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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, MARCH 6, 2013

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:40 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Schumer, Durbin, Whitehouse, Klobuchar, Franken, Coons, Blumenthal, Hirono, Grassley, Hatch, Sessions, Graham, Cornyn, Lee, Cruz, and Flake.

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

Chairman LEAHY. The Attorney General is here, and the session will be in order. Mr. Attorney General, if you would join us, please.

Because the session has begun, nobody will stand and block people behind them, with placards or otherwise. This is a meeting of the United States Senate Judiciary Committee. Everybody here is a guest of the Senate, and we expect you to be aware of all your fellow guests. And I realize some have differing views, but everybody has an opportunity to be here. And I would hope that nobody would be so arrogant that they would feel that they should have an ability to view and block the view of others.

This week is the anniversary of "Bloody Sunday," when voting rights marchers, including now-Congressman John Lewis, were beaten by State troopers as they attempted to cross the Edmund Pettus Bridge in Selma. Attorney General Holder spoke this weekend about living up to our founding ideals and the power of our legal system. The law, as we know, protects the rights of all Americans. That is what this Attorney General and the Justice Department he leads are dedicated to doing.

In 2009, the Attorney General worked with us in Congress to pass landmark hate crimes legislation to address crimes committed against Americans because of race, ethnicity, religion, sexual orientation, or gender identity. And, Mr. Attorney General, I am glad to see that the Justice Department is enforcing that law. This week, the President will sign historic legislation building upon the Violence Against Women Act and the Trafficking Victims Protection Act to protect all victims of abuse. And I know the Justice Department will implement those laws.

And the Justice Department is defending the protections provided by Section 5 of the Voting Rights Act to ensure that all

Americans have the right to vote and to have their votes matter. And this Committee played a key role in reauthorizing the Voting Rights Act 6 years ago. After nearly 20 hearings, thousands of pages of testimony, before the House and Senate Judiciary Committees, we found that modern-day barriers to voting persist in our country. We passed the bill, and President Bush signed the current extension of the Voting Rights Act in order to safeguard the fundamental rights of all Americans. I remember talking to President Bush the day of the signing and how proud he was to be signing it and that Republicans and Democrats had come together to craft that legislation because of this need.

Now, I commend the Attorney General, FBI Director Mueller, and all those who work every day to keep Americans safe. The followup attack to 9/11 that so many predicted has not occurred—not on this President's watch. Constant vigilance is part of the reason. And I think Senator Grassley will understand why I will not go into this in specific, but I also thank the Attorney General for reaching out not only to me but to Senator Grassley on issues of national security.

While the Department's success in disrupting threats to national security has been remarkable and its efforts to hold terrorists accountable commendable, I remain deeply troubled that the Committee has not yet received the materials I have requested regarding the legal rationale for the targeted killing of United States citizens overseas. I am not alone in my frustration or in my waning patience. The relevant Office of Legal Counsel memoranda should have been provided to members of this Committee, and I am glad at least to see it was provided to Senator Feinstein's Intelligence Committee. But I think that some of the votes that will perhaps be cast against a nominee that has just come out of her Committee will be because of the inability to get that memo here. It is our responsibility to make sure that the tools used by our Government are consistent with our Constitution.

We have worked together effectively to help keep Americans safe from crime and to help crime victims rebuild their lives. We have worked to strengthen Federal law enforcement and to support State and local law enforcement, and crime rates have experienced a historic decline despite the struggling economy.

I remember the hearing that Senator Coons had in Delaware where we saw police, parole officers, members of the community, and everybody else coming together and bringing out the fact that we have to all work together to lower crime.

We have worked hard to fight fraud and corporate wrongdoing. Congress passed the Fraud Enforcement and Recovery Act, which Senator Grassley and I drafted together, and important new anti-fraud provisions as part of the Affordable Care Act and the Dodd-Frank Wall Street Reform Act. Armed with these new tools, the Justice Department has broken records over the last several years for civil and criminal fraud recoveries and has increased the number of fraud prosecutions.

This Committee has also worked with the Department to try to ensure that the criminal justice system works as it should. This month marks the 50th anniversary of the Supreme Court decision in *Gideon v. Wainwright*, which affirmed that no person should

face prosecution without the assistance of a lawyer. And I remember as a young lawyer reading the book on that—I believe it was "Gideon's Trumpet"—and how much that impressed me. I am encouraged by the Justice Department's Access to Justice Office, but we need to do more to ensure justice for all. I was glad to see the announcement of a joint initiative to help standardize and improve forensic science across the country, incorporating many of the ideas from my Criminal Justice and Forensic Science Reform Act.

I appreciate the Attorney General joining me in recognizing the mounting problem of our growing prison population. This is having devastating consequences at a time of shrinking budgets at all levels of Government. But also there is a human cost, and we have to find constructive ways to solve it. Turning away from excessive sentences and mandatory minimums for nonviolent offenders would be a good start.

When the Senate confirmed Attorney General Holder 4 years ago, the Department of Justice was still reeling from scandal, mismanagement, and findings of impermissible politicization. Since that time, the credibility of the Justice Department among the American people but also very importantly in courtrooms throughout the country has increased dramatically, and I am glad to see that the morale of its hard-working agents, prosecutors, and professionals, many of whom have been there from both Republican and Democratic administrations, has improved considerably.

Again, I apologize for the allergies and the voice, but——

Senator GRASSLEY. Before I speak, could you inform us how you will handle it when we vote?

Chairman LEAHY. Oh, Senator Grassley raises a very good point. Apparently we have a vote scheduled for, what, 10:30?

Senator GRASSLEY. 10:30.

Chairman LEAHY. I would encourage us, obviously, if someone is asking questions, to continue it. I think for the sake of time we will keep the Committee meeting going and try to get out and vote as quickly as possible and come back as quickly as possible.

Senator GRASSLEY. And I will have to go over at some time for short remarks on that issue before we vote on it.

Chairman LEAHY. You and me both.

Senator GRASSLEY. Okay.

Chairman LEAHY. So go ahead.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Welcome, General Holder. This hearing affords us the opportunity to clear the deck on many outstanding letters and questions that we have yet to receive from the Department.

Example: We have not received questions for the record from the last oversight hearing held 9 months ago. We also have questions for the record from Department officials that testified at various hearings that remain outstanding.

In addition, there are a number of inquiries that have not received a response on important issues. I cannot go through all of them, but an example, I have not received a response to a letter I sent last week on the impact of the budget sequester. Another let-

ter is outstanding on the failure to prosecute individuals at HSBC for money laundering. That one was sent in December. Finally, I have an outstanding request related to the investigation Fast and Furious, including one that will be outstanding for a year March 9th.

It is unfortunate that we always have to start hearings with the same request of the Attorney General to respond to unanswered questions. That said, I have a number of topics that I want to discuss with the Attorney General, including the latest letter to Senator Paul arguing in favor of the President's ability to use military force to kill American citizens on U.S. soil without due process of law. This letter is extremely concerning, not just in its content but coupled with the classified memoranda that have been shared with just a few Members of Congress. It leaves many questions for Americans about we the Government can kill them.

This oversight hearing also comes on the heels of an extremely important hearing before the House Judiciary on the topic of targeted killing of Americans using unmanned drones. This is an issue which Chairman Leahy already referred to and I have asked repeatedly the Attorney General about. Unfortunately, our letters on this matter have also gone unanswered, including our most recent letter to President Obama seeking access to classified memoranda authorizing the targeted killings of Americans abroad that were produced to members of the Select Committee on Intelligence but not members of the Judiciary Committee. And the Chairman also just made reference to that.

A couple of weeks ago, at the Committee Executive Business session held in the U.S. Capitol Building, I joined Chairman Leahy, Senator Feinstein, and Senator Durbin in discussing the importance of the Judiciary Committee obtaining these documents as part of our legitimate oversight function. Despite opinions of this administration and the previous one to the contrary, Congress has a significant role to play in conducting oversight of national security matters. We have the right to ask for and receive classified information through appropriate channels and subject to protections to determine if the activities of the executive branch are appropriate.

This Committee has precedent of obtaining the most highly classified information within the Government. Example: In reauthorizing and overseeing the FISA Amendments Act, we obtained and continue to obtain highly classified information regarding the operation of this important function. Similarly, we obtained classified information during the reauthorization of the USA PATRIOT Act and as part of the oversight conducted by the Committee reviewing the enhanced interrogation techniques and the role OLC played in issuing those memoranda.

In light of the March 4, 2013, letter to Senator Rand Paul where the Attorney General argued that the President could authorize the military to use lethal force on a U.S. citizen on U.S. soil in an effort to protect the U.S. from a catastrophic attack, it is imperative that we understand the operational boundaries for use of such force. While the letter deals with what is labeled "extraordinary circumstances," American citizens have a right to understand when their life can be taken by their Government absent due process.

Providing these memoranda for review would go a long way toward complying with the President's original election promise to have the most transparent administration ever.

I will move on to another issue: gun violence. Tomorrow, the Committee begins a markup. We have held three hearings on the topic over the past 2 months and twice heard from the Justice Department witnesses. Both times the Department testified, we heard a reiteration of the Department's support of a ban on semiautomatic rifles with certain cosmetic features deemed "assault rifles."

However, both times, when I asked whether the Department had issued an official opinion determining whether such a ban is constitutional under the Second Amendment in light of the *Heller* case, I heard that no opinion has been issued. Given that we are marking up the bills tomorrow, it would be good to hear from the Attorney General that he will be releasing such an opinion today so members would have time to read it in advance of tomorrow's markup.

On another subject, to discuss the Department's continued failure to criminally prosecute those who commit fraud and wrongdoing at large financial firms. As a result, these companies settle for pennies on the dollar, and the costs of these fines simply become the cost of doing business for these institutions. It has led many to believe that financial institutions too big to fail by the Treasury Department are also too big to jail. What is even more disturbing is that while this distinction was mostly reserved for financial crimes, a position I find flawed in its own regard, this policy appears to have seeped into other misconduct enforced by the Department.

Example: December 2012, the Department entered into a Deferred Protection Agreement, a DPA, with the bank HSBC, and that is a global bank, as you know, violating Federal laws designed to prevent drug lords and terrorists from laundering money in the United States.

Let me repeat: a Deferred Prosecution Agreement for a company involved in money laundering for drug lords and terrorists.

I sent a letter to the Attorney General expressing my outrage at the DPA on December 13th. I asked why no employees, not even the ones who turned off the anti-money-laundering filters, were prosecuted. Further, Senator Brown of Ohio and I sent a letter in January seeking the rationale for why no individuals at these large financial institutions were prosecuted. The response was woeful and failed to actually answer our questions, leading us to question whether the Department has something to hide.

Simply put, this is a leadership problem and one that needs to be fixed, and fixed quickly. This will be a big part of any effort to confirm a new Assistant Attorney General for the Criminal Division.

I also want to hear from the Attorney General about a concerning new study issued by the Government Accountability Office. I requested GAO conduct this report to detail the use of Department-owned luxury jets by Department executives for non-mission travel, some of which included personal travel. The Department executives reimbursed the Government for part of the trip, but only the costs at regular coach fare. This is significantly less than the

tens of thousands of dollars an hour that these planes cost. That report found that between Fiscal Year 2007, which was obviously in the Bush years, to Fiscal Year 2011, the Department's executive non-mission travel for these luxury jets totaled 60 percent of the flight time. These flights accounted for $11.4 million of taxpayers' expenditures for non-mission travel.

Now, nobody has any argument with the use of these planes or the necessity of these planes for mission travel. In light of sequester and the general dire fiscal situation the Federal Government faces, this travel was concerning. Yet it was especially concerning given that the justification provided to Congress in 2010 was for counterterrorism missions. While the Attorney General and the FBI Director are now both required-use travelers, meaning they are required by executive branch policy to take Government aircraft for even personal travel, GAO found that until recently the FBI Director has the discretion to use commercial air service for personal travel, which he elected to do most of the time to save the use of Government funds.

This GAO report raises a number of troubling questions, especially in light of the proposed spending reductions because of the sequester. Most pressing is should the executives at the Department be using these planes for non-mission travel on a jet purchased for counterterrorism missions.

I yield the floor. I have more to say, but I have said enough.

Chairman LEAHY. Thank you.

What we will do is we will—and again I would add that I realize some in the audience feel very committed to their positions and apparently feel that whatever their position is is far more important than anybody else who might be sitting here. But I would ask them not to block other people. This is an important open hearing. We welcome everybody whether you agree with us or not, but I think you have a responsibility to the people who are also trying to do it and that they also may feel that they have an important reason for being here.

Mr. Attorney General, earlier this week I worked with Senator Collins in a bipartisan group of Senators to introduce a bill to address the problems of firearms trafficking and straw purchasing. I think we all agree the current law needs to be strengthened and fixed to close the gaps that make it too easy for violent criminals, gangs, and drug-trafficking organizations to obtain guns.

Do you agree that there is a need for specific statutes criminalizing gun trafficking and straw purchasing?

Attorney General HOLDER. Yes, Mr. Chairman. There is no question that there is the need for a stand-alone trafficking bill. What we now have is a hodgepodge where people, straw purchasers, buy guys for other people, and we only are able to prosecute them for what we call "paper violations" that are both inadequate and not likely to induce cooperation from people who we are charging. So the stand-alone trafficking bill is something that we really support.

Chairman LEAHY. And, Mr. Attorney General, I realize—and I cannot claim it is because I am new to the Committee—I forgot to give you a chance to give your opening statement. Please give your opening statement.

[Laughter.]

STATEMENT OF HON. ERIC H. HOLDER, JR., ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Attorney General HOLDER. Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, I really appreciate this opportunity to provide an overview of the Justice Department's recent achievements and the accomplishments that my colleagues—the 116,000 dedicated men and women who serve in offices around the world—have made possible. I look forward to working with you all to take our critical efforts to a new level.

But before we begin this discussion, I must acknowledge the debt our Nation owes to three correctional workers employed by the Federal Bureau of Prisons who over the last week and a half have made the ultimate sacrifice: Officer Eric Williams, Officer Gregory Vineski, and Lieutenant Osvaldo Albarati. As Attorney General and also as the brother of a retired police officer, I am determined to ensure that those responsible for the acts that led to the deaths of these three brave individuals are brought to justice. And my colleagues and I are committed to honoring the service of these and other fallen officers by doing everything in our power to keep the women and men in law enforcement safe and to continue the work that became the cause of their lives.

In this regard, I am proud to report that the Department has made tremendous progress in combating violent crime, battling financial fraud, upholding the civil rights of all, safeguarding the most vulnerable members of our society, and protecting the American people from terrorism and other national security threats.

Particularly since the horrific tragedy in December in Newtown, Connecticut, the urgency of our public safety efforts has really come into sharp focus. Earlier this year, I joined Vice President Biden and a number of my fellow Cabinet members to develop common-sense recommendations to reduce gun violence, to keep deadly weapons out of the hands of those prohibited from having them, and to make our neighborhoods and our schools more secure. In January, President Obama announced a comprehensive plan that includes a series of 23 executive actions that the Justice Department and other agencies are working to implement and a range of common-sense legislative proposals.

This morning, I am pleased to join the President, the Vice President, and countless Americans in calling on Congress to enact legislation addressing gun violence, including measures to require universal background checks, to impose tough penalties on gun traffickers, as I just indicated, to protect law enforcement officers by addressing armor-piercing ammunition, to ban high-capacity magazines and to ban military-style assault weapons, and to eliminate misguided restrictions that require Federal agents to allow the importation of dangerous weapons simply because of their age.

I am also pleased to echo the President's call for the Senate to confirm Todd Jones as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives—a critical Justice Department component that has been without a Senate-confirmed head for 6 years.

Now, of course, in addition to the administration's efforts to reduce gun violence, we remain focused on preventing gun-, gang-, and drug-fueled violence in all of its forms; and we are determined

to combat domestic violence as well. Now, in strengthening this work, I applaud Congress for passing a bipartisan reauthorization of the Violence Against Women Act, a landmark law that has transformed the way that we respond to domestic violence. And I am pleased that this bill will finally close a loophole that left many Native American women without adequate protection. The Justice Department looks forward to implementing this historic legislation, and we are committed to moving in a range of ways to become both smarter and tougher on crime and to remain aggressive and fair in our enforcement of Federal laws.

Now, thanks to countless Department employees and partners, we have achieved, I think, extraordinary results. And nowhere is this clearer than in our work to protect America's national security. Since 2009, the Department has brought cases—and secured convictions—against numerous terrorists. We have identified and disrupted multiple plots by foreign terrorist groups as well as homegrown extremists. Article III works, the Article III courts work. And we have worked to combat emerging national security threats, such as cyber intrusions and cyber attacks directed against our systems and infrastructure by nation states and non-state actors, including terrorist groups. Last summer, the Department created the National Security Cyber Specialists network to spearhead these efforts. The network is comprised of prosecutors and other cyber specialists across the country who will work closely with the FBI and other partners to investigate malicious cyber activity, seek any necessary cooperation, and then, where appropriate, to bring criminal prosecutions as part of our governmentwide effort to deter and disrupt cyber threats to our national security.

Beyond this work, the Department has taken significant steps to ensure robust enforcement of antitrust laws, to protect the environment, to crack down on tax fraud schemes, and to address financial and health care fraud crimes. In cooperation with the Department of Health and Human Services and others, over the last Fiscal Year alone, we secured a record $4.2 billion in recoveries related to health care fraud and abuse. As a result of our commitment to achieve justice on behalf of the victims of the 2010 Deepwater Horizon oil spill, in January we secured a guilty plea and a record $4 billion fine, criminal fine, and penalties from BP; and in February, the court approved a settlement requiring Transocean to pay $1.4 billion in fines and penalties. And on February 25th, we commenced trial of our civil claims against BP and others. And through the President's Financial Fraud Enforcement Task Force, we are working closely with Federal, State, and local authorities to take our fight against fraud targeting consumers, investors, and homeowners to new heights.

Over the last 3 years—thanks to Task Force leaders and our partners—we have filed nearly 10,000 financial fraud cases against nearly 15,000 defendants, including more than 2,900 mortgage fraud defendants. Last month, the Department filed a civil suit against the credit rating agency Standard & Poor's, seeking at least $5 billion in damages for alleged conduct that really goes to the heart of the recent economic crisis.

We are also striving to boost the capacity of our law enforcement allies and to provide access to the tools, training, and equipment

that they need in order to do their jobs as safely and as effectively as possible. And we are working with them to promote the highest standards of integrity across every agency, department, and sheriff's office.

This commitment—to integrity and to equal justice under law—has also driven the Department's Civil Rights Division in its efforts to address intimidation, bias, and discrimination from America's housing and lending markets, to our schools, workplaces, border areas, but also to our voting booths. Since 2009, the Division has filed more criminal civil rights cases than ever before, including record numbers of human trafficking and police misconduct cases. We have also led efforts to implement the Matthew Shepard and James Byrd Hate Crimes Prevention Act, which improved our ability to achieve justice on behalf of Americans who are targeted because of their gender, sexual orientation, gender identity, or disability. And we are fighting to preserve the principles of equality, opportunity, and justice that have always shaped our Nation's past—and must continue to determine our future.

Now, in the days ahead, as Congress considers ways to make fair and effective changes to America's immigration system, these same principles I believe must guide our efforts to strengthen our borders. These principles must continue to inform our actions as we fairly adjudicate immigration cases, enforce existing laws, and hold accountable employers who knowingly hire undocumented workers or engage in illegal and discriminatory business practices.

So this morning, my colleagues and I stand ready to work with leaders from both parties to help achieve lasting reform; to strengthen our ability to keep everyone in this country—and especially our young people—safe; and to move forward in protecting the American people and achieving the priorities that we share. But I must note that our ability to complete this work and to continue building upon the progress that I have just outlined will be severely hampered unless Congress adopts a balanced deficit reduction plan and ends the untenable reductions that last week set in motion a move to cut over $1.6 billion—that is, 9 percent—from the Department's budget in just 7 months' time.

As we speak, these cuts are already having a significant negative impact not just on Department employees, but on programs that could directly impact the safety of Americans across the country. Our capacity to respond to crimes, investigate wrongdoing, and to hold criminals accountable has been reduced. And despite our best efforts to limit the impact of sequestration, unless Congress quickly passes a balanced deficit reduction plan, the effects of these cuts—on our entire justice system and on the American people—may be profound.

So I urge congressional leaders to act swiftly to restore the funding that the Department needs to fulfill its critical mission and to keep our citizens safe.

Thank you, Mr. Chairman, and I look forward to answering any of your questions.

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

Chairman LEAHY. Thank you, and I apologize again for jumping to that first question. I have been watching the clock because both

Senator Grassley and I have to go over to speak on the Halligan nomination. As I said, when I leave for that, Senator Feinstein will take the gavel.

You mentioned the cuts, the $1.6 billion across the board. Obviously, I worry what that is going to do to critical grant programs that small rural States like Vermont depend upon. I do not mean that to be parochial, but in smaller areas, in rural areas in every State, all 50 of our States, it has a disproportionate effect. I would hope you would be able to continue to work on programs like the COPS program, the Bulletproof Vest Partnership program, the Victim Assistance program.

Attorney General HOLDER. Yes, we will try to do the best that we can. This is a $1.6 billion cut. It is 9 percent out of our budget over the course of 7 months. It will take $100 million out of our grantmaking capacity. We will try to minimize the harm and try to make sure that the mission that we have is not compromised. But I have to say, you cannot take $1.6 billion, 9 percent, out of our budget and expect us to be as effective as we once were.

Chairman LEAHY. I am not trying to put words in your mouth, but is it safe to say this is going to affect national security?

Attorney General HOLDER. I fear that it could. We will try to jury-rig things so that we have agents where they ought to be. The reality is—and people should understand this—that if these budget cuts stay in effect, FBI agents, DEA agents, ATF agents, people at BOP, at the Bureau of Prisons, are going to have to undergo furloughs. They are not going to be on the job.

Chairman LEAHY. Thank you. And we have talked about the Office of Legal Counsel memos on targeted killings. I have been asking for that for some time, and you and I have had discussions about this. I realize the decision is not entirely in your hands, but it may be brought to a head with a subpoena from this Committee.

In your letter to Senator Paul sent earlier this week, you left open the possibility of using lethal force against American citizens in extraordinary circumstances on U.S. soil. You mentioned 9/11 and Pearl Harbor, but you did not specifically mention armed drones.

Can you agree there is no scenario where it would be appropriate to use an armed drone on U.S. soil to strike an American citizen?

Attorney General HOLDER. Well, what I said in the letter was that the Government has no intention to carry out any drone strikes in the United States. It is hard for me to imagine a situation in which that would occur. We have within the United States the ability to use our law enforcement capacity, and as I laid out in a speech that I gave at Northwestern University with regard to the use of these kinds of lethal forces, one of the critical things was that the possibility, the feasibility of capture was difficult in foreign lands—Afghanistan, Pakistan, other parts of the Middle East.

That is not the same thing here in the United States where the possibility of capture is obviously enhanced, and as a result, the use of drones is, from my perspective, something that is entirely hypothetical. And what I tried to say in the letter to Senator Paul was exactly that.

Chairman LEAHY. Once we have seen the memo, I suspect Senator Grassley and I may want to meet with you and discuss par-

ticular points. I will leave it at that for the moment rather than going into—otherwise, you have to go into some classified hearings.

Last year, the Committee favorably reported my cyber crime bill. It had a provision authored by Senators Franken and Grassley that would amend the act to prohibit prosecutions based solely upon violations of the Terms of Use Agreement. We are concerned, some of us, that the Department may inappropriately apply the Computer Fraud and Abuse Act to criminally prosecute relatively innocuous conduct, such as violating a Terms of Use Agreement. And I supported the Franken-Grassley amendment.

Can the Department of Justice review its prosecution guidelines for computer fraud and abuse cases and consider revising those guidelines to prohibit prosecutions based solely upon conduct involving a violation of a Terms of Use Agreement?

Attorney General HOLDER. Well, I think we are always in the process of trying to look at how we are using the tools that Congress has given us, and to the extent that there are issues in enforcement, inappropriate uses of statutes, we always want to correct that. And so as I said, we constantly monitor that, and we want to make sure that we use those tools in appropriate ways and only ask for jail time, for instance, where that is absolutely needed. So that is something that we can look at.

Chairman LEAHY. Thank you.

Now, last November, voters in Colorado and Washington chose to legalize personal use of up to 1 ounce of marijuana and to enact licensing plans for cultivation and distribution of the drug. Last year, I asked Director Gil Kerlikowske of the Office of National Drug Control Policy how the administration would prioritize resources to determine policy.

In light of the choices made by the voters in Colorado and Washington, knowing that there are going to be other States that do the same thing, are you prepared to announce the Federal Government's policy in response to the voters in Colorado and Washington?

Attorney General HOLDER. Well, I have had the opportunity to meet with the leadership from Colorado and from Washington, the Governors. We had a good, I think, communication. We are in the administration at this point considering what the Federal Government's response to those new statutes will be. I expect that we will have an ability to announce what our policy is going to be relatively soon.

Chairman LEAHY. I would think that—this is simply an editorial comment, but if you are going to be, because of budget cuts, prioritizing matters, I would suggest there are more serious things than minor possession of marijuana. But that is a personal view.

Now, it has been brought up here—I know Senator Grassley raised the fact that you, like several other Cabinet Secretaries, are prohibited from flying commercially for security reasons. A recent GAO report confirmed that counterterrorism and other mission travel always takes precedent over other official travel by you, Director Mueller, and previous Attorneys General. And you and Director Mueller have complied with reimbursement requirements in all cases. Just so I understand, we are talking about—and the

number of uses. Is it true that your predecessor used the aircraft for personal travel twice as often as you have?

Attorney General HOLDER. Yes, that is true. As we looked at the numbers, I took a total of 27 trips that were categorized as personal. My predecessor took a total of 54. But one of the things that I want to emphasize is that these planes are always used first and foremost for mission purposes, and if you combine mission purposes, as the GAO has defined it, as well as official travel, the planes are used 93 percent of the time for those two purposes. And when I say "official travel," that would include trips that I made on these planes to Afghanistan, to Guantanamo, to Haiti to talk to Caribbean heads of state, to Ottawa in order to talk about border issues with our Canadian counterparts.

So this notion that these planes are somehow being misused is totally belied by the facts if they are fairly viewed.

Chairman LEAHY. You mentioned Haiti. I was in Haiti right after your trip on a Government plane with a number of both Republican and Democratic Members of Congress, and I understand the reasons why they used it there, too.

I am giving the gavel to Senator Feinstein, and I will recognize Senator Grassley.

Senator GRASSLEY. I think we will go with one of these. I am going over to the floor.

Chairman LEAHY. Okay. Who is next?

Senator GRASSLEY. Senator Cornyn.

Chairman LEAHY. Senator Cornyn.

Senator CORNYN. Good morning, General Holder.

Attorney General HOLDER . Good morning.

Senator CORNYN. I wrote you a letter on January 18, 2013, about the prosecution of Aaron Swartz, who was prosecuted by the U.S. Attorney's Office in Massachusetts for allegedly breaking into the computer networks at MIT and downloading without authorization thousands of academic articles from a subscription service. He was charged with crimes that would have carried a penalty of up to 35 years in prison and a $1 million fine. A superseding indictment, which was actually filed, would have upped both the prison time and the fines.

As I said, I wrote a letter asking about that prosecution and raising questions of prosecutorial zeal and I would say even misconduct. Have you looked into that particular matter and reached any conclusions?

Attorney GeneralHOLDER . Yes, let me first say that Mr. Swartz's death was a tragedy. My sympathy goes out to his family and to his friends, those who were close to him. It is a terrible loss. He was obviously a very bright young man and had, I think, a good future in front of him.

As I have talked to the people who have looked into this matter, these news reports about what he was actually facing is not consistent with what the interaction was between the Government and Mr. Swartz. An offer, a plea offer, was made to him of 3 months before the indictment. This case could have been resolved with a plea of 3 months. After the indictment, an offer was made that he could plead and serve 4 months. Even after that, a plea offer was made of a range of from 0 to 6 months, that he would be able to

argue for a probationay sentence, the Government would be able to argue for up to a period of 6 months. There was never an intention for him to go to jail for longer than a 3-, 4-, potentially 5-month range. That was what the Government said specifically to Mr. Swartz. Those offers were rejected.

Senator CORNYN. And he committed suicide, correct?

Attorney General HOLDER . He did.

Senator CORNYN. The subscription service did not support the prosecution. Does it strike you as odd that the Government would indict someone for crimes that would carry penalties of up to 35 years in prison and $1 million fines and then offer him a 3- or 4-month prison sentence?

Attorney General HOLDER . Well, I think that is a good use of prosecutorial discretion, to look at the conduct, regardless of what the statutory maximums were, and to fashion a sentence that was consistent with what the nature of the conduct was. And I think that what those prosecutors did in offering 3, 4, 0 to 6, was consistent with that conduct.

Senator CORNYN. So you do not consider this a case of prosecutorial overreach or misconduct?

Attorney General HOLDER. No, I do not look at what necessarily was charged as much as what was offered in terms of how the case might have been resolved.

Senator CORNYN. Well, I would suggest to you, if you are an individual American citizen and you are looking at criminal charges being brought by the U.S. Government with all of the vast resources available to the Government, it strikes me as disproportionate and one that is basically being used inappropriately to try to bully someone into pleading guilty to something that strikes me as rather minor. But I would appreciate it if you would respond to my letter in writing dated January the 18th. I know Senator Grassley listed a number of other letters that your Department has not responded to, but would you commit to responding to that letter and answering the questions in writing?

Attorney General HOLDER. We will get responses to that letter. I think the letter will probably encapsulate what I have just said in terms of how we viewed the case and how we thought it could be appropriately resolved.

Senator CORNYN. Well, I want to make sure you have done a thorough investigation into the matter and you are not just speaking off the cuff.

Attorney General HOLDER. It is not off the cuff. It is not off the cuff.

Senator CORNYN. So you have done a thorough investigation of this matter?

Attorney General HOLDER. I think a good examination has been done. The prosecutors were talked to, the U.S. Attorney was talked to, and people in the Department were responsible for those inquiries.

Senator CORNYN. Well, one of the reasons I am skeptical is because, of course, you are well aware of the prosecution of Senator Ted Stevens, and you yourself decided that the prosecutors in that case overreached, withheld information that would have been exculpatory that should have been divulged under the rules of ethics,

and I am concerned that average citizens, if you can call them that, like Aaron Swartz, people who do not have status or power perhaps in dealing with the Federal Government, could be bullied. And obviously we have seen even Members of the United States Senate like Ted Stevens who have been on the receiving end of prosecutorial misconduct. And that was a conclusion you yourself reached in that case, correct?

Attorney General HOLDER. Well, yes, I think that the level—what we did in that case, in the Stevens case, was not consistent with the high standards that I expect of people who work in the Justice Department. But I think that is also an example, as well as the numbers that I have shared with you with regard to Mr. Swartz's case, of how this Department conducts itself and, where we make mistakes, what we do to try to correct them. As long as I am Attorney General and as long as this information is brought to my attention, I will not hesitate to do what I did, for instance, in the Stevens matter.

Senator CORNYN. I respect that. Unfortunately, in both cases both of these men are dead, and it is hard to make recompense to someone after they are dead.

I know that we are going to be taking up some various gun legislation, and you have spoken to that some, and I just want to ask you, first of all, I have a copy of a speech that you gave to the Women's National Democratic Club January 30, 1995, and I want to quote it and ask you if this is a correct quote.

You said: "It is not enough to simply have a catchy ad on Monday and then only do it every Monday. We need to do this every day of the week and just really brainwash people into thinking about guns in a vastly different way."

Is that a correct quote?

Attorney General HOLDER. That part is, but it is taken out of context. What I was talking about was young black men who have all kinds of images thrown at them—at that time, Washington, DC, was the murder capital of the country, and I was talking about young black guys who see movies, television stuff that glorifies the use of guns, the possession of guns. And what I said is that we need to counter those images, and I used the term "brainwash" to get these young black guys to think differently about the possession and use of guns.

Senator CORNYN. Well, do we not think that aggressive prosecution of gun crimes is part of the answer as well to serve as a deterrence to using firearms and committing other crimes?

Attorney General HOLDER. Sure, absolutely. But I also think that preventing people from acquiring guns, using them in inappropriate ways—I was a superior court judge here in Washington, DC, during that time. I saw an ocean of young black men who should have been the future of this community go to jail because they had guns, they used them inappropriately, they killed people. And I thought that in that speech and what I tried to do as U.S. Attorney and as a judge when I was here in the local courts was to come up with ways in which we talk to these young guys and try to convince them that, you know, acquiring guns and using them to sell drugs, rob people, was just wrong, inappropriate—a prevention thing, in addition to—I think you are right, in addition to strongly

prosecuting them. When I was a judge, I sent people away for possession and use of guns for extended periods of time. I did not hesitate to do that as a judge.

Senator CORNYN. Let me just ask in conclusion, FBI figures reveal from 2010 that more than 76,000 people attempting to buy guns failed background checks. We do not know how many of these people actually have committed crimes. We do know that the Bureau of Alcohol, Tobacco, and Firearms referred just 62 of these cases to Federal prosecutors, and prosecutors declined nearly a third of those, reaching a plea of guilty or a guilty verdict in just 13 cases. So out of 76,000 failed background checks, your Department pursued a guilty plea or a guilty verdict in just 13 cases.

How is that consistent with making violation of the crime a deterrence if the likelihood of prosecution is so slight?

Attorney General HOLDER. Well, the primary purpose of the background check system is to make sure that people who should not have guns do not get them. Since 1998, 1.5 million people have been turned away in that regard.

Of all the Federal gun prosecutions that we bring—of all the prosecutions we bring, one-seventh of them are, in fact, gun prosecutions. All of those cases where people are denied the opportunity to get a gun are, in fact, reviewed for prosecution purposes and determinations made as to whether or not they should, in fact, be prosecuted.

One of the things I want to look at—and I will be talking to the U.S. Attorneys about—is whether or not we need to bring more of those cases. If we are going to be really cracking down on gun crime, there are reasonable explanations as to why we have those numbers, but I want to make absolutely certain that we are prosecuting all the people who should have been denied a gun—failing one of the instant background check system.

Senator CORNYN. A crime not prosecuted does not produce deterrence. Would you agree with that?

Attorney General HOLDER. Well, we have limited resources, and we have to try to figure out where we are going to use those limited resources, and one has to look at why the gun was denied, and then make a determination whether or not we should use those limited resources to bring a prosecution against that person.

Senator CORNYN. You did not answer my question. A crime not prosecuted does not produce the kind of deterrence that we would want to prevent other people from committing those similar crimes. Do you agree with that?

Attorney General HOLDER. Well——

Senator FEINSTEIN [presiding]. Senator, I have been very—you are 3 minutes and 23 seconds over.

Senator CORNYN. You have been very indulgent, Madam Chair.

Senator FEINSTEIN. I try.

Senator CORNYN. But with all respect to Attorney General Holder, he did not answer my question, and I would just like a simple answer to the question.

Attorney General HOLDER. Well, yes, deterrence comes in a number of forms. Some people are deterred by the prospect of jail. Other people are deterred by the prospect of having filled out a form and then having been turned down. It depends on the indi-

vidual, and those are the kinds of factors that we take into account when making determinations as to whether or not a prosecution should appropriately be brought.

Senator FEINSTEIN. Thank you very much, Senator.

I just want to say welcome, Attorney General Holder, and thank you for your service. I think it is very apparent that you have a very hard job in a hard time.

I just wanted to say something to you as Chairman of the Intelligence Committee on the Office of Legal Counsel opinions. Our job is vigorous oversight of the intelligence community. We cannot do that unless we see the legal underpinnings for certain kinds of activities, particularly clandestine activities. I believe the Committee is fully united on that point on both sides. So I believe that the administration is really going to have to come to terms with this, and I would like to ask you to spend some time and take a good look at it.

I have just been sitting here reading the white paper that you sent to this Committee on the subject of lawfulness of a lethal operation directed against a U.S. citizen who is a senior operational leader of al Qaeda or an associated force. This is Committee confidential, but it is not classified. And the fact of the matter is it is a 16-page, very thoughtful, very impressive opinion, and yet it cannot go into the public domain. I cannot ask you, even here, about some of the factors of this opinion. And I think that is a mistake. And I think that the world that we are now living in is so different and so imprecise that the legal underpinnings for action really are important.

Second, it is one thing for a President to ask for a legal opinion prior to something that is ongoing, maybe even ongoing. It seems to me that afterwards we should have the opportunity to assess the legality of that and, if necessary, if it is not legal, be able to clarify law, change law, do whatever a constitutional legislative body does.

So I would just ask you to take a look at this. We have now—well, I just got a note. It has been released now because it was leaked first, so——

Attorney General HOLDER. That is one way of getting it out.

Senator FEINSTEIN. Yes. I think that gives you an idea of the situation that we are in. From an intelligence point of view, it is absolutely vital.

And then I understand you get down to different committees. Let us say the Predator is taken out of the jurisdiction of Intelligence and put in the Military. That transfers the jurisdiction to Armed Forces. Let us say it is used in some way that brings the jurisdiction to this Committee.

So I think we now have to look at that arena and make some decisions as to the administration being more forthcoming with the legal advice that underpins law making.

[Applause.]

Senator FEINSTEIN. Please do not. Please do not.

Would you agree?

Attorney General HOLDER. Yes, and I have to say that I have heard you, the President has heard you, and others who have raised this concern on both sides of the aisle, and I think that what you will hear from the President in a relatively short period of time

is—I do not want to preempt this, but, we have talked about a need for greater transparency in what we share, what we talk about, because I am really confident that if the American people had access to, for instance—some of this stuff cannot be shared. I understand that. But if at least the representatives of the American people have the ability as members of the Intelligence Committee have had to see some of those OLC opinions, there would be a greater degree of comfort that people would have to understand that this Government does these things reluctantly but also we do it in conformity with international law, with domestic law, and with our values as the American people.

And so I think there is going to be a greater effort at transparency. A number of steps are going to be taken. I expect you will hear the President speaking about this.

Senator FEINSTEIN. Yes, I think so. I mean, right now we have someone exercising a hold on John Brennan, who said, you know, what we are talking about is you are eating dinner in your house, you are eating at a cafe, and you are walking down the road in this country, and can be targeted for elimination.

I do not believe that is true.

Attorney General HOLDER. No.

Senator FEINSTEIN. I do not believe it is correct. I think it really—you know, it is one thing after a major attack like 9/11 where we saw brave people take down a plane because they had heard that these planes were being crashed into buildings and there was a likelihood that this one was going to crash into the United States Capitol. And so people on the plane took it down. And then there was discussion as to whether a President should order a plane taken down with American citizens if it was going to jeopardize a greater number of American citizens.

I think this to some extent is something that we have to grapple with in a legal way as well. But in reading the opinions that I have just read, I believe they are very sound opinions. I have also read the opinions from the Bush administration, one of which was withdrawn by the Bush administration, and two of which were withdrawn by the Obama administration. They are not, in my view, good opinions. They were opinions designed to provide whatever the President or the administration was asking for.

I think this is where transparency is important, that years after, we have an opportunity to look and make judgments as to whether our democracy and our values are being operated by the executive in a proper manner.

Attorney General HOLDER. As I said, I think there is a greater need for transparency, a greater need for appropriately sharing information, and we are struggling with how to do that. But it is something that the President feels strongly about, and as I said, over the next few months, I think you will see an effort on the part of the administration to be more transparent.

Senator FEINSTEIN. Thank you.

Senator Cruz is next on my list and then Senator Whitehouse.

Senator CRUZ. Thank you, Senator Feinstein.

General Holder, thank you for being here this morning.

Attorney General HOLDER. Good morning.

Senator CRUZ. I would like to address three areas, and I would like to start with the topic you were just discussing, the topic of drones. In your response to Senator Paul yesterday, you suggested there may well be circumstances in which it is permissible to use drones to target a U.S. citizen on U.S. soil. I would like to explore those circumstances, and in particular, you point at two. You pointed to Pearl Harbor and 9/11, both of which were extreme military attacks on the homeland.

I want to ask a more specific question. If an individual is sitting quietly at a cafe in the United States, in your legal judgment does the Constitution allow a U.S. citizen on U.S. soil to be killed by a drone?

Attorney General HOLDER. For sitting in a cafe and having a couple of coffee?

Senator CRUZ. If that individual is not posing an imminent and immediate threat of death or bodily harm, does the Constitution allow a drone to kill that individual?

Attorney General HOLDER. On the basis of what you said, I do not think you can arrest that person.

Senator CRUZ. The person is suspected to be a terrorist, you have abundant evidence he is a terrorist, he is involved in terrorist plots, but at the moment——

Attorney General HOLDER. Okay, I see——

Senator CRUZ [continuing]. he is not pointing a bazooka at the Pentagon. He is sitting in a cafe. Overseas, the U.S. Government uses drones to take out individuals when they are walking down a path or when they are sitting at a cafe. If a U.S. citizen on U.S. soil is not posing an immediate threat to life or bodily harm, does the Constitution allow a drone to kill that citizen?

Attorney General HOLDER. I would not think that that would be an appropriate use of any kind of lethal force. We would deal with that in the way that we typically deal with a situation like that. We would expect——

Senator CRUZ. With respect, General Holder, my question was not about appropriateness or prosecutorial discretion. It was a simple legal question. Does the Constitution allow a U.S. citizen on U.S. soil who does not pose an imminent threat to be killed by the U.S. Government?

Attorney General HOLDER. I do not believe that—again, you have to look at all of the facts. But on the facts that you have given me—and this is a hypothetical—I would not think that in that situation the use of a drone or lethal force would be appropriate because the possibility——

Senator CRUZ. General Holder, I have to tell you, I find it remarkable that in that hypothetical, which is deliberately very simple, you are unable to give a simple one-word, one-syllable answer—"No." I think it is unequivocal that if the U.S. Government were to use a drone to take the life of a U.S. citizen on U.S. soil and that individual did not pose an imminent threat, that that would be a deprivation of life without due process——

Attorney General HOLDER. Well, let me—maybe I have not been clear. I said that the use of lethal force—and I am saying drones, guns, or whatever else—would not be appropriate in that circumstance.

Senator CRUZ. You keep saying "appropriate." My question is not about propriety. My question is about whether something is constitutional or not. As Attorney General, you are the chief legal officer of the United States. Do you have a legal judgment on whether it would be constitutional to kill a U.S. citizen on U.S. soil in those circumstances?

Attorney General HOLDER. A person who was not engaged, as you have described—this is the problem with hypotheticals. But the way in which you have described it, this person sitting at the cafe, not doing anything imminently, the use of lethal force would not be appropriate, would not be something——

Senator CRUZ. I find it remarkable that you still will not give an opinion on the constitutionality. Let me move on to the next topic because we have gone around and around.

Attorney General HOLDER. Let me be clear. Translate my "appropriate" to "no." I thought I was saying no. All right. No.

Senator CRUZ. Well, then, I am glad. After much gymnastic, I am very glad to hear that it is the opinion of the Department of Justice that it would be unconstitutional to kill a U.S. citizen on U.S. soil if that individual did not pose an imminent threat. That statement has not been easily forthcoming. I wish you had given that statement in response to Senator Paul's letter asking you it. And I will point out that this week I will be introducing legislation in the Senate to make clear that the U.S. Government cannot kill a U.S. citizen on U.S. soil absent an imminent threat. And I hope based on that representation that the Department will support that legislation.

Attorney General HOLDER. Well, that is totally consistent with the letter that I sent to Senator Paul. I talked about 9/11 and Pearl Harbor. Those are the instances where I said it might possibly be considered, but that other than that we would use our normal law enforcement authorities in order to resolve situations along those lines and then use the normal things that you do when you try to decide if cops can shoot somebody.

Senator CRUZ. General Holder, I would like to move on to a second topic, which is what many perceive is the politicized enforcement of the law at the Department of Justice.

In 2010, Congress heard evidence that the Department of Justice declined to enforce voter intimidation laws against members of the New Black Panther Party.

In 2011, the Department of Justice released a statement announcing that the Department would no longer defend the constitutionality of the Defense of Marriage Act, which passed with overwhelming bipartisan majorities both Houses of Congress and was signed into law by President Bill Clinton.

Last year, in 2012, the Department of Homeland Security announced that it would no longer enforce our Nation's immigration laws against individuals designated by the President.

My question to you is: Are there any other laws passed by this Congress that the Department of Justice does not intend to enforce?

Attorney General HOLDER. It is the tradition of the Department to always enforce laws where there is a reasonable basis to argue for the enforcement of those laws. I have sent memos or letters to

the Speaker of the House—I think that is where the letters go to—where we have declined to support laws, enforce laws that Congress has passed for a variety of reasons.

I will note, however, with regard to DOMA, for instance, where we declined to defend that statute, courts subsequently have agreed with us applying that standard of heightened scrutiny that, in fact, DOMA was unconstitutional. So it is not something that the Justice Department——

Senator CRUZ. Well, wait. There was a bit of a sleight of hand there. You said courts have agreed on the merits on the issue. That is very different from saying there is no reasonable basis to defend the statute, which is what you suggested was the standard. Surely it is not the Department's position that every case in which the Department might lose a case it will not defend the statute.

Attorney General HOLDER. No, no. I am saying——

Senator CRUZ. What process does the Department engage in to determine which Federal laws it will follow and which it will not?

Attorney General HOLDER. Well, there is a presumption that we will apply and support any law that Congress passes. It is the rare instance where we make the determination that we will not. DOMA was one of those. We thought there was not a reasonable basis to defend the statute applying that heightened scrutiny standard. And as I said, courts have, in fact, agreed with that determination.

Senator CRUZ. Let me very, very briefly address one other area. Much attention has focused on the Fast and Furious program and the tragic consequences of that. Was the White House involved in any way whatsoever in decisionmaking concerning Fast and Furious?

Attorney General HOLDER. No.

Senator CRUZ. Given that, last year my understanding is you asserted Executive privilege against handing over documents concerning Fast and Furious. Now, Executive privilege, the Supreme Court has made clear, protects communications and advice with the President. If the White House was not involved, Executive privilege does not apply to those documents. If Executive privilege applies to those documents, it necessarily implies that the White House and the President personally was involved. So which of the two is it, General Holder?

Attorney General HOLDER. No, you are cutting too fine a line. The President, the White House, was not involved in the operational component of Fast and Furious. There were certainly interactions, conversations between the Justice Department and the White House about the operation after all of the operative facts had occurred, after all of the controversial actions had been taken. Then we got into the situation where we were talking about the congressional investigation of Fast and Furious. There were communications between the White House and the Justice Department. But nothing——

Senator CRUZ. Do I understand you correctly—my time has expired, so I want to just understand your response correctly. Is it your position that Executive privilege only applies after the details of Fast and Furious became public and it was with subsequent communications, but there is no Executive privilege that is applica-

ble before it becoming public because, as you just said a minute ago, the White House was not involved in any way, shape, or form with Fast and Furious?

Attorney General HOLDER. Executive privilege protects communications between the White House and the executive branch agency, and to my knowledge, there are no communications that deal with the operational components of Fast and Furious between the White House and the Justice Department.

Senator CRUZ. So Executive privilege does not apply to them?

Attorney General HOLDER. There is nothing there for Executive privilege to apply to, as best I know.

Senator CRUZ. Thank you, General Holder.

Senator FEINSTEIN. Thank you very much, Senator.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Welcome, General HOLDER. First off, thank you for the initial statements that the administration has made about putting the drone program under a more regular and ongoing separation of powers framework. I know that there is going to be a lot of work ahead of us to work out the details of that, but I think it is an important step for the administration. And thank you also for your work on the cyber Executive order, which I think was a vital step. I remain disappointed that we did not pass legislation to address this pressing issue before. I see Senator Graham here. He and I are continuing to work on supplementing the Executive order with bipartisan legislation that I think is vital for our country.

Let me chime in on one other very brief thing. On the question of letters, we would love to get the response to the request for the record that was made last June, when you were last here, and which we still have no response to. I understand that it is tied up at OMB, but presumably your people could build the delay that OMB puts into these things into their calculation of when they need to have letters prepared for you. I know it is not a problem——

Attorney General HOLDER. Just to be fair, it is not only OMB. I mean, there is certainly probably something within the Department where we need to activate or be more responsive, but it is also other executive branch agencies that have equity sometimes in these responses. So it is not strictly OMB. Just to be fair.

Senator WHITEHOUSE. But June of 1 year to March of another is a pretty long run for getting an answer.

Attorney General HOLDER. I would agree with that.

Senator WHITEHOUSE. We are looking forward to having a hearing on the resources of the Department and the strategy of the Department on cyber prosecutions and on the actions against botnets. I think the Coreflood case was particularly good. I understand that there have been awards given to the participants, which I commend you for. But I would have thought that Coreflood would have been a model for a great number of other similar sort of hygienic type legal efforts to clean up the botnets out of the Web, and it does not seem to have been pursued as a model, as a strategy. And to my knowledge, there has not yet been a single cyber prosecution brought against a hacker, like we know China is doing, that comes in purely through the Web, raids an American company for its in-

tellectual property, expropriates the intellectual property out, and uses it essentially as industrial espionage.

I know there have been cases made for espionage, and they have sometimes involved cyber, but there has always been a tangible link of some kind, somebody with a CD in their pocket leaving the factory.

So I think anybody who has been in the trenches understands how immensely complicated and resource intensive these cases are, and I think at a time of diminishing budgets and budget pressures, it is important that we focus a real light on what the resources are that are required to make these cases and how important they are. And I would like to ask you now if you would be willing to work with us and send appropriate DOJ officials to such a hearing.

Attorney General HOLDER. Yes, we certainly will. I actually think that that interaction could be particularly useful as we try to explain the issues that we confront in bringing these cases, the resource issues that we have; but, frankly, also to hear suggestions that experienced prosecutors like yourself might have with regard to how we might better do these cases. So I think a hearing with that kind of interaction would be something that we will certainly send witnesses to.

Senator WHITEHOUSE. I appreciate it. Similarly, we are looking at the enforcement of campaign finance laws. There appears to be a considerable discrepancy between many of the applications that are made to the IRS for status and then the behavior of the entity once it is out acting in the political world. And we would like to look a little bit further into that, and, again, we would like to ask the cooperation of the Department with a witness at a hearing to look into that question.

Attorney General HOLDER. Yes, and we again would be glad to participate in that. We have as one of our enforcement responsibilities the campaign finance laws. There is an election crime division within the Public Integrity Section. This is something that we do. And we would be more than glad to interact with you and have a hearing in that regard.

Senator WHITEHOUSE. Good. And the last thing that I will raise is my perennial concern that the Margolis memorandum needs to be retracted by the Department. It is a continuing burr under my saddle that we could expect of the members of the Department of Justice, particularly those at the Office of Legal Counsel—who are often the best and the brightest that the legal profession has, they are off a Supreme Court clerkship or they are on to a Supreme Court seat, and they are immensely talented people. And the notion that they do not have to meet the same standards of diligence and candor that a workaday lawyer does hustling into the Garrahy courthouse in Providence with five files under his arm is to me something that I am just going to continue to press on until that gets resolved. So I will mention that to you once again now, and we can continue to followup. I think I bring it up every time a person from the Department of Justice comes to see me and whenever candidates for confirmation come to see me, and so I wanted to bring it up again now. I know that it brought a resolution to a very unhappy period in the Department's past, but I think it did so by cutting a corner that should not have been cut. And I think that

the standards of the Department should be higher than those for workaday lawyers, not lower.

Attorney General HOLDER. Okay.

Senator WHITEHOUSE. So thank you very much. I appreciate very much your service to our country. As a former member of the Department of Justice, I looked with real dismay at what was happening to it prior to your tenure, and my sources within the Department continue to express pride and enthusiasm and increasing morale as a result of the leadership that you have provided. So we are grateful to you, sir.

Attorney General HOLDER. Well, thank you. You are very kind. And perhaps you and I in a different setting can have a conversation about the Margolis theory, memo, whatever, and you and I can have a more detailed conversation about that. To the extent that you have those issues, I would like to hear what they are.

Senator WHITEHOUSE. Absolutely.

Senator FEINSTEIN. Thank you. Thank you very much, Senator Whitehouse.

Senator Flake is not here. Senator Klobuchar is not here. Senator Graham is here.

Senator GRAHAM. Thank you, Mr. Attorney General. We have been talking about the war on terror ever since you have had this job, right?

Attorney General HOLDER. During confirmation, yes.

Senator GRAHAM. Absolutely. And I want to congratulate you and the President. I think you have thought long and hard about how to defend the homeland in very difficult circumstances. I want to applaud your efforts with the drone program. I think it has really helped us in Afghanistan and Pakistan. And I just believe it is a tactical tool that this President should be using, and I think he is using it responsibly.

Now, as to the homeland, is al Qaeda actively involved in recruiting American citizens to their cause?

Attorney General HOLDER. American citizens? I certainly know of efforts that al Qaeda has made to recruit American citizens.

Senator GRAHAM. I can assure the public—and we will not disclose—that the al Qaeda organization is actively involved in seeking American citizens' support. In every war we have had, unfortunately, American citizens have sided with the enemy. They have been few in number, but that does happen. Is that correct?

Attorney General HOLDER. It does happen occasionally.

Senator GRAHAM. As a matter of fact, we had American citizens helping German saboteurs who tried to blow up infrastructure in the United States in World War II. You are familiar with that?

Attorney General HOLDER. Those cases were tried right down the hall from my office.

Senator GRAHAM. They were tried right down the hall. So it is a longstanding proposition in American law that an American citizen who joins the forces of our enemies can be considered an enemy combatant. Do you agree with that?

Attorney General HOLDER. Yes.

Senator GRAHAM. So the point I am trying to make is that, hypothetically, if there are patriot missile batteries around this Capitol and other key Government infrastructures to protect the Capitol

from an attack, it would be lawful for those batteries to launch. Is that correct?

Attorney General HOLDER. To launch——

Senator GRAHAM. Against the threat. If there was intelligence that an airplane was coming toward the Capitol or the White House, it had been hijacked——

Attorney General HOLDER. I see. Okay. Yes.

Senator GRAHAM. It would be okay for our military to act, would it not?

Attorney General HOLDER. Yes.

Senator GRAHAM. That would be an imminent threat. The military has legal authority under the Constitution and the Authorization to Use Military Force to strike back against al Qaeda. Is that correct?

Attorney General HOLDER. Yes.

Senator GRAHAM. Now, when we say Congress gave every administration the Authorization to Use Military Force against al Qaeda, we did not exempt the homeland, did we?

Attorney General HOLDER. No, I do not think we did.

Senator GRAHAM. Would that not be kind of crazy to exempt the homeland, the biggest prize for the terrorist to say for some reason the military cannot defend America here in an appropriate circumstance?

Attorney General HOLDER. No, I think that is right. The question obviously is what forces do we use, but I think we have that authority.

Senator GRAHAM. And I totally agree with you that the likelihood of capture is very high in America and that we have a lot of law enforcement agencies available and that we would put them out front. But certainly most law enforcement agencies I know of do not have patriot missile batteries, so that is a good example of where the military can provide capacity to protect the homeland against a terrorist act that law enforcement cannot.

Attorney General HOLDER. Yes, and that would be the rare case, but in the letter that I sent to Senator Paul, that is one of the reasons why I referenced September the 11th.

Senator GRAHAM. Let us go back in time. What would we all give to have those patriot missile batteries available on September 10, 2001, in New York and Washington? It would have meant that we would have lost a planeload of American citizens, but we would have saved thousands more. That is the world in which we live. And I want to stand by you and the President to make sure that we do not criminalize the war and that the commander-in-chief continues to have the authority to protect us all. And I have got a lot of my colleagues who are well meaning, but there is only one commander-in-chief in our Constitution. Do you agree with that?

Attorney General HOLDER Well, that is true, and the situation that you describe on September the 11th would have been—was among the most difficult decisions that President Bush and Vice President Cheney had to make to give that order. But I think it was appropriate.

Senator GRAHAM. And I hope you are never put in that position, but I want you to know from Senator Graham's point of view that you have the authority and my view from the Constitution, the Au-

thorization to Use Military Force to take such actions. And I know you will if put in that position.

Now, about where this war is going, we are winding down Afghanistan. Do you think the al Qaeda threat is over?

Attorney General HOLDER. No. The al Qaeda threat, as we knew it, I would say, traditionally, focused in Pakistan, core al Qaeda, has been greatly weakened, but there are nodes now of al Qaeda in different places—on the Arabian Peninsula, in North Africa—that we have to be concerned with.

Senator GRAHAM. What would your message be to any American citizen thinking about collaborating with al Qaeda to attack the United States at home or abroad? What would you want to say to them?

Attorney General HOLDER. That you do so at your risk. If you align yourself with al Qaeda, you are, in fact, taking arms against your Nation, and you then will be subject to the full weight of the American military.

Senator GRAHAM. And law enforcement community as well.

Attorney General HOLDER. And law enforcement. Whatever tools we have.

Senator GRAHAM. And I want to say that I believe Article III courts have a robust role in the war on terror, and I also want to say that military commissions have their place also. Do you agree with that statement?

Attorney General HOLDEr. True.

Senator GRAHAM. All right. Now, let us turn to another topic where we probably will not agree. This Committee will be taking up legislation about banning assault weapons. Are you familiar with the AR–15?

Attorney General HOLDER. I am familiar with it, yes.

Senator GRAHAM. Just generally speaking.

Attorney General HOLDER. Yes, I think I might have shot one at the FBI Academy.

Senator GRAHAM. Right. Are you aware that over 4 million have been purchased by American citizens?

Attorney General HOLDER. I know it is a very popular weapon.

Senator GRAHAM. Okay. Any weapon can be dangerous. I will be the first to admit that. Can you imagine a circumstance where an AR–15 would be a better defense tool than, say, a double-barreled shotgun?

Attorney General HOLDER. You mean in defense of the home?

Senator GRAHAM. Let me give you an example. You have a lawless environment where you have a natural disaster or some catastrophic event, and those things, unfortunately, do happen, and law and order breaks down because the police cannot travel, there is no communication, and there are armed gangs roaming around neighborhoods. Can you envision a situation where, if your home happens to be in the crosshairs of this group, a better self-defense weapon may be a semiautomatic AR–15 versus a double-barreled shotgun?

Attorney General HOLDER. Well, I think we are dealing there with a hypothetical in a world——

Senator GRAHAM. You do not have to agree with me. Am I unreasonable to say that I would prefer an AR–15?

Attorney General HOLDER. Well, as I said, you are dealing with a hypothetical in a world that I think does not exist. That is——

Senator GRAHAM. Well, I am afraid that world does exist. I think it existed in New Orleans, to some extent up in Long Island. It could exist tomorrow if there is a cyber attack against the country and the power grid goes down and the dams are released and chemical plants are discharges——

Attorney General HOLDER. Well, I do not think New Orleans would have been better served by having people with AR–15s in the post-Katrina environment.

Senator GRAHAM. Well, what I am saying, if my family was in the crosshairs of gangs that were roaming around neighborhoods in New Orleans or any other location, the deterrent effect of an AR–15 to protect my family I think is greater than a double-barreled shotgun. But the Vice President and I have a disagreement on that.

Now, let us talk about, very quickly——

Chairman LEAHY [presiding]. Senator?

Senator GRAHAM. Yes, sir?

Chairman LEAHY. Your time——

Senator GRAHAM. Can I ask just one more question, sir?

Chairman LEAHY. If we can keep it brief.

Senator GRAHAM. I promise.

Chairman LEAHY. We have people leaving for the vote.

Senator GRAHAM. I know other people have got to go. There were 76,142 people who failed a background check in 2010; 19.1 percent, 13,862, were denied—failed the background check because they were a fugitive from justice. I mean literally on the run from the law. What happened to those cases? How many of those fugitives were apprehended as a result of failing a background check to buy a gun?

Attorney General HOLDER. I do not know what the numbers are, but I can tell you that each of the cases are individually examined and determinations made as to whether or not prosecutions should be brought or whether prosecutions are possible. If you are talking about somebody who was a fugitive, I would agree with you, that is something that should perhaps be a priority prosecution. But that person may not be there to prosecute.

Senator GRAHAM. I would suggest that the 76,000 people who failed a background check, 13,862 were fugitives from justice, only 62 were prosecuted, and less than that number were convicted. So obviously we have got some work to do when it comes to the current background system.

Thank you for your service.

Attorney General HOLDER. Thank you.

Chairman LEAHY. Thank you, and we will—interestingly enough, there have been a lot of questions about drones in the U.S. This Committee will be holding a hearing on domestic drones on March 20th.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. And I want to thank you, General Holder, for the Department of Justice's action in the Proposition 8 case in the Supreme Court. I think it was a brave decision on your part and a powerful statement of the De-

partment's commitment to seek equality under the law for all people.

In your testimony you talk about the Department's civil suit against S&P, and you say—the quote is you are "seeking at least $5 billion in damages for alleged conduct that goes to the heart of the recent economic crisis." And I totally agree with that. I think the credit rating agencies, because of the basic conflict of interest that is inherent in the issuer pays model, where the issuer of the security chooses and pays one of the Big Three, it was—Moody's, S&P, and to some degree Fitch—and that the rating agencies basically gave out AAA ratings to junk because they wanted to keep the business. And in the DOJ case, are there not as part of the evidence emails between people at S&P saying, look, we know this is not deserving of AAA but we have got to give it that, stuff to that effect, right?

Attorney General HOLDER. Yes, I do not want to go beyond—it is a pending case. I do not want to go beyond the indictment. But that information or those kinds of emails are contained in the indictment.

Senator FRANKEN. Well, this is what DOJ, what the statement is from DOJ about the lawsuit. It says, "S&P falsely represented that its ratings were objective, independent, and uninfluenced by S&P's relationship with investment banks, when in actuality S&P's desire for increased revenue and market share led it to favor the interests of these banks over investors."

Attorney General HOLDER. We believe our evidence will show that.

Senator FRANKEN. Okay. Now, you say that this "goes to the heart of the recent economic crisis." Is that not because once they ran out of mortgages to securitize and subprime mortgages, packages of subprime mortgages to securitize, they started doing bets on the bets, and they gave those AAA ratings, right?

Attorney General HOLDER. Yes, now you are getting into an area where I am not an expert, but when you start talking about bets on bets, as I understand it, that is, in fact, correct. But I am not an economist or a financial guy.

Senator FRANKEN. Right, I understand that, but when you say it "goes to the heart of the recent economic crisis," what I am saying is that this house of cards that collapsed would have been one card high if they had not started giving AAA's to derivatives.

Attorney General HOLDER. Right.

Senator FRANKEN. And derivatives on derivatives.

Attorney General HOLDER. Getting away from the S&P case, because it is a pending matter, I think the assertions that you are making are, in fact, correct that the financial system made bets on bets, giving ratings to derivatives that were not necessarily deserved. And I am not talking about S&P now.

Senator FRANKEN. Yes, I am not asking you to testify as an expert on finance. But this prosecution, it goes to the heart of why our economy collapsed, and what it was, was that the credit rating agencies had—there was a conflict of interest they had because they knew if they gave a AAA rating they would get more business. That is essentially what the case is about.

Attorney General HOLDER. That is in essence the Government's theory.

Senator FRANKEN. And Senator Wicker and I, Senator Wicker of Mississippi and I wrote an amendment to Dodd-Frank which basically said we have to—gave the SEC the ability to address that, to eliminate the conflict of interest. And that passed in the Senate in a bipartisan way with 64 votes. It got to conference and became a study that said that if the SEC finds that this conflict of interest still exists, they will address that conflict of interest and get rid of it. That has happened, and I think that is absolutely crucial that the SEC act on that. So I wanted to just use your testimony to get on my little soapbox—my big soapbox there, but I think it is absolutely crucial.

I want to ask you about an entirely different matter. Last fiscal year, almost 14,000 children arrived at our borders alone and subsequently entered our immigration court system. Since 2008, the Department of Health and Human Services has been in charge of making sure that these children have access to legal representation. Unfortunately, experts report that only half of these children are actually getting lawyers.

My office has started to hear harrowing stories of 8-year-old kids, 7-year-old kids, 6-year-old children going before immigration judges by themselves, without representation.

Attorney General Holder, experts have suggested that the job of getting these kids lawyers should be transferred out of HHS and into the Department of Justice. I am considering this proposal closely. Do you support doing this?

Attorney General HOLDER. I certainly think that we want to work with you in coming up with ways in which we can ensure that children do, in fact, have legal representation. If this is something that is better housed in the Justice Department, that is certainly something we are willing to consider.

But I would also say that this is going to be a resource issue. We should not simply give this responsibility to the Justice Department without giving us additional resources. As part of the immigration reform package that we are considering, I would hope that this would be something that would be considered. It is inexcusable that young kids—and you are right, 6-, 7-year-olds, 14-year-olds—have immigration decisions made on their behalf, against them, whatever, and they are not represented by counsel. That is simply not who we are as a Nation. It is not the way in which we do things.

Senator FRANKEN. Well, I hope our offices can work together on this, because you are absolutely right, it is unconscionable. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Franken.

Senator Grassley.

Senator GRASSLEY. Once again, thank you for coming up here. I want to follow up on your response to Senator Cruz, and I think he talked about introducing a bill.

Do you believe that Congress has the constitutional authority to pass a law prohibiting the President's ability to use drone aircraft

to use lethal force against American citizens on U.S. soil? And if not, why not?

Attorney General HOLDER. Do I think that Congress has the ability to pass such a bill?

Senator GRASSLEY. No. Whether the legislation—well, yes, Congress has the constitutional authority to pass a law prohibiting the President's ability to use drone aircraft to use lethal force against American citizens on U.S. soil?

Attorney General HOLDER. I am not sure that such a bill would be constitutional. I think that might run contrary to the Article II powers that the President has. I would have to look, obviously, at the legislation, but I would have that concern.

Senator GRASSLEY. Okay. But your basis is the why not would be because of Article II?

Attorney General HOLDER. I believe so, yes.

Senator GRASSLEY. Okay. One last question in that area. Given the belief that it would be constitutional to use lethal force against American citizens on U.S. soil in some instances, as you said, would that theory extend to permitting the executive branch to use enhanced interrogation techniques against American citizens on U.S. soil to avoid a catastrophic event?

Attorney GeneralHOLDER. I do not think enhanced interrogation techniques, as those have been defined, should ever be used against anybody for any purpose. They are ineffective. They are inconsistent with how we think of ourselves as a Nation, and some of them are outright torture. And they do not work.

Senator GRASSLEY. On another issue, in regard to a letter you wrote to Chairwoman Mikulski on the Budget Control Act and "cutting $1.6 billion from the Department's current funding level, which would have serious consequences for the communities across the Nation," specifically the letter detailed cuts to the FBI suggesting furlough of 775 special agents, the most important asset to the agency's national security and law enforcement mission. But the reality is, as of yesterday, the Department of Justice was advertising for over 100 job openings on USAJobs website. These jobs include positions such as cook supervisor, dental hygienist, law librarian. Further, the Department's own website has over 50 attorney positions listed since January 14th. A memorandum was being issued by OMB instructing agencies. So I am skeptical about your description of "severe negative impacts on the Department, including the estimated loss of Federal agents fighting national security."

Further, your letter to the Chairwoman failed to discuss cuts to conference expenditures, which more than doubled between 2008 and 2010. It also failed to discuss reductions in travel or other nonmission expenditures.

I am leading up to what has a high priority when it comes to sequester. How do you reconcile for the American people then the fact that the Department is actively recruiting for hundreds of positions, including cooks and dental hygienists, but yet you threaten to furlough 775 FBI agents working on violent crime and national security?

Attorney General HOLDER. That is a good question. We are going to certainly have to, if the sequestration stays in effect, we are going to have to furlough FBI agents. What I have told the people

in the Department is that hiring has to stop. It does not mean, however, that we should stop the process of going through the interviews and all of that so that when the sequestration is over, when funds are returned to us, we have an ability to fill gaps that we will necessarily have just through attrition. So we want to be in a position on the other end of sequestration to have people in line to take positions that might be available, but there will not be anybody brought into the Department of Justice while sequestration is in effect. I made that clear to all the heads of the components. So you can do the interviews and all of that stuff and maybe have a person that you want to put in place once we are on the other side of sequestration.

Senator GRASSLEY. Well, how does your direction to the Chairwoman comply with OMB's memo tasking agencies to minimize cuts to agency mission, life, safety, and health concerns?

Attorney General HOLDER. All we are talking about is just interviewing people and making sure that these are potentially people who we might want to hire. The costs for that are minimal.

Senator GRASSLEY. Well, how about cutting the 700 or so FBI agents? How does that comport with the memo of OMB on minimizing cuts to agency mission, life, safety, and health concerns?

Attorney General HOLDER. Well, we have only a certain amount of flexibility in the way in which the sequester is structured. You look at the various components within the Department, and there is little or nothing that I can do with regard to, for instance, what the FBI has got to take in terms of a cut, what the DEA has to take in terms of a cut. And the resources that we have, the money in the Department of Justice is in our people. We do not have airplanes. We do not fly—or huge amounts of planes. We do not have planes like the Defense Department. So when it comes to reducing costs, all I can do is basically furlough people and then do things on the other side with regard to, as you mentioned, conferences and things of that nature. But the main way that we have to reduce cost is with regard to furloughing our people, which will have a negative impact on our ability to do the job the American people expect us to do.

Senator GRASSLEY. In my letter last week, I noted that the January OMB memo requested sequester proposals from the Department, and I asked you for a copy of these passbacks. Would you provide these draft proposals to the Committee so that we can review what cuts the Department requested and what OMB recognized? And if you cannot give it to us, why would you not give it to us?

Attorney General HOLDER. I am not sure I understand what your question is. The——

Senator GRASSLEY. Well, you know, OMB sends you recommendations and then you send back what you are going to do. I want those documents so I can compare what you recommended to what OMB said should have a higher priority.

Attorney General HOLDER. I am not sure what position the——

Senator GRASSLEY. They are called "passbacks."

Attorney General HOLDER. Yes, I am not sure what the administration position has been on that, but I would think that draft OMB correspondence between an agency and OMB about decisional

matters would be the kinds of material that we would seek to protect.

Senator GRASSLEY. Let me end, because my time is up, with just a statement, that I heard in an interview that you said for the people that voted for the contempt effort against you that you did not have respect for people like that. I want you to know that I am extremely disappointed. I voted for you based on the fact that—giving you the benefit of the doubt and disregarding previous controversies. It seems to me that your recent comments suggest a level of partisanship and disregard for those with whom you disagree that is quick shocking. And I do not think you should have said it, and I think you owe the people an apology.

Thank you.

Attorney General HOLDER. Well, let me just say that what I do not respect was the process. It was an effort that had a predetermined result. Whatever we did in good faith was met by, I think, political determinations, and that is a process that I do not respect, to be honest with you. And the people who pushed it are people who, as I said before—I will stand by that. The people who pushed that I do not respect because I do not think it was consistent with the way in which other Cabinet members who had similar kinds of issues with Congress were treated. When the gun lobby decided to score that vote, then it was clear how the vote was going to turn out. And it became something other than what it was portrayed to be, and that is a process that I simply do not respect.

Senator GRASSLEY. The House probably would not have even taken it up if you had answered the questions and given me the documents I wanted.

Attorney General HOLDER. Well, history has shown us that in the past there had been a much greater period of time for those kinds of negotiations to occur. If you look at what happened with Harriet Miers and other people, Josh Bolten, as opposed to what happened to Eric Holder, you will see the period with which we were given to try to respond to and negotiate was much, much shorter. There was a desire to get to a certain point, and they got there.

Chairman LEAHY. Well, as Chairman, I might say I agree with your answer.

Senator Klobuchar.

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

Thank you, Attorney General Holder, for being here once again. I think I told you the other day that Senator Lee and I are heading up the Antitrust Subcommittee, and we are holding a hearing on the American Airlines-USAir merger. I know you cannot talk about the details of that as it is in the Justice Department right now. But I am just wondering your views on—we have talked about some of the areas where we will see more potential action in antitrust, whether it is transportation, whether it is in the health care industry, whether it is with communications, where there has always been a lot of action in that area, and just what direction do you see the Department taking with antitrust.

Attorney General HOLDER. Well, I think you have actually hit many of the areas that I think are going to be a focus for us: communications, without talking about anything specific, we have cer-

tainly spent time and I think we will have to continue spending time with regard to airline mergers; health care—all things that impact the American consumers.

What we have tried to do in the Antitrust Division is to focus our efforts in such a way that we benefit the American people with regard to lower prices, more competition, and wherever we find—in the agricultural field, for instance, wherever we find instances that there is collusion or inappropriate activity being taken that will have a negative impact on the American consumer, we will be there.

Senator KLOBUCHAR. Very good. Well, I look forward to that hearing.

The second thing I was going to talk to you about, which we also discussed, was the issue of metal theft, and this is something that not everyone—it is not on the tip of their tongue, but I have seen increases in this all over my State. Senator Hoeven and I just met at an electric company in Moorhead, Minnesota, about this. Senator Graham and I have a bill, along with Senators Schumer and Hoeven, to up some of the penalties when copper and other metals are stolen from critical infrastructure. We are seeing nearly $1 billion in damage a year in costs for our country.

The most striking example was just this past year, 200 Bronze Stars were stolen from a grave in Isanti County, Minnesota, from the graves of veterans. And people are getting very desperate to steal this metal. Electric companies have been broken into ten times in Icerick and St. Paul that experienced hundreds of thousands of dollars of damage simply by having one pipe stolen, and one of the fears is that it is actually dangerous because homes have blown up, people have died, because taking one pipe that may be only worth a couple thousand dollars can do millions of dollars in damage. And I just wanted you to comment on that.

Attorney General HOLDER. Yes, as I said to you in the call that we had, this is something that had not really entered my consciousness. I have actually had a chance to talk to at least a couple of people in the Department who indicated that what you said was, in fact, true, that this is a growing problem, and it is one that I think we need to devote resources to, attention to.

Again, this was not something that I was, frankly, aware of, but given the nature of what people have told me within the Department, which is the potential harm not only in the theft of material but, as you were saying, the problems that the theft actually precipitates—houses blowing up, gas lines being ruptured. It is a new problem that we are going to have to focus on.

Senator KLOBUCHAR. Just briefly on this, I just wanted you to know that I am continuing to work on drug courts. Fellow Minnesotan, former Congressman Jim Ramstad talked about this in the last Congress, about how drug courts have transformed the way we handle criminal cases. They are incredibly important. As a prosecutor, I know you cared about this. We had a really groundbreaking court and have one in Hennepin. And I was pleased to see that Federal courts are beginning to embrace drug courts for low-level, nonviolent offenders. The New York Times had a story last weekend about Federal judges instituting drug court programs in

California, Connecticut, Illinois, New Hampshire, Virginia, and Washington. If you want to just comment briefly on that.

Attorney General HOLDER. I think that we have to try to use drug courts to a greater extent than we do. I think that they have generally proven to be successful. What we want to try to do is to use the criminal justice system in an appropriate way. Sometimes people have to go to jail. A great number of people, though, simply need to kick their habit. And if we can use the criminal justice—the penalties of the criminal justice system as a hammer to keep that over people's heads to force them into and keep them in treatment, we have seen really amazing success rates and a much lower recidivism rate, and that I think is the key. So it ultimately saves us money over the long haul, reduces the crime rate, and is something that I think is worthy of greater support.

Senator KLOBUCHAR. In our State, we have one of the lower incarceration rates in the country, and we use a lot of drug courts, and we also have for our metro area one of the lower crime rates. And so I think it is really important, and I hope that you will support and the administration will support continued funding. We are always having the issues in Congress, but we do have bipartisan for it.

The last thing——

Attorney General HOLDER. That is really one of those areas where we have to understand that whatever we invest up front we are going to reap more money in savings down the road. It is clear, the scientific evidence is clear.

Senator KLOBUCHAR. Exactly. And the last thing I wanted to mention is you and I were both in Selma, Alabama, last weekend for that incredible weekend, and part of the weekend, of course, was the white police chief in Montgomery handing over his badge to Congressman Lewis, saying that he apologized for what had happened 48 years ago, that the police department had not adequately protected Congressman Lewis or those marchers. You gave a beautiful speech on Sunday, and I wanted to just follow up with some questions about that.

We know the Supreme Court recently heard the Voting Rights Act case. Can you talk about the implication of a Court decision for voting rights?

Attorney General HOLDER. Yes, I mean, I cannot comment too much. It is a pending case. But I will say that, you know, the United States is—we are in a different place. The South is a different place. And yet the need for Section 5 is still evident.

If you look at the cases that we brought in the last 18 months or 2 years or so, in Texas, South Carolina, Florida, the ability to preclear things that those States wanted to do, the findings made by the three-judge panels that supported the Justice Department's position is all an indication that, given all the progress that we have made, problems persist and that Section 5, which is a critical, critical part of the Voting Rights Act, should remain a tool that we have the ability to use.

Senator KLOBUCHAR. Also, just to note, I am reintroducing the same-day registration bill. You know, we have that in Minnesota, and we have been able to have elections with the highest, if not one of the highest voter turnouts in the country repeatedly. And I

do not know if you have looked at that as a long-term solution to some of these issues with voting rights.

Attorney General HOLDER. I do think that is right. We need to try to expand the number of people who participate in voting, make it as easy as we can, being mindful of the potential for fraud, but to come up with ways in which—is it same-day, registration, portable registration, expanding the number of days on which people can cast ballots? That is the thing that defines this Nation, our ability to vote, our ability to shape the Congress that represents us, on the State level as well. That is how people decide the future of our Nation and efforts to restrict the vote have to be fought, efforts to expand the vote, the ability of people to vote have to be supported.

Senator KLOBUCHAR. Thank you very much, Attorney General. Thank you for your good work.

Attorney General HOLDER. Thank you.

Chairman LEAHY. Thank you.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thanks, General Holder, for joining us.

Last month, I joined a bipartisan group of Senators in sending a letter to your Department asking for any and all memoranda that you might have that seek to provide legal justification or a legal framework for making decisions regarding the targeted killing of American citizens using drones.

The letter noted that senior intelligence officials have indicated that your Department's Office of Legal Counsel had prepared some written but non-public legal opinions that articulate the basis for that authority. And notwithstanding that request, neither I nor other members of this Committee have received the OLC memoranda.

Now, somebody indicated earlier during this meeting that they thought that that memo, that the OLC memo, might have been leaked. It is not my understanding that that has been. What has been leaked is something that has been released by NBC News—I know that only because it carries a heavy NBC News watermark on it—as a Department of Justice white paper on the issue, which appears to provide a narrower, perhaps more condensed legal analysis than what is available in the DOJ Office of Legal Counsel memoranda.

So I want to turn back to the white paper in a minute, but first on the OLC memoranda, do we not you think that this Committee has an important oversight role over the Department of Justice's role in this analysis?

Attorney General HOLDER. Yes, I do, and I heard the Committee express the desire to see these memoranda, and I want to be careful here, but I will be bringing that to the attention of the appropriate people within the administration. I am not unsympathetic to what you are saying.

Senator LEE. Okay. You are the Attorney General, and I assume that they will respect what their boss has to say. Are you saying that you will make that available to us as Members of the Judiciary Committee?

Attorney General HOLDER. What I am saying is I will bring that desire and my view to those who are in a position to make those kinds of determinations. I am only one of those people.

Senator LEE. Right. I understand. I understand you do have clients within the Government and you have to consult with them.

Attorney General HOLDER. Right.

Senator LEE. I would strongly urge you to make that pitch quickly and as forcefully as you can. I think that is important for us to review that as Members of the Judiciary Committee, which has oversight over your Department.

One of the reasons why I think that is so important is that, as I have reviewed this Department of Justice Office of Legal Counsel—actually, we are not sure where exactly within the Department this memorandum came from, but the white paper, as I review that, it actually raises more questions in my mind than it answers.

The gist of this white paper, as I see it, says that the U.S. Government may, in fact, target and kill American citizens using drones where there is an imminent threat, an imminent threat of a national security sort to the United States, its citizens, its installations and so forth.

Now, that is a fairly familiar standard. It is a somewhat familiar standard in the law, and yet as you read on in this white paper, it becomes apparent to me that the definition of "imminence" used in this paper is different than almost any other definition I have seen.

In fact, on page 7 of the white paper, the white paper goes so far as to suggest that imminence does not really need to involve anything imminent. Specifically, it says that this condition, that of imminence, that an operational leader present an imminent threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.

So I have to ask, Mr. Attorney General, what does "imminence" mean if it does not have to involve something immediate?

Attorney General HOLDER. Yes, I think part of the problem is what you talked about in the previous question. I think that white paper becomes more clear if it can be read in conjunction with the underlying OLC advice. In the speech that I gave at Northwestern, I talked about imminent threat, and I said that it incorporated three factors: a relative window of opportunity to attack, the possible harm that missing the window would cause to civilians, and, third, the likelihood of heading off all future disastrous attacks against the United States. So that is a part of it.

But I do think, and without taking a position one way or the other, it is one of the strongest reasons why the sharing of the opinions, the advice, the OLC advice with this Committee makes sense.

Senator LEE. Because you can understand my concern here. As a lawyer who really knows a lot about these things, you understand how that standard, if that were the standard, could be manipulated, would give Americans a lot of pause. So another reason for me to strongly encourage you to make that available to us.

There are other aspects of the white paper that also trigger this concern, and I would like to ask you about those as well to find out whether your response to that is the same. The white paper notes that the President must find—in order for a drone attack on a U.S. citizen to occur, that the President must make a finding that capture of the individual is not feasible. But then the white paper goes on to state that capture is by operation of the memo's analysis not feasible if it could not be physical effectuated during the relevant window of opportunity.

Now, the paper makes no definition, makes no attempt to define what the "relevant window of opportunity" is, meaning, I suppose, that it is whatever the President decides that it is. And you understand how that could be cause for concern? And is that not fraught with opportunities for manipulation?

Attorney General HOLDER. Well, I think there is a certain degree of objectivity there in the sense that people become potentially capturable in overseas venues at certain times, and they become—that window of opportunity ceases to exist when perhaps they move or we lose track of them. So that I tend to understand.

Senator LEE. Okay. So do I understand you saying that the Office of Legal Counsel memorandum, which we have not had the opportunity to review, would also provide further clarification on this point and would answer some of the questions we have about the vagueness or the overbreadth of that standard?

Attorney General HOLDER. That one I am not sure. I am just not sure.

Senator LEE. Okay. Let me just ask one other question, another unrelated point. In the last few months, Members of your Department, including Assistant Attorney General Perez and yourself, have stated that the Department of Justice is considering certain reforms to the voter registration system. For example, Assistant Attorney General Perez stated that it should be the Government's responsibility to automatically register citizens to vote by compiling from data bases that already exist a list of all eligible residents in each jurisdiction.

These statements and others like them can be read to suggest that there might be an increased role for the Federal Government to play in voter registration. Now, voter registration, as you know, is something that has historically been carried out exclusively by the States, and so that raises some federalism-related concerns with regard to the States' traditional role in running elections and in managing voter registration.

So is it the Department's view that it has current statutory authority to promulgate regulations that would centralize voter registration in the Federal Government or otherwise increase the Federal Government's role in voter registration?

Attorney General HOLDER. I would not say centralize. You might think of the Department of Justice or the Federal Government trying to incentivize States to come up with mechanisms so that they would themselves come up with the thing that Tom had described. This is something that is a primary responsibility of the States, but I think the Federal Government can help the States in the carrying out of that responsibility.

Senator LEE. And you would agree that the Federal Government lacks existing statutory authority to centralize voter registration?

Attorney General HOLDER. To centralize it, yes. On the other hand, there are statutes that allow the Federal Government to become involved in the election processes that are normally carried out by the States.

Senator LEE. Thank you, Attorney General, and thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Coons.

Senator COONS. Thank you, Chairman Leahy, and thank you, Mr. Attorney General. Great to be with you again.

Let me just start with one question that has been fairly uniform across this entire Committee today, from Chairman Leahy to Senator Lee, who was just asking about it, just about the targeted killing question. I share the frustration and concern expressed by many other Senators about transparency on targeted killings, and I have just one specific question on that, if I might, before we turn to other topics.

Would you, as we go forward, support any form of judicial review in this context, including the limited sort that we have in FISA? Do you think that would move this forward?

Attorney General HOLDER. I think that is something that is worthy of conversation, consideration. I would want to make sure that the inclusion of a court did not, for instance, have some kind of an inhibiting impact in the operations. But I think as John Brennan testified during his confirmation hearing that that is something worthy of consideration, something that we ought to think about potentially making a part of the decisionmaking process.

Senator COONS. Thank you. I look forward to working with you on that. You can hear almost unanimous concern about transparency and wrestling with how to move forward here in a way that protects both our constitutional liberties and our security as a Nation.

We just spent a great weekend together, in part in Selma. It was wonderful to meet your wife, Dr. Sharon Malone, and to hear in Tuscaloosa her family's role in an important piece of American history. And as we sit wondering what will happen to Section 5 of the Voting Rights Act, I am also concerned about Section 5 of the National Voter Registration Act, the so-called motor-voter act, something that is not currently under review.

I am hoping that the Department is going to take up its enforcement obligation here more actively. My sense is that there has been very few enforcement actions on motor-voter, and it is something that could, I think, make a positive contribution to registration and to voter participation.

Is the reason that there really has not been an active DOJ enforcement trajectory on motor-voter a resource issue? We have heard from you about sequester and other constraints. Or are there things that we need to be doing to ensure that this critical piece of the architecture of voting rights in this country is used more actively?

Attorney General HOLDER. Well, we have taken certain actions. We have filed statewide lawsuits against Rhode Island, as well as

Louisiana. There is something going on in Florida. These are matters that I am not sure that we are underenforcing it. I am sure you hear this from all of the agencies that appear before you—we could use more when it comes to resources. It is a vital tool to increase the number of eligible citizens who can vote, to make sure that registration rolls are accurate in Federal elections. This is something that we want to be more involved in, and I think one of the things, if I talk to Tom Perez in the Civil Rights Division, my guess would be he is going to tell me, "We would like to do more, Eric, but I need more people." I think that is probably what he would say.

Senator COONS. Well, we would certainly be happy to have that conversation given the critical importance of voting. And as you have discussed with other Members of this panel today, should there be a change in the status of the Voting Rights Act, Section 5 in particular, I would love to work with you on whether there is room going forward for expedited proceedings or for special ways to make sure that voting cases still get heard and some either reauthorization or strengthening or replacement for the Voting Rights Act.

Let us talk, if we can, about another area where I think resources is a critical issue, and there may be a solution. In intellectual property—I come out of manufacturing—manufacturing relies on trade secret protection as much as on patenting for critical steps in manufacturing, and there has been just a barrage of assaults and theft of American intellectual property. A firm called Mandiant recently released a report documenting just widespread—and you have spoken to this—theft of American intellectual property. But the number of prosecutions by DOJ around trade secrets has been very light, and I understand the limitations of resources.

Would a private right of action, a Federal private right of action help accelerate perhaps some of the assertion of rights and the ability to pursue justice on behalf of American manufacturers and inventors?

Attorney General HOLDER. I think that is certainly something we should talk about, we should discuss. My instincts take me in a direction I think where you are, that perhaps that is something that we should do. What I would like to do is maybe work with you, have the appropriate people from the Department sit down and meet, perhaps with your staff, and talk about that possibility. But I do think that the theft of intellectual property, trade secrets has a devastating impact on our economy, threatens our national security, and is worthy of our attention.

This is a problem that is large but is getting larger and is something—as you look over the horizon, this is an area where we are going to have to devote more attention as a Nation.

Senator COONS. I am glad to hear you say that because I think all of us are on notice that there is probably the single greatest widespread theft in human history going on at the moment, and it really does have a negative and cumulative impact.

Let me point to a few programs that I think have significant positive impact and with a modest investment of Federal resources have a very positive impact on public safety. We were supposed to be having a session of the Senate Law Enforcement Caucus today

to hear testimony from Kentucky and Delaware about the Justice Reinvestment Initiative. We flew some people in. Unfortunately, the inclement weather has led to its cancellation. I look forward to another session. But it is a place where bipartisan bills at the State level have led with Federal partnership to sort of critical catalytic investments in improving criminal justice systems.

The Bulletproof Vest Partnership is something I value highly. I had a police officer from Dover, Delaware, here a number of months ago who was shot twice at close range in the chest and survived. Two officers in the New Castle County courthouse in the county where I used to serve, their lives were saved very recently by bulletproof vests. We should be reauthorizing this program, and I look forward to working with you on that.

The last question, if I could, in the same vein. The Victims of Child Abuse Act and the Child Advocacy Centers that it funds that you are familiar with I think are an enormous resource for law enforcement and to prevent the revictimization by children who have been traumatized by allowing them to be interviewed once in a way that is admissible as evidence, in a way that is appropriate, and that has all the relevant folks there and present. And the one I visited at A.I. Children's Hospital in New Castle County, while the circumstances that lead to these interviews are tragic, the resource for our community and our law enforcement community is terrific.

I was surprised that it was zeroed out last year, and I am hoping that I could rely on your support for restoring funding to this small but cumulatively powerful program in the Fiscal Year 2012 budget. Any thoughts on the future of Child Advocacy Centers?

Attorney General HOLDER. Well, I was one of the people who started the Children's Advocacy Center here in Washington, DC. I know the positive impact it has on child victims of crime. The decision to eliminate this funding was a difficult one. Deficit issues, restoring fiscal sustainability were all a consideration.

The Office of Justice Programs, as I have talked to them after I spoke to you, has come up with ways in which they think they can prioritize some grantmaking and training to help in that regard. But I think that as we look at the budget for the next year, given what we get from the Advocacy Centers and the relatively small amount that is involved, this has to be a part of the next budget. I am not satisfied with where we are now with regard to the present budget. I think that was a mistake.

Senator COONS. Well, thank you, Mr. Attorney General. I certainly look forward to working with you. As a member of the Budget Committee, I think all of us here recognize that we have forced far too many of the cuts we have made in the last 2 years just in the narrow area of domestic discretionary, and it is having significant negative impact on things like criminal justice, strengthening our communities, investment in infrastructure, R&D, and education, and I look forward to finding a broader solution, and I am really grateful for your service.

Thank you.

Attorney General HOLDER. Thank you.

Senator COONS [presiding]. Senator Grassley.

Senator GRASSLEY. I have had my round. I would like to ask one more question on a second round.

Senator COONS. Senator Blumenthal.

Senator BLUMENTHAL. Thank you.

Good morning, Attorney General Holder. Thank you for being here. Thank you for your leadership of the Department of Justice in areas that are so important—voting rights, DOMA, and other areas that are critical to the future of justice in this country. And I want to thank both you and the President for your leadership on gun violence prevention and particularly his and your personal commitment to the people of Newtown, who are still grieving and hurting, and your personal involvement in trying to ease those continuing traumas that still affect them as recently as yesterday in our telephone conversation. And I want to focus for the moment on gun violence prevention.

As a law enforcement professional, not just as Attorney General but one who has been a judge and a prosecutor, this whole idea of better enforcement of existing laws is one that we both agree ought to be the goal, and it always is for any prosecutor. And yet enforcement of some of these laws is impeded by gaps in those laws, such as the absence of background checks on firearms, which now enable about 40 percent of all firearms purchases to go without any check whatsoever. You would agree with that, wouldn't you?

Attorney General HOLDER. Yes. There are loopholes, as we have come to describe them, that make the enforcement of existing laws extremely difficult and render those existing laws not nearly as effective as they might otherwise be.

Senator BLUMENTHAL. And those laws now prohibit purchases of firearms by categories of people—convicted felons, fugitives, drug addicts and abusers, and domestic violence abusers—purchases of firearms and ammunition. Both firearms and ammunition. Right now there are no background checks as to purchases of ammunition, none whatsoever. And as a matter of common sense as well as law enforcement professionalism, I think you would agree that those laws are better enforced with background checks as to ammunition purchases. Would you agree?

Attorney General HOLDER. Yes, I think that I would like to discuss this with you some more. One of the concerns I have is a resource concern. I think that theoretically what you are talking about makes a lot of sense—not even theoretically. I do not mean to diminish it because it is more than theoretical. I think that would have a very real positive impact. My only concern is the NICS system, I worry about it potentially being overburdened and making sure that we would have the resources to do that.

Senator BLUMENTHAL. And just by way of background, you know, I have asked two of the U.S. Attorneys who have been active and aggressive enforcers of these laws—U.S. Attorney Heaphy, for example—whether these laws can be enforced effectively without background checks on ammunition, and to quote both of us, "Without a background check now, do you have any effective way of enforcing that law, the prohibition on ammunition purchases?" His answer: "No."

So when you are asked by my colleagues, "Why are you not you more aggressively enforcing these laws? Why do we not we have more prosecutions?" the very simple answer is that there is no real

way to enforce these bans on ammunition purchases or firearms purchases unless there are background checks.

And I understand and recognize and sympathize with your point about resources, but if we are serious about these gun violence prevention laws that keep ammunition and firearms out of the hands of criminals, we need to strengthen and bolster that NICS system so that we make these laws something more than just a charade and a feel-good set of words on a statute.

Attorney General HOLDER. You are absolutely right, Senator, and that is actually part of the comprehensive plan that the President, the administration has proposed to devote more resources to make greater use of the NICS system and to expand—to make more resources available so that it can be used in a way to support existing laws, because those people who constantly say you have got to enforce the laws do not necessarily always give us the tools to enforce those very laws.

Senator BLUMENTHAL. Exactly. And I want to again thank you and the President for that commitment on resources, and also say that as the major proponent of the background check provision for ammunition, I am looking for ways to modify this proposal so as to perhaps make it voluntary and give licensed dealers the access that they need to the system. As you know, right now they are barred from checking. They see somebody come in, a potential Adam Lanza, who is buying hundreds of rounds of .233-caliber ammunition, they have no way of checking whether he is a drug abuser, a domestic abuser, a convicted felon, a fugitive, anyone in those prohibited categories. They simply are at a loss for basic information to try to protect the public. The best intentions cannot help them help you enforce the law.

So I am hoping that we can work together on this provision. I repeat, I am sympathetic to the resource issue. If it were my say alone, those resources would be available right now. And if you——

Attorney General HOLDER. Let us see if we can work something out then, so that you have that ability.

Senator BLUMENTHAL. Thank you. Let me move to another subject, and I really appreciate your answers on that one.

On wrongful foreclosures, among particularly military mortgage holders, there have been recent reports, most recently just a few days ago in The New York Times, 700 members of the military had homes seized, and other borrowers who were current on their mortgage payments, also homes seized—those improper evictions dwarfing the numbers that were previously known. A sign of a larger problem, a sign that the recent settlement may have been based on incorrect, perhaps untruthful information, in my view more than ample basis for an investigation by the Department of Justice under either the RICO statute or wrongful, improper statements under Federal law punishable criminally.

I would like your commitment, again, to work with me and others here on the possibility of an investigation based on those disclosures that undermine the good faith and fairness of that settlement and the Government's involvement in it.

Attorney General HOLDER. I will make that commitment. When we look at what I saw there with regard to servicemembers, I did a tape, I think last week, for something that is for veterans to

make them aware of fraud, more basic fraud that they face that too often goes unreported by them for a whole variety of reasons, to try to encourage them to share information up the chain of command and also to make sure that there is a mechanism so that from the Defense Department to the Justice Department we are made aware of trends that might exist along the lines of the ones that you are describing, and then we will become involved. So I will work with you on that.

Senator BLUMENTHAL. Thank you.

And one final area that I think is and should be of interest to you. Sexual assault in the military is prosecuted and punished under its own system, and yet it is a predatory, criminal act that, in my view, should be punished with a severity and aggressiveness that is lacking right now. And as a member of the Armed Services Committee, I am seeking to help increase the completeness and fairness of this system to protect men and women from sexual assault, sometimes the most severe sexual assault imaginable. And you have resources, a perspective personally as a prosecutor, obviously the best prosecutors and investigative agency in the whole country, and I would again respectfully ask for your commitment that you will help us on the Armed Services Committee with your expertise and your commitment to fairness and aggressive prosecution of these laws.

Attorney General HOLDER. Yes, but those are primarily the responsibility of the Defense Department.

Senator BLUMENTHAL. Right.

Attorney General HOLDER. Secretary Panetta certainly focused attention on that. I expect that Secretary Hagel will as well. But to the extent that we at the Justice Department can help in that effort, we want to do all that we can.

You know, I think about the young people who put their lives on the line in service to our Nation, young women in particular, and look at the numbers that you see repeatedly year after year, and that is an extremely disturbing thing to think that you volunteer for your Nation, and as a result of that, you become the victim of a sexual assault, and that is simply not acceptable.

Senator BLUMENTHAL. And I want to make clear that my asking for your assistance is not to in any way disparage or denigrate the good faith and efforts of Secretary Hagel and the Joint Chiefs and all of the military leadership to making this system work better. They are, in my view, thoroughly committed to that goal.

Thank you.

Attorney General HOLDER. Thank you.

Chairman LEAHY [presiding]. Thank you. I would note, too, it has been my experience since he has been Attorney General, that anytime I have called Attorney General Holder on any issue, we have been able to contact him almost immediately, and I do appreciate that. I appreciate the Senators who have come here today. I realize we are under a horrendous snow condition. I think it is up to half an inch now.

[Laughter.]

Chairman LEAHY. I commented to somebody that, of course, Senator Klobuchar, coming from Minnesota, and Senator Blumenthal and Senator Grassley know what real snow is. I heard a weather

report at home where they said we had—and some will remember this—the weather report was we expected a dusting of snow, no more than 5 or 6 inches, and then, "In other news today. . ." Of course, 5 or 6 inches down here, they would be interrupting a Presidential press conference.

Senator Grassley said he had one more question, and then we will wrap up.

Senator GRASSLEY. This will not take 7 minutes. And I did not run over 7 minutes like we have had several people here run over 3 minutes.

On the issue of bank prosecution, I am concerned that we have a mentality of "too big to jail" in the financial sector of spreading from fraud case to terrorist financing and money-laundering cases, and I cite HSBC. So I think we are on a slippery slope. So then that is background for this question.

I do not have a recollection of DOJ prosecuting any high-profile financial criminal convictions in either companies or individuals. Assistant Attorney General Breuer said that one reason why DOJ has not brought these prosecutions is that it reaches out to "experts" to see what effect the prosecutions would have on the financial markets.

So then on January 29th, Senator Brown and I requested details on who these so-called experts are. So far we have not received any information. Maybe you are going to, but why have we not yet been provided the names of the experts that DOJ consults as we requested on January 29th? Because we need to find out why we are not having these high-profile cases. And I have got one follow-up. Maybe you can answer that quickly.

Attorney General HOLDER. We will endeavor to answer your letter, Senator. We did not, as I understand it, retain experts outside of the Government in making determinations with regard to HSBC.

If we could just put that aside for a minute, though, the concern that you have raised is one that I, frankly, share. And I am not talking about HSBC now because maybe that might not be appropriate. But I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy, and I think that is a function of the fact that some of these institutions have become too large. Again, I am not talking about HSBC. This is just a more general comment. I think it has an inhibiting influence, impact on our ability to bring resolutions that I think would be more appropriate. And I think that is something that we all need to consider. So the concern that you raised is actually one that I share.

Senator GRASSLEY. Well, then, do you believe that the investment bankers who were repackaging and selling bad mortgages as AAA-rated were not committing a criminal fraud? Or is it a case of just not being aggressive and effective enough to actually have the information to prove that they did something fraudulent and criminal?

Attorney General HOLDER. We have looked at those kinds of cases, and I think that we have been appropriately aggressive.

These are not easy cases necessarily to make. You sometimes look at these cases, and you see that things were done wrong. And then the question is whether or not they were illegal. And I think the people in our Criminal Division, the people in our U.S. Attorney's Office in the Southern District of New York, for instance, have been, as aggressive as they could be, brought cases where we think we could have brought them.

I know that in some instances that has not been a satisfying answer to people, but we have, as I said, been as aggressive as I think we could have been.

Senator GRASSLEY. If you constitutionally can jail a CEO of a major corporation, you are going to send a pretty wide signal to stop a lot of activity that people think they can get away with.

Thank you very much.

Attorney General HOLDER. You are absolutely right, Senator. You know, the greatest deterrent effect is not by the prosecution of a corporation, although that is important. The greatest deterrent effect is to prosecute the individuals in the corporation who are responsible for those decisions. We have done that in the UBS matter that we brought, and we try to do that whenever we can. But the point that you make is a good one.

Chairman LEAHY. Thank you.

Again, I appreciate you being here. I will probably see you at the signing of the Leahy-Crapo Violence Against Women Act.

Attorney General HOLDER. Tomorrow.

Chairman LEAHY. And we had to leave out for procedural reasons the U-visas that are important to law enforcement. And I hope you will work with us as we do immigration reform, because that would complete the whole legislation. It would protect victims, but it also would help law enforcement have a better chance of prosecuting people who have shown violence against women.

Attorney General HOLDER. Yes.

Senator KLOBUCHAR. Mr. Chairman, thank you for your leadership on that. I just want to reiterate how important that is.

Chairman LEAHY. You were there every step of the way, and the fact that we were able to get such strong bipartisan help—and I know that the Senator from Minnesota talked to a lot of people on the other side of the aisle. And it was nice to actually have Senators do things together on both sides of the aisle, and the country is better off for it.

We stand in recess.

[Whereupon, at 12 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Oversight of the U.S. Department of Justice"

Wednesday, March 6, 2013
Dirksen Senate Office Building, Room 226
9:30 a.m.

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
Washington, DC

PREPARED STATEMENT OF HON. ERIC H. HOLDER, JR.

Department of Justice

STATEMENT OF

ERIC H. HOLDER, JR.
UNITED STATES ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING

"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"

PRESENTED ON

MARCH 6, 2013

Testimony of Attorney General Eric H. Holder, Jr.
before the U.S. Senate Committee on the Judiciary
Wednesday, March 6, 2013 Washington, D.C.

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee: thank you for inviting me to appear before you today to discuss the important work of the Department of Justice. I appreciate this opportunity to provide an overview of the Department's recent achievements, and the remarkable accomplishments that my colleagues – the 116,000 dedicated men and women who serve in Justice Department offices around the world – have made possible. I look forward to working with you to realize the goals and priorities we share – and to explore strategies for taking our critical efforts to a new level.

I'm proud to report that the Department has made tremendous progress in combating violent crime, battling financial fraud, upholding the civil rights of all, safeguarding the most vulnerable members of society, and protecting the American people from terrorism and other national security threats. We've worked to forge and strengthen essential partnerships – with international allies, as well as federal, state, local, and tribal law enforcement leaders – that are enabling us to carry out the Department's missions more efficiently, and effectively, than ever before. And we are firmly committed to engaging with members of the public – and members of this Committee – to build on the progress that's been achieved, and to continue making a positive difference on behalf of the American people whom we're privileged to serve.

Particularly since last December's horrific tragedy in Newtown, Connecticut, the urgency of our public safety efforts has come into sharp focus. And the need to take decisive action to confront the epidemic of gun violence that touches every community in this country – and steals too many promising futures every day – has become increasingly clear. In response, earlier this year, I joined with Vice President Biden and a number of my fellow Cabinet members to develop common-sense recommendations to reduce gun violence, keep deadly weapons out of the hands of those prohibited from having them, and make our neighborhoods and schools more secure. In January, President Obama announced a comprehensive plan that includes a series of 23 executive actions that the Justice Department and other agencies are working to implement, and a range of common-sense legislative proposals.

This morning, I'm pleased to join the President, the Vice President, and countless Americans in calling on Congress to enact legislation addressing gun violence – including

measures to require universal background checks, impose tough penalties on gun traffickers, protect law enforcement officers by addressing armor-piercing ammunition, ban high-capacity magazines and military-style assault weapons, and eliminate misguided restrictions that require federal agents to allow the importation of dangerous weapons simply because of their age. I'm also pleased to echo the President's call for the Senate to confirm Todd Jones as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives – a critical Justice Department component that's been without a Senate-confirmed leader for six years.

I recognize that many of you have been working for some time to build a constructive, national dialogue on the need to take such steps to reduce gun violence. I am eager to join you in continuing this discussion today. And I am confident that, with the leadership of the dedicated public servants in this room, we can work together to bridge longstanding divides and achieve the results that everyone in this country, and especially our young people, deserve.

Of course, in addition to the Administration's efforts to reduce gun violence, my Justice Department colleagues and I remain focused on a broad range of programs and initiatives designed to prevent gun-, gang-, and drug-fueled violence in all its forms; to implement innovative strategies for becoming both smarter *and* tougher on crime; and to move both aggressively and fairly in our vigorous enforcement of federal laws.

Thanks to the outstanding work of countless Department employees and law enforcement partners over the past four years, these efforts have yielded extraordinary results. And nowhere is this clearer than in our work to protect America's national security. Since 2009, the Department has brought cases – and secured convictions – against numerous terrorists. We have identified and disrupted multiple plots by foreign terrorist groups as well as homegrown extremists. And we've worked to combat emerging national security threats, such as cyber intrusions and cyber attacks directed against our systems and infrastructure by nation states and non-state actors, including terrorist groups. Last summer, the Department created the National Security Cyber Specialists network to spearhead these efforts. The network is comprised of prosecutors and other cyber specialists across the country who will work closely with the FBI and other partners to investigate malicious cyber activity, seek any necessary cooperation, and, where appropriate, bring criminal prosecutions as part of our government-wide effort to deter and disrupt cyber threats to our national security.

Beyond this work, the Department has taken significant steps to ensure robust enforcement of antitrust laws, protect the environment, crack down on tax fraud schemes, and address a range of financial and health care fraud crimes. And this work is paying dividends. In cooperation with the Department of Health and Human Services and others, over the last fiscal year alone, we secured a record $4.2 billion in recoveries related to health care fraud and abuse – bringing the total recovered under this Administration to nearly $15 billion. As a result of our

commitment to achieve justice on behalf of the victims of the 2010 *Deepwater Horizon* oil spill – one of the worst environmental disasters in history – in January we secured a guilty plea and a record $4 billion in criminal fines and penalties from BP; and in February, the court approved a settlement requiring Transocean to pay $1.4 billion in fines and penalties, including a civil

penalty of $1 billion – the largest civil penalty awarded in an environmental case. Last year, MOEX agreed to pay $90 million in civil penalties and to provide for acquisition of projects to restore natural resources impacted by the oil spill. On February 25, we commenced trial of our civil claims against BP and others. And through the President's Financial Fraud Enforcement Task Force – which I've been honored to chair since its creation in 2009 – we're working closely with federal, state, and local authorities to take our fight against fraud targeting consumers, investors, and homeowners to new heights.

In fact, over the last three fiscal years – thanks to the work of Task Force leaders and partners – we have filed nearly 10,000 financial fraud cases against nearly 15,000 defendants – including more than 2,900 mortgage fraud defendants. Just last month, the Department filed a civil suit against the credit rating agency Standard & Poor's (S&P) – seeking at least $5 billion in damages for alleged conduct that goes to the heart of the recent economic crisis.

But all of this is only the beginning. In addition to our work to cut down on fraud, we're striving to boost the capacity of our law enforcement allies; to target federal resources to the areas where they're most needed; and to provide access to the tools, training, and lifesaving equipment that officers need to do their jobs as safely and effectively as possible. We're providing unprecedented levels of support to the brave men and women who risk their lives to keep us safe. And we're working closely with them to promote the highest standards of integrity across every agency, department, and sheriff's office.

This commitment – to integrity and equal justice under law – has also driven the Department's Civil Rights Division in its efforts to address bias, intimidation, and discrimination – from America's housing and lending markets, to our schools, workplaces, border areas, and voting booths. Since 2009, the Division has filed more criminal civil rights cases than ever before – including record numbers of human trafficking and police misconduct cases. We've led national efforts to implement protections like the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act – which significantly improved our ability to achieve justice on behalf of Americans who are targeted because of their gender, sexual orientation, gender identity, or disability. We are fighting to preserve the principles of equality, opportunity, and justice that have always shaped our nation's past – and must continue to determine our future.

In the days ahead, as Congress considers ways to make fair and effective changes to America's immigration system, these same principles must guide efforts to strengthen our borders while remaining true to our history as a nation of immigrants. These

principles will continue to inform the Justice Department's actions, as we fairly adjudicate immigration cases, enforce existing laws, and hold accountable employers who knowingly hire undocumented workers, engage in illegal and discriminatory business practices, and exploit the system in ways that undermine competitiveness and the well-being of those who seek refuge on our shores.

This morning, as we look toward the future of these efforts, my colleagues and I stand ready to work with leaders from both parties to help achieve lasting reform; to strengthen our ability to keep everyone in this country – and especially our young people – safe; and to move forward in protecting the American people and achieving the priorities we share. But I must note that our ability to complete this work – and continue building upon the progress I've just outlined
– will be severely hampered unless Congress adopts a balanced deficit reduction plan and ending the untenable reductions that last week set in motion a move to cut over $1.6 billion from the Department's budget in just seven months' time.

As we speak, these cuts are already having a significant negative impact not just on Department employees, but on programs that could directly impact the safety of Americans across the country. Important law enforcement and litigation programs are being disrupted. Our capacity – to respond to crimes, investigate wrongdoing, and hold criminals accountable – has been reduced. And, despite our best efforts to limit the impact of sequestration, unless Congress quickly passes a balanced deficit reduction plan, the effects of these cuts – on our entire justice system and on the American people – may be profound.

I urge Congressional leaders to act swiftly to restore the funding that the Department needs to fulfill its critical mission and keep everyone in this country safe. And I would be happy to answer any questions you may have.

PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On Oversight Of The Department Of Justice
March 6, 2013

This week is the anniversary of "Bloody Sunday" when voting rights marchers, including now-Congressman John Lewis, were beaten by state troopers as they attempted to cross the Edmund Pettis Bridge in Selma. Attorney General Holder spoke this weekend about living up to our founding ideals and the power of our legal system. The law protects the rights of all Americans. That is what this Attorney General and the Justice Department he leads are dedicated to doing.

In 2009, the Attorney General worked with us in Congress to pass landmark hate crimes legislation to address crimes committed against Americans because of race, ethnicity, religion, sexual orientation, or gender identity. The Justice Department is enforcing that law. This week the President will sign historic legislation building upon the Violence Against Women Act and the Trafficking Victims Protection Act to protect all victims of abuse. The Justice Department will implement those laws.

And the Justice Department is defending the protections provided by section 5 of the Voting Rights Act to ensure that all Americans have the right to vote and to have their votes matter. This Committee played a key role in reauthorizing the Voting Rights Act six years ago. After nearly 20 hearings before the House and Senate Judiciary Committees, we found that modern day barriers to voting persist in our country. We passed and President Bush signed the current extension of the Voting Rights Act in order to safeguard the fundamental rights of all Americans.

I commend the Attorney General, FBI Director Mueller and all those who work every day to keep Americans safe. The follow up attack to 9/11 that so many predicted has not occurred--not on this President's watch. Constant vigilance is part of the reason. I also thank the Attorney General for reaching out, not only to me, but to Senator Grassley on issues of national security.

While the Department's success in disrupting threats to national security has been remarkable and its efforts to hold terrorists accountable commendable, I remain deeply troubled that this Committee has not yet received the materials I have requested regarding the legal rationale for the targeted killing of United States citizens overseas. I am not alone in my frustration or in my waning patience. The relevant Office of Legal Counsel memoranda should have been provided to members of this Committee. It is our responsibility to ensure that the tools at Government's disposal are used in a way that is consistent with our Constitution, laws and values.

We have worked together effectively to help keep Americans safe from crime and to help crime victims rebuild their lives. Together, we have worked to strengthen Federal law enforcement and to support state and local law enforcement, and crime rates have experienced a historic decline despite the struggling economy.

We have worked together to fight fraud and corporate wrongdoing, which had such a devastating impact on the American people in the recent economic downturn. Congress passed the Fraud Enforcement and Recovery Act, which Senator Grassley and I drafted together, and important

new anti-fraud provisions as part of the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Armed with these new tools, the Justice Department has broken records over the last several years for civil and criminal fraud recoveries and has increased the number of fraud prosecutions.

This Committee has also worked with the Department to try to ensure that the criminal justice system works as it should. This month marks the 50th anniversary of the seminal Supreme Court decision in *Gideon v. Wainwright*, which affirmed that no person should face prosecution without the assistance of a lawyer. I am encouraged by the Justice Department's Access to Justice Office but so much more needs to be done to ensure justice for all. I was also glad to see the announcement of a joint initiative to help standardize and improve forensic science across the country, incorporating many of the ideas from my Criminal Justice and Forensic Science Reform Act.

I appreciate the Attorney General joining me in recognizing the mounting problem of our growing prison population. This is having devastating consequences at a time of shrinking budgets at all levels of government. We all must do more to find constructive ways to solve it. Turning away from excessive sentences and mandatory minimums for nonviolent offenders would be a good start.

When the Senate confirmed Attorney General Holder four years ago, the Department of Justice was still reeling from scandal, mismanagement, and findings of impermissible politicization. Since that time, the credibility of the Justice Department among the American people and in courtrooms throughout the country has increased dramatically, and the morale of its hard-working agents, prosecutors, and professionals has been largely restored.

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QUESTIONS SUBMITTED TO HON. ERIC H. HOLDER, JR., BY SENATOR FRANKEN

Questions for the Record for Attorney General Eric Holder from Senator Franken

1. The late Aaron Swartz's attorneys have alleged in legal filings that the federal government inappropriately withheld evidence during its prosecution against him.

   a. Has the Department of Justice investigated these allegations?

   b. If so, what is the Department's response to these allegations?

   c. If not, why not?

2. The Department of Justice and the Federal Bureau of Investigation have two separate initiatives involving the use of facial recognition technology: the Next Generation Identification initiative's Facial Recognition Pilot Program, and Project Facemask. Both of these projects are in an expansion phase.

    a. What states have formally enrolled in the Facial Recognition Pilot Program?

    b. What states are in the process of enrolling in the Facial Recognition Pilot Program?

    c. What states have expressed interest in enrolling in the Facial Recognition Pilot Program?

    d. What states have formally enrolled in Project Facemask?

    e. What states are in the process of enrolling in Project Facemask?

    f. What states have expressed interest in Project Facemask?

    g. Has the DOJ or the FBI initiated any new efforts involving the use of facial recognition technology separate from the above-named programs?

QUESTIONS SUBMITTED TO HON. ERIC H. HOLDER, JR., BY SENATOR GRASSLEY

Senator Grassley's Questions for the Record from

Senate Committee on the Judiciary

Hearing on "Oversight of the U.S. Department of Justice"

March 6, 2013

Questions for the Honorable Eric H. Holder Jr.
Attorney General, U.S. Department of Justice

1. DOJ's Decision Not to Prosecute ITAR Case

We have received information from whistleblowers that Pete Worden, a high-ranking political appointee at NASA, was involved in a DOJ investigation into foreign nationals violating International Traffic in Arms Regulations (ITAR) on his watch. The State Department certified that the technology in question was sensitive. A two year federal investigation uncovered evidence that the technology was improperly transferred. Finally, an Assistant U.S. Attorney in the Northern District of California was assigned to the case and empaneled a grand jury. But, then suddenly the National Security Division allegedly recommended that the case be dropped.

The U.S. Attorney now claims that Main Justice never prevented her from prosecuting this case, but Chairman Wolf says that law enforcement sources told his office that wasn't true. Allegations that politics improperly influenced prosecutorial decisions are very serious and the factual disputes in this case are troubling.

A) Were you ever made aware of this case? If so, how and when?
B) Did you or any member of your staff at the time have any communications related to this case with any current or former U.S. Attorney's Office official? If so, who did you or your staff speak to and please describe the communication?
C) Did you or any member of your staff at the time have any communications related to this case with any current or former White House and/or Executive Office of the President official? If so, who did you or your staff speak to and please describe the communication?
D) Did you or any member of your staff at the time have any communications related to this case with any current or former NASA official? If so, who did you or your staff speak to and please describe the communication?
E) Did you or any member of your staff at the time have any communications related to this case with any employee, representative, attorney, or lobbyist of an organization or firm that has a contract with NASA headquarters or any NASA center? If so, who did you or your staff speak to and please describe the communication?
F) When would it be appropriate for the National Security Division to tell a U.S. Attorney not to prosecute ITAR violations?

Section 2778 of Title 22, the Arms Export Control Act, provides the authority to control the export of defense articles, and charges the President to exercise this authority. Under EO 11958, this authority is delegated to the Secretary of State. The Executive Order, in turn, is implemented through the International Traffic in Arms Regulations (ITAR).

I am concerned that there are proposals under consideration that would transfer part of the authority under the AECA that is currently delegated to the Secretary of State to the Secretary of Commerce. In particular, there may be proposals to transfer such authority for what are denominated significant military equipment under the ITAR as Category I and III munitions, including various semi-automatic firearms and ammunition and ordnance for these weapons. In addition, the components, parts, and accessories of these weapons also fall within these categories.

G) Are there any efforts being considered or planned to shift authority that is currently being exercised by the Secretary of State under the Arms Export Control Act to the Secretary of Commerce?

I) If so, what is the position of the Department of Justice with respect to any such proposal?

J) If the Commerce Department were to receive authority to control export of weapons such as these, would the Commerce Department then also receive the authority to control the import of Category I and Category III munitions as well?

2. Respect for Congress

You were recently quoted as saying that you didn't have any respect for the people who voted to enforce the subpoenas in Fast and Furious. I was extremely disappointed to hear you talk that way about a bi-partisan majority of the House of Representatives which included 17 Democrats. I gave you the benefit of the doubt and supported your confirmation four years ago despite concerns about previous controversies in your record. But your recent comments suggest a level of partisanship and disregard for those with whom you disagree that is frankly shocking. After all other negotiations have failed, contempt of Congress is the mechanism we have to enforce Congress's oversight interests. Now the issue will be tied up in the courts for some time. They will have to settle it. But your open disrespect for those Republicans and Democrats who thought you had an obligation to turn over the documents is a sad commentary on our inability to disagree without being disagreeable in Washington.

When I asked you about your statement that you did not respect those in the House of Representatives who voted to enforce the House subpoena in Operation Fast and Furious, you stated:

> "Well, history has shown us that in the past there had been a much greater period of time for those kinds of negotiations to occur. If you look at what happened with Harriet Miers and other people, Josh Bolton, as opposed to what happened to Eric Holder, you can see the period with which we were given to try to respond to and negotiate was much, much shorter. There was a desire to get to a certain point, and they got there."

In fact, Miers was subpoenaed on June 13, 2007, and the full House voted her in contempt 247 days later on February 15, 2008. You were subpoenaed on October 12, 2011, and the full House voted you in contempt 260 days later, on June 28, 2012. Not only was there not a "much greater period of time" for negotiations in the Miers case than in yours, there was actually slightly more time in your case—13 days more. And this does not even take into account the fact that you were on notice of the document requests,

which you could have complied with voluntarily, from the time I first raised the issue with you publicly in early 2011, eight months or more before the House issued a subpoena to you.

A) In light of these facts, do you still insist that it is appropriate for you to explicitly disrespect those who voted to enforce the House subpoena?

B) In your remarks, do you intend to communicate that you also lack respect for the 17 Democrats who voted with the majority to enforce the House subpoena through the contempt process?

C) Given that the controversy had been brewing for 18 months, that the Department had ceased producing further documents and that it had indicated its intent to withhold an entire category of documents (those created after the February 4, 2011 false letter to me denying gunwalking, what would be the point of further negotiations other than to delay the ultimate resolution of the matter?

D) As you know, the Congress cannot seek a judicial resolution of the dispute between itself and the executive branch without first going through the contempt process. If you were a member of Congress and an Attorney General refused to comply with a valid Congressional subpoena without making a valid privilege claim, what would you do?

E) If it were clear that negotiations were not progressing, how long would you wait before taking action to enforce the subpoena?

F) Would you wait longer than 260 days from the date of the subpoena? How long would you wait and why?

3. Executive Travel on FBI Jets

According to the Government Accountability Office, the cost of flying senior leadership around on FBI aircraft for non-mission travel was $11.4 million over 4 years. That is just operation and maintenance. It doesn't even include the cost of jets themselves. Since the Justice Department had outlined the cuts it would have to make under sequestration, I was surprised the Department didn't bring these non-mission flights up for discussion as a possible area for savings.

A) I know certain officials are required by an Executive Order to take government aircraft, but shouldn't you try to limit that travel as much as possible, given it costs the taxpayers so much money?

B) The number of hours that government jets are used for personal travel isn't regularly disclosed. We have to rely on outside audits or investigative reporters for this information. Do you support a requirement to regularly disclose to the pubic how much is spent for personal travel on government jets? If not, why not?

C) Have you ever used FBI aircraft to make a one-day round trip flight for personal reasons?

In 2009, the FBI's budget justification stated that "increasing usage of the Gulfstream V ("five") has placed a strain on maintenance and fuel funds necessary to carry out crucial counterterrorism missions." So, the FBI paid for a second Gulfstream V in 2011. But, according to GAO, 60% of the travel on the Gulfstream jets was not for counterterrorism purposes, but for executive travel.

A) Why were these Gulfstream jets pitched to Congress as necessary for counterterrorism when the majority of the time they weren't being used for counterterrorism?

4. DOJ Hiring Despite Sequester

Last month, you wrote a letter to Chairwoman Mikulski and stated the sequestration would cut over "1.6 billion dollars from the Department's current funding level, which would have serious consequences for our communities across the nation." Specifically for the FBI, you wrote these cuts would force the Bureau to furlough 775 Special Agents, the most important asset to the mission.

But, the reality is, as of yesterday, the Department of Justice was advertising for many job openings on the government's website, for such positions as cook supervisor and dental hygienist. So, I am skeptical about your description of the "severe negative impacts" on the Department, including the estimated loss of federal agents fighting national security and violent crime when the government is still hiring non-mission critical staff.

A) How do you reconcile for the American people, the fact that the Department is actively hiring cooks and dental hygienists, but yet, you threaten to furlough 775 FBI agents?
B) Have you furloughed any high ranking DOJ officials, most of whom also make many times more than lower ranking employees?

5. Lack of Prosecution of Big Banks

Despite appropriating $165 million for the prosecution of entities and individuals whose actions resulted in the financial crisis, DOJ still has no high-profile financial crisis criminal convictions of either companies or individuals.

Assistant AG Breuer said that one reason why DOJ has not brought these prosecutions is that it reaches out to "experts" to see what effect a prosecutions would have on financial markets.

On January 29, Senator Brown and I requested details on who these so-called "experts" are.

So far, we have not received any information on their identity.

A) Please provide the names of experts, even if they are government employees, DOJ consulted with as we requested on January 29, 2013?
B) Why should DOJ take these so-called ripple effects into account when they are so speculative? Doesn't this also create moral hazard? And isn't your job just to enforce the law?

6. The Justice Department's Analysis of the Constitutionality of the Assault Weapons Ban

At two separate hearings on gun violence, two U.S. Attorneys testified that the Department supported assault weapons legislation. One argued the Department "would work hard to ensure that whatever comes out, if one comes out, is constitutional." However, when I asked the second U.S. attorney if such an analysis was done and available, he deflected and said that he thinks the legislation is "headed in the right direction" and that "the President would not sign a bill that he did not believe was in accordance with the Second Amendment."

A) Has the Department issued a formal legal opinion as to the constitutionality of Senator Feinstein's Assault Weapons ban in light of Heller? If not, why not?

7. Position on Marijuana Legalization

In October 2010 you sent a letter in response to former Administrators of the Drug Enforcement Administration concerning the Department of Justice's position on California's Proposition 19. This proposition was similar to ballot measures in Colorado and Washington state that legalize marijuana for recreational use.

Eight former Drug Enforcement Administrators sent you another letter this week asking you to act to nullify Colorado and Washington's laws that legalize marijuana before they can be fully implemented. These Administrators are concerned that a lack of action from the Department may cause a "domino effect" that will encourage other states to nullify federal drug laws.

In your original response, dated October 13, 2010 you state, "Let me state clearly that the Department of Justice strongly opposes Proposition 19. If passed, this legislation will greatly complicate federal drug enforcement efforts to the detriment of our citizens. Regardless of the passage of this or similar legislation, the Department of Justice will remain firmly committed to enforcing the Controlled Substances Act in all states. Prosecution of those who manufacture, distribute, or possess any illegal drugs- including marijuana- and the disruption of drug trafficking organizations is a core priority of the Department. Accordingly, we will vigorously enforce the Controlled Substances Act against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law."

I ask Unanimous Consent to include the letters from the former Drug Enforcement Administrators and the Attorney General's response in the record.

A) Do you believe the legalization of marijuana is detrimental to our citizens?

B) Do you support the legalization of marijuana for recreational or any other use?

C) Are the statements you made in the October 13, 2010 letter still the position of the Department of Justice? If not, why not? And if so, what will the Department of Justice do to "vigorously enforce" the Controlled Substances Act?

8. OPR Report for FY 2012

Provide summaries of all Office of Professional Responsibility (OPR) matters at the Department of Justice and its components for fiscal year 2012. This information has been provided to Congress

previously. Should the Department produce the documents with redactions, provide the citation to the statute that authorizes the redaction of information to Congress.

9. 1996 Task Force on FBI Crime Lab

On May 21, 2012, Chairman Leahy and I sent a letter to the Federal Bureau of Investigation (FBI) regarding the flawed forensic work of its crime lab. When we had not received a response seven weeks later, I sent a follow-up letter to the Department on July 16, 2012, with seventeen questions. The Department's December 3, 2012, response touched on some of the issues I raised in my letter, but left many of the questions unanswered.

A) Did the prior task force only review the forensic work of one scientist, as was reported?

B) Why did the task force notify only prosecutors regarding faulty forensic testing, and not defendants who could have benefited from this information?

C) What were the procedures for notification in cases where a problem with the forensic work was found by the task force?

D) In how many cases did the task force find a problem with the forensic work? In how many of those cases is the defendant still incarcerated? In how many was the defendant executed?

E) Please list each convicted individual in which the task force found the lab's flawed forensic work was determined to be critical to the conviction.

F) Please name each prosecutor who was notified by the task force, as well as which conviction the notification was relevant to.

G) For each prosecutor who was notified, please indicate, according to the Department's best knowledge, whether or not the defendant was in turn notified.

H) For each case in which the Department notified the prosecutor but the defendant was never notified by the prosecutor, please provide the Department's understanding as to why the defendant was not notified.

Aside from the questions that were left unanswered in the December 3, 2012, response, the letter itself also raised new questions. When staff for Chairman Leahy and I requested a follow-up briefing in order to understand the Department's response, the Department indicated that it was unwilling to provide any further information at this time about the prior task force.

(I) The Department's December 3, 2012, letter read: "The memoranda related to the creation and workings of the Task Force do not provide further details about findings or notifications in particular cases. Nor does the Task Force appear to have collected such information in a database or kept summary statistics. A methodical and labor-intensive review of thousands of paper files would thus be required to provide information about findings or notifications in particular cases." Does this mean that the Department does not intend to undertake a review of these records because it would be labor-intensive?

(J) On January 30, 2013, a representative of the Department's Office of Legislative Affairs indicated that the Department was still considering what steps to take in order to ascertain the results of the 1996 Task Force. Why had the Department not begun any steps in May 2012, to identify the results of the Task Force, when Chairman Leahy and I first wrote to the FBI requesting this information?

10. Current FBI Hair Comparison Analysis Review

I understand that the FBI is currently engaged in a review of microscopic hair comparison reports and testimony provided by FBI crime lab examiners prior to December 31, 1999. As of January 30, 2013, the FBI had identified one case where a conviction had been obtained and an FBI crime lab examiner either testified or provided a report about a hair sample. The case was a state death penalty case.

(A) Has the convicted defendant that had been identified as of January 30, 2013, been notified yet by the Department that the FBI crime lab examiner in their case may have overstated the conclusions that may appropriately be drawn from a positive association between crime scene evidence and a known hair sample?

(B) How many other convicted defendants whose cases involved FBI hair analysis has the FBI identified since January 30, 2013? Please provide details about each case and whether they have yet been notified by the Department.

(C) Once the Department completes this new review, will the Department commit to publicly releasing the results in detail? If not, why not?

11. ICE Agent Jaime Zapata Murder Weapons

Since March 4, 2011, I have been attempting to obtain information regarding individuals associated with the purchase of one of the weapons recovered at the murder scene of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata. Special Agent Zapata was murdered in Mexico on February 15, 2011. I wrote letters to the Department on this issue on March 4 and March 28, 2011, and also submitted Questions for the Record (QFRs) on May 11, 2011.

In response to the QFRs, the Department wrote on July 22, 2011: "The question seeks information regarding sensitive law enforcement operations. We are attempting to determine the extent to which, if any, information in response to this question can be provided consistent with the Department's law enforcement responsibilities." Later, in response to my letters, the Department wrote on October 11, 2011:

As you may know, Otilio Osorio, Ranferi Osorio, Kelvin Morrison and others have been charged with various federal offenses and are scheduled for trial in the near future. Our disclosure of additional information requested by your letters would be inconsistent with the Department's strong interest in successfully prosecuting this matter, as well as with our longstanding policy regarding the confidentiality

of ongoing criminal investigations. We will continue to provide you and Chairman Leahy with other information responsive to your requests, as appropriate.

In a letter of February 1, 2012, the Department wrote: "Sentencing of the defendants in this matter is scheduled to occur in February and March of 2012." However, even after Morrison and the Osorio brothers were sentenced on May 7, 2012, the Department continued to rebuff requests for information about their history and their interactions with federal law enforcement. In response to Questions for the Record about why the Department failed to arrest the Osorio brothers in November 2010 when law enforcement observed them engaged in illegal activity, the Department's June 7, 2012 response ignored the question and changed the focus from the Osorio brothers over to the actual shooters of ICE Agent Jaime Zapata: "The investigation and prosecution of those responsible for Special Agent Jaime Zapata's murder are ongoing. For that reason, and because disclosure could compromise these efforts, the Department is not in a position to provide additional information at this time."

Notwithstanding the charges again Julian Zapata Espinoza for the murder of Special Agent Zapata and his upcoming trial, scheduled for June 3, 2013, the Department should be able to release information related to Otilio Osorio, Ranferi Osorio, and Kelvin Morrison now that they have been sentenced—particularly as it relates to incidents other than Otilio Osorio's October 10, 2010, purchase of the gun used in the murder of Special Agent Zapata.

Therefore, included below are past Questions for the Record regarding this matter that remain unanswered:

May 11, 2011: Murder Weapon of ICE Agent Jaime Zapata

According to a Justice Department press release from March 1, 2011, one of the firearms used in the February 15 murder of U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata was traced by the ATF to Otilio Osorio, a Dallas-area resident. Otilio Osorio and his brother Ranferi Osorio were arrested at their home, along with their neighbor Kelvin Morrison, on February 28. According to that same press release, the Osorio brothers and Morrison transferred 40 firearms to an ATF confidential informant in November 2010. Not only were these three individuals not arrested at that time, according to the press release their vehicle was later stopped by local police. Yet the criminal indictment in United States v. Osorio, filed March 23, 2011, is for straw purchases alone and references no activity on the part of the Osorio brothers or Morrison beyond November 2010.

A) Why did the ATF not arrest Otilio and Ranferi Osorio and their neighbor Kelvin Morrison in November?

(B) Was any surveillance maintained on the Osorio brothers or Morrison between the November firearms transfer and their arrest in February?

(C) Did any DOJ or component personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?

(D) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico

after the undercover transfer in November, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?

(E) Why should we not believe that this incident constitutes a further example, outside of the Phoenix Field Office and unconnected to Operation Fast and Furious, of the ATF failing to make arrests until a dramatic event is linked to a purchase from one of their targets, even when those targets are ultimately only charged for the same offenses the ATF was aware of months prior to their arrest?

(F) Do you believe that it was appropriate for the ATF to wait until Agent Zapata was shot before arresting these individuals on February 28?

Earlier Knowledge of Zapata Murder Weapon Traffickers

The DOJ press release alludes to an August 7, 2010, interdiction of firearms in which including a firearm purchased by Morrison. Further documents released by my office make clear that not only did Ranferi Osorio also have two firearms in that interdicted shipment, ATF officials received trace results on September 17, 2010 identifying these two individuals.

G) What efforts did the ATF take in September to further investigate the individuals whose guns had been interdicted, including Morrison and Osorio?

H) When did law enforcement officials first become aware that Otilio Osorio purchased a firearm on October 10, 2010?

(I) Had the ATF placed surveillance on the Osorio home in September or arrested Ranferi Osorio and Kelvin Morrison, isn't it possible that the ATF might have prevented Otilio Osorio from purchasing a weapon on October 10 with the intent for it to be trafficked?

(J) Does the ATF have policies about creating ROIs at the time that events take place?

Documents also indicate that ATF Dallas did not create a Report of Investigation (ROI) regarding the November 2010 transfer of firearms until February 25, 2011—the same day ATF received the report tracing the Zapata murder weapons back to the purchase by Otilio Osorio.

(K) Does the ATF have policies about creating ROIs at the time that events take place?

(L) Why was the ROI regarding events in November 2010 not created until immediately after the ATF received the trace results on the Zapata murder weapon?

(M) Please provide all records related to the following:

i. When any component of the DOJ first became aware of the trafficking activities of Otilio and Ranferi Osorio and Kelvin Morrison;

ii. Surveillance that may have been conducted on the Osorio brothers or Morrison prior to the November 9 transfer of weapons;

iii. The November 9 transfer; and

iv. Any surveillance that any component of the DOJ continued to conduct on the Osorio brothers or Morrison between the November 9, 2010, transfer and their arrest on February 28, 2011.

12. Accountability from Operation Fast and Furious

In September 2012, the Department's Office of Inspector General (OIG) released its long awaited report on Operation Fast and Furious. However, the OIG relies on the Department to take appropriate personnel actions against the individuals outlined in the report.

A) Of the ATF employees whose performance was criticized in the Inspector General's report, which were personnel actions initiated against and what is the status of that personnel action? Which employees are still employed by the Department? Of those no longer employed by the Department, what was the reason for their separation?

B) Of the Attorney's Office for the District of Arizona employees whose performance was criticized in the Inspector General's report, which were personnel actions initiated against and what is the status of that personnel action? Which employees are still employed by the Department? Of those no longer employed by the Department, what was the reason for their separation?

C) Of the Main Justice employees whose performance was criticized in the Inspector General's report, which were personnel actions initiated against and what is the status of that personnel action? Which employees are still employed by the Department? Of those no longer employed by the Department, what was the reason for their separation?

D) News reports indicate that you "admonished" Assistant Attorney General Lanny Breuer over his conduct outlined in the OIG report on Fast and Furious. What did this admonishment consist of? Was a record placed in his personnel file? If not, please explain why not.

13. Former ATF Phoenix ASAC George Gillett

On December 19, 2012, I wrote the Department's Office of Inspector General (OIG) to inform them that during Operation Fast and Furious, then-Phoenix ATF Assistant Special Agent in Charge (ASAC) George Gillett made multiples firearms purchases at a Federal Firearm Licensee (FFL) in Phoenix. According to forms I obtained, Mr. Gillett appears to have purchased weapons on December 15, 2009, January 5, 2010, and January 7, 2010. Those forms show the residence listed on the Firearms Transaction Record (Form 4473) for two of the gun purchases was the local Phoenix ATF office. For the third purchase, Gillett listed a commercial shopping center in Phoenix as his residence. Clearly, the addresses on the forms do not accurately and truthfully reflect Gillett's actual residence in Phoenix.

One of the most troubling aspects of this new information is that one of the weapons listed as having been purchased by Gillett was recently recovered in Sinaloa, Mexico, the same weekend and in the same area as a shootout between the Mexican military and drug cartel members in Sinaloa, Mexico.

Although I provided this information to the OIG, since Mr. Gillett is no longer an ATF employee, I presume any investigation may also involve other components of the Department.

A) Which entities in the Department are conducting the investigation into Mr. Gillett? Has the Department launched a criminal investigation?

B) Has the Department identified further firearms purchases that were made by Mr. Gillett? Please provide details of those purchases.

C) What has the Department learned about who Gillett sold the firearm to and how it came to be found along with a Fast and Furious weapon at a shootout in Mexico?

14. Recovery of Fast and Furious Weapons in Connection with Violent Crimes

A) As of the date these questions are answered, how many of the guns connected to Operation Fast and Furious that have been recovered were recovered in connection with violent crimes in the U.S.? Please describe the date and circumstances of each discovery in detail.

B) As of the date these questions are answered, how many of the guns connected to Operation Fast and Furious that have been recovered were recovered in connection with violent crimes in Mexico? Please describe the date and circumstances of each discovery in detail.

15. Prosecutorial Misconduct

On April 19, 2012, the Department submitted testimony before the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security regarding the Prosecution of former Senator Ted Stevens. The Department's testimony acknowledged failures that occurred in the Senator Stevens case and put forth an argument to combat legislation being filed to alter the federal criminal discovery practice. The Department stated:

[T]he Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in Stevens, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

According to the Department's testimony in the Stevens hearing, Department regulations require Department attorneys to report any judicial findings of misconduct to OPR. According to the same testimony, Department regulations also require OPR to conduct computer searches to identify court opinions that reach findings of misconduct.

A) On what date was mandatory prosecutor refresher training on discovery initiated by the Department?

B) Please define "judicial findings of misconduct."

C) Does "judicial findings of misconduct" include judicial findings in which only the first two elements of a Brady violation exist, establishing that the evidence was exculpatory and that the prosecutor did suppress it, even if the suppression did not prejudice the defendant?

D) Please provide the number of reported instances of misconduct annually since these regulations were put in place, as well as what actions were taken to rectify these situations.

E) Who conducts the computer searches for misconduct-related opinions? How often do the searches occur? What safeguards are in place to ensure that no opinions are missed?

F) What does OPR do when such searches identify problems?

G) Please list which United States Attorneys' Offices the National Criminal Discovery Coordinator has visited since the creation of the position in 2010 and what they have discovered.

16. New Mexico USAO and Columbus Case

As I wrote you on November 28, 2012, news reports indicate the husband of the head of the Criminal Division in the U.S. Attorney's Office for the District of New Mexico (USAONM) has been indicted in connection with a gun trafficking investigation that is related to Operation Fast and Furious. Danny Burnett is being charged in U.S. District Court for the District of New Mexico with leaking sealed federal wiretap information related to the gun trafficking investigation. Mr. Burnett's wife, Paula Burnett, is an Assistant U.S. Attorney (AUSA) for the USAONM and formerly served as the chief of the office's Criminal Division. Mr. Burnett's indictment states that he had "knowledge that a Federal investigative and law enforcement officer had been authorized . . . to intercept a wire, oral and electronic communication . . . ." The indictment does not explain how Mr. Burnett obtained this knowledge or whether his wife had any role in disclosing it to him. However, a news report states that Ms. Burnett has not been charged with any wrongdoing.

A) How did the Department become aware of Danny Burnett's leaking of federal wiretap information? Please explain in detail.

B) Has an independent investigation been conducted into what role Paula Burnett played, if any, in her husband obtaining sealed federal wiretap information? If so, who conducted the investigation?

C) What steps have you or others in the Department taken, if any, to ensure that a full and independent inquiry is conducted to determine all the facts and circumstances surrounding the leak of information about the wiretap to the criminal targets of that wiretap, including the possible involvement of any Department personnel?

D) When and how was this matter assigned to the U.S. Attorney's Office for the Western District of Texas?

E) When precisely did Ms. Burnett resign as chief of the Criminal Division of the USAONM? What was the reason for her resignation?

F) Did Ms. Burnett retain her responsibilities as Chief of the Criminal Division of the USAONM while she was under any investigation?

17. New Mexico USAO and Reese Case

When Ms. Burnett stepped down as the Chief of the Criminal Division of the U.S. Attorney's Office for the District of New Mexico (USAONM), James Tierney was appointed as the new Chief of the Criminal Division. Mr. Tierney submitted an ex parte motion in the case United States v. Reese indicating that Luna County Deputy Sheriff Alan Batts, who had been a witness for the government in the case, had been under investigation by the FBI since 2003. Deputy Batts' file contains allegations he extorted assets from a drug dealer, assisted Mexican drug cartels, and assisted in alien smuggling. The investigation stretched over a period of several years, and Assistant U.S. Attorney (AUSA) Richard Williams became the primary contact for the matter in 2010.

According to a judicial opinion in the case, after AUSA Williams learned on July 31, 2012, that Deputy Batts had been called by the government as a witness at trial, he:

[I]mmediately requested information from the FBI about Deputy Batts' involvement and he received numerous print outs, dated August 1, 2012. In the print outs, Mr. Williams found an FBI report, dated May 5, 2008, of a telephone call from Deputy Batts to [FBI] Agent Brotan that indicated that Deputy Batts worried that his own credibility was at stake. AUSA Williams informed Branch Chief AUSA Perez and the information proceeded up through the chain of command through Criminal Chief Tierney, First Assistant Steven Yarbrough and AUSA Sasha Siemel, the ethics advisor, professional responsibility officer, and Giglio requesting official for the United States Attorney. There is no satisfactory explanation why the United States Attorney's Office waited an additional four months to file the ex parte motion.

The court noted that the lead trial counsel, Ms. Maria Armijo, "was also Branch Chief of the Law Cruces United States Attorney's Office from 2005 to 2008, a critical period in the Batts investigation." The court concluded: "[T]here is no doubt that the prosecution, intentionally or negligently, suppressed the evidence."

After the defendants filed a Motion for a New Trial, on January 28, 2013, the court held an evidentiary hearing and heard argument on the Motion for a New Trial. The subsequent February 1, 2013 opinion (quoted above) granted the Motion for a New Trial.

A) Has the above case been reported to OPR as a "judicial finding of misconduct," as per the new guidelines outlined in the Committee's Stevens hearing? If not, why not?

B) Has an investigation been initiated into the individuals at fault, including Ms. Armijo?

C) Did AUSAs in the USAONM complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

(D) Some public reports suggested that the public corruption case referenced above had been assigned to Ms. Paula Burnett in 2002. Did Ms. Burnett ever have responsibility for the Southern

New Mexico public corruption case involving Deputy Batts? If so, has an investigation been initiated into why Ms. Burnett did not flag the investigation into Deputy Batts earlier?

18. Officer Karl Thompson

On March 18, 2006, Officer Karl Thompson of the Spokane (Washington) Police Department responded to a reported robbery in which he attempted to apprehend a suspect, Otto Zehm, who subsequently died. The death resulted from hypoxic encephalopathy due to cardiopulmonary arrest while restrained in a prone position for excited delirium following an altercation with Officer Thompson. Officer Thompson was subsequently investigated, prosecuted, and convicted by the Department for one count of willful use of excessive force and one count of false statements. Following the conviction, an expert witness specializing in video interpretation, Grant Fredericks, who was first used by Spokane in its County investigation that cleared Thompson and then later retained by the Department, filed an affidavit claiming that the prosecution inaccurately stated his opinion in their Rule 16a Disclosure document during trial. While the Court did not ultimately find that the prosecution committed a Brady violation since Officer Thompson suffered no prejudice, it found the first two elements of a Brady violation were present. Assistant U.S. Attorney (AUSA) Tim Durkin did suppress evidence that was favorable to Officer Thompson.

A) Has the Department been made aware of the judicial finding that there was a suppression of evidence in United States of America v. Karl F. Thompson, Jr.? If so, what actions have been taken?

B) Did AUSA Durkin complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

19. Conflict Between USAO and ATF in Reno, Nevada

On September 17, 2012, I wrote to both the ATF and U.S. Attorney for the District of Nevada to inquire about a reported "breakdown" in relations between the ATF Field Office in Reno, Nevada (Reno ATF) and the U.S. Attorney's Office for the District of Nevada (USAONV). I subsequently wrote directly to the Department about the issue on September 27, 2012. The Department responded on October 10, 2012, purporting to respond to all three letters. However, the Department's response failed to substantively address a single question I had posed in any of the three letters.

While the Department subsequently responded to an October 10, 2012, letter from myself, Senator Dean Heller, and Representative Mark Amodei, I still have not received answers to the questions I sent you on September 27, 2012.

Attached to my September 17, 2012 letters was a copy of a letter sent from USAONV to Reno ATF on September 29, 2011 that read: "At this time, we are not accepting any cases submitted by your office. We are willing to consider your cases again when your management addresses and resolves the issues at hand." On October 13, 2012, Reno ATF notified the ATF Internal Affairs Division that USAONV had

alleged an agent in Reno ATF lied to the USAONV. On October 25, 2012, Reno ATF contacted the Department's Office of Professional Responsibility (OPR) to request that OPR investigate the USAONV for unethical conduct, conduct which apparently allegedly included making false claims about Reno ATF.

As attachments to my September 27, 2012 letter to you indicate, OPR ultimately declined to investigate, writing Reno ATF on December 12, 2011:

Assistant United States Attorneys are vested with broad discretion to determine whether and how to pursue criminal investigations. Absent specific evidence indicating that this discretion was corruptly or otherwise inappropriately exercised, OPR does not review the exercise of that authority. Based on a review of the information you provided, OPR concluded that your complaint concerns a management matter which can more appropriately be addressed by having ATF management raise your concerns with the United States Attorney for the District of Nevada.

An ATF Internal Affairs Division memorandum dated February 10, 2012, concluded that "no evidence was offered to substantiate the allegation of . . . lying to the U.S. Attorney's office . . . ." The memorandum reiterated that OPR had declined the investigation because OPR stated that the matter needed to be handled by management from the USAO and ATF.

A) Why did Department management fail to intervene and mediate between ATF and the USAONV in 2011, when Reno ATF agents were flagging this issue with both ATF management and the Department's OPR?

B) If a U.S. Attorney's office has a problem with a component agency or vice versa, and the offending entity refuses to address the problem, who in the Department is responsible for providing oversight and mediating such a dispute?

C) Was anyone in the Executive Office of U.S. Attorneys (EOUSA) notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

   i. If so, when were individuals in EOUSA first notified?

   ii. What actions did they take to inquire into the situation?

   iii. What actions did they take to address the situation?

D) Was anyone in ODAG notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

   i. If so, when were individuals in ODAG first notified?

   ii. What actions did they take to inquire into the situation?

   iii. What actions did they take to address the situation?

E) Was Deputy Attorney General Cole notified of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

   i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

F) Was anyone in the Office of the Attorney General notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were they first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

G) Were you aware of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

H) Please provide the following documents:

i. All emails pertaining to anyone at Justice Department headquarters becoming aware of these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

ii. All emails pertaining to anyone at Justice Department headquarters responding to these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

20. "Fearless Distributing" in Milwaukee

Recent news reports have highlighted an operation by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in Milwaukee. The operation involved an undercover storefront called "Fearless Distributing" that ATF opened to attract individuals wanting to sell firearms under the table.

Although in the end 30 individuals were charged, local residents complain that the ATF operation actually brought more crime into a neighborhood where crime had been on the decline. The operation seems to have been plagued with failures, including wrongly-charged defendants, $15,000 worth of damage being caused to the space ATF leased, and $35,000 worth of merchandise being stolen from ATF's storefront in a burglary. In a separate incident, thieves also broke into an ATF SUV parked at a coffee shop a half-mile away from the undercover storefront and stole three guns stored inside the car, including an M-4 .223-caliber fully automatic rifle.

On January 31, 2013, Chairman Darrell Issa, Chairman Robert Goodlatte, Chairman James Sensenbrenner, Jr. and I sent a letter to ATF Acting Director B. Todd Jones and copied the Department

requesting information regarding "Fearless Distributing." As of today, we still have not received a response from the ATF or the Department.

A) When was the undercover operation involving Fearless Distributing initiated and terminated?

B) What were the names of the case agent and supervisory agent over the undercover operation involving Fearless Distributing?

C) At what management level at the ATF was the undercover operation involving Fearless Distributing authorized? Please identify by name and position each individual involved in the authorization above the first-line supervisor.

D) What was the highest management level at the ATF that the operation involving Fearless Distributing was briefed? Did anyone at the ATF or DOJ ever call any aspects of this case into question? If so, please provide the Committee with that documentation.

E) What law enforcement partners, if any, did the ATF work with in the undercover operation involving Fearless Distributing? Please list them and the number of personnel assigned from each.

F) Did the United States Attorney for the District of Minnesota authorize the undercover operation involving Fearless Distributing? If not, who at the U.S. Attorney's Office authorized and managed this undercover operation?

G) What methodology was used to determine the placement of the undercover business, Fearless Distributing?

H) What United States government property, including law enforcement sensitive paperwork, was left on the premises of Fearless Distributing once the undercover operation ended?

I) What methodology was used to determine the price to be paid for weapons or drugs bought in the undercover operation involving Fearless Distributing?

J) What were the sources of cash for the undercover operation involving Fearless Distributing, including the breakdown between (a) funds provided by the ATF, (b) project generated income (PGI), and (c) interest income?

K) What were the operational costs for the undercover operation involving Fearless Distributing, including the breakdown between (a) total operational costs, (b) unused PGI remitted back to the Treasury, if any, and (c) interest income remitted?

L) What was the total cost of the undercover operation involving Fearless Distributing?

M) How many indictments, leads, and arrests were garnered through the undercover operation involving Fearless Distributing?

N) What information, including reports of investigation, was used in obtaining probable cause for the arrest of Adrienne Jones, who was allegedly falsely accused?

O) How many civil claims were filed against ATF or employees of ATF relative to this undercover operation involving Fearless Distributing?

P) How many weapons were sold by the ATF during the undercover operation involving Fearless Distributing and what are the locations of those weapons now?

Q) If weapons were sold, who approved the plan to conduct these sales?

R) What steps, if any, were taken to retrieve the weapons and prevent their use in illegal activity or transmittal to prohibited purchasers, and how successful were those precautions?

S) List all property stolen from the unattended ATF vehicle and Fearless Distributing store during their respective burglaries. Was the agent whose car was broken into (and from which weapons were reportedly stolen) working on the undercover operation involving Fearless Distributing? What personnel action(s), if any, have been taken regarding this incident?

T) Were the weapons reportedly stolen from the unattended vehicle secured with any type of safety device/trigger lock?

U) What is the status of the reportedly stolen weapons/ammunition, including the M-4 automatic rifle?

V) How many storefront operations has ATF conducted in the U.S. each year from 2005 to 2012? For each year, please break down the number by state in which the operations were conducted.

W) Please detail all storefront operations that the ATF Phoenix Field Division conducted between 2008 to the present.

X) What steps has ATF taken, if any, to ensure that these storefront operations do not encourage the very criminal activity they are supposed to combat, as appears to have happened in Milwaukee?

Y) Please provide to the Committee the following documents:

i. All ATF Operational Plans (including ATF Form 3210.7) for the undercover operation involving Fearless Distributing.

ii. All reports of investigation (ROIs) relative to the undercover operation involving Fearless Distributing.

iii. Any documentation authorizing ATF to sell weapons as part of the undercover operation involving Fearless Distributing.

iv. The ATF policy for storage of firearms in unattended vehicles.

v. The ATF policy for conducting undercover operations out of store fronts.

21. ATF Monitored Case Program

On January 27, 2012, Deputy Attorney General James Cole wrote to update certain individuals on the Hill of developments within ATF in the wake of the investigation into Operation Fast and Furious. One of those included the establishment on July 19, 2011, of a new Monitored Case Program. Under it, certain cases would receive enhanced oversight from ATF headquarters. One criteria for participation is investigations in which more than 50 firearms have been straw purchased or trafficked.

A) What are the other criteria for receiving enhanced oversight from ATF headquarters as part of the Monitored Case Program?

B) How many cases became a part of the Monitored Case Program in 2011? In 2012?

C) Was the Milwaukee "Fearless Distributing" case described above a part of the Monitored Case Program? If not, why not? Given that it involved the seizure of 145 guns, isn't a case like that precisely the type of case that requires enhanced oversight from ATF headquarters? Why was there no enhanced oversight?

22. ATF Suspect Gun Database

A) What is the criteria for adding guns to the Suspect Gun Database?

B) How was the criteria established for adding guns to the Suspect Gun Database?

C) What is the procedure for individual agents to have a gun added to the Suspect Gun Database?

D) What procedures exist, if any, for ensuring that guns entered into the suspect gun database incorrectly are purged from the database?

E) How does the use of the Suspect Gun Database comport with the statutory prohibitions against maintaining a national gun registry?

23. FBI NICS Tracking

During Operation Fast and Furious, ATF received automatic e-mail notification of purchases from the FBI's National Instant Criminal Background Check System (NICS) for certain purchasers. The e-mail notification would be roughly contemporaneous, such as the Monday after a Saturday purchase.

A) How long has this automatic notification system existed? Please describe its development.

B) Why was it created?

C) Do any other agencies receive similar notifications of purchases?

D) What is the criteria for being flagged in the NICS system such that it generates e-mail notifications of purchases?

E) How was this criteria established?

F) What are the criteria and process for removing someone from the list?

24. Prosecutions of Lying on Background Checks

New York City Mayor Michael Bloomberg is quoted publicly as saying that in 2009, the Department prosecuted only 77 out of the more than 71,000 people who failed background checks due to fraudulent applications.

A) Is this number accurate?

B) Please provide the corresponding numbers of individuals failing background checks and subsequent prosecutions for 2000 through 2012.

25. General David Petraeus

Nearly four months ago, I wrote you regarding the resignation of Director of Central Intelligence (DCI) David Petreaus and the involvement by the U.S. Department of Justice (Department), including the Federal Bureau of Investigation (FBI), in uncovering information that revealed an extramarital affair cited by General Petreaus as a reason for his resignation. My letter requested a briefing similar to the one provided to members of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and Chairman Leahy of the of the Senate Committee on the Judiciary at that time. My letter was never acknowledged nor was I ever offered a briefing.

A) Why did you provide a briefing to the Chairman of the Judiciary Committee while refusing to provide one to the Ranking Member?

B) Please provide:

i. A timeline of events from initial contact with FBI personnel through the close of the inquiry,

ii. an explanation of how and why the FBI opened the inquiry,

iii. a detailed list of personnel who signed off on the investigation,

iv. a detailed account of the legal authorities used to obtain each of the electronic communications of those involved, and the role, if any, of any U.S. Attorneys' Offices,

v. an explanation of the timing and circumstances of how you and the FBI Director first learned of this inquiry and when the White House was notified of the inquiry,

vi. a description of Department employees' contacts with Congress prior to the election and whether the Department considers those contacts protected whistleblower disclosures,

vii. an explanation of whether the FBI shared information regarding the investigation with investigators or protective security details from various military or criminal investigation organizations (including the CIA, Army Criminal Investigation Command (CID), Air Force Office of Special Investigations (OSI), or Navy Criminal Investigative Service (NCIS)) and when that information was shared,

viii. a description of the status of any related reviews being conducted by the FBI Inspections Division, the Office of Professional Responsibility, the Deputy Attorney General's Office, or the Office of Inspector General, including any related to public reports of alleged communications between an FBI agent and a witnesses that involved inappropriate photographs or text,

ix. an explanation of whether the extramarital affair was uncovered during the initial background investigation conducted by the FBI prior to General Petraeus' confirmation as DCI, and

x. an explanation of any legal analysis conducted by any component of the Department, including the FBI, regarding whether you or the FBI Director were obligated by law to report the investigation of DCI Petraeus to the President or any other government official.

26. FBI Undercover Operation Revenue

Earlier this year, the Federal Bureau of Investigation (FBI) provided the Committee with their Annual Report to Congress on Criminal Undercover Activity for Fiscal Year 2010. The report provides useful information on the scope and cost of the FBI's criminal undercover dealings but fails to address certain questions regarding the operations that generated revenue.

A) For each undercover operation with funds remitted to FBI Headquarters, did FBI comply with PL 104-132, SEC. 815(d), and deposit those funds as miscellaneous receipts in the Treasury of the United States? If so, how soon after each operation were the funds deposited?

B) For each undercover operation with funds generating interest, which financial institution(s) was (were) utilized to generate interest and how are the institutions chosen?

C) In only one undercover operation in 2010, Operation Periodic Table, was there a "refund remitted." What is the difference between the "refund remitted" and the other "unused funding returned?" For what was the $73.22 refund remitted?

D) In Operation Double Sessions, after eight years of investigation and with over $1.1 million dollars generated by the project, a total of $330 unused project generated income (PGI) was returned to FBI Headquarters. This amount is significantly below the PGI remittance level of all other

undercover operations detailed in this report. Can FBI provide an itemized budget for this operation?

27. Allegations of FBI Prostitution in Philippines

A motion filed in the U.S. District Court for the Central District of California in September 2012 alleges that an undercover FBI agent spent thousands of taxpayer dollars on prostitutes in the Philippines for himself and three other individuals cooperating with the FBI. The motion alleges that the undercover agent and another FBI agent, both based out of West Covina, California, were in the Philippines as part of a weapons-trafficking investigation. The undercover agent was reportedly posing as a weapons broker for Mexican drug cartels. According to the motion: "On several occasions, the undercover agent invited [the cooperating individuals] to . . . brothels in and around Manila in order to reward them for their efforts and encourage them to continue looking for weapons. [The undercover agent] ordered prostitutes, and paid for himself and others to have sex with the prostitutes." It is unclear whether the second FBI agent was ever also present.

The motion attaches a declaration from a federal public defender investigator, who traveled to the Philippines in May 2012 to interview witnesses. The motion also provides correspondence from Justice Department trial attorneys dated August 23, 2012, which confirms that the undercover FBI agent did indeed make "several requests for reimbursement . . . for the time period November 15, 2010 to September 27, 2011 that may relate to expenses incurred by the undercover agent at clubs in the Philippines" when the three individuals cooperating with the FBI were present. The requested reimbursements total $14,500.

The motion claims that many of the prostitutes at one of the brothels the FBI agent frequented were likely minors. It attaches documentation that on May 5, 2012, the Philippine government raided the brothel and rescued 60 victims of human trafficking, 20 of whom were minors. The aforementioned letter from Justice Department trial attorneys acknowledges that the undercover FBI agent submitted a request for reimbursement based on expenses at the brothel on September 26 and 27, 2011. The motion also identifies at least four other dates on which discovery produced by the government indicates the FBI agent visited the brothel.

A) Of the $14,500 requested by the undercover agent for reimbursement, how much was the agent actually reimbursed by the FBI?

B) Was the undercover FBI agent the case agent for this weapons-trafficking investigation? If not, did the case agent authorize the expenses at the brothels in this undercover operation?

C) Did any other U.S. law enforcement or embassy personnel visit these brothels with the undercover FBI agent? Please list each agency, the number of employees involved, each individual's role, and whether they were a recipient of the services for which reimbursement was requested of the FBI.

D) Was any of the activity for which reimbursement was requested recorded by wire or video surveillance? If so, which activity? Please provide all recordings.

E) What other U.S. law enforcement or embassy personnel participated in the Philippines in the overall weapons-trafficking investigation? Please list each agency, the number of employees involved, and their role.

F Was the first-line supervisor of the undercover FBI agent and/or case agent aware of the undercover agent's visits to brothels? What other supervisors were informed?

G) When and how did FBI headquarters become aware of these allegations against this FBI agent working in the Philippines?

H) What actions were taken by FBI headquarters to investigate these allegations?

I) Has discipline been proposed for any FBI employees (agents or other personnel) in connection with this? If so, please describe the circumstances and procedural standing of the proposed discipline.

J) When did FBI supervisors become aware that minors may have been involved at these brothels?

K) Did the U.S. Attorney's Office (USAO) running the undercover operation receive notification of and/or authorize the undercover activity at the brothels?

L) Was the USAO running the undercover operation provided notes or other materials (e.g. 302's) regarding the events in question? If so, please provide these documents.

M) Is the FBI aware of any other instances of similar behavior occurring by other agents stationed around the world? If so, please describe them.

N) How many FBI employees (agents or other personnel) have been disciplined in the last eight years, including those terminated or voluntarily separated from the FBI, for soliciting, hiring, procuring the services of, or other inappropriate behavior involving prostitutes? Include all instances in which the FBI's Office of Professional Responsibility (OPR) reviewed allegations that FBI agents were involved with prostitutes, including a detailed summary of the allegations, the findings of investigation, the pay grade and rank of the employee, the proposed punishment (administrative or otherwise), the location where the incident(s) occurred, and whether the employee is still employed by the FBI.

O) How many FBI employees (agents or other personnel) have been terminated by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

P) How many FBI employees (agents or other personnel) remain employed by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

Q) Finally, please provide the following documents:

i. Any case notes or briefing plan regarding the undercover activity, including how the undercover activity was monitored or details on surveillance by agents in the brothels.

ii. All emails pertaining to FBI becoming aware of any of the above allegations.

iii. All emails demonstrating the FBI's response to the above allegations.

28. Office of Inspector General Report on the Operations of the Voting Rights Section of the Civil Division

On March 12, 2013, the Office of Inspector General submitted report on the operation of the Department's Voting Rights Section. This report was in response to several congressional requests including those made by Chairmen Wolf and Smith, as well as a request I made.

A) The report states that Deputy Assistant Attorney General (DAAG) Julie Fernandes attempted to remove a manager from DOJ's Honors Program Hiring Committee in part because of his "perceived conservative ideology." Is it acceptable for DOJ employees to use political ideology in making these types of decisions? If not, what consequence will Fernandes face for politicizing the DOJ Honors Program Hiring Committee process?

B) The Inspector General further reported that DAAG Fernandes said that the DOJ would prioritize "traditional civil rights enforcement."

i. What is meant by the term "traditional civil rights enforcement"?

ii. What is non-traditional civil rights enforcement? If so, please describe examples of non-traditional civil rights enforcement.

iii. Do you believe that DOJ should prioritize either traditional or non-traditional civil rights enforcement? If so, please explain why.

C) The Inspector General found that DOJ hiring criteria for the Civil Rights Division produced an overwhelmingly liberal pool of applicants. Are you concerned that this policy is eliminating qualified conservative applicants from employment within the civil rights division? If so, what efforts is DOJ making to change this policy? If not, why not?

D) The Inspector General found that in conversations with you, DAAG Hirsch misrepresented key facts in attempting to persuade you to remove Voting Section Chief Christopher Coates. What actions will you take to hold DAAG Hirsch accountable as a result of these facts?

29. Louisiana

On December 6, 2012, the U.S. Attorney of the Eastern District of Louisiana (USAOELA), Jim Letten, stepped down from his position after a controversy involving illicit online commentary by two of his top

staffers. Assistant U.S. Attorney (AUSA) Sal Perricone and then later AUSA Jan Mann, at the time the First Assistant U.S. Attorney, were accused of making disparaging comments on a newspaper website about suspects in federal crime targets. The comments were revealed by former AUSA Billy Gibbons, who represents both Fred Heebe, the subject of a four-year-long federal probe into his River Birch landfill (U.S. v. Fazzio et al.), as well as retired Sergeant Arthur "Archie" Kaufman, one of the New Orleand Police Department officers charged and convicted in the Danziger Bridge case (U.S. v. Bowen et al.). After Perricone's comments were revealed in March 2012, reports indicated that he was under investigation by the Department's Office of Professional Responsibility. Perricone subsequently resigned. When Mann's comments were revealed in October 2012, she was demoted from her position as First Assistant U.S. Attorney and head of the office's Criminal Division. She and her husband Jim Mann, supervisor of the USAOELA's Financial Crimes Unit, both retired in December 2012. Reportedly, Perricone and the Manns were both close associates of Letten's.

According to a November 26, 2012 opinion from U.S. District Court Judge Kurt Engelhardt, the judge in USA v. Fazzio, both Mann and Perricone lied to him regarding their online posting. Judge Engelhardt requested that a more extensive investigation of the leaks and online postings be conducted, and recommended that an independent counsel be appointed to conduct the investigation. Engelhardt wrote:

> Although in the case of Perricone and now Mann, the usual DOJ protocol appears to require simply placing the matter in the hands of the DOJ's OPR, such a plan at this point seems useless. First of all, having the DOJ investigate itself will likely only yield a delayed yet unconvincing result in which no confidence can rest. If no wrongdoing is uncovered, it will come as a surprise to no one given the conflict of interest existing between the investigator and the investigated. Moreover, the Perricone matter has been under investigation for eight months (since March), and yet it comes as a complete surprise to everyone at DOJ and the U.S. Attorney's Office that another "poster" exists, especially one maintaining as high a position in the U.S. Attorney's Office. It is difficult to imagine how this could possibly have been missed by OPR, and surely raises concerns about the capabilities and adequacy of DOJ's investigatory techniques as exercised through OPR. In any event, the Court has little confidence that OPR will fully investigate and come to conclusions with anywhere near the efficiency and certainty offered by suitable court-approved independent counsel. The Court strongly urges DOJ to do so post haste. Should DOJ determine not to proceed accordingly, the Court is left to proceed as it sees fit.

On December 6, 2012, you announced that the case would be investigated by AUSA John Horn, First Assistant U.S. Attorney in the Northern District of Georgia. Judge Engelhardt requested a report within a month and then later granted a one-month extension, meaning AUSA Horn's report should have been submitted by January 25, 2013.

On March 8, 2013, the USAOELA filed a motion to dismiss the case against the River Birch landfill operation, citing "evidentiary concerns" and "the interests of justice." The Department's Public Integrity Section had also been assisting USAOELA in the case.

A) What is the current status of the investigation into the online postings of these federal prosecutors?

B) Has AUSA Horn submitted the findings of his investigation? When did he submit them? If he did not submit them by January 25, 2013, why not?

C) Why did the Department opt to appoint AUSA Horn and was his appointment pre-approved by Judge Englehardt?

D) What has the Department done to address the concerns expressed by Judge Englehardt about OPR?

E) Did AUSA Horn's investigation include questioning the media recipients of leaked information, as Judge Englehardt recommended?

F) Are criminal charges being considered against Perricone or Mann for lying to a federal judge?

G) Have administrative charges been filed by DOJ with Perricone's and Mann's respective state Bar associations to rescind their licenses to practice law?

H) To what extent, if any, was U.S. Attorney Letten aware of the online activities of Perricone and Mann? What actions were taken by Letten once the information was revealed that prosecutors in his office were anonymously disclosing information about current investigations and cases?

(I) Following the departures of Perricone, Letten, and Mann, what steps has the Department taken to ensure that current attorneys and employees do not disclose information received through their work?

J) What impact did the postings of these prosecutors have on any other cases to which they were assigned? Is there a review being conducted of other cases prosecuted by these AUSAs?

K) Were there any complaints of prosecutorial misconduct filed in any other cases handled by these prosecutors? If so, what were the names of those cases and how were those complaints handled?

L) For what "evidentiary concerns" was U.S. v. Fazzio dropped?

M) Are individuals in the USAOELA being investigated for possible misconduct related to those evidentiary concerns? If so, who is conducting the investigation?

N) When were the evidentiary problems in U.S. v. Fazzio discovered?

O) Why did the Public Integrity Section, which had been involved since August 2012, wait until March 2013 to move to dismiss the case?

P) Why was U.S. v. Fazzio dismissed with prejudice?

30. Chicago OIG

On March 5, 2013, U.S. District Court Judge Virginia Kendall dismissed an indictment of Deputy U.S. Marshal Stephen Linder for excessive force. The indictment had been brought by attorneys from the Department's Civil Rights Division. The dismissal was the result of the court holding that the Government had violated the defendant's Fifth and Sixth Amendment constitutional rights.

However, separate from the treatment of the defendant, the opinion also indicated that witnesses in the investigation—not targets—testified that they were "bullied, threatened, and treated like perjurors." This conduct was allegedly by the two attorneys from the Civil Rights Division as well as by an investigator for the Department's Office of Inspector General.

A) Has an Office of Professional Responsibility investigation been conducted into the conduct of the attorneys who allegedly intimidated and threatened witnesses? If not, why not?

31. Refusal to Answer Previous Questions

In addition to the above questions, there are many outstanding matters to which you have not yet responded. At the oversight hearing, several senators commented that they are still very interesting in having you respond.

For example, Senator Grassley stated that there are "many outstanding letters and questions we have yet to receive from the department," including "questions for the record from the last oversight hearing held nine months ago," "questions for the record from department officials that testified at various hearings," and inquiry letters on the "impact of budget sequester," the "failure to prosecute individuals at HSBC for money-laundering," and a "request related to investigation [into] Fast and Furious." Senator Whitehouse added that he would "love to get the response to the request for the record that was made last June…and which we still have no response to."

In accordance with these statements made during the hearing, Members are still interested in your answers to the following questions from your previous Hearing on "Oversight of the U.S. Department of Justice."

Senator Grassley's Questions for the Record from

Senate Committee on the Judiciary

Hearing on "Oversight of the U.S. Department of Justice"

June 12, 2012

Questions for the Honorable Eric H. Holder Jr.
Attorney General, U.S. Department of Justice

32. National Security Leaks

Leaks of classified information continue to plague the Obama Administration. The list of notable national security leaks includes: (1) a report detailing U.S. involvement in Stuxnet, a perported cyber weapon, and the cyber-attacks against Iran's nuclear reactors dubbed "Olympic Games"; (2) a report that U.S. national

security agencies thwarted another underwear bomber plot to be carried out on the anniversary of Osama bin Laden's death; (3) a report that the U.S. had planted a spy in al Qaeda in Yemen; (4) revelation that President Obama is personally involved in choosing the "kill list," which prioritizes U.S. terrorist killings; (5) revelation of the identity of the Pakistani doctor who aided the CIA in the capture of Osama bin Laden; (6) allegations that the Administration leaked sensitive information about the capture of Osama bin Laden to filmmakers making a movie about it.

In [May 2011], I asked you about prosecuting classified leaks and you said "there has to be a balancing that is done between what our national security interests are and what might be gained by prosecuting a particular individual." Unfortunately, based upon the evidence, it seems the balancing done here is often times whether the leaker was a Justice Department employee or not. If they are a Justice Department employee, prosecutions don't seem to follow. At the least, this was the case with DOJ employee Thomas Tamm and FBI employees who leaked information in the Anthrax case.

On [June 8, 2012], you announced that you were appointing Ronald C. Machen, Jr., the U.S. Attorney for the District of Columbia and Rod J. Rosenstein, the U.S. Attorney for the District of Maryland, to lead criminal investigations into recent instances of possible unauthorized disclosures of classified information. As part of this announcement you pledged to keep the Judiciary and Intelligence Committees apprised of the investigations, but provided no details on how these U.S. Attorneys would independently conduct the leak investigations without undue influence from the Administration. Further, you did not provide any detail as to what leaks were being investigated and by whom.

A) It has been reported that the National Security Division has been recused for at least one investigation stemming from these leaks. Is this correct, and if so, how is there not a conflict of interest on the part of the Justice Department?

B) If the leak came from within the Justice Department, why should we have confidence that these leak investigations won't be dismissed without prosecution just like the Tamm case?

C) In the Tamm case and the FBI anthrax leaks you and your Department relied upon the advice of career prosecutors to dismiss the cases. Here, you have instructed political appointees to do the work. Why did you assign political appointees as opposed to career prosecutors on this investigation breaking from past practice?

D) 28 U.S.C. 515 allows you to appoint special attorneys for criminal or civil investigations. Why did you choose to use existing U.S. Attorney's instead of a special attorney under this authority?

E) The Justice Department has had a number of high profile failures in prosecuting national security leaks. This includes the case against Thomas Drake and the ongoing prosecution of Jeffrey Sterling—which is currently on interlocutory appeal. Why is the Justice Department having trouble prosecuting national security leak cases and do we need to change the law to help bring these individuals to justice?

F) Would changes to the Classified Information Procedures Act (CIPA), as others in the legal community have called for, help the Department prosecute national security leak cases? If so, what types of reforms would be necessary to help?

33. Foreign Intelligence Surveillance Act Reauthorization

In a letter dated February 8, 2012, you joined Director of National Intelligence Clapper in requesting the reauthorization Title VII of the Foreign Intelligence Surveillance Act (FISA), known as the FISA Amendments Act of 2008.

I agree with you about the value of the FAA tools, and I support a clean reauthorization of FAA to 2017.

A) Do you support a clean reauthorization of the FISA amendments Act?
B) Is there sufficient oversight and checks and balances to ensure that the rights of U.S. citizens are protected?
C) Are any changes in the FAA needed, either to enhance intelligence gathering capabilities or to protect the rights of U.S. citizens?

34. Memo Issued by Office of Legal Counsel Regarding Anwar al-Awlaqi

On September 30, 2011, Anwar al-Awlaqi, a United States citizen, was killed in an operation conducted by the United States in Yemen. It was reported in the media that this targeted killing followed the issuance of a secret memorandum authored by the Justice Department's Office of Legal Counsel (OLC). On October 5, 2011, I sent a letter to you requesting a copy of any such memorandum, offering to make appropriate arrangements if the memo was classified. I have continually been told that the Justice Department will not confirm the existence of such a memorandum, notwithstanding the fact that the existence of such a memorandum was described to print media.

A) Given the Justice Department is not confirming the existence of the memorandum, is the Department investigating any national security leaks related to this story? If not, why not?

B) If such a memorandum exists, why does the Department continue to refuse to provide it to the Judiciary Committee?

35. Extradition of Ali Mussa Daqduq

Ali Mussa Daqduq is a Lebanese national and senior leader of Hezbollah captured in Iraq in 2007. Daqduq has been linked to the Iranian government and a brazen raid in which four American soldiers were abducted and killed in the Iraqi holy city of Karbala in 2007. Until recently, Daqduq was in U.S. custody in Iraq. Daqduq was among a few of the remaining U.S. prisoners who, under a 2008 agreement between Washington and Baghdad, were required to be transferred to Iraqi custody by the end of 2011. U.S. officials feared that if he was turned over to Iraq, he would simply walk free and resume his terrorist activities against the United States and its interests.

On May 16, 2011, five Republican members of the Judiciary Committee sent a letter to the Attorney General, expressing their concern with bringing Daqduq to the U.S., and requesting further information.

Ron Weich responded on behalf of the Attorney General on August 8, 2011. He failed to answer the specific policy questions raised, merely stating that DOJ "remains committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate."

On July 21, 2011, 20 Republican Senators sent a letter to Secretary of Defense Leon Panetta. Members urged the Administration to closely evaluate the legal authority available to bring DaqDuq's case before a military commission. On August 30, 2011, the Deputy Secretary of Defense responded on his behalf, merely stating that possible options are being examined

Despite vehement protests by Congress, Daqduq was transferred to Iraqi custody on December 17, 2011, pursuant to the aforementioned Status of Forces Agreement. While in Iraqi custody, U.S. military prosecutors charged Daqduq with murder, perfidy, terrorism and espionage, [and] other war crimes. At the time, a military spokesman stated that the U.S. government was "working with Iraq to affect Daqduq's transfer to a U.S. military commission consistent with U.S. and Iraqi law." However, on May 7, 2012, Daqduq was acquitted of any criminal charges under Iraqi law and the presiding Iraqi judge ordered his release.

On May 10th [2012], I sent a letter to you and Secretary of Defense Panetta requesting information about the Administration's plan for dealing with the Daqduq situation. He was on the verge of escaping justice after an Iraqi court cleared him of any criminal charges. Specifically, I asked whether any formal extradition request has been made for Daqduq On May 24th, Secretary Panetta sent me a personal letter acknowledging my concerns and stated he would get back to me in detail as soon as possible. I still have not heard back from you to even confirm the receipt of my letter. On June 1st, I read in the press) that the Administration has asked Iraq to extradite Daqduq.

A) Has the Justice Department been involved in negotiations seeking to extradite Daqduq?
B) Can you confirm that a request has been made to extradite Daqduq?
C) If so, does the extradition request indicate which forum, military commission or civilian court, that Daqduq would be extradited to?

36. Use of Drones by Law Enforcement

Do any Justice Department entities use or plan to use drones for law enforcement purposes within the United States? Has the Office of Legal Counsel been asked to or issued any memoranda addressing the topic of use of drones by federal, state, local, or tribal domestic law enforcement, administrative, or regulatory agencies? If so, please provide a copy of any memoranda discussing this topic.

37. Ninth Circuit Deportation Cases

On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases fit into the administration's immigration enforcement priorities. In relevant part, the order in each case states:

In light of ICE Director John Morton's June 17, 2011 memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing.

On March 1, 2012, House Judiciary Committee Chairman Lamar Smith and I sent a letter to you and Secretary Janet Napolitano expressing concern about the Ninth Circuit's order. Moreover, the letter asked the Department of Justice and the Department of Homeland Security to respond to questions about how they were handling cases before immigration judges, the Board of Immigration Appeals (BIA) and the federal courts of appeals. In particular, our letter contained four specific questions or requests for information:

A) For each of the cases that is subject to the order(s) issued by the Ninth Circuit on February 6, 2012, identify the following: (a) the date the case was commenced before an immigration judge or trial judge, (b) the date the appeal to the Ninth Circuit was filed, (c) the date the government's merits brief in the Ninth Circuit was filed, (d) the status of the case in the Ninth Circuit, (e) whether the government has argued that the Ninth Circuit should affirm a removal order, (f) the number of hours worked on the case by government attorneys before the case reached the Ninth Circuit, (g) the number of hours worked on the case by government attorneys since the case was filed in the Ninth Circuit, (h) an estimate of the number of hours worked on the case by immigration judges, BIA judges and federal judges and (i) the amount of tax payer dollars spent on the case to date, including the portion of the salaries of the government attorneys, judges and court staff who have worked on the case.

B) Does the government seek to have immigration judges enter removal orders even though those orders may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the immigration judges presiding over the cases?

C) Does the government seek to have the BIA affirm removal orders even though the affirmances may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the BIA judges presiding over the cases?

D) Does the government seek to have federal courts of appeals affirm removal orders, even though those orders may subsequently be disregard pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the federal judges presiding over the cases?

According to some reports, there are at least 1.6 million immigration cases pending before immigration judges, the BIA and the federal courts of appeals. Also, according to reports, the DHS and/or DOJ are "reviewing" 300,000 or more cases under the so-called "prosecutorial discretion" initiative.

The DOJ and the DHS are supposed to be prosecuting these cases and seeking to have illegal aliens deported. As part of that effort, line attorneys from the DOJ and DHS spend thousands of hours working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend hundreds of hours adjudicating these cases. Tens of millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges and court staff.

The answer to the Ninth Circuit's question set forth in the government's pleadings was nonresponsive. The government's pleadings tell the Court that the government does not presently intend to use prosecutorial discretion with the cases, but that the matter is totally within the discretion of the Executive Branch. If the government decides to use prosecutorial discretion while any of the cases are pending, it will inform the Court. What is unwritten is that the Obama administration can still use prosecutorial discretion after a case is concluded, even if a Court has issued a deportation order and after all the time, effort and money has been expended.

The DHS responded to the March 1 letter with a one-page letter dated April 23, 2012 and signed by Nelson Peacock, the Assistant Secretary for Legislative Affairs. The April 23 letter does not answer the four specific questions or requests for information in the March 1 letter.

The DOJ responded to the March 1 letter with a two-page letter dated June 6, 2012 and signed by Acting Assistant Attorney General Judith Appelbaum. The letter also had a one-page attachment with some information about the five cases before the Ninth Circuit. The DOJ's June 6 letter partially answers questions 1(a)-(g) from the March 1 letter. It also states that it cannot provide an accurate estimate of the number of hours worked on the five cases by immigration judges and their staffs, which was asked about in question 1(h). The DOJ letter does not acknowledge, let alone answer, questions 1(i)-4.

A) Did you review the June 6 letter before it was sent?

B) Did you authorize the June 6 letter?

C) Is the DOJ refusing to answer questions 1(i)-4 from the March 1 letter? If so, what is the legal authority for the DOJ's refusal? If the DOJ is not refusing to answer, how do you explain the June 6 letter's failure to answer the questions?

D) Provide complete and detailed answers to all of the questions and requests for information from the March 1 letter, which are quoted above.

38. Freedom of Information Act

On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration, and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a "new era of open government."

President Obama's memorandum on the Freedom of Information Act (FOIA) called on all government agencies to adopt a "presumption of disclosure" when administering the law. He directed agencies to be

more proactive in their disclosure and to act cooperatively with the public. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads.

Pursuant to the President's orders, you issued FOIA guidelines in a memorandum dated March 19, 2009. Your memorandum rescinded former Attorney General Ashcroft's 2001 pledge to defend agency FOIA withholdings "unless they lack[ed] a sound legal basis." Instead, you stated that the Department of Justice would now defend withholdings only if the law prohibited release of the information, or if the release would result in foreseeable harm to a government interest protected by one of the exemptions in the FOIA. Your memorandum extensively quoted the President's memoranda.

The Department of Justice is supposed to be overseeing the Executive Branch's compliance with the FOIA.

On March 30, 2011, the House Committee on Oversight and Government Reform released its 153-page report on its investigation of the DHS's political vetting of requests under the FOIA. The Committee reviewed thousands of pages of internal DHS e-mails and memoranda and conducted six transcribed witness interviews. It learned through the course of an eight-month investigation that DHS political staff has exerted pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people.

The report by Chairman Issa's Committee reproduces and quotes e-mails from political staff at the DHS. The report also quotes the transcripts of witness interviews. The statements made by the political staff at the DHS are disturbing.

A) What is your response to each of the findings contained on pages 5-7 of the report?

B) What is your response to the disturbing statements made by DHS political staff, who are quoted in the report? In particular, what is your response to political appointees at the DHS referring to a career FOIA employee, who was attempting to organize a FOIA training session, as a "lunatic" and to attending the training session for the "comic relief"?

C) What actions, if any, have you personally taken in response to Chairman Issa's report?

D) What actions, if any, has the DOJ taken in response to Chairman Issa's report?

Chairman Issa's report and a report prepared by the Inspector General of the DHS find that political staff at the DHS lacks a fundamental understanding of FOIA.

E) What, if anything, have you personally done to address this situation? If you have not done anything personally, acknowledge that fact.

F) What, if anything, has the DOJ done to directly address this situation?

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 5, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on March 6, 2013. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program. Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Committee on the Judiciary
United States Senate
March 6, 2013

Questions Posed by Senator Grassley

1. **DOJ's Decision Not to Prosecute ITAR Case**

We have received information from whistleblowers that Pete Worden, a high-ranking political appointee at NASA, was involved in a DOJ investigation into foreign nationals violating International Traffic in Arms Regulations (ITAR) on his watch. The State Department certified that the technology in question was sensitive. A two year federal investigation uncovered evidence that the technology was improperly transferred. Finally, an Assistant U.S. Attorney in the Northern District of California was assigned to the case and empaneled a grand jury. But, then suddenly the National Security Division allegedly recommended that the case be dropped.

The U.S. Attorney now claims that Main Justice never prevented her from prosecuting this case, but Chairman Wolf says that law enforcement sources told his office that wasn't true. Allegations that politics improperly influenced prosecutorial decisions are very serious and the factual disputes in this case are troubling.

A) Were you ever made aware of this case? If so, how and when?

B) Did you or any member of your staff at the time have any communications related to this case with any current or former U.S. Attorney's Office official? If so, who did you or your staff speak to and please describe the communication?

C) Did you or any member of your staff at the time have any communications related to this case with any current or former White House and/or Executive Office of the President official? If so, who did you or your staff speak to and please describe the communication?

D) Did you or any member of your staff at the time have any communications related to this case with any current or former NASA official? If so, who did you or your staff speak to and please describe the communication?

E) Did you or any member of your staff at the time have any communications related to this case with any employee, representative, attorney, or lobbyist of an organization or firm that has a contract with NASA headquarters or any NASA center? If so, who did you or your staff speak to and please describe the communication?

F) When would it be appropriate for the National Security Division to tell a U.S. Attorney not to prosecute ITAR violations?

Response to 1(A)-(F):

In response to an inquiry about allegations that the U.S. Attorney's Office sought approval to file charges in an investigation relating to NASA Ames Research Center and that its request was denied by the Department of Justice (DOJ) in Washington DC, U.S. Attorney Melinda L. Haag provided the following statement on February 12, 2013: "I am aware of allegations our office sought authority from DOJ in Washington, D.C. to bring charges in a particular matter and that our request was denied. Those allegations are untrue. No such request was made and no such denial was received." For additional information responsive to the questions, please refer to the Department response, dated July 17, 2013, which responds to earlier letters addressed to then Assistant Attorney General Lisa O. Monaco and U.S. Attorney Haag.

Section 2778 of Title 22, the Arms Export Control Act, provides the authority to control the export of defense articles, and charges the President to exercise this authority. Under EO 11958, this authority is delegated to the Secretary of State. The Executive Order, in turn, is implemented through the International Traffic in Arms Regulations (ITAR).

I am concerned that there are proposals under consideration that would transfer part of the authority under the AECA that is currently delegated to the Secretary of State to the Secretary of Commerce. In particular, there may be proposals to transfer such authority for what are denominated significant military equipment under the ITAR as Category I and III munitions, including various semi-automatic firearms and ammunition and ordnance for these weapons. In addition, the components, parts, and accessories of these weapons also fall within these categories.

G) Are there any efforts being considered or planned to shift authority that is currently being exercised by the Secretary of State under the Arms Export Control Act to the Secretary of Commerce?

Response:

The Department of Justice has been and continues to be involved with the President's Export Control (ECR) Initiative and has worked closely with the Departments of State and Commerce, among other agencies, in connection with ECR. The Department of Justice defers to those departments to describe their respective roles in ECR and their authorities.

H) If so, what is the position of the Department of Justice with respect to any such proposal?

Response:

The Department of Justice supports the goals of ECR to clarify the government's export control regulations and to focus export controls on sensitive items that pose a threat to U.S. national security.

I) If the Commerce Department were to receive authority to control export of weapons such as these, would the Commerce Department then also receive the authority to control the import of Category I and Category III munitions as well?

Response:

On March 8, 2013, President Obama signed Executive Order 13637 – Administration of Reformed Export Controls (AECA) – which reaffirmed and clarified the continuing delegation to the Attorney General of the authority under the AECA to control the permanent import of defense articles, which would include defense articles in Categories I, II, and III.

2. **Respect for Congress**

You were recently quoted as saying that you didn't have any respect for the people who voted to enforce the subpoenas in Fast and Furious. I was extremely disappointed to hear you talk that way about a bi-partisan majority of the House of Representatives which included 17 Democrats. I gave you the benefit of the doubt and supported your confirmation four years ago despite concerns about previous controversies in your record. But your recent comments suggest a level of partisanship and disregard for those with whom you disagree that is frankly shocking. After all other negotiations have failed, contempt of Congress is the mechanism we have to enforce Congress's oversight interests. Now the issue will be tied up in the courts for some time. They will have to settle it. But your open disrespect for those Republicans and Democrats who thought you had an obligation to turn over the documents is a sad commentary on our inability to disagree without being disagreeable in Washington.

When I asked you about your statement that you did not respect those in the House of Representatives who voted to enforce the House subpoena in Operation Fast and Furious, you stated:

> **"Well, history has shown us that in the past there had been a much greater period of time for those kinds of negotiations to occur. If you look at what happened with Harriet Miers and other people, Josh Bolton, as opposed to what happened to Eric Holder, you can see the period with which we were given to try to respond to and negotiate was much, much shorter. There was a desire to get to a certain point, and they got there."**

In fact, Miers was subpoenaed on June 13, 2007, and the full House voted her in contempt 247 days later on February 15, 2008. You were subpoenaed on October 12, 2011, and the full House voted you in contempt 260 days later, on June 28, 2012. Not only was there not a "much greater period of time" for negotiations in the Miers case than in yours, there was actually slightly more time in your case—13 days more. And this does not even take into account the fact that you were on notice of the document requests, which you could have complied with voluntarily, from the time I first raised the issue with you publicly in early 2011, eight months or more before the House issued a subpoena to you.

A) **In light of these facts, do you still insist that it is appropriate for you to explicitly disrespect those who voted to enforce the House subpoena?**

Response:

We have previously indicated that we believe that the vote to hold the Attorney General in contempt of Congress was influenced by politics, and we continue to believe that that is the case. For instance, in advance of the vote, that National Rifle Association explicitly warned Members of Congress that it would weigh whether they voted to hold the Attorney General in contempt in deciding whether to endorse them

in future elections. While we believe it is unfortunate that this matter had to go into litigation, we have continued our efforts to try to reach an accommodation.

B) In your remarks, do you intend to communicate that you also lack respect for the 17 Democrats who voted with the majority to enforce the House subpoena through the contempt process?

Response:

Please refer to the response to Question 2(A), above.

C) Given that the controversy had been brewing for 18 months, that the Department had ceased producing further documents and that it had indicated its intent to withhold an entire category of documents (those created after the February 4, 2011 false letter to me denying gunwalking, what would be the point of further negotiations other than to delay the ultimate resolution of the matter?

Response:

Please refer to the response to Question 2(A), above.

D) As you know, the Congress cannot seek a judicial resolution of the dispute between itself and the executive branch without first going through the contempt process. If you were a member of Congress and an Attorney General refused to comply with a valid Congressional subpoena without making a valid privilege claim, what would you do?

Response:

Please refer to the response to Question 2(A), above.

E) If it were clear that negotiations were not progressing, how long would you wait before taking action to enforce the subpoena?

Response:

Please refer to the response to Question 2(A), above.

F) Would you wait longer than 260 days from the date of the subpoena? How long would you wait and why?

Response:

Please refer to the response to Question 2(A), above.

3. Executive Travel on FBI Jets

According to the Government Accountability Office, the cost of flying senior leadership around on FBI aircraft for non-mission travel was $11.4 million over 4 years. That is just operation and maintenance. It doesn't even include the cost of jets themselves. Since the Justice Department had outlined the cuts it would have to make under sequestration, I was surprised the Department didn't bring these non-mission flights up for discussion as a possible area for savings.

A) **I know certain officials are required by an Executive Order to take government aircraft, but shouldn't you try to limit that travel as much as possible, given it costs the taxpayers so much money?**

Response:

The $11 million figure is for a period of over five years and includes costs for three Attorneys General and one Acting Attorney General. Attorney General Holder's travel on government aircraft is comparable to his predecessors or the heads of the Department of Defense, the Department of Homeland Security, the Department of State, and the Central Intelligence Agency. For reasons related to national security and the need for secure communications, the Attorney General is a "Required Use" traveler under Office of Management and Budget (OMB) and executive branch directives and threat assessments that date back to the 1990s. Under these rules, the Attorney General is required to use government aircraft for both official and personal travel. The Justice Department did not make these rules, which as noted apply also to other key executive branch officials beyond DOJ. Further, the focus on the term "non-mission" travel is easily misunderstood and actually includes official travel of senior executives under the definitions used in the OMB aircraft circular that dates back to 1993. "Mission travel" is defined as travel which in the use of the aircraft is part of the agency's mission itself (such as surveillance or the movement of prisoners), while "non-mission travel" includes all other official travel by senior executives. "Required use" travel is also a form of official travel, since it has been determined that a government aircraft is required for all travel by the covered officials – no matter the purpose of the travel – because of bonafide communications or security needs of the agency or exceptional scheduling requirements. Such travel is reviewed and approved in accordance with applicable regulations and policy.

B) **The number of hours that government jets are used for personal travel isn't regularly disclosed. We have to rely on outside audits or investigative reporters for this information. Do you support a requirement to regularly disclose to the public how much is spent for personal travel on government jets? If not, why not?**

Response:

The Department discloses such flight information under the FOIA, a process that enables the government to protect sensitive information while at the same time providing public disclosure.

C) **Have you ever used FBI aircraft to make a one-day round trip flight for personal reasons?**

Response:

Attorney General Holder took 23 one-day personal round trips as a Required Use traveler through December 31, 2012, and provided reimbursement in accordance with OMB Circular A-126 rules. Of the

personal trips cited in the recent Government Accountability Office (GAO) aircraft report, the current Attorney General used government aircraft approximately half as often as his predecessors.

D) In 2009, the FBI's budget justification stated that "increasing usage of the Gulfstream V ("five") has placed a strain on maintenance and fuel funds necessary to carry out crucial counterterrorism missions." So, the FBI paid for a second Gulfstream V in 2011. But, according to GAO, 60% of the travel on the Gulfstream jets was not for counterterrorism purposes, but for executive travel.

Why were these Gulfstream jets pitched to Congress as necessary for counterterrorism when the majority of the time they weren't being used for counterterrorism?

Response:

The first priority for all Gulfstream V (G-V) usage is operational missions. All executive travel requests are secondary to the Federal Bureau of Investigation's (FBI) investigative and operational needs, as well as required maintenance and pilot training missions. In a recent report, the GAO found that DOJ and FBI always adhere to these principles in scheduling the use of its aircraft.

The G-V owned by the FBI is more than 12 years old, has more miles than most other G-Vs of the same age and, therefore, is frequently out of service due to maintenance, thus necessitating the need for a second G-V. Operational requirements dictated the need for a second G-V, as the range and capacity of the G-Vs are necessary for the FBI's operational missions, which often include transporting personnel, evidence, or apprehended subjects over long distances and with short notice.

Rather than lease yet another plane with the secure communications equipment that the Attorney General and FBI Director are required to have access to when they travel – which would require additional expenditures for another lease, maintenance costs, and pilot staffing – the FBI uses the G-Vs for such executive travel when the planes are not operationally tasked. In addition, while executive travel is termed "non-mission" in the GAO report, much of that travel is official business travel by the Attorney General and FBI Director in furtherance of the Department's mission.

4. DOJ Hiring Despite Sequester

Last month, you wrote a letter to Chairwoman Mikulski and stated the sequestration would cut over "1.6 billion dollars from the Department's current funding level, which would have serious consequences for our communities across the nation." Specifically for the FBI, you wrote these cuts would force the Bureau to furlough 775 Special Agents, the most important asset to the mission.

But, the reality is, as of yesterday, the Department of Justice was advertising for many job openings on the government's website, for such positions as cook supervisor and dental hygienist. So, I am skeptical about your description of the "severe negative impacts" on the Department, including the estimated loss of federal agents fighting national security and violent crime when the government is still hiring non-mission critical staff.

A) How do you reconcile for the American people, the fact that the Department is actively hiring cooks and dental hygienists, but yet, you threaten to furlough 775 FBI agents?

Response:

In a February 1, 2013 letter to Chairwoman Mikulski, the Attorney General explained what would happen if the FBI had to absorb its sequestration cut without any mitigation effort. Sequestration was statutorily required to reduce all programs, projects and activities by the same percentage. Accordingly, over $550 million was cut from the FBI's budget. In April 2013, with the support of Congress, the Attorney General exercised a limited reprogramming authority to mitigate the furloughs for the FBI. Without this reprogramming, the FBI would have had to furlough over 35,000 employees, including over 13,000 agents. This would have the equivalent effect of cutting approximately 2,285 onboard employees, including 775 Special Agents.

The cook and dental hygienist advertisements referenced in your question are for the Federal Bureau of Prisons (BOP), not the FBI. These positions, while not as high profile as the position of FBI agent, are important functions within a prison. Every employee at the 119 federal prisons around the country is a federal law enforcement officer and serves as a correctional worker first. The BOP cooks and dental staff are trained in all aspects of correctional practices and each plays a critical role in institutional safety.

Finally, the Department, like other agencies, experiences ongoing retirements, resignations, and other job changes throughout the year – in fact, thousands of positions become vacant each year in the course of normal operations. As such, ongoing job advertisements are to be expected even during times of managed hiring, commonly referred to as a "hiring freeze."

In sum, the successful accomplishment of our national security and law enforcement missions is inextricably linked to our staff. DOJ cannot fulfill its mission responsibilities without its staff. Thankfully, in light of additional resources provided by Congress in Fiscal Year 2014, the Department has been able to fill critical vacancies, and resume the hiring process for federal agents, prosecutors, analysts, and other staff we need to fulfill our mission.

B) Have you furloughed any high ranking DOJ officials, most of whom also make many times more than lower ranking employees?

Response:

The Department was able to avoid furloughs in Fiscal Year 2013 because of additional funding received in the final Fiscal Year 2013 appropriations, the use of the Attorney General's limited authority to reprogram funds (with the support of our House and Senate appropriations subcommittees), and the Department's aggressive steps to generate savings through a "hiring freeze" and by cutting and/or delaying contracts, training, and other costs. Further, in light of the additional resources the Department has received in Fiscal Year 2014, the Department has resumed hiring and is not considering furloughing staff at this time.

5. Lack of Prosecution of Big Banks

Despite appropriating $165 million for the prosecution of entities and individuals whose actions resulted in the financial crisis, DOJ still has no high-profile financial crisis criminal convictions of either companies or individuals.

Assistant AG Breuer said that one reason why DOJ has not brought these prosecutions is that it reaches out to "experts" to see what effect a prosecutions would have on financial markets.

On January 29, Senator Brown and I requested details on who these so-called "experts" are. So far, we have not received any information on their identity.

A) Please provide the names of experts, even if they are government employees, DOJ consulted with as we requested on January 29, 2013?

Response:

In deciding whether to bring criminal charges against a business entity, long-standing Department of Justice policy requires prosecutors to consider a number of factors, including the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's timely and voluntary disclosure of wrongdoing; the existence and effectiveness of the corporation's pre-existing compliance program; the adequacy of remedies such as civil or regulatory enforcement actions; and the collateral consequences of prosecution. *See* U.S. Attorney's Manual (USAM) 9-28.300. In considering collateral consequences, prosecutors must determine whether there would be disproportionate harm to investors, pension holders, customers, employees, and others who were not personally culpable, as well as impact on the public arising from the prosecution. *See* USAM 9-28.300, 9-28.1000.

The Department does not consider potential collateral consequences in every case. As a threshold matter, federal prosecutors must determine that a business entity's conduct actually constitutes a federal crime. If prosecutors determine that the conduct does not constitute a federal crime, they need not even reach the question of assessing potential collateral consequences (including those affecting the public or the economy).

When we do consider potential collateral consequences, we may consult with experts outside the Justice Department – that is, with relevant domestic and foreign financial regulators. The Department has on occasion reached out to domestic and foreign governmental entities to better understand the regulatory consequences that might flow from an indictment or conviction. In some instances, regulators are able to provide the Department only with limited information, such as the regulatory process that would or could occur in response to a potential enforcement action. Other regulators may indicate that they are unable to provide any view on collateral consequences as part of our consultation. Some regulators, by contrast, have provided us with their views on issues such as potential collateral consequences that may affect innocent individuals, other institutions, and/or markets. Our discussions with regulators do not by themselves determine the outcome, but rather are among the mix of factors that we may consider in determining the appropriate resolution of a matter. We are not currently aware, based on the inquiries we have conducted, of any consultations with private, non-governmental third party entities on the potential collateral consequences of prosecutorial actions the Department might take with respect to any large, complex financial institution.

B) Why should DOJ take these so-called ripple effects into account when they are so speculative? Doesn't this also create moral hazard? And isn't your job just to enforce the law?

Response:

As explained in the USAM, the prosecution of corporate crime is a high priority for the Department. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. Federal prosecutions require the thoughtful analysis of all facts and circumstances presented in a given case. The consideration of the

factors listed above when determining whether to charge a corporation has been required by the USAM since 2008. But the basic principles underlying those USAM provisions have a much longer history at the Department. The first Department-wide memo on this subject was issued in 1999, and those basic principles have been reaffirmed multiple times since then.

The Department shares your concern that there must be accountability for corporate wrongdoing. None of the USAM factors acts as a bar to prosecution, or has prevented the Justice Department from aggressively pursuing investigations and seeking criminal penalties in cases involving large, complex financial institutions. In addition, we do not consider potential collateral consequences in deciding whether or not to charge individual executives and employees. We do consider them in connection with some charging decisions concerning business entities, including large, complex financial institutions, but not in every case. The Department has pursued financial crime with the same strong commitment with which we pursue other criminal matters of national and international significance. No individual or institution is immune from prosecution, and we intend to continue our aggressive pursuit of financial fraud. Indeed, where appropriate, we have filed criminal charges against, and obtained plea agreements from, financial institutions, and charged individual employees. For instance, on May 19, 2014, Credit Suisse AG pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service. Eight Credit Suisse executives have been charged in connection with that investigation since 2011. In another example, on June 30, 2014, BNP Paribas S.A. agreed to enter a guilty plea to conspiring to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act by processing billions of dollars of transactions through the U.S. financial system on behalf of entities subject to U.S. economic sanctions.

6. <u>The Justice Department's Analysis of the Constitutionality of the Assault Weapons Ban</u>

At two separate hearings on gun violence, two U.S. Attorneys testified that the Department supported assault weapons legislation. One argued the Department "would work hard to ensure that whatever comes out, if one comes out, is constitutional." However, when I asked the second U.S. attorney if such an analysis was done and available, he deflected and said that he thinks the legislation is "headed in the right direction" and that "the President would not sign a bill that he did not believe was in accordance with the Second Amendment."

Has the Department issued a formal legal opinion as to the constitutionality of Senator Feinstein's Assault Weapons ban in light of Heller? If not, why not?

<u>Response</u>:

The Department of Justice supports the concept of an assault weapons ban, but the Department has not issued any formal legal opinion on the constitutionality of Senator Feinstein's assault weapons ban.

7. <u>Position on Marijuana Legalization</u>

In October 2010 you sent a letter in response to former Administrators of the Drug Enforcement Administration concerning the Department of Justice's position on California's Proposition 19. This proposition was similar to ballot measures in Colorado and Washington state that legalize marijuana for recreational use.

Eight former Drug Enforcement Administrators sent you another letter this week asking you to act to nullify Colorado and Washington's laws that legalize marijuana before they can be fully implemented. These Administrators are concerned that a lack of action from the Department may cause a "domino effect" that will encourage other states to nullify federal drug laws.

In your original response, dated October 13, 2010 you state, "Let me state clearly that the Department of Justice strongly opposes Proposition 19. If passed, this legislation will greatly complicate federal drug enforcement efforts to the detriment of our citizens. Regardless of the passage of this or similar legislation, the Department of Justice will remain firmly committed to enforcing the Controlled Substances Act in all states. Prosecution of those who manufacture, distribute, or possess any illegal drugs- including marijuana- and the disruption of drug trafficking organizations is a core priority of the Department. Accordingly, we will vigorously enforce the Controlled Substances Act against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law." I ask Unanimous Consent to include the letters from the former Drug Enforcement Administrators and the Attorney General's response in the record.

A) Do you believe the legalization of marijuana is detrimental to our citizens?

Response:

Marijuana trafficking raises a number of public health and safety concerns. As we recently reiterated in a guidance memorandum issued by the Deputy Attorney General to all federal prosecutors, on August 29, 2013, the Department of Justice is committed to enforcing the Controlled Substances Act in all states. The Administration also remains committed to minimizing the public health and safety consequences of marijuana use, focusing on prevention, treatment, and support for recovery.

B) Do you support the legalization of marijuana for recreational or any other use?

Response:

The Administration does not support drug legalization. We are focused on making America healthier, safer, and more prepared to meet the challenges of the 21st Century.

C) Are the statements you made in the October 13, 2010 letter still the position of the Department of Justice? If not, why not? And if so, what will the Department of Justice do to "vigorously enforce" the Controlled Substances Act?

Response:

The Department's responsibility and commitment to enforcing the Controlled Substances Act is unchanged. On August 29, 2013, the Deputy Attorney General issued a memorandum to all United States Attorneys that applies to all federal enforcement activity concerning marijuana, including civil enforcement and criminal investigations and prosecutions, in all states. The memorandum directs our prosecutors to continue to fully investigate and prosecute marijuana cases that implicate any one of eight enumerated federal enforcement priorities. It also makes clear that states and local governments that have enacted laws authorizing marijuana-related conduct are expected to implement strong and effective regulatory and enforcement systems to protect against the harms addressed by those priorities.

8. OPR Report for FY 2012

Provide summaries of all Office of Professional Responsibility (OPR) matters at the Department of Justice and its components for fiscal year 2012. This information has been provided to Congress previously. Should the Department produce the documents with redactions, provide the citation to the statute that authorizes the redaction of information to Congress.

Response:

The Office of Professional Responsibility's (OPR) annual report for Fiscal Year 2012 is available at http://www.justice.gov/opr/annualreport2012.pdf. OPR's annual report for Fiscal Year 2013 is available at http://www.justice.gov/opr/annualreport2013.pdf.

9. 1996 Task Force on FBI Crime Lab

On May 21, 2012, Chairman Leahy and I sent a letter to the Federal Bureau of Investigation (FBI) regarding the flawed forensic work of its crime lab. When we had not received a response seven weeks later, I sent a follow-up letter to the Department on July 16, 2012, with seventeen questions. The Department's December 3, 2012, response touched on some of the issues I raised in my letter, but left many of the questions unanswered.

A) Did the prior task force only review the forensic work of one scientist, as was reported?

Response:

No, the Department's 1996 Task Force looked at cases involving the work of 13 FBI laboratory examiners.

B) Why did the task force notify only prosecutors regarding faulty forensic testing, and not defendants who could have benefited from this information?

Response:

As you are aware, the task force was created more than 15 years ago. The memoranda relating to the task force's creation and functioning do not appear to explain why the decision was made to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

An April 27, 1998 Memorandum for the Attorney General from Acting Assistant Attorney General John C. Keeney, however, addressed a request by the National Association of Criminal Defense Lawyers (NACDL) "that the Criminal Division Task Force overseeing the review notify a defendant's last counsel of record (or the defendant) of any possible evidentiary problems and/or case referrals to prosecutors." Memorandum from Acting Assistant Attorney General John C. Keeney to the Attorney General (April 27, 1998) at 1. That memorandum stated:

> There are safeguards in place to ensure that the case reviews are conducted in a thoughtful and objective manner.

> If a prosecutor determines that the forensic work of a criticized laboratory examiner was not material to a conviction, the prosecutor must provide the Criminal Division Task Force with the reasons for this determination in writing. If a prosecutor's reasons are incomplete or appear to be cursory, the prosecutor will be required to provide a more complete and detailed justification for this decision.
>
> This review process is consistent with the Supreme Court's decision in Brady v. Maryland and its progeny. The Court recognized that prosecutors are in a unique position to evaluate the evidence before them for disclosure pursuant to the Constitution. In addition, under professional ethics rules, prosecutors are subject to a possible finding of misconduct if they attempt to conceal exculpatory information from a defendant.

Id. at 3-4. Similarly, an August 17, 1998, letter from Attorney General Janet Reno to Gerald Lefcourt, the President of NACDL, noted that:

> The Department, like the courts, depends on prosecutors in all cases to make important decisions concerning the disclosure of information, such as determining what evidence must be disclosed under Brady. Prosecutors have an obligation to reveal potentially exculpatory or impeachment information, not only during the pendency of a case, but after conviction, to insure that justice is done. The Department trusts them to carry out this obligation.

Letter from Attorney General Janet Reno to Gerald Lefcourt (Aug. 17, 1998) at 2.

C) What were the procedures for notification in cases where a problem with the forensic work was found by the task force?

Response:

A June 6, 1997 memorandum from Acting Assistant Attorney General John C. Keeney to the Department's prosecutors explained the notification procedures as follows:

> If you determine that the work and/or testimony of a laboratory examiner was material to the verdict, the FBI and Criminal Division will work with your office to arrange for an independent, complete review of the Laboratory's findings and any related testimony. The FBI is contracting with qualified forensic scientists to perform this work. . .
>
> Once the independent scientific review is completed, you will be so notified so that you can assess any Brady obligation to further disclose information to the defense.

Memorandum from Acting Assistant Attorney General John C. Keeney to All United States Attorneys (June 6, 1997) at 4.

Similarly, a July 23, 1997, letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman stated:

> 6. If after receiving the additional input requested, or after initial review of the case, the prosecutor determines that the Laboratory's work was material to the conviction, a scientist outside the FBI will conduct a complete review of the Laboratory's findings and any related testimony. The FBI will be contracting with qualified scientists for this

purpose; however, prosecutors may choose their own scientist to conduct the review, but must notify the Criminal Division Task Force of the name of the scientist or laboratory they plan to use.

7. As soon as the independent scientific review is completed, the FBI will furnish the results of that review to the Criminal Division Task Force, which will notify the prosecutor and obtain an assessment of any Brady obligation to further disclose the information to the defense.

[...]

The process outlined above should ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized Lab examiner.

Letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman (July 23, 1997) at 2-3 (footnote omitted).

While the specific details of the notification procedures appear to have changed over time in response to issues that arose as the task force performed its work, it does not appear that the Department revisited its decision to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

D) In how many cases did the task force find a problem with the forensic work? In how many of those cases is the defendant still incarcerated? In how many was the defendant executed?

Response:

The 1996 Task Force began its work in 1996 and ended its work in or around 2003. The Department takes seriously the concerns raised regarding the Task Force's work and is diligently working to address those concerns. As part of its response, the Department has commenced a review of certain work by the 1996 Task Force and among these things, is assessing cases involving defendants who are currently on death row. On September 27, 2013, representatives from the Department provided a briefing to Committee staff including an overview of the historical activities of the 1996 Task Force, explaining the process by which cases were evaluated and how the Task Force interacted with prosecuting authorities and the parameters that triggered independent scientific review of certain cases. Since that time, the Department has provided updates on the status of the current review of the 1996 Task Force files and ongoing efforts to ensure appropriate notification especially on capital cases and those previously deemed material.

E) Please list each convicted individual in which the task force found the lab's flawed forensic work was determined to be critical to the conviction.

Response:

Please see the response to Question 9(D), above.

F) Please name each prosecutor who was notified by the task force, as well as which conviction the notification was relevant to.

Response:

Please see the response to Question 9(D), above.

G) For each prosecutor who was notified, please indicate, according to the Department's best knowledge, whether or not the defendant was in turn notified.

Response:

Please see the response to Question 9(D), above.

H) For each case in which the Department notified the prosecutor but the defendant was never notified by the prosecutor, please provide the Department's understanding as to why the defendant was not notified.

Response:

Please see the response to Question 9(D), above.

Aside from the questions that were left unanswered in the December 3, 2012, response, the letter itself also raised new questions. When staff for Chairman Leahy and I requested a follow-up briefing in order to understand the Department's response, the Department indicated that it was unwilling to provide any further information at this time about the prior task force.

I) The Department's December 3, 2012, letter read: "The memoranda related to the creation and workings of the Task Force do not provide further details about findings or notifications in particular cases. Nor does the Task Force appear to have collected such information in a database or kept summary statistics. A methodical and labor-intensive review of thousands of paper files would thus be required to provide information about findings or notifications in particular cases." Does this mean that the Department does not intend to undertake a review of these records because it would be labor-intensive?

Response:

Please see the response to Question 9(D), above.

J) On January 30, 2013, a representative of the Department's Office of Legislative Affairs indicated that the Department was still considering what steps to take in order to ascertain the results of the 1996 Task Force. Why had the Department not begun any steps in May 2012, to identify the results of the Task Force, when Chairman Leahy and I first wrote to the FBI requesting this information?

Response:

The Department began its process of reviewing the work of the 1996 Task Force in May 2012. For details regarding the Department's limited review of the 1996 Task Force's work, please see the response to Question 9(D), above.

10. Current FBI Hair Comparison Analysis Review

I understand that the FBI is currently engaged in a review of microscopic hair comparison reports and testimony provided by FBI crime lab examiners prior to December 31, 1999. As of January 30, 2013, the FBI had identified one case where a conviction had been obtained and an FBI crime lab examiner either testified or provided a report about a hair sample. The case was a state death penalty case.

A) Has the convicted defendant that had been identified as of January 30, 2013, been notified yet by the Department that the FBI crime lab examiner in their case may have overstated the conclusions that may appropriately be drawn from a positive association between crime scene evidence and a known hair sample?

Response:

Yes. The Department of Justice notified the defense counsel and prosecutor of the results of the FBI review in September 2012.

B) How many other convicted defendants whose cases involved FBI hair analysis has the FBI identified since January 30, 2013? Please provide details about each case and whether they have yet been notified by the Department.

Response:

The FBI is in the process of reviewing more than 21,500 cases to which a qualified FBI hair examiner was assigned before December 31, 1999. As we review each case, we look first at whether the FBI determined that a positive association was made between a known hair sample and an evidentiary submission. When this has occurred, the FBI contacts the contributor of the evidence to obtain further information about the case, including whether the case was prosecuted and, if so, by what prosecutor's office. When that information is received from the contributor, the FBI contacts the prosecutor to obtain additional information, such as whether the case resulted in a conviction and, if so, whether an FBI laboratory report or testimony were used in the case. If FBI testimony was provided, the FBI asks the prosecutor to forward a transcript of the FBI testimony.

Through April 2014, the FBI had conducted initial review of more than 19,000 case files to determine whether hair evidence was analyzed and a positive association was identified. The FBI has contacted approximately 1,700 contributors of evidence and 1,900 prosecutors to request underlying case information and transcripts, and has received approximately 258 transcripts for review. Notification will be sent to prosecutors, defense counsel, and defendants when the FBI completes this review.

C) Once the Department completes this new review, will the Department commit to publicly releasing the results in detail? If not, why not?

Response:

The Department of Justice will provide general information regarding the results of the review once the review is completed.

11. ICE Agent Jaime Zapata Murder Weapons

Since March 4, 2011, I have been attempting to obtain information regarding individuals associated with the purchase of one of the weapons recovered at the murder scene of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata. Special Agent Zapata was murdered in Mexico on February 15, 2011. I wrote letters to the Department on this issue on March 4 and March 28, 2011, and also submitted Questions for the Record (QFRs) on May 11, 2011.

In response to the QFRs, the Department wrote on July 22, 2011: "The question seeks information regarding sensitive law enforcement operations. We are attempting to determine the extent to which, if any, information in response to this question can be provided consistent with the Department's law enforcement responsibilities." Later, in response to my letters, the Department wrote on October 11, 2011:

As you may know, Otilio Osorio, Ranferi Osorio, Kelvin Morrison and others have been charged with various federal offenses and are scheduled for trial in the near future. Our disclosure of additional information requested by your letters would be inconsistent with the Department's strong interest in successfully prosecuting this matter, as well as with our longstanding policy regarding the confidentiality of ongoing criminal investigations. We will continue to provide you and Chairman Leahy with other information responsive to your requests, as appropriate.

In a letter of February 1, 2012, the Department wrote: "Sentencing of the defendants in this matter is scheduled to occur in February and March of 2012." However, even after Morrison and the Osorio brothers were sentenced on May 7, 2012, the Department continued to rebuff requests for information about their history and their interactions with federal law enforcement. In response to Questions for the Record about why the Department failed to arrest the Osorio brothers in November 2010 when law enforcement observed them engaged in illegal activity, the Department's June 7, 2012 response ignored the question and changed the focus from the Osorio brothers over to the actual shooters of ICE Agent Jaime Zapata: "The investigation and prosecution of those responsible for Special Agent Jaime Zapata's murder are ongoing. For that reason, and because disclosure could compromise these efforts, the Department is not in a position to provide additional information at this time."

Notwithstanding the charges again Julian Zapata Espinoza for the murder of Special Agent Zapata and his upcoming trial, scheduled for June 3, 2013, the Department should be able to release information related to Otilio Osorio, Ranferi Osorio, and Kelvin Morrison now that they have been sentenced—particularly as it relates to incidents other than Otilio Osorio's October 10, 2010, purchase of the gun used in the murder of Special Agent Zapata.

Therefore, included below are past Questions for the Record regarding this matter that remain unanswered:

May 11, 2011: Murder Weapon of ICE Agent Jaime Zapata

According to a Justice Department press release from March 1, 2011, one of the firearms used in the February 15 murder of U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata was traced by the ATF to Otilio Osorio, a Dallas-area resident. Otilio Osorio and his brother Ranferi Osorio were arrested at their home, along with their neighbor Kelvin Morrison, on February 28. According to that same press release, the Osorio brothers and Morrison transferred 40 firearms to an ATF confidential informant in November 2010. Not only were these three individuals not arrested at that time, according to the press release their vehicle was later stopped by local police. Yet the criminal indictment in United States v. Osorio, filed March 23, 2011, is for straw purchases alone and references no activity on the part of the Osorio brothers or Morrison beyond November 2010.

A) Why did the ATF not arrest Otilio and Ranferi Osorio and their neighbor Kelvin Morrison in November?

Response:

As we have explained previously, the Department has an open criminal investigation into Special Agent Zapata's murder and this matter is ongoing. We are therefore not in a position to provide additional information about the allegations concerning the Osorios and Morrison, or about the investigation into Agent Zapata's murder. We also understand that on October 4, 2012, the Department's Office of the Inspector General (OIG) informed you that OIG is reviewing "what information ATF, DEA, and DOJ obtained about the Osorio brothers and Morrison prior to the death of Agent Zapata, including the conduct of those investigations."

B) Was any surveillance maintained on the Osorio brothers or Morrison between the November firearms transfer and their arrest in February?

Response:

Please refer to the response to Question 11(A), above.

C) Did any DOJ or component personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?

Response:

Please refer to the response to Question 11(A), above.

D) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico after the undercover transfer in November, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?

Response:

Please refer to the response to Question 11(A), above.

E) Why should we not believe that this incident constitutes a further example, outside of the Phoenix Field Office and unconnected to Operation Fast and Furious, of the ATF failing to make arrests until a dramatic event is linked to a purchase from one of their targets, even when those targets are ultimately only charged for the same offenses the ATF was aware of months prior to their arrest?

Response:

Please refer to the response to Question 11(A), above.

F) Do you believe that it was appropriate for the ATF to wait until Agent Zapata was shot before arresting these individuals on February 28?

Response:

Please refer to the response to Question 11(A), above.

Earlier Knowledge of Zapata Murder Weapon Traffickers

The DOJ press release alludes to an August 7, 2010, interdiction of firearms in which including a firearm purchased by Morrison. Further documents released by my office make clear that not only did Ranferi Osorio also have two firearms in that interdicted shipment, ATF officials received trace results on September 17, 2010 identifying these two individuals.

G) What efforts did the ATF take in September to further investigate the individuals whose guns had been interdicted, including Morrison and Osorio?

Response:

Please refer to the response to Question 11(A), above.

H) When did law enforcement officials first become aware that Otilio Osorio purchased a firearm on October 10, 2010?

Response:

Please refer to the response to Question 11(A), above.

I) Had the ATF placed surveillance on the Osorio home in September or arrested Ranferi Osorio and Kelvin Morrison, isn't it possible that the ATF might have prevented Otilio Osorio from purchasing a weapon on October 10 with the intent for it to be trafficked?

Response:

Please refer to the response to Question 11(A), above.

J) Does the ATF have policies about creating ROIs at the time that events take place?

Response:

Please refer to the response to Question 11(A), above.

Documents also indicate that ATF Dallas did not create a Report of Investigation (ROI) regarding the November 2010 transfer of firearms until February 25, 2011—the same day ATF received the report tracing the Zapata murder weapons back to the purchase by Otilio Osorio.

K) Does the ATF have policies about creating ROIs at the time that events take place?

Response:

Please refer to the response to Question 11(A), above.

L) Why was the ROI regarding events in November 2010 not created until immediately after the ATF received the trace results on the Zapata murder weapon?

Response:

Please refer to the response to Question 11(A), above.

M) Please provide all records related to the following:

i. When any component of the DOJ first became aware of the trafficking activities of Otilio and Ranferi Osorio and Kelvin Morrison;

ii. Surveillance that may have been conducted on the Osorio brothers or Morrison prior to the November 9 transfer of weapons;

iii. The November 9 transfer; and

iv. Any surveillance that any component of the DOJ continued to conduct on the Osorio brothers or Morrison between the November 9, 2010, transfer and their arrest on February 28, 2011.

Response:

Please refer to the response to Question 11(A), above.

15. Prosecutorial Misconduct

On April 19, 2012, the Department submitted testimony before the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security regarding the Prosecution of former Senator Ted Stevens. The Department's testimony acknowledged failures that occurred in the Senator Stevens case and put forth an argument to combat legislation being filed to alter the federal criminal discovery practice. The Department stated:

[T]he Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in Stevens, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

According to the Department's testimony in the Stevens hearing, Department regulations require Department attorneys to report any judicial findings of misconduct to OPR. According to the same testimony, Department regulations also require OPR to conduct computer searches to identify court opinions that reach findings of misconduct.

A) On what date was mandatory prosecutor refresher training on discovery initiated by the Department?

Response:

In August 2009, the Director of the Executive Office for United States Attorneys (EOUSA) sent a memorandum to all United States Attorneys, First Assistant U.S. Attorneys, Executive Assistant U.S. Attorneys, Criminal Chiefs, Civil Chiefs, and Senior Litigation Counsel, entitled "Mandatory Brady/Giglio and Discovery Training, Appointment of Discovery Trainer, and Creation of National Discovery and Brady/Giglio Coordinator Position." Among other things, the memorandum described that every Assistant U.S. Attorney (AUSA) would be required to complete mandatory half-day training concerning Brady/Giglio and criminal discovery by the end of 2009. Based on a train-the-trainer course held at the National Advocacy Center in October 2009, all AUSAs and prosecutors from Main Justice components – roughly 6,300 in all – were able to complete this training prior to the conclusion of 2009. Thereafter, in 2010, 2011, 2012, and 2013, all federal prosecutors completed at least two hours of annual criminal discovery refresher/update training, as mandated by the June 2010 amendment to Section 9-5.001 of the United States Attorney's Manual. And mandatory criminal discovery refresher/update training for 2014 is presently taking place.

B) Please define "judicial findings of misconduct."

Response:

A judicial finding of misconduct is a finding made by a judge that an attorney violated a rule or standard of conduct intentionally or in reckless disregard of the attorney's professional obligations. In addition, Department attorneys must report to OPR any non-frivolous allegation of serious misconduct by a judge of a Department attorney's conduct.

C) Does "judicial findings of misconduct" include judicial findings in which only the first two elements of a Brady violation exist, establishing that the evidence was exculpatory and that the prosecutor did suppress it, even if the suppression did not prejudice the defendant?

Response:

OPR initiates an inquiry or investigation whenever there is sufficient evidence to establish a reasonable probability that an attorney engaged in professional misconduct. Applied in a Brady context, OPR does not restrict its investigations to only those circumstances when an attorney has been found to have suppressed material and exculpatory evidence. Pursuant to U.S. Attorneys' Manual (USAM) Section 9-5.001(C)(2), for example, prosecutors are required to disclose information that casts substantial doubt upon the accuracy of any of its trial evidence, irrespective of materiality. Accordingly, OPR would initiate an inquiry or investigation if the judicial finding suggested that the prosecutor had violated the broader requirements of the USAM disclosure provisions, apart from whether the court found the suppressed, exculpatory information to be material.

D) Please provide the number of reported instances of misconduct annually since these regulations were put in place, as well as what actions were taken to rectify these situations.

Response:

The regulation requiring Department employees to report judicial findings of misconduct (as well as misconduct allegations of any type from any source), is not new and has existed for more than a decade. With respect to discovery and disclosure obligations, on January 4, 2010, former Deputy Attorney General David Odgen issued a memorandum (Ogden Memo) to all Department of Justice prosecutors that provided further guidance regarding criminal discovery obligations. Since the issuance of the Ogden Memo, OPR has initiated approximately 106 matters in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16. These include both inquiries and investigations based upon judicial findings of misconduct, referrals by DOJ components and employees, media reports, and complaints from private citizens (including defense attorneys and defendants in criminal cases). Accordingly, these include allegations of misconduct for which there may not be a factual basis to support a misconduct finding. Upon the conclusion of an inquiry, OPR either converts the matter to an investigation, closes the matter, or refers the matter to the litigating component to take management action. Of the 106 matters opened since January 4, 2010, in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16, 35 became investigations. Of those 35 investigations, OPR has closed four resulting in findings of professional misconduct in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16. As of September 30, 2014, 12 of the 35 investigations remained pending.

E) Who conducts the computer searches for misconduct-related opinions? How often do the searches occur? What safeguards are in place to ensure that no opinions are missed?

Response:

OPR initiates inquiries based on information from many sources. Department employees are required to report to OPR judicial findings of misconduct and any non-frivolous allegation of serious misconduct by a judge of a DOJ attorney's conduct. Any evidence, or non-frivolous allegation, of serious misconduct must be reported by DOJ employees to OPR as well. OPR receives information from many other sources, including judges, private attorneys, Congress, criminal defendants, concerned citizens, and the media. Searches of legal databases also are used to identify opinions containing judicial findings of misconduct or serious criticism. For the past ten years, working in conjunction with DOJ's law library and Westlaw, senior OPR attorneys have routinely reviewed, every two weeks, all published and unpublished opinions

issued by district and circuit courts that may contain judicial findings of misconduct or serious judicial criticism of a DOJ attorney's conduct. Utilizing broad search terms to identify these opinions, OPR uses the results of these computerized searches to ensure that all such opinions are identified and reviewed to determine whether they warrant further inquiry. Senior OPR attorneys carefully evaluate the opinions that contain the broad search terms to identify those opinions that may merit further inquiry, which then are reviewed by an OPR supervisor. Periodically, OPR reviews its search terms and process to assure that all relevant judicial opinions are analyzed. Likewise, if OPR becomes aware of an opinion that was missed in its electronic search, OPR determines why the opinion was missed and takes necessary corrective action.

F) What does OPR do when such searches identify problems?

Response:

Once OPR determines that a judicial opinion contains findings of misconduct or serious criticism of a DOJ attorney's conduct, OPR typically initiates an inquiry and alerts the component head and subject attorney of the court's opinion and OPR's inquiry. If the matter was not also referred to OPR by the component or subject attorney, OPR includes in its inquiry the component's failure to alert OPR of the judicial opinion.

G) Please list which United States Attorneys' Offices the National Criminal Discovery Coordinator has visited since the creation of the position in 2010 and what they have discovered.

Response:

The National Criminal Discovery Coordinator has conducted criminal discovery training at numerous United States Attorneys' Offices since his appointment in 2010. These sessions ranged between two and four hours, and covered the following topics: Brady/Giglio, Giglio for law enforcement agents, the Jencks Act, Fed. R. Crim. P. 16, and electronically stored information (ESI) in criminal cases. During 2010-14, he conducted (or is scheduled to conduct) this training at U.S. Attorney's Offices in numerous districts, including the following:

- D. Arizona
- C.D. California
- E.D. Virginia
- W.D. New York
- N.D. Alabama
- N.D. Ohio
- N.D. Illinois
- W.D. Missouri
- D. Kansas
- E.D. Louisiana
- W.D. Tennessee
- D. Minnesota
- E.D. Michigan
- W.D. Washington
- D. Oregon

- D. Columbia
- D. Massachusetts
- D. New Jersey
- D. Nevada
- S.D. California
- N.D. California
- N.D. Texas
- E.D. Texas
- D. New Hampshire
- D. Maryland
- M.D. Georgia
- M.D. Florida
- D. Maine
- M.D. Tennessee
- E.D. Pennsylvania
- D. Connecticut
- S.D. Florida
- N.D. New York
- E.D. North Carolina
- W.D. Virginia
- E.D. New York
- D. Vermont
- W.D. Lousiana
- D. South Carolina
- D. Hawaii

In addition, the National Criminal Discovery Coordinator has frequently conducted criminal discovery training for attorneys in Main Justice components, including the Criminal Division, the Tax Division, and the Office of Professional Responsibility. He has also regularly conducted criminal discovery training at a wide variety of training courses at the National Advocacy Center, including several specifically designed to provide training for newly-hired prosecutors, as required by Section 9-5.001 of the United States Attorneys' Manual. And he has been responsible since 2010 for creation of annual online criminal discovery refresher/update training via distance education for federal prosecutors.

16. <u>New Mexico USAO and Columbus Case</u>

As I wrote you on November 28, 2012, news reports indicate the husband of the head of the Criminal Division in the U.S. Attorney's Office for the District of New Mexico (USAONM) has been indicted in connection with a gun trafficking investigation that is related to Operation Fast and Furious. Danny Burnett is being charged in U.S. District Court for the District of New Mexico with leaking sealed federal wiretap information related to the gun trafficking investigation. Mr. Burnett's wife, Paula Burnett, is an Assistant U.S. Attorney (AUSA) for the USAONM and formerly served as the chief of the office's Criminal Division. Mr. Burnett's indictment states that he had "knowledge that a Federal investigative and law enforcement officer had been authorized... to intercept a wire, oral and electronic communication . . . ." The indictment does not explain how Mr. Burnett obtained this knowledge or whether his wife had any role in disclosing it to him. However, a news report states that Ms. Burnett has not been charged with any wrongdoing.

UPDATED INFORMATION: On September 27, 2013, a New Mexico jury found Danny Burnett guilty of two counts relating to disclosure of a court authorized wiretap. Count one was based on disclosing the presence of a wiretap on the phone of Angelo Vega to Vega, and count four was based on making a false statement to investigators wherein he denied disclosure. The jury found him not guilty of count two, which alleged disclosure of a wiretap on the phone of Blas Gutierrez. On January 14, 2014, Danny Burnett was sentenced to confinement of a year and a day, and one year of supervised release. Danny Burnett is currently serving his sentence at FCI Englewood.

A) How did the Department become aware of Danny Burnett's leaking of federal wiretap information? Please explain in detail.

Response:

The Department became aware of the leak when Angelo Vega, a longtime friend to former AUSA Burnett and her husband, Danny Burnett, disclosed to AUSAs during his debriefing that Danny Burnett told him about the wiretap on his phone.

B) Has an independent investigation been conducted into what role Paula Burnett played, if any, in her husband obtaining sealed federal wiretap information? If so, who conducted the investigation?

Response:

Yes. After a thorough investigation, on March 25, 2014, the Department of Justice Office of the Inspector General issued a report of investigation into the purported leak of law enforcement sensitive information by former AUSA Burnett. Ms. Burnett voluntarily retired from the federal service on November 30, 2013. The Department of Justice Office of Professional Responsibility also conducted an investigation and issued its report on July 29, 2014. OPR has referred Ms. Burnett to the State Bar of New Mexico.

C) What steps have you or others in the Department taken, if any, to ensure that a full and independent inquiry is conducted to determine all the facts and circumstances surrounding the leak of information about the wiretap to the criminal targets of that wiretap, including the possible involvement of any Department personnel?

Response:

Please refer to the response to Question 16(B), above.

D) When and how was this matter assigned to the U.S. Attorney's Office for the Western District of Texas?

Response:

On June 8, 2011, the Office of the Deputy Attorney General approved the recusal of the District of New Mexico from the investigation and prosecution related to Angelo Vega and any co-conspirators and the assignment of the matter to the Western District of Texas.

E) When precisely did Ms. Burnett resign as chief of the Criminal Division of the USAONM? What was the reason for her resignation?

Response:

On September 18, 2012, then-United States Attorney (USA) Gonzalez informed Ms. Burnett that because of the announcement of her husband's indictment, she would be demoted from her position as Criminal Chief. He gave her the option of choosing to go to an appellate or civil position in the office. On September 20, 2012, USA Gonzalez announced to the office that, effective that date and in light of the circumstances, Ms. Burnett had elected to step down from her position as Criminal Chief into a civil position.

F) Did Ms. Burnett retain her responsibilities as Chief of the Criminal Division of the USAONM while she was under any investigation?

Response:

Yes. Please refer to the responses to Questions 16(B) and (E), above.

17. New Mexico USAO and Reese Case

When Ms. Burnett stepped down as the Chief of the Criminal Division of the U.S. Attorney's Office for the District of New Mexico (USAONM), James Tierney was appointed as the new Chief of the Criminal Division. Mr. Tierney submitted an ex parte motion in the case United States v. Reese indicating that Luna County Deputy Sheriff Alan Batts, who had been a witness for the government in the case, had been under investigation by the FBI since 2003. Deputy Batts' file contains allegations he extorted assets from a drug dealer, assisted Mexican drug cartels, and assisted in alien smuggling. The investigation stretched over a period of several years, and Assistant U.S. Attorney (AUSA) Richard Williams became the primary contact for the matter in 2010.

According to a judicial opinion in the case, after AUSA Williams learned on July 31, 2012, that Deputy Batts had been called by the government as a witness at trial, he:

[I]mmediately requested information from the FBI about Deputy Batts' involvement and he received numerous print outs, dated August 1, 2012. In the print outs, Mr. Williams found an FBI report, dated May 5, 2008, of a telephone call from Deputy Batts to [FBI] Agent Brotan that indicated that Deputy Batts worried that his own credibility was at stake. AUSA Williams informed Branch Chief AUSA Perez and the information proceeded up through the chain of command through Criminal Chief Tierney, First Assistant Steven Yarbrough and AUSA Sasha Siemel, the ethics advisor, professional responsibility officer, and Giglio requesting official for the United States Attorney. There is no satisfactory explanation why the United States Attorney's Office waited an additional four months to file the ex parte motion.

The court noted that the lead trial counsel, Ms. Maria Armijo, "was also Branch Chief of the Law Cruces United States Attorney's Office from 2005 to 2008, a critical period in the Batts investigation." The court concluded: "[T]here is no doubt that the prosecution, intentionally or negligently, suppressed the evidence."

After the defendants filed a Motion for a New Trial, on January 28, 2013, the court held an evidentiary hearing and heard argument on the Motion for a New Trial. The subsequent February 1, 2013 opinion (quoted above) granted the Motion for a New Trial.

A) Has the above case been reported to OPR as a "judicial finding of misconduct," as per the new guidelines outlined in the Committee's Stevens hearing? If not, why not?

Response:

This matter was referred to OPR by the U.S. Attorney's Office for the District of New Mexico (USAO-NM), and OPR opened an inquiry on February 5, 2013. As indicated above, however, a DOJ employee's obligation to report judicial findings of misconduct has existed for more than a decade and is not part of any new guidelines. It should be noted that in March 2014, a unanimous panel of the Tenth Circuit Court of Appeals reversed the trial court's order granting a new trial, concluding "there is not a reasonable probability that the outcome of Defendants' trial would have been different had the government disclosed the Deputy Batts investigation." *United States v. Reese, et al.*, 745 F.3d 1075, 1091 (10th Cir. 2014).

B) Has an investigation been initiated into the individuals at fault, including Ms. Armijo?

Response:

Please refer to the response to Question 17(A), above.

C) Did AUSAs in the USAONM complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

Response:

All Assistant United States Attorneys complete mandatory discovery training as required by the Attorney General. Pursuant to the United States Attorney's Manual § 9-5.001, as amended in June 2010, all Federal prosecutors, within 12 months of their initial entry on duty and every year thereafter must complete at least two hours of criminal discovery training annually.

D) Some public reports suggested that the public corruption case referenced above had been assigned to Ms. Paula Burnett in 2002. Did Ms. Burnett ever have responsibility for the Southern New Mexico public corruption case involving Deputy Batts? If so, has an investigation been initiated into why Ms. Burnett did not flag the investigation into Deputy Batts earlier?

Response:

Please refer to the response to Question 17(A), above.

18. Officer Karl Thompson

On March 18, 2006, Officer Karl Thompson of the Spokane (Washington) Police Department responded to a reported robbery in which he attempted to apprehend a suspect, Otto Zehm, who

subsequently died. The death resulted from hypoxic encephalopathy due to cardiopulmonary arrest while restrained in a prone position for excited delirium following an altercation with Officer Thompson. Officer Thompson was subsequently investigated, prosecuted, and convicted by the Department for one count of willful use of excessive force and one count of false statements. Following the conviction, an expert witness specializing in video interpretation, Grant Fredericks, who was first used by Spokane in its County investigation that cleared Thompson and then later retained by the Department, filed an affidavit claiming that the prosecution inaccurately stated his opinion in their Rule 16a Disclosure document during trial. While the Court did not ultimately find that the prosecution committed a Brady violation since Officer Thompson suffered no prejudice, it found the first two elements of a Brady violation were present. Assistant U.S. Attorney (AUSA) Tim Durkin did suppress evidence that was favorable to Officer Thompson.

A) Has the Department been made aware of the judicial finding that there was a suppression of evidence in United States of America v. Karl F. Thompson, Jr.? If so, what actions have been taken?

Response:

The Department is aware of the court's order, which also was referred to OPR in January 2013. OPR determined, however, that, given the precise ruling by the court, the factual record, and surrounding circumstances, further inquiry was not warranted until after the matter was briefed and decided on appeal. Once Mr. Thompson has briefed the matter on appeal, that Department will review the matter and develop its response to the court's order.

B) Did AUSA Durkin complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

Response:

AUSA Durkin has completed the prosecutor refresher training on discovery in 2010, 2011, and 2012.

19. Conflict Between USAO and ATF in Reno, Nevada

On September 17, 2012, I wrote to both the ATF and U.S. Attorney for the District of Nevada to inquire about a reported "breakdown" in relations between the ATF Field Office in Reno, Nevada (Reno ATF) and the U.S. Attorney's Office for the District of Nevada (USAONV). I subsequently wrote directly to the Department about the issue on September 27, 2012. The Department responded on October 10, 2012, purporting to respond to all three letters. However, the Department's response failed to substantively address a single question I had posed in any of the three letters.

While the Department subsequently responded to an October 10, 2012, letter from myself, Senator Dean Heller, and Representative Mark Amodei, I still have not received answers to the questions I sent you on September 27, 2012.

Attached to my September 17, 2012 letters was a copy of a letter sent from USAONV to Reno ATF on September 29, 2011 that read: "At this time, we are not accepting any cases submitted by your office. We are willing to consider your cases again when your management addresses and resolves the issues at hand." On October 13, 2012, Reno ATF notified the ATF Internal Affairs Division

that USAONV had alleged an agent in Reno ATF lied to the USAONV. On October 25, 2012, Reno ATF contacted the Department's Office of Professional Responsibility (OPR) to request that OPR investigate the USAONV for unethical conduct, conduct which apparently allegedly included making false claims about Reno ATF.

As attachments to my September 27, 2012 letter to you indicate, OPR ultimately declined to investigate, writing Reno ATF on December 12, 2011:

Assistant United States Attorneys are vested with broad discretion to determine whether and how to pursue criminal investigations. Absent specific evidence indicating that this discretion was corruptly or otherwise inappropriately exercised, OPR does not review the exercise of that authority. Based on a review of the information you provided, OPR concluded that your complaint concerns a management matter which can more appropriately be addressed by having ATF management raise your concerns with the United States Attorney for the District of Nevada.

An ATF Internal Affairs Division memorandum dated February 10, 2012, concluded that "no evidence was offered to substantiate the allegation of . . . lying to the U.S. Attorney's office . . . ." The memorandum reiterated that OPR had declined the investigation because OPR stated that the matter needed to be handled by management from the USAO and ATF.

A) **Why did Department management fail to intervene and mediate between ATF and the USAONV in 2011, when Reno ATF agents were flagging this issue with both ATF management and the Department's OPR?**

Response:

As you know, during a period of time between 2011 and 2012, a breakdown in the working relationship occurred between the Bureau of Alcohol, Tobacco and Firearms (ATF) and the U.S. Attorney's Office for the District of Nevada (USAO-NV). In early August 2011, the ATF San Francisco Field Division, which is responsible for the oversight of ATF's Reno office (ATF-Reno), learned of this situation and engaged with ATF-Reno and the USAO-NV in an effort to resolve it. ATF Headquarters became aware of the issues in November 2011. After further discussions in March 2012 involving Unites States Attorney for the District of Nevada Daniel Bogden, ATF Acting Director B. Todd Jones, and ATF Assistant Director Ronald Turk, it became apparent that the issues could not be readily resolved at that time in a manner that would allow ATF to best utilize its limited agent resources. ATF subsequently decided to reassign four special agents from ATF-Reno to duty posts with pressing needs for additional agents.

In August 2012, a new Special Agent in Charge (SAC) was selected to lead ATF's San Francisco Field Division. Within weeks of his arrival, the SAC met with USA Bogden in Las Vegas to discuss a mutually agreeable resolution to the outstanding issues between the two offices. Subsequently, at the direction of the Office of the Deputy Attorney General, a senior level Federal prosecutor and an ATF Supervisory Special Agent from outside the District of Nevada conducted a review of firearms cases that had been declined by the USAO-NV between February 2009 and October 2011. After the completion of this review, it was determined that a small number of these cases required additional investigation before prosecution decisions could be made. The SAC and USA Bogden worked together to determine the appropriate next steps for each case. Since some of the matters were referred to local law enforcement authorities, it would not be appropriate to comment further on them.
The USAO and ATF are working cooperatively in Reno and enforcing federal firearms laws, and the reporting relationship between the USAO and ATF has been reconfigured and involves different individuals at both entities. The ATF-Reno post of duty is now composed of two permanent Special Agents and an ATF Special Agent who began a detail on February 13, 2013, and will work as a Violent

Crime Coordinator and assist with the enhanced Project Safe Neighborhood Task Force. This enhanced task force, implemented and operational since June 2011, meets on a bi-weekly basis to review firearm and violent crime cases for federal or state prosecutions. In addition, in an effort to strengthen relationships in the region, the ATF SAC has personally met with other Federal, state, and local law enforcement agency heads with responsibilities in the Reno area. The ATF SAC will continue to monitor the situation and evaluate staffing needs of ATF-Reno.

B) If a U.S. Attorney's office has a problem with a component agency or vice versa, and the offending entity refuses to address the problem, who in the Department is responsible for providing oversight and mediating such a dispute?

Response:

The Deputy Attorney General supervises all of the Unites States Attorneys and all DOJ law enforcement components, including ATF.

C) Was anyone in the Executive Office of U.S. Attorneys (EOUSA) notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were individuals in EOUSA first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

EOUSA was not notified of this issue by the ATF or USAO-NV prior to your letter of September 17, 2012.

D) Was anyone in ODAG notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were individuals in ODAG first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

An attorney in the Office of the Deputy Attorney General (ODAG) was advised by ATF Headquarters in the spring of 2012 that there were issues in the working relationship between the USAO-NV and ATF-Reno, and that some agents based in Reno would be transferred to meet pressing ATF needs elsewhere. The full impact of these matters was not made clear to the attorney and, therefore, not further disseminated within leadership offices at the Department.

E) Was Deputy Attorney General Cole notified of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

F) Was anyone in the Office of the Attorney General notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were they first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

G) Were you aware of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

H) Please provide the following documents:

i. All emails pertaining to anyone at Justice Department headquarters becoming aware of these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

ii. All emails pertaining to anyone at Justice Department headquarters responding to these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

Response:

On April 23, 2013, The Department and ATF provided substantive written responses to Senator Grassley regarding the U.S. Attorney's Office for the District of Nevada and the Bureau of Alcohol, Tobacco, Firearms and Explosive in Reno, Nevada. In addition, Acting Director Jones responded to questions related to the matter at his nomination hearing before the Senate Judiciary Committee on June 11, 2013.

20. "Fearless Distributing" in Milwaukee

Recent news reports have highlighted an operation by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in Milwaukee. The operation involved an undercover storefront called "Fearless Distributing" that ATF opened to attract individuals wanting to sell firearms under the table.

Although in the end 30 individuals were charged, local residents complain that the ATF operation actually brought more crime into a neighborhood where crime had been on the decline. The operation seems to have been plagued with failures, including wrongly-charged defendants, $15,000 worth of damage being caused to the space ATF leased, and $35,000 worth of merchandise being stolen from ATF's storefront in a burglary. In a separate incident, thieves also broke into an ATF SUV parked at a coffee shop a half-mile away from the undercover storefront and stole three guns stored inside the car, including an M-4 .223-caliber fully automatic rifle.

On January 31, 2013, Chairman Darrell Issa, Chairman Robert Goodlatte, Chairman James Sensenbrenner, Jr. and I sent a letter to ATF Acting Director B. Todd Jones and copied the Department requesting information regarding "Fearless Distributing." As of today, we still have not received a response from the ATF or the Department.

A) When was the undercover operation involving Fearless Distributing initiated and terminated?

Response:

In response to your inquiry, the Department provided Committee staff with a briefing on ATF's Office of Professional Responsibility and Security Operations review of the Milwaukee matter on April 15, 2013, and provided further information and documents in a letter to you and Chairmen Goodlatte, Issa, and Sensenbrenner on April 30, 2013. ATF Director B. Todd Jones testified before the House Oversight and Government Reform Committee regarding ATF storefront operations on April 2, 2014. ATF Deputy Director Thomas E. Brandon testified before the House Committee on the Judiciary Crime, Terrorism, Homeland Security, and Investigations Subcommittee regarding ATF storefront operations on February 27, 2014. Additionally, ATF provided a detailed briefing on ATF storefront operations to House and Senate staff on May 16, 2014.

B) What were the names of the case agent and supervisory agent over the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

C) At what management level at the ATF was the undercover operation involving Fearless Distributing authorized? Please identify by name and position each individual involved in the authorization above the first-line supervisor.

Response:

Please refer to the response to Question 20(A), above.

D) What was the highest management level at the ATF that the operation involving Fearless Distributing was briefed? Did anyone at the ATF or DOJ ever call any aspects of this case into question? If so, please provide the Committee with that documentation.

Response:

Please refer to the response to Question 20(A), above.

E) What law enforcement partners, if any, did the ATF work with in the undercover operation involving Fearless Distributing? Please list them and the number of personnel assigned from each.

Response:

Please refer to the response to Question 20(A), above.

F) Did the United States Attorney for the District of Minnesota authorize the undercover operation involving Fearless Distributing? If not, who at the U.S. Attorney's Office authorized and managed this undercover operation?

Response:

Please refer to the response to Question 20(A), above.

G) What methodology was used to determine the placement of the undercover business, Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

H) What United States government property, including law enforcement sensitive paperwork, was left on the premises of Fearless Distributing once the undercover operation ended?

Response:

Please refer to the response to Question 20(A), above.

I) What methodology was used to determine the price to be paid for weapons or drugs bought in the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

J) What were the sources of cash for the undercover operation involving Fearless Distributing, including the breakdown between (a) funds provided by the ATF, (b) project generated income (PGI), and (c) interest income?

Response:

Please refer to the response to Question 20(A), above.

K) What were the operational costs for the undercover operation involving Fearless Distributing, including the breakdown between (a) total operational costs, (b) unused PGI remitted back to the Treasury, if any, and (c) interest income remitted?

Response:

Please refer to the response to Question 20(A), above.

L) What was the total cost of the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

M) How many indictments, leads, and arrests were garnered through the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

N) What information, including reports of investigation, was used in obtaining probable cause for the arrest of Adrienne Jones, who was allegedly falsely accused?

Response:

Please refer to the response to Question 20(A), above.

O) How many civil claims were filed against ATF or employees of ATF relative to this undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

P) How many weapons were sold by the ATF during the undercover operation involving Fearless Distributing and what are the locations of those weapons now?

Response:

Please refer to the response to Question 20(A), above.

Q) If weapons were sold, who approved the plan to conduct these sales?

Response:

Please refer to the response to Question 20(A), above.

R) What steps, if any, were taken to retrieve the weapons and prevent their use in illegal activity or transmittal to prohibited purchasers, and how successful were those precautions?

Response:

Please refer to the response to Question 20(A), above.

S) List all property stolen from the unattended ATF vehicle and Fearless Distributing store during their respective burglaries. Was the agent whose car was broken into (and from which weapons were reportedly stolen) working on the undercover operation involving Fearless Distributing? What personnel action(s), if any, have been taken regarding this incident?

Response:

Please refer to the response to Question 20(A), above.

T) Were the weapons reportedly stolen from the unattended vehicle secured with any type of safety device/trigger lock?

Response:

Please refer to the response to Question 20(A), above.

U) What is the status of the reportedly stolen weapons/ammunition, including the M-4 automatic rifle?

Response:

Please refer to the response to Question 20(A), above.

V) How many storefront operations has ATF conducted in the U.S. each year from 2005 to 2012? For each year, please break down the number by state in which the operations were conducted.

Response:

Please refer to the response to Question 20(A), above.

W) Please detail all storefront operations that the ATF Phoenix Field Division conducted between 2008 to the present.

Response:

Please refer to the response to Question 20(A), above.

X) What steps has ATF taken, if any, to ensure that these storefront operations do not encourage the very criminal activity they are supposed to combat, as appears to have happened in Milwaukee?

Response:

Please refer to the response to Question 20(A), above.

Y) Please provide to the Committee the following documents:

i. All ATF Operational Plans (including ATF Form 3210.7) for the undercover operation involving Fearless Distributing.

ii. All reports of investigation (ROIs) relative to the undercover operation involving Fearless Distributing.

iii. Any documentation authorizing ATF to sell weapons as part of the undercover operation involving Fearless Distributing.

iv. The ATF policy for storage of firearms in unattended vehicles.
v. The ATF policy for conducting undercover operations out of store fronts.

Response:

The ATF policy for storage of firearms in unattended vehicles and the ATF policy for conducting undercover operations out of storefronts were provided to your office in a letter dated April 30, 2013. ATF is preparing and producing the remaining documents in response to a subpoena from Chairman Issa, Committee on Oversight and Government Reform.

21. ATF Monitored Case Program

On January 27, 2012, Deputy Attorney General James Cole wrote to update certain individuals on the Hill of developments within ATF in the wake of the investigation into Operation Fast and Furious. One of those included the establishment on July 19, 2011, of a new Monitored Case Program. Under it, certain cases would receive enhanced oversight from ATF headquarters. One criteria for participation is investigations in which more than 50 firearms have been straw purchased or trafficked.

A) What are the other criteria for receiving enhanced oversight from ATF headquarters as part of the Monitored Case Program?

Response:

The criteria for submission of an investigation or inspection for possible enhanced oversight under the provisions of the Monitored Case Program (MCP) continue to evolve. ATF's MCP currently requires that 18 broad categories of investigations / inspections be submitted to the Deputy Assistant Director - Field Operations (DAD-FO) or Deputy Assistant Director – Industry Operations (DAD-IO) for evaluation to determine if the investigation / inspection presents the potential for significant programmatic, intelligence or operational/policy risks to ATF or the public. These categories include:

- Investigations that have reached the incremental request to exceed $100,000 in funds used for investigative purposes.
- All ATF sponsored Organized Crime Drug Enforcement Task Force (OCDETF) investigations.
- All Department of Justice authorized churning investigations.
- Investigations that have any documented, verified international nexus.
- Investigations of an organization or individuals in which more than 50 firearms (of any type) or more than 5 National Firearms Act (NFA) weapons have been straw purchased or trafficked.
- Any investigation involving the trafficking of explosives.
- All Federal firearms licensee (FFL) investigations.
- ATF investigations applying for or using T-III electronic intercept authorization sponsored by any other agency (State, local or Federal) in which ATF personnel participate; or investigations for which an ATF special agent requests Title 21 cross designation to qualify to act as the affiant for a T-III court order.
- FFL thefts involving violence (e.g., armed robberies, physical harm, or death to the FFL, their employees, or patrons).
- All investigations requiring the approval of the ATF Undercover Review Committee including investigations that involve long-term undercover or storefront operations.
- Any investigations involving sensitive investigative techniques that require the approval and concurrence of the US Attorney's office.
- Investigations that are so sensitive that the Special Agent in Charge has determined that access to the investigation in the case management system (N-Force) must be restricted to a limited number of specified personnel with a need to know.
- Any investigation or inspection that may draw significant national public interest or media attention.
- Any inspection that results in a recommendation for revocation by the Director of Industry Operations (DIO) of an FFLor explosives license/permit, or the denial of a renewal of such a license/permit.
- All inspections of national manufacturers, importers, and wholesale distributors of firearms and explosives with adverse compliance histories.

- Inspections that disclose 50 or more unaccounted-for firearms (after reconciliation) that were received by the licensee in the two years prior to the inspection.
- Inspections that disclose more than 50 pounds of unaccounted-for high explosives or more than 200 pounds of low explosives or more than 500 pounds of blasting agents (after reconciliation) that were received by the licensee / permittee in the 2 years prior to the inspection.
- Any investigation the SAC or DIO submits for monitoring, and recognized by the DAD-FO or DAD-IO as a significant organizational risk or threat.

B) How many cases became a part of the Monitored Case Program in 2011? In 2012?

Response:

In Fiscal Year 2011, ATF evaluated 175 cases for inclusion in the MCP. Of those, 120 cases (100 criminal and 20 industry) were placed into a monitored status.

In Fiscal Year 2012, ATF evaluated 148 cases for inclusion in the MCP. Of those, 143 cases (109 criminal and 34 industry) were placed into a monitored status.

C) Was the Milwaukee "Fearless Distributing" case described above a part of the Monitored Case Program? If not, why not? Given that it involved the seizure of 145 guns, isn't a case like that precisely the type of case that requires enhanced oversight from ATF headquarters? Why was there no enhanced oversight?

Response:

The Milwaukee criminal investigation titled "Fearless Distributing" was evaluated and included in the initial MCP during its operational phase because it utilized a storefront operation as an investigative technique. The investigation was monitored and monitoring was terminated when the case progressed into the judicial phase. Subsequent to the Milwaukee investigation, the MCP was enhanced in May of 2013.

22. ATF Suspect Gun Database

A) What is the criteria for adding guns to the Suspect Gun Database?

Response:

Firearms may be entered into the Suspect Gun program if ATF Special Agents suspect them to be illegally trafficked or to have another connection with potential illegal activity ATF Special Agents are investigating (for example, firearms stolen from a federal firearms licensee).

B) How was the criteria established for adding guns to the Suspect Gun Database?

Response:

The Suspect Gun program was developed by the National Tracing Center as an investigative tool in the fight against illegal firearms trafficking and firearms violence. It serves as a complement to firearms

tracing allowing an agent engaged in a criminal investigation to have a firearm flagged when it is recovered or traced.

C) What is the procedure for individual agents to have a gun added to the Suspect Gun Database?

Response:

Suspect Guns can only be accepted from an ATF Office on a preformatted submission, ATF Form 3317.1. Requests may be faxed, mailed, or emailed, and must include an ATF investigation number, a complete firearm description (i.e., manufacturer, caliber, model and serial number), the agent's telephone number and fax number, and if known, purchaser information, purchase date, and federal firearms licensees.

D) What procedures exist, if any, for ensuring that guns entered into the suspect gun database incorrectly are purged from the database?

Response:

Periodic reviews are conducted to determine if investigations of guns submitted under the Suspect Gun program are still active. If not, appropriate administrative steps are taken to remove the information on the relevant guns from the program.

E) How does the use of the Suspect Gun Database comport with the statutory prohibitions against maintaining a national gun registry?

Response:

The Suspect Gun program is a table maintained within ATF's Firearms Tracing System (FTS), which has been utilized since 1992. This table contains information about "suspect guns" so that when a trace request is received, the firearm description submitted by the requesting law enforcement agency can automatically be checked against the table to determine if there are any matches. The table is populated by ATF Special Agents with information about firearms that have not yet been recovered by law enforcement but that may be involved in criminal activity. When a match occurs during the tracing process it allows that process to be completed more efficiently and effectively. The table is not used for any other purpose. Maintaining this table does not violate any of the laws that restrict ATF's ability to centralize or maintain firearm records. *See* U.S. Government Accountability Office Report "Federal Firearms Licensee Data: ATF's Compliance with Firearms Licensee Data Restrictions," September 11, 1996 (GAO/GGD 96-174). *See* also J&G Sales v. Truscott, 473 F.3d 1043 (9th Cir. 2007) and Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281 (4th Cir. 2004).

23. FBI NICS Tracking

During Operation Fast and Furious, ATF received automatic e-mail notification of purchases from the FBI's National Instant Criminal Background Check System (NICS) for certain purchasers. The e-mail notification would be roughly contemporaneous, such as the Monday after a Saturday purchase.

A) How long has this automatic notification system existed? Please describe its development.

Response:

Since the inception of the National Instant Criminal Background Check System (NICS) in 1998, 28 C.F.R. section 25.9(b)(2)(i) has afforded NICS the authority to retain certain information in the NICS Audit Log for designated purposes. Pursuant to this regulation, information not yet destroyed "that indicates, either on its face or in conjunction with other information, a violation or potential violation of law or regulation, may be shared with appropriate authorities responsible for investigating, prosecuting, and/or enforcing such law or regulation. . . ."

Based upon this authority, the Bureau of Alcohol, Tobacco, Firearms and Explosives occasionally requests that NICS monitor transaction information (typically for up to 90 days) on named individuals who are under investigation. These written requests include discussions of the facts and the law or regulation the individual is believed to have violated. NICS reviews each request to determine whether the justification indicates a violation (or potential violation) of law or regulation. If a request is denied, the requester may provide supplemental information. NICS grants or denies requests for monitoring based on their assessment of the adequacy of the justification provided. If NICS has granted the request for monitoring and the agency that requested it wants to terminate it, the agency notifies NICS in writing (this may be accomplished by email).

B) Why was it created?

Response:

Please refer to the response to Question 23(A), above.

C) Do any other agencies receive similar notifications of purchases?

Response:

Please refer to the response to Question 23(A), above.

D) What is the criteria for being flagged in the NICS system such that it generates e-mail notifications of purchases?

Response:

Please refer to the response to Question 23(A), above.

E) How was this criteria established?

Response:

Please refer to the response to Question 23(A), above.

F) What are the criteria and process for removing someone from the list?

Response:

Please refer to the response to Question 23(A), above.

24. Prosecutions of Lying on Background Checks

New York City Mayor Michael Bloomberg is quoted publicly as saying that in 2009, the Department prosecuted only 77 out of the more than 71,000 people who failed background checks due to fraudulent applications.

A) Is this number accurate?

Response:

Federal law requires licensed firearms dealers to ensure that they are not selling firearms to prohibited persons. Specifically, before an FFL can transfer a firearm to an unlicensed individual, the dealer must request a background check through the FBI's NICS to determine whether the prospective transfer would violate federal or state law. During the NICS check, personal information provided by the prospective firearms purchaser is used to search national databases containing criminal history and other relevant records to determine if the person is disqualified by law from receiving or possessing a firearm.

Neither the ATF Denial Enforcement and NICS Intelligence (DENI) Branch nor EOUSA specifically track data as to the number of cases emanating from NICS denials that are referred to United States Attorneys' Offices (USAOs) for prosecution. Therefore, we are unable to determine the precise number of prosecutions emanating from NICS denials.

However, EOUSA has compiled two tables, below, regarding prosecutions under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A), the statutes under which offenses for making misrepresentations during the background-check process, including on ATF Form 4473, are prosecuted. The tables indicate the number of cases filed (indicted), defendants filed (indicted), and convictions obtained under these statutes for fiscal years 2004 through 2012. To be clear, charges under these statutes may arise under circumstances other than NICS denials. In addition, investigations that begin with a focus on violations of these statutes, including investigations based on NICS denials, may not result in charges under these statutes, and may result in charges with steeper penalties than those provided under these statutes. (Note: EOUSA is unable to compile a break down by these statutes for data predating fiscal year 2004. Also, defendants found guilty in a fiscal year may have been indicted in a prior fiscal year.)

B) Please provide the corresponding numbers of individuals failing background checks and subsequent prosecutions for 2000 through 2012.

Response:

Based on the reports and statistics publicly available on the NICS website at www.fbi.gov/about-us/cjis/nics/nics, the following table shows the number of NICS denials, processed by the FBI NICS Section, for calendar years 2001 through 2012:

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
64,500	60,739	61,170	63,675	66,705	69,930	66,817	70,725	67,324	72,659	78,211	88, 479

(Note: These figures do not include Point of Contact (POC) state denials, which may be based purely on state law prohibitions, and may be prosecuted by state authorities.)

The following tables indicate the prosecution statistics under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A):

18 U.S.C. 922(a)(6)										
	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Cases Filed	325	313	291	253	224	180	183	191	175	165
Defendants Filed	383	382	362	322	296	213	250	246	234	204
Defendants Guilty	292	268	253	197	224	189	121	154	149	156

18 U.S.C. 924(a)(1)(A)										
	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Cases Filed	208	197	223	154	148	154	161	196	242	206
Defendants Filed	278	257	285	207	203	214	243	388	415	328
Defendants Guilty	179	165	160	155	139	165	169	191	282	282

By its intended function, NICS actually denies prohibited persons from purchasing firearms. When an FFL is notified of an immediate, "standard" NICS denial, the FFL does not allow a firearms purchase to proceed, and the system prevents the transaction. In instances where NICS notifies the FFL of a "delayed" transaction, an FFL must wait three business days before completing the transaction if it has not definitively heard from NICS whether the purchaser is a prohibited person. If the transaction is completed, and a definitive denial subsequently issues from NICS to ATF, the delayed denial results in referral to ATF for retrieval of the firearm from the prohibited recipient. At any rate, considering the USAOs' limited prosecutorial resources – and that it would be virtually impossible to prosecute each and every one of the tens of thousands of NICS denials that occur every year – prosecution priorities usually focus on cases in which individuals actually possessed or used firearms. These firearm-possession and violent-crime cases – which often involve serious assaults, murders, and complex gang and firearms-trafficking investigations, and often result in significant mandatory-minimum sentences -- receive a higher priority than the cases in which NICS denied individuals from obtaining firearms in the first place.

25. <u>General David Petraeus</u>

Nearly four months ago, I wrote you regarding the resignation of Director of Central Intelligence (DCI) David Petreaus and the involvement by the U.S. Department of Justice (Department), including the Federal Bureau of Investigation (FBI), in uncovering information that revealed an extramarital affair cited by General Petreaus as a reason for his resignation. My letter requested a briefing similar to the one provided to members of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and Chairman Leahy of the of the Senate Committee on the Judiciary at that time. My letter was never acknowledged nor was I ever offered a briefing.

A) Why did you provide a briefing to the Chairman of the Judiciary Committee while refusing to provide one to the Ranking Member?

Response:

Please refer to the Department's response dated June 6, 2013, responding to your November 15, 2012, letters concerning an FBI investigation into matters relating to former Central Intelligence Agency (CIA) Director Patraeus. Longstanding Department policy precludes discussion of ongoing law enforcement investigations. Inasmuch as this is an ongoing investigation and significant individual privacy interests are implicated, we are unable to provide a briefing or answer the questions set forth below.

B) Please provide:

i. A timeline of events from initial contact with FBI personnel through the close of the inquiry,

Response:

Please refer to the response to Question 25(A), above.

ii. an explanation of how and why the FBI opened the inquiry,

Response:

Please refer to the response to Question 25(A), above.

iii. a detailed list of personnel who signed off on the investigation,

Response:

Please refer to the response to Question 25(A), above.

iv. a detailed account of the legal authorities used to obtain each of the electronic communications of those involved, and the role, if any, of any U.S. Attorneys' Offices,

Response:

Please refer to the response to Question 25(A), above.

v. an explanation of the timing and circumstances of how you and the FBI Director first learned of this inquiry and when the White House was notified of the inquiry,

Response:

Please refer to the response to Question 25(A), above.

vi. a description of Department employees' contacts with Congress prior to the election and whether the Department considers those contacts protected whistleblower disclosures,

Response:

Please refer to the response to Question 25(A), above.

vii. an explanation of whether the FBI shared information regarding the investigation with investigators or protective security details from various military or criminal investigation organizations (including the CIA, Army Criminal Investigation Command (CID), Air Force Office of Special Investigations (OSI), or Navy Criminal Investigative Service (NCIS)) and when that information was shared,

Response:

Please refer to the response to Question 25(A), above.

viii. a description of the status of any related reviews being conducted by the FBI Inspections Division, the Office of Professional Responsibility, the Deputy Attorney General's Office, or the Office of Inspector General, including any related to public reports of alleged communications between an FBI agent and a witnesses that involved inappropriate photographs or text,

Response:

Please refer to the response to Question 25(A), above.

ix. an explanation of whether the extramarital affair was uncovered during the initial background investigation conducted by the FBI prior to General Petraeus' confirmation as DCI, and

Response:

Please refer to the response to Question 25(A), above.

x. an explanation of any legal analysis conducted by any component of the Department, including the FBI, regarding whether you or the FBI Director were obligated by law to report the investigation of DCI Petraeus to the President or any other government official.

Response:

Please refer to the response to Question 25(A), above.

26. FBI Undercover Operation Revenue

Earlier this year, the Federal Bureau of Investigation (FBI) provided the Committee with their Annual Report to Congress on Criminal Undercover Activity for Fiscal Year 2010. The report provides useful information on the scope and cost of the FBI's criminal undercover dealings but fails to address certain questions regarding the operations that generated revenue.

A) For each undercover operation with funds remitted to FBI Headquarters, did FBI comply with PL 104-132, SEC. 815(d), and deposit those funds as miscellaneous receipts in the Treasury of the United States? If so, how soon after each operation were the funds deposited?

Response:

Section 102 of the Department of Justice and Related Agencies Appropriations Act of 1993 (Pub. L. 102-395, 106 Stat. 1838-1841 (10/6/92) requires annual reports to Congress regarding undercover operations in which "(I) the gross receipts (excluding interest earned) exceed $50,000, or (II) expenditures (other than expenditures for salaries of employees) exceed $150,000." Section 102(b)(6)(C). The FBI reports undercover operations that meet these parameters and compiles with the requirement to remit certain funds to the U.S. Treasury. Interest income and "project-generated" income that is not necessary for the conduct of an operation are reported monthly and posted to Treasury Account Symbol 3220 (general funds), 1060 (abandonment), or 1435 (interest) as appropriate. In some cases there are "unused funds" that are not immediately remitted to the U.S. Treasury. These "unused funds" are single-year appropriations for undercover operations. The single-year, unused funds received for Fiscal Year (FY) 2010 for undercover operations are being held at FBI Headquarters for an additional four years until they are either canceled or they expire in Fiscal Year 2015.

B) For each undercover operation with funds generating interest, which financial institution(s) was (were) utilized to generate interest and how are the institutions chosen?

Response:

The choice of financial institution used to support an FBI undercover operation is not dictated by FBI Headquarters but is, instead, selected at the discretion of the field office with primary oversight of the operation. This field office role is helpful when the particular circumstances of an undercover operation necessitate the use of a particular financial institution or type of institution, such as when a national or regional financial institution must be used to support the backstopping requirements of a particular operation.

C) In only one undercover operation in 2010, Operation Periodic Table, was there a "refund remitted." What is the difference between the "refund remitted" and the other "unused funding returned?" For what was the $73.22 refund remitted?

Response:

The term "refund remitted" refers to a refund received for a payment made in a prior Fiscal Year. When an operation receives a refund from a prior Fiscal Year, that refund must be remitted to FBI Headquarters. This differs from the treatment of a refund received for a purchase made in the same fiscal year, which can be "re-used." In Periodic Table, $73.22 is considered a "refund remitted" because this November

2006 (Fiscal Year 2007) refund was generated by the overpayment of a prorated energy bill during Fiscal Year 2006.

The term "unused funding returned" refers to operational funds that were properly authorized and disbursed from FBI Headquarters to the field office throughout the life of the operation but were not actually expended by the time the operation was terminated. Such funds are returned to FBI Headquarters at the end of the operation.

D) In Operation Double Sessions, after eight years of investigation and with over $1.1 million dollars generated by the project, a total of $330 unused project generated income (PGI) was returned to FBI Headquarters. This amount is significantly below the PGI remittance level of all other undercover operations detailed in this report. Can FBI provide an itemized budget for this operation?

Response:

As of May 16, 2013, the budget for this operation was as follows:

FUNDING SOURCE	FUNDS
Appropriated Funds	$459,468.27
Project-Generated Income	$1,237,806.53
Interest Income	$15,191.53
TOTAL	**$1,612,466.33**
EXPENDITURES	**FUNDS**
Professional Services	$1,003,848.79
Insurance	$233,608.62
Bribe Payment	$66,450.00
Telephone Lease Lines	$57,126.85
Payroll	$51,000.00
Commercial Rent	$37,698.00
Travel	$30,410.93
Telephone Service	$22,519.09
Miscellaneous	$19,549.76
Money Laundering Fees	$18,000.00
Rental of Vehicles	$17,580.91
Fuel	$11,852.71
Equipment	$10,818.57
Vehicle Maintenance	$9,032.67
Food and Entertainment	$3,945.73
Utilities	$3,502.17
SUBTOTAL	**$1,596,944.80**
Unused Project-Generated Income	$330.00
Interest Income Remitted	$15,191.53
TOTAL	**$1,612,466.33**

27. Allegations of FBI Prostitution in Philippines

A motion filed in the U.S. District Court for the Central District of California in September 2012 alleges that an undercover FBI agent spent thousands of taxpayer dollars on prostitutes in the Philippines for himself and three other individuals cooperating with the FBI. The motion alleges that the undercover agent and another FBI agent, both based out of West Covina, California, were in the Philippines as part of a weapons-trafficking investigation. The undercover agent was reportedly posing as a weapons broker for Mexican drug cartels. According to the motion: "On several occasions, the undercover agent invited [the cooperating individuals] to . . . brothels in and around Manila in order to reward them for their efforts and encourage them to continue looking for weapons. [The undercover agent] ordered prostitutes, and paid for himself and others to have sex with the prostitutes." It is unclear whether the second FBI agent was ever also present.

The motion attaches a declaration from a federal public defender investigator, who traveled to the Philippines in May 2012 to interview witnesses. The motion also provides correspondence from Justice Department trial attorneys dated August 23, 2012, which confirms that the undercover FBI agent did indeed make "several requests for reimbursement . . . for the time period November 15, 2010 to September 27, 2011 that may relate to expenses incurred by the undercover agent at clubs in the Philippines" when the three individuals cooperating with the FBI were present. The requested reimbursements total $14,500.

The motion claims that many of the prostitutes at one of the brothels the FBI agent frequented were likely minors. It attaches documentation that on May 5, 2012, the Philippine government raided the brothel and rescued 60 victims of human trafficking, 20 of whom were minors. The aforementioned letter from Justice Department trial attorneys acknowledges that the undercover FBI agent submitted a request for reimbursement based on expenses at the brothel on September 26 and 27, 2011. The motion also identifies at least four other dates on which discovery produced by the government indicates the FBI agent visited the brothel.

A) Of the $14,500 requested by the undercover agent for reimbursement, how much was the agent actually reimbursed by the FBI?

Response:

Under longstanding Department of Justice policy, the FBI generally does not disclose nonpublic information about spending matters. Please refer to the response provided in a letter to Senator Grassley from Stephen D. Kelly, Assistant Director of the FBI's Office of Congressional Affairs, dated April 4, 2013.

B) Was the undercover FBI agent the case agent for this weapons-trafficking investigation? If not, did the case agent authorize the expenses at the brothels in this undercover operation?

Response:

Please refer to the response to Question 27(A), above.

C) Did any other U.S. law enforcement or embassy personnel visit these brothels with the undercover FBI agent? Please list each agency, the number of employees involved, each individual's role, and whether they were a recipient of the services for which reimbursement was requested of the FBI.

Response:

Please refer to the response to Question 27(A), above.

D) Was any of the activity for which reimbursement was requested recorded by wire or video surveillance? If so, which activity? Please provide all recordings.

Response:

Please refer to the response to Question 27(A), above.

E) What other U.S. law enforcement or embassy personnel participated in the Philippines in the overall weapons-trafficking investigation? Please list each agency, the number of employees involved, and their role.

Response:

Please refer to the response to Question 27(A), above.

F) Was the first-line supervisor of the undercover FBI agent and/or case agent aware of the undercover agent's visits to brothels? What other supervisors were informed?

Response:

Please refer to the response to Question 27(A), above.

G) When and how did FBI headquarters become aware of these allegations against this FBI agent working in the Philippines?

Response:

Please refer to the response to Question 27(A), above.

H) What actions were taken by FBI headquarters to investigate these allegations?

Response:

Please refer to the response to Question 27(A), above.

I) Has discipline been proposed for any FBI employees (agents or other personnel) in connection with this? If so, please describe the circumstances and procedural standing of the proposed discipline.

Response:

Please refer to the response to Question 27(A), above.

J) When did FBI supervisors become aware that minors may have been involved at these brothels?

Response:

Please refer to the response to Question 27(A), above.

K) Did the U.S. Attorney's Office (USAO) running the undercover operation receive notification of and/or authorize the undercover activity at the brothels?

Response:

Please refer to the response to Question 27(A), above.

L) Was the USAO running the undercover operation provided notes or other materials (e.g. 302's) regarding the events in question? If so, please provide these documents.

Response:

Please refer to the response to Question 27(A), above.

M) Is the FBI aware of any other instances of similar behavior occurring by other agents stationed around the world? If so, please describe them.

Response:

Please refer to the response to Question 27(A), above.

N) How many FBI employees (agents or other personnel) have been disciplined in the last eight years, including those terminated or voluntarily separated from the FBI, for soliciting, hiring, procuring the services of, or other inappropriate behavior involving prostitutes? Include all instances in which the FBI's Office of Professional Responsibility (OPR) reviewed allegations that FBI agents were involved with prostitutes, including a detailed summary of the allegations, the findings of investigation, the pay grade and rank of the employee, the proposed punishment (administrative or otherwise), the location where the incident(s) occurred, and whether the employee is still employed by the FBI.

Response:

Please refer to the response to Question 27(A), above.

O) How many FBI employees (agents or other personnel) have been terminated by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

Response:

Please refer to the response to Question 27(A), above.

P) How many FBI employees (agents or other personnel) remain employed by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

Response:

Please refer to the response to Question 27(A), above.

Q) Finally, please provide the following documents:

i. Any case notes or briefing plan regarding the undercover activity, including how the undercover activity was monitored or details on surveillance by agents in the brothels.

ii. All emails pertaining to FBI becoming aware of any of the above allegations.

iii. All emails demonstrating the FBI's response to the above allegations.

Response:

Please refer to the response to Question 27(A), above.

28. Office of Inspector General Report on the Operations of the Voting Rights Section of the Civil Division

On March 12, 2013, the Office of Inspector General submitted report on the operation of the Department's Voting Rights Section. This report was in response to several congressional requests including those made by Chairmen Wolf and Smith, as well as a request I made.

A) The report states that Deputy Assistant Attorney General (DAAG) Julie Fernandes attempted to remove a manager from DOJ's Honors Program Hiring Committee in part because of his "perceived conservative ideology." Is it acceptable for DOJ employees to use political ideology in making these types of decisions? If not, what consequence will Fernandes face for politicizing the DOJ Honors Program Hiring Committee process?

Response:

The OIG Report did not conclude that former Deputy Assistant Attorney General (DAAG) Julie Fernandes politicized the DOJ Honors Program Hiring Committee process; it instead concluded that one incident concerning the staffing of the hiring committee "demonstrated that problems of polarization ...continued after the change in administrations." Report at 148. The Department has disagreed with the part of this conclusion that related to the actions of former-DAAG Julie Fernandes, and believes that she acted appropriately in the incident described in your question.

Deciding to include or exclude an attorney from a hiring committee because he expressed particular political views is inconsistent with the Department's policies and could be a prohibited personnel practice under the Civil Service Reform Act. 5 U.S.C. § 2301(b)(2). In the incident you describe, however, former-DAAG Fernandes did not "use political ideology" in making any staffing decisions. As described in the Inspector General's report, former Voting Section Chief Chris Coates decided in September 2009 to assign a manager to a hiring committee because Coates perceived that manager to be conservative. Report at 144-45. The report concluded that Coates's decision to do so was inappropriate. Report at 148. Then-DAAG Fernandes received a complaint about Coates's staffing decision and investigated her options for addressing that complaint, but the manager was not ultimately removed. Report at 146-47. The Department believes that then-DAAG Fernandes's response – investigating the complaint she received, then making no further staffing changes after concluding the manager would serve effectively on the committee – was perfectly appropriate.

B) The Inspector General further reported that DAAG Fernandes said that the DOJ would prioritize "traditional civil rights enforcement."

i. What is meant by the term "traditional civil rights enforcement"?

Response:

The Office of Professional Responsibility (OPR) investigated complaints regarding former-DAAG Fernandes's use of the term "traditional civil rights cases" and concluded, in its report on the New Black Panther Party litigation (which has been made public), that she used the term "to mean that she did not want to politicize enforcement of the Voting Rights Act and did not want to bring cases to benefit any one constituency group." OPR Report at 75.

The Department's policy is to enforce civil rights statutes based on a fair and even-handed application of the facts to the law.

ii. What is non-traditional civil rights enforcement? If so, please describe examples of non-traditional civil rights enforcement.

Response:

Please refer to the response to Question 28(B)(i), above.

iii. Do you believe that DOJ should prioritize either traditional or non-traditional civil rights enforcement? If so, please explain why.

Response:

Please refer to the response to Question 28(B)(i), above.

C) The Inspector General found that DOJ hiring criteria for the Civil Rights Division produced an overwhelmingly liberal pool of applicants. Are you concerned that this policy is eliminating qualified conservative applicants from employment within the civil rights division? If so, what efforts is DOJ making to change this policy? If not, why not?

Response:

The OIG report confirmed that the Division advertised the positions publicly, that the voting litigation experience hiring criteria was both appropriate and lawful, and that the OIG's review "did not reveal that Civil Rights Division staff allowed political or ideological bias to influence their hiring decisions." Report at 214. It is incorrect to suggest that the hiring criteria eliminated comparatively qualified conservative applicants from the applicant pool. First, the OIG report found that only 2% of the Voting Section's applicant pool listed Republican or conservative affiliations on their applications, Report at 205; only one applicant with Republican or conservative affiliations was "highly qualified academically," Report at 213; and none of the conservative-affiliated applicants had voting rights litigation experience, Report at 208. Hiring applicants with voting rights litigation experience was a high priority given the needs of the Voting Section at the time. The report stated: "Our interviews with hiring committee members, review of contemporaneous notes taken during the hiring committee's deliberations, and assessment of its recommendations showed that litigation experience involving voting rights and the statutes that the Voting Section enforces were highly important to the hiring committee's review of applications." Report at 215. Indeed, the report found that "78 percent of the new hires (7 of 9) had 2 or more years of voting litigation experience compared to only 3 percent of all rejected applicants (15 of 473)." Report at 211. The OIG found that voting rights litigation experience was a "legitimate criterion, particularly in light of the Voting Section's stated need for experienced attorneys who would be ready to 'hit the ground running' by leading complex voting rights cases immediately." Report at 216. The report also stated: "Our review of the backgrounds of the Voting Section's new attorneys revealed a high degree of academic and professional achievement." Report at 204.

Furthermore, remedying any perceived political or ideological disparity in an application pool would require inquiry into and consideration of applicants' political affiliation. This practice is prohibited by federal law and Department policy. As the OIG Report discusses, the Civil Service Reform Act of 1978 "prohibits consideration of political affiliation in hiring for career positions." In addition, "[t]he use of political affiliation as a criterion for considering applicants for career attorney appointments may violate several prohibited personnel practices." Report at 182. Under the Attorney General's leadership, and the leadership of former Assistant Attorney General Tom Perez, the Civil Rights Division has made it a priority to restore merit-based, non-partisan hiring. The report stated: "The [current] hiring policy also emphasized that hiring in the Civil Rights Division is based on merit-based principles and should never involve discrimination based on race, age, political affiliation, or other prohibited factors. Members of the Civil Rights Division hiring committees are required to attend training on merit system principles, prohibited personnel practices, and hiring and interviewing policies, and must certify that they will comply with applicable requirements." Report at 192. The Department believes that the OIG Report vindicated the new policies and procedures that the Civil Rights Division put into place to ensure merit-based hiring.

D) The Inspector General found that in conversations with you, DAAG Hirsch misrepresented key facts in attempting to persuade you to remove Voting Section Chief Christopher Coates. What actions will you take to hold DAAG Hirsch accountable as a result of these facts?

Response:

The premise of your question is inaccurate. Mr. Hirsch did not misrepresent facts to the Department, and the Inspector General did not find that he did. In addition, Mr. Coates was not removed from the Voting Section; he requested a transfer and received one. Report at 174-175.

29. Louisiana

On December 6, 2012, the U.S. Attorney of the Eastern District of Louisiana (USAOELA), Jim Letten, stepped down from his position after a controversy involving illicit online commentary by two of his top staffers. Assistant U.S. Attorney (AUSA) Sal Perricone and then later AUSA Jan Mann, at the time the First Assistant U.S. Attorney, were accused of making disparaging comments on a newspaper website about suspects in federal crime targets. The comments were revealed by former AUSA Billy Gibbons, who represents both Fred Heebe, the subject of a four-year-long federal probe into his River Birch landfill (U.S. v. Fazzio et al.), as well as retired Sergeant Arthur "Archie" Kaufman, one of the New Orleand Police Department officers charged and convicted in the Danziger Bridge case (U.S. v. Bowen et al.). After Perricone's comments were revealed in March 2012, reports indicated that he was under investigation by the Department's Office of Professional Responsibility. Perricone subsequently resigned. When Mann's comments were revealed in October 2012, she was demoted from her position as First Assistant U.S. Attorney and head of the office's Criminal Division. She and her husband Jim Mann, supervisor of the USAOELA's Financial Crimes Unit, both retired in December 2012. Reportedly, Perricone and the Manns were both close associates of Letten's.

According to a November 26, 2012 opinion from U.S. District Court Judge Kurt Engelhardt, the judge in USA v. Fazzio, both Mann and Perricone lied to him regarding their online posting. Judge Engelhardt requested that a more extensive investigation of the leaks and online postings be conducted, and recommended that an independent counsel be appointed to conduct the investigation. Engelhardt wrote:

> **Although in the case of Perricone and now Mann, the usual DOJ protocol appears to require simply placing the matter in the hands of the DOJ's OPR, such a plan at this point seems useless. First of all, having the DOJ investigate itself will likely only yield a delayed yet unconvincing result in which no confidence can rest. If no wrongdoing is uncovered, it will come as a surprise to no one given the conflict of interest existing between the investigator and the investigated. Moreover, the Perricone matter has been under investigation for eight months (since March), and yet it comes as a complete surprise to everyone at DOJ and the U.S. Attorney's Office that another "poster" exists, especially one maintaining as high a position in the U.S. Attorney's Office. It is difficult to imagine how this could possibly have been missed by OPR, and surely raises concerns about the capabilities and adequacy of DOJ's investigatory techniques as exercised through OPR. In any event, the Court has little confidence that OPR will fully investigate and come to conclusions with anywhere near the efficiency and certainty offered by suitable court-approved independent counsel. The Court strongly urges DOJ to do so post haste. Should DOJ determine not to proceed accordingly, the Court is left to proceed as it sees fit.**

On December 6, 2012, you announced that the case would be investigated by AUSA John Horn, First Assistant U.S. Attorney in the Northern District of Georgia. Judge Engelhardt requested a report within a month and then later granted a one-month extension, meaning AUSA Horn's report should have been submitted by January 25, 2013.

On March 8, 2013, the USAOELA filed a motion to dismiss the case against the River Birch landfill operation, citing "evidentiary concerns" and "the interests of justice." The Department's Public Integrity Section had also been assisting USAOELA in the case.

A) What is the current status of the investigation into the online postings of these federal prosecutors?

Response:

The Office of Professional Responsibility (OPR) has completed its investigation of Perricone and Mann and has shared its findings with the Louisiana bar disciplinary authorities. Special Attorneys John Horn and Charysse Alexander submitted their report on January 25, 2013, as well as a number of supplemental reports in compliance with the Court's November 26, 2012 Order entered in *United States v. Bowen, et al.*

B) Has AUSA Horn submitted the findings of his investigation? When did he submit them? If he did not submit them by January 25, 2013, why not?

Response:

Please refer to the response to Question 29(A), above.

C) Why did the Department opt to appoint AUSA Horn and was his appointment pre-approved by Judge Englehardt?

Response:

AUSA Horn is an experienced, career prosecutor in an office with no interest or history in the Eastern District of Louisiana (EDLA) litigation. His appointment was not pre-approved by Judge Engelhardt.

D) What has the Department done to address the concerns expressed by Judge Englehardt about OPR?

Response:

OPR conducted a thorough investigation relating to the conduct of former AUSAs Perricone and Mann. As a general rule, OPR initiates and conducts investigations in response to specific misconduct allegations. While comments posted by Perricone were the initial focus of OPR's investigation, the investigation was broadened to include Mann as well. The Department is confident that OPR's work was extensive, objective, and unbiased, and that their investigative report appropriately analyzed all of the issues raised by this matter.

E) Did AUSA Horn's investigation include questioning the media recipients of leaked information, as Judge Englehardt recommended?

Response:

In compliance with DOJ policy, AUSA Horn questioned the reporters regarding their source(s) of information about the guilty plea of former New Orleans Police Department (NOPD) Officer Lohmann, and the reporters invoked a First Amendment privilege and refused to answer. As reported to Judge Engelhardt, DOJ approval is required to issue subpoenas to the reporters for this information, and DOJ determined that the regulations governing such requests were not satisfied in this circumstance.

F) Are criminal charges being considered against Perricone or Mann for lying to a federal judge?

Response:

It is DOJ policy not to confirm or deny the existence of a pending criminal investigation.

G) Have administrative charges been filed by DOJ with Perricone's and Mann's respective state Bar associations to rescind their licenses to practice law?

Response:

Judge Engelhardt referred Perricone's and Mann's conduct to the Louisiana State Bar's Attorney Disciplinary Board and the Eastern District of Louisiana Lawyers Disciplinary Enforcement Committee in his November 26, 2012, Order. It is the Department's understanding that an investigation is ongoing by the Louisiana State Bar's Attorney Disciplinary Board, and the Department has fully cooperated with that investigation. The Department also understands from published reports that Perricone and Mann voluntarily withdrew their membership from the bar of the District Court for the Eastern District of Louisiana.

H) To what extent, if any, was U.S. Attorney Letten aware of the online activities of Perricone and Mann? What actions were taken by Letten once the information was revealed that prosecutors in his office were anonymously disclosing information about current investigations and cases?

Response:

The Office of Professional Responsibility concluded that former U.S. Attorney Letten was unaware of the online activities of Perricone and Mann while they were going on. After the exposure of Perricone in March 2012 and Mann in November 2012, Letten removed Perricone from the cases on which he commented, and he also demoted Mann from her position as First Assistant United States Attorney (FAUSA) and Criminal Chief. Letten immediately referred the matters to the Office of Professional Responsibility. Letten also arranged to have Andrew Goldsmith deliver a presentation in November 2012 about DOJ's social media policy to the office.

I) Following the departures of Perricone, Letten, and Mann, what steps has the Department taken to ensure that current attorneys and employees do not disclose information received through their work?

Response:

The Department requires mandatory discovery training every year for all prosecutors. As a part of that training, attorneys are reminded that they have an ethical and legal obligation to maintain the secrecy of the Grand Jury process and the information they review as Department of Justice employees. This training requirement is addressed in the United States Attorney Manual (USAM § 9-5.001), which was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring and to require two hours of training on an annual basis for all other prosecutors. Earlier this year, the Deputy Attorney General issued guidance to all Department employees concerning the use of social media.

J) What impact did the postings of these prosecutors have on any other cases to which they were assigned? Is there a review being conducted of other cases prosecuted by these AUSAs?

Response:

OPR has not received complaints in other cases relating to postings by these prosecutors at this time.

K) Were there any complaints of prosecutorial misconduct filed in any other cases handled by these prosecutors? If so, what were the names of those cases and how were those complaints handled?

Response:

OPR has not received complaints in other cases relating to postings by these prosecutors at this time.

L) For what "evidentiary concerns" was U.S. v. Fazzio dropped?

Response:

The U.S. Attorney's Office for the Eastern District of Louisiana (USAO-EDLA) recused itself from the case of *United States of America v. Dominick Fazzio and Mark J. Titus*, 11-cr-159 (E.D. La.), in April of 2012, in light of the revelations that former Assistant U.S. Attorney Salvador Perricone was posting online comments. The Public Integrity Section (PIN) in the Criminal Division of the Department of Justice assumed sole responsibility for the case at that time. PIN thereafter moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

M) Are individuals in the USAOELA being investigated for possible misconduct related to those evidentiary concerns? If so, who is conducting the investigation?

Response:

The evidentiary concerns identified by PIN did not include misconduct allegations relating to the U.S. Attorney's Office for the Eastern District of Louisiana (USAO-EDLA). No individuals in the USAO-EDLA are being investigated for possible misconduct related to the evidentiary concerns identified by PIN.

N) When were the evidentiary problems in U.S. v. Fazzio discovered?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

O) Why did the Public Integrity Section, which had been involved since August 2012, wait until March 2013 to move to dismiss the case?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

P) Why was U.S. v. Fazzio dismissed with prejudice?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice, which required finality.

30. Chicago OIG

On March 5, 2013, U.S. District Court Judge Virginia Kendall dismissed an indictment of Deputy U.S. Marshal Stephen Linder for excessive force. The indictment had been brought by attorneys from the Department's Civil Rights Division. The dismissal was the result of the court holding that the Government had violated the defendant's Fifth and Sixth Amendment constitutional rights. However, separate from the treatment of the defendant, the opinion also indicated that witnesses in the investigation—not targets—testified that they were "bullied, threatened, and treated like perjurors." This conduct was allegedly by the two attorneys from the Civil Rights Division as well as by an investigator for the Department's Office of Inspector General.

Has an Office of Professional Responsibility investigation been conducted into the conduct of the attorneys who allegedly intimidated and threatened witnesses? If not, why not?

Response:

The Civil Rights Division referred this matter to the Office of Professional Responsibility, which initiated on March 12, 2013, an inquiry and later an investigation relating to the court's findings.

31. Refusal to Answer Previous Questions

In addition to the above questions, there are many outstanding matters to which you have not yet responded. At the oversight hearing, several senators commented that they are still very interesting in having you respond.

For example, Senator Grassley stated that there are "many outstanding letters and questions we have yet to receive from the department," including "questions for the record from the last oversight hearing held nine months ago," "questions for the record from department officials that testified at various hearings," and inquiry letters on the "impact of budget sequester," the "failure to prosecute individuals at HSBC for money-laundering," and a "request related to investigation

[into] Fast and Furious." Senator Whitehouse added that he would "love to get the response to the request for the record that was made last June...and which we still have no response to."

In accordance with these statements made during the hearing, Members are still interested in your answers to the following questions from your previous Hearing on "Oversight of the U.S. Department of Justice."

Response:

On May 7, 2013, the Department provided responses to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012. The Department continues to work to respond to any outstanding Questions for the Record arising from the appearances of various Department officials before the Committee.

32. National Security Leaks

Leaks of classified information continue to plague the Obama Administration. The list of notable national security leaks includes: (1) a report detailing U.S. involvement in Stuxnet, a perported cyber weapon, and the cyber-attacks against Iran's nuclear reactors dubbed "Olympic Games"; (2) a report that U.S. national security agencies thwarted another underwear bomber plot to be carried out on the anniversary of Osama bin Laden's death; (3) a report that the U.S. had planted a spy in al Qaeda in Yemen; (4) revelation that President Obama is personally involved in choosing the "kill list," which prioritizes U.S. terrorist killings; (5) revelation of the identity of the Pakistani doctor who aided the CIA in the capture of Osama bin Laden; (6) allegations that the Administration leaked sensitive information about the capture of Osama bin Laden to filmmakers making a movie about it.

In [May 2011], I asked you about prosecuting classified leaks and you said "there has to be a balancing that is done between what our national security interests are and what might be gained by prosecuting a particular individual." Unfortunately, based upon the evidence, it seems the balancing done here is often times whether the leaker was a Justice Department employee or not. If they are a Justice Department employee, prosecutions don't seem to follow. At the least, this was the case with DOJ employee Thomas Tamm and FBI employees who leaked information in the Anthrax case.

On [June 8, 2012], you announced that you were appointing Ronald C. Machen, Jr., the U.S. Attorney for the District of Columbia and Rod J. Rosenstein, the U.S. Attorney for the District of Maryland, to lead criminal investigations into recent instances of possible unauthorized disclosures of classified information. As part of this announcement you pledged to keep the Judiciary and Intelligence Committees apprised of the investigations, but provided no details on how these U.S. Attorneys would independently conduct the leak investigations without undue influence from the Administration. Further, you did not provide any detail as to what leaks were being investigated and by whom.

A) It has been reported that the National Security Division has been recused for at least one investigation stemming from these leaks. Is this correct, and if so, how is there not a conflict of interest on the part of the Justice Department?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012. One additional item is worth noting. As referenced in your question, on June 8, 2012, Ronald C. Machen, Jr., the U.S. Attorney for the District of Columbia, was appointed to lead a criminal investigation into the possible unauthorized disclosure of classified information related to an April 2012 disrupted suicide bomb plot by the terrorist group Al-Qaeda in the Arabian Peninsula ("AQAP") and the recovery of a bomb in connection with that plot. U.S. Attorney Machen and a team of prosecutors and FBI agents conducted a swift and exhaustive investigation. They interviewed well over 550 witnesses and reviewed tens of thousands of documents. Less than a year later, the investigative team was able to identify the source of the unauthorized disclosure, former FBI agent Donald John Sachtleben. Faced with the evidence developed against him, Sachtleben agreed to plead guilty to the unauthorized disclosure and serve a sentence of 43 months. On November 14, 2013, Sachtleben pled guilty and was sentenced accordingly. This was one of the largest investigations of its kind.

B) If the leak came from within the Justice Department, why should we have confidence that these leak investigations won't be dismissed without prosecution just like the Tamm case?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

C) In the Tamm case and the FBI anthrax leaks you and your Department relied upon the advice of career prosecutors to dismiss the cases. Here, you have instructed political appointees to do the work. Why did you assign political appointees as opposed to career prosecutors on this investigation breaking from past practice?

Response:

Please refer to the response to Question 32(B), above.

D) 28 U.S.C. 515 allows you to appoint special attorneys for criminal or civil investigations. Why did you choose to use existing U.S. Attorney's instead of a special attorney under this authority?

Response:

Please refer to the response to Question 32(B), above.

E) The Justice Department has had a number of high profile failures in prosecuting national security leaks. This includes the case against Thomas Drake and the ongoing prosecution of Jeffrey Sterling—which is currently on interlocutory appeal. Why is the Justice Department having trouble prosecuting national security leak cases and do we need to change the law to help bring these individuals to justice?

Response:

Please refer to the response to Question 32(B), above.

F) Would changes to the Classified Information Procedures Act (CIPA), as others in the legal community have called for, help the Department prosecute national security leak cases? If so, what types of reforms would be necessary to help?

Response:

Please refer to the response to Question 32(B), above.

33. Foreign Intelligence Surveillance Act Reauthorization

In a letter dated February 8, 2012, you joined Director of National Intelligence Clapper in requesting the reauthorization Title VII of the Foreign Intelligence Surveillance Act (FISA), known as the FISA Amendments Act of 2008.

I agree with you about the value of the FAA tools, and I support a clean reauthorization of FAA to 2017.

A) Do you support a clean reauthorization of the FISA amendments Act?

Response:

As the Department confirmed in its May 7, 2013, response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012, the Attorney General supported reauthorization of the Foreign Intelligence Surveillance Act (FISA) Amendments Act (FAA) in its current form to 2017, which Congress enacted during the last session.

The President stated the following in his January 17, 2014, speech at the Department of Justice: "[W]e will provide additional protections for activities conducted under Section 702, which allows the government to intercept the communications of foreign targets overseas who have information that's important for our national security. Specifically, I am asking the Attorney General and DNI to institute reforms that place additional restrictions on government's ability to retain, search, and use in criminal cases communications between Americans and foreign citizens incidentally collected under Section 702." The Department is working diligently to implement the President's directive so as to maintain this valuable program while doing more to ensure that the civil liberties of U.S. persons are not compromised.

B) Is there sufficient oversight and checks and balances to ensure that the rights of U.S. citizens are protected?

Response:

As the President has stated, and as the review conducted by the President's Civil Liberties Oversight Board (PCLOB) confirmed, section 702 of FISA, the central provision of the FAA, is a valuable program that allows the government to intercept the communications of foreign targets overseas who have information that's important to our national security. It is important to note that section 702 may only be

used to target non-U.S. persons located overseas to obtain foreign intelligence. Section 702 expressly prohibits the government from intentionally targeting the communications of U.S. citizens, lawful permanent residents, and all persons located in the United States. In addition, section 704 requires an order from the FISA Court (FISC) to conduct surveillance or physical search of U.S. persons located abroad—an additional protection for U.S. persons that did not exist prior to the FAA.

To promote compliance with these and other restrictions, the FAA established a robust framework of oversight by all three branches of government. First, the FISC plays a significant role in overseeing surveillance conducted under section 702. Under section 702, the FISC must approve annual certifications by the Attorney General and the Director of National Intelligence that identify categories of foreign intelligence targets and include certifications that the acquisitions comport with the statute, including prohibitions against intentionally targeting U.S. persons or any person known at the time of acquisition to be located inside the United States. In addition to the certifications, the FISC also must approve targeting and minimization procedures.

Targeting procedures are designed to ensure that the government only targets non-U.S. persons outside the United States and does not intentionally acquire wholly domestic communications. The minimization procedures protect the identities of U.S. persons and any nonpublic information concerning U.S. persons that may be incidentally acquired. The FISC reviews the targeting and minimization procedures for compliance with the requirements of both the statute and the Fourth Amendment. By approving the certifications, as well as the minimization and targeting procedures, the FISC plays a major role in ensuring that acquisitions under section 702 are conducted in a lawful and appropriate manner.

Second, the Executive Branch conducts extensive internal oversight. Oversight within the Executive Branch begins with the intelligence agencies. For example, the National Security Agency (NSA) trains its analysts on the applicable procedures, audits the databases they use, and spot checks their targeting decisions. In addition to these internal agency processes, the National Security Division (NSD) of the Justice Department and the Office of the Director of National Intelligence (ODNI) conduct robust oversight, communicating with the agencies on a near-daily basis regarding implementation of section 702. While NSA audits queries of its analysts and self identifies issues to NSD, NSD conducts its own audits of queries of U.S. citizens at all agencies involved in retaining the collection. This oversight includes onsite reviews conducted by a joint NSD and ODNI team of each agency's activities. These onsite reviews occur approximately every 60 days. The team evaluates and, where appropriate, investigates each potential incident of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions.

Finally, Congress plays a role in the oversight of surveillance under section 702. On a regular basis, the Executive Branch sends to the Judiciary and Intelligence Committees the multiple reports required by the FAA. In accordance with these requirements, the Executive Branch has informed the Judiciary and Intelligence Committees of acquisitions authorized under section 702; reported, in detail, on the results of the reviews and on compliance incidents and remedial efforts; made all written reports on these reviews available to the Committees; and provided summaries of significant interpretations of FISA, as well as copies of relevant judicial opinions and pleadings. The government has also provided the Judiciary and Intelligence Committees numerous briefings and participated in numerous hearings addressing the government's use of FAA authorities.

As stated earlier this year, the President believes that we can do more to ensure that the civil liberties of U.S. persons are not compromised in this program. As mentioned in the response to Question 33(A), above, to address incidental collection of communications between Americans and foreign citizens, the President has asked the Attorney General and Director of National Intelligence (DNI) to initiate reforms that place additional restrictions on the government's ability to retain, search, and use in criminal cases,

communications between Americans and foreign citizens incidentally collected under Section 702. The PCLOB has also suggested certain reforms. The Department is working diligently to implement the President's directive and is considering the PCLOB's recommendations.

C) Are any changes in the FAA needed, either to enhance intelligence gathering capabilities or to protect the rights of U.S. citizens?

Response:

Please refer to the response to Question 33(A), above.

34. Memo Issued by Office of Legal Counsel Regarding Anwar al-Awlaqi

On September 30, 2011, Anwar al-Awlaqi, a United States citizen, was killed in an operation conducted by the United States in Yemen. It was reported in the media that this targeted killing followed the issuance of a secret memorandum authored by the Justice Department's Office of Legal Counsel (OLC). On October 5, 2011, I sent a letter to you requesting a copy of any such memorandum, offering to make appropriate arrangements if the memo was classified. I have continually been told that the Justice Department will not confirm the existence of such a memorandum, notwithstanding the fact that the existence of such a memorandum was described to print media.

A) Given the Justice Department is not confirming the existence of the memorandum, is the Department investigating any national security leaks related to this story? If not, why not?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) If such a memorandum exists, why does the Department continue to refuse to provide it to the Judiciary Committee?

Response:

As a general matter, the Department of Justice does not disclose confidential legal advice that it has provided. However, as an extraordinary accommodation, the Administration in May 2014 provided all Senators, including members of this Committee, with access to classified Office of Legal Council (OLC) legal advice concerning a contemplated operation against al-Aulaqi. In addition, redacted copies of two OLC memoranda addressing the lawfulness of such an operation have now been publicly disclosed in connection with Freedom of Information Act requests.

35. Extradition of Ali Mussa Daqduq

Ali Mussa Daqduq is a Lebanese national and senior leader of Hezbollah captured in Iraq in 2007. Daqduq has been linked to the Iranian government and a brazen raid in which four American soldiers were abducted and killed in the Iraqi holy city of Karbala in 2007. Until recently, Daqduq was in U.S. custody in Iraq. Daqduq was among a few of the remaining U.S. prisoners who, under a 2008 agreement between Washington and Baghdad, were required to be transferred to Iraqi custody by the end of 2011. U.S. officials feared that if he was turned over to Iraq, he would simply walk free and resume his terrorist activities against the United States and its interests.

On May 16, 2011, five Republican members of the Judiciary Committee sent a letter to the Attorney General, expressing their concern with bringing Daqduq to the U.S., and requesting further information. Ron Weich responded on behalf of the Attorney General on August 8, 2011. He failed to answer the specific policy questions raised, merely stating that DOJ "remains committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate."

On July 21, 2011, 20 Republican Senators sent a letter to Secretary of Defense Leon Panetta. Members urged the Administration to closely evaluate the legal authority available to bring DaqDuq's case before a military commission. On August 30, 2011, the Deputy Secretary of Defense responded on his behalf, merely stating that possible options are being examined

Despite vehement protests by Congress, Daqduq was transferred to Iraqi custody on December 17, 2011, pursuant to the aforementioned Status of Forces Agreement. While in Iraqi custody, U.S. military prosecutors charged Daqduq with murder, perfidy, terrorism and espionage, [and] other war crimes. At the time, a military spokesman stated that the U.S. government was "working with Iraq to affect Daqduq's transfer to a U.S. military commission consistent with U.S. and Iraqi law." However, on May 7, 2012, Daqduq was acquitted of any criminal charges under Iraqi law and the presiding Iraqi judge ordered his release.

On May 10th [2012], I sent a letter to you and Secretary of Defense Panetta requesting information about the Administration's plan for dealing with the Daqduq situation. He was on the verge of escaping justice after an Iraqi court cleared him of any criminal charges. Specifically, I asked whether any formal extradition request has been made for Daqduq On May 24th, Secretary Panetta sent me a personal letter acknowledging my concerns and stated he would get back to me in detail as soon as possible. I still have not heard back from you to even confirm the receipt of my letter. On June 1st, I read in the press) that the Administration has asked Iraq to extradite Daqduq.

A) Has the Justice Department been involved in negotiations seeking to extradite Daqduq?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) Can you confirm that a request has been made to extradite Daqduq?

Response:

Please refer to the response to Question 35(A), above.

C) If so, does the extradition request indicate which forum, military commission or civilian court, that Daqduq would be extradited to?

Response:

Please refer to the response to Question 35(A), above.

36. Use of Drones by Law Enforcement

Do any Justice Department entities use or plan to use drones for law enforcement purposes within the United States? Has the Office of Legal Counsel been asked to or issued any memoranda addressing the topic of use of drones by federal, state, local, or tribal domestic law enforcement, administrative, or regulatory agencies? If so, please provide a copy of any memoranda discussing this topic.

Response:

As of July 2014, within the Department of Justice, only the FBI currently uses Unmanned Aerial Systems (UAS) to support its mission. The Bureau of Alcohol, Tobacco, Firearms, and Explosives and the U.S. Marshals Service (USMS) obtained UAS for testing, but have no plans to deploy UAS operationally. The Drug Enforcement Administration (DEA) does not have any UAS in inventory, and has no plans to acquire them. Department components also routinely coordinate with other law enforcement agencies for investigative support. This has included support provided by U.S. Customs and Border Protection operating its UAS.

As a general matter, the Department of Justice does not disclose whether the Office of Legal Counsel has been asked to consider particular legal issues, nor does it disclose confidential legal advice provided by OLC. The Department is fully committed, however, to ensuring that any use of UAS by the Department's law enforcement agencies complies fully with all relevant constitutional and statutory requirements.

37. Ninth Circuit Deportation Cases

On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases fit into the administration's immigration enforcement priorities. In relevant part, the order in each case states:

In light of ICE Director John Morton's June 17, 2011 memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing.

On March 1, 2012, House Judiciary Committee Chairman Lamar Smith and I sent a letter to you and Secretary Janet Napolitano expressing concern about the Ninth Circuit's order. Morcover, the letter asked the Department of Justice and the Department of Homeland Security to respond to questions about how they were handling cases before immigration judges, the Board of Immigration Appeals (BIA) and the federal courts of appeals. In particular, our letter contained four specific questions or requests for information:

A) **For each of the cases that is subject to the order(s) issued by the Ninth Circuit on February 6, 2012, identify the following: (a) the date the case was commenced before an immigration judge or trial judge, (b) the date the appeal to the Ninth Circuit was filed, (c) the date the government's merits brief in the Ninth Circuit was filed, (d) the status of the case in the Ninth Circuit, (e) whether the government has argued that the Ninth Circuit should affirm a removal order, (f) the number of hours worked on the case by government attorneys before the case reached the Ninth Circuit, (g) the number of hours worked on the case by government attorneys since the case was filed in the Ninth Circuit, (h) an estimate of the number of hours worked on the case by immigration judges, BIA judges and federal judges and (i) the amount of tax payer dollars spent on the case to date, including the portion of the salaries of the government attorneys, judges and court staff who have worked on the case.**

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) **Does the government seek to have immigration judges enter removal orders even though those orders may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the immigration judges presiding over the cases?**

Response:

Please refer to the response to Question 37(A), above.

C) **Does the government seek to have the BIA affirm removal orders even though the affirmances may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the BIA judges presiding over the cases?**

Response:

Please refer to the response to Question 37(A), above.

D) **Does the government seek to have federal courts of appeals affirm removal orders, even though those orders may subsequently be disregard pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the**

time of the government attorneys working to achieve removal orders and the federal judges presiding over the cases?

Response:

Please refer to the response to Question 37(A), above.

38. According to some reports, there are at least 1.6 million immigration cases pending before immigration judges, the BIA and the federal courts of appeals. Also, according to reports, the DHS and/or DOJ are "reviewing" 300,000 or more cases under the so-called "prosecutorial discretion" initiative.

The DOJ and the DHS are supposed to be prosecuting these cases and seeking to have illegal aliens deported. As part of that effort, line attorneys from the DOJ and DHS spend thousands of hours working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend hundreds of hours adjudicating these cases. Tens of millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges and court staff.

The answer to the Ninth Circuit's question set forth in the government's pleadings was nonresponsive. The government's pleadings tell the Court that the government does not presently intend to use prosecutorial discretion with the cases, but that the matter is totally within the discretion of the Executive Branch. If the government decides to use prosecutorial discretion while any of the cases are pending, it will inform the Court. What is unwritten is that the Obama administration can still use prosecutorial discretion after a case is concluded, even if a Court has issued a deportation order and after all the time, effort and money has been expended.

The DHS responded to the March 1 letter with a one-page letter dated April 23, 2012 and signed by Nelson Peacock, the Assistant Secretary for Legislative Affairs. The April 23 letter does not answer the four specific questions or requests for information in the March 1 letter.

The DOJ responded to the March 1 letter with a two-page letter dated June 6, 2012 and signed by Acting Assistant Attorney General Judith Appelbaum. The letter also had a one-page attachment with some information about the five cases before the Ninth Circuit. The DOJ's June 6 letter partially answers questions 1(a)-(g) from the March 1 letter. It also states that it cannot provide an accurate estimate of the number of hours worked on the five cases by immigration judges and their staffs, which was asked about in question 1(h). The DOJ letter does not acknowledge, let alone answer, questions 1(i)-4.

A) Did you review the June 6 letter before it was sent?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) Did you authorize the June 6 letter?

Response:

Please refer to the response to Question 38(A), above.

C) Is the DOJ refusing to answer questions 1(i)-4 from the March 1 letter? If so, what is the legal authority for the DOJ's refusal? If the DOJ is not refusing to answer, how do you explain the June 6 letter's failure to answer the questions?

Response:

Please refer to the response to Question 38(A), above.

D) Provide complete and detailed answers to all of the questions and requests for information from the March 1 letter, which are quoted above.

Response:

Please refer to the response to Question 38(A), above.

39. Freedom of Information Act

On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration, and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a "new era of open government."

President Obama's memorandum on the Freedom of Information Act (FOIA) called on all government agencies to adopt a "presumption of disclosure" when administering the law. He directed agencies to be more proactive in their disclosure and to act cooperatively with the public. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads.

Pursuant to the President's orders, you issued FOIA guidelines in a memorandum dated March 19, 2009. Your memorandum rescinded former Attorney General Ashcroft's 2001 pledge to defend agency FOIA withholdings "unless they lack[ed] a sound legal basis." Instead, you stated that the Department of Justice would now defend withholdings only if the law prohibited release of the information, or if the release would result in foreseeable harm to a government interest protected by one of the exemptions in the FOIA. Your memorandum extensively quoted the President's memoranda.

The Department of Justice is supposed to be overseeing the Executive Branch's compliance with the FOIA.

On March 30, 2011, the House Committee on Oversight and Government Reform released its 153-page report on its investigation of the DHS's political vetting of requests under the FOIA. The Committee reviewed thousands of pages of internal DHS e-mails and memoranda and conducted six transcribed witness interviews. It learned through the course of an eight-month investigation

that DHS political staff has exerted pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people.
The report by Chairman Issa's Committee reproduces and quotes e-mails from political staff at the DHS. The report also quotes the transcripts of witness interviews. The statements made by the political staff at the DHS are disturbing.

A) What is your response to each of the findings contained on pages 5-7 of the report?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) What is your response to the disturbing statements made by DHS political staff, who are quoted in the report? In particular, what is your response to political appointees at the DHS referring to a career FOIA employee, who was attempting to organize a FOIA training session, as a "lunatic" and to attending the training session for the "comic relief"?

Response:

Please refer to the response to Question 39(A), above.

C) What actions, if any, have you personally taken in response to Chairman Issa's report?

Response:

Please refer to the response to Question 39(A), above.

D) What actions, if any, has the DOJ taken in response to Chairman Issa's report?

Response:

Please refer to the response to Question 39(A), above.

Chairman Issa's report and a report prepared by the Inspector General of the DHS find that political staff at the DHS lacks a fundamental understanding of FOIA.

E) What, if anything, have you personally done to address this situation? If you have not done anything personally, acknowledge that fact.

Response:

Please refer to the response to Question 39(A), above.

F) What, if anything, has the DOJ done to directly address this situation?

Response:

Please refer to the response to Question 39(A), above.

Questions from Senator Franken

40. The late Aaron Swartz's attorneys have alleged in legal filings that the federal government inappropriately withheld evidence during its prosecution against him.

A) Has the Department of Justice investigated these allegations?

Response:

Approximately three weeks after Mr. Swartz's death, one of Mr. Swartz's attorneys sent a letter to the Justice Department's Office of Professional Responsibility alleging that a prosecutor improperly withheld information that the attorney believed was relevant to a suppression hearing in the case. The information at issue had been disclosed to Mr. Swartz's attorney approximately six weeks prior to the date scheduled for the suppression hearing and a month prior to Mr. Swartz's death. The Office of Professional Responsibility initiated an investigation, which is ongoing.

B) If so, what is the Department's response to these allegations?

Response:

Please refer to the response to Question 40(A), above.

C) If not, why not?

Response:

Please refer to the response to Question 40(A), above.

41. The Department of Justice and the Federal Bureau of Investigation have two separate initiatives involving the use of facial recognition technology: the Next Generation Identification initiative's Facial Recognition Pilot Program, and Project Facemask. Both of these projects are in an expansion phase.

A) What states have formally enrolled in the Facial Recognition Pilot Program?

Response:

Maine, Maryland, Michigan, New Mexico, and Texas are currently connected to and participating in the Next Generation Identification (NGI) program's Interstate Photo System Facial Recognition Pilot (IPSFRP).

B) What states are in the process of enrolling in the Facial Recognition Pilot Program?

Response:

The District of Columbia Metropolitan Police, the U.S. Secret Service, Florida and Tennessee are currently establishing connectivity so they can participate in the NGI IPSFRP.

C) What states have expressed interest in enrolling in the Facial Recognition Pilot Program?

Response:

Alabama, Connecticut, Hawaii, Nebraska, New Jersey, Ohio, South Carolina, Washington, West Virginia, and Puerto Rico have expressed interest in participating in the NGI IPSFRP and have executed Memoranda of Understanding.

D) What states have formally enrolled in Project Facemask?

Response:

"Project Facemask" was initiated in 2007 as a collaborative effort by the FBI and the North Carolina (NC) Department of Motor Vehicles (DMV) to use the NC DMV's facial recognition program as a means of locating fugitives and missing persons. Upon the successful conclusion of this project in 2010, the capabilities were evaluated to assess the operational value of creating an FBI facial searching service. Based on this evaluation, the FBI created a Facial Analysis Comparison and Evaluation (FACE) Services Unit. Although the FACE Services Unit then began establishing Memoranda of Understanding (MOUs) with states willing to share DMV information for law enforcement purposes, as permitted by Federal law regarding the use of state motor vehicle records (18 U.S.C. §§ 2721-25), this work is not part of Project Facemask, which was terminated in 2010. These MOUs, which allow both state and federal law enforcement agencies to benefit from facial analysis and comparison, have been established with the states of Alabama, Arkansas, Delaware, Illinois, Iowa, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, South Carolina, Texas, Utah, and Vermont. State officials who do not anticipate an immediate need for facial analysis or comparison do not typically reach out to the FBI to seek participation in this program because the program demands state resources. Nonetheless, the FBI is proactively seeking the participation of states that have both facial recognition capabilities and laws that allow the sharing of DMV photos for law enforcement purposes.

E) What states are in the process of enrolling in Project Facemask?

Response:

Please refer to the response to Question 41(D), above.

F) What states have expressed interest in Project Facemask?

Response:

Please refer to the response to Question 41(D), above.

G) Has the DOJ or the FBI initiated any new efforts involving the use of facial recognition technology separate from the above-named programs?

Response:

The FBI is currently focused on developing facial recognition technologies through the NGI and FACE initiatives and applies facial recognition capabilities to support investigations at the local, state, and federal levels.

MISCELLANEOUS SUBMISSION FOR THE RECORD

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March 1, 2013

Sen. Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
437 Russell Senate Building
United States Senate
Washington, DC 20510

Sen. Charles Grassley
Ranking Member
United States Senate
Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Oversight of disclosure of federal booking photographs

Dear Chairman Leahy and Ranking Member Grassley:

The Reporters Committee for Freedom of the Press writes to ask the United States Senate Committee on the Judiciary to provide oversight of the U.S. Department of Justice's current policy on disclosure of federal booking photographs under the Freedom of Information Act, 5 U.S.C. § 552, in light of the efforts of the U.S. Marshals Service to restrict access to such records.

On Jan. 30, the Reporters Committee and 37 media organizations wrote to the Honorable Eric H. Holder, Jr., Attorney General, expressing our concerns about the Marshals Service's decision to no longer comply with its public disclosure obligations under FOIA regarding federal booking photographs. A copy of the letter is attached. The Department of Justice's Criminal Division responded on February 7, stating that our concerns were forwarded to the Public Affairs Division because they fell under that division's jurisdiction. A copy of the response is attached.

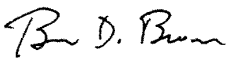
As discussed in more detail in our Jan. 30 letter, the Reporters Committee and the media organizations asked the Department of Justice to reverse the Marshals Service's decision to deny all access to federal booking photographs under FOIA, a policy that directly conflicts with binding precedent from the U.S. Court of Appeals for the Sixth Circuit that mandates access to such records. The Reporters Committee believes that the Marshals Service's unilateral decision to deny access to Sixth Circuit residents who request such records under FOIA violates the established legal rights of those requesters and also runs counter to FOIA disclosure policies enacted by

Attorney General Holder to increase government transparency.

Because the concerns raised in the letter implicate the Department of Justice's broader policy of disclosing criminal booking photographs in response to FOIA requests, assignment of our complaint to the Public Affairs Division was improper. The Reporters Committee believes that our concerns can be best addressed by Attorney General Holder, as he directs the Department's FOIA policies and authored the 2009 Department of Justice FOIA Guidelines for all federal agencies.

The Reporters Committee understands that Attorney General Holder is scheduled to testify on Wednesday, March 6 during the Committee's "Oversight of the U.S. Department of Justice" hearing. Our organization believes that the hearing would provide an excellent opportunity to elevate our concerns to Attorney General Holder and we would appreciate your bringing them to his attention. We thank you for your consideration of our concerns and we look forward to Attorney General Holder's appearance at the hearing.

Very truly yours,



Bruce D. Brown

Enclosures

cc: Honorable Eric H. Holder, Jr., Attorney General
James Cole, Deputy Attorney General of the United States
Tony West, Acting Associate Attorney General of the United States
Stuart F. Delery, Principal Deputy Assistant Attorney General, Civil Division
Lanny A. Breuer, Assistant Attorney General, Criminal Division
Melanie Ann Pustay, Director, Office of Information Policy
Miriam M. Nisbet, Director, Office of Government Information Services, National Archives and Records Administration