placed on our police force as soon as the detainees are physically transferred.

As you can imagine, such a high-profile case involving such dangerous subjects will require substantial manpower for the necessary enhanced security. The city will require the following: police officers to establish a secure perimeter around Lower Manhattan, many of those, obviously, the hours are going to vary, and so there will be overtime and other things like that; police officers and equipment for demonstration areas and crowd control police officers to enhance security units for City Hall and for police headquarters, both of which are near the courthouse and the MCC; as well as for our bridges and transit systems; increased traffic agents, aviation flyovers, sniper teams, and hazmat units. This list does not come from me, but from the police commissioner in New York.

Commissioner Kelly estimated—this is a rough estimation at this early point, because I just asked him to do it yesterday—that as much as 90 percent of the additional outlays would need to go to overtime alone because they are not going to be able to hire new police officers for all of this.

All of this comes at a time when, of course, we compete, New York City does, for Federal grants of the COPS hiring grant. We did not receive any money for that program last year. So I worry about safety first, obviously, but also the burden on the taxpayers of New York.

In 1995, the city of New York was host to the trial of Sheikh Omar Abdel Rahman, the mastermind of the 1993 bombing at the World Trade Center, and costs associated with that trial were fully reimbursed by the Federal Government.

So my general question to you is: Will you recommend to the President that he include in his budget dedicated funding to cover all of New York City's added security costs?

Attorney General HOLDER. Yes, I think that is fair. America was attacked on September the 11th. That attack was of national consequence. What we are doing is a national responsibility, and although the trial will be hosted in New York, it seems to me that New York should not bear the burden alone. This is a national——

Senator SCHUMER. So you will recommend and, I presume, fight for these funds from OMB, which we know sometimes has other things on its mind?

Attorney General HOLDER. With your help, I would——

Senator SCHUMER. You will have my full and undivided help. I just do not want—I mean, Mayor Bloomberg, the commissioner, they did not make the decision, but they stepped up to the plate and willingly agreed. I do not think either they or New York City or New York State should be left hanging out there paying any of the costs of this, and I take it you fully agree with that.

Attorney General HOLDER. I do not disagree with that at all, Senator.

Senator SCHUMER. OK. Second question—and just one other thing on this. There may be other costs that we cannot envision, and I take it we are not going to find somebody sort of trying to say, well, this was not in an original application or on an original request. I take it there will be flexibility and generosity because of New York's generosity here.

Attorney General HOLDER. You are going to be with me at OMB, yes, that does——

Senator SCHUMER. I will be there, believe me, with you or—gladly with you rather than alone. Thank you.

Attorney General HOLDER. I look forward to working with you in that regard.

Senator SCHUMER. OK, great. The next question is about the death penalty. As you know, because we discussed this back then, I was the primary author of the Federal death penalty provisions for terrorists in the 1994 omnibus crime bill, and you have already indicated you intend to seek the death penalty against Khalid Sheikh Mohammed and his cohorts, which I think is totally appropriate.

Can you tell me if you currently see any legal impediments, that is, existing court cases, because what we worry about here—and this happened in the military courts with *Hamdan* and other cases—that would stand in the way, provided all the proper procedures were followed, of seeking and imposing the death penalty?

Attorney General HOLDER. No. When I made that statement, I did so on an informed basis and looked at what the potential impediments were, and I do not see any legal impediments to our seeking the death penalty. We will obviously have to convince a jury of 12 people that the death penalty is appropriate. But I do not see any legal impediments in that regard.

Senator SCHUMER. My guess is a normal jury of 12 people would clearly see that, but we have a jury system and we trust it.

Khalid Sheikh Mohammed expressed a desire in the tribunal to plead guilty. If he wants to plead guilty in Federal court—and as

you correctly point out, we have no knowledge that he still wants to do that and cannot rely on the whims of him to make any decisions—but he waives his right to a jury trial for the penalty phase, will you agree to that to, for instance, avoid some of the theater that some people are justifiably worried about?

Attorney General HOLDER. He certainly has the right to plead guilty, and if we are spared a trial and simply go to the penalty phase, that is something we would, I think, clearly agree to.

Senator SCHUMER. Thank you. One quick other question. I know my time is coming to an end. This is about Fort Hood and guns. Senator Feinstein talked about the Lautenberg law and others to prevent terrorists and people on the watchlist from getting guns, and that makes sense. But there is another aspect here. There are restrictions on even notification. So, for instance, the people in one end of the justice system, the Joint Terrorism Task Force, were not notified when Major Hasan bought a gun. That is not talking about whether the law should allow it or not, but, clearly, there should be notification. Now the Tiahrt amendment, the 24-hour background check requirement, gets in the way of that.

My question is: Will the Justice Department remove the Tiahrt 24-hour background check destruction requirement from its 2011 budget to allow the FBI to keep records of guns purchased by subjects of terrorist inquiries—I am just limiting it to that issue—like Major Hasan?

Attorney General HOLDER. The position of the administration is that there should be a basis for law enforcement to share information about gun purchases. We fully respect the Second Amendment, fully respect the *Heller* decision. It does not seem to us that it is inconsistent to allow law enforcement agencies to share that kind of information—for that information to be retained and then to be shared by law enforcement.

Senator SCHUMER. I would just urge that you urge they write it into the budget that they are going to bring to us, the administration. It would be very important.

Attorney General HOLDER. I believe it is, but I have to check. But I believe it is.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. I was going to take a short break, but Senator Graham tells me he has a conflict, so why don't I yield to you, Senator Graham. And then after Senator Graham's questions, we will take a very short break while we reconnoiter.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator GRAHAM. Thank you, Mr. Attorney General. I have, quite frankly, enjoyed working with you on this difficult topic, and I am afraid we have reached different conclusions. But this is an important discussion for the American people to understand, you know, how this affects us now and in the future.

The first thing I would like to make the public understand is that you are not suggesting that if by some one in a million fluke one of these defendants were acquitted or given a short sentence, they would be released anywhere, are you?

Attorney General HOLDER. No.

Senator GRAHAM. We would hold them as an enemy combatant.

Attorney General HOLDER. As I indicated to Senator—as I should have indicated to Senator Kohl when that question was initially asked of me, I think we have Congressional restrictions on how these people would be treated in such a circumstance so that, no, that would not be——

Senator GRAHAM. But the administration's position would be—and this is not going to happen. I am here to tell you that I am sure he will get convicted in Federal court, but not because we are threatening the judge or the jury, but just because of the nature of the case. That is not really my concern about what happens to him because he will get his day, he will meet justice. But in the future, if one of these terrorists were taken to Federal court and somehow acquitted or given a short sentence and the administration still felt they presented a military threat to the country, you would have the legal authority to hold them as an enemy combatant, right?

Attorney General HOLDER. I certainly think that under the regime that we are contemplating, the potential for detaining people under the laws of war, we would retain that ability.

Senator GRAHAM. Yes. So in a Sheikh Mohammed case, we are never going to let him go if something happened wrong in the Federal court.

Attorney General HOLDER. I do not anticipate that anything is going to go wrong in the Federal court——

Senator GRAHAM. Nor do I, but here is my concern. Can you give me a case in United States history where an enemy combatant caught on a battlefield was tried in civilian court?

Attorney General HOLDER. I do not know; I would have to look at that. I think that, you know, the determination of——

Senator GRAHAM. We are making history here, Mr. Attorney General. I will answer it for you. The answer is no.

Attorney General HOLDER. Well, I think——

Senator GRAHAM. The Ghailani case, he was indicted for the Cole bombing before 9/11, and I did not object to going into Federal court. But I am telling you right now, we are making history, and we are making bad history, and let me tell you why.

If bin Laden were caught tomorrow, would it be the position of this administration that he would be brought to justice?

Attorney General HOLDER. He would certainly be brought to justice, absolutely.

Senator GRAHAM. Where would you try him?

Attorney General HOLDER. Well, we would go through our protocol, and we would make the determination about where he should appropriately be tried.

Senator GRAHAM. Would you try him—why would you take him someplace different than KSM?

Attorney General HOLDER. Well, that might be the case. I do not know. I would have to look at all of the evidence, all of the—indicted——

Senator GRAHAM. Well——

Attorney General HOLDER. He has been indicted already in Federal court.

Senator GRAHAM. Does it matter if you use the law enforcement theory or the enemy combatant theory in terms of how the case would be handled?

Attorney General HOLDER. Well, bin Laden is an interesting case in that he has already been indicted in Federal court.

Senator GRAHAM. Right.

Attorney General HOLDER. We have cases against him in Federal court.

Senator GRAHAM. Right. Well, where would you put him?

Attorney General HOLDER. It would depend on a variety of factors.

Senator GRAHAM. Well, let me ask you this question. Let me ask you this. Let us say we capture him tomorrow. When does custodial interrogation begin in his case? If we captured bin Laden tomorrow, would he be entitled to Miranda warnings at the moment of capture?

Attorney General HOLDER. Again, that all depends. I mean, if we capture——

Senator GRAHAM. Well, it does not depend. If you are going to prosecute anybody in civilian court, our law is clear that the moment custodial interrogation occurs, the defendant, the criminal defendant is entitled to a lawyer and to be informed of their right to remain silent. The big problem I have is that you are criminalizing the war, that if we caught bin Laden tomorrow, we have mixed theories and we could not turn him over to the CIA, the FBI, or military intelligence for an interrogation on the battlefield because now we are saying that he is subject to criminal court in the United States, and you are confusing the people fighting this war.

What would you tell the military commander who captured him? Would you tell him, "You must read him his rights and give him a lawyer"? And if you did not tell him that, would you jeopardize the prosecution in a Federal court?

Attorney General HOLDER. We have captured thousands of people on the battlefield, only a few of which have actually been given their Miranda warnings.

With regard to bin Laden and the desire or the need for statements from him, the case against him at this point is so overwhelming——

Senator GRAHAM. Mr. Attorney General——

Attorney General HOLDER.—that there is no need to——

Senator GRAHAM.—the only point I am making is that if we are going to use Federal court as a disposition for terrorists, you take everything that comes with being in Federal court. And what comes with being in Federal court is that the rules in this country, unlike military law—you can have military operations, you can interrogate somebody for military intelligence purposes, and the law enforcement rights do not attach. But under domestic criminal law, the moment the person is in the hands of the U.S. Government, they are entitled to be told they have a right to a lawyer and can remain silent, and if we go down that road, we are going to make this country less safe. That is my problem with what you have done.

You are a fine man. I know you want to do everything to help this country be safe. But I think you have made a fundamental

mistake here. You have taken a wartime model that will allow us flexibility when it comes to intelligence gathering, and you have compromised this country's ability to deal with people who are at war with us by interjecting into the system the possibility that they may be given the same constitutional rights as any American citizen. And the main reason that KSM is going to court apparently is because the people he decided to kill were here in America and mostly civilian, and the person going into military court decided to kill some military members overseas. I think that is a perversion of the justice system.

Attorney General HOLDER. What I said repeatedly is that we should use all the tools available to us—military courts, Article III courts. The conviction of Osama bin Laden, were he to come into our custody, would not depend on any custodial statements that he would make. The case against him, both for those cases that have already been indicted, the case we could make him against for his involvement in the 9/11 case, would not be dependent on——

Senator GRAHAM. Mr. Attorney——

Attorney General HOLDER.—would not be dependent on custodial interrogations. And so I think in some ways you have thrown up something that is—with all due respect, I think is a red herring. It would not be something——

Senator GRAHAM. With all due respect, every military lawyer that I have talked to is deeply concerned about the fact that if we go down this road, we are criminalizing the war, and we are putting our intelligence gathering at risk. And I will have some statements from them to back up what I am saying.

Chairman LEAHY. Senator Graham——

Senator GRAHAM. My time is up. I look forward to talking to you. There are some issues we can agree on.

Attorney General HOLDER. One thing I would say, that with regard to those people who are captured on the battlefield, we make the determinations every day as to who should be Mirandized, who should not. Most are not Mirandized. And the people who are involved in that decision involve not only lawyers and agents but also military personnel who make the determination as to who should be Mirandized.

But, again, the notion that a conviction of Khalid Sheikh Mohammed would depend on his getting Miranda rights is simply not accurate.

Senator GRAHAM. I am not saying that.

Chairman LEAHY. And, Senator Graham, you were out of the room when I put into the record some very significant, well-qualified military people who support what Attorney General Holder has done, as well as numerous other commentators.

I would also put into the record statements of those who have called for the closing of Guantanamo: General Colin Powell, Defense Secretary Robert Gates, Chairman of the Joint Chiefs of Staff Admiral Mullen, the CENTCOM Commander General David Petraeus, the Director of National Intelligence Admiral Blair, former Guantanamo Commander Marine Corps Major General Michael Lehnert, former Navy General Counsel Alberto Mora, and Senator John McCain.

Senator SESSIONS. That is to close Guantanamo but not dealing with what Senator Graham talked about.

Chairman LEAHY. We have already put into the record statements across the political spectrum, including military who take a different view than Senator Graham.

[The statements appear as a submission for the record.]

Chairman LEAHY. We will stand in recess for 10 minutes.

[Recess 11:32 a.m. to 11:46 a.m.]

Chairman LEAHY. The Committee will come to order.

We have finished with Senator Graham, so next is Senator Durbin. Senator Durbin, I yield to you.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Attorney General, thank you for your appearance. I would like to call your attention to a matter which has been discussed here, a matter of discretion by the Attorney General of trying an accused terrorist before the tribunals of our land that are available. In fact, the terrorist who was being tried was accused of being the 20th hijacker on 9/11, and the decision was made by the previous administration to try that terrorist in an Article III court in the Eastern District of Virginia, literally 15 minutes away by car from the Pentagon, where on 9/11 innocent lives were lost and families still grieve to this day, and we join them in that grief.

That decision was made in 2006 to try Zacarias Moussaoui in the Eastern District of Virginia. I do not recall any complaints from either the Republican side of the aisle of their President, President Bush's decision through his Department of Justice, to try that case in an Article III court, or on our side of the aisle either. And I ask you, as you reflect on the parallels between Khalid Sheikh Mohammed's prosecution in New York and this prosecution in the Eastern District of Virginia, can you tell me what the distinction might be, why Khalid Sheikh Mohammed should be tried in a military commission?

Attorney General HOLDER. Well, again, we have learned, I think, a great deal from the Moussaoui trial which I think will assist us in the conduct of the Khalid Sheikh Mohammed trial and the other four. Again, I think determinations are made as to what is the best forum for a particular case. What I have tried to do is make individualized determinations looking at each of these matters and trying to decide what is in the best interests of the American people in terms of safety, what is consistent with our values, and I have made determinations that some should go to our Article III courts and some should go to the reformed military commissions.

Senator DURBIN. I would like to quote former Mayor Giuliani, who has been outspoken about the trial of Khalid Sheikh Mohammed, in what he said about the Moussaoui trial, tried in an Article III court. He said, "At the same time, I was in awe of our system. It does demonstrate that we can give people a fair trial, that we are exactly what we saw we are. We are a nation of law. I think it is going to be a symbol of American justice."

That was the trial of an accused terrorist, 20th hijacker, 9/11, in an Article III court, within a minute's drive away from the scene of that horrific loss of life at the Pentagon. And I struggle to find the difference, but I want to draw one point, too. You refer, accurately so, to the reformed military tribunals, reformed military

commissions, and it reflects the fact that because of Supreme Court decisions in *Hamdan* and actions by Congress, at the time controlled by the Republicans, that we have changed the laws when it relates to military tribunals to try to come in conformance with Supreme Court requirements. You have noted that since 9/11, only three have been successfully tried before military tribunals accused of terrorism, and I want to ask you this question: As you referred the five to military tribunals under the reform, are you not also aware of the possibility that some will challenge this new procedure as to whether or not it conforms with earlier Supreme Court decisions, which may lead to procedural delays and some delay in the final outcome of those tribunals?

Attorney General HOLDER. No, that is a distinct possibility and something that we will have to try to deal with, or the prosecutors in that case will have to deal with, and that is something we will certainly not have to deal with in bringing Khalid Sheikh Mohammed and his cohorts in the Article III court in Manhattan. We have a 200-year history of trying cases, these kinds of cases. And so the question of legitimacy is not an issue that we will have to deal with at all.

Senator DURBIN. So we have a very close parallel where the Bush administration decided on the 20th hijacker for 9/11 to prosecute him in the Article III court, in a venue very close to the scene of the horrific tragedy. We have a situation now where some are calling for any future trials to be in military tribunals or commissions, which have procedures still not ruled upon by the Supreme Court which could lead to some ultimate delay in the outcome of those proceedings.

I think those are things which should be made part of this record in our hearing today.

I would like to move, if I can, to the issue of the future of Guantanamo. I support the administration's decision in closing Guantanamo. It is consistent with positions taken by General Colin Powell, who said, "If I had my way, I wouldn't close Guantanamo tomorrow. I'd close it this afternoon."

Secretary of Defense Robert Gates, under both President Bush and President Obama, has called for the closure of Guantanamo because of the danger that it presents to our troops in the field.

President Bush on eight separate occasions called for the closure of Guantanamo. Admiral Mullen, Chairman of the Joint Chiefs of Staff, called for the closure of Guantanamo. General David Petraeus called for the closure—all believing that the existence of Guantanamo was, in fact, an incitement for those who would do harm to our soldiers and to the American people.

And so now there is a possibility that we will find another venue, and one of the opportunities or possibilities is in my home State of Illinois in the small town of Thompson, fewer than 1,000 people, in the northwestern part of our State, a rural area. And the Bureau of Prisons and Department of Defense have been out to look at this site. It is my understanding that they are considering the configuration of this facility if it is chosen, and one of the things they are proposing is to put a new perimeter fence beyond what currently exists at this maximum security prison, built 8 years ago and never fully occupied. And it is my understanding that if this

new perimeter fence is installed, this would indeed be the most secure, the safest maximum security prison in America. Is that correct?

Attorney General HOLDER. That is correct.

Senator DURBIN. And to date, we have never had an escape from a supermax facility in the United States.

Attorney General HOLDER. That is also correct.

Senator DURBIN. You mentioned some 300-plus convicted terrorists, domestic and international, being held; in our State, some 35. And, incidentally, one of those happens to be a man accused of being in a sleeper cell for al Qaeda, al-Bari, who is serving in the Marion Federal penitentiary, without any danger to the surrounding community.

I might also ask, one of the congressional critics in my State has said that there would be a requirement if we brought the Guantanamo detainees to Thompson, Illinois, that they would be allowed up to ten visitors, which means if there were 100 transferred, we would, in his words, have 1,000 jihadist followers going through O'Hare, trekking across Illinois to visit, as, he said, they were legally entitled to do. My understanding is that those held in military facilities—and this would be a military facility for Guantanamo detainees—are denied access to any visitors, family or friends, and the only visitation is from legal counsel. Is that your understanding as well?

Attorney General HOLDER. That is my understanding.

Senator DURBIN. So the statement that has been made about a thousand jihadist followers streaming across the highways of Illinois is inconsistent with the law.

Attorney General HOLDER. That is not consistent with my understanding of how people are held in military detention.

Senator DURBIN. Thank you, Mr. Holder. I appreciate your testimony.

Chairman LEAHY. Thank you very much Senator Durbin.

Senator Cornyn.

Senator CORNYN. Thank you.

Mr. Attorney General, please forgive my voice. We are going to try to croak through this together.

Attorney General HOLDER. OK.

Senator CORNYN. Let me just ask, do you acknowledge the legitimacy of military commissions?

Attorney General HOLDER. Absolutely. I think that what Congress has done in response to the Supreme Court concerns in reforming the military commission, military tribunals, has legitimized them and makes them places in which people can be referred and tried. And it was one of the reasons why I sent five of those people there last Friday.

Senator CORNYN. And so your decision to try some of these 9/11 co-conspirators in an Article III court is not compelled by any law. It was a matter of your judgment and discretion.

Attorney General HOLDER. A matter of my judgment, my discretion, my experience, my interaction with the Secretary of Defense, my interaction with prosecutors both on the military side and on the civilian side. All of that went into making that determination.

Senator CORNYN. Does the President of the United States agree with you?

Attorney General HOLDER. I believe that he does. I have not had a direct conversation with him. I have seen reports indicating that he agrees with the decision that I made. But the decision I made I think is consistent with his Archives speech where he laid out how he viewed how the detainees at Guantanamo should be handled.

Senator CORNYN. Well, you acknowledge that you work for the President of the United States, that he could fire you if he disagreed with you, that he could overrule you. Correct?

Attorney General HOLDER. Yes, he could do that.

Senator CORNYN. Well, I want to ask you, you mentioned that we are currently offering Miranda rights or reading Miranda rights to suspected terrorists on the battlefield. Is that correct?

Attorney General HOLDER. No. What I said was that happens very, very rarely. It happened during the Bush administration. It happens very rarely. I have talked to the FBI about this. There was some misreporting about the notion that people captured on the battlefield were automatically being read their Miranda warnings and that the reality is there are thousands of people who are captured and a very, very small number have been read Miranda warnings after military lawyers, civilian lawyers, investigators from both sides made the determination that there was some reason to give Miranda warnings to those captives.

Senator CORNYN. And you support that decision to give Miranda rights to some suspected terrorists?

Attorney General HOLDER. Well, give them Miranda warnings if that means it is going to preserve an option for us. I think that is why it is done.

Senator CORNYN. And you support it?

Attorney General HOLDER. Well, I would support it to the limited extent that it is done. I defer to the people in the field who make these determinations and, I think, are capable of making those determinations given the facts that they have to confront that are right in front of them.

Senator CORNYN. And should Khalid Sheikh Mohammed have been read his Miranda rights?

Attorney General HOLDER. There was no need. We do not need his statements.

Senator CORNYN. With all due deference, you are not going to be the ultimate arbiter of that decision. It will be a judge, won't it, at the trial or appellate level? Correct?

Attorney General HOLDER. That is true, if that is an issue that they raise on appeal, should there be an appeal. But I am confident that the way in which this case is going to be structured, given the way in which and the various places in which we will be able to find statements that he made, there was no need for Miranda warnings.

Senator CORNYN. Well, he did ask for a lawyer, didn't he, when he was detained?

Attorney General HOLDER. I frankly do not know.

Senator CORNYN. You are not aware of the fact that he asked for a lawyer and he said he wanted to go to New York?

Attorney General HOLDER. Yes, I do remember that. Yes, that is correct. "I want a lawyer" and "I want to go to New York," I remember those two, yes.

Senator CORNYN. And he is getting his wish, I guess. When did he first get a lawyer, do you know?

Attorney General HOLDER. No, I do not know the exact date.

Senator CORNYN. Do you acknowledge the possibility that a judge, consistent with what you believe to be the sound policy of providing Miranda rights to some suspected detainees, would conclude that Khalid Sheikh Mohammed was denied his rights and, thus, he cannot be prosecuted for the crimes for which you anticipate charging him?

Attorney General HOLDER. Well, Senator, you have been a judge; I have been a judge. And there is no—I cannot say, you cannot say, no one can say with any 100-percent degree of certainty that a judge would not look at a particular set of facts and rule in a particular way. And yet, as I look at the facts surrounding the interaction with Khalid Sheikh Mohammed, the detention of him, the evidence that we will present at trial, I am very confident that Miranda issues are not going to be a part of that trial.

Senator CORNYN. Well, General Holder, you have been a judge, I have been a judge, and you are correct to acknowledge the fact that you will not make that decision.

Attorney General HOLDER. Right.

Senator CORNYN. I will not make that decision. Some judge will make that decision. Just like you said you are not going to defer to Khalid Sheikh Mohammed in determining the venue where he is going to be tried, you are the one making that decision. But isn't it the fact that you will not be the one making that decision, ultimately—if an attempt to transfer venue based on the notoriety of this event on 9/11 is such, just like Timothy McVeigh, who killed so many Americans in Oklahoma, he was tried in Colorado. Isn't it a distinct possibility that a judge would transfer this case based on a local prejudice?

Attorney General HOLDER. Sure, that is entirely possible. There may be a motion for a venue change. But just as in the McVeigh case, the venue change did not have a material negative impact on the outcome of the trial. He was convicted and he was executed.

Senator CORNYN. Well, in terms of local security arrangements, I mean, this case might be tried in Connecticut or Vermont or some other part of the Second Circuit. And you cannot control that; I cannot control that. The judge is ultimately going to make that decision, correct?

Attorney General HOLDER. Well, I would think that one of the things a judge would take into account—again, we are speculating here about the possibility of this case being moved. I would hope that a judge——

Senator CORNYN. Well, you have to consider all the possibilities, don't you, consider the risk——

Attorney General HOLDER. We consider the possibilities, and I would hope that the judge would take into account in deciding where the case would be tried the very real security concerns that this trial would present.

Senator CORNYN. And you said that if Khalid Sheikh Mohammed is acquitted, he will not be released. What if a Federal judge orders the Department of Justice to release him? Will you defy that order?

Attorney General HOLDER. We have taken the view that the judiciary does not have the ability necessarily to certainly require us, with regard to people held overseas, to release them. It is hard for me to imagine a set of circumstances given the other things that we could do with Khalid Sheikh Mohammed. There are other things that we can do with him aside from simply immigration. There are other legal things we can do with him. It is hard for me to imagine a set of circumstances under which, if he were acquitted, that he would be released into the United States. There are other matters. There are other things that we have the capacity to do, other legal matters that we can bring.

Senator CORNYN. Well, you recognize the Supreme Court has said you cannot hold somebody indefinitely, for example, who cannot be repatriated to their home country.

Attorney General HOLDER. You can certainly hold people in connection with matters that are pending, and we have the capacity to make sure that Khalid Sheikh Mohammed is not released into the United States.

Senator CORNYN. My time has expired. Thank you.

Chairman LEAHY. Thank you. Of course, I might say on half-facetiously, I suspect that a lot of people in New York would not mind having him released onto the streets of New York. I suspect he would not want to be released onto the streets of New York.

Senator Cardin.

Senator CARDIN. Thank you, Chairman.

Attorney General, it is a pleasure to have you before the Committee. There is risk involved in any trial, whether it is a military trial or whether it is a civilian trial. And I think you have gone over that very well. You give us great confidence of the confidence that you have in this trial of our terrorists. So I think we need to also underscore the advantages of trying the terrorists in the civilian courts, Article III courts. It gives us an established process that has been used before. It gives us the credibility of our system, which is internationally understood and respected. And it gives us the ability to showcase that we are using the American values to hold the terrorists responsible. So I think there are a lot of positive reasons to use Article III courts, particularly considering the history of how we have not only ignored international laws, we have ignored our own laws, as the Supreme Court has held on previous occasions.

I want to follow up on Senator Kohl's point where we are talking about the closing of Guantanamo Bay, which I strongly support, and Senator Feingold's point of how you have made informed decisions as to how to basically classify the detainees at Guantanamo Bay, those who are going to be relocated to other countries, those who are going to be tried in military courts, those who are going to be tried in our Article III courts; and then in response to Senator Feingold, your ability to detain these individuals basically indefinitely under certain circumstances.

When you previously testified before us, you indicated that there was going to be a process, a more open process with accountability.

Can you just share with us how that is progressing as to how we can showcase to the world that, in fact, we are using fair procedures that everyone who is detained has their opportunity to challenge the methods that we are using?

Attorney General HOLDER. Well, that is something that we are still in the process of trying to put together. Actually, it is something that I have worked a great deal with or talked about with Senator Graham—about the mechanism that we would use in order to detain somebody under the laws of war. But it certainly would involve a due process determination at the outset, that this was a person who could be detained under the laws of war with some periodic review to ensure that the continued detention of that person was appropriate, that that person continued to be a danger to the United States. It would not simply be placing somebody in a gulag and never hearing from or seeing that person again. There would be continuous reviews, as I said, to make sure that that person's continued detention was appropriate.

Senator CARDIN. I would just encourage you to be as open as you can on the procedures that are being used so that we can, in fact, justify the issues. I do not think anyone disagrees with the need to preserve public safety and the need to deal with the urgencies of war. But we want to make sure that it is not an arbitrary decision and is one that can withstand international scrutiny, and the more transparency that you bring to that process I think would be valuable for our country.

Attorney General HOLDER. Senator Cardin, what I want to assure you and all the members of this Committee and the American people is that if we were to put such a regime in place, we would seek the approval of Congress—hold hearings, however that is to be done—to ensure that the mechanisms that we put in place have the support, perhaps generated by the executive branch, but have the support of the legislative branch. That is where the executive is most powerful, when it works in conjunction with the legislature.

Senator CARDIN. Thank you. I want to mention another area of concern on terrorist activities in the United States, and that is cybersecurity. I held a hearing yesterday in the Subcommittee on Terrorism and Homeland Security, and the Department of Justice was represented very ably at that hearing. We also had the Department of Homeland Security and NSA.

I think the consensus there was that the line responsibility rests with the Department of Justice, although there are interagency working groups now. The vulnerability of America is great here. The assessment was made that we might be able to prevent 80 percent of the attacks, and I made the comment we would never do a defense budget based upon an 80-percent efficiency. We have to do better than that.

I just want to get your assessment as to how high a priority you are placing on dealing with this issue. There have been some recommendations made about establishing a cybersecurity person who is principally responsible on the interagency issues. There are the legal matters as to whether our current laws are adequate to deal with this from the point of view of both protecting our country against cyber attacks, as well as protecting individual liberties of the people in America.

It is a complicated area, but it is an area that is changing every day and making us more at risk every day.

Attorney General HOLDER. You are absolutely right, Senator Cardin, and I think that the hearing that you held yesterday was an important one because I think it draws attention to something that has not gotten the attention that it needs.

The cyber issues present problems for us when it comes to espionage, when it comes to terrorism, when it comes to economic harm that is done to our country. The potential in all those areas is great, and unless we have an effective response, an effective defensive capability in that regard, I worry about what the future could look like. And so I think we have to devote attention. We are doing that at the Justice Department. We are working with our partners in the executive branch. But we also need the help of Congress to, as you have done, examine these issues, propose legislation where that is appropriate. We have to be partners in dealing with this very real 21st century issue.

Senator CARDIN. Thank you. I look forward to working with you on that.

I just really want to point out for the Committee, in your report to us the section you have on civil rights, I do not want this hearing to go by without just applauding you and urging you to continue to make civil rights a priority. We know the problems we had in the last administration, and we are very pleased that we have moved forward with Tom Perez as the head of the Civil Rights Division. And I noticed that you are taking action on voting rights, as you did for military personnel and absentee ballots. We think that is absolutely the right thing to do, that you are moving forward with Native Americans. We would urge you to continue an aggressive policy, as we get into redistricting and the challenges that one has to protect Americans' rights of voting as well as the other civil rights issues that have been, I think, not given the priority that they deserve in the previous administration and restoring that confidence to the Civil Rights Division.

Attorney General HOLDER. Well, as I said at my confirmation hearing, my primary focus I think has to be on the national security responsibilities that I have, but the Justice Department also has to do the traditional things that it has always done under Republican as well as Democratic Attorneys General. And a revitalized, reinvigorated Civil Rights Division that I believe in some ways is the conscience of the Justice Department remains a priority for me. The confirmation and now the installation of Tom Perez as the head of that Division I think will help a great deal. I think there is a sense, as I walk around, that there is a greater sense of mission among the lawyers, the career folks in the Civil Rights Division, and I think we are starting to see that in the statistical things that I see in terms of number of cases filed, where they have investigations open. I think the Civil Rights Division is coming back.

There is still more work to be done, but I think we are on a good path.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, and I would also put in the record a number of military and other national security and terrorism experts, their support for the closing of Guantanamo.

[The information referred to appears as a submission for the record.]

Chairman LEAHY. Senator Coburn, you are next. Thank you for waiting.

Senator COBURN. Mr. Attorney General, welcome. We are about through here. I appreciate your patience.

Just to clear up some small things, I sent you a letter on March 30th about thousands of Oklahomans that are freedmen, and I have not gotten a response from you. I would just appreciate it if you would get us a response on that.

Attorney General HOLDER. OK.

Senator COBURN. That affects thousands of people in my State, and I would very much appreciate it.

Attorney General HOLDER. Senator, I will get you that response.

Senator COBURN. Thank you. Also, I am not going to spend a whole lot of time on what has been the main subject, and you do not have to answer these because I do not expect you to have the answer right now, but I do want to put into the record and ask that you answer it at a later time.

During your press conference you noted that Federal prosecutors have successfully prosecuted—and you have alluded to it today—a number of terrorists who are now serving lengthy sentences in our prisons. And the three questions about that that I would have that I do not expect you to answer now: How many of those convicted terrorists were picked up during firefights in Pakistan or Afghanistan or elsewhere? How many of them were held without being Mirandized? And how many of them were interrogated by the CIA to gather intelligence about pending plots? If you could answer that, I would appreciate it very much.

Attorney General HOLDER. All right. We will answer those questions.

[The information referred to appears as a submission for the record.]

Senator COBURN. And one other question I have, we have recently—on October 30th, the Recovery and Accountability Transparency Board issued a list of recipients of Federal funds who submitted reports to the Government that were fraudulent on information as pertaining to a judge. Does the Department have a plan to prosecute that fraudulent behavior or that fraudulent reporting, especially not just in this instance, but in all instances related to the recovery?

Attorney General HOLDER. Yes. In fact, that was one of the things that we mentioned yesterday in the announcement of that task force, that economic crimes task force. One of the areas that we are going to be focusing on is the misuse of Recovery Act funds, fraud connected to the Recovery Act funds. We will be working with our partners both at Treasury, SEC, other Federal agencies, as well as our State and local counterparts. That is one of the priority areas, I would say, of the four or five priorities that we identified yesterday. That is one of them.

Senator COBURN. It is going to be big because the Special Inspector General says it is going to be over $50 billion. So it is a lot of money to play with, but a lot of negative things can happen.

At our last oversight hearing, you were kind enough to talk with me about the hate crimes issue, and I had asked you about the murder of some of our recruiters in Arkansas and whether or not that would apply, and you said you would have to think about that and get back to me. It has been 5 months. I wonder if you have given any thought to that, especially in light of what has happened now at Fort Hood.

Attorney General HOLDER. Well, I think that we now have, you know, a hate crimes bill that, in fact, does say that such actions are potentially hate crimes.

Again, there is, I believe, a mandatory minimum sentence that Senator Sessions introduced with regard to the hate crimes bill that deals with the set of facts that you are talking about.

Senator COBURN. OK. Thank you.

One other issue—and you really do not have to go into it now, but I wanted to raise it with you because it—and it has to do with the Voting Rights Act, and it has to do with Kingston, North Carolina. I do not know if you are familiar with that or not. But, in fact, in North Carolina, only 9 out of 551 localities hold their election on a partisan basis, and in Kingston, seven of the nine minority—which actually in Kingston is the majority—voted to eliminate that, and then the Civil Rights Division went back and, because they fall under the Voting Rights Act, having to have that approved, reversed that. And I would just like to hear the comments about that and why that was seen, because 73 percent of which the vast majority of those are African Americans, voted by over 2:1 to remove party labels, and yet what we did in Washington was tell them, "You cannot decide that because you fall under the Voting Rights Act."

And so there are a lot of complicated questions with that, and I understand that, but I would appreciate you giving me a written response justifying how we would reverse what the majority of African-Americans in that town thought to be prudent for them when they are doing local elections.

Attorney General HOLDER. All right, Senator. I will get you a written response on that. I do not know enough about the case at this point, I think, to respond to you today, but we will get—I am familiar with it, but not as well as I think I need to be to respond intelligently.

Senator COBURN. I understand, and I do not expect you to have to——

Attorney General HOLDER. But I will get you a written response to that.

Senator COBURN. Thank you.

[The information referred to appears as a submission for the record.]

Senator COBURN. Thank you.

Now, here is the area that I really want to get into because I am really concerned. As a practicing physician, I have dealt with lots of drug abuse in this country and know the significant power of marijuana use to lead to other drug use. On October 12th, Deputy

Attorney General David Ogden issued a memorandum to U.S. Attorneys in all the States that have laws authorizing the use of medical marijuana directing prosecutors not to focus Federal resources on individuals whose actions are in clear and unambiguous compliance with State law. Never mind the fact that it violates U.S. Federal law. It is a dramatic break with previous administration policies, both the Clinton and the Bush administration policies, which demanded the prosecution of marijuana distributors, even those acting in accordance with State law. It is prohibited for any use under Federal law, meaning that no matter what the States' laws are, it is still a Federal crime to use it or to distribute it.

The Obama Justice Department is saying that it simply will not enforce those Federal laws as long as you are legal in your State, and I think that is kind of the summation of where you all are. And I know that you have limited resources, so I understand there can be a—did you personally approve of the issuance of this new policy?

Attorney General HOLDER. I did.

Senator COBURN. Do you agree that this is a dramatic break from past administration policies?

Attorney General HOLDER. It is certainly a break. I will let other people decide whether it is dramatic. It——

Senator COBURN. It is a break. I will cancel the word "dramatic."

Attorney General HOLDER. It is certainly a break, but it seems to me it is a logical break given, as you indicated, the limited resources that we have, the use of marijuana in the way that these State laws prescribe, which is for medical purposes. But what that directive from the Deputy Attorney General, I guess on October 19th, indicated was that we are not blind, and to the extent that people are trying to use these State marijuana laws to do things that are not consistent with State law, that are not being used for medicinal purposes, that are not being used to help cancer patients, for instance, the Federal role is still there, and we will be vigorous in our prosecutions. And on, I guess, page 2 of that memo, there are a number of factors that are set out that are, we think, indicia of a non-compliance with State law.

The Mexican cartels make most of their money from the importation of marijuana from Mexico into the United States, and so this continues to be a priority for this administration.

Senator COBURN. The fact is that 90 percent of the people that have a medical marijuana prescription in California do not have a real illness. What they have is a desire to smoke marijuana, and yet we are allowing State law to usurp Federal law.

I would quote former Clinton White House Director of Public Affairs, White House Office of National Drug Policy, Bob Weiner, was recently quoted warning the administration, Be careful about the new lax enforcement policy for medical marijuana because you may get way more than you bargained for. Prescription marijuana use has exploded for healthy people. And there is no question about that that it has. I want to make sure that you are concerned with that as well, and this will be my last question.

You know, pay attention to this because 2 years ago I released a report on the Justice Department that outlined the $1 billion of waste a year that most Americans would concur with in terms of

low priorities. And if, in fact, there is 10 percent truth to that report, which I believe it is very accurate, those monies could certainly be used to enforce the drug laws. The No. 1 risks for our kids is not obesity. It is illicit marijuana.

Chairman LEAHY. I tried to give and have given extra time to the Senator, but——

Attorney General HOLDER. All I would say is, Senator Coburn, is that one of the purposes of the guidance that was issued by the Deputy Attorney General, as I indicated to you in my response to your question that I approved, was to make clear to people in the field that this remains a priority enforcement for us. And to the extent that we have people who are misusing these State laws or using these State laws for traditional marijuana importation or growing purposes, the Federal Government, the DEA, the Justice Department, will be vociferous in our enforcement efforts.

Chairman LEAHY. Thank you.

Senator Whitehouse.

Senator COBURN. Mr. Chairman, may I——

Chairman LEAHY. The what?

Senator COBURN. To have questions submitted for the record.

Chairman LEAHY. Oh, of course, and we will keep the record open until the end of the week.

Senator Whitehouse.

Senator WHITEHOUSE. I believe Senator Klobuchar was here before me, Mr. Chairman. I am happy to yield to her.

Chairman LEAHY. Sorry. I did have a list, and I neglected to look at it.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, and thank you, Senator Whitehouse. I would have said it was fine, but I have some people waiting out there from Minnesota.

Thank you very much for being here today, Attorney General Holder. You mentioned the tragedy at Fort Hood in your opening statement, and that terrible crime weighs heavily on all our minds. I was one of several Senators on this Committee that went to Fort Hood to that memorial service. We had a young man, Kham Xiong, who was killed there. He was waiting in line for a physical, ready to deploy. His family had come over from—they fought in the wars in Laos, were then relocated to Thailand, ten kids, in St. Paul, Minnesota. He has three himself. And the saddest thing I remember from that memorial service is that family huddled next to his picture propped next to the combat boots.

So we are very interested in a thorough investigation here—I know the Justice Department has a hand in this—and that no stone is left unturned, that we get the results not only for a strong prosecution but also so that we can make sure that this does not happen again.

Attorney General HOLDER. Well, I think President Obama has given us unequivocal direction that we are to find out what happened there, how do we prevent what happened there from occurring again, and it is our intent to, again, share the findings of that inquiry with the Committee and with the American people.

Senator KLOBUCHAR. Today I want to focus on some of the bread-and-butter law enforcement issues, but I want to quickly summa-

rize. So much of the questions have been understandably about your decision about the trial. This resonates for me because it was in Minnesota where some diligent citizens caught Moussaoui, so we watched that with great interest, the trial in Virginia.

First of all, of course, my focus is on security, and I think you have talked about how you consulted with the mayor and with the police chief, and Senator Schumer went over that at length. But, obviously, most of us are interested in getting these guys.

Senator Leahy mentioned that the conviction rate I think is 90 percent—is that right?—of people tried in——

Attorney General HOLDER. It is about 94 percent.

Senator KLOBUCHAR. 94 percent, and you feel that you have a strong case. Could you just briefly talk about your decision to do this in New York and why you picked that particular jurisdiction in terms of the expertise of the U.S. Attorneys that will be handling that case?

Attorney General HOLDER. We are going to have a joint team that involves lawyers from the Eastern District of Virginia as well as lawyers from the Southern District of New York. New York is a place that has tried these kinds of cases before. You have a hardened detention facility. You have a hardened courthouse. You have a means by which a person can go from the jail to the courthouse without seeing the light of day.

I had a Marshals Service report done looking at all of the potential venues if we were going to do this in an Article III court, and the recommendation from the Marshals Service was that this be done in New York City. That is the place that was the most secure, and did not have to have any construction work done in order to try to harden those facilities. And so for that reason and for other reasons, that was why I made the determination that New York was the appropriate place to try these cases.

Senator KLOBUCHAR. Focusing now on some of these domestic issues, Senator Kaufman has a bill on health care fraud enforcement. I am a cosponsor, a number of us are. I have my own bill with Senator Snowe that complements that bill. And I know in May—and this is a question from me and Senator Kaufman, who is presiding over the Senate. I know that in May you and Secretary Sebelius created a Health Care Fraud Prevention and Enforcement Action Team to work on coordinating the Federal Government's response to this issue. Could you say more about what that group has been working on since it was formed? Because we just had a report, $47 billion lost in Medicare fraud. The health reform that we are working on now must contain provisions that make it easier to go after this kind of fraud, because it is an outrageous amount of money.

Attorney General HOLDER. Yes, the creation of the HEAT task forces, as we call them, are, I think, critical tools in trying to deal with an immense problem. We have seen the misuse of Medicaid, Federal health care funds for procedures that never occur, for devices that are never bought. We have actually seen people who were once engaged in drug dealing and in organized crime activities moving into this area because they determined that it is safer, it is easier, and we are determined to put an end to that. We will

have to work with our partners at HHS. Secretary Sebelius and I have been giving particular attention to this.

We made the announcement I think in—I believe in April or May. We have already announced significant numbers of arrests that have occurred in a variety of cities. We are in four cities now. We are going to be expanding those task forces into other cities as well. This is a national problem.

Senator KLOBUCHAR. Right, and I am hoping we can give you more tools in this bill. One of the things I found most interesting was that areas where you seem to have hot spots of this crime tend also to be areas that have high-cost health care, disorganized health care systems, which is something we should be looking at as well.

A second thing I wanted to raise is the important reauthorization that we are going to be handling in the Violence Against Women Act. Senator Leahy mentioned the rape kit issue and the backlog. There are also other issues as well with the rural services—we had a hearing on this recently—as well as child protection issues. Could you talk about what your priorities will be as we work to reauthorize this important piece of legislation?

Attorney General HOLDER. If we want to get a handle on the crime problem that we have had success in knocking down to historically low numbers, we have to deal with the problem of violence against women, and we have to deal with the problem of children who are exposed to violence and who often see that in a domestic violence context. We have to deal with these issues.

This Senate, this Congress, our Government, 15 years or so ago made a commitment in the Violence Against Women Act. It seems to me that we need to celebrate the successes that we have had, the consciousness that we have raised in our Nation, but we need to do more.

There are still issues, you know, the whole question of rape kits. I mean, we have to deal with that. We have people on the streets who, because we have not analyzed those kits, are free to commit these acts yet again.

The whole question of children who are exposed to violence and who are the victims of violence I think is part and parcel of this same issue. And if we are ever to get a handle on this crime problem, we have to deal with those who are most vulnerable. We are doing much better than we have, but not as well as I think we can do.

Senator KLOBUCHAR. Thank you very much.

Chairman LEAHY. Thank you very much.

Next will be Senator Franken, then Senator Whitehouse, and Senator Specter.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. I will just pick up on the rape kit matter that both the Chairman and Senator Klobuchar brought up.

I think it is important for people to realize that this is pro-law enforcement rape kit management. It puts criminals behind bars. It protects people who are innocent, and it brings victims closure and justice.

In Hennepin County, Minnesota, one prosecutor has recently filed charges in eight separate rape cases as a result of cold hits produced by cleaning up their backlog, and they have done this in New York, and it has also increased the number of convictions that they have gotten. I think they have gone from 40 percent to 70 percent of the convictions just because they cleaned up the backlog.

I am just wondering—and maybe this is an answer you cannot give me right now, but what has gone wrong with this? Because we had, you know, this act, the Debbie Smith Rape Kit Reduction Law Act in 2004 with $500 million to address the problem, and we still have this problem. So it is just that we do not seem to have a regular system in place to specifically track rape kit backlogs around the country.

Can you tell me what you are doing about it? And if you do not have an answer right now, get back to me or us?

Attorney General HOLDER. What I would like to do is give you a more fulsome response maybe in a written form, but to tell you that what you are talking about is exactly right—what you said in the early part of your comment. This is an ultimate law enforcement tool, and the ability to process these kits and then compare the results from those analyses to the data bases that exist will, as you have indicated, solve cases and put people behind bars who are responsible for really heinous and very serious crimes.

Exactly why the prior legislation which was designed to avoid the very situation we find ourselves in——

Senator FRANKEN. Which, by the way, the Chairman was a great leader on.

Attorney General HOLDER. I do not know why it has not worked. But we in the Department are trying to come up with ways in which we can work with our State and local partners to effectuate that act and would look forward to working with you on this Committee and in Congress, again, to identify why it has not worked as well as we thought in the past and how we can prevent that from happening in the future. But this is something that, for me, matters a great, great deal. I know you have devoted a lot of attention to this, but these are crimes that we can solve. And inability to do that is extremely frustrating.

Senator FRANKEN. I am going to get to just a macro issue here on the United States and crime and the number of people we have incarcerated. We have 5 percent of the world's population and 25 percent of the world's prisoners. And so many of these people are in because of drug addiction or mental health problems, and very many of these people have no history of anything violent or any even high-level drug activity. We are essentially sending kids who are in possession of drugs and sending them to crime school. We put them in prison, and then they learn from other criminals how to do crime. And two-thirds of them come back when they are released within 3 years.

More than a third of the counties in Minnesota have drug courts that stop this cycle. These are special courts for nonviolent drug offenders that steer them toward rehabilitation and treatment. In Minnesota, offenders who use our drug courts are ten times more likely to continue their treatment than other offenders.

Can you tell us about drug courts, what they are, and what your Department is doing to support them?

Attorney General HOLDER. Well, we certainly have supported them in connection with the budgets that the President has proposed to increase the use of drug courts. I am familiar with the one that we have here in Washington, D.C., that started I guess a little after I left the D.C. Superior Court and has proved to be, I think, very successful in dealing with people who are selling drugs because they are addicted to drugs. These are the low-level dealers, not the people who live in penthouses and drive big cars and all that. And so I think that drug courts are an effective way at getting at the problem, and their expansion is something that this administration supports.

In terms of those macro issues that you were talking about, we have a sentencing group that is looking at a whole variety of issues now that I put together to look at that whole question of recidivism. Are we doing the right things? I think we should ask ourselves—we should always be asking ourselves: is the criminal justice system that we have in place truly effective?

My thought is that we should have a data-driven analysis to see exactly who is in jail. Are they in jail for appropriate amounts of time? Is the amount of time that they spend in jail a deterrent? Does that have an impact on the recidivism rate? And so this group will be reporting back to me I hope within the next couple of months, and it is on that basis that we will be formulating policy and working with the Committee with, I hope, some interesting and innovative ideas.

Senator FRANKEN. And in doing that, might I suggest an increase in drug rehabilitation within prison? Because there are people in prison who are—a lot of people in prison who have addiction problems who should be in prison, but are going to get out, and it would be nice if while they were in there they got treatment.

I just wanted to mention one thing on health care fraud, which is I would like to see those people go to prison. I know I may be contradicting myself by saying we have too many people in prison. It seems like health care fraud folks might belong there more than people who are simply addicted to drugs.

If I could quickly just touch on trafficking in women, it is a subject I just want to touch on. I am running out of time, but trafficking of Native American women is a big problem that I think is being ignored. And in international trafficking, there are women who are trafficked into this country for prostitution who, because some of these cases are sent to ICE, these women have a disincentive to report these crimes. And I think that is something that needs to be looked at.

Attorney General HOLDER. That is an issue, I think, that is worthy of examination. We are paying particular attention to the plight of women on reservations. I was in Minnesota I think about 3 or 4 weeks or so ago for a listening conference, and if you look at the levels of violence that young girls and women are subjected to on the reservation, sometimes ten times as high as the national averages with regard to particular crimes, that is simply unacceptable in our country, and it is something that the President followed up on by having a listening conference at the White House.

The international trafficking of women and youngsters is something that we need to look at as well, and to the extent that ICE—or their interaction with ICE somehow prevents us from being very effective in our enforcement efforts, I will work with Secretary Napolitano and with members of the Committee to see if we can come up with ways in which we can be really effective in dealing with the problem that we have to get a handle on.

Senator FRANKEN. Thank you, General.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman. And welcome, Attorney General Holder.

Now that we are toward the end of the hearing, I would just like to take a moment and react to two things that I think have come out during the course of the hearing today. One is, I think, perhaps inadvertently, a disparaging tone about Federal prosecutors and our United States law enforcement mechanism. I hope it is inadvertent, but I want to take a moment to say that, having had some experience in that world, I am extremely proud of our Federal law enforcement officers, of our career prosecutors. I have had prosecutors have to go to court in body armor. I have had prosecutors have to go home to their families and explain why a security system needs to be put in their home because of threats. They take this on day in and day out, and as you know, they do not get paid a great deal. And they are, I think, among the best lawyers in our country, and I just want to make that point because I did not like the tone that I was detecting.

The second point that I want to make is one in favor of prosecutorial independence, and to the extent that you have been criticized that your decision is unpopular, I think people looking at this should bear in mind that the implication of that is that prosecutors should seek to make decisions that meet with popular opinion. And from my perspective, popular opinion is a very dangerous bellwether as a standard to hold prosecutors to, and I would not want that to emerge from this hearing as an unchallenged point.

I think it gets worse when you move from popular opinion to legislative opinion. There are very significant separation-of-powers reasons why I as a prosecutor did not want to hear from the legislature, why the Founding Fathers set up a system in which the legislature was kept for good and prudent reasons out of these prosecutorial decisions. We are entitled to our opinions. Everybody has one. Fine. We can come here and ventilate. But nobody watching this should not react to the proposition that a prosecutor should either listen to the threats or criticisms—I mean, obviously with courtesy you should, and you did. But I want to assert the proposition here that a prosecutor should not make their decision or allow their decision in any way to be influenced by legislative opinion. And if there is any way to make it worse, it would be to allow it to be influenced by talk show opinion, and there has been a whiff of that here today.

This country is going to last a long time, long after Khalid Sheikh Mohammed is safely either in prison for life or executed, or whatever the outcome is, and we want to stand by the principles

that have gotten us through 220 years and that will get us through to the future. And one of them is that people like us—and I say this as a sitting Senator—have no business attempting to influence the prosecutorial decisions of our law enforcement officials.

In evaluating this, I do want to make an additional point and get your reaction to it. In Article III courts, we have probably had tens of thousands of criminal prosecutions. Almost every possible permutation of law and fact and procedure has at one point or another reared its head in Article III courts and been disposed of and left a trail of precedent for future prosecutors to follow.

Military commissions, no matter how well we may have drafted them in our recent repair of the original flawed military commissions, have now, as I understand it, only achieved three convictions, and one came by plea. So in terms of the military commission, however properly statutorily established, being able to contribute the same kind of reliability and resilience that Federal courts have obtained through those tens of thousands of cases and through the exploration of all those different permutations, it strikes me that even a perfect military commission still bears some risk of unreliability in that you are either in new territory, in which case there are questions about where you go on appeal, or you are modeling yourself on an Article III existing legal structure, in which case you might as well stick with it; but that they are to a very significant extent, even if properly constituted, still untested.

I wonder if you share that view.

Attorney General HOLDER. Well, first, I would like to thank you for the statement that you made in support of the career people who work at the Justice Department and other parts of the executive branch and at the State and local level as well. I mean, you were a great U.S. Attorney and a great Attorney General in Rhode Island. I am proud to say that you were my colleague. But your comments are really appreciated.

To the extent that people have any question about the determination of the people who work in the Justice Department and who will be responsible for these cases, about their abilities, they should put those fears to rest. These people are among the best of the best. They could be in other places making a lot more money, but they serve their country, and they do it quite well. And I am proud to say that I am their colleague. So I really thank you for that.

In terms of the question of Article III versus the military commissions, I think there is no question that there is a greater experiential base on Article III courts, and I think your observation is correct. We have seen virtually every permutation. I am not naive. I know that Khalid Sheikh Mohammed in an Article III court will do as he tried to do in the military commission—spew his ideology, his hate, you know, whatever.

Article III judges have dealt with these issues before. The unique issues that I think in some ways sound unique are not going to be found to be unique. In the Article III courts over the past 200 years, we have dealt with, as you said, just about every permutation. There is going to be precedent for almost every decision that

a judge is going to have to make, from obstreperous defendants to questions of admissibility of evidence.

I do not want to denigrate, however, the fact that these reformed military commissions, though not having that experiential base, are, I think, much better than they were. I think the action that Congress took in reforming them is significant. And I think they are a legitimate place in which we can try some of these defendants. But there is no question that in terms of the experience, the Article III courts have an advantage.

Senator WHITEHOUSE. Mr. Chairman, it was certainly not my intention to denigrate what has been accomplished with the military commissions. It was simply—and I agree with the Attorney General that there is this experiential base differential. If I could ask unanimous consent that three questions for the record be propounded by me.

One has to do with where we are on the Drug Enforcement Administration's new rules that will allow them to move off paper records so that we can move to e-prescribing, so that we can build-up our electronic health record network, as the President wishes, timing on that determination.

The Second is we have people in our present bankruptcy courts who are being, I think, harshly treated under the new law. We have a U.S. Trustee vacancy. When will we have a U.S. Trustee recommendation from the Department of Justice?

And, finally, as you probably have come to expect from me, when is OPR going to put out its report on the Office of Legal Counsel? And I think my time has expired, so I will have to take those for the record.

Attorney General HOLDER. Well, maybe I could say with regard to the first two, we will certainly send you something in writing, but I think given the fact that you have asked this question before—and I think this is a matter of great public interest, the whole question of the OPR report—if I could be allowed to respond to that.

Chairman LEAHY. Sure.

Attorney General HOLDER. The report is completed. It is being reviewed now. It is in its last stages. There is a career prosecutor who has to review the report. We expect that that process should be done by the end of the month, and at that point the report should be issued. It took longer than we anticipated and certainly longer than I anticipated when I testified I think 5 months or so ago because of the amount of time that we gave to the lawyers who represented the people who are the subject of the report an opportunity to respond, and then we had to react to those—people in OPR had to react to those responses.

The report, as I said, is complete and is now simply being reviewed by that last career person in the Justice Department, and my hope is that by the end of the month it should be complete.

Senator WHITEHOUSE. I thank you, Chairman, and I extend my gratitude to my colleagues for that little extra time.

Chairman LEAHY. Thank you. I appreciate that. I also wanted to associate myself with what you said about the role of a prosecutor. Those of us who—and there are several on this panel who have had

the privilege of serving in law enforcement as prosecutors, and I concur with what Senator Whitehouse said.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Holder, thank you for your service, coming back to head up the Department of Justice. Tomorrow this Committee will take up the issue of a reporter's shield, which has been very carefully crafted to try to provide some balance so that we do not have reporters jailed, as so many have been, or threatened. Judith Miller, 85 days in jail, no justification yet explained.

Just one question, which I will cite tomorrow if your answer is right, and that is, are you confident that the compromises crafted will protect the national security interests of the United States?

Attorney General HOLDER. Yes, I think that the bill as it presently exists, as opposed to the form that it was in before, now gives us the tools to protect the national security, to go after leaks if we desire. What——

Senator SPECTER. I do not want to interrupt you, Attorney General Holder, but I have only got 7 minutes, and I heard your "yes" answer.

Attorney General HOLDER. OK. Yes.

Senator SPECTER. A report publicized within the past several days is that out of the $440 billion a year for Medicare, $47 billion is a result of waste—or fraud, rather, criminal fraud. We are working hard to craft a health care reform bill, and the President is committed not to sign one which adds to the deficit, and I am committed not to vote for one which adds to the deficit.

Medicare and Medicaid fraud are enormously consequential. So many cases result in fines, and that really results in being added to the cost of doing business. Jail sentences, as we know, are a deterrent. Others look at them and do not want to be sent to jail.

Would you submit to the Committee an action plan as to what you can do to see to it that there are jail sentences as a matter of a very active governmental policy? I know you agree with the thrust, but we do not have time to discuss it within the 7 minutes that each of us has. But if you would submit in writing how you will aggressively attack this issue with jail sentences.

Attorney General HOLDER. Sure. I will work the folks in the Criminal Division, and we will have a response. But I agree with your overall thrust in that regard.

Senator SPECTER. The Bureau of Prisons does a good job, I think, with very limited funding, and among the many challenges you have and the many jobs you have, I would like you to undertake a personal review of the adequacy of their funding on rehabilitation. There have been some real studies which show that a two-pronged attack to violent crime would be successful in America, perhaps reducing violent crime by as much as 50 percent, with life sentences for career criminals, as, for example, under the armed career criminal bill. And we passed the Second Chance Act, the Biden-Specter bill. The President signed it last year. And it seems to me that we need more funding on detoxification, job training, literacy training, reentry. No surprise when a functional illiterate leaves prison without a trade or skill, they go back to a life of crime. And I would like you to take a look at that.

I would also like you to take a look at the issue on attacks on prison guards, a rash of them because of the very substantial overcrowding. And I wrote to the Director of the Federal Bureau of Prisons, Mr. Lappin, who I think is doing an excellent job, with some suggestions about giving the guards some protective measures. Some suggestions have been made about pepper spray. Some suggestions have been made about the breakaway batons, stab-proof vests.

I would appreciate it if you would take a look at those items and others which could provide safeguards for prison guards.

Attorney General HOLDER. I will do so. I have actually had a meeting with the head of the union who represents these guards, and he is actually, I thought, a very considerate person and has raised some issues and potential solutions to the problems you have identified.

Senator SPECTER. I want to ask you in the remaining 2 minutes that I have about the distinction between trying some of the terrorists in Article III court as opposed to the military commissions, and, preliminarily, let me agree with what Senator Whitehouse has had to say about the standards you apply. I am confident you will apply them as you see them professionally.

As I take a look at the protocol which has been issued by the Department of Justice, I have a hard time in seeing the discretionary judgments. If you talk about the strength of the interest, it looks to me like they are very, very similar. I do not think the location of where the offense occurred in Yemen as opposed to New York City is very important since extraterritorial jurisdiction applies all over the world as a result of amendments we made in 1984. The point on protecting intelligence sources and methods looks to me to be in line. With respect to the evidentiary problems there could be, the decision to make these trials in Article III courts is quite a testimonial to our criminal justice system to try these horrendous criminals with the rights of a criminal court, constitutional rights, is a great credit to the United States. And military commissions have been crafted after a lot of starts and stops.

But what standards do you apply to try the terrorists one place instead of the other?

Attorney General HOLDER. Well, we do it on a case-by-case basis using the protocol that I think you have in front of you. There are evidentiary questions. I think the location of the crime can be a factor, and I think you are right, given the extraterritoriality——

Senator SPECTER. Are you saying you have less evidence than necessary in a commission as opposed to an Article III court?

Attorney General HOLDER. No. I focus more on the admissibility of the evidence and where the possibility exists, if there are problems in one forum or the other with regard to the admissibility of evidence.

Senator SPECTER. Can you give me an example?

Attorney General HOLDER. Well——

Senator SPECTER. Just one.

Attorney General HOLDER. I have one that I—the kind of interrogation perhaps that a person was subjected to might lead you to want to use one forum as opposed to another. There might be ques-

tions of techniques that were used, and one forum might be more hospitable than another to the admission of such evidence.

No one should read into that anything more than what I have said. This administration has indicated that we will not use evidence that was derived as a result of torture. But even saying that, there is at least a possibility that some techniques were used that might be better received in one forum than another.

Chairman LEAHY. Thank you. I would note that this is Attorney General Holder's fourth appearance before this Committee this year, and I appreciate that. Every Senator on the Committee has asked questions, both Democrat and Republican, and I understand the Republicans have a couple more questions on 5-minute rounds. I am asking Senator Klobuchar if she would chair for me.

And I just want to note that one of the good things about this, Attorney General Holder, I think the American public, having been told by some commentators and others, that the 9/11 suspects will gain access to classified material and they will be able to block the admission of evidence obtained by torture, I think those claims have been refuted very directly today, and I appreciate that. In fact, some of those same protections were adopted into the revised military commissions that Congress passed last summer. The concern I have is that military commissions before have been repeatedly overturned by the Supreme Court. They have comparatively little precedent. I like the fact that our Federal courts have 200 years of precedent and a track record of successfully convicting terrorists and murderers. Prosecutors know how the systems work. The courts have established systems. And we have a lot of confidence that following that, convictions can be upheld.

So I am pleased that you have the preference to use the Federal courts whenever you can, and as Chairman of this Committee, I want to acknowledge the 9/11 families that are here present today. I want to recognize their losses. They and their families have been constantly in my prayers and my thoughts, along with the victims and the survivors of the Fort Hood shooting.

Senator Kyl, we are going to go out of order. I realize you have other matters, and I thank Senator Sessions for agreeing to that. Please go ahead, sir, for 5 minutes.

Senator KYL. Thank you, Mr. Chairman, and thank you, Senator Sessions.

Mr. Attorney General, I had some other questions on the subject we have mostly dealt with this morning, and I will ask those for the record. But I want to turn to the media shield discussion which you and I talked about on November 4th. You had indicated your willingness to address that at more length in a hearing, and I am hopeful that the Chairman will call a hearing at which you could express your views in more detail than you did in the views letter that was sent to us recently.

Did you consult with Secretary Gates in determining to support the current version of the legislation, the media shield legislation?

Attorney General HOLDER. Secretary Gates?

Senator KYL. Yes, the Secretary of Defense. The reason I ask is that you said in your confirmation hearing that you would do so.

Attorney General HOLDER. I believe we have had conversations, but I do not—I am trying to remember the extent to which I have

had this conversation. I do not think we have had a major conversation about this, but I think I have discussed it with him.

Senator KYL. Well, the reason I ask is, I will just quote a small portion of the letter that he wrote to us concerning the bill. He said, "The bill would undermine our ability to protect national security information and intelligence sources and methods and could seriously impede investigations of unauthorized disclosures."

In view of that strong opinion—and, incidentally, he was joined in that by several other members, people in position of authority in our intelligence and national security community—it seems to me that it would be important for us to hear from them and certainly, Mr. Attorney General, for you to weigh their views before expressing absolute support for a bill which you say should not be amended in any additional way.

Attorney General HOLDER. Well, I think, first off, the letter that you quote from Secretary Gates deals with a prior version of the bill.

Senator KYL. It does indeed. There were a couple of major changes made—actually several changes, a couple of which in my view would, arguably, make the situation worse. But what I am going to propose is that we talk to all of the people who have expressed a view about the previous legislation since many of its provisions remain in the bill that you have supported.

Did you consult with the FBI Director?

Attorney General HOLDER. Yes, I have talked to Bob about that.

Senator KYL. Did you tell him that this was going to be the result, or did you elicit his—did he express any concerns?

Attorney General HOLDER. We certainly have discussed it. I know that he has taken a different position, at least with regard to a prior bill. I think that he understood the position that I took, and I think he accepted where I was coming from with regard to this present form of the media shield legislation.

Senator KYL. I appreciate he had expressed as recently as September that his views were the same as previously expressed in opposition to the bill, which is why I asked.

United States Attorney Patrick Fitzgerald, who has been commented on, has recommended that the law include another provision, and I want to just specifically ask you about this. It is in effect an offer of proof under which the information that is being sought by the Government would be provided to the court in camera, and only if the Government prevailed, utilizing all of the provisions of the law, would the information be then turned over. If the Government did not prevail, then obviously it would not.

You have previously, again, in the confirmation hearing, said that that seemed like a reasonable requirement. Would you be open to having a provision like that added to the legislation? I know in your views letter you said you do not want to see any other amendments, but there are a few amendments, it seems to me, make sense, and that clearly is one that both you and I and Mr. Fitzgerald think is reasonable.

Attorney General HOLDER. Well, the bill as it presently exists is a compromise, and I can——

Senator KYL. Excuse me. It is a compromise between the journalists and you all and Democratic Members of the Senate. Nobody

has talked to me, and I have been noting my concerns about this bill for a long time.

Attorney General HOLDER. Well, I think this is right, but I think Senator Graham on the Republican side is a cosponsor. I believe that that is true.

Senator KYL. That is right. None of us who are opposed to it were consulted when the so-called compromise was put together. I just wanted to make it clear in case you had any doubt about that.

Attorney General HOLDER. Well, that is fair. That is fair. And so the views letter was to express the concern I think that we had that in its present form this is something that is satisfactory to us in law enforcement.

Senator KYL. Could I just interrupt you? I have only got 19 seconds left. Just to make the point that I would hope you would be open to the suggestion that I just made and a couple of others, if I could bring those to your attention.

And, last, your letter did not comment on the new, in effect, absolute privilege in one sense, and I am curious about why you—and would, again, elicit your views on that in the future if not today—on the privilege extending to protect those who actually violate Federal law by leaking the information itself. In other words, that act of leaking would be subject to the privilege, would be privileged. And I just wonder—the letter did not express itself on that, and that seemed to me to be new and odd, and I really wanted to get your views on that.

Attorney General HOLDER. I did not see an absolute privilege to leak. I mean, it seems to me that there are provisions within the bill that deal with leaks and how they can be dealt with, and there are certain steps that the Government has to go through in order to prosecute or get information from a reporter in connection with a leak investigation. But I do not think that the steps that the Government has to go through are necessarily going to frustrate our efforts to identify and ultimately prosecute leakers.

Senator KYL. Good. Then what I want to do, since I am over the time, is to show you Section 3 and have you show me why that does not provide, in effect, an absolute privilege here not to disclose information where the crime itself is the leak. I hope we will have a further opportunity to talk about that and some other concerns that I have about the bill. Thank you.

Attorney General HOLDER. That is fine.

One thing, if I could just add, in response to—Senator Kyl I guess was asking the question on behalf of Senator Grassley before. I did not mean to be flip when I said that I would consider the request about turning over the names of people who had previous representations that might conflict with their duties as Department of Justice attorneys. When I said I would consider it, I only meant to say that I do not know if there are ethical concerns with regard to attorney-client privilege and things of that nature and I needed to consider those before I would actually be able to respond to the question. So I was not trying not to be responsive or not taking seriously a question that was posed, I guess initially by Senator Grassley and then by you, Senator Kyl. I just wanted to talk to the experts back at the Department about whether there is an ethical concern in responding to the question.

Senator KYL. Thank you. I suspect that you and Senator Grassley will have more conversations about that.

Senator KLOBUCHAR. [presiding.] Thank you, Senator.

Senator Cornyn.

Senator CORNYN. Thank you very much, Madam Chairman. I do not know if we are going to get through this or not, but let us try.

I want to follow up on a question that Senator Specter asked about admissibility of evidence in deciding in which forum you would try these defendants. Is it your position that it is going to be easier to get evidence of their guilt in an Article III court than it would be in a military commission?

Attorney General HOLDER. I am not sure I view it that way, what evidence would be used in the Article III courts in connection with the cases that I have already made the determination should go there as opposed to the way in which the military prosecutors wanted to conduct the case.

Senator CORNYN. Well, surely you would not decide in your discretion to try a case in a tribunal where it would be harder to get actual conviction, would you?

Attorney General HOLDER. No. I mean, what I take into account are all of the factors that are part of the protocol.

Senator CORNYN. You mentioned the Marshals report on the potential venues where this case could be tried, and as you noted, a judge could, contrary to your wishes, contrary to my wishes, transfer to another venue other than New York City. Based on the Marshals report, in what other venues are you prepared to try this case?

Attorney General HOLDER. Well, I asked the Marshals not to look at the entirety of the United States but really just to look at two districts and the courthouses in two districts and to make a determination as to where in those two districts the case could be best tried, and——

Senator CORNYN. And where was the other one?

Attorney General HOLDER. I looked at the Eastern District of Virginia as well as the Southern District of New York.

Senator CORNYN. And those are the only two?

Attorney General HOLDER. Those are the two I asked the Marshals Service to look at.

Senator CORNYN. When the detainees come to the United States, will they have some immigration status?

Attorney General HOLDER. I am not an immigration expert. I do not know what their status might be. I am confident, however, that given the fact that they would be here under the supervision of and as a result of their being charged in a Federal court, that we would be able to detain them, that we would be able to hold them, as we would do anybody who is charged with such serious crimes.

Senator CORNYN. Are you aware of any bar to their ability to claim asylum or argue that they should not be removed from the U.S. because of the Convention Against Torture?

Attorney General HOLDER. Again, I am not an immigration expert. One can be paroled into the United States solely for this purpose, but there is no right to be here after. I cannot imagine a situation in which these people would be paroled into the United States for that purpose.

Senator CORNYN. So is it your position they will not be conferred rights that they did not previously have by virtue of their coming to the United States?

Attorney General HOLDER. That is my belief, but, again, I am not an immigration expert. I am confident—my expertise deals more on the Department of Justice side, and I am confident that on that side we can detain them safely and prevent them from ever walking the streets of the United States.

Senator CORNYN. I understand we cannot all be an expert in everything in the law. It is complicated. But will you acknowledge that it is possible—or let me ask you if you will look into whether if a detainee claims an immigration status by virtue of their presence on U.S. soil, it will allow them to immediately trigger tandem administrative and Federal judicial immigration proceedings? Will you look into that?

Attorney General HOLDER. OK. I can look into that, because I would not be able to answer that question today.

Senator CORNYN. And if the detainee is acquitted or there is a mistrial, let us say one juror decides to hang up this jury, on what basis do you believe that you can permanently detain Khalid Sheikh Mohammed or any other of the 9/11 detainees? Is that on the basis of a Supreme Court decision? On the basis of a statute that Congress has passed? What is the foundation of that belief?

Attorney General HOLDER. Well, the initial determination that a judge would make for the detention of Khalid Sheikh Mohammed would be one that would last beyond a mistrial. If, for instance, there were a trial and a determination made—a hung jury, we would—I suppose the defense could move to have his detention status changed. It is hard for me to imagine that a judge, having heard the evidence and making that initial determination, as I am confident a judge would, to hold him, seeing that he is a danger and a flight risk, would then change that status of Khalid Sheikh Mohammed between the time of a hung jury and the next trial.

Senator CORNYN. I believe the Supreme Court has held that you cannot indefinitely detain somebody under the Zadvydas case, but let me just ask a final question. Are you concerned that a judge may say you have made an election to try these terrorists as a criminal and you are bound by that election and you cannot go back and revert to the laws of war in order to claim that you can indefinitely detain that individual? Are you worried about that?

Attorney General HOLDER. No, I am not. I think that under the Congressional provisions that we have and the laws of war, you cannot perhaps indefinitely detain somebody, but you certainly can detain somebody for lawful reasons.

Again, I do not think that we are going to be facing that possibility. We are talking about very extreme hypotheticals, I believe, based on my understanding of the evidence and the law and the ability of our prosecutors to present a very strong case.

Senator CORNYN. I hope you are right.

Senator KLOBUCHAR. Thank you very much, Senator Cornyn, and we hope your voice improves. I know Attorney General Holder will join me in saying you are sitting dangerously close to Senator Graham, and we would never want to muzzle Senator Graham, so I hope it is not contagious.

Senator GRAHAM. I wish more people felt that way.

[Laughter.]

Senator KLOBUCHAR. Senator Graham.

Senator GRAHAM. This is an important point here that, you know, the idea of preventive detention, I do not think Senator Feingold is high on that idea. But I am, not because I like keeping people in jail for the hell of it; I just think when you are at war and the people you have in your capture the commander-in-chief has determined through a rational process are part of the enemy force or may go back to the fight, that America is not a better place for letting them go. Do you agree with that general concept?

Attorney General HOLDER. I agree with that general concept. It is something that the President talked about in his Archives speech, about the possibility of detaining somebody, again, pursuant to the laws of war and dialing in due process.

Senator GRAHAM. Well, and I would like to help—do you believe that Congress needs to weigh in here, or do you have the authority as the executive branch to make that decision without any Congressional involvement?

Attorney General HOLDER. I personally think that we should involve Congress in that process, that we should interact with, I guess in the first instance, this Committee in crafting a law on detention process or program.

Senator GRAHAM. I totally agree with you, and, you know, obviously we parted ways on some of this, but these are not easy decisions, so I do not—you know, I think the Bush administration made their fair share of mistakes and also did some good things, too, and preventive detention is a concept only known in military law.

Is there any theory under domestic criminal law where the Government can hold someone without trial indefinitely?

Attorney General HOLDER. Indefinitely?

Senator GRAHAM. Yes. There are speedy trial rights, which——

Attorney General HOLDER. There are speedy trial rights. I do not think that holding somebody—you can certainly preventively detain somebody with the expectation that there is going to be a trial without an adjudication of guilt.

Senator GRAHAM. Right. And under military law, you can hold somebody without any expectation of trial if they are, in fact, part of the enemy force. That is the big difference, right?

Attorney General HOLDER. Right. I mean, there is certainly precedent throughout history of holding combatants for the duration of the war.

Senator GRAHAM. Right. And, Mr. Attorney General, my problem with what we are doing here is that—let us play this forward. In Afghanistan, Pakistan, you name the venue, in the future we capture a suspected al Qaeda member. Under your rationale, the decision as to whether they go into Federal criminal court or military commissions would not be known at the point of capture. Is that correct? You would make that decision later?

Attorney General HOLDER. Yes, I think that is correct.

Senator GRAHAM. Now, from the protocols that we would institute from the military side, what would you recommend that our military commanders, intelligence officials do at the point of cap-

ture? Because under domestic criminal law, if that is where they wind up, once they are in the hands of the Government suspected of a crime, that is when custodial interrogation Miranda rights attach. Under military law, there is no such concept. Under military commissions, there is no requirement for Miranda warnings or Article 31 rights. You expect the person to be interrogated for military intelligence purposes, not worrying about the criminal aspects.

What do we tell our soldiers and our commanders when they capture somebody about how to interrogate and when to interrogate?

Attorney General HOLDER. Well, first I would say that, you know, this notion of when a person is in custody is something that there are lots of cases that people have to deal with and that the automatic capture of a person is not necessarily going to be viewed as in custody by our courts, though I think that is something we certainly——

Senator GRAHAM. If you were a defense attorney, would you not raise that? I mean, I would. I have no desire——

Attorney General HOLDER. Sure.

Senator GRAHAM. But, you know, I would defend anybody because I think defending the worst among us makes us all better. So let me tell you what I would do, Mr. Attorney General. If you took my client who was suspected to be a member of al Qaeda and they were captured on the battlefield into Federal court, I would argue that at that moment in time any questioning of my client without Miranda warnings would be a violation of criminal domestic law. What would your answer be?

Attorney General HOLDER. Well, it would depend again on the circumstances. You know, again, "in custody" is defined in a variety of ways, and that is something that we have to be sensitive to.

Senator GRAHAM. In custody, custodial interrogation, you lose the freedom to leave?

Attorney General HOLDER. That is certainly a factor. But I think what we have to understand is that these determinations are being made now and have been made during the prior administration with thousands of people who have been captured——

Senator GRAHAM. If I may, because our time is—no one in the past up until now has ever worried about this, because no one ever envisioned that the detainee caught on a foreign battlefield would wind up in domestic criminal court with the same constitutional rights of American citizens. They have never worried about that before. Now I think we have to seriously worry about that, and what I am afraid of is the war on terror has become a police action, and I think that undermines our National security.

But at the end of the day, I look forward to working with you about what we can do with preventive detention and see if we can find a way forward as a Nation. Thank you.

Senator KLOBUCHAR. OK. Thank you.

Senator Sessions.

Senator SESSIONS. Thank you, Madam Chairman, and I know you are knowledgeable about all these issues, but I would just say, Mr. Attorney General, that if a police officer stops someone on the street and his gun is in his holster and asks questions, that can be considered custody. If the individual has any sense they are not

free to go, then that is considered custody. I cannot imagine somebody captured on the battlefield not being considered in custody.

I went through this with Mr. Mueller, the Director of the FBI, and eventually he flatly conceded that if you are going to try an individual in Federal civilian court and they are captured, you should give them Miranda warnings or the statements they make would probably be suppressed. I mean, that is the rule in civilian Federal courts. And it is not constitutional, the Supreme Court still says it must be given, but it is not really required by the Constitution. So the military commissions, that is one of the differences, I think, that we have in those matters.

And Senator Graham is raising a point that you cannot avoid, and that point is, if the presumption is, according to the U.S. Department of Justice, your Department, that individuals who are terrorists would be tried in Federal court and not in military commissions, then it is almost an absolute requirement that people apprehended need to be given Miranda warnings and told they can have a lawyer and they do not have to talk.

When our military is in a life-and-death struggle to win a victory over the enemy and one of the key things the 9/11 Commission drove home to us is that intelligence is the way to do that in this kind of battle we are in. So I think that that is not a matter that can be lightly dismissed. I also——

Attorney General HOLDER. Senator, I would not lightly dismiss it, but what I am saying is that we have a great deal of flexibility. I do not think that the military commissions are an illegitimate forum in which to bring these cases, and on a case-by-case basis what we would do would be to look at the admissibility of evidence, the quantum of evidence that could be introduced, and make that determination. That is one of the factors. Although there is a presumption of Article III, it is not an irrebuttable presumption, and the proof is in the pudding. Five of the people I talked about last week are going to go to military commissions as opposed to Article III courts.

Senator SESSIONS. Well, if the presumption is these cases will be tried in civilian courts, then I do not know why the soldier he talks to on the battlefield is not instructed to give Miranda warnings.

I would also just note that there has been a hostility by the President toward military commissions. For example, soon after taking office, he suspended military commissions immediately and later issued an order suspending all military commission trials, and we have not had one since.

Attorney General HOLDER. But I do not think that necessarily indicates a hostility toward military commissions as opposed to a desire to perfect them, and I think that we are now in a position where we have a much improved military commission system that I think can stand on its own, that is legitimate, and in which we can place, as I have——

Senator SESSIONS. The Supreme Court did raise questions about the military commissions, and Congress passed some laws, I think, that improved that. But the Congress did some things that make it clear to me that normally for these kinds of cases, you are better trying them in the commissions. For example, reliable hearsay is available, so you do not have to bring people off the battlefield, per-

haps, and it is easier to have in camera hearings. We have them all the time in Federal court trials. But you have to have a real high reason to do that in a normal civilian trial to go in camera. They are on the record, of course. In the military commissions, you can go on the record, but in camera and take more evidence and protect our intelligence sources and methods better. I do not think there is any doubt about that.

Anyway, I just would disagree there and would point out that General Mukasey has expressed concerns about New York City. He tried the blind sheikh case as a Federal judge, your predecessor, and he is afraid that New York City would "become the focus for mischief in the form of murder by adherents to Khalid Sheikh Mohammed." That was his view of it. I do not think that is an irresponsible analysis. And do you remember the case involving Mr. Salim, who was a co-founder of al Qaeda, held in Federal court for the bombing of the Kenya and Tanzania murders? And he attempted to escape using tabasco sauce and pepper and put it in the eye of one of the guards and stabbed him in the brain with a makeshift knife and blinded him, and he is unable to fully speak today. I mean, these are dangerous people, and I would just ask you that.

Two more things, and I will wrap up. Senator Coburn's concern about medical marijuana, having been involved in that for many years, attempting to do what we could to drive down the use of illegal drugs in America, working with the Partnership for Youth and a Drug-Free Mobile and that kind of thing, I have seen a little bit of the history of it. We need to send that clear message, and we are sending a bad message with the medical marijuana laws. States are making a mistake when they do this, and the Federal Government really needs to speak out against it and show some leadership there.

And, second, I really want to affirm that I will be supportive of your efforts to enhance medical fraud prosecutions and recoveries. Every President I think has tried to do something about it, but it is going to take a sustained effort, not just a press conference, over a period of years. And I think, Mr. Attorney General, with your experience both as a prosecutor and as a judge, you could probably help make this become more effective than it has been in the past.

Attorney General HOLDER. Well, I think there are a number of U.S. Attorneys on this panel who, I think if we put our heads together, we can come up with an effective way in which we can deal with this problem of health care fraud. We need to ask ourselves some tough questions and be honest about the failures that we have had in the past in trying to do this. I think you are absolutely right that this is something that has to be sustained over time, which includes funding, maybe dedicated resources. But I think we will make money back on the provision of additional prosecutors, investigators, and people at HHS, auditors, to do these kinds of things. They will more than pay for themselves, and I think we should be cognizant of that.

With regard to the concerns that you raise, just kind of in summary, I do believe that we can protect sources and methods within the Article III courts, and I would note, as I said in my opening statement, that the provisions designed to protect sources and methods in the military commissions are based on the CIPA Act

that we use in Article III courts. I have great respect for Judge Mukasey. He was, I think, a great Attorney General. He is obviously a great judge. He helped the healing process that has begun at the Justice Department. The only thing that he did not have at the Department, I think, was the gift of time. We owe him a great deal for starting to right the ship, and I am trying to continue the work that he began.

But I disagree with him about New York. New York is—and this is not a secret—New York is a target for al Qaeda and for those who would do this Nation harm. I am not at all certain that the bringing of these trials necessarily means that New York is at greater risk. And with regard to what happened in the jail, that is an unfortunate, tragic incident that I think we probably have learned from, and I am confident that the marshals, the Bureau of Prisons officials who will be responsible for the detention of these individuals will handle them in a way that will be consistent with our values, but also allow them to protect themselves.

I do not take lightly, though, the issues and the concerns that were raised by Judge Mukasey. He is a person I have great respect for—great respect for—and one of the things that I actually read in trying to make this determination was an article that he wrote, I believe it was for the Wall Street Journal—I am not sure—but I remember reading that article and kind of underlining things that he said and asking the people who were part of our group to respond to the things that Judge Mukasey had raised. That is the degree of respect that I have for him, both as a lawyer, a judge, and as a great Attorney General.

Senator SESSIONS. Thank you.

Senator KLOBUCHAR. Thank you very much, Attorney General Holder. I just wanted to follow up on a few of my colleagues' questions.

You were asked about evidence and if there were Miranda rights read or not. Could you just go through again this notion that you raised at the beginning that that is one of the considerations that you have when you look at whether you are going to use the military commissions or whether you are going to use Article III courts?

Attorney General HOLDER. Yes. One of the things that we look at, one of the things that we consider is the admissibility issue, where can we get admitted the evidence that is going to be necessary to be most successful. And that is something that really is important in the determination that I made with regard to the use of the Article III courts concerning Khalid Sheikh Mohammed and his four colleagues.

I would also say that the people in the field have been making this determinations about giving Miranda warnings or not for some time now. They have had thousands of people who have come into our custody; only a small number of them have been given Miranda warnings. And I have faith in the ability of the people in the field to make those kinds of determinations, and to the extent that there is a problem with regard to admitting a piece of evidence—and I think that is the other thing we have to remember. The trials that we will bring will not only be based on admissions, confessions,

there will be other ways in which we will prove the guilt of the people that we charge.

So I have discretion, and I want to have the maximum use of the tools that I have been given by Congress and by the President in making these determinations, and on a case-by-case basis using the protocol that we have, that is what I will do.

Senator KLOBUCHAR. And you said at the beginning of your testimony today, you talked about how you were being as forthcoming as you could be, describing your decisionmaking process. But you also said that there was some evidence you could not share with us today, which I think is always difficult for prosecutors—I know this from my own work—where you are, you know, explaining things to people and you want so much to tell them about the real factor that led you to a decision, but you cannot until the trial is going on or until the trial is over. Could you expand on that a little, not telling us what the evidence is, but explaining that there is some evidence that you cannot discuss right now in this forum?

Attorney General HOLDER. Yes, there is really, from my perspective, very compelling evidence that I am not at liberty to discuss now that probably will not be revealed until we are actually in either a trial setting or perhaps a pretrial setting. Once these cases have been indicted, a judge has been assigned, motions perhaps have been filed to the extent—you know, at some point an Assistant United States Attorney will reveal that which I cannot talk about now, but the evidence that I am not talking about, as I said, I think is compelling, is not tainted, and I think will be proved to be decisive in this case.

Senator KLOBUCHAR. Thank you. And then I wanted to move just last to some of these general issues. As we look at what you are facing, whether people on this Committee agree or disagree with some of your decisions, I think we are unified in wanting to give you the tools that you need to do your work. And there clearly have been issues in the past—you just raised this—with morale in the Justice Department. I think everyone knows that. And you mentioned and praised Attorney General Mukasey for some of the work that he did in trying to right that ship. I certainly know he worked hard with our Minnesota U.S. Attorney General's office and with me and others in trying to fix some of the issues there. And I think that we are well on their way, as you know, with Frank McGill and now our newest appointee, Todd Jones, to do that.

But could you discuss more generally at the Justice Department what you have been doing to work on this morale issue and improvements you think have been made?

Attorney General HOLDER. Well, first, one of the things is to make people again believe in the mission of the Department and to reassure people that some of the unfortunate things that happened in the past and that are identified in the Inspector General reports, that that is not the way in which this Justice Department is going to be run—we are not going to be inventing things. It is not going to be a new way of doing things at the Department. It is really going to be a return to the old ways.

I served as a line attorney in the Justice Department under Republican as well as Democratic Attorneys General and had great respect for all of them and the way in which they dealt with me

as a career person, and that is what I have tried to reassure people at the Department, that we are going back to that way of doing things, that they are only expected to do their jobs. There are no political consequences; there are no political litmus tests with regard to case decisions, with regard to who gets to be a lawyer at the Justice Department. This is the way things have always been done at the Department. It is the great tradition of a very, very special place that I have had the good fortune to be associated with most of my professional life.

I think one of the things that would help with regard to morale—this is kind of an advertisement, I guess—would be for confirmation of those remaining Assistant Attorneys General who—I think we have three left now. To get them confirmed I think would help. To get U.S. Attorneys confirmed I think would help——

Senator KLOBUCHAR. Right, and I understand. I just checked this to get the numbers. We have three pending on the floor, and I am sure you would like to get those done, say, before Thanksgiving? That would be nice?

Attorney General HOLDER. Tomorrow would be good.

Senator KLOBUCHAR. OK. And then I think there are six pending before this Committee, and I am sure you would like to get those through this Committee, because when I look at your workload that you are facing here, not only with these newest trials, but with this major investigation going on at Fort Hood, with the Medicare fraud that we all want you to focus on, as every person in this country should want you to do, with the new and revived focus on white-collar crime, which I think is long overdue, from the Madoff case, which I think that has been completed here, but there are offshoots from that, and there are other white-collar cases all across the country, to not have, you know, some of these nominations clogged up a bit here just cannot be what you want. And so I know I want to move forward on those as soon as possible as well as any personnel that you need in the Justice Department.

Attorney General HOLDER. I appreciate that.

Senator KLOBUCHAR. All right. Thank you very much. You have one more thing, Senator Sessions.

Senator SESSIONS. One thing. I offered for the record a letter earlier, and I failed to note that—from the 9/11 victims that, according to their letter, when word of the letter got out, some 3,000 firefighters across the country joined us and added their names; less than 24 hours after the Attorney General's announcement last Friday, 100,000 people signed our letter before our computers crashed. And this is the box of signatures and confirmations. I just feel like I should make that statement for the record because I do think the victims felt strongly about it, and they are asking that the Attorney General reconsider.

Attorney General HOLDER. Well, there certainly have been those who have opposed the decision that I made. There have been many people who have supported it as well. I expected that when I made the decision. These are tough decisions that an Attorney General is called upon to make, and all I can do is look at the evidence, look at the facts, and look at the law and try to make the best decision that I can. And I hope people would understand that.

Senator KLOBUCHAR. Thank you very much, Attorney General Holder. I want to thank you for so thoroughly and respectfully answering all the questions from the members of this Committee. I want to thank those who have been very respectful in the gallery here as well. I know that not all of you agree with every decision here, but I want to thank you for your respect. And for those of you who are family members, firefighters, thank you so much for your service. And as Senator Schumer said, we cannot even imagine what you have been going through, so I want to thank you for that.

And I think we would all agree in this room that we want you, Attorney General Holder, to go back and whatever disagreements there may be, but to make sure you put the best people on this case, that they do their work, that we get the toughest penalties here, and we wish you well. So thank you very much, Attorney General.

Attorney General HOLDER. Thank you.

Senator KLOBUCHAR. The record will stay open for 1 week for this hearing, and the hearing is now adjourned. Thank you.

[Whereupon, at 1:37 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General — *Washington, D.C. 20530*

March 22, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Attorney General Eric Holder following his appearance before the Committee at a hearing on November 18, 2009 entitled "Oversight of the Department of Justice."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Senate Judiciary Committee
November 18, 2009

QUESTIONS POSED BY CHAIRMAN LEAHY

State Secrets:

1. **On September 23, 2009 you announced new procedures and policies that will guide how and when the Justice Department may invoke the state secrets privilege. I was pleased to see that the administration adopted some of the elements of the State Secrets Protection Act that I introduced this Congress, including requiring that a standard of "significant harm" to national security be met before the privilege can be invoked. Nonetheless, I remain concerned about how these policies will be exercised and whether they will truly provide accountability for the use of this privilege. Last month you again invoked the state secrets privilege in *Shubert v. Obama*, a case involving the Bush administration's warrantless wiretapping program, and moved for summary judgment.**

   a. **In how many cases have you invoked the state secrets privilege since you announced the new procedures? How have those new policies changed the practice of invoking the privilege?**

Response: The Department of Justice has only invoked the state secrets privilege in one case -- *Shubert v. Obama* -- since the Department announced the new procedures. The Administration continues to assert the state secrets privilege in several other cases where the assertions pre-dated the policy (for example, *Jewel v. NSA*, *Al-Haramain Islamic Foundation v. Bush*, and *Mohamed et al. v. Jeppesen Dataplan, Inc.*). The new policy procedures have not been applied to these cases, but the Department has determined that the claims of state secrets in these cases are well justified.

The new policy establishes a formal internal Justice Department practice for asserting the state secrets privilege, which mandates full consideration by the Department's leadership; this new policy thus ensures, through a formal approval procedure, that there will be serious and personal consideration paid by the highest levels of the Department of Justice before any state secrets privilege claim can be made in litigation.

   b. **The new policies do not explicitly state a commitment by the government to ensure that a court will actually get to see the documents the government relies upon in order to claim the privilege. This was a key component of the state secrets litigation I introduced. Do you agree that the court should have the ability to review the materials the government relies upon to claim the privilege?**

Response: The Justice Department fully embraces the Judiciary's essential independent role in evaluating assertions of the state secrets privilege. In practice, the Justice Department regularly provides Article III judges with access to all of the background material necessary to understand and justify the assertion of the privilege in litigation, even when that material is very sensitive. If an Article III judge in a particular case were to indicate that further explanation is required, the Justice Department would normally provide the necessary additional material. Nevertheless, there may be rare cases, as the Supreme Court noted in *United States v. Reynolds,* 345 U.S. 1 (1953), where it is possible to satisfy the court that the privilege is being properly invoked without making a robust evidentiary submission. As noted above, however, the Justice Department nonetheless typically has provided Article III judges with an expansive explanation of the necessary background factual material.

Material Witness:

2. **Thank you for the letter dated November 12, 2009, that responded to my questions about the Department's use of the material witness statute. You stated that the Department is reviewing its existing guidance for use of the statute and will consider whether new or additional policy is warranted. In this review, I urge you to consider the bill I introduced in 2005, S.1739, to strengthen procedural safeguards in the use of the material witness statute. Specifically, the bill would raise the standard that the government must meet to obtain a material witness warrant; requires that the witness be expeditiously brought before a court; and imposes reasonable limitations on the detention of the witness. Will you study S.1739 from the 109th Congress carefully as you review current guidance?**

Response: Yes, the Department will study S.1739 as part of its review of current guidance.

FBI Domestic Investigation and Operations Guide:

3. **I have requested an unredacted copy of the FBI's Domestic Investigation and Operations Guide, or "DIOG". Subsequently, staff members were briefed on the redacted portions of the DIOG, but due to time limitations in that briefing, were not able to closely study the unredacted DIOG in hard copy. Later, I learned that there is a classified annex to the DIOG, which, to the best of my knowledge, has not been transmitted to Congress. It is critical to the Judiciary Committee's oversight responsibilities that we review these documents in full, and so I reiterate my request that the full DIOG, including any classified portions of the DIOG, be transmitted to the committee for review by senators and cleared staff.**

Response: The FBI's Domestic Investigations and Operations Guide (DIOG) has been made available to the Committee and was released to the public in September 2009. Certain portions of the DIOG were redacted to prevent sensitive information from being released publicly, as releasing that information would cause significant harm to our national security and criminal investigation programs. The FBI has provided to Committee staff several briefings on the DIOG, including a briefing specifically regarding the redacted portions of the DIOG. Staff for

the Committee has also been afforded an opportunity to view the redacted portions of the DIOG, and we will continue to offer that access to Committee Members and staff in the future.

Hate Crimes Enforcement:

4. **Last month, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act became law. You twice came before this Committee to push for this historic protection so it is clear you support the law's provisions designed to help the Justice Department and local law enforcement investigate and prosecute violence motivated by hate. Now that President Obama has signed the historic Hate Crimes Prevention Act into law, what is the Department of Justice doing to enforce it?**

Response: The Department is actively involved in implementing and enforcing the new law. We already have several open ongoing investigations. We have been cooperating with state and local law enforcement authorities to support their hate crimes enforcement activities. In addition, following the enactment of the law, Assistant Attorney General Tom Perez sent a memo to all 93 U.S. Attorneys offering the support of Main Justice to the prosecutors in the field. The Attorney General has also issued guidance to the field regarding enforcement under the new law. Recently, the Attorney General's Advisory Committee approved a U.S. Attorney's Manual revision requiring that prosecutors apply neutral and objective criteria in bringing hate crimes prosecutions. The Community Relations Service is training all of its field-office staff on the new law. Finally, the Civil Rights Division has developed training videos and other materials, and will be conducting a training program at the National Advocacy Center in Columbia, South Carolina for federal prosecutors and law enforcement. The Division also is developing plans for joint training and outreach with the FBI, state and local law enforcement, and community stakeholders throughout the country.

The Justice Department's Role in Reforming Forensic Sciences:

5. **In February, the National Academy of Sciences issued a comprehensive report on the urgent need to improve forensic sciences in the United States. Our criminal justice system frequently relies upon forensic science to ensure that we convict the guilty and exonerate the innocent. As a former prosecutor, I know that the evidence from forensic science used in court must be accurate, reliable, and reflect state-of-the-art technology and techniques. The two hearings held by this Committee on this important issue reinforced the fact that the forensic technology used in the criminal justice system is not yet infallible. We have seen a litany of cases in which faulty forensic evidence led to the wrong result, including a case in Texas in which an innocent man may have been executed.**

   The National Academy of Science report found that science needs to be the guiding principle in determining the standards and procedures for forensic science. The report called for the federal government to set national standards for accrediting forensic labs and for certifying forensic scientists. It also urged the federal government to facilitate significant new research into traditional forensic disciplines

in order to provide the validation and standards necessary to restore confidence in the forensic evidence so crucial to prosecuting serious crimes.

a. Do you agree that there should be a nationwide forensics reform effort including national standards to be set for accrediting forensic labs; certification of forensic scientists; and research leading to validation and standards for the forensic disciplines?

Response: Yes, we believe that there should be a nationwide forensics improvement effort. For some time, it has been clear that forensic science is in need of improvements. A 1999 report published by the Department's National Institute of Justice (NIJ) identified lapses in training, standardization, validation, and funding, and in 2004, responding to a Congressional directive, NIJ published a survey of forensic science organizations that emphasized the need for more basic research; personnel and equipment resources; education; professionalism through accreditation and certification; quality assurance; and enhanced coordination among Federal, State, and local stakeholders. An interagency committee of forensic experts from across the Executive Branch departments is examining how best to accomplish these goals, in line with the recommendations of the NAS report.

With regard to the specific issue of accreditation, much progress has already been made on this front. Most of the public forensic science laboratories are accredited, including virtually all of the U.S. federal government's labs. More should be done, however. For example, although more than a number of private labs have been accredited, accreditation of all private forensic science service providers is paramount. Furthermore, accreditation through the International Association for Standardization (ISO), the world's largest developer and publisher of international standards, should become the norm. ISO has developed standard 17025 (ISO 17025), based on the standard for the accreditation of calibration and testing laboratories, and it should become one of the cornerstones of a comprehensive forensic laboratory accreditation program.

Likewise, certification of individual forensic practitioners should be part of the effort to improve the forensic science community. Each forensic practitioner should be required to demonstrate that he or she possesses the knowledge, skills, and abilities to competently perform analysis in his or her individual discipline or sub-discipline. While many laboratories have their own internal training and certification processes, there is some inconsistency in how these voluntary certifying bodies develop and oversee their examination and certification processes and there are currently no requirements for the external certification of forensic practitioners. Although some external certification bodies have case work experience requirements, a blended, short-term approach for demonstrating competencies could include, but not be limited to, passage of proficiency tests, compliance with continuing education requirements, and adherence to a code of ethics.

b. What role should the Justice Department play in this effort to reform forensic sciences in this country?

Response: The Department of Justice is at the forefront of the effort to improve the forensic science community. Although around 98 percent of forensic science is performed outside the federal government, the Federal government has a crucial role to play.

A DOJ official serves as one of the co-chairs of the recently chartered Subcommittee on Forensics of the National Science and Technology Council of the Office of Science and Technology Policy. Of course, the Subcommittee is composed of forensic experts from all parts of the Executive Branch, but DOJ participation and leadership is particularly crucial because forensic science is mostly (though certainly not exclusively) employed in criminal investigations.

The Department's National Institute of Justice (NIJ) has been on the forefront of funding efforts specifically targeted at issues identified in the National Academy of Sciences' (NAS) report "Strengthening Forensic Science in the United States: A Path Forward". In FY 2009, approximately $8M was awarded to 16 projects under NIJ's new "Fundamental Research to Improve Understanding of the Accuracy, Reliability, and Measurement Validity of Forensic Science Disciplines" solicitation. This program was created specifically to facilitate scientific research recommended in the NAS report. NIJ has been competitively funding other peer-reviewed research for forensic sciences since FY 2003. Since that time, NIJ has provided over $76M in grants to fund forensic science research and development projects. In FY 2009 alone, over $7M was awarded for 18 projects under the General Forensics program and over $6M was awarded to 18 DNA R&D projects. All of the topics under the research and development solicitation programs are guided by the needs of the forensic science community.

Training, which was also addressed in the NAS report, has been a topic for which NIJ developed a competitive solicitation in 2007. The goal of the program is to develop and/or deliver approved forensic science training to forensic science practitioners and other key personnel within the criminal justice community at no charge to the person or their agency. In FY09 awards were made totaling to more than $12M to continue offering the training needed to the criminal justice community.

Significant funding has gone towards the reduction of backlogs and capacity enhancement in State and Local crime laboratories. To date, NIJ has provided funds totaling over $389M to States, units of local governments and eligible fee-for-service laboratories for the reduction of backlogs of both forensic DNA casework evidence samples and DNA database samples (i.e. samples taken from convicted offenders and/or arrestees), as well as the capacity enhancement of state and local DNA laboratories. The Paul Coverdell Forensic Science Improvement Program continues to give both formula (75%) and competitive (25%) awards to state and local crime laboratories as well as to the medical examiner/coroner community. These awards are dedicated to enhancing the quality, timeliness, and credibility of forensic science services for criminal justice purposes for disciplines that are outside of DNA but still very vital to the investigation of crime. In FY09 over $23M was granted to 103 awardees. Since 2004 over $106M has been awarded under this program.

NIJ has funded numerous projects in other areas as well. Since 2005 over $50M has been awarded under the "Solving Cold Cases with DNA" program. From the 2005 awards alone, over 400 CODIS DNA matches have been made on cases that did not have DNA technology available

at the time they were originally investigated. In 2008 NIJ released the "Identifying the Missing Using DNA Technology" program to help address the growing number of missing and unidentified persons cases in the USA. In conjunction with this, NIJ also funds the National Missing and Unidentified Persons System (NamUs). This system is for use by the law enforcement, medical examiner/coroner, and forensic science community but is also for the general public. In 2009, the cross matching capability of the system became active. This allows the missing persons database to compare cases to the unidentified decedent database to allow for potential investigative leads for the criminal justice community to use. The system is currently managed by the National Forensic Science Technology Center (NFSTC) which, in 2007 won a competitive award to become NIJ's Forensic Science Technology Center of Excellence. This award will be recompeted in 2010. The Center is charged with numerous tasks including managing the Grant Progress Assessment program, hosting technology transfer workshops and evaluations, and partnering with other agencies and institutions for other purposes which serve the community. Finally, NIJ has awarded more than $10M in funding to 13 States to support their "Postconviction DNA Testing Assistance" program. Under this program states may apply for funding to review postconviction cases and pay for any DNA analysis deemed necessary in cases where this evidence may prove "actual innocence".

Pending FOIA litigation:

6. I commend you for releasing new Freedom of Information Act (FOIA) guidelines that restore the presumption of openness to our government. During the FOIA oversight hearing that this Committee held in September, I asked the Associate Attorney General about the impact of your new guidelines on pending FOIA cases. I was promised that the Department would provide the Committee with more information about these cases; but I have not yet received a response. This is an important issue to me and to many in the open government community who want to be sure that your new FOIA guidelines actually do result in more disclosures to the American people.

a. How many times has the Department released additional information in a pending FOIA case since your new guidelines went into effect?

b. Do you believe that your new FOIA guidelines have been successful in getting more government information to the American people, thus far?

Response to a-b: We believe that the FOIA guidelines have been successful in getting more information out to the American public. The Department has been actively engaged in educating and training agencies with respect to the new guidelines, and agencies are releasing information that may be technically exempt under FOIA, but which can nevertheless be disclosed as a matter of discretion. Pending FOIA cases have been reviewed to determine whether additional information can be released, and in many cases additional information has been released. It is not possible to provide a truly accurate count of the number of times information has been released in a pending case since the issuance of the guidelines because we do not maintain statistics of that kind for these types of cases that are litigated all around the country by various offices. The Department is proud to be effectively implementing one of the President's top priorities in making the government transparent and accountable to the American people.

Oversight:

7. **The Senate and House Judiciary Committees have traditionally had oversight jurisdiction over all activities of the Department of Justice. In recent years, some have suggested that certain intelligence-related activities of the Department, particularly within the Federal Bureau of Investigation, are not within the Judiciary Committee's oversight purview. While I am happy to share oversight jurisdiction as appropriate, I believe strongly that the Judiciary Committees, with their long tradition of oversight of all aspects of Department work and their considerable expertise in these matters, should not be shut out of important Justice Department activities. I think that all members of this Committee, and our House counterparts, will agree. Do you agree with me that this Committee has oversight jurisdiction over the entire Department of Justice?**

Response: Generally, we agree that the Committee has oversight jurisdiction over the Department although we note that certain activities of the FBI are scored to the National Intelligence Program, which we understand falls within the purview of the Intelligence Committees.

Consular Access for Criminal Defendants:

8. **The Vienna Convention on Consular Rights requires that non-citizens charged in the criminal justice system under certain circumstances, particularly in capital cases, must be told of their rights of access to their consulate. In a number of cases, states failed to provide this notice. The International Court of Justice found in the *Avena* case that failure to provide such notification is a violation of the Convention's requirements. In the case of *Medellin v. Texas,* the U.S. Supreme Court held that only Congress can enforce these treaty obligations by enacting legislation. It is important for the protection of the rights of Americans abroad that we uphold our treaty obligations here at home. I joined four other Senators in writing to you earlier this fall to ask for your views about the appropriate next steps to resolve this situation. We have not yet received a response. Please share your thoughts about the appropriate steps Congress and the executive branch should take to address this issue.**

Response: The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

QUESTIONS POSED BY SENATOR FEINSTEIN

Gun Trafficking Across the Southwest Border:

9. The June 2009 report by the Government Accountability Office found that the two agencies tasked with deterring arms smuggling along the Southwest border, the Bureau of Alcohol Tobacco and Firearms and the Department of Homeland Security's Immigration and Customs Enforcement, "do not consistently coordinate their efforts effectively." Also in June, you testified that additional ATF personnel would be deployed to the Southwest border as part of Project Gunrunner, and that you and Secretary Napolitano were working to increase coordination on matters related to the Southwest border.

a. Since June, how have the roles of the Bureau of Alcohol, Tobacco and Firearms and Immigration and Customs Enforcement been defined?

Response: ATF and ICE have long recognized that by working as partners they will be more successful in the fight against persons and organizations engaged in cross border firearms trafficking and related violent crime. Their mutual goal is to achieve a greater level of public safety by cooperating with regard to our respective jurisdictions, resources and investigative capabilities. In that regard, on June 30, 2009, ATF and ICE announced the execution of a new memorandum of understanding (MOU) regarding cooperative guidelines for the handing of firearms investigations. This MOU is a reflection of their respective commitments to these principles in areas of mutual interest, and should guide and help coordinate their respective investigative activities.

For example, the MOU provides guidance in those situations where the Agencies' respective mission efforts coincide and will serve to coordinate how both will pursue their investigations cooperatively to optimize the use of resources and minimize duplication of effort. The MOU also outlines the process by which each Agency will address intelligence and information sharing, provides general and specific investigative guidelines, outlines the acceptable use of sources of information and provides conflict resolution procedures.

ATF and ICE continue to work to improve interagency coordination and cooperation. The recently enacted MOU represents an important step toward this goal. In furtherance of this objective ATF and ICE organized two recent senior level conferences to discuss the MOU and cooperative enforcement strategies. The first was held in Albuquerque, NM, from June 29 to July 2, 2009, and in addition to ATF and ICE, also included DEA, FBI, CBP and representatives from the US Attorney community. The second conference was held in San Diego from November 2 through November 5, 2009. That conference was primarily organized by ICE, and in addition to ATF, included CBP.

Improved cooperation between ATF and ICE has resulted in the two agencies partnering for a number of successful joint investigations along the border. For instance, in June 2009, ATF and ICE agents received information regarding the recovery in Mexico of a firearm originally purchased by a Brownsville, Texas resident. The purchaser was interviewed and admitted to

being paid to buy two .223-caliber Bushmaster rifles for the ring leader, who was also in the Brownsville area. The joint investigation subsequently identified an additional straw purchaser. ATF and ICE agents interviewed this subject, who admitted to purchasing five firearms. Two of these firearms have been recovered in Mexico and Guatemala. This subject was arrested after the interview, subsequently indicted, and pled guilty in the U.S. District Court for the Southern District of Texas. He is awaiting sentencing. Defendants have admitted to purchasing a total of 29 firearms on behalf of the trafficking ring leader, nine of which have been recovered in Mexico and Guatemala.

Additionally, as noted above, all seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk which is staffed by ATF and DHS personnel. The agencies believe they are making progress and these efforts will continue at the national and local levels. Additionally, ATF and ICE are also working with several other partners, including the Government of Mexico, on a variety of issues pertaining to the investigation of cross border firearms trafficking and related violence.

b. How is data on weapons seizures at the ports of entries being coordinated and compiled among the two agencies?

Response: All seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk, which is staffed by ATF and DHS personnel. ATF works cooperatively with CBP and ICE to investigate the sources of firearms and firearms trafficking schemes when firearms are recovered at or between ports of entry. CBP and ICE also share seizure information with ATF for incorporation into ATF intelligence products and ATF has provided firearms trafficking data to CBP and ICE for their southwest border assessment products.

c. How is the Justice Department working with the Department of Homeland Security to recommend and update technology at the ports of entries in order to deter weapons smuggling?

Response: ATF supports DHS efforts to update and make better use of technology to detect and deter firearms trafficking along the U.S.-Mexico border. However, ATF does not maintain equipment nor have statutory responsibility to conduct inspections at ports of entry.

Investigations of Identity Theft and Data Breaches:

10. A recent survey by Unisys Security Index found that 65 percent of Americans are "extremely" or "very" concerned about the security of their private information, such as their social security numbers. In fact, the survey found that Americans are more concerned about identity theft than the H1N1 virus. Recent headlines give cause for concern. This month, four Russian and Eastern European men were indicted in the United States for hacking into an Atlanta-based payment processing center and using the information to steal more than $9 million from ATM machines around the world. And, in August, an American and two Russian accomplices were charged with masterminding a global scheme to steal more than 130 million credit and debit cards by hacking into American retail companies' computer systems.

a. What steps is the Department taking to make investigation and prosecution of data theft a priority?

Response: Over the last several years, the Department has implemented a number of important initiatives to combat this problem in a more aggressive fashion, both domestically and abroad. Recent cases, such as the indictment of an international hacking ring responsible for the theft and sale of more than 130 million credit and debit card numbers, provide excellent examples of how we have used our resources in a creative and coordinated manner. Recent cases also demonstrate that we have the ability to identity, charge and capture some of the most sophisticated online criminals. Success in this area requires well-trained law enforcement agents, well-trained prosecutors, and close working relationships with our foreign allies.

However, many cyber criminals rely upon online anonymity, encryption, and routing of their communications through foreign countries to commit online fraud. These are significant problems that have hampered, and continue to hamper, our success in fighting online crime in an large number of cases.

To respond to this threat, the Department has over 230 prosecutors in U.S. Attorneys' Offices who are part of a "CHIP" (Computer Hacking and Intellectual Property) network. These prosecutors are dedicated to pursuing, among other types of cybercrime, investigations and prosecutions related to data breaches and payment card fraud. In addition, the Computer Crime and Intellectual Property Section within the Criminal Division of the Department, a section with 40 prosecutors and 5 individuals comprising an in-house Cybercrime Lab, is similarly positioned to investigate and prosecute data breach cases. Finally, U.S. Attorney's Offices and the Criminal Division's Fraud Section, with more than 60 prosecutors, actively pursue and prosecute the resulting payment card fraud and identity theft from data breach compromises.

b. How is the Department cooperating with law enforcement in other countries to pursue foreign hackers who are targeting United States computer systems?

Response: We already have a number of established working relationships with multinational organizations that are focusing on broader identity theft issues, but which encompass compromises of computer systems and resulting fraud. The Council of Europe, for example, oversaw the development of the Convention on Cybercrime, which is an indispensable tool in improving cooperation in fighting computer crime, including data breaches and identity theft. The Convention encourages countries to pass adequate computer crime laws, as well as laws that provide the legal tools necessary to collect electronic evidence, thereby eliminating safe havens. We are actively engaged in encouraging other countries to accede to the Convention. The European Union also is taking an active interest in the specific topic of identity theft, and we are discussing with the European Union how to address the issue. Through its Legal Attaché offices, the FBI is also working globally to coordinate cybercrime investigations with, and to provide cyber training to, our international law enforcement partners. For example, over the past few months the FBI has worked closely with Egyptian authorities in the Phish Phry case and with Estonian authorities in the Royal Bank of Scotland Worldpay case. We also work closely with

Interpol and other international law enforcement organizations in pursuing these types of criminals.

In addition, the United States should continue to work closely with multilateral organizations to urge other countries to review their criminal codes and criminalize identity-related criminal activities where appropriate. This has historically proven effective. Earlier this year, for example, the G-8 Roma/Lyon Group approved for further dissemination a paper that examines the criminal misuse of identification information and identification documents within the G-8 States and proposes "essential elements" of criminal legislation to address identity-related crime.

The Identity Theft Task Force's Strategic Plan also directs the U.S. government to identify countries that are safe havens for identity thieves and to use appropriate diplomatic and enforcement mechanisms to encourage those countries to change their practices. The Department of Justice has begun this process, gathering information from a range of law enforcement authorities.

c. Is the Department of Justice working with the Federal Trade Commission and others to educate Americans about what steps they should be taking to protect their computers and their sensitive data from unauthorized access and misuse?

Response: Yes. The Federal Trade Commission's website on identity theft, http://www.ftc.gov/bcp/edu/microsites/idtheft/ , contains comprehensive information and guidance for the public in recognizing and dealing with identity theft. The Department of Justice frequently directs consumers concerned about identity theft to the FTC site, and provides hard copies of the FTC materials to consumers as well. In addition, a partnership of law enforcement and private-sector entities -- including the FBI, the United States Postal Inspection Service, the National White Collar Crime Center, Monster.com, Target, and members of the Merchants Risk Council -- developed and established LooksTooGoodToBeTrue.com, a website with consumer quizzes and other information to educate consumers about a wide variety of Internet fraud schemes and identity theft. That website can be found at: http://www.lookstoogoodtobetrue.com/ .

11. Data breaches were once considered solely a financial threat. We know now, however, that seemingly isolated breaches may be linked to larger threats against our electricity grid, our cyber-infrastructure, or our national security more broadly.

a. In April 2009, you asked the Deputy Attorney General to chair a working group on federal sentencing. Has this group reviewed sentences for identity theft and cyber-crimes? Are the criminal penalties currently in the United States Code sufficiently severe to deter, prevent, and eliminate these crimes?

Response: No. The Sentencing and Corrections Working Group has generally been focusing on structural issues surrounding federal sentencing rather than crime-specific sentencing policy. Among other issues, the Group has been examining the structure of federal sentencing following the Supreme Court's decisions rendering the sentencing guidelines advisory only; racial and

ethnic disparities in federal sentencing; internal Department of Justice charging and sentencing policies; and prisoner reentry issues.

With respect to criminal penalties, in the Identity Theft Enforcement and Restitution Act of 2008, Congress directed the Sentencing Commission to review the penalties for identity theft and computer intrusion offenses. In response, the Commission amended the U.S. Sentencing Guidelines. The Department believes that these amendments did not go far enough to address the threat of identity theft and to comply with Congress' explicit direction that penalties for such offenses be increased.

Apart from the Sentencing Guidelines, enhancing penalties for such computer crimes should be accomplished in other ways as well. Congress should consider raising the maximum penalties that apply to certain violations of 18 U.S.C. § 1030 to bring these penalties in line with similar crimes committed without the use of computers. The Department stands ready to work with Congress to propose specific amendments to address these shortcomings.

b. Is the Department of Justice, and particularly the Federal Bureau of Investigation, getting the information that it needs to thoroughly investigate cyber-threats?

Response: The Department of Justice, including the FBI, is working to identify and address potential information gaps that relate to cyber-threats. For example, for a variety of reasons, data breaches and other types of cyber-threats are significantly underreported, and as a result, law enforcement efforts to bring criminals to justice are significantly hampered. Immediate reporting of incidents to law enforcement is vital to law enforcement's ability to investigate large-scale data breaches. Payment card industry businesses are required by the credit card associations under their operating rules to report breaches to law enforcement. However, these private sector rules are neither universal nor consistently enforced across the various companies. In addition, only a few state notification laws require the victim to notify law enforcement.

c. Is the Department engaged in any public-private partnerships to identify and eliminate cyber-threats?

Response: The Department actively participates in several well-established public-private partnerships that are designed to share information related to cyber-threats. These include, for example, the FBI's InfraGard program and the National Cyber Forensics and Training Alliance. InfraGard, which the FBI established and leads, currently consists of more than 33,000 members spanning 87 cities nationwide and including representatives from federal, state, and local government, industry, and academia. InfraGard is the nation's largest government/private sector partnership focused on reducing physical and cyber threats against our critical infrastructure. The FBI also established a lead role in the development of the National Cyber Forensics and Training Alliance, a group committed to combining the resources of academia, law enforcement, and industry to identify major global cyber threats.

In partnership with the National White Collar Crime Center, the FBI also helped to establish the Internet Crime Complaint Center (IC3), which is the nation's premier web-based portal for receiving Internet-related criminal complaints and for researching, developing, and referring cybercrime complaints to Federal, state, local, or international law enforcement and/or regulatory agencies for appropriate action. The IC3 has received complaints relating to a broad spectrum of cyber crime matters, including intellectual property rights matters, computer intrusions (hacking), economic espionage (theft of trade secrets), online extortion, international money laundering, identity theft, and a growing number of Internet-facilitated crimes.

The Department is also an active participant in the U.S. Secret Service's Electronic Crime Task Forces, established to combine the resources of academia, private industry, and local, state, and federal law enforcement agencies to combat computer-based threats to our financial payment systems and critical infrastructures. The Department is a member of DHS' Joint Agency Cyber Knowledge Exchange (JACKE) program, a sharing platform between civilian Federal Government and the United States Computer Emergency Response Team (US-CERT) for the exchange of cyber threat information and mitigation techniques, including foreign nation/state cyber threats to U.S. Government networks.

In addition, the Office of the Chief Information Officer runs the day to day operations of the Justice Security Operations Center (JSOC). The JSOC teams with private companies to identify and eliminate cyber threats against the department. Currently, we are teaming with various companies to develop a methodology for early detection and mitigation of vulnerabilities in our infrastructure. We also work with technology partners to develop advanced detection and mitigation techniques, which are then adopted by the companies and offered to other agencies and private companies to improve their capabilities. The JSOC then shares the information with other government agencies (DISA, SSA, HHS, JTFGNO, USDA etc). We also post to the US-CERT Mercury portal, any new techniques, or information (including our custom developed block lists of known bad sites) that is shared with private organizations as well as U.S. government agencies. The JSOC also participates in a number of conferences and events that include both private and government agencies. The end goal of these events is to collaborate on and share detection strategies with other organizations to help them increase the security posture of their networks.

Cooperation with Foreign Antitrust Authorities:

12. **In today's economy, it is more essential than ever that financial regulators cooperate with each other across borders. For many California companies with international reach, a merger or other business transaction must be reviewed not only by the United States Department of Justice or the Federal Trade Commission, but also by the European Commission and other foreign antitrust enforcement authorities. This can take time and unnecessary delays can lead to Americans' losing their jobs as companies falter.**

    What steps is the Department taking to cooperate with foreign antitrust authorities and to ensure that companies receive timely review of their business dealings and are not subject to unnecessary delays?

Response: The Department of Justice shares the concern that American companies be treated fairly abroad, and that foreign enforcers do not use antitrust law unfairly as a means to protect their local industries at the expense of American companies. To achieve these goals, the Department actively works to strengthen its relationships with foreign antitrust agencies. In order to minimize the risk of divergent outcomes in particular investigations, the Department's Antitrust Division engages on individual enforcement matters at all levels—staff attorneys, economists and Division leadership—with its counterparts in foreign agencies on both substance and procedure to pursue timely, accurate, and responsible enforcement decisions. The United States is party to eight bilateral cooperation agreements, with Australia, Brazil, Canada, the European Union (EU), Germany, Israel, Mexico, and Japan (copies of the agreements can be found at the following website: www.usdoj.gov/atr/public/international/int_arrangements.htm). Despite certain differences in our respective antitrust laws, the Department has almost always reached similar results as its counterparts when they have fully engaged with us on the analysis of a particular enforcement matter.

In addition, the Department promotes convergence at the bilateral level through consultations on a wide range of antitrust policy matters. The Department (together with the Federal Trade Commission) meets regularly with counterparts from the European Union, Canada, the United Kingdom, Japan, Mexico, and South Korea and has close informal ties with the antitrust authorities of many other countries, including China, India, and Russia. The Department has participated in informal working groups with foreign antitrust agencies on merger, unilateral conduct, and intellectual property matters. These working groups have held meetings and videoconferences to compare approaches and to bring our policies into greater conformity. Also, since the early 1990s the Department has worked bilaterally with new antitrust agencies around the world in the context of technical cooperation programs, in which we provide advice based on our own experience on issues ranging from standard antitrust analysis to agency administration and law enforcement investigative techniques.

The Department has worked for years to encourage other nations to base their antitrust enforcement on sound economic analysis and evenhandedness. To promote these principles and to strengthen its bilateral relationships with foreign antitrust authorities, the Department has been very active in two major international organizations, the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).

The ICN—which in eight years has grown from 15 founding members into a global network of 107 members from 96 jurisdictions—provides an opportunity for senior antitrust officials and non-governmental advisors from developed and developing countries to work together to achieve practical improvements in international antitrust enforcement. Through its Eight Guiding Principles and 13 Recommended Practices for Merger Notification and Review Procedures, the Merger Working Group, which is chaired by the Department of Justice, has brought much needed procedural coherence to multi-jurisdictional merger review. Scores of jurisdictions have made or proposed changes that would bring their merger regimes into closer conformity with the Recommended Practices. Under the Department's leadership, the ICN Merger Working Group has also negotiated, and the ICN has adopted, six Recommended Practices for Substantive Merger Review, which cover much of the basic analytical content of

merger review. These Recommended Practices are bringing increased coherence to merger analysis around the world.

The Department has also been active for many years in the OECD, which provides a setting where its members seek answers to common problems, identify best practices, and coordinate antitrust policies. The OECD's Competition Committee and the Committee's two working groups—one of which the Assistant Attorney General for Antitrust currently chairs—are important venues for promoting sound convergence with respect to both antitrust policy and process.

The Department continues to be a global leader in the pursuit of convergence in antitrust analysis and is actively working to ensure that American companies receive objective, principled, and timely review of the competitive implications of their business dealings and are not subject to unnecessary delays.

Assault Weapons:

13. **Mandated by the Brady Handgun Violence Prevention Act of 1993 and launched by the FBI on November 30, 1998, the National Instant Criminal Background Check System (NICS) is used by Federal Firearms Licensees (FFLs) to instantly determine whether a prospective buyer is eligible to buy firearms or explosives. Before ringing up the sale, cashiers call in a check to the FBI to ensure that each customer does not have a criminal record or isn't otherwise ineligible to make a purchase. More than 100 million such checks have been made in the last decade, leading to more than 700,000 denials.**

    a. **What additional resources would be needed by the DOJ and the NICS if Congress decided to re-regulate assault weapons? What impact would closing the gun-show loophole have on the number of checks done by the FBI and the NICS?**

Response: Based on experience, if assault weapons are re-regulated, we would expect that the number of individuals attempting to acquire such firearms would likely increase significantly in the months before the legislation takes effect, creating a concomitant increase in the number of firearm background checks processed during that period. The extent and duration of the additional NICS workload will depend upon the nature of the regulation and the period of time over which it is phased in or otherwise implemented. Without knowing those variables, we cannot estimate the amount of additional resources NICS will require to ensure that firearm background checks continue to be processed within the required "three business day" time frame. It is fair to predict, however, that additional staffing requirements will be significant, if perhaps temporary.

The Department does not have access to reliable information concerning the number of firearms sold at gun shows by those who do not possess a Federal Firearms License. As a result, we cannot predict how many additional firearm background checks would be processed by NICS if the gun show loophole is closed. However, we believe there would be a noticeable increase, and unlike the increase associated with re-regulating assault weapons, it would not be temporary.

b. What regulatory or policy changes can be made to the NICS system, that would not require congressional action, that would ensure that someone like Major Nadal Hasan cannot purchase a firearm?

Response: The Federal criteria for prohibiting the possession or receipt of a firearm are established by statute (18 U.S.C. § 922(g) and (n)). Consequently, any changes to the criteria for denying a firearm purchase or transfer must be effected by legislation, not by policy or regulatory changes. A person who does not meet any of the Federal or State firearms disqualifying criteria would not be prohibited from receiving, purchasing, or possessing a firearm, and so far as we know, none of those criteria applied to Major Hasan.

c. How is information entered into the NICS system and how often is it audited to ensure its accuracy? If inaccuracies are found, how quickly is that information corrected and is it still possible to purchase a firearm if there are inaccuracies in the NICS system?

Response: The National Instant Criminal Background Check System (NICS) checks the records of three databases: the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. The records contained in these databases are entered by various Federal, state, local, and tribal departments and agencies. The frequency of record submissions varies from real-time to quarterly. The FBI's Criminal Justice Information Services (CJIS) Division serves as the custodian of the information submitted by these agencies.

The CJIS Division conducts a triennial review of the NCIC, the III, and the NICS Index, conducting random sampling of NICS Index submissions from outside entities during the other two years. As part of this review, CJIS conducts on-site audits at the states' central records repositories, examining data quality, policies, and procedures. When inaccuracies are found, CJIS asks the submitting agency to correct the information as soon as practicable; the time frame in which this correction is accomplished varies by agency (information submitted by the FBI can be corrected immediately because the FBI databases are housed in the CJIS Division).

In addition to FBI review, participating agencies are asked to conduct self audits, which the importance of accuracy and completeness is emphasized. For example, the III Standards For Participation and the National Fingerprint File Qualification requirements both advise that record accuracy and completeness are of primary importance and are to be maintained at the highest levels possible.

Persons who are denied the ability to purchase a firearm based upon what they believe to be inaccurate or incomplete records contained within one of the databases accessed by NICS are able to challenge that denial in accordance with procedures contained within 28 C.F.R. § 25.10. Those procedures are available to prospective purchasers at the point of sale and include multiple methods by which inaccurate or incomplete records can be corrected or completed so that the denied transaction and/or future transactions are not affected by the errors or omissions.

MAIG Blueprint Memo:

14. **The Washington Post reported on October 2nd that the bi-partisan coalition of Mayors Against Illegal Guns sent a memorandum to the Obama Administration with 40 recommendations to better enforce existing gun laws. In addition, I sent you a letter on October 15th urging you to examine and adopt these recommendations. Among other things, these recommendations urge the federal government to share critical information with federal, state, and local law enforcement to prevent guns from ending up in the hands of terrorists and dangerous criminals.**

    The response to my October 15th letter was insufficient. Please describe how the Justice Department is reviewing the MAIG recommendations and which recommendations you expect will be adopted.

Response: The Mayors Against Illegal Guns publication is both thorough and thoughtful. It has been provided to policy-makers and other senior officials throughout the Department. In addition, our Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is in receipt of the recommendations. The Department is engaged in a comprehensive review of its firearms enforcement efforts and is taking into consideration a broad spectrum of ideas and recommendations, including those proposed by the Mayors. At this time, it is premature to comment on what recommendations may be adopted.

MATCH Act:

15. **On September 17th, I along with Senator Boxer introduced The Matching Arson Through Criminal History (MATCH) Act. The bill would create a national arson registry, requiring convicted arsonists to report where they live, work, and go to school. It is the Senate companion to H.R. 1759, introduced in the House of Representatives by Representatives Mary Bono Mack (R-Palm Springs) and Adam Schiff (D-Pasadena).**

    It is my understanding that the Department of Justice has concerns with the bill, specifically how the FBI and ATF will work to implement the legislation. I have been told that the formal views on the legislation are forthcoming. Please describe those concerns in writing so that we might be able to make the necessary changes to the legislation and enact it into law.

Response: The Department is reviewing this legislation and would appreciate the opportunity to work with the Committee about any concerns we may have.

Miranda:

16. **During your testimony, you explained that soldiers and Department of Justice employees are not regularly giving Miranda warnings to persons caught on the**

battlefield; however, you acknowledged that any decision on administering such warnings would be made on a case-by-case basis.

a. Can you describe the criteria that are being used by the Department of Justice and how FBI agents are being instructed to proceed in the event that a high-value person is captured on the battlefield?

Response: The primary mission of our nation's military, in times of armed conflict, is to capture or engage the enemy; it is not evidence collection or law enforcement. *Miranda* warnings are never given by our soldiers on the battlefield or in any other circumstance where they would have an adverse impact on military or intelligence operations.

Section 1040 of the FY 2010 NDAA prohibits members of the U.S. Armed Forces, officials or employees of the Department of Defense or a component of the intelligence community, absent a court order requiring the reading of such statements, from reading *Miranda* warnings to foreign nationals who are captured or detained outside the United States as an enemy belligerent and are in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility. (This prohibition does not apply to officials or employees of the Department of Justice.) Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are only given in a very small number of cases overseas after an individual has been removed from the battlefield, and only when consistent with military and intelligence needs. It is a strategy that is consistent with longstanding practice under prior administrations to use all instruments of national power to defeat our adversaries. This includes the prosecution of some terrorists in Article III courts. U.S. law enforcement personnel have, in a small handful of situations, provided *Miranda* warnings prior to questioning detainees who were potential criminal defendants. The warnings are not authorized if providing them will hinder our counterterrorism efforts, or if doing so would violate the restrictions in section 1040 of the FY 2010 NDAA. Before warnings are given, an assessment is made based on numerous factors, including the effect the warnings could have on any ongoing or future intelligence interviews of the subject. This assessment is made on a case-by-case basis by experienced career professionals in consultation with military and intelligence officials.

b. In the 1% of cases where detainees have been "mirandized", can you describe the circumstances and what impact you believe it will have on the prosecution of those individuals?

Response: Over the course of the last two decades, a number of individuals who have been apprehended overseas and *Mirandized* have been successfully prosecuted for terrorism offenses. For example, *Mirandized* statements played a critical role in winning convictions and lengthy sentences in the 1993 World Trade Center bombing case and the plot to bomb U.S. airlines (Ramzi Ahmed Yousef sentenced to 240 years in prison, Abdul Hakim Murad and Wali Khan Amin Shah sentenced to life imprisonment); the 1998 East African embassy bombing case (Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-Owhali, Wadih El-Hage and Khalfan Khamis Mohamed sentenced to life imprisonment); and the 1985 hijacking of Royal Jordanian Flight 402 (Fawaz Yunis sentenced to 30 years in prison). John Walker Lindh, a U.S. citizen who was captured in Afghanistan, interrogated by U.S. forces, and later *Mirandized* by the FBI,

was prosecuted in federal court and sentenced to 20 years in prison in connection with his support of the Taliban. There have also been numerous successful terrorism prosecutions of individuals apprehended in the United States who were *Mirandized* after they were arrested, such as Zacarias Moussaoui, who was sentenced to life imprisonment after pleading guilty for conspiring to commit terrorist attacks, and Ahmed Rassam, who was sentenced to 22 years for conspiring to bomb Los Angeles International Airport.

DEA Operations in Afghanistan:

17. As part of your testimony before the Committee on November 18, 2009 you said:

Three weeks ago, I had the honor of joining the President at Dover Air Force Base for the dignified transfer of the remains of eighteen Americans, including three DEA agents, who lost their lives to the war in Afghanistan. The brave soldiers and agents carried home on that plane gave their lives to defend this country and its values, and we owe it to them to do everything we can to carry on the work for which they sacrificed.

I agree that we should do everything we can to carry on their work. Just five days prior to the agents and soldiers perishing in that counternarcotics mission in Afghanistan, on October 21, 2009, as the Chairman of the Senate Caucus on International Control I held a hearing entitled, "U.S. Counternarcotics Strategy in Afghanistan", co-chaired by Senator Charles Grassley. At the hearing we learned that additional resources are needed for the DOJ/DEA effort in Afghanistan. The specific recommendations made at the hearing by Michael Braun, retired DEA Chief of Operations, were as follows:

The current number of Foreign-deployed Advisory and Support Teams (FASTs) dedicated to Afghanistan is three, which only allows for the deployment of one 11-man team at a time in Afghanistan. I believe that five to seven additional FASTs would provide the DEA with the flexibility and nimbleness needed to effectively conduct counter narco-terrorism operations throughout Afghanistan, and extend the Rule of Law to the farthest reaches of the country. Virtually all counter narco-terrorism operations are now conducted by the DEA jointly with the U.S. Military Special Forces, Afghan Army Commandos and the Counter Narcotics Police of Afghanistan; however, the DEA does not have enough FASTs to sustain the current and anticipated future operations tempo in Afghanistan.

The DEA finds it extraordinarily difficult to travel to most areas of Afghanistan without the support of DOD and/or DOS helicopter assets. The Agency's counter narco-terrorism operations and vitally important intelligence gathering missions are routinely delayed, often for several days, because the DEA lacks its own organic helicopter assets in Afghanistan. UH-60 Blackhawk and CH-47 Chinook helicopters are the safest and most reliable airframes needed to transport DEA Special Agents, and their U.S.

Special Forces and Afghan colleagues into the remote mountainous terrain where FASTs most often find themselves working. Accordingly, the DEA needs fifteen UH-60 Blackhawk and three CH-47 Chinook helicopters to support its operations in Afghanistan; however, the Agency sorely lacks the funding for such an acquisition. The DEA also requires the funding to hire and train the aircrews and mechanics, as well as the funding for operations and maintenance (O&M) and facilities for the airframes.
I believe that it is clear the Taliban is gaining strength and revenue through the narcotics trade in Afghanistan. Our resource allocation in Afghanistan should reflect a comprehensive approach to winning the fight and that cannot be done without providing the tools needed for successful counternarcotics operations.

a. Do you agree that there should be an increase in FASTs by five to seven teams?

Response: Yes, Mr. Braun testified that there were three FASTs dedicated to Afghanistan. In addition to those three teams, two additional FASTs were added for the transit and source zone Western hemisphere operations during FY 2009. While additional FASTs would always be a welcome addition, we believe DEA can be effective in Afghanistan with the resources we have. The most significant limiting factor we face in Afghanistan is helicopter lift. DEA must have adequate helicopter lift capability that is night capable and flown by veteran pilots.

b. Do you agree that DEA should be provided with 15 Blackhawk and 3 Chinook helicopters in order to effectively and safely carry out their mission in Afghanistan?

Response: While DEA still firmly believes that the Blackhawk helicopter is a suitable platform for operations in Afghanistan, a recent evaluation of operations in Afghanistan and current budgetary issues leads DEA and its Aviation Division to the conclusion that the development of a helicopter operation utilizing these assets is not feasible. Costs for the initial purchase of such assets and construction of an infrastructure would be extensive, and the ongoing costs to maintain such an operation are not likely to be sustainable. At present, DEA lacks the necessary personnel and resources to effectively build and manage such a program.

Despite these issues, helicopter support in Afghanistan is still a much needed commodity. There are organizations currently in Afghanistan, to include the United States military and the Department of State, who are willing and able to utilize airframes such as the Blackhawk in support of DEA operations. If provided with the necessary resources, this support could be provided to DEA on a reimbursable basis.

Narco-terrorism Prosecutions:

18. Under the federal narco-terrorism statute 21 U.S.C. § 960a, which was enacted in March of 2006, several high-value narco-terrorists have been removed from Afghanistan to face justice in the United States. This federal narco-terrorism statute has been tested and proven to be an effective tool in a court of law. What concerns me is that there are very limited resources

dedicated full time to the investigation of 21 U.S.C. § 960a narco-terrorism cases and extraterritorial narcotics cases under 21 U.S.C. § 959. While additional FAST personnel and equipment will provide the operational "end game" capability of arresting high value narcotics traffickers and narco-terrorists worldwide, there is an equally important need for agents dedicated full time to those complex investigations and subsequent preparation for trial in the United States of the violators charged with 21 USC 959 and 960a. This will provide for judicial "end game" capability.

a. Do you agree that additional personnel should be dedicated to these types of cases?

Response: The Drug Enforcement Administration has significant resources directed toward investigating high-level foreign-based drug traffickers and terrorists impacting the United States. Resource needs, to include personnel levels, are consistently evaluated, and any identified resource needs are submitted as part of the Administration's budget request.

The DEA Special Operations Division (SOD) has two domestic field enforcement groups with the mission of investigating high-level foreign-based drug traffickers and terrorists impacting the United States. The groups primarily conduct joint investigations with DEA Foreign Offices working towards U.S.-based prosecutions in coordination with SOD's Counter-Narcoterrorism Operations Center (CNTOC), DEA's central hub for addressing the increase in narco-terrorism related issues and investigations. The CNTOC's primary mission is to coordinate all DEA investigations and intelligence linked to counter-terrorism and narco-terrorism; targeting, investigating, and extraditing individuals who are involved with drug proceeds that finance terror; and coordinating terrorism-related information with the FBI and other relevant United States Government agencies as appropriate.

The Bilateral Investigations Unit (BIU) primarily pursues cases under 21 U.S.C. § 959, and has actively investigated major Mexican drug traffickers in cooperation with the DEA Mexico City Country Office and the Government of Mexico. Since its formation in 2002, the BIU has realized numerous successes including the indictments of Ismael Zambada-Garcia and two key lieutenants; Ignacio Coronel Villarreal; and the late Arturo Beltran Leyva and Hector Beltran Leyva. Additionally, the BIU indicted seventeen Gulf Cartel members under Operation Dos Equis.

In 2007, the DEA established the Terrorism Investigations Unit, a second enforcement group that works within SOD. Under the authority of 21 U.S.C. § 960a, this Unit investigates international criminal organizations that use illicit drug proceeds to promote and finance foreign terrorist organizations and acts of terror. These DEA agents have also produced impressive case results such as the arrest of alleged arms trafficker Viktor Bout and his associate Andrei Smulian; the arrest of arms trafficker and terrorist Monzer Al Kassar; the capture of Haji Bashir Noorzai, allegedly Afghanistan's biggest drug kingpin with ties to the Taliban and allegedly the leader of one of the largest drug trafficking organizations in the Central Asia region; and the capture of Haji Baz Mohammad, an Afghan heroin kingpin who was the first 21 U.S.C. § 960a defendant ever extradited to the United States from Afghanistan.

During December 2009, the investigative efforts of the Terrorism Investigations Unit resulted in Federal prosecutors charging three West Africans with plotting to transport tons of cocaine across Africa in concert with Al Qaeda, using 21 U.S.C. § 960a for the first time against that group. This investigation highlights the growing trend of ties between drug traffickers and Al Qaeda as the terrorist group seeks to finance its operations in Africa and elsewhere.

These two domestic DEA enforcement groups are comprised of twenty-six Special Agents. These groups, working in conjunction with the CNTOC, DEA Foreign Offices and foreign counterpart agencies, have a proven track record for consistently producing some of the most significant investigative results in law enforcement, effectively maximizing all resources provided.

QUESTIONS POSED BY SENATOR FEINGOLD

Patriot Act

19. Senator Wyden, Senator Durbin and I sent you a letter on November 17, 2009, reiterating our request that certain limited information about the implementation of Section 215 of the Patriot Act be declassified. That letter is attached. Please respond promptly, or indicate when we can expect a response.

Response: After extensive coordination with the Intelligence Community regarding the declassification requests contained in your letter of June 24, 2009 (co-signed by Senators Wyden, Whitehouse and Leahy) and reiterated in your November 17, 2009 letter (co-signed by Senators Wyden and Durbin), the Department of Justice and the Office of the Director of National Intelligence sent a response on January 5, 2010. We regret the delay in responding.

Office of Legal Counsel White Memos:

20. In your October 29, 2009, responses to Questions for the Record from the June 17, 2009, Department of Justice Oversight hearing, you stated that there was an ongoing review of whether to withdraw the January 2006 White Paper and other classified Office of Legal Counsel (OLC) memos providing legal justification for the NSA's warrantless wiretapping program. What is the current status of that review? When will it be complete? Has anyone at the Department made an affirmative decision to leave those opinions in effect?

Response: The Department is still conducting its review, and will work with you and your staff to provide a better sense of the timing of the completion of the review. No one in the Department has made any affirmative decision about the treatment of the OLC opinions.

Post-Conviction DNA Testing

21. Last month, you ordered a review of the Bush administration policy encouraging prosecutors to require federal criminal defendants to waive their right to post-conviction DNA testing when they entered a guilty plea. These waivers prevent federal defendants who have pleaded guilty from ever requesting DNA testing, even if new evidence emerges. Can you provide a status update on the review of this policy? Has it been completed, and if not when do you expect that it will be?

Response: The Department continues to examine its DNA waiver policy, but has not yet finished its review. We expect the review will be completed in 2010.

OLC Reporting Act

22. Last year I introduced the OLC Reporting Act, S. 3501 (110th Cong.), which would require DOJ to report to Congress when OLC issues an authoritative legal opinion concluding that the Executive Branch is not bound by a statute. The legislation has the support of former officials from both Democratic and Republican administrations.

a. On November 14, 2008, then-Attorney General Michael Mukasey sent a letter expressing concerns about the bill. Does that letter still represent the policy of the Department of Justice?

b. Will the Department support the legislation?

Response a-b: The Department shares the goal of promoting greater transparency in government. Consistent with that objective, in the past year we have released over forty OLC opinions and other memoranda. We are reviewing the OLC Reporting Act and look forward to working with the Committee further on that proposed legislation.

International Court of Justice

23. On October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent you and Secretary Clinton a letter seeking your recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input. Please respond to our letter (attached), or indicate when we can expect a response.

Response: The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

QUESTION POSED BY SENATOR SCHUMER

Guns and Fort Hood:

24. The Tiahrt Amendment 24-hour background check destruction rule prevented the FBI from keeping any record of Hasan's gun purchase for more than 24 hours. I asked about this issue at the hearing, and I hope that you can expand upon it.

a. Will the Department of Justice remove the Tiahrt Amendment 24-hour background check destruction requirement from its FY-2011 budget to allow the FBI to keep records of guns purchased by subjects of terrorist inquiries like Major Hasan?

Response: The Department is subject to a statutory requirement, 18 U.S.C. §922(t)(2), which requires the National Instant Criminal Background Check System (NICS) to "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer" for all transfers that would not violate 922(g), 922(n), or state law. In addition, the Firearms Owners' Protection Act prohibits use of the NICS to establish any system "for the registration of firearms, firearm owners, or firearms transactions or dispositions," except with respect to prohibited persons.

To ensure compliance with these statutory mandates, in 2004 the Department promulgated a regulation that requires destruction of certain information within 24 hours of approved, or "proceeded" transactions. *See* 69 Fed. Reg. 43892 (July 23, 2004) (reducing time period for information kept in NICS audit log for certain transactions from 90 days to 24 hours). That same year, Congress included an appropriations restriction that prohibited the Department from expending appropriated funds to establish a longer retention period. Similar restrictions have been kept in place for each succeeding fiscal year. In addition, 28 CFR §25.9(b)(2) imposes restrictions on the use of information concerning proceeded transactions that has yet to be destroyed. Such information can only be used for purposes related to NICS performance unless, on its face or in conjunction with other information, it demonstrates a violation or potential violation of law. The regulation does not permit routine dissemination of proceed information for law enforcement purposes. In short, even if the appropriations restriction was lifted, the FBI would continue to be constrained by the statutory requirements identified above. Additionally, if the retained information was intended to be available for law enforcement use, additional regulatory changes would be required.

That said, we note that the NICS searches several databases, one of which is the National Crime Information Center database, which includes the Known or Appropriately Suspected Terrorist (KST) file. If an individual included in the KST file attempts to receive a firearm from a Federal Firearms Licensee (FFL), a permanent record of the check is maintained by the FBI's Terrorist Screening Operations Unit and can be shared as appropriate. The attempted firearm purchase will not be placed in a "proceed" status until the NICS Section communicates with the FBI case agent to ensure that the case agent is not aware of factors that would prevent the KST from legally receiving a firearm.

QUESTIONS POSED BY SENATOR WHITEHOUSE

Electronic Prescriptions:

25. More than five years after the initial draft rule was proposed, I understand that a final rule permitting the electronic prescription of controlled substances, drafted by the Drug Enforcement and Administration and the Department of Health and Human Services, is under review at the Office of Management and Budget. When do you expect the final rule to be promulgated?

Response: The Drug Enforcement Administration's (DEA) final rule "Electronic Prescriptions for Controlled Substances" was accepted for review by the Office of Management and Budget on October 29, 2009. Pursuant to Executive Order 12866, OMB has 90 calendar days within which to notify DEA of its review of the rule, although the Executive Order permits an extension of that review period at the request of the agency head and written approval by the Director of OMB.

As part of its review, OMB circulated this rule to interested federal agencies. DEA has received comments from the Department of Health and Human Services, the Executive Office of the President, the Office of Management and Budget, and the Department of Veterans Affairs. DEA has reviewed and responded to all interagency comments as they were received.

While DEA cannot predict when this final rule will be published, please be assured that DEA will continue to work cooperatively with OMB, the Department of Health and Human Services, and other interested federal agencies to ensure that conclusion of OMB review occurs as quickly as possible. Once OMB concludes review of this rule, DEA anticipates that the rule would be published within a month.

Director for Executive Office for the U.S Trustee:

26. You have yet to appoint a Director for the Executive Office for U.S. Trustees. The U.S. Trustee Program is critical to the administration of bankruptcy cases nationwide, and the Director of the Executive Office yields considerable influence. It is my understanding that this position has historically been filled with a political appointee selected by the Attorney General. I am concerned that you have yet to replace Bush administration holdover Clifford J. White, III. Where are you in the process of selecting a new Director? Do you plan to make an appointment this year?

Response: There are no plans to replace to replace the current Director, Clifford J. White, III. As you know, the position of the Director of the Executive Office for U.S. Trustees is a General SES position that may be filled by a career or noncareer employee, at the discretion of the Attorney General. Mr. White has been in the Federal service for nearly 30 years and in the U.S. Trustees program since 1991, where he has served in both a field office and the main office, as Deputy Director, and as Director. He is a recipient of the Presidential Rank Award, and we have every confidence in his leadership.

Criminal Justice Reinvestment Act, S. 2772:

27. **On November 16, I introduced the Criminal Justice Reinvestment Act, S. 2772, which will help state and local governments reduce spending on corrections, control growth in the prison and jail populations, and increase public safety. Most policymakers have limited access to detailed, data-driven explanations about changes in crime, arrests, convictions, and prison and jail population growth, and this legislation will provide them with the resources to undergo a thorough analysis of those issues, and to create and implement policy options to respond to them.**

In your answer to a question by Senator Franken, you appeared to support this approach:

"I think we should ask ourselves – we should always be asking ourselves is the criminal justice system that we have in place truly effective and my thought is that we should have a data-driven analysis to see exactly who was in jail, are they in jail for appropriate amounts of time, is the – the amount of time they spend – spend in jail a deterrent, does it have an impact on the recidivism rate."

What do you believe is the benefit of analyzing data and creating policy based on analytical research? Will the Department of Justice support the Criminal Justice Reinvestment Act?

Response: This Administration has placed a very high value on evidence-based programming, and the Department is fully committed to advancing that cause. Evidence-based programs and practices are those that have demonstrated their effectiveness through rigorous evaluation. Our Office of Justice Programs (OJP) plays a key role in the Department's effort to better use evidence to drive programming, practices, and decision making in criminal and juvenile justice.

Under the leadership of Assistant Attorney General Laurie O. Robinson, OJP is improving the quantity and quality of evidence that is generated through OJP-sponsored activities. This includes generating evidence through the progression from innovative to evidence-based practices. It also includes a greater investment in highly rigorous research and evaluation.

OJP is improving the management of knowledge and integration of evidence to inform decisions within OJP and in the field. This will include the development of evidence integration teams that will draw together information, research, and expertise on specific topics to share internally and externally.

OJP is also improving the translation of evidence into practice through improved communication strategies and training. Even as organizations have identified evidence based practices and programs over the years, there are a number of hurdles to implementing such practices. Information about effective practices must be distilled, accessible, and comprehensible. This is one reason why OJP is developing a "what works" resource center.

Through the resource center, criminal justice practitioners will be able to learn about successful programs, including related research and evaluation results.

The Department is reviewing this legislation, but has not taken an official position on the bill. We would welcome the opportunity to work with the Committee on the legislation in the future.

QUESTIONS POSED BY SENATOR SESSIONS

Classified Information Protection Act (CIPA):

28. Under the Classified Information Protection Act (CIPA), the government may pursue an interlocutory appeal from orders "authorizing the disclosure of classified information . . . or refusing a protective order sought by the United States to prevent the disclosure of classified information." 18 U.S.C. App. § 7(a). In *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003), the Fourth Circuit held CIPA did not authorize interlocutory appeals from orders related to the "pretrial disclosure of classified information to the defendant or his attorneys." *Id.* at 514.

a. Do you agree that under the *Moussaoui* decision, the government may not seek immediate review of certain decisions authorizing the pretrial disclosure of classified information? If not, please explain your answer.

Response: In cases involving CIPA within the Fourth Circuit, under the *Moussaoui* decision, appellate courts lack jurisdiction under CIPA § 7 to entertain an interlocutory appeal by the United States of a district court order allowing a criminal defendant to depose a witness who may possess classified information.

b. Senator Kyl has offered legislation, including an amendment in Committee, to amend CIPA to address the deficiencies in CIPA. Given your decision to try Khalid Sheikh Mohammed and others in federal court, do you support legislation to address gaps in CIPA that could lead to disclosure of classified information?

Response: While CIPA has generally worked well in both protecting classified information and ensuring fair trials, there may be certain portions which could be usefully updated and clarified. The Administration has not yet taken a position on possible legislation to improve CIPA.

c. At the November 18, 2009 hearing, you stated that the "the standards recently adopted by the Congress to govern the use of classified information in military commissions are based on -- derived from the very CIPA rules that we would use in federal court." Do you agree that the classified information procedures recently enacted as part of the National Defense Authorization Act have procedural improvements beyond what is currently available in civilian criminal trials under CIPA?

d. For example, do you agree that the classified information procedures enacted as part of this year's National Defense Authorization Act, specifically those to be codified at 10 U.S.C. § 950d(c), contain what has been called for years a *Moussaoui*-fix to allow interlocutory appeals from ordinary discovery orders and other orders that could reveal classified information? For ease of reference, that language reads: *"(c) Scope of Appeal Right With Respect to*

Classified Information- The United States has the right to appeal under paragraph (4) of subsection (a) whenever the military judge enters an order or ruling that would require the disclosure of classified information, without regard to whether the order or ruling appealed from was entered under this chapter, another provision of law, a rule, or otherwise. Any such appeal may embrace any preceding order, ruling, or reasoning constituting the basis of the order or ruling that would authorize such disclosure."

e. Do you agree that CIPA lacks the *Moussaoui*-fix language that was recently enacted for military commission trials in 10 U.S.C. § 950d(c)?

Response to c-e: The classified information provisions of the Military Commissions Act of 2009 were based on CIPA, but with revisions to take into account lessons learned in terrorism cases in federal court. The following is a list of some of the key differences between the MCA of 2009 and CIPA:

- Ex Parte Pretrial Conference. The MCA includes an explicit provision allowing a military commissions judge to conduct an ex parte pretrial conference with either party to address potential classified information issues that may arise in connection with the case. Although federal judges applying CIPA routinely conduct such conferences, they are not expressly addressed in the statute.

- Protective Orders. The MCA requires a military commissions judge to issue an order to protect against the disclosure of classified information produced in discovery *or* otherwise provided to, or obtained by, any accused. This provides protection for classified material that the defense may have obtained outside the formal discovery process. While CIPA only requires the issuance of a protective order with respect to classified documents provided in discovery, some federal court judges have similarly issued protective orders covering the use at trial of classified information acquired by the defense outside the discovery process.

- Discovery. The MCA authorizes the military judge to order alternatives to full disclosure of *any* form of classified information. Although federal judges have crafted numerous ways to protect all types of classified information, CIPA only explicitly authorizes the judge to order alternatives to disclosure of classified *documents*. The bill also provides a clear standard ("non-cumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing") for determining whether defense access to classified information should be granted. This standard is drawn from case law addressing classified evidence issues but is not found in the text of CIPA itself.

- Declarations. Under the MCA, the prosecution must provide a declaration invoking a privilege to protect classified information and setting forth the damage to the national security that the disclosure or access to the classified information reasonably could be expected to cause when seeking an alternative to full disclosure. By comparison, CIPA does not specify what must be provided in

support of the government's request for relief from disclosure of classified information. This is consistent with CIPA practice -- in which the government regularly provides a declaration setting forth the possible damage to national security if disclosure is ordered -- but is not explicitly required by the CIPA statute.

- Use of Classified Information at Trial. The MCA bill provides explicit authority for the prosecution to protect the classified information it seeks to introduce at trial through the use of alternatives to full disclosure and protective orders. Although federal courts have routinely allowed the use of alternatives at trial, the CIPA statute does not provide the explicit authority to do so. The MCA also provides a standard for the judge in determining whether to order the disclosure of classified information for use at trial ("relevant and necessary to an element of the offense or a legally cognizable defense and . . . otherwise admissible in evidence"). This standard is drawn from case law addressing classified evidence issues but is not found in the text of CIPA itself.

- Interlocutory Appeal Right by U.S. The MCA provides the U.S. with authority to seek interlocutory appeal of any order or decision that forces the disclosure of classified information, regardless of whether the order appealed from was entered under a specific provision governing classified information, or any other rule or provision of law. By comparison, CIPA only provides for interlocutory appeal from certain decisions or orders issued pursuant to CIPA.

- Closure of the Courtroom. The MCA explicitly allows the judge to order closure of the courtroom to protect evidence "whose disclosure could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities." (§ 949d(a)(2)(c) of S. 1390.) Although CIPA does not contain a provision explicitly allowing such closures, the courtroom may be closed to protect classified information in federal court provided the relevant constitutional standard is met.

f. Were you aware of this difference (i.e., the *Moussaoui*-fix) between CIPA and the classified information protections recently enacted as to military commissions when you testified: "the standards recently adopted by the Congress to govern the use of classified information in military commissions are based on -- derived from the very CIPA rules that we would use in federal court[?]"

g. Do you believe classified information should receive greater protection in military commission trials through the safeguard of the *Moussaoui*-fix, or should the civilian CIPA be amended to provide those same greater procedural protections? As part of your answer, please explain which interlocutory appeals standard provides a greater safeguard in your opinion for classified information.

h. Do you agree that the *Moussaoui*-fix described above and incorporated into military commissions trials via 10 U.S.C. § 950d(c) could not have been derived from "the very CIPA rules that we would use in federal court" because the federal CIPA statute does not contain the same *Moussaoui*-fix language?

Response to f-h: The classified information provisions of the MCA were based on CIPA, but with revisions to reflect lessons learned in terrorism prosecutions in federal court. The Department of Justice made this clear in a July 23, 2009 letter to Senators Levin and McCain in connection with its efforts to work with the Senate to reform the military commissions. The Administration has not yet taken a position on possible legislation to improve CIPA. There are respects in which the classified information provisions of the MCA improve upon those in CIPA, as noted above, including with respect to the issue of interlocutory appeals.

Protocol to detain Osama bin Laden and Guantanamo Detainees:

29. Mr. Attorney General, during your testimony Senator Graham asked where Osama bin Laden would be tried if he were captured tomorrow. You stated: "Well, we'd go through our protocol. And we'd make the determination about where he should appropriately be tried." The protocol you referenced "applies to detainees held at Guantanamo Bay." Please answer each question separately.

a. Does the July 20, 2009 protocol govern the disposition of terrorists not yet captured?

Response: The protocol governs the forum decisions for prosecution of individuals who are currently detained at Guantanamo Bay.

b. If not, please explain why you told Senator Graham that if Osama bin Laden were captured you would "go through [your] protocol" to decide where to try him.

c. Under the protocol you referenced, "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court." Regardless of your answers to (a) and (b), will there be a presumption that Osama bin Laden will be tried in an Article III court?

Response: If Osama bin Laden were captured, a decision as to how to proceed would be made at that time in consultation with the President's full national security team.

Current # of convicted terrorists currently in BOP:

30. In your opening testimony, you stated that "there are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons custody." In response to my question, you stated without reservation that you would provide the details regarding these convictions.

Please provide the details regarding each of these convictions, including: (a) the names and dates of the individuals convicted; (b) the offense(s) with which they were charged; (c) the offense(s) for which they were convicted; (d) the sentences imposed; and (e) the year the criminal case was instituted via indictment.

Response: The Department is working to develop information responsive to this request and will advise the Committee when it becomes available.

Health Care Fraud Prevention and HEAT:

31. **In your written testimony, you highlighted the Department's current efforts to combat healthcare fraud, including the creation of the Health Care Fraud Prevention and Enforcement Action Team ("HEAT"), announced in May.**

    a. **You noted that Department's civil and criminal enforcement efforts "have returned more than $15 billion to the Federal government, of which $13.1 billion went back to the Medicare Trust Fund." Please provide the time period over which these funds were recovered.**

    b. **Please specify the dollar amount of the recoveries cited in question (a) above that were recovered after the creation of HEAT?**

    c. **You stated that between 1986 and 2008, the Department has recovered "more than $14.3 billion from fraud that had been committed against Federal health care programs, including Medicare." Does the $14.3 billion you referenced here include the $13.1 billion you referenced earlier in your testimony?**

    d. **You also detailed the number of indictments filed, defendants charged, guilty pleas negotiated, and convictions won "in Strike Force cases alone since the HEAT initiative was announced in May." In how many of these cases did prosecutors initiate investigations after the HEAT initiative was announced in May?**

Response to a-d: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established a national Health Care Fraud and Abuse Control Program (HCFAC or the Program) under the joint direction of the Attorney General and Secretary of the Department of Health and Human Services. Congress designed the HCFAC program to coordinate Federal, state and local law enforcement activities with respect to health care fraud and abuse. Over the twelve-year period of fiscal years 1997 through 2008, combined criminal, civil and administrative enforcement actions have returned more than $15 billion to the Federal government, of which $13.1 billion was transferred to the Medicare Trust Fund. Another $1.27 billion, representing the Federal share of Medicaid fraud recoveries, was transferred to the Centers for Medicare and Medicaid Services during this twelve-year period. These figures are published annually in the

HCFAC Program Report to Congress. HCFAC program accomplishments are not yet available for FY 2009.

The HCFAC program recoveries and transfers cited in question (a) include results from enforcement efforts from the inception of the program in 1997 through the end of fiscal year 2008. Since the HEAT Initiative was announced in May 2009, no recoveries and transfers from the cases indicted as part of the HEAT initiative are included in the overall HCFAC program results referenced in response to question (a). While several defendants indicted in cases filed as part of the HEAT Initiative have pleaded guilty since May 2009, courts have not sentenced any of these defendants as of the current date. Therefore, financial recoveries and transfers as a result of Strike Force cases filed as part of the HEAT initiative will not be included in HCFAC program results to be reported for fiscal year 2009, but instead will be included in HCFAC program results to be reported for fiscal year 2010. In civil cases, recoveries since May 2009 under the False Claims Act are at least $1.5 billion.

To be clear, the $13.1 billion transferred to the Medicare Trust Fund since the HCFAC program's inception in 1997 includes recoveries, fines and restitution that resulted from both civil and criminal matters. The civil recoveries included in the $13.1 billion are also included in the $14.3 billion in settlements and judgments reported by the Department in civil False Claims Act matters alleging health care fraud for the period FY 1986 through FY 2008. Since the Attorney General's testimony, the Department reported an additional $1.6 billion recovered in FY 2009 in False Claims Act matters alleging health care fraud, bringing the total civil FCA recoveries in these matters since FY 1986 to more than $15.9 billion.

The Department's Strike Force case tracking efforts begin with the indictment and/or unsealing of each new case, so we cannot provide specific information or statistical counts for the number of these investigations that were initiated before or after the May 21, 2009 announcement date. Generally, for most Strike Force cases, it has taken about three to four months, on average, from the initial stages of identifying potential targets, to conducting initial investigations, to preparing and presenting evidence to obtain grand jury indictments filed under seal, and to locating and arresting each suspect charged. The HEAT announcement in May included the announcement of Strike Force operations in Detroit and in Houston. Investigations in both cities began prior to the HEAT announcement. These investigations culminated in charges being unsealed in Detroit against 53 defendants in the seven indictments on June 24, and charges being unsealed in Houston against 32 defendants in the seven indictments on July 29. Continuing investigations in ongoing Strike Force cases following the HEAT announcement in both sites led to the filing of superseding indictments charging another defendant in Houston in August and charging three more defendants in Detroit in September. On October 21, the Department announced indictments of another twenty defendants, most of them residing in the Los Angeles area, who were charged in seven cases that had been initiated several months prior. Houston Strike Force prosecutors also unsealed an indictment, a superseding indictment, and a complaint charging six additional defendants in October. On December 15, the Department announced indictments of another 30 defendants in three cities (Brooklyn, NY; Detroit, MI; and Miami, FL) for their alleged roles in schemes to submit more than $61 million in false Medicare claims as part of the continuing operation of the Strike Force. To date, 60 defendants have pleaded guilty and another five defendants have been convicted in four jury trials since the

HEAT announcement. Two jury trials that were conducted last summer, which resulted in conviction of three defendants, involved Strike Force cases investigated and unsealed prior to the HEAT announcement. The two most recent jury trials involved Strike Force cases that were indicted following the HEAT announcement and resulted in jury convictions of a physician in Detroit and a retired nurse in Houston.

AAG for Office of Legal Counsel:

32. **According to recent media reports, the President's nominee for Assistant Attorney General for the Office of Legal Counsel, Professor Dawn E. Johnson, has been involved in hiring decisions for the Office of Legal Counsel. Given that Professor Johnson has not been confirmed, it would be inappropriate for her to participate in hiring decisions. Please advise what role, if any, Professor Johnson has played in the hiring process for prospective nominees, including but not limited to whether she has been consulted in hiring decisions, reviewed resumes or other submissions, interviewed or recommended candidates, or otherwise participated in the process.**

Response: The Attorney General (or the Acting Attorney General, before Attorney General Eric Holder was confirmed) has appointed all of the individuals for the political appointee positions in the Office of Legal Counsel, and the Acting Assistant Attorney General for OLC has made all decisions about who to hire for available civil service positions in that Office. Professor Johnsen's participation in this process has been appropriate and consistent with the past practice of presidential nominees of both parties. Like such other nominees, she was involved in the consideration of candidates for political appointments, such as those persons who would serve as her deputies should she be confirmed. By contrast, with respect to applicants for civil service positions, Professor Johnsen simply forwarded some resumes for attorney positions to the Acting Assistant Attorney General for OLC and occasionally offered her views as to some candidates for those positions who came to her attention and on general attorney staffing issues. Professor Johnsen did not participate in the interviews of any candidates for career positions, nor was she part of the final selection process for any such hires, all of which were made by the Acting Assistant Attorney General.

QUESTIONS POSED BY SENATOR HATCH

CIA Special Prosecutor:

33. **In August, you appointed a Special Prosecutor to review actions of CIA contractors and employees. These cases had already been subjected to a two year review by DOJ career Attorneys working in the Eastern District of Virginia. These Assistant United States Attorneys (AUSA) were assigned to the Detainee Treatment Task Force and with the exception of one case, made determinations that these allegations did not merit federal prosecution for a wide array of reasons. After these decisions were made, the remaining cases were referred back to CIA and handled internally through administrative disciplinary action. This action ranged from demotion, transfer, suspension and termination. This procedure happens regularly in federal agencies when misconduct by government employees does not meet guidelines for federal prosecution but are clearly a violation of agency policy or procedures.**

You may recall that in response to your announcement, I joined with several of my colleagues from both the Senate Judiciary Committee and the Senate Select Committee on Intelligence in sending a letter expressing our concerns on this matter. You promptly responded to that letter. In your response, you cited the central reason for initiating what you are calling a preliminary review was based on recommendations from the DOJ's Office of Professional Responsibility (OPR).

a. Was new evidence developed or provided to OPR that was not previously available to AUSAs assigned to the Detainee Treatment Task Force that supported OPR's recommendation for review?

Response: OPR reviewed no new evidence regarding potential criminal prosecution of individuals involved in interrogations of detainees.

b. If OPR investigates misconduct on the part of DOJ lawyers, under what authority does it have to make recommendations that justify reviewing the conduct and behavior of employees and contractors of the Central Intelligence Agency?

Response: OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR. In this matter, OPR recommended that the Department review the prosecutorial decisions of DOJ attorneys on certain cases involving Central Intelligence Agency employees and contractors relating to interrogations of detainees. OPR recommended that, due to significant developments in the law, the Department determine whether decisions based on certain prior assumptions about the law remained correct.

c. Was there any misconduct on the part of career DOJ prosecutors in the Eastern District of Virginia when they decided not to pursue all but one of these cases criminally?

Response: OPR did not make a finding of misconduct by the Department attorneys who declined prosecution on these cases. OPR recommended that, due to significant developments in the law, the Department determine whether prosecutorial decisions based on certain prior assumptions about the law remained correct.

34. During the over sight hearing, I asked you about the problems of disclosing sources and methods during the trial of Ramzi Yousef. Specifically, what I was discussing was testimony regarding the delivery of a cell phone battery and how it tipped off terrorists that their communications had been compromised. The end result was the disclosure of a source and method and the loss of useful intelligence.

You responded that this was "misinformation" and that it did not occur. Furthermore, you referenced testimony from the East Africa embassies bombing trial that included dates of disclosure of cell phone records during that trials discovery process. You insisted that this disclosure of cell phone records in December 1998 and testimony of these records in March 2001 had no impact on active sources and methods tracking Osama Bin Laden.

However, that is not what my question was asking. What I was referencing was the cell phone battery testimony in the Ramzi Yousef trial. In fact, testimony during this trial did compromise sources and methods and was not "misinformation."

a. Do you still stand by your answer?

Response: The Department has researched this issue. There were actually two trials of Ramzi Yousef. We are not aware of testimony about a cell phone battery at either trial. Likewise, we are not aware of any related compromise of sources and methods during those trials.

b. How do you intend to ensure that sensitive national security information does not end up in the hands of terrorists or their associates?

Response: During terrorism prosecutions, experienced prosecutors work closely and effectively with the intelligence community to safeguard national security information, using the Classified Information Procedures Act ("CIPA") or procedures such as protective orders. CIPA enables prosecutors to apply to the court to protect sensitive national security information and to prevent the public disclosure of the means, methods and sources through which it was obtained.

Moreover, an extensive analysis of terrorism prosecutions from 2001-2009 found that these procedures have been highly effective in protecting classified information in federal

trials. [1] The study did not find a single case in which a failure of CIPA procedures resulted in a serious security breach.

CIPA:

35. CIPA does not presently provide a standard for the protection of classified information. CIPA merely requires the defendant to give notice of the intent to introduce classified information into evidence. During the Zacarias Moussaoui case, the procedures of CIPA became problematic to prosecutors. CIPA authorizes an expedited interlocutory appeal of trial court orders authorizing the disclosure of classified information in a criminal case.

However, the U.S. Court of Appeals for the Fourth Circuit held than an order giving the defendant (Moussaoui), classified information was not an order of disclosure subject to interlocutory appeal. In its reasoning, the court explained that the interlocutory appeal provisions are concerned with the disclosure of classified information by the defendant at trial or pre-trial proceeding, not the pre-trial disclosure of classified information to the defendant or his attorneys. In my view this interpretation of CIPA should be corrected.

a. Would the Department of Justice support legislation that would overturn the Fourth Circuit's interpretation? Please state reasons why or why not?

Response: Please see the response to Question 28.

b. Do you believe that the Classified Information Procedures Act (CIPA) is sufficient to safeguard classified information if these detainees do not have counsel?

Response: While CIPA does not specifically address this point, federal courts have in the past implemented practices to safeguard classified information when the defendant has elected to proceed pro se – for example, through the appointment of cleared counsel to review the material in lieu of the defendant. Such procedures, which have been upheld on appeal, have served to safeguard classified information sufficiently while ensuring that the defendant has adequate access to the evidence against him even when the defendant is pro se.

Material Support of Terrorism As An Offense Prosecuted by Military Commission:

36. Article I of the Constitution grants Congress the authority to "define and punish offences against the law of nations." In the Military Commissions Act (MCA),

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[1] Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (analyzing data from Sept. 12, 2001 through Dec. 31, 2007); Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court, 2009 Update and Recent Developments* 9 (2009), *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf (analyzing data from Sept. 12, 2001 through June 2, 2009).

material support of terrorism is defined as an offense that can be prosecuted in a military commission. There have been several recent international agreements that condemn support of terrorism including the United Nations Security Council. The International Criminal Tribunals for Rwanda and Former Yugoslavia consider aiding and abetting acts, which the MCA defines as terrorism, to be a war crime. Does the Justice Department and the Administration believe that the crime of material support of terrorism can be prosecuted in a military commission?

Response: The Administration has expressed concerns about the historical basis for treating material support for terrorism or terrorist groups as a violation of the law of war, and the constitutional issues that thus may arise. The MCA of 2009, in section 950t(25), retains material support for terrorism as an offense triable by military commission, and section 950p of the MCA of 2009 declares that the offenses Congress included in the Act "have traditionally been triable under the law of war or otherwise triable by military commission." Under Article I, section 8 of the U.S. Constitution, Congress has the power to "define and punish ... offenses against the law of nations," and the courts would likely pay some deference to Congress's exercise of that authority, subject to constitutional limits such as those imposed by the Ex Post Facto Clause.

Terrorism Convictions for Material Support:

37. **What is the actual number of successful Justice Department prosecutions of persons convicted of providing material support to Al Qaeda since 9/11 (please provide a listing)? How many cases have been pursued since 9/11? How many of those defendants were investigated and captured on U.S. soil? In which federal correctional institutions are these persons currently detained (please provide a list)?**

Response: The Department is working to develop information responsive to this request and will advise the Committee when it becomes available.

ACORN:

38. **Several videos have surfaced that show alleged misconduct of ACORN employees in Washington, Baltimore, Philadelphia, New York and cities in California. This egregious behavior included providing advice on money laundering, organizing a prostitution ring and human trafficking of minors for sex slavery.**

In September, I brought these videos to the attention of Director Mueller during an FBI over sight hearing. I asked Director Mueller if these alleged violations under the jurisdiction of the FBI and warranted further investigation by field offices of the FBI in cities where this misconduct occurred. In his response, Director Mueller stated that after consultation with the Department of Justice he would look into these allegations. Given that ACORN has been the recipient of OJP funding in the past, has the Department of Justice authorized the FBI field offices in these cities to conduct an investigation into the activities and conduct of ACORN offices? Please state reasons why or why not?

Response: It is the responsibility of the FBI to "[i]nvestigate violations of the laws . . . of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise exclusively assigned to another investigative agency." (28 C.F.R. § 0.85(a).) Longstanding Department of Justice (DOJ) policy generally precludes us from commenting on the existence or status of ongoing investigations.

Special Administrative Measures:

39. Within correctional institutions supervised by the Federal Bureau of Prisons (BOP), there is Special Administrative Measures (SAM) used to address security threats posed by prisoners. These include but are not limited to special housing measures or limited communication and correspondence. Previously released Department of Justice figures indicate that only 29 inmates incarcerated on terrorism-related charges are subject to SAMs at the moment. Recently, the convicted attempted shoe bomber Richard Reid was removed from Special Administrative Measures at the Federal Supermax in Florence, Colorado. What was the Department of Justice's basis for this decision?

Response: There are currently 25 inmates incarcerated or detained on terrorism related charges in BOP and USMS custody who are subject to SAMs.

As a general matter, the Attorney General may direct the Bureau of Prisons to implement SAMs on a particular inmate when there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons. SAMs must be reviewed annually to determine if they should be renewed. In advance of the potential renewal date, the U.S. Attorney's Office, in consultation with the FBI, and the National Security Division's Counterterrorism Section, determines whether continued imposition is warranted.

With respect to the SAMs placed on Reid, the convicted terrorist known as the "shoe bomber," it was the joint recommendation of the prosecuting U.S. Attorney's Office, the FBI, and the Counterterrorism Section that the SAMs not be renewed in June 2009. This recommendation was based on an assessment of the potential threat posed by Reid's communications and contacts.

Although the SAMs on Reid were not renewed, he remains incarcerated at the Administrative Maximum facility in Colorado where he is serving a life sentence for his terrorism conviction. His communications and contacts are limited and closely monitored. While he may send and receive mail to and from his family, per Bureau of Prison procedures, this correspondence is reviewed. He has limited visiting rights that are subject to Bureau of Prison restrictions and can receive news publications only after they are reviewed by authorities. SAMs can be reimposed on Richard Reid at any time if there is any indication that his communications or contacts warrant such action.

Homelessness & Recidivism:

40. As I am sure you are aware, roughly 500,000 people leave U.S. prisons annually. The Bureau of Justice Statistics estimates that 67 percent of those who are released from prisons are rearrested for a felony or serious misdemeanor within three years. Often, those released from prison have little or no money, no place to live, and no plan for successfully reentering society. In other words, ex-offenders frequently are left homeless and penniless with no viable employment options. Some have argued that increased private and non-profit job training and homeless prevention activities could help address recidivism. What are your thoughts on this issue? Is the Department working on any efforts in this regard? Please explain. Can you tell us about any inter-agency efforts the Department participates in to address the issues of homelessness and recidivism?

Response: The Department is committed to ensuring returning offenders have the tools they need to become contributing members of their communities, which includes adequate housing and community support. Our role is to facilitate partnerships between community groups, corrections and other justice system agencies to make sure services, such as housing, job training, substance abuse and mental health treatment, and employment assistance, are available beginning at an offender's incarceration and continuing after release.

At the Department's Office of Justice Programs (OJP), we are working toward this goal through our Second Chance Act Offender Reentry Initiative. In FY 2009, OJP's Bureau of Justice Assistance (BJA) and Office of Juvenile Justice and Delinquency Prevention (OJJDP) solicited applications under five grant programs: Second Chance Act Mentoring Grants to Nonprofit Organizations; Second Chance Act Prisoner Reentry Initiative Demonstration Grants; Second Chance Act National Adult and Juvenile Offender Reentry Resource Center; Second Chance Act Youth Offender Reentry Initiative; and Second Chance Juvenile Mentoring Initiative. These comprehensive programs are designed to assist individuals' transition from prison back into the community through a variety of services for adult and juvenile offenders such as housing, mentoring, literacy classes, job training, education programs, substance abuse, rehabilitation and mental health programs.

In October 2009, OJP announced more than $28 million in grant funding to states, local governments and non-profit organizations through these five initiatives, which support reentry programs throughout the United States. OJP also announced the creation of the National Adult and Juvenile Offender Reentry Resource Center with a national partner, the Council of State Governments (CSG) Justice Center. Through the Reentry Resource Center, OJP, the CSG Justice Center and many other national organizations will provide valuable training and technical assistance to states, localities and tribes to develop evidenced-based reentry programs that will help reduce the recidivism rate, while still protecting the communities they serve. Grants awarded under these five initiatives were based on a program's evidence-based process and the delivery of evidence-based services during and after confinement.

In addition to its own efforts, the Department is an active member of the Interagency Council on Homelessness (ICH) and is working closely with the new Executive Director of the Council, Barbara Poppe, to identify and coordinate DOJ reentry programs with efforts at the Department of Labor (DOL), the Department of Housing and Urban Development (HUD), the Department of Health and Human Services (HHS), and the Department of Veterans Affairs (VA). Potential areas of collaboration include linking incarcerated veterans with the myriad of services offered by the VA upon release; coordinating reentry job counseling services with Department of Labor One-Stop Career Centers; and addressing the housing needs of juveniles in the delinquency and dependency system who age out of the foster care system.

The Administration is committed to furthering the goals of the Second Chance Act and ensuring those who are released back into communities are not without a home. We appreciate Congress including in the FY 2010 budget $100 million for the Second Chance Act Offender Reentry Initiative. This funding level was part of the President's budget request and represents an increase of $75 million over the FY 2009 funding level. In addition, the budget proposed to set aside $10 million for research authorized under the Second Chance Act, furthering our goals in supporting evidence-based initiatives.

Crack Cocaine v. Powder Cocaine Disparity:

41. While I fully support efforts to address the crack cocaine sentencing disparity, I do not support raising the crack cocaine threshold up to the powder threshold under a 1:1 sentencing ratio. I have always held that the 100:1 sentencing ratio was not the correct approach. That is why I have supported an approach that balances proper punishment for the free-base form of this dangerous drug and is commensurate with the manner in which crack is sold and possessed.

As I understand it, under pending legislation, the 1:1 ratio would require possession of 500 grams of crack cocaine before an offender could face a five year federal prison term. I believe setting the 500 gram threshold as the starting point for a five year federal prison sentence will have dire unintended consequences on federal law enforcement and prosecutors. This approach fails to take into consideration the impact on Drug Enforcement Agency investigations and prosecutions pursued by Assistant United States Attorneys (AUSA). Furthermore, if the pending bills are passed, state laws will have more severe penalties than federal sentences.

For example, in Vermont, a defendant in possession of 500 grams of crack cocaine is currently subject to a maximum sentence of 10 years. In Illinois, a defendant convicted of possessing 500 grams of crack cocaine could face a sentence of 8-40 years in prison

Data from the United States Sentencing Commission (USSC) confirms that the average weight in federal crack cocaine prosecutions is 51 grams. In fiscal year 2008, USSC data indicated that there were 6,168 federal prosecutions of crack cocaine. In those prosecutions, 5,913 defendants qualified for sentencing under the

Sentencing Guidelines 2D1.1 as drug trafficking. Only 28 cases involved defendants sentenced for simple possession.

That equals out to less than 1% of federal cases involving prosecutions for simple possession. This data cannot be ignored and refutes the portrayals of Assistant United States Attorneys and federal agents as only pursuing the low level crack abuser who is apprehended with an "insignificant" amount of crack in their possession.

a. Does the Department of Justice support these proposed bills that set 500 grams of crack cocaine as the marker for a 5 year federal sentence?

b. Does the Department of Justice agree with raising crack up to powder in a 1:1 sentencing ratio?

Response to a-b: The President and the Attorney General support the elimination of the sentencing disparity between crack and powder cocaine offenses. We are committed to ensuring that our sentencing and corrections systems promote public safety, provide just punishment to offenders, avoid unwarranted sentencing disparities, and reduce recidivism. The bill recently passed by unanimous consent in the Senate, S. 1789, the Fair Sentencing Act, makes progress toward achieving a more just sentencing policy while maintaining the necessary law enforcement tools to appropriately punish violent and dangerous drug trafficking offenders. The Department supports S. 1789, and we look forward to the House approving this legislation quickly so that it can be signed into law.

Intellectual Property:

42. The Department of Justice has a nationwide network of over 230 Computer Hacking and Intellectual Property (CHIP) prosecutors. Last Congress, when my colleagues and I worked on the PRO-IP Act of 2008, I was particularly concerned about the role of Assistant United States Attorneys (AUSA) in the investigation of computer hacking and intellectual property crimes.

I have long been a supporter of the CHIP Unit concept. Building units of specialized prosecutors in such a complex and economically significant area of the law is, in my opinion, an effective law enforcement tool. At the same time, we have to admit that within those Units there are competing interests, including a host of complex computer intrusion and other high-tech crimes, in addition to intellectual property prosecutions.

The PRO-IP Act specifically provides that all CHIP units are to be assigned at least two AUSAs responsible for investigating and prosecuting computer hacking or intellectual property crimes.

Considering the seriousness of these crimes, I would have preferred dedicating a specific number of AUSAs to prosecuting criminal intellectual property crimes and having others focused on prosecuting and investigating computer hacking crimes.

a. Do you agree with this idea?

Response: Maintaining CHIP AUSAs' dual responsibilities over prosecuting both computer crime and IP offenses is an important and effective way to maximize their knowledge and expertise to the benefit of each of those areas. Since 1995, the CHIP Network has evolved into an effective group of prosecutors who specialize not only in prosecuting computer crime and IP offenses but who also have developed a unique expertise in the types of investigative tools and techniques necessary to prosecute these crimes. The tools used in obtaining electronic evidence, reviewing forensic analysis, and pursuing online investigations overlap for both the computer crime and IP areas. In addition, there are certain IP and computer crime offenses which occur during the same criminal act. For example, a criminal who misappropriates a trade secret often does so in violation of computer intrusion laws. In this regard, a prosecutor who pursues IP crimes will necessarily be more effective in prosecuting computer crimes. In addition to working on their own cases, the CHIP prosecutors are able to contribute their expertise in these areas as legal advisors to other prosecutors in the office confronting similar issues.

b. Can you give me an estimate of how much time CHIP prosecutors devote to cyber security related crimes compared to IP related crimes?

Response: The Department does not maintain data that describes the allocation of time each CHIP prosecutor spends on cyber security as compared to IP crimes. Nor can a general comparison be made as the focus of a particular CHIP unit will depend on the types of crimes that are more prevalent in that District.

Healthcare:

43. Does the Constitution provide a right to healthcare? If so, please explain the basis for your conclusion, including the provisions of the Constitution that form the basis of this right and any applicable Supreme Court precedents.

Does the Constitution allow Congress to require that individuals obtain health insurance? If so, please explain the basis for your conclusion, including the enumerated powers that form the basis of this requirement and any applicable Supreme Court precedents.

Response: Although the Constitution may limit the Government's ability to prohibit or regulate access to health care in certain circumstances--just as it may limit the Government's ability to prohibit or regulate access to other important social goods in certain circumstances--the Supreme Court has never addressed whether the Constitution affirmatively guarantees a right to health care for all citizens. Congress has the authority under the Commerce Clause, U.S. Const., Art. 1, sec. 8, cl. 3, the Power to Tax and Spend for the General Welfare, U.S. Const., Art. 1, sec. 8, cl. 1, and the Necessary and Proper Clause, U.S. Const., Art. 1, sec. 8, cl. 18, to enact the provision

in question. In particular, over 70 years of Supreme Court precedents have established that Congress can regulate activities that have a substantial effect on interstate commerce. A requirement that individuals obtain health insurance, included as part of health insurance reform legislation, fits comfortably within these precedents.

QUESTIONS POSED BY SENATOR GRASSLEY

Potential Conflicts of Interest in Detainee Transfers:

44. At the hearing I asked you to provide the Committee with the following information:

a. The names of political appointees in the Department who represented detainees, worked for organizations advocating on behalf of detainees, or worked for organizations advocating on terrorism or detainee policy;

b. The cases or projects that these appointees worked on with respect to detainees prior to joining the Justice Department;

c. The cases or projects relating to detainees that they have worked on since joining the Justice Department; and

d. A list of all political appointees who have been instructed to, or have voluntarily recused themselves from working on specific detainee cases, projects, or matters pending before the courts or at the Justice Department.

Response: The Department responded to these requests in a letter, dated February 18, 2010.

45. You responded that you would "consider" these requests. Following the hearing, six other members of the Judiciary Committee joined me in a letter to you dated November 23, 2009, requesting the aforementioned information along with the following additional requests:

a. Have any ethics waivers been granted to individuals working on terrorism or detainee issues pursuant to President Obama's Executive Order dated January 21, 2009, titled "Ethical Considerations for Executive Branch Employees?"

b. What are the Department's criteria for recusing an individual who previously lobbied on detainee issues, represented specific detainees, worked on terrorism or detainee policy for advocacy groups, or formulated terrorism or detainee policy?

c. What is the scope of recusal for each of the political appointees who have recused themselves from working on specific detainee cases, projects, or matters? (E.g. is an individual who previously represented a detainee recused only from matters related to that individual or from other detainees?) Please provide a detailed listing of the scope of each recusal.

Response: As noted in response to Question 44, the Department responded to these requests in a letter, dated February 18, 2010.

46. In the event you have not responded to the Committee by providing all the information requested at the November 18, 2009, hearing or in the November 24, 2009, letter prior to the submission of these questions for the record, please include this information as part of your official submission. If you have failed to provide this information prior to the submission of these responses provide a detailed response explaining the reason for the delay, any privileges cited for withholding information, and all relevant legal analysis citing authorities utilized for withholding the information. This analysis should include all relevant statues, case law, and any other legal authority the Department believes authorizes withholding the information from Congress.

Response: As noted in response to Question 44, the Department responded to these requests in a letter, dated February 18, 2010.

DOJ Role in the Termination of Inspector General Gerald Walpin:

47. In written follow-up questions to your testimony in June, I asked a twenty-four part question regarding the role of the Department in the termination of Inspector General Gerald Walpin. Your response failed to answer the specific questions so I'm going to ask that question now.

The acting United States Attorney for the Eastern District of California, Lawrence Brown, wrote to Kenneth Kaiser, the Chair of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). Mr. Brown alleged that Inspector General Walpin of the Corporation for National and Community Service had committed misconduct in his investigation of Sacramento Mayor Kevin Johnson.

The Integrity Committee notified Walpin on October 9, 2009, of its conclusion that Mr. Brown's allegations were unfounded. Unfortunately, the President did not wait for Integrity Committee's decision and did not consider its views before removing Walpin as Inspector General.

Although Mr. Brown's referral was ultimately dismissed, it is similar to an ethics complaint against an attorney or judge that is involved in litigation with the Department. The U.S. Attorney's Manual, Section1-4.150 states that, "Allegations of misconduct by non-DOJ attorneys or judges shall be reported to OPR for a determination of whether to report the allegation to appropriate disciplinary officials."

a. Your written response to my questions said that Mr. Brown had "no outside contact" before the letter was sent. Does that mean that Mr. Brown did not provide his complaint against Walpin to OPR for approval before filing it with the Integrity Committee?

b. Since the Department requires U.S. Attorneys to contact OPR before referring complaints on judges or even non-Department attorneys, shouldn't Mr. Brown have sought approval from OPR before filing a complaint against an Inspector General? If not, why?

c. Why should complaints against Inspectors General be treated differently by the Department than those brought against opposing attorneys or Judges?

d. Should the Acting U.S. Attorney have checked with the Department before lodging such a serious complaint that was later determined to be unfounded?

e. Will you commit to revising the U.S. Attorneys manual to require Department approval before U.S. Attorneys lodge serious complaints against Inspectors General?

f. Seems to me that this would be something very easy to implement and that it would be consistent with the current policy for non-Department attorneys or judges. Why won't you commit today to doing this?

Response to a-f: Mr. Brown did not seek the approval of the Office of Professional Responsibility or any other office at Justice Department headquarters before sending his letter to the Integrity Committee. The U.S. Attorney's Manual provision that you cite is not applicable to such a letter because an Inspector General does not function as an attorney or a judge. For that reason, we do not believe revisions to the U.S. Attorneys Manual are warranted.

Fort Hood Tragedy:

48. The shooting at Fort Hood has raised serious questions about what the Federal Bureau of Investigation (FBI) knew, when they knew it, who the information was shared with, and what was done with that information. I don't want to hinder the ongoing criminal investigation. However, it appears that there was a possible breakdown in information sharing between the FBI and other agencies. I don't want to jump to any conclusions, but I think this Committee needs to exercise its oversight role and get to the bottom of what happened.

I'm particularly interested in a statement released by the FBI on November 9th that stated the investigators knew about communications between Major Hasan and the target of a terrorism investigation but determined, "that the content of those communications was consistent with research being conducted by Major Hasan in his position as a psychiatrist at the Walter Reed Medical Center." (Emphasis added).

a. I find it difficult to understand what type of communications with a possible extremist can be explained away as "consistent with research being

conducted" as part of his job duties. What type of communications would be acceptable between a terrorism suspect and an Army Psychiatrist?

Response: The response to this inquiry is classified and will, therefore, be provided separately.

b. It has been reported that FBI Director Mueller has instructed a FBI "Red Team" to investigate what the FBI knew about Hasan and how that information was handled. When do you anticipate the completion of the investigation by the FBI Red Team?

Response: Pursuant to the President's November 10, 2009, directive to the Intelligence Community, on November 30, 2009, the FBI completed an initial review of the FBI's actions as well as any relevant policies and procedures that may have impacted FBI efforts before the shootings. On December 8, 2009, Director Mueller asked Judge William H. Webster to conduct an independent review that will both look at the initial findings and allow for additional review as Judge Webster and his staff determine appropriate.

c. Will you pledge to cooperate fully with any congressional inquiries into what the FBI knew and when they knew it? Will you pledge to provide access, subject to proper classification procedures, to documents and witnesses requested by Congress?

Response: The FBI has and will continue to cooperate fully with the reviews of this matter consistent with our obligation to preserve the integrity of the criminal case, to maintain national security information, and to keep Congress appropriately informed. The FBI is working with the Department of Justice, the Department of Defense, and other affected agencies to ensure that all requests from Congress are reviewed and responded to consistent with these principles.

FBI/ATF Cooperation:

49. I have long been concerned about jurisdictional "turf wars" between our federal law enforcement agencies. These inter-agency battles are a disservice to taxpayers and more importantly to our public safety. The valuable time wasted on arguing who should be in charge of an investigation is better spent making sure the criminals responsible are arrested and prosecuted. This is especially true of explosives incident investigations between the FBI and ATF.

I have repeatedly asked both the Department and component agencies specific questions on this topic. In fact, one of my questions for the record at the September 17, 2008, FBI Oversight hearing dealt directly with this topic. Director Mueller responded to my question on March 25, 2009, stating "DOJ requested the opportunity to provide consolidated responses on behalf of all involved DOJ components. The FBI has provided its input to DOJ for the preparation of that consolidated response." However, DOJ has not yet responded. Both your staff and mine met on this outstanding response and, despite that meeting, I have received no indication when an official response will be provided.

a. What is the hold-up on this response?

b. What has DOJ done with the information that Director Mueller said was provided to DOJ for the consolidated response?

c. When DOJ received the response from FBI, did it also ask ATF for a response? If so, when was that response received by DOJ?

d. Why has it taken over a year to get an answer?

Response to a-d: The Department responded to a number of the written questions from the March 2008 hearing in September 2008 and is working to complete its review of the remainder of the responses to these questions. We regret the delay in completing that review and will provide a response to the Committee as soon as their review is complete.

With respect to the above-referenced consolidated response by the Department to a Question for the Record that arose from the September 17, 2008, Committee hearing regarding the relationship between the FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Department's Office of the Inspector General (OIG) completed an audit report regarding this relationship, "Explosives Investigation Coordination Between the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives," dated October 21, 2009. The OIG report includes a "Consolidated DOJ Response to Audit Report Recommendations" at Appendix VIII, which can be found here: http://www.justice.gov/oig/reports/plus/a1001.pdf.

FBI/ATF Cooperation:

50. On top of this outstanding request, last month the DOJ OIG issued a report addressing this very issue. I was stunned, but not surprised by DOJ OIG's findings that the AG's 2004 memo regarding coordination of explosives incidents was never implemented because that memo failed to properly define agency roles. The OIG also blamed the Justice Department for not providing clear and specific direction to the FBI and ATF to eliminate the ambiguities. Surveys of FBI and ATF bomb personnel also showed they really don't like to work with each other. Furthermore, bomb incident investigation disputes were not made any better by the 2008 MOU issued by DOJ.

In short, all of DOJ's previous guidance, memos and MOUs have fallen on deaf ears or worsened the already unstable relationship between the FBI and ATF. The FBI Director acknowledged that there are still issues to be resolved with the 2008 MOU at the September oversight hearing. Based on the OIG report and Director Mueller's answer, I am concerned about the Justice Department's current ability to appropriately respond to any type bombing incident.

a. Do you share my concerns about the cooperation between ATF and FBI?

Response: The Department of Justice recognizes the critical importance of a well-coordinated and effective response to explosives incidents. The Department, including the FBI and ATF, is dedicated to keeping our nation safe from those who seek to illegally use explosives to do us harm. We also recognize that it is equally important to adequately train our personnel and to ensure effective information sharing with all appropriate entities within the Federal Government and our State, local and tribal law enforcement partners.

b. What are you doing, personally, to fix this problem?

c. Have you or your Deputy discussed the findings of the OIG report with Directors of the FBI or ATF? If so, what was their response?

Response to b-c: As an indication of the seriousness with which the Department views the issues identified by the OIG audit and the recommendations made by the OIG, the Deputy Attorney General recently convened a meeting with senior leadership of FBI and ATF, including the Deputy Director at FBI and the Executive Assistant Director at ATF, to discuss the importance of, and establish an expedited process to resolve these issues permanently. The Department has created working groups of subject matter experts and leadership from both bureaus on each of the areas of recommendations from the OIG audit – jurisdiction, information sharing, training, and laboratories – to make proposals for resolving these issues. The Deputy Attorney General called on the participants in these groups and their leadership to move quickly to agree on specific timelines for resolving each of the recommendations in the OIG audit and to set benchmarks for success which will be monitored by the Office of the Deputy Attorney General.

d. When can we expect this problem to be resolved between the ATF and FBI? Can I have your guarantee that you will personally work to repair this relationship?

e. Six of the fifteen recommendations by the DOJ OIG were directed specifically at DOJ. They range from delineating new guidelines, coordinating labs to consolidating training and databases. In an October 9th response to the OIG, the Justice Department agreed "in concept" with all 15 recommendations. What is the status of the DOJ progress on this issue? Have you established a timeline for the issuance of a new MOU or AG memo to be issued? What are you doing in the interim to resolve these critical issues?

Response to d-e: We appreciate the constructive recommendations in the Office of the Inspector General audit, which documents the Department's challenges concerning the most efficient application and balance of its explosives enforcement assets and responsibilities and offers some remedies to those challenges. As your question notes, the Department agrees in concept with the recommendations contained in the OIG report on explosives. Because of the

audit findings, we have been engaged in a series of meetings designed to create efficiencies and clarity in the respective mission responsibilities of the ATF and FBI. Nonetheless, we are considering organizational and other changes that may modify how we go about implementing those recommendations in order to achieve the most successful and efficient outcome.

While the OIG audit did address the coordination challenges, it is also equally important to highlight some of the successes and joint efforts between the ATF and FBI. From 2003 through 2008, the ATF and FBI jointly investigated and recommended for prosecution 192 explosives related cases involving 397 defendants. In addition, prior to the audit period, the ATF recognized some of the highlighted issues and began a process to improve the use and function of the Bombing and Arson Tracking System (BATS). In the past year, over 3,000 bomb technician and investigators have received in-person BATS training, and the numbers of agencies and individual users registered in the BATS have increased significantly, facilitating greater information sharing.

It is also important to note that the Joint Program Office (JPO), which is comprised of both the ATF and FBI, has been successful in resolving the types of issues raised in this report. For example, the JPO coordinated the development of community-wide consensus standards for uniform training of explosive-detection canine teams, which will be published in a guidelines document for implementation nationwide. Another example of joint coordination is the Terrorist Explosives Device Analytical Center (TEDAC), which is co-managed by the FBI and ATF. Through TEDAC, the leadership of the FBI and ATF meet regularly to address inter-component issues. Although the FBI and ATF each use their own platforms to manage their forensic reports, intelligence reports and explosives reference material, the systems have been adapted so that both FBI and ATF information is available to TEDAC partners.

The challenges in aligning the explosives missions between ATF and the FBI predate the movement of ATF from the Department of Treasury into the Department of Justice. This issue is one that has evolved over a long period and we recognize that a successful solution will require careful attention by the Department and active monitoring of progress in resolving these issues by Department leadership. Despite the long-standing nature of the problem, the current leadership at the Department is confident that there is an effective way to move forward and bring resolution to the matter as recommended in the OIG report.

f. The problem between the FBI and ATF has always been centered on whether an explosives incident should be classified as terrorist- related or not. How do you propose to overcome this common investigative problem?

Response: As noted above, we have been engaged in a series of meetings designed to create efficiencies and clarity in the respective mission responsibilities of the ATF and FBI, to ensure that the role of each is clear, and the potential for misunderstandings regarding jurisdiction is minimized. Nonetheless, we are also considering organizational and other changes that may modify how we go about implementing those recommendations in order to achieve the most successful and efficient outcome. On December 14, 2009, we convened a meeting with senior leadership from the FBI and ATF to establish a process for moving forward to resolve the recommendations in the OIG Report. We directed the formation of four FBI/ATF working

groups, each focused on one of the four areas of recommendations in the Report: jurisdiction, information sharing, training, and laboratories. Each working group included subject matter experts and representatives of senior leadership from both ATF and the FBI as well as a representative from the Office of the Deputy Attorney General. We directed the working groups to provide concrete options for resolving the issues raised in the OIG report and a roadmap for the Department to decide those issues. This process is ongoing and the Department intends to resolve the jurisdictional issue as soon as possible.

The Department is dedicated to keeping our nation safe from those who seek to use explosives to do us harm. We recognize that it is critically important to define clear roles and responsibilities, to adequately train our personnel, and to ensure effective information sharing with all appropriate entities within the government and our State, local and tribal law enforcement partners. We recognize that a successful solution will require careful attention by the Department and active monitoring of progress in resolving these issues by Department leadership. Despite the long-standing nature of the problem, the leadership at the Department is confident that the steps outlined here provide a way forward that will bring resolution to the matter as recommended in the OIG report.

Grant Programs and Budget:

51. On November 13, 2009, the DOJ Inspector General released an updated list of Top Management and Performance Challenges for the Department of Justice last Friday. For the ninth straight year, Grant Management is listed as a "significant challenge for the Department." The Inspector General stated that this problem is, "particularly acute for the Department in 2009 because in addition to managing over $3 billion in grant funding from its regular fiscal year appropriation, the same grant administrators also must oversee...$4 billion in grants under the Recovery Act."

Year after year, we hear horror stories of DOJ grant programs gone wrong. Under the Recovery Act, DOJ's grant money has more than doubled increasing the probability of fraud and waste. The OIG has provided 43 specific recommendations for best practices in managing grants at the Department. As a simple solution, the OIG has recommended applying audit recommendations to all grants.

a. What is the status of implementing all 43 recommendations and examples of best practices issued by the Inspector General?

Response: The Department is committed to improving the grant management process. Each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 funding and Recovery Act grants. As the Inspector General noted in his November 13, 2009 report of the Department's Top Management and Performance Challenges, "[t]he Department has taken positive steps," and "is demonstrating a commitment to improving the grant management process."

b. Does the Department disagree with any of the 43 recommendations? If so, which ones and why does the Department disagree?

Response: No.

c. When will all the recommendations be implemented?

Response: Each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 and Recovery Act grants, and will continue to do so.

d. Will you support efforts to debar and remove grantees that commit fraud, waste, and abuse from Department sponsored grant programs? Why or why not?

Response: In appropriate cases, the Department's debarring official has proposed debarment and has debarred grantees when the OIG, a United States Attorney's Office, or a grant-making component has notified the debarring official of circumstances justifying such action. The Department's debarring official will continue to do so.

GAO Report on ATF/ICE Cooperation on Weapons Smuggling:

52. In June 2009, the Government Accountability Office (GAO) published a report regarding the U.S. efforts to combat arms trafficking to Mexico. The GAO report states, "ATF and ICE officials acknowledged they need to better coordinate their efforts to leverage their expertise and resources, and to ensure their strategies are mutually enforcing, particularly given the recent expanded level of effort to address arms trafficking." I've been informed of the updated MOU (Memorandum of Understanding) between ICE and ATF signed in June 2009 to improve de-confliction and coordination of firearms investigation.

The GAO also found that DOJ and DHS both need to do a better job of sharing data to better assess southbound weapons smuggling trends. To address this issue, the GAO's principal recommendation was that the "U.S. Attorney General prepare a report to Congress on approaches to address the challenges law enforcement officials raised in this report regarding the constraints on the collection of data that inhibit the ability of law enforcement to conduct timely investigations." Unfortunately, the Justice Department never provided any formal comment on the draft GAO report.

a. The firearms MOU between ICE and ATF has been in place for nearly five months. Has the new MOU improved cooperation and collaboration between these two agencies in the Southwest border region?

Response: ATF and ICE continue to work to improve interagency coordination and cooperation. In that regard, on June 30, 2009, ATF and ICE announced the execution of a new memorandum of understanding (MOU) regarding cooperative guidelines for the handing of firearms investigations. The recently enacted MOU represents an important step toward

the goal of improved interagency coordination and cooperation. In furtherance of this objective ATF and ICE organized two recent senior level conferences to discuss the MOU and cooperative enforcement strategies. The first was held in Albuquerque, NM, from June 29 to July 2, 2009, and in addition to ATF and ICE, also included DEA, FBI, CBP and representatives from the US Attorney community. The second conference was held in San Diego from November 2 through November 5, 2009. That conference was primarily organized by ICE, and in addition to ATF, included CBP.

Improved cooperation between ATF and ICE has resulted in the two agencies partnering for a number of successful joint investigations along the border. For instance, in June 2009, ATF and ICE agents received information regarding the recovery in Mexico of a firearm originally purchased by a Brownsville, Texas resident. The purchaser was interviewed and admitted to being paid to buy two .223-caliber Bushmaster rifles for the ring leader, who was also in the Brownsville area. The joint investigation subsequently identified an additional straw purchaser. ATF and ICE agents interviewed this subject, who admitted to purchasing five firearms. Two of these firearms have been recovered in Mexico and Guatemala. This subject was arrested after the interview, subsequently indicted, and pled guilty in the U.S. District Court for the Southern District of Texas. He is awaiting sentencing. Defendants have admitted to purchasing a total of 29 firearms on behalf of the trafficking ring leader, nine of which have been recovered in Mexico and Guatemala.

Additionally, all seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk which is staffed by ATF and DHS personnel. The agencies believe they are making progress and these efforts will continue at the national and local levels. Additionally, ATF and ICE are also working with several other partners, including the Government of Mexico, on a variety of issues pertaining to the investigation of cross border firearms trafficking and related violence.

b. The GAO recommended you prepare a report to Congress. You never responded. Does your Department plan to prepare this report? If not, why not?

Response: The Department did respond to the GAO's recommendation that the Attorney General prepare a report. As required by law, 31 U.S.C. Section 720, the Department wrote to eight members of Congress and explained the Department's response to all of the recommendations in the Report the GAO issued. Please find attached a copy of one such letter from Lee Lofthus, the Assistant Attorney General for Administration, to Senator Joseph I. Lieberman, dated September 17, 2009 (Attachment 1). Also, the Department provided the GAO with a copy of the letter. For reasons the Department stated in that letter, it will not prepare the report.

c. How many times has GAO recommended the Department prepare a report to Congress and the Department failed to respond?

Response: The Department does not retain such information. The Department routinely responds to recommendations the GAO makes in its reports.

Money Laundering:

53. Illicit proceeds from the drug trade and other criminal enterprise continue to fuel the Drug Trafficking Organizations (DTOs) and terrorists operating around the globe. In the past couple of congresses I've introduced comprehensive money laundering legislation. At our private meeting prior to your confirmation, we discussed the importance of reforming our anti-money laundering laws. In your responses to questions at your confirmation, you pledged your full cooperation to help strengthen our anti-money laundering laws.

I plan to introduce my legislation in the near future. One provision of my comprehensive anti-money laundering legislation will address the Supreme Court decision in *Cuellar v. United States*. This 2008 decision held that the Government must prove a defendant charged with transporting drug proceeds across the border knew the purpose or plan behind the transportation. This creates a very tough hurdle for prosecutors to bring charges against bulk cash smugglers. My legislation fixes this language in the statute consistent with the recommendation of the Supreme Court. Further, witnesses from the Department have explicitly stated their support for this fix in previous testimony before this panel as part of the hearing on the Fraud Enforcement Recovery Act.

a. Will you continue your pledge to support efforts to reform our money laundering laws by ensuring a timely response from the Department to review and comment on this legislation?

b. My bill includes a number of other clarifications to our anti-money laundering laws—including reverse money laundering, blank checks in bearer form, bulk cash smuggling, commingled funds, structured transactions, charging money laundering as a course of conduct, and freezing bank accounts of those arrested for money laundering. Are there any additional concerns that should be addressed? If so, please provide a list of all areas of concern and any possible legislative solutions to correct these concerns.

Response to a-b: In addition to the areas covered in your bill, we recommend that legislation be enacted to make the international money laundering offense, section 1956(a)(2)(A) of Title 18, applicable to tax evasion. We also recommend amending the money laundering statutes to specify that they apply to stored value cards and other forms of e-currencies. We also recommend including additional provisions that were part of your 2007 bill, S. 473 (the Combating Money Laundering and Terrorist Financing Act of 2007). Those provisions address: issuing subpoenas in certain money laundering and forfeiture cases; illegal money transmitting businesses; defining specified unlawful activity to include all foreign and domestic felony offenses; amending the money laundering statute to make it clear that it does not require knowledge that property is the proceeds of a specific felony; and providing for extraterritorial jurisdiction for certain money laundering offenses. Possible legislative solutions relating to the above can be found in the attached testimony of Criminal Division former Acting Assistant

Attorney General Rita Glavin, which was presented to the Committee on February 11, 2009 (Attachment 2).

Mexican Drug Trafficking Organizations:

54. Mexico continues to pose a significant threat to our national security, especially along the Southwest Border. Major drug trafficking organizations are focusing their violence at rival cartels and at the Government of Mexico which is trying to bring an end to their illegal activities, including narcotics trafficking.

a. It is my understanding that corruption continues to plague the Government of Mexico's ability to combat the drug cartels. What is the status of the reform programs and how long do you believe it be for these reforms to take hold?

Response: The Government of Mexico is working to enhance its internal integrity systems and anti-corruption mechanisms to foster and ensure public confidence and trust. The Department of Justice is assisting Mexico's efforts through various programs.

For example, in response to the Calderon administration's desire to improve the operational integrity and administrative effectiveness of SIEDO (Subprocuraduria de Investigaciones Especializada en Delinquencia Organizada - Mexico's Office of Specialized Investigation Against Organized Crime), upon urgent request from then-Mexican Attorney General Eduardo Medina-Mora, the United States Drug Enforcement Administration (DEA) led a review team, consisting of DEA and Department of Justice experts in security, criminal investigation, intelligence, law, and internal affairs, to observe the policies and procedures at SIEDO and provide recommendations for their improvement. After several site visits and personnel interviews, the team prepared recommendations to improve security standards and operational abilities, all of which impact corruption at SIEDO.

On a broader basis, pending legislative reforms, including drafting of a new Criminal Procedure Code, will enhance Mexico's anti-corruption efforts. These reforms, in which Mexico's criminal justice system is expected to transition from an inquisitorial system to an accusatory system, will help ensure procedural fairness and judicial efficiency within Mexico's trial process.

The Government of Mexico has required that the Procedural Code Reform be completed by 2016. This serves as a reminder that the transition from an inquisitorial system to a more accusatory system is difficult, complex, and is a sometimes exceedingly slow process. We know from experience in countries throughout the world, including Colombia, that this process can take between five and ten years. And while we recognize fully the breadth and enormity of the challenge Mexico faces in transitioning to an adversarial system, we are committed to facing this challenge with them. We have also learned, through our assistance efforts in Colombia and elsewhere, that these reforms can and do work and will result in a better functioning criminal justice system. During this complex process, we will be steadfast in our commitment and support of our Mexican counterparts.

We also support the development of vetted law enforcement units, through which the most sensitive and complex investigations will be handled by investigators and prosecutors who have passed vigorous background and integrity checks. We are providing assistance to Mexico in developing and implementing sound vetting procedures, which, in the end, will help root out corruption and not let it halt progress in Mexico.

Effective anti-corruption efforts are cross cutting and require the political will of a country's leadership. The Government of Mexico has prioritized anti-corruption efforts. This is a critical mission and we applaud the commitment that the Government of Mexico has already made. This will be a lengthy process, but one that the Department of Justice will continue to support.

b. It is my understanding that the Obama Administration is already looking beyond the first Merida Initiative to provide additional training and assistance to Mexico. What counter-narcotics programs would DOJ want to see in a possible second Merida assistance package to Mexico and why?

Response: The Department of Justice will seek to build on gains made during the first Merida assistance package. We will continue to work together with our Mexican colleagues as Mexico continues to build the institutional capacity to effectively and efficiently investigate and prosecute criminal cases. In doing so, DOJ will continue to look to our interagency partners for their assistance and cooperation in helping advance the abilities and expertise of Mexican prosecutors and law enforcement in the pursuit of dismantling drug trafficking organizations.

A critical component of anti-cartel activities is the continued development and support of vetted units of Mexico law enforcement officials and prosecutors. Vetted units are staffed by police, investigators and prosecutors who have passed vigorous background and integrity checks – persons who can be trusted to handle the most sensitive and complex cases. Merida funding to support vetted unit development is imperative. As we work with our Mexican counterparts to enhance investigative and prosecutorial capabilities, we anticipate an increased training focus on the financial underpinnings of drug trafficking organizations, such as money laundering, bulk cash smuggling, and asset forfeiture efforts, as well as efforts against precursor chemical diversion and trafficking. We also foresee assisting in efforts to extend special investigative tools including undercover investigations.

We also support Mexico's efforts to further develop witness protection, courthouse security, and judicial security assistance programs.

Medical Marijuana Decriminalization:

55. The Administration's recent decision to drastically change counternarcotics enforcement policy and move toward decriminalization of marijuana in states that have state laws allowing medicinal use of marijuana is troubling. This sends the wrong message to kids, parents, and the drug cartels. Further, this decision to not enforce federal law in these states raises serious questions about how state and local

partners, particularly those jurisdictions that opt-out of state laws allowing medicinal marijuana, will interpret this decision. These jurisdictions that opt-out may now be left to combat illegal marijuana distributors and growers without the assistance of federal law enforcement. Will the Department, including component law enforcement agencies, provide investigative and prosecutorial support local law enforcement in jurisdictions that opt-out of state medicinal marijuana laws? If not, why?

Response: The Department and its component law enforcement agencies will continue to enforce federal laws throughout the country in accordance with the Controlled Substances Act. The Department is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. Accordingly, the DEA will continue to focus and direct its limited investigative resources toward international and domestic drug trafficking organizations involved with the manufacture and distribution of marijuana for profit.

Nor does the Department endorse purported "medical" uses of controlled substances, including marijuana, except as approved by the Food and Drug Administration. Medications should be evaluated by scientific standards as determined by the FDA, not by popular vote. This is how safe and effective medications have been approved for decades. Science, not the political process, should determine which medicines are safe, effective, and appropriate.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources are directed towards these objectives.

As a general matter, in pursuing these priorities, the Department and its law enforcement components do not focus their investigative and prosecutorial resources on sick and/or terminally ill patients who use marijuana as part of a recommended treatment regimen consistent with applicable state law. Such conduct has never been a focus of the Department's enforcement efforts.

The Department's enforcement guidance does not "legalize" marijuana. To the contrary, the guidance explicitly states that use or distribution of marijuana remains illegal under federal law. Drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask their activities will face federal prosecution. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority.

Moreover, the Department and its component agencies, particularly the DEA, are committed to providing continued investigative and prosecutorial support to state and local law enforcement in all jurisdictions, regardless of a state's medicinal marijuana laws.

Marijuana from Mexico:

56. Mexico is a major producer of marijuana grown for the U.S. market. I'm concerned that the current Administration's stance on marijuana at home could impact international policy on marijuana enforcement.

a. Given that Mexico is the primary foreign source of marijuana for the United States, what steps are being taken by the Department of Justice to address future increases in the flow of marijuana into the United States?

Response: Mexico has been the principal source area for U.S. destined foreign marijuana for decades. The prevalence of marijuana and the continuing high demand for it make marijuana one of the foremost drug threats in the U.S. The stable market for illicit marijuana often provides the financial wherewithal for drug traffickers to bankroll other criminal activity, including the production and/or distribution of other illicit drugs, like methamphetamine and cocaine. According to a 2008 interagency report, marijuana is the top revenue generator for Mexican drug trafficking organizations —a cash crop that finances corruption and the carnage of violence year after year. The profits derived from marijuana trafficking – an industry with minimal overhead costs, controlled entirely by the traffickers – are used not only to finance other drug enterprises by Mexico's polydrug cartels, but also to pay recurring "business" expenses, purchase weapons, and bribe corrupt officials. Though the Government of Mexico has a robust eradication program, many of the military personnel traditionally assigned to eradicate marijuana and opium poppies have recently been diverted to the offensive against the cartels.

As a result, the Department of Justice has long targeted marijuana trafficking organizations both domestically and in Mexico, for investigation and anticipated disruption and dismantlement, and will continue to do so. Just last month, the Department promulgated its Strategy for Combating the Mexican Cartels. Pursuant to that Strategy:

> It is a priority of the Department of Justice to disrupt and dismantle the Mexican drug cartels, bring to justice their leadership, and stem the growing violence and associated criminal activity perpetrated by the cartels, both along the Southwest Border and throughout the Nation. . . .
>
> The Department's Strategy will be executed through the proven mechanism of prosecutor-led, intelligence-driven multi-agency task forces, with the Organized Crime Drug Enforcement Task Forces (OCDETF) Program serving the primary coordinating function. . . .
>
> The Department has embraced a model to achieve these comprehensive goals that is proactive, in which we develop priority targets through the

extensive use of intelligence. . . . Sharing information, we build cases, coordinating long-term, extensive investigations to identify all the tentacles of a particular organization. Through sustained coordination of these operations, we are able to execute a coordinated enforcement action, arresting as many high-level members of the organization as possible, disrupting and dismantling the domestic transportation and distribution cells of the organization, and seizing as many of the organization's assets as possible, whether those assets be in the form of bank accounts, real property, cash, drugs, or weapons. Finally we prosecute the leaders of the cartels and their principal facilitators, locating, arresting, and extraditing them from abroad as necessary. In this effort, we coordinate closely with our Mexican counterparts to achieve the goal: destruction or weakening of the drug cartels to the point that they no longer pose a viable threat to U.S. interests and can be dealt with by Mexican law enforcement in conjunction with a strengthened judicial system and an improved legal framework for fighting organized crime.

b. Will the recent decision to abandon enforcement efforts in states that allow medicinal marijuana use impact the broader strategy against Mexican marijuana? If not, why not?

Response: The Department of Justice has not "abandoned" enforcement efforts on marijuana in any states. The Department and its component law enforcement agencies will continue to enforce federal laws throughout the country in accordance with the Controlled Substances Act. The Department is committed to the enforcement of the Controlled Substances Act in all States. The Department's recent guidance regarding effective use of limited investigative and prosecutorial resources will have no impact on our broader strategy against Mexican marijuana. The Department's guidance simply clarifies that our limited federal resources should be used to target major drug traffickers – precisely the kind of people who seek to illegally import Mexican marijuana into the United States. Moreover, the guidance makes clear that the Department will continue to investigate and prosecute people whose claims of compliance with State and local law conceal operations inconsistent with the terms, conditions, or purposes of those laws, which would certainly include anyone involved in illegal efforts to import or distribute Mexican marijuana in the United States.

Afghanistan Counternarcotics Strategy:

57. In Afghanistan, I believe we must use a comprehensive counter-narcotics approach that incorporates interdiction, alternative development and even eradication. The Obama Administration has shifted its counter-narcotics strategy to place a greater emphasis on interdiction which requires an increase in DEA manpower and assets. The Senate Drug Caucus recently held a hearing on Counternarcotics Operations in Afghanistan after which Michael Braun, the former DEA Chief of Operations, stated in a follow up question that he would recommend establishing 5 to 7 additional FAST teams to conduct operations in Afghanistan to fulfill their mission.

a. Do you believe we have enough FAST teams in place to ensure the success of the program? If not, how many additional FAST teams would you recommend establishing?

Response: Prior to FY 2009, there were three FASTs dedicated to Afghanistan. Two additional FASTs were added for the transit and source zone Western hemisphere operations during FY 2009. While additional FASTs would always be a welcome addition, we believe DEA can be effective in Afghanistan with the resources we have. The most significant limiting factor we face in Afghanistan is helicopter lift. DEA must have adequate helicopter lift capability that is night capable and flown by veteran pilots.

b. What efforts are being made to shut down the major opium trafficking routes, especially along the Afghan border?

Response: The DEA has a multi-objective approach to combating the trafficking of opium throughout Afghanistan and to restrict the movement of opium across Afghanistan's borders to neighboring countries. Specifically, in the last two years, DEA enforcement operations have targeted opium markets and bazaars close to the Afghanistan border in northern (Konduz), southern (Spin Boldak), eastern (Khowst) and western (Herat) provinces. These operations have resulted in record seizures of narcotics, to include 25 metric tons of opium and 53 metric tons of hashish in 2009.

The DEA supports the Afghan National Drug Control Strategy (NDCS) under the Law Enforcement and Interdiction Pillar; one of eight pillars of the NDCS. The DEA's lead role within the U.S. Government under the Interdiction Pillar strengthens the legitimacy of the Government of the Islamic Republic of Afghanistan (GIRoA) by enhancing its ability to conduct law enforcement operations and extend the Rule of Law to provinces where tribal law, corrupt officials, and insurgent forces operate at will. Lack of governance, corruption, and the nexus between drugs and the insurgency have seriously destabilized the GIRoA. By destroying drug organizations abroad, the DEA is able to deny a source of funding to terrorists and extremists, assist in stabilization efforts and ultimately protect the United States from terrorist activities.

In support of the NDCS Law Enforcement and Interdiction Pillar, DEA operations and programs in Afghanistan are aligned under two broad objectives. The first objective is synchronized with the primary objective of all DEA foreign offices: to work with its host-nation counterparts in order to identify, investigate, and dismantle the largest drug trafficking organizations (DTO). This will include the targeting of corruption that is made possible through the use of proceeds from drug trafficking. The DEA is unique in this regard, as its network of overseas offices and extensive relationships with host-nation counterparts facilitate the evolution of bilateral investigations of DTOs into transnational multi-lateral investigations. Within Afghanistan, the DEA's efforts are and will remain focused on investigating DTOs that have been identified as having ties to the insurgency. These DTOs are internally designated as Regional High Value Targets (RHVT), and those located in or exercising significant influence on Helmand Province will receive the bulk of our investigative resources during the next three to six

months. The DEA has spent decades developing ties to the nations bordering Afghanistan (with the exception of Iran). These relations allow the DEA to develop a regional strategy to deal with not only the production of illicit drugs in Helmand, but the customers receiving the drugs in bordering countries. The DEA will leverage those resources to mount a full scale attack on the DTOs in the targeted regions.

The DEA's second objective in Afghanistan is to develop the capacities of its host-nation counterparts; DEA capacity-building efforts are primarily focused on three specialized units of the Afghanistan Counter-Narcotics Police (CNP-A). The three specialized units include a Sensitive Investigative Unit, a Technical Investigations Unit, and a National Interdiction Unit. Excellent working relationships between the DEA, the Department of Defense (DoD), and the Department of State (DoS) have focused capacity building efforts on these three units, combining training, equipment, and infrastructure with mentoring and operational interaction with DEA enforcement groups, DEA training teams, and experienced mentor/advisors. These specialized units have developed to the point where they are operationally capable -- with limited support from coalition members -- and they are currently engaged with the DEA on a daily basis participating in joint operations and investigations.

At the request of the National Security Council (NSC) and in support of the Law Enforcement and Interdiction Pillar, the DEA initiated the U.S. Special Forces-trained Foreign-deployed Advisory and Support Teams (FAST). FAST's primary enforcement priority is to support the U.S. Government's foreign drug policy and enhance the U.S. Embassy Country Teams by strengthening the host nation counterparts capabilities and expertise. FAST personnel advise, train, and mentor host nation counterparts to build Host Nation capacity. FAST is a component of the DEA's operational campaign plan in Afghanistan and has taken the lead in synchronizing and integrating all operations with the U.S. Military targeting High Value Target Organizations (HVTs), networks affiliated with the insurgency, and terrorist organizations.

Illicit Currency Transfers in Afghanistan:

58. One tenet of President Obama's proposed Counternarcotics Strategy is a focus on stopping the flow of drug money to the insurgents who are using it to destabilize the country and support their terrorist activities. This may be difficult because much of the Afghanistan economy uses cash, trade and an elaborate system of hawaladars to move value.

a. It is my understanding that the Afghan Threat Finance Cell, which the DEA leads, is currently just assessing threat finance in the country but not actively conducting operations. When do you believe it will begin to conduct operations?

Response: The ATFC started to become operational in February 2009 following the January 28, 2009, delivery of its first shipment of equipment. It is currently staffed by 32 investigators and analysts from the U.S. military, U.S. law enforcement and intelligence agencies, with the majority of staff arriving in the last few months. Throughout 2009, ATFC staffing has been increasing towards the proposed staffing level of 49. In addition to the involvement of U.S.

agencies, the ATFC includes law enforcement officials from the United Kingdom and Australia and conducts many of its activities with Afghan officials. The ATFC primarily works with Afghan vetted units, and its current partners include the DEA's vetted Sensitive Investigative Unit (SIU), the National Directorate of Security, and the central bank's Financial Transactions and Reports Analysis Center for Afghanistan (FINTRACA).

Since its inception, the ATFC has identified a number of financial facilitators operating in Afghanistan with ties to insurgents, narcotics traffickers, criminal organizations and corrupt governmental officials. The ATFC developed target packages for these facilitators and is working with U.S./coalition law enforcement agencies, U.S./International Security Assistance Force (ISAF) military units, and Afghan authorities to disrupt and dismantle the financial organizations controlled by these facilitators. In order to incorporate the expertise of the various U.S. coalition and Afghan agencies involved in the ATFC, a majority of the ATFC operations and initiatives are conducted utilizing information obtained via judicially authorized telephone intercepts.

The ATFC works in conjunction with vetted members of the Afghan National Police, vetted prosecutors, and vetted members of the Afghan judiciary to obtain court orders to intercept telephonic communications between targets of their operations. The information developed as a result of these intercepts can be presented in Afghan and U.S. courts. The ATFC works closely with members of the U.S. Embassy interagency community, ISAF military units, and coalition and Afghan partners to focus their limited resources on high level financial targets who have a nexus to insurgent/terrorist groups operating in the region.

In an operation which was conducted in August 2009, members of the ATFC, in conjunction with Afghan authorities and members of ISAF, identified a Kabul-based hawaladar believed to be funneling funds from narcotics trafficking groups and a foreign government to the insurgency and corrupt government officials. Intelligence was developed indicating that a large amount of the funds were being used to purchase components to make improvised explosive devices. As a result of a joint investigation and operation conducted by the ATFC, ISAF, and Afghan officials, evidence was obtained which resulted in a raid on the hawaladar. Additional evidence, obtained as a result of this raid, led to the identification of a network of other hawaladars involved in the movement of funds from individuals affiliated with a foreign government to insurgent groups, the identification of a human trafficking group in Australia, several heroin and money laundering organizations operating in the United Kingdom, and a heroin/money laundering network in the Netherlands. These countries have taken ATFC provided information and are conducting investigations into the organizations identified as a result of the ATFC raid. Additionally, a large amount of documentary, computer and telephone information was obtained as a result of this raid, and this information was passed to members of the U.S. Intelligence Community for additional analysis and exploitation.

Since the ATFC began operations, it has stressed the importance of ensuring that information that has been collected and obtained is disseminated throughout the U.S. intelligence, law enforcement, ISAF, and Afghan communities in a timely and expedient manner. To date, the ATFC has generated over 70 Intelligence Information Reports (IIR's)

containing information on financial facilitators and networks. These IIR's are made available to a wide array of organizations throughout the U.S. Government.

b. What do you believe is the most significant financial threat to ISAF troops operating in the country?

Response: The ATFC was established to identify and disrupt the various sources of funding for insurgent and terrorist organizations operating in Afghanistan. These sources include funds from involvement in various stages of the narcotics trade, funds received from outside donors, funds received from other criminal activities (e.g., extortion, kidnapping), and funds received from insurgent groups operating businesses. However, members of the ATFC have indicated that the most serious threat they face is the public corruption that appears endemic throughout various levels of the Afghan government.

c. What additional recommendations would you make to improve our ability to stop the flow of drug money to the insurgents?

Response: The United Arab Emirates (UAE) serves as the hub for financial activity throughout the region. There continues to be concern among the international community that insurgent, terrorist, and criminal organizations may be using the UAE financial infrastructure to move funds throughout the region and the world. The United States and the UAE are working together to combat terror finance. UAE officials have assisted the ATFC in a limited capacity on several ongoing investigations and we look forward to continuing this cooperation.

FBI Whistleblower Retaliation:

59. On March 25, 2007, the DOJ OIG found that the FBI retaliated against Robert Kobus, a Senior Administrative Support Manager in the NY Field Office. The DOJ OIG found that the retaliation was in response to protected whistleblowing by Mr. Kobus. Why hasn't the FBI implemented the corrective action ordered by the DOJ OIG?

Response: On March 15, 2007, DOJ's Office of the Inspector General (OIG) recommended the following: "As corrective action we recommend that OARM [DOJ's Office of Attorney Recruitment and Management] direct the FBI to restore Kobus to the position of a senior administrative support manager in the New York Field Division, or an equivalent position." The FBI identified several open positions available to Mr. Kobus. After rejecting several offers, Mr. Kobus accepted and was placed directly into a newly created Administrative Officer position in approximately December 2007/January 2008, changing both his supervisor and work location.

FBI Whistleblower Retaliation:

60. The DOJ Office of Attorney Recruitment and Management (OARM) received an FBI appeal of the IG's findings in March of 2007, but still no hearing has been held and no resolution of Mr. Kobus's case has been issued by OARM more than 2.5

years after the appeal was filed. Why is the process taking so long? What is a reasonable amount of time in your view for a case such as this to be resolved?

Response: The time required for the Department's final resolution of FBI whistleblower cases depends on a number of factors, including: the complexity of the legal and factual issues presented; the time for and extent of discovery, as well as the time for the parties' respective briefs on the issues (the deadlines for which are usually extended due to requests made by the parties); the voluminous nature of the case files and record evidence; the number and length of hearings (if requested and granted) and OARM's opinions (which typically range between 20-60 pages); a possible stay of OARM proceedings pending resolution of any concurrently filed federal court cases (involving Title VII/EEO claims); and the pendency of other cases before OARM.

OARM has been conducting appropriate and necessary proceedings regarding Mr. Kobus' Request for Corrective Action since it was filed in May 2006. Subject to a change in circumstances, a ruling could be issued by OARM within the next several months.

61. **I understand that Mary Galligan, one of the FBI officials cited by the IG for retaliation against Mr. Kobus, has since been promoted to the position of Chief Inspector of the FBI at FBI Headquarters. What kind of message does this send to other employees that a supervisor who has been cited for whistleblower retaliation has been promoted to head of inspections at the FBI, while, at the same time, no decision has been made by the DOJ on the FBI's appeal of the IG's findings in favor of Mr. Kobus?**

Response: Please see the response to Question 62, below.

62. **Did Director Mueller, or other officials participating in the decision, know of the IG's findings of retaliation involving Ms. Galligan at the time she was promoted? If not, why not?**

Response to 61 - 62: Prior to any executive promotion or selection within the FBI, the FBI conducts disciplinary reviews of the records of the FBI's OPR, Inspection Division, Office of Equal Employment Opportunity Affairs, and Security Division, and of DOJ's OIG, OPR, and Criminal Division, for all prospective candidates.

Internal disciplinary reviews, covering Mary Galligan's entire career, were conducted prior to her selection as Chief Inspector. DOJ records did not disclose any pending OIG investigation regarding Ms. Galligan and the FBI's OPR records revealed that an administrative inquiry involving Ms. Galligan had concluded that allegations that she had retaliated against an FBI employee (not identified) were unsubstantiated.

Following these checks, on June 30, 2009, the FBI Director selected Ms. Galligan for the position of Chief Inspector.

63. Mr. Kobus filed his complaint under 5 U.S.C. § 2303, which provides the statutory authority creating baseline whistleblower protections for FBI employees. Under that law, FBI employees are required to file their whistleblower retaliation complaint with the DOJ OIG or DOJ OPR, and in this case the OIG, make specific findings of retaliation after conducting a thorough investigation of Mr. Kobus's whistleblower complaint. As shown in this case, the OIG plays an important role in investigating whistle blower retaliation and produces significant information that an employee who alleges whistleblower retaliation would not otherwise have access to.

In a last minute amendment prior to the Homeland Security and Government Affairs Committee mark-up of the Whistleblower Protection Enhancement Act of 2009, S. 372, the Administration included a provision that would repeal section 2303 and eliminates the IG's role in FBI whistle blower cases. I asked Director Mueller about the origins of this provision at the last FBI oversight hearing and am still awaiting a response. However, I remain concerned about how and why this amendment came to be.

It appears to me that there is still hostility to whistleblowers at the FBI and the Department of Justice. You have publicly stated your support for whistleblowers. Do you support repealing 5 U.S.C. § 2303 and eliminating the OIG's role in FBI whistle blower cases? If so, please provide a detailed explanation as to how you reconcile previous statements supporting whistleblowers with repealing this important protection.

Response: The Department of Justice strongly supports protecting the rights of whistleblowers and recognizes the invaluable role that whistleblowers play in unearthing waste, fraud, and abuse. The Department does not support eliminating OIG's role in FBI whistleblower cases.

QUESTIONS POSED BY SENATOR KYL

Constitution's Naturalization Clause:

64. The Supreme Court repeatedly has held that the Congress has exclusive authority to determine who may enter the United States pursuant to the grant of authority in the Constitution's Naturalization Clause.[2] Congress has exercised that authority by enacting the Immigration and Nationality Act, which explicitly prohibits admission of aliens who have "engaged in terrorist activity," including those who are members of terrorist organizations, those who endorse or espouse terrorist activity, and those who have received military-type training on behalf of a terrorist organization.[3]

a. Have the detainees presently held at Guantanamo Bay been "engaged in terrorist activity," for purposes of the Immigration and Nationality Act?

Response: "Engaged in a terrorist activity" in the Immigration and Nationality Act (INA) both incorporates the phrase "terrorist activity," which is defined therein, and adds additional activities beyond those contained in the definition of "terrorist activity." Based on those definitions and the information we have about each of the detainees at Guantanamo, it is likely that many of the current GTMO detainees have engaged in activities that would make them ineligible for admission under the INA. Additionally, Congress in separate legislation has specifically prohibited both their release into the United States and the use of DHS funds to provide any immigration benefit to Guantanamo Bay detainees (other than parole into the U.S. for prosecution and related detention). Thus, there has been no occasion to make specific determinations regarding the application of the terrorist activity provisions of the INA in order to determine which of the detainees "engaged in terrorist activity" as that term is used in the INA, 8 U.S.C. § 1182(a)(3)(B).

b. Assuming *arguendo* that there were no Congressional restrictions on the use of appropriated funds for transfer of detainees, what affirmative statutory authorization do you have to admit Guantanamo Bay detainees into the United States for prosecution?

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[2] U.S. CONST. Art. I, § 8, cl. 4; *see, e.g., Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Fok Yung v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

[3] 8 U.S.C. § 1182(a)(3)(B).

Response: The Administration has no plans to "admit" any Guantanamo detainees into the United States. "Admission" is a term of art in the INA, and means with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

Following standard procedures regularly used by the Department of Homeland Security (DHS), detainees at Guantanamo Bay need not be admitted into the United States in order to be prosecuted here. They may be paroled into the United States under section 212(d)(5) of the INA. In immigration law, "parole" is a term of art, and section 212(d)(5) specifically provides that parole "shall not be regarded as an admission" into the country. Paroled individuals are treated as though they were still at the border applying for admission throughout their period in the country. Under section 552(f) of the DHS Appropriations Act, 2010, Pub. L. No. 111-83 (DHSAA), DHS funds may not be used to provide any immigration benefit to Guantanamo Bay detainees except for parole into the United States "for the purposes of prosecution and related detention." Such aliens would be paroled into the U.S. subject to appropriate conditions and not admitted into the U.S.

c. Assuming *arguendo* that there were no Congressional restrictions on the use of appropriated funds for transfer of detainees, what affirmative statutory authorization do you have to admit Guantanamo Bay detainees into the United States for detention not in conjunction with a prosecution?

Response: Please see response to Question 64b.

Although as a general matter parole may be granted in the Secretary's discretion for "urgent humanitarian reasons or significant public benefit," which could include purposes other than criminal prosecution, under current law, DHS funds may not be used to provide any immigration benefit to Guantanamo Bay detainees except for parole into the United States "for the purposes of prosecution and related detention."

Interagency Task Force on Detention Policy:

65. After you testified before the Committee on June 17, 2009, I asked you to identify the legal basis that the Department of Justice could invoke to prevent a Guantanamo Bay detainee from being released into the United States if found not guilty in a federal court. In your October 29 response, you did not identify any legal basis to continue to hold an acquitted detainee, but you did provide the following answer: "There are a number of tools at the government's disposal to ensure that no such detainee is released into the United States, all of which are currently being reviewed by the Special Interagency Task Force on Detention Policy that was created pursuant to Executive Order 13493."

a. Has the Special Interagency Task Force on Detention Policy finished its review of the government's options to prevent the release of an acquitted detainee, at least with respect to Khalid Sheikh Mohammed and the other 9/11 conspirators who you already have announced will be prosecuted in federal court?

Response: The Detention Policy Task Force established by Executive Order 13493 completed its work on January 22, 2010.

b. If so, please identify the legal basis that the Department of Justice could invoke to prevent these individuals from being released into the United States if one or more is found not guilty in a federal court.

Response: Current law bars release of any Guantanamo Bay detainee into the United States. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011(a) (2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Div. B of Pub. L. No. 111-117, § 532(a) (2009); Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 428(a) (2009); and Department of Homeland Security Appropriations Act (DHSAA), 2010, Pub. L. No. 111-83, § 552(a) (2009). Moreover, as a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the question of whether the government has authority to detain under the authority provided by Congress in the 2001 Authorization for Use of Military Force (AUMF), as informed by the law of war. This authority could be relied upon, where appropriate, to detain individuals after an acquittal, whether in a military commission or in federal court. The Administration may also choose to repatriate or resettle any such individuals where consistent with national security, as occurred during the last Administration with respect to two individuals who received only short sentences after military commission prosecutions. Finally, the authority to detain under immigration authorities pending removal from the United States is also a separate legal issue. Immigration authorities may be relied on to hold in immigration detention non-citizens who have been acquitted or who have completed their criminal sentence and who endanger the national security, pending their removal from the United States. We note, however, that normal operation of the immigration laws may be altered by the spending restrictions of the DHSAA.

Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond - witness Michael Edney:

66. In response to a written question following the July 28 hearing entitled "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond," witness Michael Edney said: "Relying on *Zadvydas*, a court may hold that a Guantanamo detainee—transferred to the United States and acquitted on U.S. soil—has a constitutional right to be released in the United States within six months if no foreign country can be found to take him. If kept at Guantanamo, detainees would not have such a right under the *Zadvydas* line of cases and the territorial distinction those cases draw."[4]

a. Is there any possibility that a court could, relying on the *Zadvydas* decision, conclude that a Guantanamo detainee acquitted on U.S. soil could not be held indefinitely?

Response: The Court's decision in *Zadvydas* ultimately was based on construction of a particular statute, rather than on any constitutional holding. Furthermore, in its discussion of possible constitutional limitations, the Court cautioned that it was not considering "terrorism or

[4] Written responses of Michael Edney to questions by Senator Kyl, Oct. 28, 2009, 7-8.

other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." As noted in the response to Question 65, the various statutory authorities under immigration law may provide one avenue to continue to detain Guantanamo detainees where necessary, even were they to be acquitted after a trial. Law of war detention under the 2001 AUMF is another basis for continued detention where appropriate. And current federal law expressly bars release of any Guantanamo Bay detainee into the United States.

b. If there is the possibility that a detainee could not be held indefinitely post-acquittal, has the Administration identified a foreign country that would be willing to accept transfer of Khalid Sheikh Mohammed and the other 9/11 conspirators who will be prosecuted in federal court, in the event that the government is unable to obtain a conviction?

Response: Please see the response to Question 66a.

c. In enacting the PATRIOT Act, Congress added a provision to the Immigration and Nationality Act authorizing continuing detention of aliens who are certified by the Attorney General to be terrorists.[5] Under the statute, the Attorney General may continue to hold a terrorist indefinitely, subject to periodic reviews of the detainee's certification as a terrorist. That authority, however, has never been tested in court. Is there a risk that the Supreme Court could conclude, drawing on the analysis set forth in *Zadvydas*, that this terrorist detention authority is unconstitutional?

Response: Please see the response to Question 66a.

d. This terrorist detention statute allows detained terrorists to bring habeas corpus actions in the federal district courts. Do you know what the government's burden will be to establish the continued dangerousness of a terrorist detainee who seeks release in federal court? How do you plan to meet that burden if the detainee has been tried but not convicted of terrorism-related criminal charges in civilian court?

Response: In order to certify an alien for detention under INA § 236A, the statute provides that the Attorney General must have "reasonable grounds to believe" the alien is either "described in" specific national security-related provisions of the INA, including but not limited to the "engaged in a terrorist activity" provisions of INA § 212(a)(3)(B), or "is engaged in any other activity that endangers the national security of the United States." This "reasonable grounds to believe" standard has historically been interpreted to mean evidence sufficient to meet a probable cause standard. That is substantially lower than the "beyond the reasonable doubt" standard required for a criminal conviction. Additionally, the "engaged in a terrorist activity" grounds in the INA includes significantly more conduct than that covered under the criminal provisions. Hence, a criminal acquittal should not adversely affect the certification legal standard under § 236A – which is essentially equivalent to that required to obtain a criminal search warrant.

[5] INA § 236A, 8 U.S.C. § 1226A.

Six months after the initial certification (and every six months thereafter), if the alien has not been removed and removal is "unlikely in the reasonably foreseeable future," in order to continue the alien's detention, the statute provides that the Attorney General must determine that "the release of the alien will threaten the national security of the United States or the safety of the community or any person." INA § 236A(a)(6). The re-certification and continued detention "will threaten" criterion differs from the initial certification standard; it is a predictive judgment of future threat to the national security – a discretionary determination to be made by the Secretary DHS/Attorney General.

Accordingly neither the initial certification nor subsequent re-certifications under § 236A would be controlled by criminal acquittal.

e. This statute also provides that the power to detain a terrorist "shall terminate" if "the alien is finally determined not to be removable." Do you have any reason to believe that the failure to make such a determination will not be subject to second-guessing in a federal court?

Response: We think it will rarely, if ever, be the case that a terrorist detainee could be found not to be removable under the INA.

Prosecution Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

67. In order to prosecute Khalid Sheikh Mohammed and other 9/11 conspirators in federal court, many U.S. citizens will be asked to serve as jurors.

a. Has the Department of Justice conducted a risk assessment of whether jurors and their families could become targets of violence from al Qaeda operatives or other terrorist sympathizers? If so, how did this consideration factor into the decision to prosecute some 9/11 terrorists in federal court?

Response: Ensuring the security of the public is one of the most important issues the Department considered in making this decision. While the U.S. Marshals Service has not conducted a specific risk assessment on the particular issue of prospective jurors and their families becoming targets, subject matter experts in the U.S. Marshals Service, with extensive experience in risk management, protective investigations and protective response, have conducted an overall risk analysis in connection with the decision to pursue this prosecution in federal court. Based on consultations with the U.S. Marshals and our review of other information concerning the security of conducting terrorism trials in the United States, as well as the long history of successful terrorism trials in our country, we are confident that holding and trying accused terrorists in federal courts can occur safely.

b. What are the range of protections that might be necessary to ensure the safety of jurors and their families both during trial and post-trial?

Response: The U.S. Marshals Service (USMS) has provided protection to jurors for many years. The USMS employs a robust behavioral-based methodology to investigate and mitigate threats and inappropriate communications directed to jurors and other USMS protectees. This investigation and mitigation is one part of the USMS protective response. The second part is the range of physical protection that the USMS can utilize to complement the protective investigation of threats or inappropriate communications.

The protective response is generally determined at in consultation with the trial judge and our partners in the Federal Bureau of Investigation. The FBI is responsible for the criminal investigation of threat activity while the USMS is responsible for threat mitigation via protective investigation and providing a protective response. There are several options for the physical protection of jurors, including: the seating of an anonymous jury, USMS transportation of jurors to and from the trial venue, partial sequestration of jurors, and full sequestration of jurors. These options are scalable and are dictated by current threat activity and consultation with our partners in the court and FBI.

Prosecution of Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

68. Now that the Administration has made a final decision to bring Khalid Sheikh Mohammed and other 9/11 conspirators to the United States for prosecution, please provide this Committee with any memoranda written by the Office of Legal Counsel articulating what additional constitutional and statutory rights detainees may receive by virtue of their presence in the United States that are not currently available to them at Guantanamo.

Response: Please find attached a memorandum concerning the application of the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

69. When you announced that you were authorizing prosecutor John Durham to investigate whether CIA employees violated the law in interrogations of overseas detainees, you issued a statement that your decision was made after you had "reviewed the [Office of Professional Responsibility] report in depth" and "closely examined . . . the 2004 CIA Inspector General's report, as well as other relevant information available to the Department." In contrast, it has been reported that you did not personally review the declination of prosecution memoranda by career prosecutors. For instance, on September 19, 2009, the *Washington Post* reported: "Before his decision to reopen the cases, Holder did not read detailed memos that prosecutors drafted and placed in files to explain their decision to decline prosecutions."

a. Prior to your decision to open the preliminary investigation, did you personally read all of the memoranda of career prosecutors that explained their decisions to decline prosecutions?

b. In announcing your decision to prosecute Khalid Sheikh Mohammed and other 9/11 conspirators in federal court, you stated that you "personally reviewed these cases." Why did you personally review the files of foreign al Qaeda terrorists before making a decision regarding their prosecution, but not review the memoranda written by career prosecutors explaining why U.S. citizens employed by the CIA should not be prosecuted?

Response to a-b: In both of these matters, the Attorney General reviewed materials relevant to his decisions but, consistent with long-standing confidentiality interests, the Department has not identified particular documents that the Attorney General reviewed in either case.

November 13, 2009 Washington Times News Article:

70. The November 13, 2009 Washington Times article, "Iran advocacy group said to skirt lobby rules" alleges that the National Iranian American Council (NIAC) may be operating as an undeclared lobby and may be guilty of violating tax laws, the Foreign Agents Registration Act, and lobbying disclosure laws.

a. Is DOJ investigating the allegations put forward in this article? If not, why?

b. Has DOJ found the allegations in this article to be true?

c. What is the proper recourse against a 501(c)(3) group that engages in lobbying activity on behalf of a foreign government without registering as a lobbyist or filing papers with DOJ indicating that the group is a local agent of a foreign government?

Response to a-c: The Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq. (FARA or the Act), requires an "agent of a foreign principal" to register when engaged within the United States in certain activities at the request of, or under the direction or control of, a foreign principal. Absent this agency relationship, registration under FARA is not required. If an agency relationship is found to exist, registration may not be required if the person qualifies for any of the exemptions in Section 3 of the Act, 22 U.S.C. § 613.

There are criminal penalties under Section 8 of the Act for any person who willfully violates any provision of the Act or any of its regulations, or for any person who willfully makes a false statement of a material fact or willfully omits any material fact required to be stated on any registration statement or supplement thereto or in any other document filed with or furnished to the Department under the provisions of the Act. In addition, the penalties are available for anyone who willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of the documents furnished not misleading.

Section 8 of the Act also provides that whenever in the judgment of the Attorney General any person is engaged in or about to engage in any acts that constitute or will constitute a violation of any provisions of the Act or its regulations, or whenever an agent fails to comply with the provisions of the Act or regulations, or otherwise is in violation of the Act, the Attorney

General may make application to the appropriate United States district court for an order enjoining such acts or enjoining such person from continuing to act as an agent of the foreign principal. The Attorney General can also apply for an order requiring compliance with any appropriate provision of the Act or regulations. The district court has the jurisdiction and authority to issue a temporary or permanent injunction, restraining order or such other that it may deem appropriate.

As you know, longstanding Department policy prohibits us from commenting on whether a matter is the subject of an ongoing investigation.

ALPACT and CAIR:

71. According to media reports, you were the keynote speaker at a November 19 event hosted by a coalition called the Advocates and Leaders for Police and Community Trust (ALPACT). It has also been reported that the Michigan chapter of the Council on American-Islamic Relations (CAIR) is a member of that coalition.

Earlier this year, there were reports that the FBI had suspended its liaison relationship with CAIR, based on the fact that CAIR was named as an unindicted co-conspirator in *United States v. Holy Land Foundation*[6] and evidence that demonstrated a relationship between CAIR, the Palestine Committee, and HAMAS. On February 24, 2009, Senators Coburn, Schumer, and I wrote to the FBI requesting more information.[7] The FBI responded that, in light of the *Holy Land* case and CAIR's potential connection with HAMAS, the FBI had "suspended all formal contacts between CAIR and the FBI." The letter noted that "until [it] can resolve whether there continues to be a connection between CAIR or its executives and HAMAS, the FBI does not view CAIR as an appropriate liaison partner."[8]

a. Were you aware of CAIR's participation in ALPACT when you accepted the invitation to speak?

b. Is there new evidence that exonerates CAIR from the allegations that it provides financial support to designated terrorist organizations?

Response to a-b: No.

c. Has the Department established a different policy with respect to CAIR than its FBI component? If so, why?

d. Please explain the considerations that led you to conclude that speaking to an organization with extremely questionable ties was an appropriate use of your time and the Department's resources.

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[6] Cr. No. 3:04-240-P (N.D. TX).

[7] Letter from Senators Kyl, Schumer, and Coburn to FBI Director Mueller, Feb. 24, 2009.

[8] Letter from FBI Assistant Director Richard Powers to Senator Kyl, April 28, 2009.

Response: Advocates and Leaders for Police and Community Trust (ALPACT) is a coalition of more than 100 law enforcement and civil rights and community leaders in Michigan who are dedicated to fostering collaboration between law enforcement agencies and the communities they serve.

Our law enforcement efforts will be more successful – and our communities will be safer – if we in law enforcement work closely with those we serve and if those communities cooperate with us. This speech, which was widely attended and open to the public, offered an important opportunity to encourage and support these types of partnerships. The speech in no way indicates a change in policy with respect to the Council on American-Islamic Relations.

QUESTIONS POSED BY SENATOR COBURN

# of Prisoners Serving Lengthy Sentences in Prison:

72. During your press conference you noted that a number of terrorists who are now serving lengthy sentences in our prisons.

a. How many of those convicted terrorists were picked up during fire fights in Pakistan or Afghanistan or elsewhere?

Response: While the Department of Justice does not keep statistics on this issue, at least one convicted terrorist was apprehended during military operations in Afghanistan and tried in U.S. courts: John Walker Lindh was captured by U.S. military personnel in Afghanistan and sentenced to 20 years of imprisonment by the U.S. District Court for the Eastern District of Virginia. In addition, there are other convicted terrorists who were apprehended in raids in Afghanistan or Pakistan. For example, the 1993 World Trade Center bomber Ramzi Yousef was captured in a raid on a guest house in Islamabad, Pakistan. Mir Aimal Kasi, who was responsible for the 1993 shootings at CIA headquarters, was captured in a raid on a hotel in Pakistan. These circumstances are similar to those in which, for example, alleged 9/11 mastermind Khalid Sheikh Mohammad was captured in Rawalpindi, Pakistan in a raid on a house. In addition, Aafia Siddiqui was recently convicted for attempting to murder U.S. military officers and personnel while she was in a police station in Afghanistan in the summer of 2008; she is now awaiting sentencing.

b. How many of them were held without being Mirandized?

Response: All of the individuals listed above were originally held and questioned by the capturing authorities without being *Mirandized* although they were later advised of their rights.

c. How many of them were interrogated by the CIA to gather intelligence about pending plots?

Response: Please consult the Department's Office of Legislative Affairs regarding this request. We may be able to arrange a classified briefing in response to this question.

Possible Prosecution of People Who Submitted Fraudulent Reports:

73. On October 30, 2009, the Recovery Accountability and Transparency Board issued a list of recipients of federal funds that submitted reports to the government that contained fraudulent information on stimulus jobs. I asked you whether the Department plans on prosecuting the people and organizations who submitted fraudulent reports on stimulus jobs and you responded that "One of the areas [you are] going to be focusing on is the misuse of Recovery Act funds, fraud connected to the Recovery Act funds. [And you will] be working with [y]our partners both at Treasury, SEC, other federal agencies, as well as our state and local counterparts." Can you provide me with more details about how you plan to pursue these prosecutions and how you will coordinate among the various agencies?

Response: On November 17, 2009, President Barack Obama established by Executive Order an interagency Financial Fraud Enforcement Task Force ("FFETF") to strengthen efforts to combat financial crime. The Department will lead the task force and the Department of Treasury, the Department of Housing and Urban Development, and the Securities and Exchange Commission will serve on the steering committee. The task force's leadership, along with representatives from a broad range of federal agencies, regulatory authorities, and inspectors general, will work with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets, and recover proceeds for victims.

The task force, which replaces the Corporate Fraud Task Force established in 2002, will build upon efforts already underway to combat mortgage, securities and corporate fraud, and fraud connected to Recovery Act funds, by increasing coordination among the participating agencies and fully utilizing the resources and expertise of the government's law enforcement and regulatory apparatus.

To address fraud connected to the Recovery Act, the FFETF includes a Recovery Act Fraud Working Group that will bring together federal and state prosecutors and investigators, including officials from the Recovery Accountability and Transparency Board, to enhance coordination and information sharing and develop prosecution and investigation strategies for addressing fraud associated with the Recovery Act.

Hate Crimes Law:

74. **During the hearing, I asked you whether current hate crimes laws covered situations like the one in Arkansas where a Muslim gunman shot two military recruiters outside of an Army recruitment facility, killing one. As you may recall, the gunman described his actions as follows: "This was an act of retaliation. An act for the sake of God, for the sake of Allah, the lord of all the world, and also retaliation on the U.S. military." He added, "I do feel I'm not guilty. I don't think it was murder, because murder is when a person kills another person without justified reason." In response to my question, you said, "We now have ... a hate crimes bill that in fact does say that such actions are potentially hate crimes. Again, there is, I believe, a mandatory minimum sentences that Senator Sessions introduced with regard to the -- the hate crimes bill that deals with -- that deals with the set of facts that you are -- that you're talking about." I believe this answer was a bit misleading. Is violence against a U.S. soldier, because he is a U.S. soldier, a hate crime under current law?**

    a. **Does the new mandatory minimum provision referenced in your response make killing a soldier because he is a soldier a hate crime?**

Response: Section 4712 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, enacted as Division E of the National Defense Authorization Act for Fiscal Year 2010, makes it a crime to knowingly assault a member of the U.S. Armed Services "on account of the military service of that serviceman or status of that individual as a United States serviceman." In

the case of a battery, or an assault resulting in bodily injury, the crime carries a mandatory minimum prison term of six months. That provision does not appear in the new section 249 of title 18, United States Code, entitled "Hate crime acts," but it does make it a federal offense to target violent conduct against a member of the Armed Services because of his or her status as a servicemember.

b. I disagree on principle with Hate Crimes legislation, but if we are going to have it, I believe it should include hate crimes perpetrated against our military. When I asked you previously about this matter you stated that you would "want to look and see what the statistics show, what the facts show." Have you had an opportunity to review those statistics and facts and do you now have an opinion on whether our military should be included as a protected class?

Response: As noted above, federal law now makes it a crime to knowingly assault a U.S. serviceman on account of the military service of that serviceman or status of that individual as a U.S. serviceman. In addition, Section 3A1.1 of the U.S. Sentencing Guidelines provides for enhanced penalties for assaults on servicemen and women, as well as other persons serving in their official capacities in this country. We support these provisions and the policies underlying them.

c. As a general principle, and particularly following the tragic events at Ft. Hood, doesn't it make sense to protect our military from crimes perpetrated on them simply because they are members of the military? Shouldn't they be offered the same protections as minorities who are targeted simply because they are minorities?

Response: Please see the responses to Questions 74 a-b.

d. Would you support legislation adding U.S. soldiers as a protected class, covered explicitly by the federal hate crimes statute? Please explain.

Response: We do not believe additional legislation is needed, especially in light of the recently enacted law criminalizing assaults on members of the Armed Services and the existing provision of the U.S. Sentencing Guidelines. See answers to questions a and b above. See also 18 U.S.C. § 111(a), which, even before enactment of the Matthew Shepard Act, made it a federal crime to assault an officer or employee of the United States, including a member of the uniformed services.

Kinston Voting Rights Case:

75. I also asked you about the Kinston voting rights case where the Department of Justice rejected a change to their election laws after the people of Kinston, N.C. voted by a 2-1 margin to remove party designations from their voter ballots. DOJ rejected the change in the law arguing that the effect of the change would be "strictly racial." This change would have brought the town in line with the vast majority of localities in North Carolina where only 9 out of 551 localities hold

partisan elections. The measure passed in seven of the nine black-majority precincts. On what basis did the Department of Justice decide to strike down Kinston's reasonable change to its election laws?

a. How is removing partisan designations from a ballot a "strictly racial" change?

b. Isn't it true that black voters turned out in record numbers in Kinston in the 2008 election?

c. By preventing the implementation of this provision, isn't the Justice Department abrogating the will of the people, the majority of whom are black?

d. According to the Justice Department's letter to Kinston, "black persons comprise a majority of the city's registered voters" but "in three of the past four general municipal elections, African Americans comprised a minority of the electorate on Election Day" so "for that reason, they are viewed as a minority for analytical purposes." Can you explain to me why they are considered a minority when they are actually the *majority* of registered voters?

e. Doesn't this statement presume that the "candidate of choice" will always be a black Democrat?

f. Isn't this ruling actually attempting to ensure that the people who don't vote get what the Department believes is their "candidate of choice?"

g. Do you believe the Voting Rights Act guarantees that voters get to elect their "candidate of choice?"

Response: When a jurisdiction subject to the provisions of Section 5 of the Voting Rights Act submits a voting change to the Department for review, the analysis focuses on "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting * * *." H.R. Rep. No. 94-196, p. 60. As the Supreme Court has noted, "the purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 125, 141 (1976). Likewise, the 2006 amendments to Section 5 prohibit voting changes that have the effect of diminishing the ability of citizens, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice. *See* Public Law 109-246, Section 5.

In making the requisite determination in this matter, the Department conducted an objective, fact-based analysis of electoral behavior in the city, with a particular emphasis on the prevailing voting patterns in municipal elections, and compared the voting patterns of African Americans voters in Kinston with those of white voters. The analysis established that, for most white voters in Kinston, not only does the race of candidates matter, but it trumps party affiliation.

For example, in election after election, white voters voted according to party affiliation when both candidates were white, and voted according to race when one of the candidates was African American. The election returns also showed that a small percentage of white voters did not let the racial identity of a candidate sway their decision and instead consistently voted according to party affiliation, regardless of candidates' race. Our analysis indicated that it was this small percentage of voters who provided the margin of victory for those African American candidates supported by the minority community who prevailed. Thus, while the change to non-partisan elections is not a "racial" change, it does have a "racial" effect that is retrogressive. The city was not able to establish that this margin of victory did not result from voters' ability to ascertain a candidate's partisan affiliation.

In addition, the issues raised in your questions are addressed in the Department's August 17, 2009, letter to the City of Kinston, which informed city officials of the decision to interpose an objection.

a. How is removing partisan designations from a ballot a "strictly racial" change?

Response: As described above, the Department concluded the change would have a racially discriminatory effect, *i.e.*, a retrogressive effect that is prohibited by Section 5.

b. Isn't it true that black voters turned out in record numbers in Kinston in the 2008 election?

Response: As described above, the Department's analysis focused on the actual voting patterns in elections for municipal office in Kinston.

c. By preventing the implementation of this provision, isn't the Justice Department abrogating the will of the people, the majority of whom are black?

Response: When a voting change is objected to under Section 5, it may not be implemented. Sometimes, this does prevent implementation of a change adopted by referendum or by an elected body.

d. According to the Justice Department's letter to Kinston, "black persons comprise a majority of the city's registered voters" but "in three of the past four general municipal elections, African Americans comprised a minority of the electorate on Election Day" so "for that reason, they are viewed as a minority for analytical purposes." Can you explain to me why they are considered a minority when they are actually the majority of registered voters?

Response: As described above, the Department's analysis focused on the actual voting patterns that occurred in elections for municipal office in Kinston.

e. Doesn't this statement presume that the "candidate of choice" will always be a black Democrat?

Response: The Department did not presume the facts, and instead reported what the analysis of actual voting patterns in elections for municipal office in Kinston revealed.

f. Isn't this ruling actually attempting to ensure that the people who don't vote get what the Department believes is their "candidate of choice?"

Response: No. As described above, the Department's analysis focused on actual voting patterns in elections for municipal office in Kinston.

g. Do you believe the Voting Rights Act guarantees that voters get to elect their "candidate of choice?"

Response: The Voting Rights Act does not guarantee any particular outcome in an election. As described above, however, one of the purposes of Section 5 has always been, and continues to be, to ensure that the ability of citizens to elect their candidates of choice is not diminished based on race, color, or membership in a language minority group.

Medical Marijuana:

76. I asked you about the memorandum issued on October 19, 2009, to U.S. Attorneys in states that have laws authorizing the use of medical marijuana directing prosecutors not to "focus federal resources" on individuals whose actions are in "clear and unambiguous compliance" with state law. You agreed that this was a "break" from the Bush administration policy, but argued that it was merely due to a limited amount of resources. Do you agree that this reallocation of resources will result in fewer prosecutions for marijuana crimes in the states with medical marijuana laws?

a. Do you agree that this directive could send a signal that this administration is not as concerned as prior administrations with the enforcement of our federal marijuana laws?

Response: No. The Administration firmly opposes the legalization of marijuana and all illegal drug use. The Department of Justice's primary aim is to utilize its limited resources effectively to prosecute and dismantle criminal organizations, violent actors, and significant drug traffickers. Drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask such activities will face federal prosecution. The departmental guidance simply articulated that, as a matter of resource allocation, the Department should focus its investigative and prosecutorial resources on significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks.

b. The new DOJ policy directs prosecutors not to investigate caregivers if they appear to be complying with state law. Distributor centers for medical marijuana and their staffs could be considered caregivers under this directive could they not?

Response: Laws authorizing the "medical" use of marijuana vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting states and often among local jurisdictions within those states. (For example, in November 2008, the California Supreme Court in *People v. Mentch*, 45 Cal. 4th 274, 195 P.3d 1061 (Cal., 2008), found that a primary caregiver cannot merely supply marijuana or counsel on its use under state law in California. The primary caregiver must provide consistent responsibility for the housing, health, and safety of that person, not merely just one single pharmaceutical need.) Rather than developing different guidelines for every possible variant of state and local law, the memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The departmental guidance is intended to focus the department's limited investigative and prosecutorial resources on significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks. As the departmental guidance memorandum makes clear, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority. Likewise, drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask their activities will face federal prosecution. The Department will continue to target illegal drug traffickers vigorously, including those that use "dispensaries" as a front to conduct illegal drug trafficking.

c. Do you agree that including caregivers could cause serious problems for prosecutors and law enforcement trying to discern the difference between illicit dealers and distributors?

Response: No. United States Attorneys are vested with prosecutorial discretion based on the law, Department policies, and the facts and circumstances surrounding each case. The guidance does not provide any safe harbor from violations of federal law. Rather, it simply states that the prosecution of "those individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana . . . [are] unlikely to be an efficient use of limited federal resources." The decision to investigate or prosecute in any matter will necessarily be a fact intensive inquiry, based on the particular circumstances of the situation, and a variety of factors are weighed in determining what investigations and prosecutions the Department will pursue. The departmental guidance identifies a number of characteristics that may indicate illegal drug trafficking activity of potential federal interest, including evidence of violence; the unlawful use of firearms; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law; money laundering activity; excessive financial gains or amounts of cash; illegal possession or sales of other controlled substances; or ties to other criminal enterprises.

d. Do you agree that weakening federal drug enforcement efforts with regard to medical marijuana will result in more people abusing marijuana?

Response: The Department's guidance articulates the Department's balanced approach, which effectively focuses the Department's limited resources on serious drug traffickers while taking into account state and local laws. As a matter of resource allocation, the Department does not focus its investigative efforts on individuals with serious illness who are in clear and unambiguous compliance with applicable state "medical marijuana" laws. Such conduct has never been a focus of the Department's enforcement efforts. To be clear, the guidance does not legalize marijuana. To the contrary, it explicitly states that marijuana remains illegal under federal law. As the enforcement guidance makes clear, investigation and prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be a Departmental enforcement priority, including those who falsely claim to be in compliance with state law. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority.

The Administration strongly promotes efforts to reduce marijuana use, especially among young people – and will continue to do so. For example, the DEA has partnered with states, community groups and other organizations to aggressively promote demand reduction. DEA's personnel regularly speak with young people about the negative impact of drug use. Additionally, the Office of National Drug Control Policy supports multi-faceted prevention and treatment programs, and that support will continue.

Prosecution of Khalid Sheikh Mohammad (KSM):

77. **When asked on one of the Sunday talk shows what would happen if the jury failed to convict Khalid Sheikh Mohammad (KSM) or one of the other 9/11 co-conspirators, Senator Reed responded that "under the basic principles of international law, as long as these individuals pose a threat, they can be detained, and they will."**

    a. **You stated at your hearing that you plan to continue to detain these individuals if they are acquitted or released on a technicality. Can you please describe the legal basis on which you will base their continued detention?**

    b. **What are your specific plans for these terrorists in the event that you are not successful in prosecuting them?**

Response to a-b: As the Attorney General stated in his testimony, in the event that the accused 9/11 co-conspirators were acquitted, that would not mean that these individuals would be released into this country. As noted in the responses to Questions 65, as a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the question of whether the government has authority to detain under the 2001 AUMF, as informed by the law of war, which provides another legal basis for continued detention where appropriate. In addition, as noted in the responses to Questions 65 and 66, the authority to detain under immigration authorities pending removal from the United States also furnishes a separate legal basis for continued detention where appropriate. We cannot speculate on what might happen in the event that these individuals were acquitted.

c. Can you explain how your plan to detain these individuals regardless of the result of the trial in federal court "showcases" our justice system, as some proponents have stated?

Response: The purpose of any criminal trial, whether in federal court or in military commission, is not to "showcase" our system of justice. Rather, it is to hold accountable those who have committed serious crimes in a manner that is consistent with the rule of law. The fact that there may be independent bases for detention of individuals that are not based on criminal activity does not undermine that objective.

d. Section 1-7.550 of the Department of Justice's Manual for U.S. Attorney's states: "Because the release of certain types of information could tend to prejudice an adjudicative proceeding, Department personnel should refrain from making available the following: (A) Observations about a defendant's character; (B) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement; (C) Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic services, including DNA testing, or to the refusal by the defendant to submit to such tests or examinations; (D) Statements concerning the identity, testimony, or credibility of prospective witnesses; (E) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial; and (F) Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense."

How do you reconcile your ethical duty to not to prejudice a case according to this provision with your statements at the hearing calling those individuals being tried in federal court "terrorists" who "murdered" people and asserting that "failure is not an option"?

Response: The Attorney General's comments were meant to assure the public that civilian courts are able to handle the most serious of cases and to express his confidence that the evidence exists to so prove the case. We believe the Attorney General's comments are not in contradiction with the principle that the Government bears the burden of proving a defendant's guilt beyond a reasonable doubt in a court of law.

Campaign against Terrorism:

78. During your press conference you noted that a "sustained campaign against terrorism requires a combination of intelligence, law enforcement and military operations..." As a member of the Senate Intelligence Committee, I'm glad that you recognize the vital role our intelligence professionals play in protecting us from terrorism.

a. How soon before announcing this decision did you consult with the CIA Director and NCTC Director?

b. Did they outline any concerns about the potential exposure of sources and methods or the exposure of his officers during a lengthy public trial?

c. If not, did you consult with the DNI or any other IC leader?

d. Did you undertake any assessment of the potential damage to our intelligence sources and methods from the trials?

e. Does your assessment change in any way if a detainee represents himself and is given direct or indirect access to intelligence?

Response to a-e: Prior to making this decision, the Attorney General received extensive input from the Intelligence Community on classified information that might be relevant to this trial and how best to protect that information, as well as classified sources and methods and other information impacting security concerns. We recognize that intelligence collection is an essential part of a successful fight against al Qaeda and we are committed to ensuring that classified information, including sources and methods, are adequately protected in criminal trials, military commissions, and habeas corpus review of detention in federal court. Of course, there may be instances in which we do not use certain information in any of these fora if we believe it would have an adverse impact on intelligence equities.

Prosecution of Khalid Sheikh Mohammad (KSM):

79. When you bring Khalid Sheikh Mohammed to the United States, it seems quite clear you will give him and his fellow war criminals a whole host of Constitutional and statutory rights not currently available to them at Guantanamo. Will you share with this Committee any memos written by the Office of Legal Counsel articulating what additional Constitutional and statutory rights al Qaeda terrorists will receive by virtue of their presence in the United States when you unnecessarily bring them here voluntarily?

Response: Please find attached a memorandum concerning the application of the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

80. In making your announcement that Khalid Sheikh Mohammed and his co-conspirators will be moved to a federal criminal court, despite a revamped military commission system that President Obama just signed into law, you said that the Justice Department has, and I am quoting here, "a long and a successful history of prosecuting terrorists for their crimes." The 9/11 Commission has described how past public criminal trials of terrorists have compromised U.S. intelligence information on al Qaeda. Can you explain how giving intelligence information to the enemy can in any way be considered a success?

Response: We are not going to give intelligence information to the enemy. Regardless of whether suspected terrorists are prosecuted in military commissions or in civilian criminal courts, the government must always be careful to protect sensitive intelligence information about sources, methods and tactics. Since 2001, by using tools such as the Classified Information Procedures Act and other laws designed to protect sensitive information, the Department has successfully prosecuted dozens of terrorists in our criminal courts. Although the 9/11 Commission Report noted that prosecutions during the 1990s targeting the perpetrators of the first World Trade Center bombing "had the unintended consequence of alerting some al Qaeda members to the United States government's interest in them," the Department's record of success since the September 11 attacks demonstrates the great strides that the Intelligence Community and law enforcement community have made during the past nine years.

D.C Voting Rights Bill:

81. *The Washington Post* reported in April 2009 that you received a memo from the Office of Legal Counsel that declared unconstitutional the D.C. Voting Rights bill that is currently pending in the House. At that time, you refused to release the OLC memo despite requests from members of both the House and the Senate. You said the reason you were not releasing it because it reflected internal deliberations and was not a "final" or "formal" ruling, even though it had been signed by Deputy Assistant Attorney General David Barron, a political appointee who has served as the office's acting chief since January. On what basis did you withhold this memo?

a. Will you now agree to release it?

b. If not, please explain why not, especially given the Obama Administration's commitment to transparency, the lack of national security implications of this memo, and the logic that releasing the memo would benefit Congress by explaining why an independent review by the Executive Branch has determined that a law is unconstitutional.

Response to 81a-b: The Department has substantial confidentiality interests in documents that would reveal its internal deliberations in reaching its final decisions. We believe that this confidentiality is important to preserving the candid and robust debate within the Department, which is essential to sound decision-making. As the Department has previously indicated, after concluding that there are strong arguments on both sides of the issue, the Attorney General determined that fundamental constitutional principles favoring enfranchisement, together with the District Clause (which confers on the Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District ... as may ... become the Seat of Government of the United States," U.S. Const., art. I, s 8, cl. 17) , provides Congress with the authority to confer congressional representation on the District of Columbia.

c. Following receipt of the OLC memo, you contacted Deputy Solicitor General Neal K. Katyal to ask his opinion on whether the bill was constitutional and could be defended by the Office of the Solicitor General.

i. Why did you seek his counsel when you already had an opinion by the Office of Legal Counsel that it was unconstitutional?

Response: As indicated above, the Department has substantial confidentiality interests in the internal deliberations that lead to its final decisions.

ii. Do you believe the bill is constitutional?

Response: The Attorney General carefully considered the relevant legal arguments stemming from the District Clause, the Composition Clause, and fundamental constitutional principles. After concluding that there are strong arguments on both sides of the issue, the Attorney General determined that fundamental constitutional principles favoring enfranchisement, together with the District Clause, which confers on the Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District … as may .. become the Seat of the Government of the United States . . .," U.S. Const., art. I, section 8, cl. 17, provide sufficient authority to support the constitutionality of a statute conferring congressional representation on the District of Columbia.

iii. Did you seek Mr. Katyal's opinion because you wanted to find someone to support your position and override the determination of OLC?
iv. Why did you not issue your own detailed, signed opinion as to the legislation's constitutionality as prior Attorney General's have done?
v. Isn't overriding an OLC opinion without even following the proper procedures the same type of politicization of the Justice Department that the previous Administration was accused of doing?

Response to 81c.iii.- v: As indicated above, the Department has substantial confidentiality interests in the internal deliberations that lead to its final decisions. In this instance, the Department has disclosed the Attorney General's decision and reasons therefore.

d. As you know, following the Department of Justice's voluntary dismissal of the complaint against members of the New Black Panther Party, members of the House and Senate repeatedly requested information concerning the details of this decision. In addition, pursuant to its statutory mandate to properly investigate the enforcement of civil rights laws and deprivations of the right to vote, the U.S. Commission on Civil Rights requested similar information regarding the dismissal of this case. To date, the only responses Congress and the U.S. Commission on Civil Rights have received are largely nonresponsive letters that do not include the materials requested. Further, the Department of Justice's final response merely indicates that the matter has been referred to the Office of Professional Responsibility and it is conducting an inquiry. Hence, the Department's position is that no further information will be provided until OPR's inquiry is concluded.

i. Why has DOJ refused to provide information in response to these valid requests?

ii. Will you provide the information requested?

Response to 81d(i-ii): The Department seeks to be as responsive as possible to Congressional oversight and to requests from the U.S. Commission on Civil Rights. The Department has responded to each of the requests from Members of Congress and from the U.S. Commission on Civil Rights about this litigation and has provided information about the Department's decisions in the case. Among other things, on January 11, 2010 and February 26, 2010, consistent with the Department's ongoing practice of cooperation with the U.S. Commission on Civil Rights, the Department provided the Commission responses to its requests for information, including approximately 2,000 pages of documents. We also have made this same information available to Senator Sessions and Representatives Conyers, Smith and Wolf. We continue to evaluate whether we can provide further information to the Commission consistent with confidentiality concerns.

iii. Do you believe that an OPR investigation supersedes Congress' legitimate oversight functions?

Response: No. The Department seeks to accommodate legitimate congressional oversight requests to the extent possible, consistent with the integrity of OPR's process and individual privacy interests that are necessarily implicated by OPR investigations and the confidentiality concerns that the Department routinely protects in litigation matters. As noted above, on January 11, 2010 and February 26, 2010, consistent with the Department's ongoing practice of cooperation with the U.S. Commission on Civil Rights, the Department responded to the Commission's requests for information. In so doing, the Department did not provide documents prepared by or for OPR only insofar as such information was privileged or Privacy Act protected. In addition, as noted, the Department has made the same information available to Senator Sessions and Representatives Conyers, Smith and Wolf.

iv. It has been reported that the U.S. Commission on Civil Rights has issued subpoenas to employees of the Justice Department and has scheduled depositions in the coming weeks as part of its investigation into the Civil Rights Division's dismissal this case.[i] Will you provide USCCR with the DOJ witnesses and materials they request?

Response: The depositions to which you refer did not go forward. Rather, since the time of your question, the United States Commission on Civil Rights sent a request to the Department of Justice for documents and other information in connection with the Commission's planned enforcement report. As noted above, consistent with its ongoing practice of cooperation with the Commission, on January 11, 2010 and February 26, 2010, the Department provided the Commission responses to its requests for information, including approximately 2,000 pages of documents.

In addition, the Department is carefully considering a more recent request from the Commission that career Department employees provide hearing testimony about information gained in the course of their official duties. The Department is evaluating that request in light of its ongoing cooperation with the Commission and the confidentiality and other institutional

interests the Department routinely protects, and will respond as soon as possible in order to facilitate the Commission's planning for the hearing.

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[1] Ryan J. Reilly, *U.S. Commission on Civil Rights Issues Subpoenas to DOJ*, MAINJUSTICE, Nov. 24, 2009, at http://www.mainjustice.com/2009/11/24/u-s-commission-on-civil-rights-issues-subpoenas-to-doj/.

Attachment 1

U.S. Department of Justice

SEP 17 2009

Washington, D.C. 20530

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Lieberman:

Pursuant to the requirements of 31 U.S.C. § 720, the U.S. Department of Justice (the Department) hereby responds to recommendations contained in the Government Accountability Office's (GAO) final report 09-709, dated June 18, 2009, entitled "FIREARMS TRAFFICKING: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges". The report contained six recommendations for the Attorney General which are addressed below.

GAO Recommendation Number 1: The U.S. Attorney General should prepare a report to Congress on approaches to address the challenges law enforcement officials raised in this report regarding the constraints on the collection of data that inhibit the ability of law enforcement to conduct timely investigations.

The Department's response: For the reasons outlined below, the Department does not believe that a report along the lines recommended is warranted and thus does not concur in this recommendation.

The existing constraints on the collection of data relevant to firearms trafficking are well known. The Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is prohibited through an annual appropriations restriction from centralizing or consolidating information relating to firearms purchases from Federal firearms licensees (Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524.575). As a result, completing a firearm trace can take a considerable amount of time. The lack of background checks for private firearms sales can also hinder the tracing process because ATF often cannot trace a firearm beyond its first retail sale. Also, while the multiple sales reporting requirement for handguns is a useful law enforcement tool, the fact that it does not apply to all firearms purchases means that ATF does not have such information for certain types of firearms that may be involved in trafficking. In any event, while ATF could conduct more timely investigations if the constraints on the collection of data were lifted, ATF works hard to efficiently and effectively combat violent crime and firearms trafficking within the existing framework of the law.

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GAO Recommendation Number 2: To further enhance interagency collaboration in combating arms trafficking to Mexico and to help ensure integrated policy and program direction, the U.S. Attorney General and the Secretary of Homeland Security should finalize the Memorandum of Understanding (MOU) between ATF and U.S. Immigration and Customs Enforcement (ICE) and develop processes for periodically monitoring its implementation and making any needed adjustments.

The Department's response: The Department agrees with this recommendation.

Notably, ATF and ICE have finalized the MOU, which was signed on June 30, 2009. As noted below in response to Recommendation 4, ATF is committed to working effectively with ICE in combating arms trafficking by ensuring that there is a high level of coordination, collaboration, and cooperation between the two agencies. Officials from ATF and ICE continue to meet periodically to discuss ongoing issues relating to the MOU and interagency law enforcement efforts aimed at combating firearms trafficking.

GAO Recommendation Number 3: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General should direct the ATF Director to regularly update ATF's reporting on aggregate firearms trafficking data and trends.

The Department's response: The Department agrees with this recommendation. The AG has directed the ATF Director to begin publishing certain aggregate-level firearms trace data and studies. However, the publishing of any trace data or studies will be subject to resource and appropriations limitations.

The specific rationale provided for in this GAO recommendation is that such reporting will assist with identifying where efforts should be targeted to combat illicit arms trafficking to Mexico. ATF has historically produced a variety of documents/publications designed to address firearms-related issues including data pertaining to firearms trafficking and trends. Importantly, however, these publications were primarily designed to provide a general understanding of these issues with respect to domestic firearms trafficking. The reports ATF used to publish did not directly address firearms trafficking along the southwest border, and going back to publishing certain aggregate studies will not necessarily provide the type of information needed to combat illicit arms trafficking to Mexico. Many of these publications have been discontinued due primarily to competing demands and a lack of resources essential to their development and continued publication. Nevertheless, despite the discontinuance of some publications depicting general aggregate-level firearms trafficking data and trends, ATF has produced other (law enforcement sensitive) publications that address firearms trafficking trends and trace statistical data specifically related to firearms trafficking to Mexico and ATF's efforts along the southwest border. Further, ATF already provides trace data and other relevant strategic and tactical information to the Government of Mexico and other law enforcement partners. ATF also has been a significant contributor to publications developed and distributed by other agencies that address similar issues

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such as the National Gang Intelligence Center's 2009 National Gang Threat Assessment. While ATF relies on a variety of management tools in making decisions regarding investigative priorities and the deployment of resources in support of our enforcement responsibilities, these discontinued resources nevertheless have been of some use internally. Therefore, ATF will publish certain aggregate-level firearms trace data and studies as resources allow.

GAO Recommendation Number 4: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General and the Secretary of Homeland Security should, in light of Department of Homeland Security's (DHS) recent efforts to assess southbound weapons smuggling trends, direct ATF and ICE to ensure they share comprehensive data and leverage each other's expertise and analysis on future assessments relevant to the issue.

The Department's response: The Department agrees with this recommendation.

The Department is committed to ensuring that tactical, operational, and strategic intelligence and investigative information is efficiently and effectively shared among our law enforcement partners. To that end, on August 13, 2009, the Department signed a letter of intent with DHS and the Mexican Attorney General to develop a coordinated and intelligence-driven response to the threat of cross border smuggling and trafficking of weapons and ammunition. Further, we note that both ICE and U.S. Customs and Border Patrol (CBP) provide analysts who serve at the "Gun Desk" at the El Paso Intelligence Center (EPIC), a multi-agency intelligence center that provides tactical and operational support in targeting narcotics- and firearms-trafficking and violence related to the Mexican cartels. The "Gun Desk" at EPIC serves as a central repository for all intelligence related to firearms along the Southwest Border.

In addition, on June 30, 2009, ATF and ICE updated a MOU that addresses how the two agencies will work together on investigations of international firearms trafficking and possession of firearms by illegal aliens. This MOU provides a framework for both agencies to share intelligence and conduct investigations and will help ensure that the resources of both agencies are utilized in a more efficient, coordinated manner.

Similarly, on June 18, 2009, DEA and ICE entered into an MOU that memorializes both agencies' commitment to information sharing. Under this MOU, ICE will participate fully in both the Organized Crime Drug Enforcement Task Force (OCDETF) Fusion Center (OFC) and the Special Operations Division (SOD), sharing all investigative reports, records, and subject indexing records from open and closed investigations, including those related to weapons. OFC is a comprehensive data center containing data from, and providing intelligence and investigative support to, ATF, DEA, Federal Bureau of Investigation, Internal Revenue Service, and EPIC, among others. In addition, under the terms of this MOU, ICE will provide access to data related to all seizures of money, drugs, and firearms at EPIC.

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These two MOUs reflect the commitment of the Department and DHS to greater coordination of resources in combating firearms trafficking in the Southwest Border region and represent significant steps toward achieving that goal.

GAO Recommendation Number 5: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General and the Secretary of Homeland Security should ensure the systematic gathering and reporting of data related to results of these efforts, including firearms seizures, investigations, and prosecutions.

The Department's response: The Department agrees with this recommendation and refers to its response to Recommendation 4, *supra.*

GAO Recommendation Number 6: To improve the scope and completeness of data on firearms trafficked to Mexico and to facilitate investigations to disrupt illicit arms trafficking networks, the U.S. Attorney General and the Secretary of State should work with the Government of Mexico to expedite the dissemination of eTrace in Spanish across Mexico to the relevant Government of Mexico officials, provide these officials the proper training on the use of eTrace, and ensure more complete input of information on seized arms into eTrace.

The Department's response: The Department agrees with this recommendation and will take the following action.

ATF expects to complete the Spanish version of e-trace in or about December 2009. In the meantime, ATF will work with the Government of Mexico to develop an effective training plan for the proper implementation and use of Spanish e-trace. Once Spanish e-trace is fully disseminated and implemented, ATF should realize an increase in both the number and quality of firearm trace submissions which should increase the number and scope of firearms trafficking investigations and aid in the reporting of information back to the Government of Mexico.

Should you or members of your staff have any questions, please contact Richard P. Theis, the Department Audit Liaison, on 202-514-0469.

Sincerely,

Lee J. Lofthus
Assistant Attorney General
for Administration

Attachment 1

Copies furnished:

The Honorable Elliot L. Engel
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Committee on Foreign Affairs
House of Representatives
Washington, DC 20515

The Honorable Connie Mack, IV
Ranking Member
Subcommittee on the Western Hemisphere
Committee on Foreign Affairs
House of Representatives
Washington, DC 20515

The Honorable Dan Burton
The Honorable William Delahunt
The Honorable Gabrielle Giffords
The Honorable Albio Sires
The Honorable Gene Green
House of Representatives

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Attachment 1

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Attachment 2

Department of Justice

STATEMENT OF

RITA GLAVIN
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ENTITLED

"THE NEED FOR INCREASED FRAUD ENFORCEMENT IN THE WAKE OF THE ECONOMIC DOWNTURN"

PRESENTED

FEBRUARY 11, 2009

Attachment 2

Good morning, Mr. Chairman, Senator Specter, and members of the Committee. Thank you for your invitation to address the Committee. The Department of Justice (Department or DOJ) welcomes this opportunity to testify on fraud enforcement in the wake of the economic downturn and in support of the Fraud Enforcement and Recovery Act of 2009 (FERA or the Act).

Introduction

I am privileged to be serving the Department of Justice as the Acting Assistant Attorney General for the Criminal Division. Although I am new to this position, I am not new to the Department. I have been a prosecutor with the Department for more than 10 years, and have served the Department in many different capacities, including as Acting Principal Deputy Assistant Attorney General of the Criminal Division, Assistant United States Attorney in the Southern District of New York, and trial attorney with the Public Integrity Section of the Criminal Division. During my long tenure with the Department, I have personally prosecuted and have supervised complex, financial crime cases. As a result, I am well-versed in the tools the Department has at its disposal to address the Nation's current economic crisis.

The Nation's current economic crisis has had devastating effects on mortgage markets, credit markets, commodities and securities markets, and the banking system. The financial crisis demands an aggressive and comprehensive law enforcement response, including vigorous fraud investigations and prosecutions of securities and commodities firms, banks, and individuals that have defrauded their customers and the American taxpayer and otherwise placed billions of

dollars of private and public money at risk. Furthermore, a strategic and proactive approach for detecting and preventing fraud is needed to detect and deter fraud in the future.

The Department, through its Criminal Division, the Federal Bureau of Investigation (FBI), the U.S. Attorney community, and other components, has been investigating and prosecuting financial crimes aggressively. But, we believe more can and should be done. As the Attorney General has stated, we must reinvigorate the traditional missions of the Department and we must embrace the Department's historic role in fighting crime and ensuring fairness in the marketplace.

The proposed FERA legislation gives us some of the tools we need to aggressively fight fraud in the current economic climate. The legislation will provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable. FERA will also provide needed resources to investigate and prosecute those responsible for such misdeeds.

Mortgage Fraud

Along with widespread mortgage delinquencies and foreclosures, lender failures, massive losses by investors in mortgage-backed securities, and turbulence in the credit markets, there has been an alarming increase in mortgage fraud. Whether measured by Suspicious Activity Report (SAR) data, or by the rapid expansion of the FBI's nationwide inventory of mortgage fraud cases, fraud has infected a significant segment of mortgage lending over the past five or more

years. During that period, for example, the FBI's inventory of mortgage fraud cases has more than tripled, and SARs of mortgage fraud have increased almost four-fold.

Even before this current crisis, the Department responded to these alarming numbers. For years, we have been waging an aggressive campaign against mortgage fraudsters through vigorous investigation and prosecution. We deployed a broad array of enforcement strategies that ensured optimal use of our investigative and prosecutorial resources to maximize deterrence and remediation. We have conducted nationwide sweeps in mortgage fraud cases, formed local and regional task forces and working groups, and engaged in major undercover operations. We are also working to uncover rescue scams that target desperate homeowners trying to avoid foreclosure.

For example, in partnership with the FBI, the Department has conducted three nationwide mortgage fraud and other banking crime sweeps. Operation "Malicious Mortgage", conducted last year, resulted in charges against more than 400 defendants across the nation brought by many of the local and regional task forces and working groups currently targeting mortgage fraud. By fully utilizing these task forces and working groups, we have leveraged our limited resources by joining forces with federal, State, and local law enforcement and regulatory partners and have ensured a coordinated and comprehensive response to mortgage fraud and related crimes. Operation "Malicious Mortgage" was the most recent coordinated sweep in an ongoing law enforcement effort to combat mortgage fraud, which also included Operation "Quick Flip" in 2005 and Operation "Continued Action" in 2004.

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On another front, the FBI has established a National Mortgage Fraud Team at FBI Headquarters. This unit, working closely with the DOJ Criminal Division, U.S. Attorneys' Offices and other law enforcement partners, encourages proactive investigations of mortgage fraud and related crimes and employs an intelligence-driven case targeting system to promote real-time enforcement operations. The Deputy Director of the FBI will describe this program in further detail.

Another example of our ongoing efforts to prosecute mortgage fraud is Operation "Homewrecker," a case brought last year by the United States Attorney's Office for the Eastern District of California and investigated by the FBI and the Internal Revenue Service Criminal Investigation Division, which resulted in the indictment of 19 individuals on mortgage fraud-related charges stemming from a scheme that targeted homeowners in dire financial straits, fraudulently obtaining title to more than 100 homes and stealing millions of dollars through fraudulently obtained loans and mortgages. *See United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Feb. 2, 2008); *United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Mar. 13, 2008).

The Department, joining forces with the financial regulatory community, including the Securities and Exchange Commission, has also successfully identified and prosecuted fraud associated with securitization of mortgage-backed securities. For example, as part of Operation "Malicious Mortgage," the United States Attorney's Office for the Eastern District of New York charged a securitization fraud scheme in which investors were victimized when risky subprime mortgage-backed securities were substituted for safer and more conservative investments.

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Because of the complexity and creativity of these criminal schemes, the Department has embraced a collaborative approach – working closely with many different law enforcement agencies – to bring these prosecutions. For example, in a case investigated by the Secret Service and the FBI and prosecuted by the U.S. Attorney's Office for the Northern District of Georgia, a defendant agreed to purchase properties from true owners, assumed their identities, obtained multiple further mortgages on the properties, then used the identities of the homeowners and others to purchase vehicles, open bank accounts and obtain passports which he then used to travel to Jamaica, Italy, Greece while a federal fugitive. His crimes resulted in clouded property titles in several states, a trail of more than 100 victims, and millions of dollars in losses. The defendant was sentenced to 26 years in prison and ordered to pay restitution of almost $6 million. The government also obtained a forfeiture judgment of $6 million, access to the defendant's book and movie rights, and the right to sell the defendant's paintings on eBay in order to restore money to victims.

At the same time, the Department has addressed mortgage fraud through vigorous civil enforcement, including under the False Claims Act (FCA). The Department's recoveries under the FCA, with the assistance of private whistleblowers, have reached record levels. In eight of the last nine years, the Department's recoveries have exceeded $1 billion. Moreover, since 1986, the Department, working with government agencies, and private citizens, has returned more than $21 billion in public monies to Government programs and the Treasury. During the past year, the Department also recovered funds on its own behalf, as well as on behalf of the Departments of Defense, Homeland Security, and Education, and the General Services Administration, to name just a few of the agencies.

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The Department has used the FCA to protect a broad range of government programs and contracts. Health care fraud cases are currently the largest source of the Department's recoveries, but the Department has also relied on the FCA to combat mortgage and other fraud on the Department of Housing and Urban Development (HUD). The Department's recent recoveries include a $10.7 million settlement with RBC Mortgage Company to resolve allegations that it sought FHA insurance for hundreds of ineligible loans. Additionally, the Department obtained two recent judgments, totaling $7.2 million, against a California real estate investor and a Chicago-based mortgage company, for defrauding HUD's direct endorsement program. The Department will continue to vigorously utilize the FCA to hold accountable those who engage in all types of housing related fraud.

Financial Fraud

In addition to mortgage fraud, the Department has had tremendous success in identifying, investigating, and prosecuting massive financial fraud schemes, including securities and commodities market manipulation and Ponzi schemes. Just last week, the Criminal Division and U.S. Attorney's Office in Minnesota charged and arrested an individual who is alleged to have engaged in a large Ponzi scheme operation involving commodities. *See United States v. Charles Hays*, 09-mj-36 (D. Minn. Feb. 4, 2009). The defendant allegedly told investors that their money had been invested in a pooled commodities trading account, but his company had no such account; instead, he used this investor money for his own personal expenses, including a $3 million yacht. This criminal case was brought in parallel with a civil enforcement action and

restraining order freezing assets by the Commodity Futures Trading Commission (CFTC). The case was also worked jointly with U.S. Postal Inspection Service.

In addition, last year, the Department secured the convictions of five former executives, including the owner and president of National Century Financial Enterprises, one of the largest health care finance companies in the United States until its 2002 bankruptcy, on charges stemming from an investment fraud scheme resulting in $2.3 billion in investor losses. In addition, in a case investigated by the United States Postal Inspection Service, the U.S. Attorneys' Offices in Connecticut and the Eastern District of Virginia, working with the Criminal Division's Fraud Section, obtained convictions of four executives who engaged in corporate fraud by executing two false reinsurance transactions to conceal a $59 million decrease in the loss reserves of AIG. The Court found that the transactions caused a loss to AIG shareholders of between $544 and $597 million. Just two weeks ago, an AIG vice president was sentenced to serve four years in federal prison.

Oversight of Economic Stimulus Funding

In addition to continuing our efforts to prosecute the types of fraudulent conduct described above, we must ensure that the funds that Congress authorizes to rejuvenate and stimulate the economy are used as intended. Where these taxpayer funds are not used appropriately or where misrepresentations are made in order to obtain such funds, we are committed to investigating and prosecuting the wrongdoers.

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The Department has always been committed to fighting fraud and, as the nation suffers through the current economic crisis, we are committed to redoubling our efforts. We are determined to move decisively to uncover abuses involving financial fraud schemes, mortgage lending and securitization frauds, foreclosure rescue scams, government program fraud, bankruptcy schemes, and securities and commodities fraud. Much remains to be done and this bill is an important and timely step in the process. It arises at a critical juncture to provide enhanced tools and critically-needed resources that will advance our work in protecting the public, our markets and institutions from fraud and related abuses.

Criminal Statutory Revisions

Let me now turn to specific comments on the legislation. First, I would like to address the proposed changes in various provisions of Title 18 of the United States Code. These changes would enhance our ability to investigate and prosecute mortgage fraud and other types of investment fraud. We support these changes, and would like to take a moment to explain why:

Expanding the scope of financial institution frauds.

First, section 2(a) of the bill would amend the definition of "financial institution" in section 20 of Title 18, United States Code, to include both mortgage lending businesses and any person or entity that makes in whole or in part a federally-related mortgage loan. Subsection 2(b) would introduce a definition of "mortgage lending business" as a new section 27 of Title 18 and would define that term to mean any organization that finances or refinances any debt secured

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by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.

The new definitions for "financial institution" and "mortgage lending business" will ensure that private mortgage brokers and companies are both protected by, and held fully accountable under, federal fraud laws, particularly where they are dealing in federally-regulated or federally-insured mortgages. For example, the bank fraud statute, 18 U.S.C. § 1344, prohibits defrauding "a financial institution," and the amendment to this definition would extend the bank fraud statute beyond traditional banks and financial institutions to private mortgage companies. This definition of "financial institution" would also apply to the following criminal provisions: 18 U.S.C. § 215 (financial institution bribery); 18 U.S.C. § 225 (continuing financial crimes enterprise); and 18 U.S.C. § 1005 (false statement/entry/record for financial institution). The new provision would also create enhanced penalties for mail and wire fraud affecting a financial institution, including a mortgage lending business, pursuant to 18 U.S.C. §§ 1341 and 1343. Additionally, expanding the term "financial institution" to include mortgage lending businesses will strengthen penalties for mortgage frauds and would extend the statute of limitations in mortgage fraud cases.

According to the Wall Street Journal, more than 50 percent of sub-prime mortgages made in this country in 2005 were made by institutions that do not currently fall under the bank fraud criminal statute. Changing the definition of "financial institution" to include non-bank lenders will enhance our ability to prosecute criminals under the bank fraud statute who commit fraud involving loans from those companies.

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The nation's current financial crisis has demonstrated how bad mortgages can affect the health of the banking system and the overall economy. Mortgage lending businesses should be held accountable in the same way as traditional financial institutions, given the impact of their businesses on federally-insured and federally-regulated institutions. These provisions will help do that.

Criminalizing false statements to mortgage lending businesses.

Second, subsection 2(c) would expand the prohibition regarding false statements to financial institutions, section 1014 of Title 18, United States Code, to cover false statements made to mortgage lending businesses. Currently, section 1014 applies only to federal agencies, banks, and credit associations and does not extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. This new provision would ensure that private mortgage brokers and companies are held fully accountable under this federal fraud provision by providing prosecutors with an important tool to charge those who engage in false appraisals.

Amending the Major Fraud statute to include activities relating to TARP funds.

Third, subsection 2(d) of the Act would amend the major fraud statute, section 1031 of Title 18, United States Code, to make explicit that transactions and activities that fall under the Troubled Assets Relief Program (TARP) and the stimulus packages fall within the scope of that provision. The proposed amendment would define the scope of the existing law to criminalize the execution of any fraud scheme with the intent to obtain any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of federal assistance. This would include the

TARP funds, an economic stimulus, recovery or relief plan provided by the Government, or the Government's purchase of any preferred stock in a company. This amendment would ensure that federal prosecutors are able to use one of our most potent fraud statutes to protect government assistance provided during this economic crisis. We look forward to working with the Special Inspector General for TARP to ensure the integrity of the TARP funds and other economic stimulus and rescue packages.

Amending the securities fraud statutes to include commodities options and futures trading.

Fourth, subsection 2(e) of the Act would amend the securities fraud statute by extending its reach to commodities. Among other things, the amendment would ensure that prosecutions could be brought against anyone engaging in a scheme or artifice to defraud, or to obtain money or property by false or fraudulent pretenses, in connection with a commodity for future delivery, or option on a commodity for future delivery. Currently, the securities fraud statute does not reach frauds involving options or futures, which include some of the derivatives and other financial products that were part of the financial collapse. This amendment helps to fill in an existing gap in the tools available to prosecutors and agents.

Amending the Money Laundering statute to define the "proceeds" of illegal activity.

Fifth, subsection 2(f) of the Act would amend the definition of the term "proceeds" in the money laundering statute to make clear that the proceeds of specified unlawful activity includes the gross receipts of the illegal activity, not just the profits of the activity. The money laundering statutes make it illegal to conduct a financial transaction involving the "proceeds" of a crime; however, the term "proceeds" is not defined. As a result, the courts have been left to define the

term. For more than 20 years, courts had almost uniformly construed the term "proceeds" to mean "gross receipts" and not "net receipts."

In *United States v. Santos*, 128 S. Ct. 2020 (2008), the Supreme Court ruled that the term "proceeds," as used in the money laundering statute, was ambiguous, and that the rule of lenity required them to define the term as "net profits" rather than "gross receipts." The Court's decision effectively limited the money laundering statute to profitable crimes. Prior to *Santos*, a mortgage fraudster's kickback to a corrupt appraiser for inflating the value of a home could be charged as a money laundering transaction and could provide a legal basis for seizing the transferred money and eventually returning it to the fraud victims. Under *Santos,* a court could conclude that the payment constituted an expense of the fraud scheme and that it therefore could not be charged as "money laundering."

The result is contrary to Congress' intent to target money laundering as envisioned when the statute was enacted more than two decades ago. The proposed legislation would eliminate the uncertainty that has followed *Santos* and would restore a valuable tool to federal prosecutors. Although the Department supports the Act, the Department respectfully submits additional modifications to further strengthen the proposed amendments. The proposed modifications to the Act pertaining to the money laundering statutes are attached as Appendix A.

Amending the Money Laundering statute to apply to tax evasion.

Sixth, subsection 2(g) of the Act would add a new provision to the international money laundering offense, section 1956(a)(2)(A) of Title 18, United States Code, to make it applicable

to tax evasion. Due to the rapid globalization of the financial system in the last two decades and the development of offshore banking centers, we have seen the development of a troubling growth of income tax evasion that exploits the international funds transfer mechanisms and these offshore centers. In many cases, these tax evasion schemes utilize the same methods and mechanisms as money laundering schemes which involve criminal proceeds. In some, but not all cases, the offshore movement of funds for the purpose of evading income taxes can contribute to the development of offshore centers, and businesses operated by international criminal organizations, that facilitate the laundering of proceeds of drug trafficking and other serious offenses. These activities represent a threat to our financial system beyond the evasion of income taxes.

The proposed amendment to section 1956(a)(2)(A) will address this threat by criminalizing the transfer of funds into or out of the United States with the intent to engage in conduct constituting a violation of our income tax laws. The amendment will not only allow the government to bring civil forfeiture actions against tax evasion funds sent abroad, but will also help U.S. prosecutors enforce forfeiture orders for foreign tax offenses.

Clarifying the Civil False Claims Act

In addition to these revisions to federal criminal statutes, the Act also would add language to section 3729 of Title 31, United States Code, to clarify the scope of liability for civil false claims under the False Claims Act (FCA), which is one of the primary tools used by the Civil Division, along with the U.S. Attorneys' Offices around the country, to deter and recover from those who seek to defraud the Government.

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As the Department's continuing experience reflects, every government agency and program is susceptible to potential fraud, and is therefore in need of the protections afforded by the FCA. The Department therefore supports changes to the FCA designed to eliminate any presentment or federal funds requirements and also recommends that the Committee consider additional modifications to redress the impact of the Supreme Court's recent decision in *U.S. ex rel. Sanders v. Allison Engine*, 128 S. Ct. 2123 (2008). The Department would be happy to discuss with staff these additional modifications. The Department has concerns with some aspects of the Act, however, and would also welcome the opportunity to discuss them with staff.

Additional Resources

Our Nation faces an unprecedented financial crisis. The crisis requires a strategic response to prosecute those responsible for abusing the financial markets, to deter future similar conduct, and to prevent fraud and abuse relating to funds that have been and will be disbursed to help improve the current situation. The Department of Justice has a critical role to play. Federal prosecutors, including those in U.S. Attorneys' Offices around the country, and in the Criminal, Tax, and Civil Divisions of the Department will undoubtedly face an unprecedented demand on their prosecutorial resources through referrals from the FBI, the U.S. Postal Inspection Service, the Special Inspector General for the Troubled Assets Relief Program, and other investigative agencies. To meet these imminent demands and to effectively prosecute the crimes that have come to light as a result of to the current crisis, the Department requires a concomitant increase in resources. The Department has a successful track record in leading groundbreaking nationwide initiatives to target specific criminal activities and, ultimately, the Department's past experience reveals that an investment in a coordinated response and appropriate resources help

ensure justice is served. Further, such an investment allows the government to recover funds that otherwise may be lost to criminals who may go unpunished. Accordingly, the Department supports the Act's allocation of additional resources for the Department.

Conclusion

We applaud the leadership of this Committee in proposing this Act. It provides important enhancements to key statutes that the Department uses to combat fraud. Additionally, FERA adds crucial reinforcements to strained law enforcement resources that would enable the Department and its partners to advance the pace and reach of the enforcement response. With the tools that the Act provides, the Department will be better equipped to address the challenges that face this Nation in these difficult times and to do its part to help our Nation respond to this challenge.

I would be happy to answer any questions from the Committee.

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Appendix A

1. Proposed Change to section sections 2(e)(1)(B) and 2(e)(1)(C).

At Section 2(e)(1)(B): The language "or a commodity" should be deleted so that the bill reads "by inserting 'any commodity for future delivery, or any option on a commodity for future delivery, or' after 'any person in connection with'"; and

At Section 2(e)(1)(C): The language "or a commodity" should be deleted so that the bill reads "by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or' after 'in connection with the purchase or sale of'".

2. Proposed Change to section 2(f).

We suggest slightly revising the *Santos* fix, at section 2(f), to read as follows:

Section 1956(c) of title 18, United States Code, is amended –

(1) by striking the period at the end of paragraph (8) and inserting "; and"

(2) by adding at the end the following:

"(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."

The purpose of the change (from "property derived from . . . **commission of a specified unlawful** activity" to "property derived from . . . **some form of** unlawful activity") is to avoid confusion where "proceeds" is used elsewhere in the statute to describe the knowledge component of the crime (see section 1956(c)(1)). The statute currently requires knowledge that property involved in a transaction represents proceeds of "some form of unlawful activity." The

requested change does not expand the scope of the statute, because paragraph (a)(1) makes it clear that it applies only to transactions involving proceeds of specified unlawful activity.

3. Proposed Change to section 2(h).

In order to make it clear that "proceeds" has the same meaning in section 1956 and section 1957, we suggest adding the following section 2(h) to the bill:

Section 1957(f) of title 18, United States Code, is amended –

(1) by deleting "and" from the end of paragraph (2);

(2) by striking the period at the end of paragraph (3) and inserting "; and"

(3) by adding at the end the following:

"(4) the term "proceeds" has the meaning given that term in section 1956 of this title."

4. Proposed Change to 2(i).

On the same day it issued *U.S. v Santos*, the Supreme Court issued another decision that has adversely affected federal money laundering prosecutions. In *Cuellar v. United States*, 128 S.Ct. 1994 (2008), the unanimous Court held that certain language in section 1956 –"knowing that the transaction is designed in whole or in part" – requires the Government to prove that a defendant charged with transporting drug proceeds across the border knew the purpose or plan behind the transportation. As the Court stated in the opinion, it is not enough to show how the defendant moved the money, the Government must also prove why he moved it.

The *Cuellar* Court also suggested that Congress could correct this situation by deleting the words "designed in whole or in part" from the statute. We therefore propose that 18 U.S.C.

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§§ 1956(a)(1)(B) and (a)(2)(B) be amended to correct the ambiguous language cited by the Court in *Cuellar*. The following language, which could be added to the bill as section 2(i), would help eliminate ambiguity in international money laundering prosecutions.

Section 1956(a)(1)(B) of title 18, United States Code, is amended to read as follows:

"(B) knowing that the transaction –

"(i) conceals or disguises, or is intended to conceal or disguise, the nature, source, location, ownership or control of the proceeds of specified unlawful activity; or

"(ii) avoids, or is intended to avoid, a transaction reporting requirement under state or federal law,"

Section 1956(a)(2)(B) of title 18, United States Code, is amended to read as follows:

"(B) knowing that the monetary instrument or funds involved in the transportation, transmission or transfer represent the proceeds of some form of unlawful activity, and knowing that such transportation, transmission, or transfer --

"(i) conceals or disguises, or is intended to conceal or disguise, the nature, source, location, ownership or control of the proceeds of specified unlawful activity; or

"(ii) avoids, or is intended to avoid, a transaction reporting requirement under state or federal law,"

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After careful consideration and legal review, the Administration has concluded that, whether military commissions are convened in the United States or at Guantánamo, there is a significant risk courts will apply a baseline of due process protection in commission proceedings. We do not believe this means courts will provide commission defendants with the same array of constitutional rights that defendants receive in article III criminal trials. We do believe, however, there is a significant risk courts would afford commission defendants with those due process protections that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In particular, we have concluded that there is a substantial risk courts would hold the Constitution requires application of a due process voluntariness test for admission of statements of the accused, although we do not believe courts would apply the *Miranda* rules prohibiting admission of unwarned statements. In light of these risks, the Administration urges Congress to design a commissions system that will satisfy constitutional due process standards whether the proceedings are conducted in the United States or at Guantánamo. If the recent Senate Armed Services Committee draft amendment of the Military Commissions Act were modified along the lines the Administration has suggested, we believe the bill would satisfy those constitutional standards, no matter where the commissions are convened.

As the Assistant Attorney General for the National Security Division testified before the Senate Armed Services Committee, the Administration has concluded that if commissions are convened in the United States, there is a significant risk courts would afford the accused with baseline constitutional protections under the Fifth Amendment's Due Process Clause. The Supreme Court has held that this Clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). We recognize that there are contrary arguments based on Supreme Court precedents concerning World War II-era commissions conducted in U.S. territories. But, in light of intervening developments, there are reasons to doubt that these precedents would be applied to preclude recognition of any due process rights for detainees being tried before military commissions in the United States.

We also believe that even if the commissions were convened at Guantánamo, there is a significant risk the courts would apply a baseline of due process protections in commissions proceedings. Senator Graham touched on this concern at the recent Armed Services hearing, remarking that "just the location [of the commission] alone is not going to change the dynamic the court would apply in a dramatic way." To be sure, certain older Supreme Court precedents, especially *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were often read to suggest that aliens detained overseas have no constitutional protections at all. In its recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), however, the Court rejected the notion that, as a categorical matter, the Constitution provides no protection to aliens outside the *de jure* sovereignty of the United States. The Court instead held that the Guantánamo detainees are entitled to the guarantee, implicit in the Suspension Clause, of the right to petition for the writ of habeas corpus challenging the legality of their detention.

In reaching this conclusion, the Court recognized a "common thread uniting" its former cases dealing with the extraterritorial application of the Constitution—namely, "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258. The Court then emphasized the unique attributes of the detention facilities at Guantánamo, given that the United States exercises an unusual degree and exclusivity of control over the Naval Base there.

The decision in *Boumediene* concerned the writ of habeas corpus, but we believe there is a significant risk the Court could further hold that baseline due process protections would apply to the Guantánamo detainees, as well. Writing for the Court in *Boumediene*, Justice Kennedy explained that in determining whether habeas applies outside the United States, a court should look, in particular, to whether such a result would be "'impracticable and anomalous.'" *Id.* at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957)). Justice Kennedy also relied in part on the *Insular Cases*, *see id.* at 2253-55, which held that residents of U.S. territories have certain individual constitutional rights that are deemed "fundamental." To be sure, the *Insular Cases* can be distinguished on the ground that they involved the government of a general civilian population in U.S. territories, not the specific context of alleged enemy aliens detained and prosecuted by a military commission on a U.S. military base in a foreign country, where application of the Bill of Rights would perhaps be more "impracticable and anomalous." But in light of the Supreme Court's extension of the writ of habeas corpus under the Suspension Clause to detainees at Guantánamo, along with the Court's discussion of the *Insular Cases*, there is a significant risk the Court would conclude that not only the writ of habeas corpus, but also certain due process protections, would apply at Guantánamo.

We emphasize that even if the courts hold that the Due Process Clause "applies" to aliens detained at Guantánamo, that conclusion would not mean the Clause would apply in the same way that it applies to U.S. citizens, or even to aliens, in the United States. "As Justice Harlan put it, 'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid,* 354 U.S. at 75). Thus, whether commissions are convened inside the United States or at Guantánamo, we do not believe courts would afford aliens tried in such commissions with the entire panoply of constitutional rights that defendants in article III courts enjoy. In particular, we believe the Supreme Court is likely to reaffirm its precedents that defendants in such commissions are not entitled to a grand jury indictment or a jury trial. We also do not believe courts would hold that defendants in commission proceedings are entitled to all of the Fifth and Sixth Amendments procedural trial rights for criminal defendants that apply in article III courts.

Instead, we think it likely the courts would rely upon a balancing test to determine which fundamental procedural safeguards would be constitutionally required in commissions as a matter of due process, and how those fundamental protections should be applied given the particular context of these trials. Courts would be most likely to

afford commission defendants with those due process protections that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Although we do not express an independent position on the question here, we do think that under this approach there is a significant risk courts would afford Guantánamo detainees with certain fundamental due process trial protections, even for commissions conducted at Guantánamo. *Cf. Weiss v. United States*, 510 U.S. 163, 178 (1994) (noting that in the context of both the criminal and military justice systems, "[i]t is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).* We also believe there is a substantial risk the courts would hold that one such fundamental protection is the prohibition on the use in military commissions of coerced statements by the accused, even if the coercion did not rise to the level of torture or cruel, inhuman or degrading treatment. As we have explained, we do not believe this approach would lead courts to conclude that the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding unwarned statements) would apply. It also does not mean that legal forms of interrogation could not be used to obtain valuable intelligence from captured unprivileged belligerents. It would mean instead that courts would not allow evidence to be used as the basis for convicting persons in commission proceedings without showing it satisfies a due process voluntariness inquiry.

Because of the substantial risk that courts will require baseline due process protections in military commissions, whether in the U.S. or at Guantánamo, and in light of the Supreme Court's recent rejections of detention and commissions policies at Guantánamo, we think it would be unwise to risk another confrontation between the Court and the political branches—one that could result in another derailing of the commissions process many years after the accused were apprehended. The Administration therefore strongly believes Congress should take the more secure path,

* The United States has recently argued in *Rasul* v. *Myers*, on behalf of officers sued in their individual capacities for damages arising out of alleged torture and other abuse at Guantánamo, that the Due Process Clause does not protect Guantánamo detainees as a matter of *stare decisis* in the U.S. Court of Appeals for the District of Columbia Circuit. In a decision issued February 18, 2009 (*Kiyemba v. Obama*), the Court of Appeals had concluded that *Boumediene* did not affect the court of appeals' earlier decisions holding that aliens detained overseas have no constitutional due process rights, and that therefore detainees at Guantánamo who were entitled to release from detention on habeas do not have a right under the Due Process Clause (or the Suspension Clause) to be brought to the United States. In *Rasul v. Myers*, which was briefed in March of this year, the Department of Justice argued that even though "plaintiffs argue that *Kiyemba* was wrongly decided, that ruling is binding Circuit precedent." The Department did not further address the merits of the due process question. The court of appeals in *Rasul* ultimately ruled for the individual defendants based on qualified immunity and special factors weighing against recognition of a cause of action under *Bivens* in that setting, without resting its decision on whether the Due Process Clause applied to the detainees at Guantanamo. 563 F.3d 527, 532-533 (2009). Meanwhile, the detainees' petition for a for a writ of certiorari seeking review of the D.C. Circuit's decision in the *Kiyemba* case is pending before the Supreme Court. The Government's brief opposing certiorari states with respect to the question of due process at Guantánamo that "[f]or purposes of this case . . ., the dispositive question is not whether petitioners have any due process rights, but instead whether they have a due process right to enter the United States from abroad. As the court of appeals explained, it has long been established that aliens have no constitutionally protected interest in coming to the United States from abroad.

and design a commissions system that will satisfy the constitutional standards there is a significant risk the Court will insist upon. In our view, the recent Senate Armed Services Committee draft amendment of the Military Commissions Act, if it is modified by the Administration's proposals, would satisfy those constitutional standards, no matter where the commissions are convened.

7 October, 2009 SUBMISSIONS FOR THE RECORD

President Barack Obama
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500

Dear Mr. President:

As you know, the Department of Defense has since September 11, 2001 detained at Guantanamo individuals identified or treated as enemy combatants. Yet, shortly after you took office in January of 2009, you issued an Executive Order mandating the closure by January 22, 2010 of the detention/interrogation facilities at the Guantanamo Bay Detention Facility, U.S. Naval Base, Cuba (popularly known as Gitmo.)

Our past experience as military, intelligence, law enforcement and security policy professionals leads us to believe that the transfer of Guantanamo detainees into the United States would threaten national security and public safety.

For example, prisoners transferred to U.S. prisons would turn those prisons – and the nearby civilian populations – into high-probability terrorist targets. Based on past experience in Guantanamo, they would also expose prison staff to unique threats, physical risks and legal liabilities. FBI Director Robert Mueller has warned that the high-value prisoners will also contribute to the radicalization of prison populations. Detainees will pressure prison officials to remove special security restrictions and will receive due process and other rights that may force the government to choose between revealing classified evidence to secure a conviction in a U.S. court or dropping charges against dangerous terrorists and releasing them from prison. Over 500 lawyers describing themselves as the "Gitmo Bar" stand ready to file the paperwork to free any detainees transferred to U.S. prisons.

If detainees are released and cannot be resettled abroad securely, they may be resettled inside the United States. Worse yet, according to Director of National Intelligence Dennis Blair, U.S. taxpayers may be required to provide financial support for such detainees to "start a new life" here.

Moreover, the Department of Defense asserts that at least 61 of the 520 detainees released from Gitmo so far are confirmed or suspected of having returned to terrorism – other Department sources put the number at 102 of 520 detainees.

For these reasons, we believe strongly that the detainees should not be transferred to any locale in the United States or its territories, and should be kept at Guantanamo Bay until a more permanent and secure alternative is found. Today, potential national and local security risks greatly outweigh any prospective economic benefits for states under consideration for such transfers.

In conclusion, as a matter of national security, we strongly advise that the Department of Defense and other federal or state agencies spend no funds to accomplish the closure of Guantanamo detention facilities or the transfer of Guantanamo detainees into the United States. All efforts should be made to enable state representatives to have opportunities to visit Gitmo and to be briefed on the risks associated with the management of Gitmo detainees.

Sincerely,

Army

Gen. Frederick J. Kroesen, USA (Ret.)
Maj. Gen. Thomas F. Cole, USA (Ret.)
Maj. Gen. Vincent E. Falter, USA (Ret.)
Maj. Gen. Alvin W. Jones, USA (Ret.)
Maj. Gen. Henry D. Robertson, USA (Ret.)
Maj. Gen. Mel Thrash, USA (Ret.)
Brig. Gen. Francis A. Hughes, USA (Ret.)
Brig. Gen. Ronald K. Kerwood, USA (Ret.)
Brig. Gen. Gary J. Tellier, USA (Ret.)
Lt. Col. Gordon Cucullu, USA (Ret.) Author of *Inside Gitmo: The True Story Behind the Myths of Guantanamo Bay*

Navy

Adm. Jerry Johnson, USN (Ret.)
Adm. James "Ace" Lyons, USN (Ret.)
Vice Adm. Robert Monroe, USN (Ret.)
Vice Adm. David C. Richardson, USN (Ret.)
Rear Adm. Lawrence Burkhardt III, USN (Ret.)
Rear Adm. H.E. Gerhard, USN (Ret.)
Rear Adm. James M. Gleim, USN (Ret.)
Rear Adm. Robert H. Gormley, USN (Ret.)
Rear Adm. James B. Morin, USN (Ret.)
Rear Adm. Robert S. Owens, USN (Ret.)
Rear Adm. Don G. Primeau, USN (Ret.)
Rear Adm. Rollo Rieve, USN (Ret.)
Rear Adm. Hugh Scott, USN (Ret.)

Air Force

Gen. Charles A. Horner, USAF (Ret.)
Lt. Gen. E.G. "Buck" Shuler, Jr., USAF (Ret.)
Lt. Gen. William H. Ginn, Jr., USAF (Ret.)
Maj. Gen. Charles L. Wilson, USAF (Ret.)
Brig. Gen. Bernard W. Gann, USAF (Ret.)

Marine Corps

Gen. P.X. Kelley, USMC (Ret.)
Maj. Gen. Geoffrey Higginbotham, USMC (Ret.)
Maj. Gen. Joseph D. Stewart, USMC (Ret.)
Brig. Gen. William A. Bloomer, USMC (Ret.)
Brig. Gen. Gary E. Brown, USMC (Ret.)
Brig. Gen. M.A. Johnson, Jr., USMC (Ret.)
Brig. Gen. William L. McCulloch, USMC (Ret.)
Brig. Gen. William Weise, USMC (Ret.)

National Security

R. James Woolsey, former Director of Central Intelligence
Tidal McCoy, former Acting Secretary of the Air Force
Andrew C. McCarthy, former Chief Assistant United States Attorney
Bradford A. Berenson, Associate Counsel to the President, 2001-2003
Frank J. Gaffney, Jr., former Assistant Secretary of Defense for International Security Policy
Dr. Peter Leitner, President, Higgins Counter-Terrorism Research Center
Elaine Donnelly, 1992 Presidential Commission on the Assignment of Women in the Armed Services

cc: Members of the 111th Congress
The Honorable Robert M. Gates, Secretary, U.S. Department of Defense
The Honorable Eric H. Holder, Jr. Attorney General of the United States
The Honorable Dennis Blair, Director of National Intelligence
The Honorable Robert Mueller, Director, Federal Bureau of Investigation

- The Foundry - http://blog.heritage.org -

Statement by Former Attorney General Ed Meese on New York Terror Trials

Posted By Ed Meese On November 18, 2009 @ 5:40 pm In Rule of Law | 33 Comments

Edwin Meese III, the Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies at The Heritage Foundation as well as the United States Attorney General between 1985 and 1988 released the following statement today on the proposed trials of terrorists in New York City, including confessed 9/11 mastermind Khalid Sheikh Mohammed.

"It is clear that foreign terrorists and terrorist groups have committed acts of war against the United States, and that our national security requires that we respond accordingly. This means that President Bush's prudent actions and the military response which he led should continue as our answer to these attacks.

Congress overwhelmingly reaffirmed their commitment to military commissions in 2006, which have historically been the way that we respond to acts of war. To abandon our two centuries of tradition and to substitute some new civilian procedure as a response to such attacks endangers the security of our country and our national interest.

It was a tragic mistake to decide to abandon the prison facility at Guantanamo Bay, which was designed physically and legally to handle these types of cases. It is a further tragic mistake to now bring the detained war combatants into the United States and to employ civilian criminal procedures which were never intended for this type of situation.

The U.S. Constitution protects American citizens and visitors from the moment they are suspected of criminal wrongdoing through a potential trial. These same protections are not, have never, and should not be granted to enemy combatants in war, since it is clear that regardless of the outcome of the trial, these detainees will likely remain in the custody of the United States."

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URL to article: **http://blog.heritage.org/2009/11/18/statement-by-ed-meese-on-new-york-terror-trials/**

The Attorney General's oral presentation at the hearing today will depart from his written testimony because of recent developments on Fort Hood and Guantanamo detainees. His remarks as prepared for delivery appear below.

Oral Remarks As Prepared For Delivery

Attorney General Eric Holder Senate Judiciary Committee
November 18, 2009

When I appeared before this committee in January for my confirmation hearing, I laid out several goals for my time as Attorney General: to protect the security of the American people, restore the integrity of the Department of Justice, reinvigorate the Department's traditional mission, and most of all, to make decisions based on the facts and the law, with no regard for politics. In my first oversight hearing in June, I described my early approach to these issues.

Five months later, we are deeply immersed in the challenges of the day, moving forward to make good on my promises to the committee and the president's promises to the American people.

First and foremost, we are working day and night to protect the American people. Due to the vigilance of our law enforcement and intelligence agencies, we have uncovered and averted a number of serious threats to domestic and international security. Recent arrests in New York, Chicago, Springfield, and Dallas, are evidence of our success in identifying nascent plots and stopping would-be attackers before they strike.

Violence can still occur, however, as evidenced by the recent tragic shootings at Fort Hood. We mourn the deaths of 13 brave Americans, including Dr. Libardo Caraveo, a psychologist with the Justice Department's Bureau of Prisons who had been recalled to active duty. The Federal Bureau of Investigation is working diligently to help gather evidence that will be used by military prosecutors in the upcoming trial of the individual who is alleged to have committed this heinous act.

We are also seeking to learn from this incident to prevent its reoccurrence. Future dangerousness is notoriously difficult to predict. The president has ordered a full review to determine if there was more that could have been done to prevent the tragedy that unfolded in Texas two weeks ago. We have briefed the chairman and ranking member of this committee and other congressional leaders on our efforts, and will continue to keep Congress abreast of this review.

I would also like to address a topic that I know is on many of your minds -- my decision last week to refer Khalid Sheikh Mohammed and four others for prosecution in federal courts for their participation in the 9/11 plot.

As I said on Friday, I knew this decision would be controversial. This was a tough call, and reasonable people can disagree with my conclusion that these individuals should be tried in federal court rather than a military commission.

The 9/11 attacks were both an act of war and a violation of our federal criminal law, and they could have been prosecuted in either federal courts or military commissions. Courts and commissions are both essential tools in our fight against terrorism. Therefore, at the outset of my review of these cases, I had no preconceived views as to the merits of either venue, and in fact on the same day that I sent these five defendants to federal court, I referred five others to be tried in military commissions. I am a prosecutor, and as a prosecutor my top priority was simply to select the venue where the government will have the greatest opportunity to present the strongest case in the best forum.

I studied this issue extensively. I heard from prosecutors from both the Department and from the Office of Military Commissions. I asked a lot of questions and weighed every alternative. And at the end of the day, it was clear to me that the venue in which we are most likely to obtain justice for the American people is in federal court.

I know there are members of this committee, and members of the public, who have strong feelings on both sides. There are some who disagree with the decision to try the alleged Cole bomber and several others in a military commission, just as there are some who disagree with prosecuting the 9/11 plotters in federal court.

Despite these disagreements, I hope we can have an open, honest, and informed discussion about that decision today, and as part of that discussion, I would like to clear up some of the misinformation that I have seen since Friday.

First, we know that we can prosecute terrorists in our federal courts safely and securely because we have been doing it for years. There are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons custody, including those responsible for the 1993 World Trade Center bombing and the attacks on our embassies in Africa. Our courts have a long history of handling these cases, and no district has a longer history than the Southern District of New York in Manhattan. I have talked to Mayor Bloomberg of New York, and both he and the Police Commissioner Ray Kelly believe that we can safely hold these trials in New York.

Second, we can protect classified material during trial. The Classified Information Procedures Act, or CIPA, establishes strict rules and procedures for the use of classified information at trial, and we have used it to protect classified information in a range of terrorism cases. In fact, the standards recently adopted by Congress to govern the use of classified information in military commissions are derived from the very CIPA rules that we use in federal court.

Third, Khalid Sheikh Mohammed will have no more of a platform to spew his hateful ideology in federal court than he would have in military commissions. Before the commissions last year, he declared the proceedings an "inquisition," condemned his own attorneys and our Constitution, and professed his desire to become a martyr. Those proceedings were heavily covered in the media, yet few complained at the time that his rants threatened the fabric of our democracy.

Judges in federal court have firm control over the conduct of defendants and other participants in their courtrooms, and when the 9/11 conspirators are brought to trial, I have every confidence

that the presiding judge will ensure appropriate decorum. And if KSM makes the same statements he made in his military commission proceedings, I have every confidence the nation and the world will see him for the coward he is. I'm not scared of what KSM will have to say at trial – and no one else needs to be either.

Fourth, there is nothing common about the treatment the alleged 9/11 conspirators will receive. In fact, I expect to direct prosecutors to seek the ultimate and most uncommon penalty for these heinous crimes. And I expect that they will be held in custody under Special Administrative Measures reserved for the most dangerous criminals.

Finally, there are some who have said this decision means that we have reverted to a pre-9/11 mentality, or that we don't realize this nation is at war. Three weeks ago, I had the honor of joining the President at Dover Air Force Base for the dignified transfer of the remains of eighteen Americans, including three DEA agents, who lost their lives to the war in Afghanistan. The brave soldiers and agents carried home on that plane gave their lives to defend this country and its values, and we owe it to them to do everything we can to carry on the work for which they sacrificed.

I know that we are at war.

I know that we are at war with a vicious enemy who targets our soldiers on the battlefield in Afghanistan and our civilians on the streets here at home. I have personally witnessed that somber fact in the faces of the families who have lost loved ones abroad, and I have seen it in the daily intelligence stream I review each day. Those who suggest otherwise are simply wrong.

Prosecuting the 9/11 defendants in federal court does not represent some larger judgment about whether or not we are at war. We are at war, and we will use every instrument of national power – civilian, military, law enforcement, intelligence, diplomatic, and others – to win. We need not cower in the face of this enemy. Our institutions are strong, our infrastructure is sturdy, our resolve is firm, and our people are ready.

We will also use every instrument of our national power to bring to justice those responsible for terrorist attacks against our people. For eight years, justice has been delayed for the victims of the 9/11 attacks. It has been delayed even further for the victims of the attack on the USS Cole. No longer. No more delays. It is time, it is past time, to act. By bringing prosecutions in both our courts and military commissions, by seeking the death penalty, by holding these terrorists responsible for their actions, we are finally taking ultimate steps toward justice. That is why I made this decision.

In making this and every other decision I have made as Attorney General, my paramount concern is the safety of the American people and the preservation of American values. I am confident this decision meets those goals, and that it will withstand the judgment of history.

Thank you.

Department of Justice

STATEMENT OF

ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"OVERSIGHT OF THE DEPARTMENT OF JUSTICE"

PRESENTED

NOVEMBER 18, 2009

Statement of
Eric H. Holder Jr.
Attorney General
Before the
Committee on the Judiciary
United States Senate
At a Hearing Entitled
"Oversight of the Department of Justice"
November 18, 2009

Good morning Chairman Leahy, Ranking Member Sessions, and Members of the Committee. Thank you for the opportunity to appear before you today to highlight the work and priorities of the Department of Justice. I would also like to thank you for your support of the Department. I look forward to your continued support and appreciate your recognition of the Department's mission and the important work that we do.

As I have stated to you on previous occasions, the Department continues to focus on its vital missions and goals: protecting the American people from terrorist threats and reinvigorating its traditional role in fighting crime, protecting civil rights, protecting the environment, and ensuring fairness in the market place.

Counter-Terrorism Efforts

Protecting America against acts of terrorism is the highest priority of the Department. The Department is constantly striving to improve its ability to identify, penetrate, and dismantle terrorist plots as a result of a series of structural reforms, the development of new intelligence and law enforcement tools, and a new mindset that values information sharing, communication and prevention.

I am committed to continuing to build our capacity to deter, detect and disrupt terrorist plots and to identify those who would seek to do us harm; and I am committed to doing so consistent with the rule of law and American values. We will continue to develop intelligence, identify new and emerging threats, and use the full range of tools and capabilities the Department possesses in its intelligence and law enforcement components.

Together with our Federal, State, and local partners, as well as international counterparts, the Department has worked tirelessly to safeguard America and will continue to do so. For instance, by working with our partners in New York and Colorado, and in concert with other Federal agencies, the Department was recently able to thwart one of the most serious threats since September 11, 2001, culminating in the arrest of Najibullah Zazi.

We are continuing the investigation of Zazi, who at this point has only been charged with a crime, and thus retains the presumption of innocence. But the threat posed to this nation by

international terror networks, including al-Qaeda, remains real. The response to that threat depends on the work of law enforcement at all levels and our partners in the intelligence community who disrupt plots before they actually develop into attacks. The good news is that the system worked: a coordinated effort led to the disruption of the alleged plot before anyone was harmed.

But the system has to work every time. We cannot rest for a single minute – and we will not. The ongoing investigation in Colorado and New York reminds us that there are people who live in this country whose radicalization leads to a desire to commit terrorist attacks against the very country that shelters them. They can become supporters of al-Qaeda or they can become anti-government radicals in the model of Timothy McVeigh. The presence of would be domestic terrorists further highlights the need for collaboration between law enforcement and intelligence agencies at all levels of government.

As we indicated in the papers that we filed in the Zazi case, we used the tools available under the Foreign Intelligence Surveillance Act ("FISA") to obtain much of the information that led to unraveling that plot. The existing tools are valuable in a real and practical sense, and we have discussed their uses with you in detail. I look forward to continuing to work with you to ensure that all these tools are utilized fully, in a manner that is consistent with the rule of law and our core values relating to privacy and civil liberties.

Counterintelligence and Counterespionage

The Department is also pursuing a vigorous strategy to disrupt the activities of foreign intelligence services and foreign illicit procurement networks here in the United States. In the fall of 2007, the Department announced an initiative to step up enforcement of our export control and embargo laws on a nationwide scale. There are now approximately 25 interagency enforcement groups throughout the country working under the guidance of Federal prosecutors, with the full cooperation of the intelligence community, to protect dual use and military technologies from adversaries who would potentially use them against us and to maintain our technological advantage. The substantial increase in prosecutions demonstrates very clearly that our adversaries and others have sophisticated acquisition programs targeting technologies that relate directly to our advantage on the battlefield, such as military night vision, encryption software, unmanned aerial vehicles, and military aircraft components.

We have also seen that espionage is not simply a relic of the Cold War. Earlier this year, a retired State Department employee and his wife were charged with engaging in a long running conspiracy with the Cuban intelligence service to furnish highly sensitive classified information through coded communications and clandestine meetings. Most recently, a scientist who had access to classified information relating to satellites and Department of Defense programs, was charged with attempted espionage after he gave some of that information to an undercover FBI agent posing as a foreign intelligence officer. We remain vigilant in identifying these activities and will continue to disrupt them whenever possible.

Drug Enforcement

The Department is reinvigorating its traditional role in fighting crime, and drug enforcement is a significant aspect of this effort. We have renewed our commitment to identifying and attacking the highest-level drug trafficking organizations that pose the greatest threat to our communities. The Department's overall drug enforcement strategy draws on the collective talent and expertise of multiple Federal law enforcement agencies. Together, we are identifying and targeting the most significant drug trafficking organizations in the world that contribute to the supply of illegal drugs in the United States. We are attacking the financial infrastructure supporting those enterprises, thereby disrupting and ultimately dismantling them.

At the outset, let me salute the courage of our Drug Enforcement Administration ("DEA") employees, who fight these enterprises around the world, often at great personal risk. Sadly, on October 26, 2009, three DEA agents – Special Agent Forrest Leamon, Special Agent Chad Michael, and Special Agent Michael Weston – paid the ultimate price, as a result of a helicopter crash in Afghanistan. In Afghanistan, the DEA has undertaken an expansive effort to target high value drug traffickers, both through its increased operational presence and by focused mentoring of elite Afghan counternarcotics forces. We owe a debt of gratitude to these agents, and all of their colleagues serving around the world.

Closer to home, in recent years, there has been a marked rise in violence within Mexico and along the border between Mexico and the United States – due in significant part to the courageous decision of Mexican President Calderon to confront the cartels head-on. In response to this development, the Department has made it a priority to stem the growing violence and associated criminal activity by deploying all available resources, guided by a coherent strategic plan that maximizes the efficacy of those resources. An essential aspect of our plan is ensuring a productive partnership with the Government of Mexico – including through the Merida Initiative – as well as to strengthen our partnerships with our State and local law enforcement counterparts. Equally important, the Department's plan avoids wasteful overlap and duplication with the activities of our other Federal partners, particularly the law enforcement agencies at the Department of Homeland Security ("DHS").

The root cause of the explosion of violence in Mexico and the associated criminal activity along the Southwest Border is the conflicts within and among a limited number of sophisticated, transnational criminal organizations. These hierarchical, Mexico-based cartels are responsible for smuggling into the United States most of our nation's foreign-produced illegal drugs, which are then transported to distribution organizations in almost every State. While the cartels' primary business is drug trafficking, they also sponsor a panoply of other crimes that support their illegal operations. These other crimes include extortion, murder, corruption of public officials, kidnapping and human smuggling, laundering of illicit criminal proceeds through the existing financial system and through bulk cash smuggling, and the illegal acquisition, trafficking, and use of firearms and other weapons.

The Department's view – based on our decades of experience in investigating, prosecuting, and dismantling organized criminal groups, such as the Mafia, international terrorist groups, and domestic and transnational gangs – is that the best way to fight such large scale criminal organizations is through intelligence-based, prosecutor-led, multi-agency task forces that blend the strengths, resources, and expertise of the complete spectrum of Federal, State, local, and international investigative and prosecutorial agencies. Through their participation in such task forces, our prosecutors in the U.S. Attorneys' Offices and the Criminal Division, together with the Department's law enforcement agencies – DEA, ATF, FBI, and USMS – and other Federal law enforcement agencies (including from DHS and Treasury) and State and local law enforcement, give us the capacity to carry out the full range of activities necessary to succeed against these organizations.

The Department has embraced a model to achieve our comprehensive goals that is proactive, in which we develop priority targets through the extensive use of intelligence. Sharing information, we build cases, coordinating long-term, extensive investigations to identify all the tentacles of a particular organization. Through sustained coordination of these operations, we are able to execute a coordinated enforcement action, arresting as many high-level members of the organization as possible, disrupting and dismantling the domestic transportation and distribution cells of the organization, and seizing as many of the organization's assets as possible, whether those assets be in the form of bank accounts, real property, cash, drugs, or weapons. Finally, we prosecute the leaders of the cartels and their principal facilitators, locating, arresting, and extraditing them from abroad as necessary.

The Department's Organized Crime Drug Enforcement Task Forces ("OCDETF") Program, which is under the direct supervision of the Deputy Attorney General, coordinates the provision of resources and related logistical support to many of these prosecutor-led, multi-agency task forces. The Department's Special Operations Division coordinates all investigations and operations targeting the cartels and other high-value drug trafficking organizations in multiple districts throughout the country and coordinates the sharing of tactical and operational intelligence, ensuring that those investigations are pursued in a coordinated, focused manner to have the maximum possible impact on these organizations and their operations. In certain key locales, OCDETF has established Co-Located Strike Forces, for the pursuit of the highest level traffickers of drugs, guns, and money. For instance, the San Diego Strike Force has been responsible for coordinating the Federal government's successful efforts against the Arellano-Felix Organization, sometimes known as the Tijuana Cartel, and the Houston OCDETF Strike Force has directed some of our most damaging blows against the Gulf Cartel.

As has been previously reported to you, earlier this year the Department struck tremendous blows against two of the largest Mexican drug cartels, the Sinaloa Cartel and the Gulf Cartel, in Operation Xcellerator and Project Reckoning, both multi-agency, multi-national operations that have so far collectively led to the arrests of more than 1350 drug traffickers and the seizure of more than $137 million in U.S. currency, 32,000 kilograms of cocaine, thousands of pounds of methamphetamine, and several hundred firearms.

Only a few weeks ago, more than 3,000 agents and officers combined across the United States to make more than 300 arrests in 19 States as part of Project Coronado, a 44-month, multi-agency law enforcement investigation involving Strike Forces, which targeted the distribution network of a major Mexican cartel known as La Familia. To date, Project Coronado has yielded more than 1,186 total arrests, and the seizure of more than $33 million in U.S. currency, 2,000 kilograms of cocaine, 2,710 pounds of methamphetamine, 29 pounds of heroin, and nearly 400 weapons.

Just this month, I met with Mexican Attorney General Arturo Chávez Chávez and members of his team to discuss how our respective departments could best coordinate our attack on the Mexican cartels. The level of cooperation between our two departments is unprecedented, and, as our recent meeting demonstrates, we will continue to strive to find ways to jointly attack these vicious organizations. An example of our growing levels of cooperation with Mexico is the record number of fugitives Mexico has extradited to the United States over the years. Just this year, we received 100 fugitives from Mexico, in comparison with only 12 fugitives in 2000.

By continuing to work together, building on what we have done well so far and developing new ideas to refresh our strategies, the Department is rising to the challenge of combating the highest-level drug trafficking organizations that threaten our nation.

International Organized Crime

Globalization confers great benefits to people all over the world. But it also generates enormous and unforeseen opportunities for the growth of crime. Criminals from many countries have been quick to see how improved travel and communications could facilitate their illegal businesses. They have become adept in their use of computers and the tools of international finance to prey on victims around the globe. The unfortunate result of these trends is that we now find ourselves facing an unprecedented explosion in organized crime that threatens every nation. In some parts of the world, leaders of criminal enterprises, through ill-gotten fortunes, wield more influence than heads of state or legitimate businesses. Organized criminals seek to gain or solidify footholds here in the United States with an eye toward some of our most strategic industries and markets, our financial institutions and infrastructure. They collude with hostile states, intelligence services and terrorists.

Very early in my tenure I determined that international organized crime must become a priority of the Department. Toward that end, we brought together nine of the major U.S. Federal law enforcement agencies under the auspices of the Attorney General's Organized Crime Council to devise and implement a unified national strategy in response to international organized crime.

One of the most significant steps we have taken to implement the strategy is to establish the International Organized Crime Intelligence and Operations Center, or IOC-2. IOC-2, which has already begun operations, allows partner agencies working across the United States to focus and prioritize joint efforts, combine data, and produce actionable leads for investigators and

prosecutors. IOC-2 also provides a forum for coordinating the multi-jurisdictional investigations and prosecutions that result from these leads. IOC-2 is an important step in our strategy to marshal all available intelligence about international criminal organizations, including information from law enforcement, our international partners, and the private sector, to combat this growing threat.

Overseas Rule of Law Development

Given the globalization of crime, it is also essential that we extend our first line of defense abroad, in order to better protect our own citizens. The Obama Administration is taking three steps to accomplish this goal. First, the Criminal Division's Office of International Affairs, working together with the State Department, continues to build a critical international framework of extradition and mutual legal assistance treaties – including a landmark set of treaties with the European Union, for which I exchanged the instruments of ratification last month. Second, we continue to expand our network of overseas law enforcement partnerships, including by conducting joint cross-border investigations and by posting Justice Department prosecutors and law enforcement agents as attaches in our Embassies. And third, in post-conflict and fragile states around the world, we are working to help build police and prosecutorial agencies that are committed to the rule of law.

Indeed, the Justice Department is committed to upholding the rule of law in all our actions -- and we believe the rule of law is one of the United States' greatest exports. Where there is rule of law, citizens can have an expectation of safety, fairness, due process, and accountability. But it is not only the citizens of other countries who benefit from our overseas rule of law work. Rule of law development helps foster capable and strong partners in the fight against transnational crime, corruption, and terrorism and, in so doing, helps stem the tide of criminality before it reaches the United States. Thus, the safety and future prosperity of the United States, no less than that of foreign countries, depends on the strengthening of the rule of law overseas.

To advance this goal, the Justice Department has two offices in the Criminal Division dedicated solely to overseas rule of law development: the International Criminal Investigative Training Assistance Program (known as "ICITAP") and the Office of Prosecutorial Development, Assistance and Training (known as "OPDAT"). These two offices, with funding support from the State Department, place long-term, in-country Federal prosecutors and senior law enforcement advisors to provide tailored rule of law assistance on a range of issues from human trafficking to border security in more than 30 countries around the world – ranging from Indonesia, to Pakistan, to the Balkans, to Colombia.

The Justice Department also has made an extensive commitment to support the missions in Afghanistan and Iraq. In Afghanistan, in addition to the DEA's efforts. the FBI continues to undertake counterterrorism efforts and intelligence gathering, and also supports the Major Crimes Task Force by closely mentoring select Afghan investigators. The USMS advises and trains Afghan counternarcotics police on witness and judicial security, and ATF agents

embedded with the military are conducting post-blast investigation training. Finally, the Criminal Division's Senior Federal Prosecutors Program, located in Kabul, Afghanistan, provides training, mentoring and guidance to a Task Force of Afghan prosecutors and police investigators responsible for the investigation and prosecution of high-level narcotics, corruption and money laundering offenses. These Department prosecutors also advise and mentor Afghan prosecutors and investigators in the Afghan Attorney General's Anti-Corruption Unit and the Major Crimes Task Force.

In Iraq, the Department of Justice has been involved in rule of law development assistance since 2003. In 2007, U.S. Ambassador Khalilzhad created the Office of the Rule of Law Coordinator—the first of its kind in any embassy abroad—and directed that this office be led by the Department of Justice. Since then, three senior Justice Department prosecutors, all with previous Justice Department development experience in Iraq, have served as the Rule of Law Coordinator, coordinating all U.S. government Rule of Law assistance programs in Iraq.

Civil Rights

Over the past nine months, the Department has taken decisive steps to emphasize the Civil Rights Division's traditional enforcement priorities. But that is not enough. I also am committed to making the Division stronger and better equipped to address today's civil rights challenges.

The recent passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act stands at the forefront of our efforts to strengthen our civil rights enforcement. As I noted when I testified in support of this legislation before you in June, one of my highest personal priorities upon returning to the Justice Department has been to do everything I could to help ensure that this legislation finally became law. I am grateful to Congress for passing this landmark legislation, which has been over a decade in the making. In particular, we all owe a significant debt of gratitude to the late Senator Kennedy, who championed this bill from its inception, and to you, Chairman Leahy, for your leadership.

This is landmark legislation. For the first time in the history of this nation, the Federal government has authority to prosecute violent hate crimes committed because of the victim's sexual orientation, gender, gender identity, or disability. The new law also enhances our ability to prosecute hate crimes based on the victim's race, religion, or national origin, or military status, and enables us to provide assistance to State, local, and tribal officials in their investigation and prosecution of hate crimes. This is the first significant expansion of Federal criminal civil rights laws in over a decade, since passage of the Church-Arson statute in the mid-1990s and it is long overdue.

The Department stands ready to use all of the tools at its disposal to bring the perpetrators of hate crimes to justice. In fact, immediately after the bill became law, the Department began taking action to implement it, issuing a directive to prosecutors in the field and preparing

guidance and training for those who are responsible for enforcing it. We also continue to vigorously prosecute cases under other Federal hate crimes statutes. This summer, for example, a grand jury indicted James von Brunn, an 88-year-old anti-Semite, Holocaust-denier and white supremacist, for opening fire at the U.S. Holocaust Museum and killing Stephen T. Johns, a security guard.

I have said to you that we would strengthen civil rights enforcement, and we have done so across a range of other areas. We have been working to protect the voting rights of all Americans. We are currently preparing for a massive influx of redistricting submissions that will result from the 2010 Census. In September, we achieved an important victory on behalf of American military personnel and other overseas citizens when a Federal court in Virginia ruled that the State violated the voting rights of these citizens by failing to mail absentee ballots in sufficient time for them to be counted in the November 2008 general election, as required by the Uniform and Overseas Citizens Absentee Voting Act. The brave women and men who risk their lives to protect our nation must be given the opportunity to vote and to have their votes counted.

We have also stepped up our voting rights enforcement in Indian Country. In October, the Division notified Shannon County, South Dakota, that it intends to bring suit under Section 203 of the Voting Rights Act, to protect the voting rights of American Indians who speak the Lakota language and have limited English proficiency. This would be the first lawsuit to protect the voting rights of Native Americans since 2000.

The Civil Rights Division is working to fulfill the continuing vitality of the Americans with Disabilities Act through implementation of the Supreme Court's decision in the *Olmstead* case. *Olmstead* held that the ADA requires public agencies to make services available in the most integrated settings appropriate to serve the needs of qualified individuals with disabilities. We are actively considering litigation opportunities in which the Department, through intervention and *amicus* filings, will seek to end unlawful segregation of persons with disabilities and ensure that appropriate integrated settings are made available to them.

We are also bringing cases to enforce the Fair Housing Act. In the past ten months, we have filed 30 cases under that Act, including 17 pattern or practice cases. Earlier this month, we announced that the owners of numerous Los Angeles apartment buildings located in the Koreatown section of the city agreed to pay $2.7 million to settle allegations that they discriminated against African Americans, Hispanics, and families with children, preferring to rent units instead to Korean tenants. This was the largest monetary settlement ever obtained by the Justice Department in a Fair Housing Act case alleging discrimination in apartment rentals. The Department also has obtained 14 Fair Housing Act consent decrees in the past ten months, including 11 pattern or practice consent decrees.

In fair lending cases, we currently are monitoring cases for compliance and recently entered into two consent decrees with lenders who had engaged in a pattern or practice of discriminatory lending. We are actively engaged in investigations of other lenders for violations of fair lending laws.

In the employment area, the Civil Rights Division is vigorously enforcing Title VII. Since January of this year, we have filed three Title VII pattern and practice suits and obtained consent decrees in five cases. We also have opened six new investigations of State and local governmental employers with respect to employment opportunities for women, African Americans, and Latinos.

We also continue to file an increasing number of cases under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") on behalf of service members returning to the workforce. In fiscal year 2009, we received 175 USERRA referrals from the Department of Labor, a 75% increase over the previous year and established a "fast track" program to address suitable cases administratively, thereby eliminating any backlog.

Finally, in our work to protect civil rights in education, we filed an *amicus* brief in support of Florida parents who filed suit under Title IX after the State's high school athletic association adopted discriminatory reductions in the game schedule for female student athletes. Our work helped prompt a resolution, pursuant to which the school athletic association agreed to restore the full schedule and to refrain from making any policy changes that treat one gender differently from the other.

As we celebrate new tools and tackle these modern challenges, we are forever mindful of the initial charge of the Civil Rights Division: the enduring promise of the 13th Amendment. As long as slavery or trafficking in persons, as it is often called, endures, the Human Slavery and Trafficking Prosecution Unit stands ready to ensure that this most fundamental civil right is protected.

I am confident that the Civil Rights Division will be able to build on this record of the past ten months, and accomplish even more in the future because of the arrival of Assistant Attorney General Tom Perez. I thank you for confirming him to this important post.

Fairness and Integrity in the Criminal Justice System

Ensuring justice requires the public's trust and confidence in the criminal justice system. I am committed to using all the tools at my disposal to enhance the fairness and integrity of the criminal justice system in numerous ways.

Our sentencing laws play a key role in our criminal justice system. These laws must be tough, predictable, and fair, and must be perceived as fair by the public. As you know, I have set up a working group that is analyzing the range of sentencing issues – from the overall structure of Federal sentencing to prisoner reentry to unwarranted sentencing disparities – so we can identify those sentencing policies that are working and those that are in need of reform.

There are few areas of the law that cry out for reform more than Federal cocaine sentencing policy. Bipartisanship is in short supply in Washington, but on this issue there is

agreement on the need for change. This Administration continues to believe that we can eliminate the sentencing disparity between crack and powder cocaine while also ensuring that violent and dangerous crack offenders receive stiff and certain prison sentences, as they must. The stakes are simply too high to let reform in this area wait any longer.

I am committed to addressing two other areas to help ensure the fairness and integrity of the criminal justice system: helping to solve the indigent defense crisis and ending racial profiling.

I have previously spoken about, and will continue to highlight the indigent defense crisis that exists throughout the Nation. Our criminal and juvenile justice systems fail when defendants lack access to independent and effective counsel. Due to lack of funding and oversight, many jurisdictions fall woefully short of the promise made in *Gideon v. Wainwright* more than 45 years ago. With that promise in mind, I have convened a working group in the Department and tasked it with identifying every tool at our disposal to help address this problem. Justice simply should not be contingent upon whether a defendant can afford to pay for a lawyer.

In the area of racial profiling, the Department's current Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, issued in 2003, has been the subject of some criticism. We need to ensure that our policy allows us to perform our core law enforcement and national security responsibilities with legitimacy, accountability, and transparency. Therefore, I have initiated an internal review to evaluate the 2003 Guidance and to recommend any changes that may be warranted.

Transparency

The Department is committed to an open and accountable government. I have pledged greater transparency and the Department has continued to follow through. As you already know, we issued new comprehensive Freedom of Information Act ("FOIA") Guidelines that direct all Executive branch departments and agencies to apply a presumption of openness when administering the FOIA. The Department has provided extensive guidance and training to educate our agency partners on what this presumption requires, and our attorneys regularly work with agencies to identify documents that the agency has withheld under a legitimate assertion of a FOIA exemption but that could be disclosed under the new guidelines. In addition to issuing these new FOIA guidelines, the Department has released more than two dozen previously undisclosed Office of Legal Counsel memoranda and opinions relating to national security matters.

My commitment to transparency includes forthrightness concerning difficult issues. For instance, my decisions concerning interrogations – to undertake a limited review of various decisions -- have made some people on both sides unhappy. But I did what I thought was necessary and explained the reasons for my decisions. I have made a number of decisions that have not pleased everyone, but I have made the calls that I believe are right based on the facts and the law.

The Department has also redesigned its website, in part to advance our interest in transparency. The Department's website contains useful information for citizens about our activities, and we are using the site to fulfill the promise of transparency that I have made here and elsewhere in the past.

Youth Violence

Juvenile violent crime arrests grew dramatically in the late 1980s and reached a peak in 1994; in the following ten years the numbers dropped sharply, and they have continued to drop, although less dramatically, since then. For example, there were 3% fewer juvenile arrests in 2008 than in 2007, and juvenile violent crime arrests were down 2%. Nonetheless, as I saw in my recent trip to Chicago, some areas are experiencing increases in the level and severity of youth violence. In the last school year, 34 students were killed and another 290 were shot on the streets of Chicago. In the previous school year, 23 students were killed and 211 were shot. Although none of the homicides occurred inside the schools, what happens in and near the schools affects both the safety and security of our children and their learning environment.

Complex social issues like youth violence and problems involving criminal street gangs are most effectively reduced through collaborative strategies that include law enforcement, social services, community- and faith-based organizations, public health organizations, and the business community, among others. Anti-violence and anti-gang strategies must be carefully planned, drawing on local data and evidence from previous effective efforts. Research shows that high quality implementation is just as important as high quality program designs. Key strategies that have demonstrated effectiveness in reducing gang and youth violence are prevention, intervention to change norms about violence, and targeted enforcement.

The Department supports prevention activities targeted to at-risk and high-risk youth, such as those implementing counseling and skill building programs, which are necessary components of a comprehensive approach to sustainable violence reduction. Early prevention activities that address family environment and parenting tend to yield larger long-term effects than those that reach older children and exclude parents. Some successful prevention programs include the nurse-family partnership, in which registered nurses visit at-risk mothers during pregnancy and in the first two years of childhood; Big Brothers/Big Sisters and other mentoring programs; and cognitive behavioral therapy, which uses structured goal setting and planning to reduce recidivism.

Intervention to change norms about violence includes strategies that utilize targeted deterrence. In one such strategy spearheaded by the Department, groups of known offenders are assembled together with criminal justice officials, community offenders, and service providers. Offenders are exposed to evidence and testimony of the effect of their violent actions, warned of serious consequences for continued violence, and given opportunities, services, and support. This strategy was used in Boston, Chicago, and Project Safe Neighborhood ("PSN") sites across the country. Although nationally PSN was not primarily designed to combat youth violence, this

targeted deterrence strategy – embraced by the PSN initiative -- produced a 63% decrease in monthly youth homicides in Boston and a 37% decrease in the monthly homicide rate in Chicago.

Too often, youth are led down the path to criminality by adults who exploit them for personal gain. The Department does not, and will not, tolerate criminals who prey on youth, either by directly involving them in crime, or by creating unsafe and unhealthy environments for youth. In those cases, the Department works to remove those influences from the communities they undermine through targeted enforcement initiatives, where law enforcement officers, prosecutors, and probation and parole professionals coordinate to address the most significant offenders in places of concentrated gang activity. High rate, violent offenders and central gang network figures are identified. Strong cases are built, using Federal prosecutions when appropriate.

Child Exploitation

Children are not subject to violence only through gangs and guns. Each day, children throughout the country encounter the dangers and suffer the consequences of exploitation. No child should have to endure the harm that results from predators and child pornographers on the Internet, abduction, being prostituted (a form of sex trafficking), sexual and physical abuse, and "child sex tourism" in which travelers abroad seek to sexually abuse foreign children.

The Department is developing a National Strategy for Child Exploitation Prevention and Interdiction to further this critical goal, consistent with the PROTECT Our Children Act, which the Congress passed last year. The National Strategy will establish long-range goals for preventing child exploitation, including annual objectives for measuring the Government's progress in meeting those goals. In developing an effective National Strategy, the Department determined that it first was necessary to undertake a detailed assessment of the child exploitation threats posed to our children. The information that the Department is gathering and analyzing in this initial threat assessment is a vital prerequisite to development of an effective, comprehensive, fact-based future strategy. We will soon appoint a senior official within the Office of the Deputy Attorney General to oversee this effort.

Project Safe Childhood ("PSC") is an existing Department-wide effort to prosecute those who use the Internet and other modern technology to distribute child pornography or solicit children for sexual activity. PSC coordinates the efforts of Federal, State and local law enforcement agencies to protect our children from online sexual predators. Today, a PSC task force, led by the U.S. Attorney, operates in every Federal district. PSC is supported by experts in the Child Exploitation and Obscenity Section of the Criminal Division, and their High Technology Investigative Unit. In FY 2007, the Department's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") provided $4 million in grants to further the goals of Project Safe Childhood. As part of this effort, OJJDP provided $2.5 million to fund a national public education and awareness campaign. To date, this national media campaign has generated an estimated audience reach of more than 185 million. OJJDP also provided $1.5 million to fund

projects at the local, State, or multi-State levels, including outreach efforts and innovative programming to schools, youth, and community organizations, businesses, and various parent groups. These local projects have provided training and information to a total of nearly 10,000 participants.

OJJDP also administers the ICAC Task Force Program. The ICAC program is a national network of 61 coordinated task forces representing more than 2,000 Federal, State, local, and tribal law enforcement and prosecutorial agencies. By helping State, local, and tribal law enforcement agencies develop effective and sustainable responses to online child victimization and child pornography, we are helping to build capacity at the local level to address these offenses.

In the realm of child sex trafficking, the Child Exploitation and Obscenity Section, the FBI's Crimes Against Children Unit, and the National Center for Missing and Exploited Children have teamed up to target those responsible for the prostitution of children on our own city streets through an initiative dubbed *Innocence Lost*. Since its inception in 2003, 34 Innocence Lost Task Forces and Working Groups have recovered nearly 900 children from the streets. The investigations and subsequent 510 convictions have resulted in lengthy sentences, including multiple 25-years-to-life sentences, and the seizure of more than $3.1 million in assets. The task forces include United States Attorneys, State and local law enforcement, and child victim service providers. The FBI, through Operation Cross Country, has led four nationwide take-downs designed to gather intelligence on this form of child sex trafficking and to identify victims who are minors and remove them from the sex trade. The last take-down, in October of 2009, resulted in enforcement actions in 36 cities across 30 FBI divisions around the country and led to the recovery of 52 children who were being victimized through prostitution. Eighty-four pimps were among those arrested on State and local charges.

Health Care Fraud

Every year, billions of dollars are lost to Medicare and Medicaid fraud. Those billions represent health care dollars that could be spent on services for Medicare and Medicaid beneficiaries, but instead are wasted on fraud and abuse. This is unacceptable. The Department is actively fighting health care fraud in all areas of the country through robust criminal prosecution and civil enforcement efforts.

This important work is done through a number of collaborative efforts. In every region of the country, United States Attorneys' Offices, the Department's Criminal Division and other litigating components and the FBI work together with the Center for Medicare and Medicaid Services, the Department of Health and Human Services Office of Inspector General, other Federal agencies (such as the Drug Enforcement Administration, the Department of Labor, and the Office of Personnel Management), State and local law enforcement agencies, and private insurance company special investigative units to deter, detect, and prosecute health care fraud. In addition, our Medicare Fraud Strike Force uses interagency teams to identify hot spots of unexplained high-billing levels in concentrated areas by analyzing Medicare data so that it can

target emerging or migrating schemes along with chronic fraud by criminals masquerading as health care providers or suppliers. Working with the Department of Health and Human Services and these other agencies, the Department's civil and criminal enforcement efforts have returned more than $15 billion to the Federal government, of which $13.1 billion went back to the Medicare Trust Fund.

Because coordination across agencies is an integral part of preventing and prosecuting health care fraud, Secretary Sebelius and I have pledged to work together to fight waste, fraud and abuse in Medicare and Medicaid. In May 2009, we announced the creation of the Health Care Fraud Prevention and Enforcement Action Team ("HEAT"). In connection with the HEAT initiative, the Justice Department and HHS investigators are using comprehensive data analysis and intelligence gathering to identify potential fraud with unprecedented speed and efficiency. We have also enhanced training programs on enforcement measures for prosecutors and investigators, and we have increased compliance training for providers to prevent honest mistakes and help stop potential fraud before it happens.

The HEAT initiative has had some great successes thus far. We expanded the Medicare Fraud Strike Force to Houston and Detroit, bringing the total number of cities/regions where the Strike Force is operating to four: South Florida, Los Angeles, Detroit and Houston. These expanded efforts have already shown results. On June 24, 2009, the Criminal Division and United States Attorney's Office for the Eastern District of Michigan announced seven indictments charging 53 people with submitting more than $50 million in false bills to Medicare in schemes involving physical, occupational, and infusion therapy. On July 29, the Department and United States Attorney's Office for the Southern District of Texas announced that 32 people were indicted in Houston for schemes to submit more than $16 million in false Medicare claims for durable medical equipment. In fact, in Strike Force cases alone since the HEAT initiative was announced in May, Department prosecutors have filed or unsealed indictments in 25 cases charging 128 defendants who allegedly submitted more than $123 million in false claims to Medicare, negotiated 24 guilty pleas, and conducted two jury trials that won convictions of three defendants on multiple counts charged. We know that these strike forces work, and in the coming months, we plan to expand strike forces into several other areas around the country that are experiencing a concentrated and cross-regional spread of Medicare fraud.

In addition to criminal prosecutions, the Department has pursued civil enforcement for health fraud. We have worked closely with Congress on the recently passed Fraud Enforcement and Recovery Act ("FERA") to strengthen the Government's ability to combat fraud. Private parties also bring claims under the False Claims Act, alleging fraud against government health care programs, and the Government then can intervene in appropriate cases to pursue the litigation and recover against the defendant.

Although I am personally recused from this matter, the Department's significant recoveries this calendar year include the historic settlement with Pfizer and its subsidiary that resulted in Pfizer agreeing to pay $2.3 billion, the largest health care fraud settlement in the history of the Department of Justice. Pfizer paid $1.195 billion in criminal fines, forfeiting $105

million, and paid $1 billion to resolve civil claims that the company illegally promoted four drugs and caused false claims to be submitted to government health care programs for indications of the drugs that were not covered. The civil settlement also resolved civil claims that Pfizer paid kickbacks to health care providers to induce them to prescribe these and other drugs.

The Department completed significant civil settlements against drug companies under the False Claims Act recently. For instance, in January, 2009, Eli Lilly pled guilty to illegal marketing of one of its drugs for unapproved uses, and paid $1.415 billion, including $800 million in civil damages that were recovered under the False Claims Act and under State laws, in addition to a $515 million criminal fine and $100 million in forfeited assets. And in October, Mylan Pharmaceuticals, Inc., paid $118 million to resolve allegations that it had sold innovator drugs that were manufactured by other companies and had classified those drugs as non-innovator drugs for Medicaid rebate purposes.

Since the False Claims Act was substantially amended in 1986 and through fiscal year 2008, we have recovered more than $14.3 billion from fraud that had been committed against Federal health care programs, primarily Medicare. During fiscal year 2008 alone, the Department of Justice's vigorous efforts to combat health care fraud accounted for $1.12 billion in civil settlements and judgments. During that same time period, the Department opened 849 new civil health care fraud matters and filed complaints or intervened in 226 civil health care fraud matters. Also, during that time period, Federal prosecutors filed criminal charges in 502 health care fraud cases involving charges against 797 defendants and obtained 588 convictions for health care fraud offenses. In addition, they opened 957 new criminal health care fraud investigations involving 1641 defendants. Our monetary recoveries in fiscal year 2009 have already exceeded those of the previous year. We just announced that we have obtained more than $2.4 billion in False Claims Act settlements and judgments, and that more than $1.6 billion of that amount was in health care fraud matters.

We will continue to vigorously pursue health care fraud through the criminal and civil means at our disposal. Potential fraudsters should be aware that the HEAT is on.

Tribal Justice and Public Safety for Tribal Communities

Another top priority for the Department of Justice is improving public safety and law enforcement in tribal communities. By statute and because of its government-to-government relationship with tribes, the United States has a legal duty and moral obligation to address violent crime in Indian country and to assist tribes in their efforts to provide for safe tribal communities. The Department takes this obligation seriously and is working actively with tribes and Federal agencies to improve all aspects of law enforcement in Indian country.

Last month, the Deputy Attorney General, the Associate Attorney General, and I met with tribal leaders from throughout the United States to discuss the pressing public safety issues facing American Indians and Alaska Natives, and to hear their views on the most effective

strategies for making tribal communities safe. On October 30, the Department also held the official consultation required under the Violence Against Women Act, to obtain information specifically about the problem of violence directed at Native American women.

Tragically, in many parts of the Indian country, the situation is dire. Violent crime has reached crisis proportions on many reservations, and is having a devastating toll on the daily lives of Native Americans. Based on data reported by tribes to the Bureau of Indian Affairs, we have seen violent crime rates in some parts of Indian Country that are two, four, and sometimes over ten times the national average. When I met with tribal leaders, they made very clear that they also are facing serious problems of violence against children, women, and elders, and that they want and need the Federal government's help in bringing the perpetrators to justice.

The Department has a unique legal and moral duty to respond to the public safety crisis in tribal communities. Under current law, the Department has sole responsibility for prosecuting major crime, including violent felonies, in most of Indian Country. In many instances, only the Department can seek a sentence appropriate to certain serious crimes committed in Indian Country. If we fail to act, justice is not served. I take seriously the Department's duty in this area, and I intend to ensure the Department does all it can to enforce the law where we have jurisdiction. Because the Federal government has a legal obligation to consult with tribal nations before making major decisions that affect their interests, the Department will convene a tribal Nations Leadership Council, composed of elected officials from tribal nations to advise me on matters critical to American Indians and Alaska Natives.

To meet the Department's basic governmental responsibilities in this area, we have launched a comprehensive initiative on public safety in tribal communities, with two principal goals. The first is to find immediate solutions to reduce the crime rates, including homicide, drugs, and violence against children and women, and to put policies in place to help tribal communities make a difference for themselves. The other is to develop long term answers to the problems facing tribal communities. We also are reevaluating our grants to tribal courts and tribal justice initiatives to ensure that we do everything we can to answer the challenge. We have reached out to other Federal agencies – including the Departments of Interior and Health and Human Services, among others – to try to develop a unified and comprehensive approach to public safety challenges in Indian Country.

Although we have already begun to take action to improve the Department's effectiveness in addressing our responsibilities toward Native Americans, a great deal more must be done. We are working to ensure that these discussions with the tribes will provide the foundation for lasting change in this area.

Recovery Act

The American Recovery and Reinvestment Act of 2009 ("ARRA") included $4 billion in Department of Justice grant funding to enhance State, local, and tribal law enforcement efforts, including the hiring of new police officers, to combat violence against women, and to fight

internet crimes against children. The economic crisis has hit our State, local, and tribal justice partners especially hard. Public safety was paramount in the Department's decisions about the use of the money that ARRA provided to us. As of the end of FY 2009 on September 30, our Office of Justice Programs ("OJP") has made 3,883 ARRA grant awards totaling $2.74 billion to State, local, and tribal criminal justice agencies. This funding is in addition to our 4,346 FY09 grants totaling almost $2.2 billion that also were awarded.

OJP focused its funding efforts on supporting innovative, evidence-based programs that help communities with a wide range of crime prevention, prosecution, and reentry efforts. Some of these programs have specifically addressed the needs of communities particularly hard hit by the economic downturn. For example, OJP's Bureau of Justice Assistance ("BJA") used ARRA funds to provide over $123 million to rural law enforcement agencies to help them prevent and combat crime, especially drug related crimes that have had a devastating effect on these smaller communities.

The Department recognizes that State and local agencies need the flexibility to assess their own criminal justice needs and the ability to focus their funding based on those needs. BJA administers the Edward Byrne Memorial Justice Assistance Grant Program ("JAG"), which provides formula block grants to States and localities. In FY09, BJA awarded more than $480 million in JAG funding. In addition to regular FY JAG funding, BJA also administered critical Recovery Act JAG funding in 2009, awarding more than $1.9 billion in Recovery JAG funding.

In addition, the Department is committed to ensuring that all funds expended pursuant to the Recovery Act are protected from fraud. We will aggressively enforce the False Claims Act and other federal statutes to ensure that we recover vital dollars that are fraudulently obtained and hold accountable those who steal government recovery funds. The Department worked closely with this Committee on the Fraud Enforcement and Recovery Act to amend the major frauds statute, 18 U.S.C. § 1031, to include fraud involving funds made available under the Recovery Act and the Troubled Assets Relief Program. This important amendment will ensure that Federal prosecutors have jurisdiction to use a potent fraud statute to protect the government assistance provided during this most recent economic crisis. The Department has been providing training to the IG community on the new amendments and their role in strengthening the government's ability to combat Recovery Act fraud, and is working with the Recovery Accountability and Transparency Board to ensure that matters are referred to the Department in a timely matter. Furthermore, the Antitrust Division launched an Economic Recovery Initiative aimed at training government officials to prevent, detect, and report efforts by parties to unlawfully profit from federal assistance. We ensured that this initiative was up and running just one month after the Recovery Act was signed into law, so that the public would receive the maximum benefit of these fraud prevention and detection efforts before stimulus money was awarded. The Department is uniquely positioned to provide such training due to its expertise in investigating and prosecuting procurement fraud schemes. We intend to draw on all the resources and expertise of the Department, together with our partner agencies and regulatory authorities throughout the Executive Branch to ensure that taxpayer funds are safeguarded from

fraud and abuse and that the recovery effort is conducted in an open, competitive and non-discriminatory manner.

Economic Crime

Economic crimes pose a continual threat to the vitality of our economy. Financial, corporate and mortgage frauds are significant problems and a major focus of the Department of Justice. For example, the integrity of our capital markets depends on the ability of investors to receive, and rely on, accurate financial information. Similarly, abuses involving financial fraud schemes, such as mortgage lending and securitization frauds, foreclosure rescue scams, reverse mortgage scams and bankruptcy schemes, have affected the health of our housing markets. In addition, 15 United States Attorneys' Offices have already reported opening matters concerning entities receiving economic recovery funds. Vital funds appropriated to our armed forces overseas are being diverted.

The Department has an impressive record of success in identifying, investigating, and prosecuting economic crimes, including massive financial and corporate fraud schemes. For example, on October 17th, the manager of the multi-billion dollar Galleon Group hedge fund was arrested on insider trading charges along with five others, including an IBM executive, in what was described as the largest hedge fund insider trading scheme ever charged by the Department. We have also had similar success in fighting mortgage fraud. For example, on April 22, 2009, a Federal grand jury indicted four defendants for their participation in a massive mortgage fraud scheme that promised to pay off homeowners' mortgages on their "Dream Homes," but left them to fend for themselves. The scheme involved more than 1,000 investors who invested approximately $70 million.

I recently joined Treasury Secretary Geithner, Housing and Urban Development Secretary Donovan, Federal Trade Commission Chairman Leibowitz and a group of State attorneys general to announce the creation of four State/Federal mortgage fraud working groups that will be focused on information-sharing, criminal enforcement, civil enforcement and civil rights enforcement in combating mortgage fraud, including foreclosure and rescue scams and lending discrimination. These working groups are each co-chaired by a State Attorney General and an Assistant Attorney General from the Department of Justice, and include high-level participants from Treasury, HUD, the FTC, the FBI and State banking authorities.

The Department of Justice has also established a coordinated and unified approach to combating procurement fraud, including fraud relating to the wars in Iraq and Afghanistan and reconstruction efforts in those countries. The Department has devoted an array of resources and expertise to this important mission. The Antitrust Division, the Civil Division, and numerous U.S. Attorneys' Offices have devoted substantial resources and coordinated their efforts with the Criminal Division's Fraud Section, Public Integrity Section, Office of International Affairs, and the Asset Forfeiture and Money Laundering Section.

The Department has been working closely with and through the International Contract Corruption Task Force ("ICCTF"), various inspectors general, and other law enforcement partners to investigate and prosecute procurement fraud relating to the wars in Iraq and Afghanistan, and the rebuilding of those countries. Established in October 2006, the ICCTF is a joint agency task force that deploys criminal investigative and intelligence assets worldwide to detect and investigate corruption and contract fraud resulting primarily from wars and reconstruction efforts in Iraq and Afghanistan (also referred to as "war-related contract fraud"). This task force is led by a board of governors composed of senior agency representatives who operate all major war-related contract fraud cases to defend the interests of the United States overseas.

Procurement fraud cases, especially those involving the wars in Iraq and Afghanistan, usually are very complex and resource intensive. The cases often involve extraterritorial conduct as well as domestic conduct, requiring coordination between appropriate law enforcement agencies. In order to improve coordination and information sharing, the ICCTF has established a Joint Operations Center based in Washington, D.C. The JOC currently serves as the nerve center for the collection and sharing of intelligence regarding war-related contract fraud cases. The Joint Operations Center coordinates intelligence-gathering and provides analytic and logistical support for the ICCTF agencies. As a result of this concentration of efforts, the Department has significantly increased the number of prosecutions relating to war-related contract fraud.

The FBI currently has special agents deployed in Iraq, Afghanistan, and Kuwait to provide full-time support to the International Contract Corruption Initiative, which addresses major fraud and corruption in the war and reconstruction efforts in Iraq and Afghanistan. These deployments are conducted in 120-day rotation cycles and special agents work jointly with the Defense Criminal Investigative Service, Army Criminal Investigation Command Major Procurement Fraud Unit, Special Inspector General for Iraq Reconstruction, and the U.S. Agency for International Development, which also have agents deployed to address this crime problem.

To date, the Department has brought criminal charges against more than 100 defendants (including mainly individuals and some companies) for war-related contract fraud, in addition to civil claims brought or settled against a number of contractors. This figure represents more than triple the number of similar criminal cases that had been brought by June 2007.

We must do more and we are doing more. We recently announced an intensified effort to combat financial and corporate fraud. Our new Financial Fraud Enforcement Task Force will tackle all aspects of financial crime, including the type of mortgage fraud that was a significant catalyst for the recent worldwide financial marketplace meltdown.

Protecting Consumers and a Competitive Marketplace

Vigorous antitrust enforcement is critical to protecting America's consumers and ensuring the conditions for a competitive marketplace. We are fulfilling our plans to emphasize robust enforcement of the antitrust laws.

We are committed to challenging mergers that will harm consumers and businesses. Since the beginning of the year, four transactions were restructured or abandoned by the parties in response to an Antitrust Division investigation, and the Division obtained divestitures or other relief in two additional enforcement actions. In addition, the Department of Justice, together with the Federal Trade Commission, announced on September 22, 2009, that we will solicit public comment and hold joint public workshops to explore the possibility of updating the Horizontal Merger Guidelines that are used by both agencies to evaluate the potential competitive effects of mergers and acquisitions. Having guidelines that offer more clarity and better reflect agency practice provides for enhanced transparency and gives businesses greater certainty when making merger decisions, resulting in a more competitive marketplace that benefits consumers.

As part of the Department's effort to work cooperatively with other agencies, we announced in August a partnership with the Department of Agriculture to co-host a series of workshops held around the country in States with significant agriculture industries to examine the state of competition in agriculture markets. The Antitrust Division is actively seeking input from farmers, ranchers, economists, lawyers, consumer groups and processors about their views and experiences. These workshops will give the Department the opportunity to learn first-hand about such issues as the effects on competition of concentration in relevant sectors, concerns about buyer power, and the economic impact of vertical integration.

Protecting the Environment

The Department continues to vigorously enforce the environmental laws through its Environment and Natural Resources Division, which on November 16 marked the 100th anniversary of its founding as the Public Lands Division. Our enforcement priorities include reducing harmful emissions from large coal-fired power plants, cleaning up environmental sites, and preventing water pollution, especially in the form of contaminated stormwater runoff. During this Administration we have brought cases or secured major settlements in all three of these areas.

The Department also continues its other work to protect the environment. For example, the Environment Division has been involved in the ongoing bankruptcy of a large mining company, Asarco, in an effort to ensure that more than $1.6 billion is available to clean up the contaminated sites the company is leaving behind. The Department also entered into a landmark agreement to clean up the contaminated Hanford nuclear site, a matter in which both Secretary of Energy Chu and I were personally involved. And, we have prosecuted criminally a number of

companies and individuals who have intentionally discharged pollutants from vessels en route to American ports.

The Environment Division is also working with the Environmental Protection Agency to obtain the cleanup of major river bodies in the United States, including the Fox River (Wisconsin), the Kalamazoo River (Michigan) and the Hudson River (New York). Additionally, we have vigorously defended important Federal agency actions from a variety of legal challenges including defense of the U.S. Army's multifaceted activities to dispose of chemical weapons and defense of the Interior Department's listing of the polar bear as a threatened species under the Endangered Species Act.

Nominations

The Department appreciates the work the Committee and the Senate have done to confirm nominees that the President has submitted both for positions in the Department and for the Federal judiciary. At this point in the first year of President Bush's administration, the Senate had confirmed 12 of his lower court judicial nominees; as of November 16, 2009, the Senate has approved only six, while eight remain on the Executive Calendar, continuing to await confirmation by the full Senate. Similarly, as of November 16, 2009, three of eleven Assistant Attorneys General have yet to be confirmed. I hope the Committee will continue to approve these nominations, and it is imperative that the full Senate act on them expeditiously.

Conclusion

Chairman Leahy, Ranking Member Sessions, and Members of the Committee, I want to thank you for this opportunity to address my priorities for the Department. I am pleased to answer any questions you might have.

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont
November 18, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Department Of Justice Oversight"
November 18, 2009

I commend the Attorney General for moving forward last week with plans to proceed on several cases against those who seek to terrorize the United States. He is using the full range of authorities and capabilities available to us. Just as President Obama is using our military, diplomatic, legal, law enforcement, and moral force to make America safer and more secure, the Attorney General is exercising his responsibilities in consultation with the Secretary of Defense to determine where and how best to seek justice against those who have attacked Americans here at home and around the world. After nearly eight years of delay, we may finally be moving forward to bring to justice perpetrators of the September 11 attacks. I have great confidence in our Attorney General, the capability of our prosecutors, our judges, our juries, and in the American people in this regard. I support the Attorney General's decision to pursue justice against Khalid Sheikh Mohammed and four others accused of plotting the September 11 attacks in our Federal criminal court in New York.

War crimes, crimes of terror, and murder can successfully be prosecuted in our Federal courts, as we have demonstrated time and again. America's response to these acts is not to cower in fear, but to show the world that we are strong, resilient and determined. We do not jury-rig secret trials or kangaroo courts. We can rely on the American justice system. I urge this Committee and the American people to support the Attorney General as this matter proceeds, and urge the Congress to provide such assistance as will be needed, included providing the victims of those events the ability to participate. As many surviving family members of those killed that day have said, after years of frustration, it is time to have justice.

Federal courts have tried more than 100 terrorism cases since September 11, proving they can handle sensitive classified information, security, and other legal issues related to terrorism cases. Since the beginning of this year more than 30 individuals charged with terrorism violations have been successfully prosecuted or sentenced in Federal courts. The Federal courts located in New York City tried and convicted the so-called "Blind Sheikh" for conspiring to bomb New York City landmarks, and Ramzi Yousef for the first World Trade Center bombing.

New York was one of the primary targets of the September 11 attacks. Those who perpetrated the attacks should be tried there. They should answer for their brutality, and for the murder of thousands of innocent Americans. Like Mayor Bloomberg, I have full confidence in the capacity of New York, and I have full confidence in Ray Kelly and the New York Police Department.

The Attorney General personally reviewed these cases and, along with Defense Secretary Gates and based on the protocol that they announced this summer, determined to use our full array of powers by proceeding against the September 11 plotters in Federal court, those charged with the attack on the U.S.S. Cole before a military tribunal, and against Major Hasan in a court martial for the deadly attack at Fort Hood just two weeks ago.

The President spoke at Fort Hood last week in a tribute to the brave men and women of our Armed Forces there. He expanded on that matter in his weekly address over the weekend. We all join the President and military community in grieving for the victims and their families and pray for the recovery of those who were wounded. Nidal Hasan has been charged with 13 counts of premeditated murder. The Army is leading the investigation with the support of the FBI. The President has ordered a review of what was known about Hasan prior to the assault at Fort Hood and has promised accountability. He has urged us to resist the temptation to politicize these matters or make irresponsible accusations before we assemble and know the facts.

This Committee will conduct appropriate oversight, but we should do so at a time and in a manner that does not interfere with the investigation and prosecution of this case. I am one who believes that we need to determine what mistakes were made, and that we should do all we can to prevent this tragedy from being repeated. I have already written to John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, on behalf of this Committee, and asked him to provide us the results of the internal investigation by the FBI, Army and intelligence agencies that is already underway. I have spoken to both Attorney General Holder and FBI Director Mueller, and yesterday the Ranking Republican member and I, as well as the Chairman of the Intelligence Committee Senator Feinstein, were briefed on the status of the investigation. We should and will conduct responsible oversight, but we should not be reckless. We should not take steps that will interfere with the ongoing investigation or stand in the way of military prosecutors compiling a thorough case.

Also yesterday, the Attorney General Holder and Treasury Secretary Geithner announced the creation of a financial fraud task force. This is a significant step in our efforts to strengthen fraud prevention and enforcement. It implements the authority we provided in the Fraud Enforcement and Recovery Act (FERA) of 2009. I worked hard with Senator Grassley and Senator Kaufman to draft FERA and get it passed. President Obama signed it into law earlier this year. By giving law enforcement new tools and resources, FERA strengthens the Federal Government's ability to investigate and prosecute the kinds of financial frauds that have severely undermined our economy and hurt so many hard-working Americans. We are now hard at work on measures that can help find, deter and punish health care fraud, as well. Just this week, we learned that the government has paid more than $47 billion in questionable Medicare claims. As we prepare to consider health reform legislation, we must address these growing instances of health care fraud. We also need to complete our legislative work on a media shield bill and the USA PATRIOT Act Sunset Extension Act. On both these important measures, the Attorney General has come forward with strong support.

With those opening remarks, I welcome Attorney General Holder back to the Committee for his fourth appearance this year.

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Ashcroft Joins Criticism of KSM Trial

Posted By Ryan J. Reilly On November 23, 2009 @ 1:52 pm In News | 1 Comment

[1]

John Ashcroft (USDOJ)

Former Attorney General John Ashcroft said on Friday that trials for the Sept. 11, 2001, plotters could endanger the public and give anti-U.S. elements a public stage to voice their rhetoric, according to the Associated Press.

"If your top priority is the liberty and life of American citizens and the security of their lives and liberty, then this decision is less than optimal," he told [2] reporters at a Kansas fundraiser for Republican Rep. **Todd Tiahrt**'s campaign for U.S. Senate. "I believe we are still in a very significant war on terror. The administration doesn't appear to believe that we are in a war on terror."

Last Wednesday, Ashcroft said that Holder technically lacks the legal standing to move alleged Sept. 11 plotter Khalid Shaikh Mohammed and other detainees to federal courts in New York City to stand trial.

"The attorney general doesn't have the authority to mandate that the secretary of Defense turn somebody over to him and yield jurisdiction so that something that would have been done in a military setting is done in a civilian setting," Ashcroft told the Chris Stigall show on KCMO radio, according to the Hill [3].

Notwithstanding Ashcroft's views, the trials will be held in New York City; Holder made his decision in consultation with Secretary of Defense **Robert Gates**, according to the Justice Department

Ashcroft, who was Attorney General from 2001-2005, joins former Attorneys General Ed Meese [4] and Michael B. Mukasey [5] in criticizing Holder's decision to give the Sept. 11 plotters civilian trials.

Related stories:

1. DiGenova Joins GOP Chorus Against KSM Trial [6]
2. Meese Chimes In Against KSM Terrorism Trial in New York [4]

Andrew C. McCarthy
Contributing Editor
November 10, 2009, 4:00 a.m.

Dare to Call It Terrorism

The FBI will not admit that what happened in Texas is part of the jihad.

By Andrew C. McCarthy

So it turns out that the worst Islamist terrorist strike since 9/11 — an attack that killed twice as many Americans as were slain in the 1993 World Trade Center bombing — was not a terrorist attack at all. Just ask the FBI.

The initial hurried reports of thirteen people (including twelve U.S. soldiers) murdered, and dozens of others wounded, were just coming in. A pained Diane Sawyer was wishing aloud that Nidal Malik Hasan were named "Smith." Her colleagues in what now passes for mainstream journalism were risibly theorizing that post-traumatic stress disorder must have snapped this non-combat Army psychiatrist — one who'd screamed "Allahu akbar!" while mowing down U.S. soldiers about to deploy to a Muslim country for a war he'd made no secret of deploring; one whose only battlefield experience was the massacre he'd just committed against unarmed men and women in a Fort Hood training center.

Then, like the cavalry, the FBI came riding to the PC rescue. The Federal Bureau of Let's Skip the Investigation pronounced that the killing was not terrorism. Forget about *Islamic* (or at least *Islamist*) terrorism. This mass murder wasn't even *terrorism*.

The FBI and the rest of our Islamophilic government have their story, and they're sticking to it. The terrorists' siege on our nation has nothing to do with Islam. It is the work of al-Qaeda, and al-Qaeda terrorists — so the catechism goes — are not true Muslims. Sure, Osama bin Laden & Co. accurately quote Islamic scriptural injunctions to wage jihad against non-Muslims. But never mind that: Islam is an irenic, unmitigated good; in fact, it is one of our best weapons against terrorism.

Come again? If all the terrorists are Muslims and all the terrorists say scriptures that plainly command killing are inspiring them to kill, how could Islam be an asset? Don't go spoiling a feel-good theory by asking a lot of questions — that would be almost like an investigation, and when it comes to Islam, the FBI doesn't do investigation.

If it did, it might stumble onto all sorts of things we'd just as soon not know. We'd have to start acknowledging that Salafist ideology (the strain of Islam endorsed by the Muslim Brotherhood and Sunni terrorist organizations) is prevalent in American mosques. We'd have to concede that beliefs we optimistically call "radical" are actually quite mainstream among American Muslims and predominant among Muslims overseas — including the beliefs that sharia (the law of Islam) should govern the United States, that Muslims must resist American military and law-enforcement

operations against other Muslims, that the U.S. military presence in Islamic countries renders American soldiers and those who support them legitimate targets of jihadist terror, and that Israel, America's democratic ally in the Middle East, should not exist.

Obviously, this reality of Islam defies the government's wishful fiction. So the FBI doesn't do Islam. It does politics. And if you're going to do politics, you can't do preventive counterterrorism of the kind the FBI, the Justice Department, the Homeland Security Department, the intelligence community, and the rest of Leviathan promised to do right after 9/11.

If we're going to pretend that there is no war and that attacks by Muslim terrorists are mere crimes committed by random nutcases, then who really needs the FBI, anyway? Any competent police agency can investigate atrocities *after* they happen. No matter how heinous the crime, that's standard gumshoe work: Cordon off the crime scene, draw the chalk outlines (you will need a lot of chalk), gather up the bullet casings (or the bomb fragments), interview the witnesses, etc. Within a few days or weeks or months, you'll have enough for an arrest warrant. Sure, the culprits may be dead or comatose — or gone, if they were ever here in the first place — but at least you can tell everyone you're honoring the "rule of law," as President Obama and his attorney general are fond of putting it. Thanks to that approach, bin Laden and his sidekick, Ayman al-Zawahiri, have been under indictment, but free to kill, for eleven years now. Several thousand deaths later, we can rest assured the FBI should be wrapping up those cases any day now.

It turns out that Nidal Hasan had been on the FBI's radar screen for six months before he paraded about the base in his martyr suit, spent a few days passing out Korans and most of his belongings, exclaimed the obligatory "Allahu Akbars," and opened fire on our troops. Federal law-enforcement sources have told the British press (which is where one has to go to get news about Islamist terrorism in America) that Hasan came to the FBI's attention early this year when a blogger identifying himself as "Nidal Hasan" — a name bearing a striking resemblance to "Nidal Hasan" — posted odes to suicide bombers on the Internet.

No investigation was opened at the time, so the Bureau did not interview the legion of active and retired military officials who've now come out of the woodwork to report that Hasan appeared to be a Muslim militant. Before Hasan's rampage, those officials shrank from speaking, none wanting to become the next Stephen Coughlin. (Coughlin, you may recall, is the former Pentagon terrorism expert cashiered by Deputy Defense Secretary Gordon England because he refused to soften his impeccably reasoned conclusion that sharia is incompatible with Western liberalism and American democracy.) As a result, the FBI did not learn, for example, that Hasan had praised Abdulhakim Mujahid Muhammad, who murdered Pvt. William Long and wounded Pvt. Quinton Ezeagwula in June at an Arkansas recruiting station — another jihadist shooting spree targeting our troops that the government decided was not a terrorist attack.

Would opening an investigation have made a difference? I doubt it. After all, the Bureau actually had opened an investigation on Abdulhakim Mujahid Muhammad in the months before the attack — months during which Muhammad returned from a mysterious trip to the jihadist hothouse of Yemen, researched recruiting stations, plotted his attack, and finally struck.

To stop bad things from happening, you have to come to grips with what causes them. We won't. So even with its eyes on Muhammad, the FBI couldn't see a problem, because there were no obvious ties to known terrorists — officially defined as the teeny-tiny fringe of faux Muslims

from al-Qaeda who've hijacked the religion of peace. Muhammad's ideology — shared by tens of millions of Muslims — was simply not our concern. And with Hasan, the biggest challenge was not whether to investigate an infiltrator wearing a neon "Islamist" sign, but how to promote him up the ladder and burnish our diversity cred while intimidating the suspicious into silence.

Mission accomplished.

— National Review's Andrew C. McCarthy is a senior fellow at the National Review Institute and the author of Willful Blindness: A Memoir of the Jihad (Encounter Books, 2008).

Andrew C. McCarthy
Contributing Editor
November 13, 2009, 0:00 p.m.

September 10? It's Worse Than That

We are ignoring the best tools we have for fighting terrorism. Why?

By Andrew C. McCarthy

'September 10 America." The phrase signifies a reprise of the "terrorism is just a crime" mindset that reigned in the years before the 9/11 attacks. Like other observers, I've groused in recent months that we are back to that self-destructive ethos. I was wrong. If the Fort Hood atrocity tells us anything, it is that things are much worse than they were before 9/11.

For one thing, 9/11 *has happened.* Before it did, perhaps we had an excuse. But we've experienced the wages of consciously avoiding Islamism. To have retreated into puerile fantasies about a religion of peace is, at this juncture, unfathomable.

Fathom it, though, we must. In 2008, I wrote a book called *Willful Blindness* to describe government's stubborn refusal to deal with the nature and magnitude of jihadism when it first emerged as a domestic threat in the early Nineties. For a long time, I'd resisted writing about the experience of prosecuting Muslim terrorists. I'm very proud of what we did, but the story is a painful one of warning signs missed and lives lost. Having lived it, I wasn't anxious to relive it.

Yet, more than a decade after Muslim terrorists declared war on the United States by bombing the World Trade Center, we were still making the same errors, with wishful thinking about Islam still substituting for sober analysis. It seemed important to go back to the beginning, to explore why jihadism is a profound threat, why we've underestimated it, and why it is so perilous to treat a national-security challenge as if it were a mere legal problem. In a display of my own wishful thinking, I subtitled the book "A Memoir of the Jihad" — *memoir* conveying the hope that the worst of the willful blindness was behind us, and that the misjudgments of the past would yield wisdom in the here and now.

Wrong again.

The word *incomprehensible* does not do justice to the FBI's conclusion that jihadist saboteur Nidal Hasan's numerous communications with jihadist imam Anwar al-Awlaki were either (a) not significant enough to warrant further investigation or (b) significant but immune from further investigation on First Amendment grounds.

The first possibility would not pass the laugh test if this were a laughing matter. Anonymous government officials have suggested that the substance of the conversations was innocuous. That remains to be seen — we can't know until we learn exactly what was said, how it was acted on, who else may have been in the loop, and so on. But even if you buy the innocent-substance theory

(I don't), the *occurrence* of the communications — between an Islamist infiltrator in our armed forces and a known al-Qaeda recruiter who ministered to some of the 9/11 hijackers — could not be more significant. The mere circumstances were more than enough to turn up the investigative heat.

That's so palpable that we must worry that about the second possibility: That the FBI and the Justice Department have convinced themselves that the Constitution really is a suicide pact — that a mainstream construction of Islam, calling for our demise as a free people, is somehow insulated from inquiry because we don't want to confront the stubborn fact that Islamist terror is instigated by Islamic doctrine.

Journalism in the last week has been a feast of fables about Islam, libels about military culture, and gut-wrenching accounts of sorrow and heroism. But the most disturbing thing I've read is Ron Kessler's *Newsmax* column. It addressed little not already known about the mass murder, but Ron has singularly good sources in the FBI. He provides a window into Bureau thinking that makes the mind reel.

Besides grossly low-balling the number of U.S. mosques that propagate Islamist ideology — the Feebs say it's about 10 percent of 2,000 mosques; it's actually about six to eight times that amount — a top FBI counterterrorism official told Kessler:

> Those who actively support extremist causes, say America is evil and deserves what it gets, and celebrate the death of soldiers, know they may come to our attention. So they don't do it as openly now . . . . There was much more of that [before 9/11] because all of it was considered by Justice Department guidelines to be purely protected speech. We do not have incitement laws in America, but once an imam facilitates someone else taking action, he has crossed the line into material support and becomes our business.

Where to begin? Almost 17 years ago, after the Trade Center was bombed, the Justice Department did not believe a Muslim cleric had to "cross the line into material support" before he became the FBI's business. Indeed, there were no "material support" laws until 1996. In 1995, as detailed in *Willful Blindness*, I led the team that convicted Omar Abdel Rahman, the "Blind Sheikh." In essence, we prosecuted him for *inciting terrorism* — the thing the senior official tells Kessler isn't a crime. Specifically, the Blind Sheikh was convicted of (among other things) soliciting an attack against a U.S. military installation (like Hasan just committed) and soliciting the murder of Egyptian president Hosni Mubarak.

Solicitation is still a federal crime — and there's no requirement that the incitement actually lead to a terrorist act. Moreover, even before anyone in America ever heard of al-Qaeda — even before there was a 9/11, or bombings of Khobar Towers, the U.S. embassies in eastern Africa, and the U.S.S. *Cole* — some of us realized that terrorists fueled by viscerally anti-American Islamist ideology, were at war with the United States. And guess what? There's a statute for that, too: The Civil War–era seditious-conspiracy law makes the waging of such a terror campaign a 20-year felony. And there's no carve-out for imams.

How was the Blind Sheikh convicted? By presenting to the jury his fiery sermons and private meetings with the faithful, often in mosques where he urged barbarous strikes against America, swaddled in accurate quotations of the Koran and other Muslim scripture. Of course, he claimed that such exhortations were protected speech. That is, he made exactly the same arguments the Islamist Left has spent the last eight years beating into the country, including into the Justice

Department and the FBI. But back in 1995, those arguments were seen for the nonsense that they were.

There is no bar to the use of speech as evidence. The First Amendment generally prohibits the criminalization of speech itself — i.e., the act of communicating. But settled law holds that when prosecutors use your speech to prove crimes, there is no First Amendment violation. When the mafia boss tells the button-man "Whack him!" he doesn't get to lodge a First Amendment objection to the introduction of that statement at his murder trial. He's not being tried for saying "Whack him!" He's being tried for murder. The statement is evidence.

Nor does the principle change just because the speech happens to implicate religion. In America, you can *believe* whatever you want, but your *actions* must be lawful. Not surprisingly, the Blind Sheikh contended that his incitements to terror were beyond prosecution because he was practicing his religion: Specifically, he claimed he had simply been performing the traditional role of an Islamic cleric called on to determine whether proposed courses of conduct (in this instance, mass-murder plots) were permissible under Islamic law. Fourteen years ago, that contention was properly seen as frivolous. In America, we are not under sharia law — not yet. There is no religious exception for violent acts, conspiracies, and incitements to violence that violate American law.

So what has happened? Why did we know these rudimentary, commonsense principles in the Nineties but not now? Because incitement explodes the government's "religion of peace" narrative. The incitement to Islamist terror is Islamic scripture. The Blind Shiekh was not a hypnotist or a particularly compelling speaker. His authority over terrorist organizations was rooted exclusively in his acknowledged mastery of sharia. Islamic scripture was the source of his power over Muslims.

To concede this would be to concede the obvious but unspeakable fact that there is a nexus between Islam and terror. That would harpoon the lovey-dovey dream that Islam and Western democracy are perfectly compatible. It would upset Muslims — especially the well-organized, deep-pocketed Islamic grievance industry. Today's hip, progressive FBI, like Gen. George Casey's modern, slavishly "diverse" military, doesn't want to upset Muslims. Besides souring State Department cocktail parties and drying up funding for presidential libraries, upsetting Muslims would put a damper on our government's lavish "Islamic outreach" efforts. These initiatives are premised on the delusion that we'll stop more terror by having unindicted co-conspirators like CAIR teach Islamic "sensitivity" to our agents than by turning our agents loose to investigate CAIR and its ilk.

So the FBI ignores the significance of a terrorist cleric's influence over an unabashed Islamist in our midst. After all, their contacts seemed to be religious in nature. We're told, moreover, that we can't do anything about the anti-American vitriol oozing out of Islamist mosques under the guidance of our friends the Saudis. After all, the vitriol hasn't yet "crossed the line into material support." By the time it does, you might have 13 corpses to tend to, but at least there will be lots to talk about at the next outreach conference — or the next time the attorney general decides to speak at a CAIR-fest.

The post-9/11 era was supposed to be about knocking down walls that obstructed effective counterterrorism. But behold the new wall, more insidious than its suicidal Nineties forerunner: the arbitrary barrier separating terrorism from "protected" incitement — the cagey, generalized,

non-specific jihadist rhetoric that is the Islamist cleric's stock-in-trade. Aside from not being required by law, this new wall will usually mean you can't go after the worst actors (the Islamic authorities and the terrorists they inspire) until after an attack has happened and Americans have been killed.

In other words, be prepared for more Fort Hoods. We're not in September 10 America. We've managed to land in a much more dangerous place.

— National Review's Andrew C. McCarthy is a senior fellow at the National Review Institute and the author of Willful Blindness: A Memoir of the Jihad (Encounter Books, 2008).

Andrew C. McCarthy
Contributing Editor
November 16, 2009, 0:00 a.m.

Trial and Terror

The Left gets its reckoning.

By Andrew C. McCarthy

The decision to bring Khalid Sheikh Mohammed and four other top al-Qaeda terrorists to New York City for a civilian trial is one of the most irresponsible ever made by a presidential administration. That it is motivated by politics could not be more obvious. That it spells unprecedented danger for our security will soon become obvious.

The five 9/11 plotters were originally charged in a military commission. Military commissions have been approved by Congress and the courts. Eleven months ago, the jihadists were prepared to end the military case by pleading guilty and proceeding to execution. Plus, the Obama administration is continuing the commission system for other enemy combatants accused of war crimes. If we are going to have military commissions for any war criminals, it is senseless not to have them for the worst war criminals. In sum, there is no good legal or policy rationale for transferring these barbarians to the civilian justice system. Doing so will prompt a hugely costly three-ring circus of a trial, provide a soapbox for al-Qaeda's anti-American bile, and create a public-safety nightmare for New York City.

There is, however, a patent political rationale behind Obama's decision.

The terrorists are clearly committed members of the al-Qaeda conspiracy to wage a terrorist war against the United States — so much so that KSM cannot help himself, bragging about his atrocities against our country, including the 9/11 massacre of nearly 3,000 Americans. Further, controversy surrounds the intelligence-collection measures used by the Bush administration after 9/11 — measures such as enhanced interrogation that, though they saved countless lives, have been stridently condemned by the antiwar Left. This antiwar Left, President Obama's base, has demanded investigations and prosecutions against Bush officials.

The Obama Justice Department teems with experienced defense lawyers, many of whom (themselves personally or through their firms) spent the last eight years volunteering their services to America's enemies in their lawsuits against the American people. As experienced defense lawyers well know, when there is no mystery about whether the defendants have committed the charged offenses, and when there is controversy attendant to the government's investigative tactics, the standard defense strategy is to put *the government* on trial.

That is, Pres. Barack Obama and Attorney General Eric Holder, experienced litigators, fully realize that in civilian court, the Qaeda quintet can and will demand discovery of mountains of government intelligence. They will demand disclosures about investigative tactics; the methods

and sources by which intelligence has been obtained; the witnesses from the intelligence community, the military, and law enforcement who interrogated witnesses, conducted searches, secretly intercepted enemy communications, and employed other investigative techniques. They will attempt to compel testimony from officials who formulated U.S. counterterrorism strategy, in addition to U.S. and foreign intelligence officers. As civilian "defendants," these war criminals will put Bush-era counterterrorism tactics under the brightest public spotlight in American legal history.

This is exactly what President Obama and Attorney General Eric Holder know will happen. And because it is unnecessary to have this civilian trial at all, one must conclude that this is exactly what Obama and Holder want to see happen.

During the 2008 campaign, candidate Obama and his adviser, Holder, rebuked the Bush counterterrorism policies and promised their base a "reckoning." Since President Obama took office, Attorney General Holder has anxiously shoveled into the public domain classified information relating to those policies — with the administration always at pains to claim that its hand is being forced by court orders, even though the president has had legal grounds, which he has refrained from invoking, to decline to make those disclosures. Moreover, during a trip to Germany in April, Holder signaled his openness to turning over evidence that would assist European investigations — including one underway in Spain — that seek to charge Bush-administration officials with war crimes (which is the transnational Left's label for actions taken in defense of the United States).

Now, we see the reckoning: Obama's gratuitous transfer of alien war criminals from a military court, where they were on the verge of ending the proceedings, to the civilian justice system, where they will be given the same rights and privileges as the American citizens they are pledged to kill. This will give the hard Left its promised feast. Its shock troops, such as the Center for Constitutional Rights, will gather up each new disclosure and add it to the purported war-crimes case they are urging foreign courts to bring against President Bush, his subordinates, and U.S. intelligence agents.

From indictment to trial, the civilian case against the 9/11 terrorists will be a years-long seminar, enabling al-Qaeda and its jihadist allies to learn much of what we know and, more important, the methods and sources by which we come to know it. But that is not the half of it. By moving the case to civilian court, the president and his attorney general have laid the groundwork for an unprecedented surrender of our national-defense secrets directly to our most committed enemies.

The five jihadists in question are *alien* enemy combatants currently detained outside the United States. They are not Americans and are not entitled to the protection of our Bill of Rights. That means that in a military-commission trial, they would be given only those rights Congress chose to give them.

At Gitmo, they've insisted on representing themselves. In a military commission, we can allow them to do that, but we don't have to. The commission rules provide for the appointment of military counsel and permit the combatants to retain their own lawyers. This is significant because discovery rules require that the defense be given mounds of information for trial preparation. Much of that information is top-secret intelligence. Importantly, however, we do not have to show the terrorists themselves any classified information. Only counsel who have the required security clearances, and are duty-bound not to reveal the nation's secrets to the nation's enemies, get

access.

The rules are saliently different in the civilian justice system, where, the attorney general has promised, this case will be treated like any other criminal case. In federal court, defendants — even illegal aliens — are vested with constitutional rights that Congress may not alter or reduce. One of those is the right to represent oneself, meaning: to conduct one's own defense without the participation or interference of an attorney.

In 1975, the Supreme Court ruled in *Faretta v. California* that this right to self-representation is absolute. As Justice Potter Stewart put it, "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." To borrow Holder's pet phrase, we are supposedly bringing terrorists into civilian court to honor "the rule of law." Well, our rule of law holds that a defendant may tell the judge that he does not want a lawyer, that he wants to conduct his own defense, and that he wants to see all of the legally required discovery himself — not have a lawyer or some other government operative restrict his access.

The judge may try to talk the defendant out of his decision to be his own lawyer. The judge may appoint "stand-by counsel" to advise the defendant and to be available to represent the defendant if he changes his mind. Under *Faretta*, however, the judge may not deny the defendant the right to conduct his own defense.

By transferring this case to civilian court rather than leaving it to be handled by the military-commission system created by Congress, Obama and Holder have needlessly created a perilous dilemma. Do we deny KSM & Co. the right to represent themselves and thus risk reversal of any convictions on Sixth Amendment grounds? Do we grant them self-representation but withhold critical discovery and thus risk reversal on due process grounds? Or do we grant them self-representation and disclose directly to our wartime enemies the nation's security secrets, which they can then pass on to confederates who are actively targeting us for mass-murder attacks?

In the military court, there would be no such dilemma. Indeed, in the military court, this case would be over now. If President Obama had simply let it proceed, there would have been no trial, and these war criminals would be well on their way to the execution of death sentences.

But then the Left would not have gotten its reckoning. Can't have that.

— National Review's *Andrew C. McCarthy is a senior fellow at the National Review Institute and the author of* Willful Blindness: A Memoir of the Jihad *(Encounter Books, 2008).*

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Andrew C. McCarthy
Contributing Editor
November 17, 2009, 4:00 a.m.

Justice Delayed

Holder's friends in the al-Qaeda bar caused the trial delays he now criticizes.

By Andrew C. McCarthy

Of all the infuriating aspects of the decision to transfer five 9/11 war criminals to civilian federal court, the one that grates most is the contention that the Obama administration is finally moving forward after "eight years of delay" — as Attorney General Eric Holder put it at his Friday press conference — during which the Bush administration managed to complete only three military-commission trials.

This is chutzpah writ large. The principal reason there were so few military trials is the tireless campaign conducted by leftist lawyers to derail military tribunals by challenging them in the courts. Many of those lawyers are now working for the Obama Justice Department. That includes Holder, whose firm, Covington & Burling, volunteered its services to at least 18 of America's enemies in lawsuits they brought against the American people. (During 2007 alone, Covington contributed more than 3,000 hours of free, top-flight legal assistance to our enemy detainees.)

Almost from the moment President Bush authorized military commissions in 2001, this legion of litigators flooded the courts with habeas corpus petitions, contending that military detention and trials violated the Constitution, the Uniform Code of Military Justice, and the Geneva Conventions. In 2004, the al-Qaeda bar induced the Supreme Court, in *Rasul* v. *Bush*, to grant enemies a statutory habeas corpus right to challenge their military detention in civilian court. Congress tried to stop them by amending the habeas statute to divest the lower federal courts of jurisdiction in these lawsuits, but the al-Qaeda bar later persuaded the liberal bloc on the Court to ignore that amendment.

In 2006, in *Hamdan* v. *Rumsfeld*, our enemies' lawyers persuaded the Court's liberal bloc to invalidate the military commissions on the ground that they had been prescribed by the president rather than by Congress. This rationale was (a) disingenuous, because Congress had implicitly approved military tribunals in the 2005 Detainee Treatment Act, (b) legally untenable, inasmuch as presidentially authorized commissions have a long history in the United States, and (c) practically pointless: Since Congress already had implicitly approved the commissions, it was no surprise when it then explicitly approved the commissions in the 2006 Military Commissions Act. In terms of delay, however, the damage was done. The military commissions that had been convened up to that point — and delayed by continuous litigation — had to be started all over again under the new congressionally authorized system.

As night follows day, the al-Qaeda bar immediately went to work attacking the new commission system. Simultaneously, the terrorists' volunteer lawyers worked to undermine Congress's

narrowing of their statutory habeas corpus rights by claiming the combatants had a constitutional right to seek civilian federal court review of their military detention. In the disastrous 2008 *Boumediene* v. *Bush* decision, the Supreme Court's liberal bloc again went along with the leftist lawyers for the enemy. Armed with that victory, the lawyers redoubled their efforts, using the new *Boumediene* ruling (which only applied to detention, not to commission trials) as a basis to argue, again, that the military-commission system was invalid.

It was well into 2008 when the lower courts finally ruled that *Boumediene* did not invalidate the commissions. At that point, in the eleventh hour of its second term, the Bush administration was able to push ahead and get some commissions done. In the interim, however, *Boumediene* meant that more than 200 detainee cases were dumped on the lower federal courts with no guidance about how to proceed.

Attorney General Michael Mukasey pleaded with Congress to enact rules to make the process more orderly, but Democrats turned a deaf ear. Like the al-Qaeda bar, they wanted to maximize due-process rights for the enemy but didn't want to be held politically responsible for doing so. What better way to thread that needle than to sit on their hands while federal judges — who are insulated from voters — made up procedural rules as they went along? At the urging of the enemies' lawyers, those judges are treating combatant-detention hearings as if they were full-blown trials and ordering the release of trained terrorists who should be detained.

It is mind-boggling that the delay in completing commission trials would be derided by Eric Holder, a lawyer whose firm is among those responsible for the litigation-driven delay that became a lawfare triumph for al-Qaeda. Holder and his comrades did everything they could do to undermine the commission system, both in legal motions and in public appearances accusing the Bush administration of torture, war crimes, and disregard for the legal rights of terrorists.

And exactly when would Holder have had Khalid Sheikh Mohammed be tried? We did not gain custody of him until his capture by the Pakstanis in 2003. After that, years were taken to break him in our attempt to extract the full breadth of his knowledge of al-Qaeda's players and plans, and to exploit that intelligence to save lives. KSM was submitted to a military commission in 2006 — shortly after Holder's colleagues in the al-Qaeda bar got the commission system invalidated in *Hamdan*.

Yet, within two years (i.e., in less time than most civilian terrorism cases), KSM and four fellow war criminals stood ready to plead guilty and proceed to execution. But then the Obama administration blew into Washington. Want to talk about delay? Obama shut down the commission despite the jihadists' efforts to conclude it by pleading guilty. Obama's team permitted no movement on the case for eleven months and now has torpedoed a perfectly valid commission case — despite keeping the commission system for other cases — so that we can instead endure an incredibly expensive and burdensome civilian trial that will take years to complete.

How many years? Terrorists bombed the U.S. embassies in 1998. It took three years to bring four of them to trial. (There would have been a fifth, but the civilian system failed to detain him securely: He maimed a prison guard during an escape attempt and was never brought to trial for the bombings.) The embassy-bombing trial took seven months to complete and failed to result in death sentences for the two capital defendants. Guess when the appeal was decided? Just a few months ago — eleven years after the attacks and eight years after the trial. The convictions were upheld by the appellate court, so now we move on to the Supreme Court. Once that's done, they'll

have a couple of years to relitigate their trial and sentences by filing habeas corpus motions.

But it's good to hear we're finally ending all this unseemly delay.

— National Review's Andrew C. McCarthy is a senior fellow at the National Review Institute and the author of Willful Blindness: A Memoir of the Jihad (Encounter Books, 2008).

Statement of 9/11 Family Members and New York City Firefighters
Senate Judiciary Committee
Department of Justice Oversight Hearing
November 18, 2009

On February 6 of this year, Barack Obama met with families of 9/11 victims to explain why one of his first acts upon being sworn in as President of the United States, was to suspend the military commission trials of the men who carried out the worst attack on American soil in the history of our nation. The President called us the "conscience of the country" and promised that those responsible for the cruel deaths of our loved ones eight years earlier would receive "swift and certain justice." But the decision to cloak Khalid Sheikh Mohammed and his co-conspirators with the full force and protection of the United States Constitution has guaranteed that their prosecution for war crimes, which resulted in the deaths of 3,000 innocent people, will be neither swift, nor certain.

After years of litigation, initiated on behalf of America's avowed enemies by some of the country's most prestigious law firms, including the Attorney General's former firm, and the intervention of the Supreme Court, bi-partisan Congressional legislation created a workable military commission framework. Working diligently over a period of three years, processing more than 500,000 documents, preparing evidence and witnesses, the Office of Military Commissions was prepared to proceed to trial. Victims' families were being allowed to attend the proceedings and preparations were being made to allow them to witness the trial from remote locations in the United States. On December 8, 2008, Khalid Sheikh Mohammed, the so-called mastermind of 9/11, and his co-conspirators demanded to plead guilty. Victims' families would never see or touch our loved ones again, but we would finally feel the balm of justice.

Now that has been taken from us. In moving the 9/11 trials to federal court, Attorney General Holder has offered us no explanation or justification for this decision, made all the more baffling by his declaration that military commissions are "lawful, fair and effective," and that they are "consistent with our highest standards as a nation."

If this decision is allowed to stand, we face a wait for justice of several more years, as massive amounts of evidence is re-evaluated under a different legal framework and the government copes with what prosecutors anticipate will be an avalanche of defense motions dealing with never-before-decided legal issues. The President's concurrence with the Attorney General's decision makes a mockery of his promise to us and to the country, that he would ensure that those who attacked America receive "swift and certain justice."

For those of us whose dearly loved family members were burned alive or crushed and torn to pieces, who jumped to their deaths or who died in planes hurtling into buildings or gave the last moments of their lives trying to stop their killers from inflicting more death and destruction right

here in the nation's Capitol, we adamantly oppose the creation of a two-tier legal system which arbitrarily says that the individuals who attacked our military forces at the Pentagon will be treated no different than a bank robber, but those who attacked the USS Cole are war criminals. We are insulted on behalf of our loved ones, as the Attorney General and our Justice Department has decided that killing 3,000 unarmed civilians, targeting thousands and terrorizing millions is not a crime against humanity deserving of a military tribunal in the tradition of Nuremberg, which meted out justice, not on the basis of the identity of the victims or the location of the crimes but on the heinous nature of the crimes in violation of the laws of war and civilized society.

The Attorney General's decision tells terrorists who have repeatedly declared war on America that killing civilians where they live and work will result in greater due process protections for defendants than killing military personnel overseas. This nonsensical, two class system of justice will not result in greater respect for America, it will be roundly criticized—as we are already seeing in Canada.

We adamantly oppose the decision to subject victims' families and the American people to a federal trial in New York City, with procedural rules that will enable Khalid Sheikh Mohammed to make a mockery of his victims, exult in the pain of their families, ridicule the judge and, worst of all, use the media urge his brother terrorists to spill more American blood, all just blocks from the site of Al Qaeda's greatest victory. Mr. Holder's bravado in the media, that we "need not cower in the face of this enemy," evinces a colossal lack of understanding as to the intended audience of Al Qaeda's propaganda, not to mention gross insensitivity to the people of New York.

Last week, the Mr. Holder was quoted describing what he and the President plan to inflict on America as the "trial of the century," with federal prosecutors in different jurisdictions competing for the prize of an O.J.-style media spectacle, complete with roof-top snipers, concrete barriers, armored vehicles, streets on lock-down and jurors escorted by armed guards in flak jackets. If the 3,000 whose deaths will be cheapened by this circus, Mr. Holder offers this: the world will think the better of us.

Last Tuesday, 300 9/11 family members sent a letter to the President urging him to allow the military commissions to go forward against the 9/11 defendants. When word of the letter got out, some 3,000 firefighters across the country joined us and added their names. Less than 24 hours after the Attorney General's announcement last Friday, 100,000 people signed our letter before our computers crashed under the volume of messages.

On 9/11, our fellow Americans stood with us and helped us cope with the horrible events that had befallen our country. They are standing with us now again as we urge members of Congress to reverse this national disgrace.

November 9, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Obama:

On September 11, 2001, the entire world watched as 19 men hijacked four commercial airliners, attacking passengers and killing crew members, and then turned the fully-fueled planes into missiles, flying them into the World Trade Center twin towers, the Pentagon and a field in Shanksville, Pennsylvania. 3,000 of our fellow human beings died in two hours. The nation's commercial aviation system ground to a halt. Lower Manhattan was turned into a war zone, shutting down the New York Stock Exchange for days and causing tens of thousands of residents and workers to be displaced. In nine months, an estimated 50,000 rescue and recovery workers willingly exposed themselves to toxic conditions to dig out the ravaged remains of their fellow citizens buried in 1.8 million tons of twisted steel and concrete.

The American people were rightly outraged by this act of war. Whether the cause was retribution or simple recognition of our common humanity, the words "Never Forget" were invoked in tearful or angry rectitude, defiantly written in the dust of Ground Zero or humbly penned on makeshift memorials erected all across the land. The country was united in its determination that these acts should not go unmarked and unpunished.

Eight long years have passed since that dark and terrible day. Sadly, some have forgotten the promises we made to those whose lives were taken in such a cruel and vicious manner.

We have not forgotten. We are the husbands and wives, mothers and fathers, sons, daughters, sisters, brothers and other family members of the victims of these depraved and barbaric attacks, and we feel a profound obligation to ensure that justice is done on their behalf. It is incomprehensible to us that members of the United States Congress would propose that the same men who today refer to the murder of our loved ones as a "blessed day" and who targeted the United States Capitol for the same kind of destruction that was wrought in New York, Virginia and Pennsylvania, should be the beneficiaries of a social compact of which they are not a part, do not recognize, and which they seek to destroy: the United States Constitution.

We adamantly oppose prosecuting the 9/11 conspirators in Article III courts, which would provide them with the very rights that may make it possible for them to escape the justice which they so richly deserve. We believe that military commissions, which have a long and honorable history in this country dating back to the Revolutionary War, are the appropriate legal forum for the individuals who declared war on America. With utter disdain for all norms of decency and humanity, and in defiance of the laws of warfare accepted by all civilized nations, these individuals targeted tens of thousands of civilian non-combatants, brutally killing 3,000 men, women and children, injuring thousands more, and terrorizing millions.

It is morally offensive to offer Constitutional protections to individuals charged with murdering 3,000 individuals, in essence, to jeopardize justice for war crimes victims, in order to make an appeal to the Muslim world. The use of Article III courts after the 1993 World Trade Center attack didn't stop any of the subsequent terrorist plots, including the attack on Khobar Towers, 19 Americans killed, the 1998 East African Embassy bombing, 212 killed, the USS Cole bombing, 17 sailors killed. The attacks of 9/11 were a resounding rebuke to the view that federal courts were an appropriate counterterrorism strategy. Afterward, we didn't send law enforcement personnel to apprehend the perpetrators, we sent the United States military, who captured them and held them pursuant to the 2001 Authorization of the Use of Military Force (AUMF).

The American people do not support the use of our cherished federal courts as a stage by the "mastermind of 9/11" and his co-conspirators to condemn this nation and rally their fellow terrorists the world over. As one New York City police detective, who lost 60 fellow officers on 9/11, told members of the Department of Justice's Detainee Policy Task Force at a meeting last June, "You people are out of touch. You need to hear the locker room conversations of the people who patrol your streets and fight your wars."

On May 21, you stated that military commissions, promulgated by congressional legislation and recently reformed with even greater protections for defendants, are a legal and appropriate forum to try individuals captured pursuant the 2001 AUMF, passed by Congress in response to the attack on America. Nevertheless, you announced a new policy requiring that Al-Qaeda terrorists should be tried in Article III courts "whenever feasible."

We strongly object to the creation of a two-tier system of justice for terrorists in which those responsible for the death of thousands on 9/11 will be treated as common criminals and afforded the kind of platinum due process accorded American citizens, yet members of Al Qaeda who aspire to kill Americans but who do not yet have blood on their hands, will be treated as war criminals. To date, you have offered no explanation or justification for this contradiction, even as you readily acknowledge that the 9/11 conspirators, now designated "unprivileged enemy belligerents," are appropriately accused of war crimes. We believe that this two-tier system, in which war criminals receive more due process protections than would-be war criminals, will be mocked and rejected in the court of world opinion as an ill-conceived contrivance aimed, not at justice, but at the appearance moral authority.

The public has a right to know that prosecuting the 9/11 conspirators in federal courts will result in a plethora of legal and procedural problems that will severely limit or even jeopardize the successful prosecution of their cases. Ordinary criminal trials do not allow for the exigencies associated with combatants captured in war, in which evidence is not collected with CSI-type chain-of-custody standards. None of the 9/11 conspirators were given the Miranda warnings mandated in Article III courts. Prosecutors contend that the lengthy, self-incriminating tutorials Khalid Sheikh Mohammed and others gave to CIA interrogators about 9/11 and other terrorist operations–called "pivotal for the war against Al-Qaeda" in a recently released, declassified 2005 CIA report–may be excluded in federal trials. Further, unlike military commissions, all of the 9/11 cases will be vulnerable in federal court to defense motions that their prosecutions violate the Speedy Trial Act. Indeed, the judge presiding in the case of Ahmed Ghailani, accused of participating in the 1998 bombing of the American Embassy in Kenya, killing 212 people, has asked for that issue to be briefed by the defense. Ghailani was indicted in 1998, captured in Pakistan in 2004, and held at Guantanamo Bay until 2009.

Additionally, federal rules risk that classified evidence protected in military commissions would be exposed in criminal trials, revealing intelligence sources and methods and compromising foreign partners, who will be unwilling to join with the United States in future secret or covert operations if doing so will risk exposure in the dangerous and hostile communities where they operate. This poses a clear and present danger to the public. The safety and security of the American people is the President's highest duty.

Former Attorney General Michael Mukasey recently wrote in the Wall Street Journal that "the challenges of terrorism trials are overwhelming." Mr. Mukasey, formerly a federal judge in the Southern District of New York, presided over the multi-defendant terrorism prosecution of Sheikh Omar Abel Rahman, the cell that attacked the World Trade Center in 1993 and conspired to attack other New York landmarks. In addition to the evidentiary problems cited above, he expressed concern about courthouse and jail facility security, the need for anonymous jurors to be escorted under armed guard, the enormous costs associated with the use of U.S. marshals necessarily deployed from other jurisdictions, and the danger to the community which, he says, will become a target for homegrown terrorist sympathizers–like the recent Fort Hood shooter–or embedded Al Qaeda cells.

Finally, there is the sickening prospect of men like Khalid Sheikh Mohammed being brought to the federal courthouse in Lower Manhattan, or the courthouse in Alexandria, Virginia, just a few blocks away from the scene of carnage eight years ago, being given a Constitutionally mandated platform upon which he can mock his victims, exult in the suffering of their families, condemn the judge and his own lawyers, and rally his followers to continue jihad against the men and women of the U.S. military, fighting and dying in the sands of Iraq and the mountains of Afghanistan on behalf of us all.

There is no guarantee that Mr. Mohammed and his co-conspirators will plead guilty, as in the case of Zacarias Moussaoui, whose prosecution nevertheless took four years, and who is currently attempting to recant that plea. Their attorneys will be given wide latitude to mount a defense that turns the trial into a shameful circus aimed at vilifying agents of the CIA for alleged acts of "torture," casting the American government and our valiant military as a force of evil instead of a force for good in places of the Muslim world where Al Qaeda and the Taliban are waging a brutal war against them and the local populations. For the families of those who died on September 11, the most obscene aspect of giving Constitutional protections to those who planned the attacks with the intent of inflicting maximum terror on their victims in the last moments of their lives will be the opportunities this affords defense lawyers to cast their clients as victims.

Khalid Sheikh Mohammed and his co-conspirators are asking to plead guilty, now, before a duly-constituted military commission. Mr. President, the families of their victims have a right to know, why don't you let them?

Respectfully submitted,

Tim Sumner
Brother-in-law of FDNY Joseph G. Leavey, 45, Ladder 15, WTC
Debra Burlingame
Sister of Captain Charles F. Burlingame III, pilot, American Flt. 77, Pentagon

United States Senate

WASHINGTON, DC 20510

October 15, 2009

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hillary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We respectfully request the administration's input on what steps may be taken, including by Congress, to respond to the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and *Medellin v. Texas*, 552 U.S. 491 (2008), and what additional measures may be taken to ensure that state and local officials are aware of the United States' obligations under the Vienna Convention on Consular Relations.

In 1969, the United States ratified the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR grants individual foreign nationals a right of access to his or her consulate, and ensures that consular officials can visit their nationals and arrange for their legal representation. The receiving state bears the burden of facilitating such access by informing "the person concerned without delay of his rights [under Article 36]." United States citizens rely on the protections of the VCCR every day, and the U.S. Government frequently demands that other countries comply with the VCCR to ensure our citizens receive fair treatment when detained abroad.

In 2004, the International Court of Justice (ICJ) determined that the United States had violated Article 36(1)(b) of the VCCR by failing to inform 51 foreign nationals of their VCCR rights, and by failing to notify consular authorities of the detention of 49 foreign nationals. The United States had voluntarily consented to the ICJ's jurisdiction to hear such complaints when it ratified in 1969 an Optional Protocol Concerning the Compulsory Settlement of Disputes, which accompanies the VCCR.

On February 28, 2005, President Bush, in recognition that the United States was required to comply with the ICJ's decision and that doing so would continue to preserve these rights for American citizens abroad, issued a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principles of comity." The Supreme Court, however, in *Medellin v. Texas* held that the Optional Protocol is not a self-executing treaty and that the president did not have the authority unilaterally to enforce the decision of the ICJ. Chief Justice Roberts, writing for the Court, noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." Nevertheless, the Court held that the *Avena* judgment did not have automatic domestic legal effect and that, to give it effect, congressional action is required. We believe that the United States should

fulfill its international treaty obligations. As former Bush Administration State Department Legal Adviser John Bellinger emphasized in a recent op-ed published in *The New York Times* (attached), it is critical to the rights of U.S. citizens abroad that all nations fully comply with the VCCR.

We would appreciate receiving your recommendations about what steps may be taken, including by Congress, to address the *Avena* judgment and the subsequent Supreme Court decision in *Medellin v. Texas*. We would also appreciate any recommendations you may propose for additional efforts to ensure that state and local officials are aware of our responsibilities under the VCCR.

Thank you for your attention to this important matter.

Sincerely,

PATRICK J. LEAHY
United States Senator

JOHN F. KERRY
United States Senator

RUSSELL D. FEINGOLD
United States Senator

BENJAMIN L. CARDIN
United States Senator

AL FRANKEN
United States Senator

The New York Times
July 18, 2009
OP-ED CONTRIBUTOR
Lawlessness North of the Border

By JOHN B. BELLINGER III

PRESIDENT OBAMA has rightly emphasized America's commitment to complying with international law. It is surprising, then, that he has so far taken no steps to comply with decisions of the International Court of Justice requiring the United States to review the cases of 51 Mexicans convicted of murder in state courts who had been denied access to Mexican consular officials, in violation of American treaty obligations.

In contrast to its mishandling of detainees, the Bush administration worked conscientiously in its second term to comply with these rulings, even taking the step of ordering the states to revisit the Mexican cases, a move the Supreme Court invalidated last year. The Obama administration should support federal legislation that would enable the president to ensure that the United States lives up to its international obligations.

The international court's decisions arise from the arrest, conviction and death sentences of more than 50 Mexicans. As a party to the 1963 Vienna Convention on Consular Relations, the United States is required to inform foreigners arrested here of their right to have a consular official from their country notified of their arrest.

Unfortunately, it has proven all but impossible to guarantee that state law enforcement officials observe this obligation in all cases, and nearly all of the Mexicans at issue were never told of their Vienna Convention rights.

In 2003, Mexico filed suit against the United States in The Hague, demanding that the Mexicans' convictions be reviewed to determine whether the absence of consular notice had prejudiced the defendants' ability to hire qualified counsel. The international court sided with Mexico, ruling that the United States had violated the Vienna Convention, and ordered us to reconsider all of the convictions and death sentences.

This decision presented a serious legal and diplomatic challenge for President George W. Bush early in his second term. But Texas strongly opposed acquiescing to an international court, especially in the prominent case of José Medellín, who had been convicted of the rape and murder of two teenage girls.

Secretary of State Condoleezza Rice argued, however, that the United States was legally obligated by the United Nations Charter to follow the international court's decisions, and she emphasized the importance of complying to ensure reciprocal Vienna Convention protections for Americans arrested overseas. (The United States, for example, took Iran to the international court for violating the Vienna Convention by denying American hostages consular access during the 1979 embassy takeover.) President Bush ultimately issued an order in February 2005 directing state courts to follow the international court's decision.

But Texas challenged the president's order and, in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the president lacked inherent constitutional authority to supersede state criminal law rules limiting appeals and that Congress had never enacted legislation authorizing him to do so.

President Bush's advisers concluded that, in an election year, Congress could not be persuaded to pass legislation extending additional rights to convicted murderers. So instead Secretary Rice and Attorney General Michael Mukasey wrote to Gov. Rick Perry of Texas reminding him of the United States' treaty obligations. Although Governor Perry agreed to support limited review in certain cases, Texas nevertheless proceeded with the execution of José Medellín.

In the meantime, after the Medellín decision, Mexico sought a new ruling from the International Court of Justice that the United States had misinterpreted the court's earlier judgment. In January — in a case I argued — the international court concluded that although the United States clearly accepted its obligation to comply with the decision, our nation had violated international law by allowing Mr. Medellín to be executed. The court reaffirmed that the remaining cases must be reviewed.

President Obama now faces the same challenges as Mr. Bush in 2005: an international obligation to review the cases of those Mexicans remaining on death rows across the country; state governments that are politically unwilling or legally unable to provide this review; and a Congress that often fails to appreciate that compliance with treaty obligations is in our national interest, not an infringement of our sovereignty.

The Obama administration's best option would be to seek narrowly tailored legislation that would authorize the president to order review of these cases and override, if necessary, any state criminal laws limiting further appeals, in order to comply with the United Nations Charter.

From closing Guantánamo to engaging with the International Criminal Court to seeking Senate approval of the Law of the Sea Convention, President Obama is confronting the recurring tension between our international interests and domestic politics. But reviewing the Mexican cases as the international court demands is not insincere global theater. On the contrary, complying with the Vienna Convention is legally required and smart foreign policy. It protects Americans abroad and confirms this country's commitment to international law.

John B. Bellinger III, a lawyer, was the legal adviser to the State Department from April 2005 to January 2009.

United States Senate
WASHINGTON, DC 20510

November 17, 2009

The Honorable Eric Holder
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder:

In June 2009 we and other senators wrote a classified letter to you requesting the declassification of information which we argued was critical for a productive debate on reauthorization of the USA PATRIOT Act. We appreciate that the Department of Justice has taken action on several of the issues we raised, including the release of information about use of the "lone wolf" surveillance authority. We also appreciate the Department's pledge to establish a process for releasing information contained in key decisions of the Foreign Intelligence Surveillance Court. However, the Department has yet to act on – or respond to – the issue we raised in the first two paragraphs of our letter.

We believe that the information we referenced in those paragraphs – specifically about the use of section 215 – is essential to understanding the full scope of the PATRIOT Act, which is about to be debated in Congress. As we said in June, if you have concerns about declassifying the specific language contained in our letter, we ask that you work with us to find language that conveys enough information to allow for an informed public debate on the PATRIOT Act's reauthorization.

The PATRIOT Act was passed in a rush after the terrorist attacks of September 11, 2001. Sunsets were attached to the Act's most controversial provisions, to permit better-informed, more deliberative consideration of them at a later time. Now is the time for that deliberative consideration, but informed discussion is not possible when most members of Congress – and nearly all of the American public – lack important information about the issue.

Thank you for your attention to this important matter. We look forward to your prompt response.

Sincerely,

Ron Wyden
United States Senator

Russell D. Feingold
United States Senator

Richard Durbin
United States Senator

THE WALL STREET JOURNAL.
WSJ.com

OPINION | APRIL 17, 2009

The President Ties His Own Hands on Terror

The point of interrogation is intelligence, not confession.

By MICHAEL HAYDEN and MICHAEL B. MUKASEY

The Obama administration has declassified and released opinions of the Justice Department's Office of Legal Counsel (OLC) given in 2005 and earlier that analyze the legality of interrogation techniques authorized for use by the CIA. Those techniques were applied only when expressly permitted by the director, and are described in these opinions in detail, along with their limits and the safeguards applied to them.

The release of these opinions was unnecessary as a legal matter, and is unsound as a matter of policy. Its effect will be to invite the kind of institutional timidity and fear of recrimination that weakened intelligence gathering in the past, and that we came sorely to regret on Sept. 11, 2001.

Proponents of the release have argued that the techniques have been abandoned and thus there is no point in keeping them secret any longer; that they were in any event ineffective; that their disclosure was somehow legally compelled; and that they cost us more in the coin of world opinion than they were worth. None of these claims survives scrutiny.

Soon after he was sworn in, President Barack Obama signed an executive order that suspended use of these techniques and confined not only the military but all U.S. agencies -- including the CIA -- to the interrogation limits set in the Army Field Manual. This suspension was accompanied by a commitment to further study the interrogation program, and government personnel were cautioned that they could no longer rely on earlier opinions of the OLC.

Although evidence shows that the Army Field Manual, which is available online, is already used by al Qaeda for training purposes, it was certainly the president's right to suspend use of any technique. However, public disclosure of the OLC opinions, and thus of the techniques themselves, assures that terrorists are now aware of the absolute limit of what the U.S. government could do to extract information from them, and can supplement their training accordingly and thus diminish the effectiveness of these techniques as they have the ones in the Army Field Manual.

Moreover, disclosure of the details of the program pre-empts the study of the president's task force and assures that the suspension imposed by the president's executive order is effectively permanent. There would be little point in the president authorizing measures whose nature and precise limits have already been disclosed in detail to those whose resolve we hope to overcome. This conflicts with the sworn promise of the current director of the CIA, Leon Panetta, who testified in aid of securing Senate confirmation that if he thought he needed additional authority to conduct interrogation to get necessary information, he would seek it from the president. By allowing this disclosure, President Obama has tied not only his own hands but also the hands of any future administration faced with the prospect of attack.

Disclosure of the techniques is likely to be met by faux outrage, and is perfectly packaged for media consumption. It

will also incur the utter contempt of our enemies. Somehow, it seems unlikely that the people who beheaded Nicholas Berg and Daniel Pearl, and have tortured and slain other American captives, are likely to be shamed into giving up violence by the news that the U.S. will no longer interrupt the sleep cycle of captured terrorists even to help elicit intelligence that could save the lives of its citizens.

Which brings us to the next of the justifications for disclosing and thus abandoning these measures: that they don't work anyway, and that those who are subjected to them will simply make up information in order to end their ordeal. This ignorant view of how interrogations are conducted is belied by both experience and common sense. If coercive interrogation had been administered to obtain confessions, one might understand the argument. Khalid Sheikh Mohammed (KSM), who organized the Sept. 11, 2001 attacks, among others, and who has boasted of having beheaded Daniel Pearl, could eventually have felt pressed to provide a false confession. But confessions aren't the point. Intelligence is. Interrogation is conducted by using such obvious approaches as asking questions whose correct answers are already known and only when truthful information is provided proceeding to what may not be known. Moreover, intelligence can be verified, correlated and used to get information from other detainees, and has been; none of this information is used in isolation.

The terrorist Abu Zubaydah (sometimes derided as a low-level operative of questionable reliability, but who was in fact close to KSM and other senior al Qaeda leaders) disclosed some information voluntarily. But he was coerced into disclosing information that led to the capture of Ramzi bin al Shibh, another of the planners of Sept. 11, who in turn disclosed information which -- when combined with what was learned from Abu Zubaydah -- helped lead to the capture of KSM and other senior terrorists, and the disruption of follow-on plots aimed at both Europe and the U.S. Details of these successes, and the methods used to obtain them, were disclosed repeatedly in more than 30 congressional briefings and hearings beginning in 2002, and open to all members of the Intelligence Committees of both Houses of Congress beginning in September 2006. Any protestation of ignorance of those details, particularly by members of those committees, is pretense.

The techniques themselves were used selectively against only a small number of hard-core prisoners who successfully resisted other forms of interrogation, and then only with the explicit authorization of the director of the CIA. Of the thousands of unlawful combatants captured by the U.S., fewer than 100 were detained and questioned in the CIA program. Of those, fewer than one-third were subjected to any of the techniques discussed in these opinions. As already disclosed by Director Hayden, as late as 2006, even with the growing success of other intelligence tools, fully half of the government's knowledge about the structure and activities of al Qaeda came from those interrogations.

Nor was there any legal reason compelling such disclosure. To be sure, the American Civil Liberties Union has sued under the Freedom of Information Act to obtain copies of these and other memoranda, but the government until now has successfully resisted such lawsuits. Even when the government disclosed that three members of al Qaeda had been subjected to waterboarding but that the technique was no longer part of the CIA interrogation program, the court sustained the government's argument that the precise details of how it was done, including limits and safeguards, could remain classified against the possibility that some future president may authorize its use. Therefore, notwithstanding the suggestion that disclosure was somehow legally compelled, there was no legal impediment to the Justice Department making the same argument even with respect to any techniques that remained in the CIA program until last January.

There is something of the self-fulfilling prophecy in the claim that our interrogation of some unlawful combatants beyond the limits set in the Army Field Manual has disgraced us before the world. Such a claim often conflates interrogation with the sadism engaged in by some soldiers at Abu Ghraib, an incident that had nothing whatever to do with intelligence gathering. The limits of the Army Field Manual are entirely appropriate for young soldiers, for the conditions in which they operate, for the detainees they routinely question, and for the kinds of tactically relevant information they pursue. Those limits are not appropriate, however, for more experienced people in controlled

circumstances with high-value detainees. Indeed, the Army Field Manual was created with awareness that there was an alternative protocol for high-value detainees.

In addition, there were those who believed that the U.S. deserved what it got on Sept. 11, 2001. Such people, and many who purport to speak for world opinion, were resourceful both before and after the Sept. 11 attacks in crafting reasons to resent America's role as a superpower. Recall also that the first World Trade Center bombing in 1993, the attacks on our embassies in Kenya and Tanzania, the punctiliously correct trials of defendants in connection with those incidents, and the bombing of the USS Cole took place long before the advent of CIA interrogations, the invasion of Saddam Hussein's Iraq, or the many other purported grievances asserted over the past eight years.

The effect of this disclosure on the morale and effectiveness of many in the intelligence community is not hard to predict. Those charged with the responsibility of gathering potentially lifesaving information from unwilling captives are now told essentially that any legal opinion they get as to the lawfulness of their activity is only as durable as political fashion permits. Even with a seemingly binding opinion in hand, which future CIA operations personnel would take the risk? There would be no wink, no nod, no handshake that would convince them that legal guidance is durable. Any president who wants to apply such techniques without such a binding and durable legal opinion had better be prepared to apply them himself.

Beyond that, anyone in government who seeks an opinion from the OLC as to the propriety of any action, or who authors an opinion for the OLC, is on notice henceforth that such a request for advice, and the advice itself, is now more likely than before to be subject after the fact to public and partisan criticism. It is hard to see how that will promote candor either from those who should be encouraged to ask for advice before they act, or from those who must give it.

In his book "The Terror Presidency," Jack Goldsmith describes the phenomenon we are now experiencing, and its inevitable effect, referring to what he calls "cycles of timidity and aggression" that have weakened intelligence gathering in the past. Politicians pressure the intelligence community to push to the legal limit, and then cast accusations when aggressiveness goes out of style, thereby encouraging risk aversion, and then, as occurred in the wake of 9/11, criticizing the intelligence community for feckless timidity. He calls these cycles "a terrible problem for our national security." Indeed they are, and the precipitous release of these OLC opinions simply makes the problem worse.

Gen. Hayden was director of the Central Intelligence Agency from 2006 to 2009. Mr. Mukasey was attorney general of the United States from 2007 to 2009.

Please add your comments to the Opinion Journal forum.

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THE WALL STREET JOURNAL.
WSJ.com

OPINION | OCTOBER 19, 2009, 11:06 A.M. ET

Civilian Courts Are No Place to Try Terrorists

We tried the first World Trade Center bombers in civilian courts. In return we got 9/11 and the murder of nearly 3,000 innocents.

By MICHAEL B. MUKASEY

The Obama administration has said it intends to try several of the prisoners now detained at Guantanamo Bay in civilian courts in this country. This would include Khalid Sheikh Mohammed, the mastermind of the Sept. 11, 2001 terrorist attacks, and other detainees allegedly involved. The Justice Department claims that our courts are well suited to the task.

Based on my experience trying such cases, and what I saw as attorney general, they aren't. That is not to say that civilian courts cannot ever handle terrorist prosecutions, but rather that their role in a war on terror—to use an unfashionably harsh phrase—should be, as the term "war" would suggest, a supporting and not a principal role.

The challenges of a terrorism trial are overwhelming. To maintain the security of the courthouse and the jail facilities where defendants are housed, deputy U.S. marshals must be recruited from other jurisdictions; jurors must be selected anonymously and escorted to and from the courthouse under armed guard; and judges who preside over such cases often need protection as well. All such measures burden an already overloaded justice system and interfere with the handling of other cases, both criminal and civil.

Moreover, there is every reason to believe that the places of both trial and confinement for such defendants would become attractive targets for others intent on creating mayhem, whether it be terrorists intent on inflicting casualties on the local population, or lawyers intent on filing waves of lawsuits over issues as diverse as whether those captured in combat must be charged with crimes or released, or the conditions of confinement for all prisoners, whether convicted or not.

Even after conviction, the issue is not whether a maximum-security prison can hold these defendants; of course it can. But their presence even inside the walls, as proselytizers if nothing else, is itself a danger. The recent arrest of U.S. citizen Michael Finton, a convert to Islam proselytized in prison and charged with planning to blow up a building in Springfield, Ill., is only the latest example of that problem.

Moreover, the rules for conducting criminal trials in federal courts have been fashioned to prosecute conventional crimes by conventional criminals. Defendants are granted access to information relating to their case that might be useful in meeting the charges and shaping a defense, without regard to the wider impact such information might have. That can provide a cornucopia of valuable information to terrorists, both those in custody and those at large.

Thus, in the multidefendant terrorism prosecution of Sheik Omar Abdel Rahman and others that I presided over in 1995 in federal district court in Manhattan, the government was required to disclose, as it is routinely in conspiracy

cases, the identity of all known co-conspirators, regardless of whether they are charged as defendants. One of those co-conspirators, relatively obscure in 1995, was Osama bin Laden. It was later learned that soon after the government's disclosure the list of unindicted co-conspirators had made its way to bin Laden in Khartoum, Sudan, where he then resided. He was able to learn not only that the government was aware of him, but also who else the government was aware of.

It is not simply the disclosure of information under discovery rules that can be useful to terrorists. The testimony in a public trial, particularly under the probing of appropriately diligent defense counsel, can elicit evidence about means and methods of evidence collection that have nothing to do with the underlying issues in the case, but which can be used to press government witnesses to either disclose information they would prefer to keep confidential or make it appear that they are concealing facts. The alternative is to lengthen criminal trials beyond what is tolerable by vetting topics in closed sessions before they can be presented in open ones.

In June, Attorney General Eric Holder announced the transfer of Ahmed Ghailani to this country from Guantanamo. Mr. Ghailani was indicted in connection with the 1998 bombing of U.S. Embassies in Kenya and Tanzania. He was captured in 2004, after others had already been tried here for that bombing.

Mr. Ghailani was to be tried before a military commission for that and other war crimes committed afterward, but when the Obama administration elected to close Guantanamo, the existing indictment against Mr. Ghailani in New York apparently seemed to offer an attractive alternative. It may be as well that prosecuting Mr. Ghailani in an already pending case in New York was seen as an opportunity to illustrate how readily those at Guantanamo might be prosecuted in civilian courts. After all, as Mr. Holder said in his June announcement, four defendants were "successfully prosecuted" in that case.

It is certainly true that four defendants already were tried and sentenced in that case. But the proceedings were far from exemplary. The jury declined to impose the death penalty, which requires unanimity, when one juror disclosed at the end of the trial that he could not impose the death penalty—even though he had sworn previously that he could. Despite his disclosure, the juror was permitted to serve and render a verdict.

Mr. Holder failed to mention it, but there was also a fifth defendant in the case, Mamdouh Mahmud Salim. He never participated in the trial. Why? Because, before it began, in a foiled attempt to escape a maximum security prison, he sharpened a plastic comb into a weapon and drove it through the eye and into the brain of Louis Pepe, a 42-year-old Bureau of Prisons guard. Mr. Pepe was blinded in one eye and rendered nearly unable to speak.

Salim was prosecuted separately for that crime and found guilty of attempted murder. There are many words one might use to describe how these events unfolded; "successfully" is not among them.

The very length of Mr. Ghailani's detention prior to being brought here for prosecution presents difficult issues. The Speedy Trial Act requires that those charged be tried within a relatively short time after they are charged or captured, whichever comes last. Even if the pending charge against Mr. Ghailani is not dismissed for violation of that statute, he may well seek access to what the government knows of his activities after the embassy bombings, even if those activities are not charged in the pending indictment. Such disclosures could seriously compromise sources and methods of intelligence gathering.

Finally, the government (for undisclosed reasons) has chosen not to seek the death penalty against Mr. Ghailani, even though that penalty was sought, albeit unsuccessfully, against those who stood trial earlier. The embassy bombings killed more than 200 people.

Although the jury in the earlier case declined to sentence the defendants to death, that determination does not bind a future jury. However, when the government determines not to seek the death penalty against a defendant charged with

complicity in the murder of hundreds, that potentially distorts every future capital case the government prosecutes. Put simply, once the government decides not to seek the death penalty against a defendant charged with mass murder, how can it justify seeking the death penalty against anyone charged with murder—however atrocious—on a smaller scale?

Even a successful prosecution of Mr. Ghailani, with none of the possible obstacles described earlier, would offer no example of how the cases against other Guantanamo detainees can be handled. The embassy bombing case was investigated for prosecution in a court, with all of the safeguards in handling evidence and securing witnesses that attend such a prosecution. By contrast, the charges against other detainees have not been so investigated.

It was anticipated that if those detainees were to be tried at all, it would be before a military commission where the touchstone for admissibility of evidence was simply relevance and apparent reliability. Thus, the circumstances of their capture on the battlefield could be described by affidavit if necessary, without bringing to court the particular soldier or unit that effected the capture, so long as the affidavit and surrounding circumstances appeared reliable. No such procedure would be permitted in an ordinary civilian court.

Moreover, it appears likely that certain charges could not be presented in a civilian court because the proof that would have to be offered could, if publicly disclosed, compromise sources and methods of intelligence gathering. The military commissions regimen established for use at Guantanamo was designed with such considerations in mind. It provided a way of handling classified information so as to make it available to a defendant's counsel while preserving confidentiality. The courtroom facility at Guantanamo was constructed, at a cost of millions of dollars, specifically to accommodate the handling of classified information and the heightened security needs of a trial of such defendants.

Nevertheless, critics of Guantanamo seem to believe that if we put our vaunted civilian justice system on display in these cases, then we will reap benefits in the coin of world opinion, and perhaps even in that part of the world that wishes us ill. Of course, we did just that after the first World Trade Center bombing, after the plot to blow up airliners over the Pacific, and after the embassy bombings in Kenya and Tanzania.

In return, we got the 9/11 attacks and the murder of nearly 3,000 innocents. True, this won us a great deal of goodwill abroad—people around the globe lined up for blocks outside our embassies to sign the condolence books. That is the kind of goodwill we can do without.

Mr. Mukasey was attorney general of the United States from 2007 to 2009.

The Washington Post

The right place to try terrorists

By Michael B. Mukasey
Friday, November 6, 2009

Ali Saleh Kahlah al-Marri, who by his own account came to this country most recently in 2001 to help organize a second wave of attacks after the Sept. 11 atrocities, received a jail sentence on Oct. 29 that could free him within six years. This again prompts the question of whether it is wise for the administration to cancel the military trials of those held at Guantanamo Bay and charged with planning the Sept. 11 attacks and, instead, to bring them to the United States to be charged anew and tried in civilian courts.

Marri acted on the direct order of Khalid Sheik Mohammed, the alleged mastermind of Sept. 11 among other accomplishments, to enter the United States not later than Sept. 10, 2001. He entered on a student visa and stayed in touch with his mentor, Mohammed, by cellphone and through coded messages sent via e-mail accounts in fictitious names. Marri used his computer to research the toxicity, availability and price of various cyanide compounds, as well as the location of dams, waterways and tunnels where such compounds could be used with lethal effect.

He was arrested initially in December 2001 for credit-card fraud and later charged with lying to federal agents about his travel and telephone calls. In 2003, President George W. Bush, relying on World War II-era Supreme Court authority, designated Marri an unlawful enemy combatant and ordered him detained in the naval brig at Charleston, S.C. Marri's legal challenge to that detention was about to reach the Supreme Court when he was transferred in February to civilian custody and charged with providing material support for terrorist activities.

The choice of charges is notable. In 1996 and 1998, after prosecutions in civilian courts had revealed gaps in the statutory framework for dealing with such crimes, Congress added provisions to prosecute those who planned or carried out international terrorist acts, with penalties up to "any term of years" -- which is to say, life imprisonment -- or capital punishment if death resulted. Also added was the offense of material support for terrorist

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activities, crafted for use against those who, though not directly involved in terrorism planning or execution, knowingly provided money or other kinds of assistance to those who were so involved. That offense carried a maximum penalty of 15 years -- severe, but well below the appropriate limit for those directly involved in planning and carrying out mass murder.

Despite the evidence on the hard drive of Marri's computer, other evidence, and the bold statement in the Justice Department press release that accompanied the indictment that the case "shows our resolve to protect the American people and prosecute alleged terrorists to the full extent of the law," Marri was charged not with offenses related directly to terrorism, which could have exposed him to life imprisonment, but, rather, with material support offenses. Marri's guilty plea on April 30 was heralded with a Justice Department press release conceding that "[w]ithout a doubt, this case is a grim reminder of the seriousness of the threat we as a nation still face," but offering the consolation that "it also reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which the nation was founded and the rule of law."

Marri's time in the brig at Charleston apparently was substantially responsible for the judge's decision to impose even less than the 15-year maximum "in order to reflect respect for the law and reflect just punishment." The judge rejected Marri's attempt to portray himself as a lackey -- "that would be an insult to your intelligence and to the commitment you made when you came here as a sleeper agent for al Qaeda" -- and acknowledged that it "remains to be seen" whether Marri would resume that commitment after he was released, but added that "we are defined as a people by how we deal with difficult and unpopular legal issues."

The very transfer of prisoners from Guantanamo to this country has consequences. The question of what constitutional rights may apply to aliens in government custody is unsettled, but it is clear from existing jurisprudence that physical presence in the United States would be a significant, if not a decisive, factor. That presence would generate serious security concerns for any person or place associated with their prosecution or

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confinement, would facilitate the torrent of lawsuits that several lawyers have promised to bring on detainees' behalf once they come within the jurisdiction of any federal court, and would present those in custody and those yet at large with a cornucopia of valuable information disclosed as part of discovery in criminal cases and during the trial -- all of this notwithstanding the availability of a congressionally created forum in a location that is remote, secure and (agitprop to the contrary notwithstanding) humane.

At the least, those moving this process forward should consider whether the main purpose here is to protect the citizens of this country or to showcase the country's criminal justice system, which has been done before and which failed to impress Khalid Sheik Mohammed, Marri or any of their associates. We should not wish for any future sentencing judge to deal with the specter of recidivism by telling us that that "remains to be seen," or for any future defendant's lawyer to describe, as did Marri's, his client's reaction to the process with what sounds like a wicked parody of the pronouncements that accompanied Marri's indictment, plea and sentence: "His faith in the American justice system and the Constitution were fulfilled."

The writer was U.S. attorney general from 2007 to 2009.

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The Washington Post

Travesty in New York

By Charles Krauthammer
Friday, November 20, 2009

For late-19th-century anarchists, terrorism was the "propaganda of the deed." And the most successful propaganda-by-deed in history was 9/11 -- not just the most destructive, but the most spectacular and telegenic.

And now its self-proclaimed architect, Khalid Sheik Mohammed, has been given by the Obama administration a civilian trial in New York. Just as the memory fades, 9/11 has been granted a second life -- and KSM, a second act: "9/11, The Director's Cut," narration by KSM.

September 11, 2001 had to speak for itself. A decade later, the deed will be given voice. KSM has gratuitously been presented with the greatest propaganda platform imaginable -- a civilian trial in the media capital of the world -- from which to proclaim the glory of jihad and the criminality of infidel America.

So why is Attorney General Eric Holder doing this? Ostensibly, to demonstrate to the world the superiority of our system, where the rule of law and the fair trial reign.

Really? What happens if KSM (and his co-defendants) "do not get convicted," asked Senate Judiciary Committee member Herb Kohl. "Failure is not an option," replied Holder. Not an option? Doesn't the presumption of innocence, er, presume that prosecutorial failure -- acquittal, hung jury -- is an option? By undermining that presumption, Holder is undermining the fairness of the trial, the demonstration of which is the alleged rationale for putting on this show in the first place.

Moreover, everyone knows that whatever the outcome of the trial, KSM will never walk free. He will spend the rest of his natural life in U.S. custody. Which makes the proceedings a farcical show trial from the very beginning.

Apart from the fact that any such trial will be a security nightmare and a terror threat to New York -- what better propaganda-by-deed than blowing up the courtroom, making KSM a martyr and turning the judge, jury and spectators into fresh victims? -- it

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will endanger U.S. security. Civilian courts with broad rights of cross-examination and discovery give terrorists access to crucial information about intelligence sources and methods.

That's precisely what happened during the civilian New York trial of the 1993 World Trade Center bombers. The prosecution was forced to turn over to the defense a list of 200 unindicted co-conspirators, including the name Osama bin Laden. "Within 10 days, a copy of that list reached bin Laden in Khartoum," wrote former attorney general Michael Mukasey, the presiding judge at that trial, "letting him know that his connection to that case had been discovered."

Finally, there's the moral logic. It's not as if Holder opposes military commissions on principle. On the same day he sent KSM to a civilian trial in New York, Holder announced he was sending Abd al-Rahim al-Nashiri, (accused) mastermind of the attack on the USS Cole, to a military tribunal.

By what logic? In his congressional testimony Wednesday, Holder was utterly incoherent in trying to explain. In his Nov. 13 news conference, he seemed to be saying that if you attack a civilian target, as in 9/11, you get a civilian trial; a military target like the Cole, and you get a military tribunal.

What a perverse moral calculus. Which is the war crime -- an attack on defenseless civilians or an attack on a military target such as a warship, an accepted act of war that the United States itself has engaged in countless times?

By what possible moral reasoning, then, does KSM, who perpetrates the obvious and egregious war crime, receive the special protections and constitutional niceties of a civilian courtroom, while he who attacked a warship is relegated to a military tribunal?

Moreover, the incentive offered any jihadist is as irresistible as it is perverse: Kill as many civilians as possible *on American soil* and Holder will give you Miranda rights, a lawyer, a propaganda platform -- everything but your own blog.

Alternatively, Holder tried to make the case that he chose a civilian New York trial as a more likely venue for securing a conviction. An absurdity: By the time Barack Obama

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came to office, KSM was ready to go before a military commission, plead guilty and be executed. It's Obama who blocked a process that would have yielded the swiftest and most certain justice.

Indeed, the perfect justice. Whenever a jihadist volunteers for martyrdom, we should grant his wish. Instead, this one, the most murderous and unrepentant of all, gets to dance and declaim at the scene of his crime.

Holder himself told The Post that the coming New York trial will be "the trial of the century." The last such was the trial of O.J. Simpson.

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