U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 2, 2011

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

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on May 4, 2011. Please note that responses to Questions 37 through 53 were provided to the Committee on July 22, 2011.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. 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.

Sincerely,

Ronald Weich
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
May 4, 2011

QUESTIONS POSED BY CHAIRMAN LEAHY

Collateral Consequences of Crime Study

1. **I wrote and Congress passed in 2007 a provision requiring the Department to study the collateral consequences of criminal convictions across the country. This means consequences like restrictions on jobs and housing for those convicted of crimes. Vermonters have told me that some of these consequences are not related to public safety and make it harder for those getting out of jail to become contributing members of society. The study, commissioned by the Department and done by the American Bar Association, has documented more than 38,000 collateral consequences nationally. You have now written to every state Attorney General in the country asking each state to review this study and reevaluate its laws and policies. I am thinking about these issues as I work on reauthorizing the Second Chance Act.**

   Do you agree with me that it is essential in these times of tight budgets that states and the federal government review their policies to make sure we maximize the chance that those convicted of crimes will not return to crime and jail and instead will become contributing members of society?

Response:

Yes. The ABA study provides an excellent opportunity for states – and the federal government – to examine policies that may serve as barriers to successful reentry. As you know, in January of this year the Attorney General convened the interagency Reentry Council. The purpose of this group is to bring together federal agencies to make communities safer, assist those returning from prison and jail in becoming productive, tax-paying citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration. The Council also empowered staff – now representing 18 federal departments and agencies – to work towards a number of goals. The Council's most recent meeting occurred on September 27, 2011.

In the short term, Reentry Council agencies are working together on a number of issues including: juvenile reentry, barriers to employment and access to benefits, and enhanced coordination of federal resources and efforts. Importantly, we are currently forming a new working group to examine the federal collateral consequences of a felony conviction. We have also developed a set of "Reentry MythBusters" to clarify federal policy on a number of issues, such as access to public housing and federal benefits, federal bonding for employers, parental

rights, and many others. These materials are available at http://www.nationalreentryresourcecenter.org/reentry-council-meeting, and more will be available soon.

State Secrets

2. **You announced a new policy on the use of the state secrets privilege in September 2009. That policy incorporated some elements of a bill I introduced, the State Secrets Protection Act, but did not go as far as I would have liked. I believe that the government should be required to show significant evidence to a judge when seeking to assert the privilege. Otherwise, the decision to assert the privilege lies solely in the hands of the Executive Branch.**

   Neither the report you submitted to me last Friday on use of the privilege-- stating that the Department has asserted the privilege only twice since September 2009-- nor the letter you send me last night with some additional detail, contained basic information about the number of state secret cases.

   A. **Your task force reviewed all pending cases and determined that all assertions of the state secret privilege were valid. How many pending cases did the task force review?**

Response:

Because some of the matters reviewed by the state secrets task force involved classified information and were litigated under seal, it would not be appropriate for the Department to indicate the precise number of such matters reviewed.

   B. **Did you personally review each of these prior pending cases? Or did you only personally review the two cases in which the privilege was asserted since September 2009?**

Response:

In 2009, the Attorney General established a Departmental Task Force, comprised of senior lawyers from the Department's leadership offices as well as career Department lawyers with experience in litigating cases in which the state secrets privilege had been invoked, to analyze how the privilege had been invoked in pending cases. For each pending case, the Task Force reviewed all key pleadings and relevant case law, as well as classified declarations from agency heads and others submitted in support of the privilege, and interviewed Department counsel litigating the case. The Task Force then evaluated all of the cases as a group to assess the privilege assertions on a comparative basis before coming to rest on an analysis and recommendation for each case. For each of the cases reviewed, the Task Force concluded that the risk to national security was sufficiently grave, and the evidentiary submission made to the court to support the privilege was sufficiently strong, that invocation of the privilege was

warranted and should be maintained. At the conclusion of that process, members of the Task Force briefed the Attorney General on the conclusions as to each case, as well as on its recommendations concerning changes to the procedures by which privilege assertions are invoked. For the two cases referenced in the Report with privilege assertions under the September 2009 policy, the Attorney General gave personal approval as provided in the policy.

Mortgage/Foreclosure Fraud

3. **As the result of the housing market's collapse, millions of Americans have lost, or will lose their homes to foreclosure. I feel very strongly that as lenders repossess homes to put back on the market, homeowners in foreclosure must be treated fairly and honestly in this process. There is pervasive evidence that the opposite is occurring in the rush by lenders to foreclose.**

   I am especially concerned by reports of widespread abuses by servicers, the foreclosure mills that assist them, and lenders. Bankruptcy and state court decisions have outlined these problems in great detail. I am not alone in my fear that we are seeing a substantial fraud on the courts carried out through the use of forged or fraudulent documents, inaccurate accounting, and serious assignment of title issues. I appreciate that the Department is leading an interagency effort to combat mortgage fraud, and I encourage continued vigilance in this work.

   A. **Is mortgage servicer fraud in the foreclosure process something the Task Force is looking at?**

Response:

Yes. Members of the Financial Fraud Enforcement Task Force (FFETF), including the Department of Justice (Department or DOJ), the Department of Housing and Urban Development, the Department of the Treasury, the Federal Trade Commission, federal regulators, state attorneys general, and others, are working together to examine the mortgage servicing problems and to ensure the full resources of the federal and state regulatory and enforcement authorities are brought to bear in addressing the issue with a coordinated response. This process is ongoing, and at this time we cannot provide specifics of what the outcome will be. While we cannot discuss any ongoing investigations or the substance of negotiations related to potential resolutions, the Department conducts each investigation, charging decision, or resolution, whether large or small in scale, based on the facts and interests of justice.

   B. **What specific steps are being taken by the Department to address fraudulent documentation and other problems in the foreclosure process?**

Response:

As noted above, members of the FFETF are focused on a wide array of problems in the mortgage servicing industry.

C. Would the Department like to see Congress consider additional legal tools to help you ensure that homeowners in foreclosure are not victimized by fraudulent conduct?

Response:

There are numerous and broad enforcement statutes and provisions, including criminal, civil, and regulatory tools, that can be used to address potential fraudulent and improper conduct. While the Department believes that these tools are sufficient to address the fraudulent conduct at issue here, we are always open to a constructive dialogue with Congress about ways to improve fraud enforcement.

Hate Crimes

4. After more than a decade, Congress finally passed the *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, which the President signed in October 2009. I am proud that Congress came together in a bipartisan fashion to show that violence against members of any group because of who they are will not be tolerated in this country.

The tragic deaths of Matthew Shepard and James Byrd, Jr. highlighted the need for this law. In recent years, many cases have raised new concerns about the growing violence against other groups including Latinos and immigrants.

Just last month, a federal grand jury returned an indictment charging two Arkansas men with one count of conspiracy and five counts of violating the new hate crimes law. The indictment alleges that the defendants yelled anti-Latino epithets at the victims while they were at a gas station parking lot. When the victims drove away, the defendants chased after them in a separate vehicle. Eventually the defendants caught up to the victims' car and repeatedly rammed their truck into it, causing the victims' car to go off the road, overturn and ignite.

A. In what other cases has the Department been able to apply the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act?

Response:

The Department has indicted four cases under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. The first case indicted under the Act involved an incident in New Mexico in which the defendants abused a Native American man with developmental disabilities. All three defendants have pleaded guilty to federal hate crime charges. *See United States v. Beebe, et al. (D.N.M.)*. The Department also charged a defendant under the Act in the attempted bombing of the Martin Luther King Jr. Unity March in Spokane, Washington on January 17, 2011. The indictment alleges that the defendant planted and attempted to use an improvised

explosive device on the corner of Main and Washington Streets in Spokane during the march, because of the actual or perceived race, color or national origin of participants. *See United States v. Kevin Harpham (E.D. Wash.).* That case is scheduled for trial in September 2011.

The third case indicted under the Act is the Arkansas incident referenced in your question. In May, the Department secured convictions under the Act of the two defendants responsible for this horrific incident. They were the first two defendants convicted under the Act. *See United States v. Popejoy and Maybee (W.D. Ark).* Finally, the Department successfully prosecuted a defendant in Minneapolis for assaulting an 83-year-old Somali man because the Defendant believed he was Muslim and Somali. The Defendant pleaded guilty on August 10, 2011. *See United States v. Thompson (D. Minn.).*

In the aftermath of the attempted bombing of the Martin Luther King, Jr. Unity March in Spokane, Washington, on January 17, 2011, the Community Relations Service met with regional and local civil rights organizations, a human rights commission, and local law enforcement representatives. In April 2011, CRS offered training, participated in contingency planning with all parties, and monitored a special march and rally in Spokane in response to the bomb that was left along a parade route on Martin Luther King Day. The march and rally were also in response to the 40-year anniversary of Martin Luther King Jr.'s assassination on April 4.

With the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in 2009, the Community Relations Service (CRS) has worked with communities across the country to employ strategies to prevent and respond to alleged violent hate crimes committed on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability.

B. What has the Department done, and what else needs to be done, to implement these hate crimes measures designed to help law enforcement curb the alarming trend of attacks based on ethnicity, race, sexual orientation, and other forms of bias?

Response:

Bias-motivated crimes victimize individuals and entire communities. Hate crimes must be prevented and those who commit them punished to the full extent of the law. Prosecuting those persons responsible for committing these crimes has been at the core of the Department's mission since 1957, when the Civil Rights Division was created.

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 strengthened the Department's ability to prosecute hate crimes at the federal level. The Department has opened over 100 matters under the Act and has already indicted four cases under the new statute. As discussed in Part A of this question, in May, the first two defendants were convicted under the statute for their role in ramming their truck into a car occupied by five Hispanic men, which forced the car off the road, causing it to crash and burn.

In addition to prosecuting hate crimes under the new Act, the Department has organized training conferences throughout the country at which over a thousand law enforcement officers and community stakeholders have been trained on the law, its implementation and the identification, investigation and prosecution of hate crimes. The Civil Rights Division has taken the lead in training Assistant U.S. Attorneys and FBI agents regarding the requirements of the new law. In February 2010, approximately 100 Department attorneys received training on the new law at the Department's National Advocacy Center. Also, a video devoted exclusively to issues presented by the law is available to all Department personnel. The Department is working with the FBI to ensure that federal, state, and local law enforcement officers are trained on the law as well. As a result of this outreach, we are fostering collaboration and cooperation among state, local, tribal and federal law enforcement officials that will enhance our efforts to combat hate crimes throughout the nation.

The Department's Community Relations Service works with community leaders, students, law enforcement officials, and government leaders who have embraced the challenge of making communities stronger, fairer, and freer by helping them develop local capacity to work together to address discrimination and prevent hate crimes. Beginning in 2010, CRS sharpened its focus on serving Indian tribes and responding to allegations of discrimination and the potential for violence against Arab American, Muslim American, and Sikh American communities. With the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, CRS is now able to work with communities to employ strategies to prevent and respond to alleged violent hate crimes committed on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability.

CRS continues to increase its efforts to serve Indian tribes in a manner consistent with the government-to-government relationship between the United States and sovereign Indian tribes. In 2010, tribal leaders asked CRS to work with their representatives to facilitate dialogue between a tribal nation and officials from bordering cities to address alleged disparate treatment and discrimination on the basis of race and national origin.

CRS continues to work with local religious leaders to address allegations of discrimination and concerns about faith-based violence. Houses of worship targeted for hate graffiti and desecration create a real sense of fear in those communities, and CRS has worked with Jewish, Muslim, Christian, Hindu, and Sikh leaders to develop relationships with other community leaders, law enforcement, and local government officials to foster improved communication and cooperation.

CRS has strengthened relationships with civil rights groups addressing discrimination on the basis of race, color, and national origin and built new relationships with groups working with communities that may be targeted for violent hate crimes on the basis of gender, gender identity, sexual orientation, religion, or disability. CRS helped to facilitate dialogue between law enforcement officials and leaders from gay, lesbian, bisexual, and transgender civil rights organizations in the aftermath of an alleged violent hate crime, which led to the development of a sustainable communication structure to help prevent and respond more effectively to violent hate crimes. In the aftermath of allegations of excessive use of force and biased-based policing, CRS further strengthened its long-standing relationships with civil rights groups representing African

Americans and Latinos to rebuild trust and confidence in law enforcement and local government.

QUESTIONS POSED BY SENATOR SCHUMER

5. **As you know, the Bureau of Prisons oversees more than 209,000 Federal Inmates. This population has grown by over 45 percent over the past decade, while space and staffing has failed to keep pace. Indeed, today Federal prisons are overcrowded by 45 percent of their rated capacity, and the inmate-to-staff ratio increasing by 50 percent. This is truly a recipe for tragedy.**

Regrettably, the April report released by the GAO (Bureau of Prisons: Evaluating the Impact of Protective Equipment Could Help Enhance Officer Safety, GAO-11-410) showed a 43 percent increase in assaults on our federal prison officers over the last decade. That increase is nearly identical to the population growth over the same time period. Moreover, the report included understaffing and overcrowding as two of the five factors most impacting officer safety. However, even as understaffing of these facilities reaches critical levels, and assaults on prison officers increases – a recent FOIA request reveals the increasing allocation of bonuses for BOP management personnel – more than doubling from 2005 to 2008.

With BOP Director Lappin's recent resignation, I ask you to commit to closely examining these issues as you find a suitable replacement. Can you make that commitment?

Response:

Managing crowding within the Federal Bureau of Prisons (BOP), fully staffing existing positions, adding new bedspace capacity, and adding new positions to support that capacity has been a high priority in recent years, and will remain so for the foreseeable future.

System-wide, the BOP is operating at 38 percent over its rated capacity. Crowding is of special concern at higher security facilities – with 53 percent overcrowding at high security facilities and 47 percent at medium security facilities.

To help safely manage the increasing federal inmate population, the President's total FY 2011 budget request for the BOP was $6.804 billion, which included half-year funding to fill 1,200 vacant correctional worker positions and activation funds for Federal Correctional Institution (FCI) Berlin, NH, as well as the purchase and renovation of the Thomson Correctional Center, IL. Unfortunately, the enacted budget was $6.394 billion, causing the BOP to fall short of its goals. The President's total FY 2012 budget request for the BOP is $6.824 billion, which includes a 1,768 increase in staffing and funds to begin the activation process of FCI Berlin, FCI Mendota, CA and FCI Aliceville, AL.

While we are optimistic about the impact recent staffing increases will have upon staff safety, there remains a continued focus upon achieving and maintaining adequate staffing levels to ensure the safety and security of all BOP staff.

6. **The GAO report (GAO-11-410) gauged the opinions of corrections officers, union officials, and BOP management officials on several items of safety equipment used in state correction facilities. It found that corrections officers and BOP management held vastly differing opinions in the effectiveness of that equipment. Additionally, the report recommend that the BOP collect increased data on the assault of federal corrections officers to evaluate the impact of equipment which it already provides or could provide to enhance protection.**

   A. **The report asserts that the BOP concurred with its recommendation and will conduct an evaluative study of protective equipment; can you confirm the implementation of this study, and provide a timeline for completion?**

Response:

The BOP is consulting with the National Institute of Justice (NIJ) and National Institution of Corrections (NIC) to ensure the study design appropriately measures safety equipment used by correctional officers. Currently in the design phase, completion of this study is anticipated for June 30, 2012.

   B. **Can you confirm that such a study would move beyond the opinions provided in the GAO report and rely on data?**

Response:

The BOP will perform the study with the assistance of NIJ and NIC.

The BOP's Office of Research and Evaluation (ORE) will use data on significant incidents recorded in the BOP's significant incident reporting system (TRUINTEL) to analyze the effectiveness of equipment in controlling violently disruptive inmates and protecting staff from injury. TRUINTEL records the date of serious assaults, type of incident, use of less lethal weapons (e.g., pepper spray), staff injury, and the number of inmates involved, among other important data.

ORE will analyze critical variables in TRUINTEL to answer questions about the type and frequency of less lethal weapons use in various types of incidents. Additionally, ORE will use the data file to evaluate equipment effectiveness in returning order to the facility and protecting staff from injury. ORE's analysis will identify data deficiencies for the purpose of monitoring equipment effectiveness, and recommend needed enhancements to current incident reporting systems. Both the NIJ and NIC will be consulted regarding the appropriate research designs.

7. **In questions I previously submitted regarding the safety of federal prisons, your Department mentioned that you had "recently formed a Sentencing and Corrections Workgroup to make recommendations for addressing the critical challenges facing the federal prison system among other issues."**

What is the status of this workgroup – has it submitted recommendations? Has the Department implemented any such implementations?

Response:

The federal prison system faces many challenges. The continued growth of the inmate population during this austere budget period strains correctional and other law enforcement resources, and the burgeoning prison population limits the ability of corrections officials to provide drug treatment, job skills training, and other program and treatment services that are necessary for minimizing recidivism and promoting public safety.

For all these and many other reasons, the Sentencing and Corrections Working Group undertook a thorough review of federal sentencing and corrections policies, with an eye toward possible reform. For many years, Congress and the Department have been working on reentry issues and improving reentry at the state and federal level. The passage of the Second Chance Act during the Bush Administration was an important step and helped to shape prisoner reentry as a national priority. But our Working Group efforts revealed that at the federal level, much more can and should be done. The Working Group concluded that offender reentry strategies have the potential to reduce crime substantially. Focusing on reentry programs that have the potential not only to reduce the recidivism rate but to improve public safety and reduce total criminal justice spending, the Working Group developed recommendations for reform.

As a result, on October 8, 2010, the Department launched Project Reentry. Project Reentry focuses federal resources on increasing public safety and maximizing the efficient use of public safety dollars to reduce reoffending of released offenders. Modeled on Project Safe Neighborhoods, Project Reentry has three major components: (a) coordination and planning; (b) data generation and evidence analysis; and (c) policy change.

With respect to coordination, the Department has convened an interagency Reentry Council to improve coordination among the myriad federal departments and subcomponents focused on state, local, tribal, and federal reentry issues. This Council will track developing reentry-related research and legislation and help to ensure that resources devoted to reentry are used wisely and efficiently. A separate working group will meet regularly with the federal judiciary and the U.S. Sentencing Commission to coordinate the work between the Department of Justice and the Judicial Branch. This group also will work with the Judicial Conference, emphasizing the importance of reentry investment for federal offenders that begins with incarceration and runs through post-release supervision.

In addition, the Administration has submitted legislation to revise statutes governing federal inmate good time credit and credit for participating in recidivism-reducing programs. Enacting these proposals will help to reduce reoffending, promote effective prisoner reentry, manage the federal offender population, and control the federal prison population.

Other steps that will be part of Project Reentry include:

As part of the Department's Project Reentry activities, the Department has finalized a comprehensive U.S. Attorney "toolkit" focused on reentry for nationwide distribution. This toolkit is designed to support ongoing efforts by federal courts around the country to experiment with reentry courts and other mechanisms to improve prisoner reentry.

The Sentencing and Corrections Working Group took on other issues beyond reentry. You can find a full rundown of these issues and the progress of the Working Group in a recent article authored by Assistant Attorney General Lanny Breuer in the Federal Sentencing Reporter, "The Attorney General's Sentencing and Corrections Working Group: A Progress Report", *Federal Sentencing Reporter*, Vol. 23, No. 2, pp.110-114.

8. In a recent opinion piece, the President stated that that NICS Improvement Amendments Act of 2007 which sought to strengthen our gun check system "hasn't been properly implemented." Representative McCarthy and I worked long and hard to pass this legislation through Congress after the tragedy at Virginia Tech. This act included among other provisions, a requirement that all federal agencies provide any record of persons prohibited from purchasing firearms to the FBI. Tucson gunman Jared Loughner, was rejected by the Army due to his admitted drug use. Under the NICS Improvement Amendments Act – now federal law – it seems to me that such information could have been sent to the NICS.

However, according to press accounts, a policy enacted by former-Attorney General Janet Reno directed federal agencies not to report to the FBI for inclusion in the NICS failures on "voluntary" drug tests, including tests taken by persons seeking federal jobs or seeking to enlist in the military. That directive seems to contradict the NICS Improvement Amendments Act, but apparently the policy remains in place at most federal agencies. Unfortunately, FBI information reveals very few federal agencies reporting any information at all to the NICS.

A. Attorney General Holder, would you agree that the Reno memo is superseded by the more recent statute?

Response:

The NICS Improvement Amendments Act of 2007 (NIAA) did not alter the discretion provided to the Attorney General by the Brady Handgun Violence Prevention Act of 1993 to obtain information from federal agencies that demonstrates a firearms prohibition under the Gun Control Act of 1968. As a result, the NIAA did not automatically supersede the policy decisions made by Attorney General Reno in 1998 concerning federal drug test information and the NICS.

B. What has the Department done to let the military and other federal agencies know that you want the names of known drug abusers and other prohibited purchasers so we can keep them from getting guns?

Response:

The Department has engaged in extensive outreach with other federal agencies to communicate the information-sharing requirements of the Brady Act, as amended by the NICS Improvement Amendments Act (NIAA), and to provide any necessary technical assistance. After passage of the NIAA in 2008, the Department hosted two widely-attended interagency meetings to introduce the requirements of the NIAA and to provide further information on the Gun Control Act and the categories of persons prohibited from possessing firearms. Those meetings were followed by approximately ten smaller group and individual agency meetings throughout 2009 and 2010. In addition, at the end of 2008 and beginning of 2009, the Department sent individual letters to every federal agency, again providing information on persons prohibited from possessing firearms and requesting assistance in ensuring that all relevant information is provided to the NICS. These letters also asked for a point of contact with whom the Department could communicate further. The Department then sent surveys to all of the provided federal agency points of contact to ascertain whether their agencies created records relevant to the firearms background check system. Since then, the Department has engaged in extensive outreach with individual federal agencies to follow up on their survey responses. Most recently, on April 22, 2011, the Department sent a follow up letter to the agencies that have not yet provided a point of contact or completed a survey. The Department will continue to engage in outreach and to provide technical assistance to encourage federal agencies to share relevant information with the NICS.

C. Given that the President has stated the NICS Improvement Amendments Act "hasn't been properly implemented," your Department's stated commitment to strengthening our gun check system, and Loughner's ability to purchase a firearm even after admitting to the federal government of his drug abuse, will you examine the implementation of NICS Improvements Amendments Act to ensure it is serving its intended purpose?

Response:

Yes. The Department continues to work with our federal and state partners to increase the availability of relevant federal and state records for the firearm background check process.

9. Since January, 29 police officers have been killed which amounts to an increase in fatal police shootings of more than 50 percent over last year. Of the 29 officers fatally shot this year, at least 20 were killed by individuals who were actually barred by federal law from possessing guns.

A. Do you support broader use of the federal background check system to prevent such violence?

Response:

The fact that prohibited persons can completely avoid the federal background check system altogether is a significant gap in our ability to keep guns out of the hands of dangerous persons. Any serious legislative attempt to improve the way the system works should examine whether to extend the background check requirement to more firearms transfers.

B. How are the Department's public safety responsibilities impacted by the loophole in law that allows a person to buy a gun from a private seller with no background check?

Response:

Whenever criminals or other persons prohibited by law from possessing firearms are able to acquire guns – from whatever source – it has an adverse effect on public safety.

10. As you know, I am the lead sponsors of the Fix Gun Checks Act. I believe it provides common sense ways to ensure dangerous people cannot purchase guns – first, by making sure all these names are in the NICS database and second, by requiring virtually everyone goes through the background check system.

Do you agree that this is a common sense approach to ensuring dangerous people can't access guns?

Response:

We share your commitment to keeping firearms out of the hands of criminals and others who are prohibited by law from possessing them. Although the Department is aware of the Fix Gun Checks Act, we have not yet taken a position on it.

QUESTIONS POSED BY SENATOR WHITEHOUSE

11. With gas prices in Rhode Island and across the country approaching or exceeding $4 per gallon, we need to make sure we are doing everything we can to ease the burden on consumers at the pump. I was pleased to see that you recently appointed an Oil and Gas Price Fraud Working Group to look into illegal activity in the energy markets. I hope the Working Group, and the Department, will ensure that fraud, collusion, and manipulation, do not contribute to price-gouging in this essential market.

A. Please provide an update on the Working Group's progress, and the timeline for completion of its work.

Response:

In April 2011, the Attorney General, in his role as the Chair of the Financial Fraud Enforcement Task Force, convened a new working group to pursue a comprehensive approach in monitoring and sharing information about the oil and gas markets, to determine whether or not there is evidence of unlawful activity or violations of regulations, and to take the appropriate action if wrongdoing has occurred. This new working group, the Oil and Gas Price Fraud Working Group, is led by regulators and authorities with a long history of expertise and enforcement in this area, including the Commodity Futures Trading Commission, the Federal Trade Commission, and the state attorneys general, as well as federal partners from the Departments of Agriculture, Energy, and Treasury, the Securities and Exchange Commission, and the Federal Reserve. This Working Group enables Task Force members to formalize collaborative efforts, share current oversight activities, avoid duplication, and combine resources and expertise. This collaborative effort also enables us to more effectively evaluate forthcoming market developments, so that any instances of suspected illegal activity can be pursued quickly. The Working Group also will foster increased cooperation between investigators and regulators, so that, where appropriate, we can vigorously enforce state and federal laws against fraud, collusion, manipulation, and other forms of wrongdoing. Since its inception, the full working group has held meetings to further these goals and convened more targeted sub-groups to focus on specific issues. Although the Working Group is newly formed, it is already demonstrating that the members are more effective in this area when working together. While we cannot discuss any specific investigations or potential enforcement matters, the Working Group's efforts to share information, combine resources and expertise, and work collaboratively to address potential unlawful activity are progressing. This effort is ongoing and at this time there is no completion date.

B. Do the Working Group and Department have sufficient resources to identify and prosecute misconduct in the energy markets?

Response:

The Department and our partner members in the Working Group are well positioned, due to strong coordination and communication, to effectively fulfill their enforcement and oversight authority and address misconduct, should it be detected, in the oil and gas markets.

C. Does the Department need new statutory tools to deter and eliminate fraud or price-gouging in the gas markets?

Response:

There are numerous state and federal enforcement statutes and provisions, including criminal, civil, and regulatory tools that can be used to address improper conduct in this area. While the Department believes that these combined tools are sufficient, we are always open to a constructive dialogue with Congress about ways to improve enforcement, protect consumers, and ensure the integrity of our markets.

12. Unfortunately, because of rising healthcare costs, some are urging us to do away with Medicare as we know it. The House of Representatives recently passed a Republican Budget, which proposes privatizing Medicare and requiring seniors to pay the majority of their health expenses with their own money. Estimates suggest that this proposal would end up forcing a typical, 65 year-old senior to pay on average $12,500 each year in out-of-pocket expenses starting in 2022. In my home state of Rhode Island, where the average senior only gets about $13,600 per year from Social Security, that would be an exercise in poverty creation. I believe we can protect and strengthen Medicare for our seniors, in part by making sure we do not lose Medicare dollars to fraud and abuse. Last year, I worked on bipartisan Medicare fraud-fighting legislation that was signed into law as part of the Small Business Jobs Act. The law requires Medicare to adopt state-of-the-art technology – predictive modeling systems currently used by the credit card and banking industries – to identify fraudulent claims and billing patterns before taxpayer funds are spent.

A. Please provide an update on the scope of the threat to Medicare's finances from fraud and the success of the Department's Medicare fraud prosecutions to date.

Response:

We do not know for certain how much taxpayer money is lost to health care fraud, waste, and abuse. Various estimates – none of which is based on scientific data collection procedures or has been verified – have been generated by public and private sources. The National Health Care Anti-Fraud Association (NHCAA) has estimated that "3% of all health care spending – or approximately $78 billion – is lost to health care fraud" or, more likely, may be lost to some combination of fraud, waste and abuse. This figure represents 3% of the total $2.6 trillion spent

on health care from all sources – private, government, and consumers – in 2010. Medicare accounted for $534 billion of total health care expenditures. Therefore, using the NHCAA's 3% estimate, possibly as much as $16 billion of Medicare money may have been lost to fraud, waste and abuse last year.

The joint enforcement and prevention efforts of the Departments of Justice and Health and Human Services since Attorney General Holder and Secretary Sebelius announced the HEAT Initiative in May 2009 have produced the best two years on record with regard to health care fraud recoveries and prosecutions. In fiscal year 2010, federal health care fraud enforcement efforts recovered and transferred more than $4 billion to the Centers for Medicare and Medicaid Services (CMS), U.S. Treasury, other Federal agencies administering health care programs, and to private persons. This is the highest annual amount ever recovered from health care fraudsters and represents an increase of $1.47 billion, or 57 percent, over the previous record of $2.55 billion in recoveries and transfers to victim health care programs in FY 2009. Furthermore, a record high total of 931 defendants were charged with health care fraud violations during FY 2010, a 16% increase over the prior fiscal year. Another record high total of 726 health care fraud defendants were convicted of health care fraud related offenses last year – a 23 percent increase over the previous high number of health care fraud convictions. Most of the defendants charged and convicted were involved in schemes targeting Medicare, Medicaid and other government-sponsored health care programs.

We are continuing to aggressively prosecute Medicare fraud in the current fiscal year. On February 17, 2011, a takedown involving the largest number of defendants in U.S. history, Medicare Fraud Strike Force teams arrested and unsealed charges against 114 defendants who are responsible for over $240 million in fraudulent billings to Medicare and other health care programs. We also expanded the number of Medicare Fraud Strike Force sites from seven to nine, adding Chicago and Dallas in February 2011. On September 7, 2011, Strike Force teams coordinated our latest national takedown in eight cities that resulted in charges against 91 defendants for their participation in Medicare fraud schemes involving approximately $295 million in false billing – this was the largest amount of false Medicare billings in a single takedown in Strike Force history.

The President's budget request for FY 2012 seeks an additional $63 million in discretionary funding to continue to expand the number of Strike Force sites and teams to combat criminal health care fraud schemes and the Department's civil enforcement efforts targeting violations of the False Claims Act, Food, Drug and Cosmetic Act, and Anti-Kickback Act.

B. Is the Department of Justice working with counterparts at the Department of Health and Human Services to use the predictive modeling systems required by law to limit Medicare fraud, in order to protect the program's finances and ensure its continued viability for our seniors?

Response:

The Small Business Jobs Act of 2010 provided $100 million to HHS's Centers for Medicare and Medicaid Services (CMS), beginning in FY 2011, for CMS to phase-in the implementation of predictive analytics in Medicare fee-for-service (FFS), Medicaid, and Children's Health Insurance Program (CHIP) over the next four years. In December 2010, the CMS Center for Program Integrity (CPI) issued a Request for Information asking vendors to identify their capabilities in the areas of provider screening/enrollment and data integration. CMS is in the process of reviewing the responses and will incorporate innovative ideas into a strategy for integrated, automated, providers screening and data integration. The Act mandates that the Secretary shall require the contractors selected by CMS to commence using predictive analytics technologies on July 1, 2011, in the 10 States identified by the Secretary as having the highest risk of waste, fraud, or abuse in the Medicare fee-for-service program. CMS applied the predictive analytics technology to Medicare FFS claims nationwide on July 1, 2011. All FFS claims across the country are now being screened before they are paid and the ones that receive the highest risk scores will receive additional review to examine the conduct that produced the high-risk score. CMS then will consider a wide variety of appropriate actions, including claim denial, payment suspension or revocation, as well as referral to law enforcement. While the Act does not require the Secretary to consult with the Attorney General in implementing, contracting, or administering the predictive modeling activities, the CPI Director has briefed numerous DOJ officials on the agency's implementation efforts in early March 2011 and made a short presentation to the membership of the interagency Health Care Fraud Prevention and Enforcement Action (HEAT) Team in mid-March 2011. As part of HEAT, HHS representatives continue to work with DOJ and HHS Office of Inspector General staff members on a variety of data sharing issues. We expect additional dialogue on the agency's efforts to administer predictive modeling in the near future, especially with regard to identifying fraudulent providers that may be appropriate referrals for investigation and possible prosecution.

HHS, including CMS and Office of Inspector General, and DOJ have participated in collaborative working sessions to discuss strategies for improving CMS' Fraud Prevention System (FPS). CMS met with DOJ officials on July 29, 2011, to review the FPS and discuss the first alerts generated by the system. The group also discussed early plans to establish a command center for responding rapidly to cases of likely fraud and emerging fraud schemes. CMS reconvened with DOJ and FBI on September 26, 2011, in the interim command center to review in greater detail the updated functionalities and future capabilities of the Fraud Prevention System. CPI presented some of the new models under development and received input from DOJ and FBI on improvements to the models. The group also addressed recent examples of egregious fraud to begin building a unified interagency strategy for responding to such extreme alerts.

13. **The recent financial crisis has done great harm to the American people. Thousands of families in Rhode Island and elsewhere have lost their homes, jobs, or retirement savings as a consequence of this crisis. The Financial Crisis Inquiry Commission recently released its report on the causes of the crisis. It found that there were "stunning instances of governance breakdown and irresponsibility" in several major financial institutions, and concluded that the crisis resulted from "a systemic breakdown in accountability and ethics." The Commission wrote that "we clearly**

believe the crisis was a result of human mistakes, misjudgments, and misdeeds" and "that specific firms and individuals acted irresponsibly." In light of this, I have been surprised at the paucity of major prosecutions stemming from this crisis. Are there obstacles to holding wrongdoers in the financial crisis accountable? Is there a need for additional resources or more robust statutory tools to prosecute this type of conduct?

Response:

The Department has devoted, and continues to devote, significant resources to the investigation of the conduct at financial institutions across the country that may have contributed to the financial crisis. These investigations are complex and resource intensive, and involve numerous witnesses, including overseas witnesses, voluminous amounts of documents, and complex accounting issues. Notwithstanding these challenges, the Department is committed to prosecuting wrongdoing by financial service firm executives where there is clear evidence of wrongdoing. The recent successful conviction of Lee Bentley Farkas, the former Chairman of Taylor, Bean & Whitaker (one of the largest privately held mortgage lending companies in the United States in 2009), who was convicted for a $2.9 billion fraud scheme that contributed to the failure of Colonial Bank (one of the 25 largest U.S. banks in 2009), is indicative of the Department's efforts.

14. **What is the Department's current standard for prosecution of medical marijuana cases? In particular, what is the standard with respect to medical marijuana compassion centers sanctioned by state law?**

Response:

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the distribution and sale of marijuana is a serious crime that provides a significant source of revenue to criminal enterprises, gangs, and cartels. The prosecution of individuals and organizations involved in the trade of any illegal drugs, including marijuana, and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises that unlawfully cultivate and sell marijuana, even if such activities are permitted under state law. However, the Department has recognized that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or to focus on their caregivers who are individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints, such persons are subject to federal enforcement action, including potential prosecution, whenever the Department determines that such legal action is warranted

15. I understand that the Department's Inspector General (IG) found that the current encryption methods used by many of the Department's tactical communications systems are vulnerable to amateur hacking attempts that allow communications to be intercepted by unauthorized parties, thereby jeopardizing operations and investigations. The IG also found cases where agents had to interrupt surveillance operations in order to manually reprogram their radios with updated encryption keys. Can you let us know what the Department has done to address these concerns? The IG stated that "if IWN is not implemented DOJ will miss a critical opportunity to provide more effective communications support to its law enforcement agents in the field." Do you share that concern?

Response:

First, the Department wishes to make clear that it remains committed to the Integrated Wireless Network (IWN) and its goal of upgrading its Land Mobile Radio (LMR) systems, even though, due to funding constraints, it has been forced to make changes in its approach.

With this as background, the following addresses your specific questions.

The Department has taken steps to address the encryption concerns raised in the IG's March 2007 report in a manner that minimizes exposure and balances risk against limited funding constraints. Specifically, in terms of the first concern that the "Department's tactical communications systems are vulnerable..." the Department has implemented AES 256 bit encryption in conjunction with the installation of new/upgraded equipment provided as part of IWN. AES is the FIPS-140 certified standard that was mandated to replace the DES standard by 2005. As the newest standard, AES is very robust and has not yet been proven to be vulnerable. Other DOJ systems utilize the DES method which is also a sophisticated encryption method. Although DES has been proven to be vulnerable, it is difficult to un-encrypt DES traffic.

Regarding the comment that "agents hav[e] to interrupt surveillance operations in order to manually reprogram their radios with updated encryption keys," the Department has provided, and will continue to provide, Over-The-Air-Rekey capability – however, this requires funding for infrastructure upgrades that support such capability.

QUESTIONS POSED BY SENATOR KLOBUCHAR

16. Last November, the FBI searched several homes in Chicago and Minneapolis, and nineteen individuals – including several Minnesotans – were subpoenaed to appear before a grand jury.

Many Minnesotans have questions about these searches and about the scope of surveillance being performed by the FBI. Understanding that investigations may be ongoing, will the Department of Justice work with community members to address their concerns?

Response:

The Department of Justice and the FBI engage in community outreach on an ongoing basis to hear and address the concerns of various community groups. This includes outreach both to advocacy and issue-based groups and to ethnic and religion-based community groups. For example, the FBI recently invited a broad range of civil liberties organizations to discuss the FBI's investigative guidelines. The FBI Citizens' Academies offer another means of improving transparency and increasing public understanding of the rules under which the FBI operates. In addition, U.S. Attorneys offices and FBI offices across the country regularly partner to host community meetings and multi-cultural advisory councils. These and other efforts create an invaluable two-way dialogue between DOJ/FBI and the communities they serve.

QUESTIONS POSED BY SENATOR FRANKEN

17. On April 29, 2011, the Department reported that the FBI made 24,287 National Security Letters (NSLs) requests for information pertaining to 14, 212 U.S. persons. This is a substantial increase from the level reported in 2009. Can you explain what accounts for this substantial increase in NSLs requests?

Response:

By statute, the FBI reports certain statistics related to its National Security Letter (NSL) usage. For 2009, the public reporting indicated that the FBI made 14,788 NSL requests seeking information regarding 6,114 different U.S. Persons, while in 2010 the FBI made 24,287 NSL requests seeking information regarding 14,212 different U.S. Persons. While it may seem that the numbers jumped significantly from 2009 to 2010, it is important to note that in 2008 the FBI made 24,744 NSL requests for information regarding 7,225 different U.S. Persons. So, it appears that the low number of 2009 NSLs may have been an anomaly rather than a basis for perceiving a significant increase in 2010. To the extent these number may indicate an upward trend, we are unable to explain the increase because we do not collect statistics or other information that would enable us to discern the reason for the increase. Generally, though, changes from year to year may be based on the types of threats being investigated or the locations of the threats (e.g., inside the U.S. versus outside the U.S.). These variables impact the way we gather information and what information we need to address the threat.

18. The Office of Legal Counsel (OLC) is considered to be the Supreme Court of the Executive Branch, and absent judicial review, OLC's advice is the final word on many pertinent legal issues. Unlike Supreme Court decisions, OLC memos are regularly not made public. Why not make all OLC memos public, except for those very limited parts of any memo that must remain classified for national security reasons? At a minimum, shouldn't the existence of all OLC memos on significant subjects be made public?

Response:

The Department remains committed to disclosing opinions issued by the Office of Legal Counsel (OLC) when possible and consistent with protecting sensitive national security and law enforcement information, as well as the confidentiality of attorney-client communications and internal Executive Branch deliberations. This approach properly takes account of OLC's role as both a legal counselor to, and adjudicator of legal disagreements within, the Executive Branch. OLC has explained its approach to publication of OLC opinions in its "Best Practices" Memorandum (available at http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf).

As that memorandum explains, at pp. 5-6, "[OLC] operates from the presumption that it should make its significant opinions fully and promptly available to the public. This presumption furthers the interests of Executive Branch transparency, thereby contributing to

accountability and effective government, and promoting public confidence in the legality of government action.... At the same time, countervailing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication. For example, OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security. (Declassification decisions are made by the classifying agency, not OLC.) Similarly, OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts, or is prohibited by law. OLC will also decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices. The President and other Executive Branch officials, like other public – and private – sector clients, sometimes depend upon the confidentiality of legal advice in order to fulfill their duties effectively. An example is when an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken. If OLC routinely published its advice concerning all contemplated actions of uncertain legality, Executive Branch officials would be reluctant to seek OLC advice in the early stages of policy formulation – a result that would undermine rule-of-law interests.... In cases where delaying publication may be sufficient to address any of these concerns, OLC will reconsider the publication decision at an appropriate time."

19. You recently announced that Khalid Sheikh Mohammed and four others would be tried in military commissions at Guantanamo instead of in federal courts. Does that decision reflect any lack of confidence on your part in our federal criminal justice system's ability to try terrorists?

Response:

Absolutely not. Federal courts have proven an unparalleled instrument for bringing terrorists to justice. As the Attorney General reiterated in his April announcement that the prosecution of Khalid Sheikh Mohammed and four other individuals would proceed in military commissions, he stands by his initial decision to prosecute the case in federal court. We were prepared to bring a powerful case, and the Attorney General is confident that our justice system would have performed with the same distinction that has been its hallmark for over two hundred years. The Attorney General referred the case to military commissions primarily because Members of Congress intervened and imposed restrictions blocking the administration from bringing any Guantanamo detainees to trial in the United States, regardless of the venue. We could not allow a trial to be delayed any longer for the victims of the 9/11 attacks or for their family members.

These restrictions on the Executive branch's authority to determine when and where to prosecute detainees – as well as other restrictions currently being considered – undermine our counterterrorism efforts and could harm our national security. Prosecution decisions have always been – and must remain – the responsibility of the Executive branch. For decades presidents of both political parties have leveraged the flexibility and strength of our federal courts to incapacitate dangerous terrorists and gather critical intelligence. Since September 11,

our courts have convicted hundreds of terrorists and our prisons safely and securely hold hundreds today, many of them serving long sentences. Our national security plainly demands that we continue to prosecute terrorists in federal court, and we will do so.

20. Several weeks ago, a member of Congress said that there was a lack of cooperation from the Somali community after a very small number of members of that community went back to Somalia to train with al Shabaab. Both Secretary Napolitano and FBI Director Mueller, however, made clear in previous hearings that the Somali community is cooperating with law enforcement, and Director Mueller said the FBI is actively working to recruit more Somalis as field agents for the FBI. Do you agree that it is essential that we encourage and recruit members of key communities like the Somali community to actually become law enforcement officers, prosecutors, and analysts at the Department of Justice?

Response:

Yes. In combating radicalization that leads to violence, the Department's focus is on individuals that would do harm to American interests or citizens, rather than on whole communities. We want neither to stigmatize nor alienate communities, and our outreach with communities, including these communities, is designed to build mutual trust and understanding, so that information can flow both ways.

21. The Supreme Court recently handed down *AT&T v. Concepcion*, which affirmed AT&T's ability to bar customers from bringing a class action through use of an arbitration clause. Although the Department didn't take a position on the *Concepcion* case, do you agree that forced arbitration clauses and class action bans make it harder for Americans to seek justice in our courts?

Response:

Your question raises issues that touch upon the need to protect consumers from fraud and deception, the high costs of litigation, the potential abuse of class action litigation, and the benefits of arbitration. The conflict that arises as a result of these considerations has led Congress and the courts to take steps to try to reach an appropriate balance that protects consumers without exposing those who provide goods and services to excessive risk. The *Concepcion* case is part of that mosaic, and it is extremely difficult to resolve these conflicts perfectly. Rather, the Congress and courts continue to strive to find the best balance, and that process is likely to continue for years to come. The Supreme Court's decisions on these issues involve statutory interpretation, and Congress can modify the relevant statutes as appropriate to preserve this role.

Representative or class suits have an important role in protecting Americans and ensuring the fair enforcement of laws in a variety of areas – including workers' rights, civil rights, environmental laws and consumer protections.

QUESTIONS POSED BY SENATOR GRASSLEY

Prosecution of Leaks of Classified National Security Information

22. Two weeks ago, it was reported that the Justice Department had notified a former Justice Department attorney—Thomas Tamm—that that it was no longer investigating him for leaking classified information to *The New York Times*. This announcement surprised many because Tamm had publicly admitted he revealed classified information in a series of phone calls with reporters at *The New York Times*. This information ultimately was printed and revealed the existence of the Terrorist Surveillance Program.

Attorney General Holder, you have stated publicly that "to the extent that we can find anybody who was involved in breaking the law...they will be held accountable." At the hearing, you mentioned that the decision not to prosecute Tamm was "done on the merits by career professionals within the – within the Department of Justice."

A. Which offices at the Department signed off on the decision not to criminally prosecute Thomas Tamm?

Response:

The Public Integrity Section of the Department's Criminal Division.

B. What are some of the possible reasons the Department would choose not to prosecute an individual who admits revealing classified information?

Response:

As an initial matter, the *Newsweek* article does not reflect that Mr. Tamm admitted that he revealed classified information. Instead, according to the article, Tamm stated that "he divulged no `sources and methods' that might compromise national security," and that he told the *New York Times* reporters "nothing about the operational details of the NSA program because he didn't know them," having never been "'read into,' or briefed, on the details of the program."

Among the reasons that the Department may decline to seek to bring charges against a particular individual at the conclusion of any criminal investigation is that there is insufficient evidence that the individual's conduct met the elements of a crime. For example, to successfully prosecute an individual for a violation of 18 U.S.C. §§ 793(d) or (e) , the government must prove that: (1) the individual had possession or control over specific information relating to the national defense of the United States; (2) the individual's possession of the information was authorized (or unauthorized); (3) the defendant had reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation; and (4) the individual willfully disclosed or transmitted the specific information to another not entitled to receive it. If, for example, the evidence is insufficient to establish that an individual ever

possessed information relating to the national defense, or cannot establish that the defendant knowingly possessed such information, then the Principles of Federal Prosecution bar the Department from bringing such charges.

C. What message does it send to other potential leakers when the Department fails to prosecute an individual who admits leaking classified information?

Response:

The Department has pursued a number of criminal cases involving the unlawful retention of and/or disclosure of national defense information, in part to deter other potential leakers. *See U.S. v. Sterling*, No. 10-CR-485 (E.D. Va. filed Dec. 22, 2010); *U.S. v. Kim*, No. 10-CR-225 (D.D.C. filed Aug. 19, 2010); *U.S. v. Drake*, No. 10-CR-181 (D. Md. filed Apr. 14, 2010). The Department makes prosecutorial decisions based on the facts and the law, and believes that its pursuit of meritorious prosecutions will have a deterrent effect on potential violators.

D. If the Department won't prosecute an individual who admits knowingly leaked classified information, how can we have any confidence that the Department will prosecute the harder cases, such as Wikileaks?

Response:

The *Newsweek* article does not state that Tamm admitted knowingly leaking classified information. However, putting that issue aside, the Department recognizes the importance of investigating and prosecuting cases involving the disclosure of national defense information, and the Department will vigorously apply its criminal enforcement efforts to any facts developed from a criminal investigation consistent with the Principles of Federal Prosecution.

Double Standard for Prosecution of Department of Justice Employees that Leak Classified Information

23. In addition to Mr. Tamm, the Justice Department has sought to protect the identity of two Department employees who received formal warnings for leaking classified information to the media in 1996.

One individual was an assistant director in charge at the FBI and the other an Assistant United States Attorney, who was detailed as the head of a DOJ component. They were both subjected to internal sanction by the Department's Office of Professional Responsibility. However, DOJ objected to releasing their names in response to a FOIA inquiry earlier this year.

In another, more recent example, the Justice Department has supposedly been investigating the leak of sensitive information from the Amerithrax investigation. That leak led to the Department paying out a multi-million dollar settlement for revealing the identity of a suspect who turned out not to be the perpetrator.

Based upon these examples, it appears that there may be a double standard at the Department when it comes to prosecuting those who leak classified information. These examples show where the Department took little or no action on DOJ employees, while criminally prosecuting a former State Department employee, a former CIA employee and a former NSA employee.

A. Do you believe there is a double standard for prosecuting Department employees that leak classified information?

Response:

There is no "double standard" for investigations or prosecutorial decisions involving Department employees who leak classified information. Every case is evaluated based upon the particular facts developed in the course of an investigation and prosecutorial decisions are made based on those facts. The Attorney General has every confidence that these prosecutorial decisions have been made consistent with the "principles of federal prosecution," set forth in Section 9-27.000 et seq. of the U.S. Attorney's Manual.

B. How do you explain this perception of a double standard for not prosecuting Department employees that leak classified information?

Response:

We cannot comment on any particular matters or prosecutorial decisions. However, the record reflects that the Department takes its obligation to enforce the criminal laws regarding the protection of classified information very seriously. The Department aggressively investigates and prosecutes those persons who unlawfully disclose classified information, without regard to their affiliation with the Department.

C. Please provide the Committee with a list of all Department personnel sanctioned, either criminal or administratively, for leaking classified information over the last 10 years. Additionally, provide a list and summary of all OPR investigations into leaks of classified information by Department employees.

Response:

Since May 2001, OPR has conducted six investigations into allegations of unauthorized disclosure of classified information or the improper handling of classified information. None of the investigations resulted in a finding of professional misconduct. OPR closed one investigation administratively because the Public Integrity Section was conducting a criminal investigation into the same matter. The following is a summary of those investigations:

Subject One: OPR investigated allegations that Subject One failed to properly safeguard classified materials in his office. OPR concluded that

the subject did not engage in professional misconduct but rather exercised poor judgment.

Subject Two: OPR investigated allegations that during the course of litigation, Subject Two disclosed classified information to court personnel who did not have the requisite security clearances, and also improperly stored classified materials in his office. OPR closed the investigation because of an ongoing criminal investigation into the same matter by the Public Integrity Section.

Subject(s) Three: OPR conducted an investigation involving the leak of classified information to the media pertaining to an investigation. OPR was unable to identify the individual(s) responsible for the leak.

Subject(s) Four: OPR conducted an investigation into the leak to the media of the existence of an ongoing investigation involving the unauthorized disclosure of classified information. OPR was unable to identify the individuals responsible for the leak.

Subject Five: OPR investigated allegations that Subject Six mishandled classified information when he shipped home several boxes of files from his detail in Iraq, some of which contained some classified material. OPR concluded that given the unique circumstances Subject Six faced while serving in Iraq, Subject Six did not engage in professional misconduct but rather made an excusable mistake.

D. Will you support an independent review by the Inspector General of the decisions not to prosecute Department employee that leak classified information? If not, why not?

Response:

The Office of the Inspector General (OIG) is an independent entity within the Department charged with pursuing misconduct, fraud, waste, and abuse. It is difficult to see how routine prosecutorial decisionmaking regarding Department employees, made in a manner consistent with the Principles of Federal Prosecution, constitute the misconduct, fraud, waste, or abuse necessary to trigger an OIG investigation. Nor is there the kind of systemic defect with regard to such prosecutorial discretion that would benefit from OIG oversight. But the OIG's independence is essential for it to effectively pursue its mandate, and, in light of that independence, it is for the OIG to determine its investigatory priorities.

Integrated Wireless Network (IWN) Contract

24. It was reported two weeks ago that the Department has suspended work on the Integrated Wireless Network (IWN). This program began in 2002 and was designed

to integrate all wireless radios for federal law enforcement. This was a key recommendation of the 9/11 Commission.

To date, the Department has spent hundreds of millions of dollars on the program and it now appears that the program will end without completing the stated goal. In fact, it sounds like the program hasn't even succeeded in completing work in the national capital region as originally planned.

On top of that, what work was done didn't include agencies from the Department of Homeland Security. From the looks of it, this program is just another in the long line of failed government procurements for information technology. I want to know why this program failed and why so much taxpayer money was wasted on a system that isn't going to work.

A. Would you support a top to bottom review of the Integrated Wireless Network to determine why the program failed to complete a nationwide interoperable system? If not, why not?

Response:

The IWN program has not been canceled – the Department remains committed to the goals of IWN and will continue this effort going forward within available resources

The Department has implemented IWN in the Pacific Northwest and in the greater San Diego region and is implementing IWN in the National Capital Region. In short, the program has not failed. Moreover, the Department remains committed to the IWN project and is developing contingency strategies to determine how best to move forward.

Much has been accomplished to date. While all original objectives have not been met, the program has been flexible and has adjusted its plans on a yearly basis to align with available resources. Over the last ten years, $258 million has been spent in total on IWN infrastructure upgrades, and for that the Department has attained the following significant objectives:

1. A fully operational system supporting Department of Homeland Security and DOJ users in the Pacific Northwest and in the greater San Diego area, averaging over 300,000 "push-to-talk" events each week.

2. Special event radio coverage supporting events such as the following:
    - Super Bowl 2007 – Miami, FL
    - Super Bowl 2008 – Phoenix, AZ
    - Super Bowl 2010 – Miami, FL
    - Super Bowl 2011 – Arlington, TX
    - Equestrian Games, Louisville, KY
    - NASCAR Cup, Knoxville, TN
    - NASCAR Cup, Charlotte, NC

3. The Department's High Risk Metropolitan Area Interoperability Assistance Project, better known as the "25 Cities Program," was initiated in 2003 and has provided federal agencies with basic inter-systems communications, as well as interoperability/ interconnectivity with key state and local agencies in the original 25 cities. The program has expanded in the last 3 years and is now operational in a total of 29 cities.

4. An integrated system in the National Capital Region (transition in process).

B. There is some speculation that the Department will take the remaining money that was appropriated as part of the FY2011 continuing appropriations bill and use it to provide a sole source contract to purchase radios that would not meet the original contract specifications. Will you support freezing any further purchases under this program until a top to bottom audit and evaluation of the program is complete? If not, why not?

Response:

The Department has obligated monies to fund the purchase of new P-25 compliant radios sorely needed by agents in the field. It has always been the Department's plan under IWN to continue with ongoing law enforcement radio upgrades where needed, while awaiting the land mobile radio (LMR) infrastructure upgrade through IWN. However, it is important to understand that law enforcement radio upgrades can take place apart from LMR infrastructure upgrades. New radios must be purchased in advance of the infrastructure upgrade within a geographic area, as the new infrastructure will not work on the old radios. Moreover, the new radios can be put to use immediately on legacy systems until such time as the infrastructure can be upgraded. New radios can be used "out-of-the-box" in radio-to-radio direct mode without the network, which is a critical function that is used often in tactical situations. In summary, the law enforcement radio purchase is essential to maintaining the Department's law enforcement tactical communications ability.

As to the sole source question, because the Department's legacy systems, as well as many of the state and local law enforcement agencies' LMR systems with whom the Department partners, are comprised of older Motorola equipment with proprietary Motorola encryption technology, the Department has no choice but to purchase Motorola radios. This is because Motorola is the only vendor that supplies radios that meet all of the Department's requirements, including the ability to work on the legacy Motorola analog infrastructure and new infrastructure, if and when it is replaced, while still providing Motorola's propriety legacy security protocols. The Department wishes to make clear, however, that the sole source vehicle it has used, and plans to use, to make these purchases was awarded in accordance with the legal requirements for entering into a sole source contract, including notice to vendors to allow them the opportunity to demonstrate ability to meet the Department's needs.

C. Do you support using sole source contracts as a method of dolling out congressional funding for the IWN project? If so, please explain how the use of sole source contracts meets the requirements outlined in the original IWN program.

Response:

The Department does not support "using sole source contracts as a method of doling out congressional funding for the IWN project," and the Department has not done so. DOJ's contract for systems integration in support of the IWN implementation was awarded to General Dynamics using full and open competitive procedures. General Dynamics then performed a competitive procurement for the infrastructure equipment for use within the National Capital Region, and Harris Corporation was chosen as the supplier. Contracts to maintain legacy systems, narrowband legacy systems, and purchase radios have been awarded using other than full and open competitive procedures when justified in accordance with the Federal Acquisition Regulation (FAR). In those cases where, due to technical constraints, Motorola equipment has been necessary for mission-critical reasons, DOJ has based its requirements on information gathered during market research and publicized its intentions without protest from the vendor community. In other words, DOJ has been open and up-front regarding its needs, publicizing them as required by the FAR.

DOJ's plan has been and will continue to be to utilize full and open competition based on P-25 standards (which is an industry-led voluntary standard that is many years old) and in accordance with the Administration's objective to be technology neutral wherever possible.

D. The Inspector General warned in 2007 that, "Despite over 6 years of development and more than $195 million in funding for IWN, apart from one pilot system DOJ law enforcement agents have received little in the way of new, secure, compliant radio equipment through IWN." Now that you have suspended the IWN contract, what do the American taxpayers have to show for the project?

Response:

The Department has not suspended the IWN contract. In fact, the Department still has an active task order with the system integrator for post deployment support for the National Capital Region (NCR). In addition, the Department recently extended the IWN Contract, while the Department evaluates its opportunities given the austere budget climate. Also, please see other responses to Question #24 above.

E. This program sounds an awful lot like the failed information technology programs at the FBI. What is it going to take for the Department of Justice to get these contracts done on time and on budget?

Response:

IWN is not a failed IT program. In fact, IWN has not suffered from insurmountable technical problems, or ever-increasing costs with no final product. The Department has implemented IWN in the Pacific Northwest and in the greater San Diego region and is implementing IWN in the National Capital Region, among other successes.

Defense of Marriage Act and Attorneys for Guantanamo Detainees

25. General Holder, you commented last week that Paul Clement should be praised and not criticized for representing the House in arguing for the constitutionality of the Defense of Marriage Act. That representation was made necessary, by the way, by your refusal to continue the Justice Department's defense of the statute. Clement's previous law firm had been attacked by some who believed that it was wrong for it to defend the law. You, however, and I agree with you, stated that "those who were critical of him for taking that representation—that criticism is very misplaced."

However, you also went on to compare the criticism of Mr. Clement to criticism of Justice Department lawyers who had defended Guantanamo detainees while in private practice. You said, "The people who criticized our people at the Justice Department were wrong then, as are the people who criticized Paul Clement for taking the representation that is going to continue."

These two matters are apples and oranges. Mr. Clement had agreed to represent a client and was rightly offended that his former firm, as he understood the situation, after agreeing to that representation, bowed to political pressure in dropping that client. He acted in accord with the highest principles of professionalism.

I certainly believe that the Guantanamo detainees were entitled to be represented, and, indeed, there was no shortage of attorneys who offered to represent them. When some of those attorneys joined the Justice Department, I and others who criticized them did not so for having represented those detainees in the past. We objected to the conflict of interest that was posed by their working on detainee issues at the Department of Justice on behalf of the American people after having represented Guantanamo detainees on the opposite side of the same issues.

Neither Paul Clement nor King & Spaulding had any conflict of interest that should have kept them from continuing to represent the House in support of DOMA. Equating criticism of Mr. Clement's representation of the House to criticism of Guantanamo detainee lawyers now working on those issues at the Department of Justice misses the point entirely. Mr. Clement undoubtedly acted in conformity with the highest ethical standards. The actions of the Department of Justice attorneys, by contrast, could represent an unethical conflict of interest, to the detriment of the American people.

A. Do you see the difference between criticizing a law firm or attorney in private practice for the unpopularity of the representation it is undertaking and criticizing Justice Department lawyers who have a conflict of interest from previously representing individuals whose interests are adverse to the Department? If not, please explain why.

Response:

We respectfully disagree with a premise of this question. As indicated in our letter, dated February 18, 2010, a copy of which is enclosed for the Committee's information, the Department, in evaluating conflict of interest questions, has been mindful of established governing standards, as set forth in statutes, regulations, rules of professional responsibility, and an Executive Order in evaluating conflict of interest questions. Based upon that guidance, all political appointees have been recused from particular matters involving specific parties in which they actually participated in their previous employment, as well as from particular matters in which their prior employers (within two years of their appointments) represented specific parties, including individual detainees.

As the Attorney General recognized, the criticism of Department employees who represented Guantanamo detainees appears to be based on the unpopularity of their representation. It was on that basis that the Attorney General compared the criticism of Department attorneys with the criticism of Mr. Clement. In both instances, the Attorney General was recognizing the important service of attorneys who represent clients in such controversial circumstances.

Office of Legal Policy

26. There has been a hiring freeze in effect at the Department of Justice since January 21, 2011. Notwithstanding the freeze, it is my understanding that hiring can occur if the Attorney General authorizes such hiring.

One of the Department's components is the Department's Office of Legal Policy, headed by Assistant Attorney General Christopher Schroeder. This is a small office at DOJ, with only around 25 lawyers. One attorney who recently left OLP had so little work assigned that after the attorney informed OLP's chief of staff that he was available to take on more work, she responded by thanking the attorney for the email, stating that it was good to know of the situation, and by assigning very little additional work.

Nonetheless, it has come to my attention that OLP asked to hire four new attorneys despite the hiring freeze, and that you approved the request. I understand that two attorneys have left OLP, but given the hiring freeze, the important work that other components are performing without hiring new attorneys, the huge percentage increase in the number of attorneys sought at OLP, and the objective evidence that even the previously smaller number of attorneys were not being fully utilized, how can your approval of Assistant Attorney General Schroeder's request for four additional attorneys not be considered a waste of valuable taxpayer resources?

In addition, it has come to my attention that Mr. Schroeder, while a nominee for Assistant Attorney General, insisted on the appointment of a particular employee, who to the knowledge of the career employees, produced no work. He did not come to work two days per week at a time when OLP had no policy concerning telecommuting. In the entire month of December, 2009, this employee did not spend a single day at his OLP office. The OLP career attorneys allowed him to do so if he

complied with various requirements that documented the work that he produced. He did not do so. After one year of producing no work at OLP, this employee left DOJ for a position in private life, whereupon Assistant Attorney General Schroeder sought to provide this individual with a consulting contract.

A. Is this individual an example of DOJ employing, as you said in a recent speech, "some of the world's most ... dedicated lawyers... and public servants"?

Response:

The Office of Legal Policy (OLP) performs some of the Department's most important work and has a vital role in the Department's activities. As you know, OLP develops key Department policy initiatives, processes all regulations issued by the Department, coordinates and oversees important projects that implicate the interests of multiple Department components, and leads the Department's involvement in the judicial nomination and confirmation process. Like all the men and women at the Justice Department who dedicate their time and talent to the pursuit of justice and the protection of the public, the attorneys who work in OLP and enable the office to carry out these critical responsibilities are dedicated public servants.

In January of this year, OLP had a total of five vacancies in its attorney positions. As you recognize, OLP is a relatively small office, and given its size and substantial workload, these five attorney vacancies created a severe staffing shortage.

When the Attorney General ordered the hiring freeze, he notified all Department components that his office would consider a very limited number of exemptions from the freeze on a case-by-case basis. OLP sought an exemption to the freeze in light of its responsibilities and workload. OLP's request, just like the requests from other Department components, was submitted to the Justice Management Division, fully reviewed and evaluated, and ultimately approved by the Attorney General's office.

B. Will you please undertake an internal review of the functions of OLP and whether its staffing levels are appropriate in light of these examples of underutilized attorneys and the new hires that were made as exceptions to the hiring freeze? If not, why not?

Response:

Please see response to Question 26A, above.

C. Do you believe that an OIG or OPR investigation is warranted into OLP's personnel practices?

Response:

Please see response to Question 26A, above.

U.S. v. Booker and Sentencing Guidelines

27. I am concerned that the Supreme Court's decisions in United States v. Booker and subsequent cases have greatly compromised the effectiveness of the Sentencing Guidelines in reducing unwarranted sentencing disparities among criminal defendants and in assuring that criminal defendants receive appropriate sentences given the severity of the crimes that they committed. Recently, Chairman Leahy sent the Department a letter seeking its views on a proposal by Judge Sessions, the former chairman of the Sentencing Commission, to legislatively overturn Booker while respecting constitutional limitations.

Although I appreciate that I was copied on the response that the Department provided to Chairman Leahy, I was very disappointed in the content of the letter. It provided no clear statement whether the Department supported overturning Booker under Judge Session' approach or any other.

Would you please specify in unambiguous terms (1) whether the Department favors legislation that would overturn Booker, and if so (2) whether the Department favors doing so through an approach that is similar to that which Judge Sessions has suggested, and (3) whether the Department will be sending legislation to the Congress in the next six months to accomplish the objective of overturning Booker or whether it recommends that Congress begin the process without awaiting any further input from the Department.

Response:

While the Department has been troubled by many of the trends in federal sentencing policy following the Supreme Court's decision in *Booker,* we do not anticipate putting forward legislation in the next few months to overturn *Booker*. However, we do support ongoing efforts, at the Sentencing Commission and in the Department, to study alternative sentencing structures and to explore larger reforms to the overall structure of federal sentencing now and over the coming years. In addition, we reiterate our position on this matter as expressed in our letter of April 14, 2011 (to which you allude in your question), as well as our commitment to work with Congressional leadership on this complex and important issue. We think Judge Sessions' proposal has many worthwhile elements and perhaps could be the foundation for reform of federal sentencing policy. We would be happy to discuss his proposal with you and your staff and to explore alternative sentencing structures based on Judge Sessions' proposal and those of others.

Corruption Investigations

28. Following the decision of the United States Court of Appeals for the District of Columbia Circuit in United States v. Rayburn House Office Building, the Department of Justice warned that the effect of the ruling would be to "seriously and perhaps fatally" undermine Congressional corruption investigations by

cabining the ability of FBI to undertake wiretaps and searches. Since then, it has been publicly reported that at least four of the Department's criminal investigations of members of Congress have been impeded by Speech or Debate Clause claims.

A. Are these reports accurate?

Response:

While we cannot comment on specific investigations, the Speech or Debate Clause precludes the use of evidence regarding legislative acts against Members or their staff, absent a waiver of the protection. As a result, the clause has, at times, resulted in an inability to proceed with certain investigations or charges. Following the *Rayburn* decision, the ability to gather evidence is further constrained, particularly in cases involving investigative activity in the District of Columbia, where the *Rayburn* decision is binding precedent.

B. What steps is the Department taking to make sure that the Speech and Debate Clause does not impede valid criminal investigations of Members of Congress?

Response:

The Department is committed to using all of the available investigative tools to combat public corruption, including corruption in the legislative branch. However, the Department also respects its co-equal branch and takes careful precautions to ensure compliance with the constitutional protections provided by the Speech or Debate Clause. Where possible, the Department seeks to obtain waivers of the Speech or Debate Clause protections by Members or committees.

C. Is any legislation needed to ensure that Members of Congress can be held accountable for any criminal acts that they commit?

Response:

Because the Speech or Debate Clause is a constitutional protection, and because the protection belongs to the individual members and committees rather than to Congress as a whole, there is little that could be done through legislation to limit the scope of the Speech or Debate protection.

Medical Marijuana Policy

29. Marijuana is a dangerous drug that is illegal under the Controlled Substances Act. In an October 19, 2009, memorandum entitled "Memorandum for Selected United States Attorneys" (Ogden Memo), Deputy Attorney General David Ogden stated that federal drug enforcement efforts "should not focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana" despite the fact that possession and distribution of marijuana violates federal laws.

States have relied on this memo in passing legislation legalizing medical marijuana in direct contravention of federal law. Recently, several United States Attorneys have issued letters indicating they intend to vigorously prosecute violations of the Controlled Substances Act against large-scale distributors and state regulators who approve and regulate the sale of medical marijuana. These letters and memos seem to point to a change in policy away from the Ogden Memo at the Department of Justice. However, some of these memos by US attorneys indicate that the Ogden memo is still in effect. Based on these memos, it appears states are being sent mixed signals as to whether or not your department will enforce the law.

A. Is the Ogden memo's indication that the Justice Department will not prosecute drug offenders that comply with state law undermined by these recent memos and letters from US Attorneys? If so, to what extent? If not, how do you reconcile the two competing policy pronouncements?

Response:

No. As reiterated in recently issued guidance from Deputy Attorney General James Cole to the United States Attorneys, the Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. The letters issued recently by several United States Attorneys in States which have, or are contemplating, "medical" marijuana laws, are entirely consistent with the Ogden Memorandum, and properly reflect the Department's commitment to enforcing federal criminal laws in all states.

What has changed is that many states have experienced a dramatic increase in the scope of cultivation, sale and distribution of marijuana purportedly for medical use. The Ogden Memorandum was never intended to shield such activities (or those individuals and entities participating in them) from federal enforcement action and prosecution, even where those activities are in compliance with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law, and are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including the CSA.

B. To what extent will the Department prosecute drug offenders who violate federal law, but are in compliance with state law?

Response:

As set forth in the Ogden Memo and reiterated in the recent guidance issued by Deputy Attorney General Cole, prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority for the Department. However, the Department recognizes as a general matter, that it is likely not an efficient use of limited federal resources to focus enforcement efforts on those individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or to focus on their caregivers who are individuals providing care to an individual with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints, such persons are subject to federal enforcement action, including potential prosecution, whenever the Department determines that such legal action is warranted.

C. Will the Department allow United States Attorneys to prosecute state regulators who approve of violations of federal drug laws that are in compliance with state law?

Response:

As noted in the Ogden memo, "in general, the United States Attorneys are vested with plenary authority with regard to federal criminal matters within their districts" and "in exercising this authority, United States Attorneys are invested by statute and delegation from the AG with the broadest discretion in the exercise of such authority." The United States Attorneys exercise their discretion in accordance with the Department's priorities and through the rational and efficient use of our limited investigative and prosecutorial resources. The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints, these individuals are subject to federal enforcement action, including potential prosecution, whenever the Department determines that such legal action is warranted.

D. The Department seems to be sending mixed signals about the enforcement of federal drug laws. How do you intend to clarify the Department's policy on enforcing federal drug laws? Will you provide direction to United States Attorneys as to what offenses to prosecute? If not you, who at the Department will clarify this policy?

Response:

On June 29, 2011, Deputy Attorney General Cole issued guidance consistent with the Odgen memo and the recent letters sent by United States Attorneys which properly reflect the Department's commitment to enforcing federal criminal laws in all states. Prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority for the Department. However, the Department recognizes, as a general matter, that it is likely not an efficient use of limited federal resources to focus enforcement efforts on those individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or to focus on their caregivers who are individuals providing care to an individual with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and through the exercise of prosecutorial discretion, such persons are subject to federal enforcement action, including potential prosecution, whenever the Department determines that such legal action is warranted. The United States Attorneys, through the exercise

of prosecutorial discretion, will continue to focus their limited resources on the investigation and prosecution of significant traffickers of illegal drugs, including marijuana and the disruption of illegal drug manufacturing and trafficking networks, including those persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, even if such conduct is in compliance with state law.

Domestic Communications Assistance Center

30. The President's fiscal year 2012 budget requests $15 million to establish the Domestic Communications Assistance Center (DCAC). This center, under the control of the Federal Bureau of Investigation (FBI), will allegedly establish an effective relationship with the communications industry and assist state and local law enforcement by facilitating the sharing of information. The FBI also claims the DCAC will support initiatives aimed at solving Communications Assistance for Law Enforcement Act (CALEA) issues. Furthermore, FBI Chief Counsel Valerie Caproni testified before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security that "due to the immediacy of these issues, DOJ is identifying space and building out the facility now." The FBI, attempting to justify the need for the DCAC, has also briefed Senate staff members that communications industry members don't want a relationship with so many law enforcement entities and instead would prefer one specific point of contact.

A. Do you feel it is appropriate for the Department of Justice to begin "identifying space and building out the facility now" given that the fiscal year 2012 budget has not yet been agreed upon?

Response:

The FY 2012 President's Budget requested funding to staff and operate the DCAC, but did not request funding for the one-time start up costs (e.g., build out) associated with the DCAC facility. Due to the length of time necessary to build out a facility for the DCAC, the Department had planned to use existing funding so that the facility could be ready when the positions and operational funding requested in the FY 2012 Budget were appropriated. The intent at the time of the FBI General Counsel's testimony was to set aside balances within the Assets Forfeiture Fund (AFF), known as AFF Super Surplus, to fund facility start up costs so that GSA could begin its process of identifying the location and renovating the facility. As a result of the FY 2011 appropriation and the expectation of continuing fiscal austerity in future years, the timing of setting aside the funding is now dependent on ensuring AFF receipts will be sufficient to cover the AFF's own program expenses and that the Department's components operating below current services this fiscal year will be able to maintain solvency. Nevertheless, the Department is committed to funding the one-time start-up costs without requiring additional appropriations enhancements.

B. Provide the location and current costs associated with the identification and "building out" of the DCAC.

Response:

The cost estimates developed in support of the DCAC assumed the facility would exist within or near the Quantico market. This location is central to the FBI's Engineering Research Facility, DEA's Office of Investigative Technology, and the U.S. Marshals Service's Technical Operations Group. Final determination of the location of the facility will be made by GSA in consultation with the Department. The Department is currently estimating that $4.5 million will be required to establish the facility, including renovation. An additional $2.6 million in one-time start-up costs for cabling, lab equipment, furniture, and security will also be required. As stated above, the Department is committed to funding the $7.1 million of one-time start-up costs without requiring additional appropriations enhancements. To date, no funding has been spent on the DCAC facility. As is customary, the Department will notify Congress of any allocation of excess balances from the Assets Forfeiture Fund before obligating the funds. However, GSA has been informally notified and we are nearing completion of the space and security requirements, known as the Program of Requirements, a necessary step prior to formal notification of GSA.

C. The Department of Justice, Office of Inspector General recently released a report stating that the FBI agents routinely assigned to units investigating cybercrimes lacked the necessary experience. Specifically, the OIG supported a previous Government Accountability Office review which stated, "the agents who replaced experienced cyber crime investigators often had little or no cyber crime experience or background." Moreover, the report also found that the FBI routinely withheld pertinent information from other member law enforcement agencies of the FBI led National Cyber Investigative Joint Task Force.

1. Is it appropriate to construct the DCAC under the control and leadership of the FBI when according to the Inspector General and the GAO; the FBI lacks the skills necessary to investigate cyber-attacks?

Response:

The June 2007 GAO report on cyber threats[1] focused on the impact of the FBI's Special Agent rotation policy on the background and experience level of cyber crime investigators. The April 2011 Inspector General's report on cyber intrusions[2] focused on the rotation policy, the use of agents on cyber investigations, and the FBI's Cyber Development Plan (the curriculum for agents on the cyber career path). Neither report addressed the FBI's capabilities in areas relating to the Domestic Communications Assistance Center (DCAC).

The DCAC is vital to law enforcement's overall effort to close the gap in electronic surveillance capabilities identified through the "Going Dark" Initiative. It will: (1) serve as a hub for electronic surveillance knowledge management; (2) facilitate the sharing of technical

[1] GAO, Report to Congressional Requestors entitled, "CYBERCRIME: Public and Private Entities Face Challenges in Addressing Cyber Threats" (June 2007).

[2] Department of Justice Inspector General Report entitled, "The Federal Bureau of Investigation's Ability to Address the National Security Cyber Intrusion Threat" (April 2011).

solutions and know-how among law enforcement agencies; (3) advance initiatives to implement solutions that comply with the Communications Assistance for Law Enforcement Act; and (4) strengthen relations with industry.

The FBI is recognized throughout the law enforcement community for its work in each of the four mission areas of the DCAC. With respect to the first two, the FBI has organized widely attended forums and working groups on electronic surveillance challenges for federal, state, and local law enforcement agencies and has established a website and help desk to provide technical assistance on lawful intercepts. We have also provided direct technical assistance, tools, and expertise to law enforcement agencies and communications providers that have sought the FBI's assistance in addressing technically complex electronic surveillance challenges. For example, the FBI has shared its pen register / trap and trace mapping tool with more than 50 law enforcement agencies and its cell site location database tool with 49 agencies.

With respect to the third mission area of the DCAC, the FBI has successfully directed the government's implementation of the Communications Assistance for Law Enforcement Act (CALEA) since its enactment more than 15 years ago. In the fourth area, the FBI has organized and hosted numerous forums, conferences, and working groups to address the electronic surveillance challenges facing both the communications industry and the law enforcement community.

In sum, the FBI has experienced success in the four mission areas of the DCAC, but new mechanisms are needed to address the rapidly increasing need for assistance on electronic surveillance issues by federal, state, and local law enforcement agencies and to strengthen relations between the law enforcement community and the communications industry. The DCAC would address these requirements.

2. If the FBI withholds relevant information from agencies they partner with on task forces, how are we in Congress expected to believe that the FBI is the best agency to undertake control and coordination of the DCAC?

Response:

The April 2011 report by DOJ's Office of the Inspector General discusses the fact that certain legal and policy restrictions affect how participants in the National Cyber Investigative Joint Task Force (NCIJTF), including the FBI, share information with participating agencies that have not signed Memoranda of Understanding (MOUs) governing their participation. The OIG Report did not address the FBI's ability to conduct, or to assist its federal, state, and local partners in conducting, lawful electronic surveillance intercepts.

As discussed in response to Question 30C1, above, the DCAC is vital to law enforcement's overall effort to close the gap in electronic surveillance capabilities identified through the "Going Dark" Initiative. From the perspective of law enforcement, the significant expansion of communications technologies coupled with the complexity of processing those communications into a readable format are outpacing any single agency's ability to maintain, let alone get ahead of, investigative demands. In particular, the rapid growth of wireless and

internet-based communications services and the migration of traditional carriers to internet-based technology have contributed significantly to the increasing intercept capability gap. Some providers lack technical intercept solutions that meet the electronic surveillance needs of law enforcement.

From the standpoint of industry, communications providers have identified the varying demands of thousands of federal, state, and local law enforcement agencies as a challenge they are trying to address on an ongoing basis. Agencies often make isolated, non-standardized, and duplicative requests for assistance from providers that result in the inefficient use of scarce technical resources and missed opportunities to deploy existing intercept solutions. To compound matters, law enforcement agencies often lack insight into new services offered by providers, while providers often lack an understanding of the needs of law enforcement.

The DCAC would address the law enforcement needs by: creating a technical resource center; establishing a call-in and website Help Desk; providing training; organizing forums, meetings, and working groups; and engaging in other activities that will assist law enforcement in identifying areas of consensus. The DCAC will also facilitate the sharing of technical solutions, expertise, best practices, equipment, facilities, and other forms of assistance among law enforcement entities, providing a single entity through which federal, state, and local law enforcement can leverage resources by making technical expertise and capabilities easily accessible and shareable.

At the same time, the DCAC will reduce the burden on the communications industry by working to standardize common requests for assistance, develop automated practices, ensure information exchanges are conducted in a more consistent standardized manner, reduce duplicative communications, and identify other ways to lower costs, create efficiencies, and improve relationships between law enforcement and the communications industry.

3. Given the current financial difficulties the federal government faces, why should Congress fund and construct the DCAC given that the Inspector General found serious deficiencies in the FBI's ability to share information?

Response:

Please see the response to Question 30C2, above.

4. Do you think there a better agency in the federal government to handle the proposed capabilities of the DCAC? Should it be coordinated by a working group instead of a single federal agency?

Response:

The DCAC will be managed by the Attorney General or his designee. It will have a multi-agency board composed of Federal, state, local, and tribal representatives. The board will provide input to the Attorney General (or the Attorney General's Department-level designee), shape the overall direction of the DCAC, play an active role in DCAC operations, and help the Attorney General select the DCAC's Director and Deputy Director (who will be responsible for

executing policy and operations at the direction of the Governing Board). It is through the board that a wide variety of agencies will have the opportunity to influence the DCAC's direction, policies, priorities, and operations.

Freedom of Information Act – Office of Information Policy

31. According to its website:

> **The Office of Information Policy (OIP) is responsible for encouraging agency compliance with the Freedom of Information Act (FOIA) and for ensuring that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines are fully implemented *across the government.* OIP develops and issues policy guidance to *all agencies* on proper implementation of the FOIA. ... OIP provides individualized guidance to agencies on questions relating to the application of the FOIA, regularly conducts training programs for FOIA personnel across the government, including specialized agency programs, and provides general advice to the public on use of the FOIA. In addition to its policy functions, OIP *oversees agency compliance with the FOIA*....**

(Emphasis added).

Thus, the OIP's responsibilities are not limited to the Department of Justice ("DOJ"). It (and therefore the DOJ) is responsible for "oversee[ing]" compliance with the Freedom of Information Act ("FOIA") by all agencies "across the government."

A. Do you agree that the DOJ is responsible for insuring compliance with the FOIA by all agencies "across the government"?

Response:

Every agency subject to the Freedom of Information Act is responsible for complying with its obligations under the statute. Indeed, as the Attorney General emphasized in his March 2009 guidance, "FOIA is everyone's responsibility"; from full-time FOIA professionals to agency personnel conducting searches for responsive records from their own files, we all must be focused on fulfilling the President's commitment to openness and transparency. As part of the Department's leadership role on FOIA, the Department views itself as having a responsibility to work with its sister agencies to ensure that they are meeting their obligations.

B. If you disagree, how do you reconcile your disagreement with the statements on the OIP's/DOJ's website? And if you disagree, identify the government agency that is responsible for "oversee[ing]" compliance with the FOIA by all agencies "across the government."

Response:

Please see response to Question 31A, above.

Freedom of Information Act – Department of Homeland Security

32. Last year, Ted Bridis of *The Associated Press* uncovered that for at least a year, the Department Homeland Security ("DHS") was diverting requests for records to senior political advisers, who delayed the release of records they considered politically sensitive.

Specifically, the AP's July 21, 2010 article revealed that in July of 2009, the Secretary Napolitano's political staff introduced a directive at the DHS requiring a wide range of information to be vetted by political appointees, no matter who requested it. Under the directive, career employees were ordered to provide Secretary Napolitano's political staff with information about the people who asked for records — such as where they lived, whether they were private citizens or reporters — and about the organizations where they worked.

At a March 15, 2011 hearing before the Senate Judiciary Committee, Melanie Pustay, the Director of the OIP, testified that "if" the AP's story was true, the DOJ would have serious concerns. She also testified that the DOJ has not investigated the DHS's political vetting policy.

On March 31, 2011, the Office of the Inspector General at the DHS released a report on the DHS' implementation of the FOIA. The report is carefully written in measured language. Nevertheless, in relevant part, in connection with the political vetting policy, the report states:

> **We also determined that the Office of the Secretary has had unprecedented involvement in the *Freedom of Information Act* process beginning in 2009. For several hundred requests deemed significant, components were required to provide for headquarters review all the material they intended to release. The department's review process created inefficiencies that hampered full implementation of the *Freedom of Information Act.* We evaluated a *Freedom of Information Act* release about the review process, and identified some redactions we believe may have been inappropriate.**

The AP's article is now 10 months old. It was based on and quoted DHS emails. Those emails either say what they say or they don't.

A. By the time of the Senate Judiciary hearing on March 15, 2011, the AP story was nine months old. As noted above, the story was based on and quoted DHS emails. Those emails either say what they say or they do not. Given the

DOJ's responsibility for "oversee[ing]" compliance with the FOIA, didn't the DOJ have a duty to know whether or not the AP story was "true" long before March 15, 2011?

B. Do you agree that at this point there is no question that the AP's story is "true"?

C. If you agree that the AP story is "true," do you have serious concerns about the actions of DHS political actions reported on by the AP? If not, why don't you? If you do have serious concerns, what are you and the DOJ doing to resolve those concerns?

Response:

The Office of Information Policy (OIP) first learned of the concerns with DHS's FOIA processing procedures through the published news reports. Consistent with the Department's role of providing guidance on FOIA matters to its sister agency, the Department contacted DHS and was assured that new procedures had been implemented to ensure there were no unnecessary delays in the processing of FOIA requests. In light of that assurance, the Department's concerns were alleviated and it determined that no further action on its part was necessary. The Department's authority under the FOIA does not include the authority to investigate allegations of an agency's handling of its own requests.

D. (i) Was the DOJ aware of the DHS's political vetting policy prior to the AP's reporting on it? (ii) If so, why didn't the DOJ direct the DHS to end the policy and to properly comply with the FOIA?

Response:

DOJ was not aware of the processing procedures at DHS until after the news reports came out. After contacting DHS's Chief FOIA Officer, OIP learned that new procedures had been implemented to ensure there were no unnecessary delays in the processing of FOIA requests, so there was no need to direct DHS to end them.

E. Has the DOJ obtained copies of the DHS emails at issue? If not, why not?

F. Did the DOJ ever review the DHS emails? If not, why not?

Response:

DOJ has not obtained or reviewed the DHS emails, but has seen excerpts of them in news articles. Given that new procedures had been implemented to ensure there were no unnecessary delays in the processing of FOIA requests, there is no apparent need for DOJ to obtain or review the emails at this time.

G. Does the DOJ know whether the DHS withheld any emails or other documents which were responsive to the AP's FOIA request?

Response:

DOJ does not have any independent knowledge of whether DHS withheld documents in response to the AP's FOIA request.

H. Was any consideration at all given by the DOJ to commencing an investigation of the DHS's political vetting of FOIA requests? If so, describe in detail what consideration was given. If any consideration was given and any documents were prepared by the DOJ in connection with that analysis, provide copies of those documents.

I. Who made the decision that the DOJ would not conduct an investigation of the DHS's political vetting policy? If you did not make the decision, why wasn't this decision made by you?

J. Describe in detail the justification for and reasoning behind the DOJ's conclusion that an investigation should not be commenced. If any documents were created by the DOJ in connection with its decision not to investigate the DHS's political vetting policy, provide copies of those documents.

Response:

DOJ's formal interagency FOIA oversight authority is exercised in connection with agencies' statutory obligations to provide Annual FOIA Reports and Chief FOIA Officer Reports to the Department of Justice. DOJ develops guidelines for those reports, issues guidance and provides training to agencies to help them complete the reports, and reviews and compiles summaries of both those reports, which are made publicly available. All agencies Annual FOIA Reports and Chief FOIA Officer Reports are also made available to the public in a centralized location on OIP's website. OIP has no investigatory authority concerning FOIA matters and so had no occasion to consider whether an investigation was warranted. As mentioned above, however, upon reading the news reports regarding DHS, the Department, consistent with its role of providing guidance to its sister agencies regarding their implementation of the FOIA, contacted the Chief FOIA Officer at DHS. The Department was assured that new procedures had been implemented to ensure there were no unnecessary delays in the processing of FOIA requests.

K. Have you or any member of your staff had any conversations with the President or any member of his staff regarding the DHS's political vetting policy? If so, identify the individuals involved in the conversation(s) and the date(s) on which the conversation(s) took place. Also, set forth the content of the conversation(s) in as much detail as possible.

Response:

No.

L. Has any member of the DOJ or any other government agency questioned Secretary Napolitano about her knowledge of the events reported on by the AP and her involvement and knowledge of the political vetting policy? If not, why not? If so, set forth in detail the circumstances of the questioning, the questions asked and Secretary Napolitano's responses.

M. Have you had any conversations with Secretary Napolitano about the political vetting policy at DHS and the events reported on by the AP? If so, set forth in detail the circumstances of the conversation(s) and what Secretary Napolitano's said.

Response:

The Attorney General has not discussed with Secretary Napolitano the events reported in the AP news story referenced in this question.

O. Other than the Inspector General's Office at the DHS, has any unit of the federal government investigated the DHS's political vetting policy? If so, which unit and what conclusions were reached? If any documents were prepared in connection with any other investigation, provide copies of those documents.

Response:

Other than the investigation by DHS's OIG, we are not aware of any other government investigation of DHS's FOIA procedures.

P. Has any disciplinary action been taken against the political appointees on Secretary Napolitano's staff who created and/or implemented the political vetting policy at the DHS? If not, why not?

Response:

DOJ has no knowledge of whether any personnel action has been taken by DHS in connection with the processing of FOIA requests.

Q. Assuming that it has actually been discontinued, what corrective actions have been taken by the DOJ to prevent the DHS's political vetting policy from being repeated at the DHS or any other agency?

Response:

DHS is in the best position to provide an explanation of the corrective steps taken specifically at DHS. As to ensuring that proper FOIA procedures are followed at all agencies, the Department engages in a wide variety of initiatives to help agencies fully comply not only with the legal requirements of the FOIA, but also with the President's FOIA Memorandum and with the March 2009 Attorney General FOIA Guidelines. First, the Department prepares and publishes the *United States Department of Justice Guide to the FOIA,* which is a legal treatise addressing all aspects of the law, including all its procedural provisions. Second, the Department issues guidance to agencies on proper implementation of the statute and the new guidelines, which includes guidance on the procedural aspects of the law and the need to ensure that an effective and efficient system in place for responding to requests. Third, the Department trains thousands of FOIA professionals each year on all aspects of the FOIA, including the law's procedural requirements. Fourth, the Department provides daily legal counseling services to FOIA professionals, who can call the Department on a dedicated phone line and speak to an attorney about any matter connected with the administration of the FOIA. Fifth, agencies are required to file two reports each year to the Department of Justice. The Annual FOIA Report contains detailed statistics regarding the numbers and disposition of FOIA requests, and the time taken to respond. The Chief FOIA Officer Report describes narratively the steps taken to improve transparency at the agency, specifically including the steps taken to ensure that the agency has an effective and efficient FOIA process. Sixth, the Department now makes available on a new website called FOIA.Gov all of the detailed statistics on agency FOIA compliance in order to "shine a light" on FOIA compliance itself. The statistics are displayed graphically and allow not only the Department, but any member of the public or any interested party, to compare and contrast the data between agencies and over time. Finally, the Department regularly meets with agency Chief FOIA Officers and principal FOIA contacts at agencies to address improvements to FOIA administration and compliance with the President's FOIA Memorandum and the Attorney General FOIA Guidelines. Through all these initiatives, the Department both encourages proper compliance with the FOIA and helps ensure agency accountability.

R. Since March 15, 2011, has DOJ commenced an investigation of the political vetting policy implemented at the DHS? If so, set forth in detail the circumstances involved in the decision to commence an investigation at this point in time, including identifying the individuals involved in making the decision. Also, if so, set forth in detail what has taken place so far and what remains to be done with the investigation. If any documents have been created in connection with the decision to commence an investigation and the investigation, provide copies.

Response:

As noted above, the Department's authority under the FOIA does not include the authority to investigate allegations of an agency's handling of its own requests.

Freedom of Information Act – Political Vetting

33. The reports of the DHS's political vetting policy are disturbing to say the least. Nevertheless, based on Ms. Pustay's testimony, it does not appear that the DOJ has done anything in response to the DHS's political vetting of FOIA requests.

A. Describe in detail what level of disregard or violation of the FIOA by political appointees would need to occur before the DOJ commenced an investigation?

B. Given the DOJ's responsibility to "oversee" compliance with the FOIA by all agencies "across the government," do agree that the implementation DHS's political vetting policy or its continuance for one year constitutes a failure by the DOJ to fulfill its duties?

C. If you agree, describe how the DOJ is being held accountable for its failure and what, if anything, you are doing to guarantee that the failure will not occur again.

D. If you disagree, how do you characterize DOJ's failure to detect and correct the DHS's political vetting policy?

Response:

DOJ takes its FOIA oversight responsibilities very seriously. At the direction of the President, the Attorney General issued comprehensive new FOIA Guidelines in March 2009 that stress this Administration's commitment to the presumption of openness called for in the FOIA. The FOIA Guidelines specifically address the need for agencies to respond to requests promptly. Any level of disregard to those principles would be of concern to DOJ.

As explained above, the Department did not become aware of the processing procedures at DHS until there were published news reports. DOJ's formal interagency FOIA oversight authority is exercised in connection with agencies' statutory obligations to provide Annual FOIA Reports and Chief FOIA Officer Reports to the Department of Justice. DOJ develops guidelines for those reports, issues guidance and provides training to agencies to help them complete the reports, and reviews and compiles summaries of both those reports, which are made publicly available. All agencies' Annual FOIA Reports and Chief FOIA Officer Reports are also made available to the public in a centralized location on OIP's website. OIP has no investigatory authority concerning FOIA matters and so had no occasion to consider whether an investigation was warranted. Upon reading reports regarding DHS's practices, the Department contacted the Chief FOIA Officer at DHS. The Department was assured that the procedures for handling FOIA requests at DHS had been revised and that the new procedures were designed to ensure that responses were not unnecessarily delayed.

Freedom of Information Act – President Obama's and AG Holder's Memoranda

34. 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 designed to usher in a "new era of open government."

The President's memorandum on 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, the President ordered you to issue new FOIA guidelines for agency heads.

Following the President's order, you issued FOIA guidelines in a memorandum dated March 19, 2009. Your memo 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 DOJ 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. In relevant part, your memo states:

> **As President Obama instructed in his January 21 FOIA Memorandum, `The Freedom of Information Act should be administered with a clear presumption: *In the face of doubt, openness prevails.*' This presumption has two important implications.**
>
> **First, an agency should not withhold information simply because it may do so legally. *I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.***
>
> **Second, ... [a]gencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information....**
>
> **At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. *But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."...***

> ***... Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.***
>
> ***I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government.***

(Emphasis added).

A. Did the DHS's political vetting policy and the conduct of Secretary Napolitano's political staff who authored the directive and carried out the policy, violate the President's and your memoranda? And if so, why hasn't some disciplinary action been taken?

B. If you do not believe that the political vetting policy at the DHS violated the President's and your memoranda, how do you reconcile the DHS's policy and the conduct of Secretary Napolitano's staff with the instructions set forth in the President's and your memoranda?

Response:

Under the Attorney General's FOIA Guidelines, agencies are directed to ensure that they have in place an effective system for responding to FOIA requests. As the Guidelines stress: "[a]pplication of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests." The Guidelines also emphasize that "[t]imely disclosure of information is an essential component of transparency." Accordingly, if an agency employs procedures that are unnecessarily inefficient or that cause undue delays in responding to requests, those procedures would be contrary to the FOIA Guidelines. As to DHS, its Office of Inspector General has completed a review of DHS's FOIA process and made recommendations accordingly. Looking ahead, DHS has implemented new procedures to ensure there are no unnecessary delays in the processing of FOIA requests.

C. If your political staff at the DOJ (including your Chief of Staff and/or Deputy Chief of Staff) implemented the same political vetting policy that the DHS did and carried out that policy for one year, as reported on by the AP, would you know about it?

Response:

Yes.

D. If your political staff at the DOJ (including your Chief of Staff and/or Deputy Chief of Staff) had implemented the same political vetting policy that the DHS did and carried out that policy for one year, as reported on by the AP, how would you have reacted?

Response:

The Department has no such policy. With respect to any FOIA policy adopted by Department leadership, the Department would take steps to ensure that the FOIA, the President's Memorandum, and the Attorney General's Guidelines were given full effect.

E. Did Secretary Napolitano know about the political vetting policy at the DHS before it was exposed by the AP's article? If you do not know, is the DOJ or any other unit of the government currently investigating this question?

Response:

The Department does not know the answer to this question, and is not currently investigating that question.

F. Is the DOJ currently monitoring or "oversee[ing]" the DHS's compliance with the FOIA? If so, describe in detail how that is being done. If not, why not?

Response:

The Department continues to work with DHS and all of its sister agencies as they work to fulfill their obligations under the FOIA. DHS, like all federal agencies, is required to file two reports each year to the Department of Justice. The Annual FOIA Report contains detailed statistics regarding the numbers and disposition of FOIA requests received and processed, and the time taken to respond. The Chief FOIA Officer Report describes narratively the steps taken to improve transparency at the agency, specifically including the steps taken to ensure that the agency has in place an effective and efficient FOIA process. The Department, in turn, reviews these reports, engages in outreach to agencies as needed, and prepares a summary of both reports. OIP posts these reports on its website at a central access point. OIP also now makes available on a new website called FOIA.Gov all the detailed statistics on agency FOIA compliance. This is done in order to "shine a light" on FOIA compliance itself. The statistics reported by agencies are displayed graphically and allow not only the Department, but any member of the public or any interested party, to compare and contrast the data between agencies and over time.

In addition, OIP engages in a number of activities designed to ensure that proper FOIA procedures are followed at all agencies. These activities are intended to help agencies fully comply not only with the legal requirements of the FOIA, but also with the President's FOIA Memorandum and the Attorney General's FOIA Guidelines. As mentioned above, OIP writes the *United States Department of Justice Guide to the FOIA*, which is a legal treatise addressing

all aspects of the FOIA, including all its procedural provisions. OIP also issues guidance to agencies on proper implementation of the statute and the new guidelines, which includes guidance on the statute's procedural aspects and the need to ensure that there is an effective and efficient system in place for responding to requests. OIP trains thousands of FOIA professionals each year on all aspects of the FOIA, including the law's procedural requirements. In addition, OIP provides daily legal counseling services to FOIA professionals, who can call OIP on a dedicated phone line and speak to an attorney about any matter connected with the administration of the FOIA. Finally, OIP regularly meets with Chief FOIA Officers and principle FOIA professionals at agencies to discuss improved administration of the FOIA and compliance with the Attorney General FOIA Guidelines. Through all these initiatives OIP is both encouraging proper compliance with the FOIA and ensuring agency accountability.

Freedom of Information Act – Civil Rights Division

35. **In a February 10, 2011 blog posting, Christian Adams set forth his detailed analysis of FOIA logs for the DOJ's Voting Section in its Civil Rights Division. Mr. Adams is a former DOJ attorney. His review of the logs reveals that requests from certain civil rights groups are often given same day turn-around. By contrast, requests from conservative groups faced long delays, if they are fulfilled at all. Indeed, according to Mr. Adams' analysis in no instance did a conservative or Republican requestor receive a reply in the time period prescribed by FOIA.**

On March 1, 2011, Representative Frank Wolf questioned you about Mr. Adams' blog posting. You testified that you had looked into the issues and assured Congressman Wolf that there is no ideological component to how the DOJ answers FOIA requests. You maintained that Mr. Adams' analysis was misplaced and compared "apples to oranges."

A. Describe in detail the DOJ's investigation into the allegations made in Mr. Adams' article, including the date it commenced and the date it was completed.

Response:

Beginning in February 2011, the Department undertook a review of the allegations raised in the blog post referenced in this question. As the Department explained in the attached letter of March 30, 2011 to Congressman Wolf, the Department's policy is to process records requests without taking into account any ideological or political affiliations of the requester, and the Department's review uncovered no evidence to substantiate the claim that the Civil Rights Division allows politics or any improper factors to play a role in the handling of such requests. See letter to Mr. Wolf dated March 30, 2011, attached, which addressed in some detail the specific allegations in the blog post. On October 11, 2011, the Acting Inspector General advised you that her office had "initiated a review of allegations relating to the Voting Section's responses to Freedom of Information Act (FOIA) requests." The Department will cooperate fully with this review.

B. Who conducted the investigation?

Response:

The Department's review of these allegations has been conducted principally by staff in the Civil Rights Division's FOIA Branch and Voting Section.

C. Who supervised the investigation?

Response:

The Department's review of these allegations was supervised by the Chief of Staff of the Civil Rights Division.

D. Were any political appointees involved in conducting or supervising the investigation?

Response:

The review of this matter was coordinated with assistance from both career and political professionals.

E. Were any political appointees at DOJ questioned in connection with the investigation?

Response:

The Department sought information and input from both career and political employees in the course of identifying the relevant facts and responding to Congressional inquiries on this matter.

F. If a report has been written in connection with the investigation, provide a copy.

Response:

The attached letter to Chairman Wolf provides a description of the FOIA requests referenced in this question.

G. If the investigation is ongoing, describe in detail what has been done to date and what remains to be done. [watch formatting here]

Response:

The review of the allegations contained in the blog post referenced in this question is no longer pending because, as noted above, the Department found the allegations to be unsubstantiated.

Mr. Adams' blog posting identified 16 FOIA requests by groups perceived as liberal and 11 FOIA requests by groups or individuals perceived as conservatives or Republicans. Two of the 11 requests from conservatives or Republicans had received no reply. In order to accept your March 1, 2011, testimony, it would seem to mean that all of the FOIA requests from perceived conservatives or Republicans were "complex" and all of the perceived liberal FOIA requests were "simple."

Moreover, in connection with the FOIA hearing held before the Senate Judiciary Committee on March 15, 2011, Mr. Adams submitted written testimony. In relevant part, it states as follows:

> **Attorney General Eric H. Holder, Jr. testified before an appropriations subcommittee chaired by Representative Frank Wolf on Tuesday, March 1, 2011. When confronted by Mr. Wolf with the data about the log which I described in the *Pajamas Media* story, the Attorney General claimed that there may be differing degrees of complexity in the differing FOIA requests. This is inaccurate. There is no difference in complexity in request for submission files created under Section 5 of the Voting Rights Act. The comparison is an "apples to apples" comparison.**
> **Further contradicting the Attorney General's testimony is the structure of the files in question. The Section 5 submission files are already pre-segregated between public and non-public content. The public and non-public content occupy literally different portions of the file folder. I have seen them myself. It takes hardly any effort whatsoever to access the requested Section 5 file, walk to a copier machine, and copy the public portion of the file and mail it to the requestor. The Attorney General should look more carefully at the issue, for he will discover different requests are being treated differently.**

H. What is your response to Mr. Adams' written statement?

Response:

It is inaccurate to state that the "public portion" of Section 5 submission files can simply be copied and mailed to a requester. In fact, before producing any files in response to a request, the Voting Section must review files for completeness (i.e., to ensure that every document related to the submission that has been created or received up to the moment of the request – whether transmitted by letter, email, or otherwise – has been added to the Section 5 file) and

when necessary, must refer the files to the Division's FOIA Branch to make any redactions that are appropriate under the FOIA. In addition, while files for pending Section 5 submissions are generally accessible on site, files for closed Section 5 submissions may need to be retrieved from archives off-site, which entails additional delay. While the Voting Section makes every effort to fulfill incoming requests efficiently, the process is more complex than the statement cited suggests.

Freedom of Information Act – Whistleblower Retaliation

36. On March 17, 2011, Ted Bridis of *The Associated Press* reported that Catherine Papoi, formerly the Deputy Chief FOIA Officer at the DHS was effectively demoted and denied a promotion. According to news reports, Ms. Papoi had complained to the Inspector General of the DHS about the political vetting policy implemented by Secretary Napolitano's political staff. Also, according to news reports, the day after she spoke with investigators, Ms. Papoi was told that she was being replaced as the Deputy Chief FOIA at the DHS and was told to clear out her office. The adverse employment action taken against Ms. Papoi appears to be retaliatory. And it is sure to deter other career employees in all agencies from reporting misconduct about the handling of FOIA requests or any other misconduct.

A. Is the DOJ investigating DHS' mistreatment of Ms. Papoi for potential employment retaliation, violation of statutes protecting whistleblowers and/or any other civil or criminal violation?

B. If so, identify which unit is conducting the investigation and whether any attorney conduction or supervising the investigation is a political appointee?

C. If the DOJ is not conducting an investigation of DHS' treatment of Ms. Papoi, why is it not doing so?

Response:

We are not aware of any DOJ investigation at this time concerning employment actions taken by DHS regarding this DHS official. Such investigations are not typically conducted by DOJ.

54. Misconduct in the Civil Rights Division

I have been informed that DOJ employee Maura Lee, then an employee in the Voting Section of the Civil Rights Division, was caught breaking into other employees' e-mail accounts and disseminating personal information. I understand that at one point, the DOJ Office of Professional Responsibility authorized the searching of Lee's emails by her superiors, and that search turned up evidence that Lee had attempted to leak information to the Washington Post on a variety of issues.

Questions:

A. Are these charges regarding Maura Lee true?

Response:

The premise of your question is incorrect. Although the Department does not generally comment on such allegations involving Department employees, we believe the public record concerning Ms. Lee must be corrected. The Office of Professional Responsibility (OPR) never authorized nor conducted a search of Ms. Lee's emails. There are no "charges" regarding Ms. Lee.

B. Were these or similar allegations ever referred to DOJ OPR or to the OIG? If not, why not?

Response:

No, for the reasons described in response to Question 54A.

C. Why was such an employee transferred to the Office of the Inspector General?

Response:

The OIG has advised that Ms. Lee was selected for employment, consistent with established merit systems principles, and she has served in that office since September 2006.

D. What individual changes to the security protocols of the Civil Rights Division have taken place over the past five years? When was each change made?

Response:

We understand this question to pertain to computer security protocols. The Division has not issued new security protocols in the last five years although individual sections within the Division sometimes alter access permissions for various directories.

E. Was one of those changes a result of the investigation of Maura Lee?

Response:

As indicated above, there was no investigation of Ms. Lee.

55. **Housing Testing Program**

In 2008, a complaint was filed with the DOJ Office of the Inspector General (OIG) regarding Darryl Foster, then head of the Housing Testing Program in the Housing and Civil Enforcement Section of the Civil Rights Division. The OIG investigation involved allegations that Foster had engaged in an inappropriate relationship with the president of an organization over whom he had oversight responsibility for approving contracts with and requests for payments by the organization. Foster was demoted in May 2008 and reassigned to the Voting Section, also receiving a 7-day suspension of duration.

Questions:

A. What were the specific findings of the OIG report?

Response:

It is our understanding that Senator Grassley already has sought information relating to this matter from the Department's OIG. Moreover, as a general matter, the Privacy Act and the Department's longstanding policies regarding the confidentiality of Department personnel decisions limit our ability to comment publicly on the merits of specific allegations of misconduct about individual Department employees.

B. How large was the budget that Foster was responsible for overseeing as head of the Housing Testing Program?

Response:

For fiscal years 2007-2009, the contractor budgets for the Housing Testing Program were as follows:

Fiscal Year 2007: $235,593
Fiscal Year 2008: $206,733
Fiscal Year 2009: $86,751

C. For what behavior was Foster demoted?

Response:

Please see response to Question 55A, above

D. What kind of message does it send when employees guilty of misconduct are only transferred between sections instead of being fired?

Response:

Please see response to Question 55A, above.

56. Prince George's County Inmate Death

Ronnie L. White, who was arrested for murdering Prince George's County Police Corporal Richard S. Findley, was found dead in his cell of the Prince George's County Jail on June 29, 2008. Anthony McIntosh was the only guard with access to White's jail cell when he died, and White's family has filed a wrongful death lawsuit against Prince George's County. An investigation conducted by the Maryland State Police concluded that White might have killed himself, but the Justice Department has taken over in launching Federal Civil Rights investigation. Some reports indicate that the federal criminal investigation may have been launched because White's death is not the first security concern that has been raised at the Upper Marlboro jail in the past two years.

Question:

A. What is the status of the federal investigation?

Response:

The Civil Rights Division is currently investigating this matter. Since this is an ongoing investigation, the Department cannot comment any further about the status of the investigation.

B. When do you expect the investigation to conclude?

Response:

This is an open and ongoing investigation. Accordingly, the Department cannot comment any further about the status of the investigation.

57. February Questions for the Record

On February 2, 2011, I submitted questions for the record to Assistant Attorney General Lanny Breuer and Assistant Attorney General Tony West for the Committee on the Judiciary hearing on "Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud."

Question:

What is the status of Mr. Breuer's and Mr. West's responses to those questions?

Response:

These questions for the record responses were submitted to the Committee on June 29, 2011.

QUESTIONS POSED BY SENATOR SESSIONS

58. You have reaffirmed that, under this administration, there is a rebuttable presumption that captured terrorists will be tried in civilian courts. What remains unclear is whether this presumption encompasses the classification of terrorists either as enemy combatants or criminal defendants.

A. When a suspected terrorist is apprehended in the United States, is the presumption that the individual will be designated as a criminal defendant, or is the presumption that the individual will be designated as an enemy combatant?

Response:

Since the September 11, 2001 attacks, the practice of the U.S. government, followed by prior and current Administrations without a single exception, has been to arrest and detain under federal criminal law all terrorist suspects who are apprehended inside the United States. Two (and only two) persons apprehended in this country in recent times have been held under the law of war after their initial arrest by federal law enforcement authorities. Both cases led to significant litigation concerning the lawfulness of the government's actions. Ultimately, in both cases, those individuals were returned to law enforcement custody, convicted of terrorism charges and sentenced to prison.

i. If the presumption is that the individual will be designated as a criminal defendant, under what circumstances would this presumption be rebutted in favor of military detention and trial by a military commission?

Response:

The criminal justice system has proven an effective weapon in the government for both incapacitating terrorists and collecting intelligence from them. In the event there were a serious domestic threat to national security that could not be addressed effectively by our federal law enforcement authorities, the President would have to consider carefully whether use of military authorities was lawful and appropriate under the circumstances.

B. When a suspected terrorist is apprehended abroad, is the presumption that the individual will be designated as a criminal defendant, or is the presumption that the individual will be designated as an enemy combatant?

Response:

The United States is committed to using all lawful and appropriate authorities to win the war against al Qaeda and associated forces, including military, intelligence, law enforcement, diplomatic, and economic powers. When a suspected terrorist is apprehended abroad, whether

military or law enforcement authorities will be used to detain him and address the threat he poses depends on all the facts and circumstances of the case, the context in which the apprehension occurs, and what is in the best interest of our national security. Since September 11, the U.S. government has used both military and law enforcement authorities to detain terrorists apprehended abroad, depending on the circumstances. Likewise, the decision whether to employ a civilian court or a military commission to prosecute a terrorist apprehended abroad is based on all the facts and circumstances of the case and what is in the best interest of national security. Where appropriate and in our national security interests, we will make every effort to prosecute suspected terrorists apprehended abroad – whether in civilian court or military commission.

i. If the presumption is that the individual will be designated as a criminal defendant, under what circumstances would this presumption be rebutted in favor of military detention and trial by a military commission?

Response:

Please see response to Question 58B, above.

59. You testified that you have "modified how *Miranda* should be viewed." While I understand a public safety exception exists allowing the delay of the administration of *Miranda* rights in certain circumstances, there is a risk that employing this exception to the broadest extent possible (as indicated in the FBI's October 2010 memorandum) would yield incriminating statements that will later be deemed inadmissible. Even though a significant delay in *Miranda* rights might produce more intelligence information, a successful prosecution of the individual is also important. Do you agree that, instead of stretching criminal laws to accommodate terror suspects, the wiser policy is to designate these individuals as enemy combatants from the beginning, subjecting them to military detention, lawful military interrogation, and trial by military commission, thus preserving both intelligence gathering and the case against the individual?

Response:

As stated above, the administration's first priority is to gather actionable intelligence from captured terrorists. The criminal justice system has a well-proven record as a tool for gathering vital intelligence information from terrorist suspects. When faced with the possibility of lengthy prison sentences, terrorists have offered up valuable intelligence about al Qaeda and other terrorist groups – even after they have been given Miranda warnings. Terrorists facing federal court prosecution have, for example, provided valuable information about telephone numbers and e-mail addresses used by al Qaeda, al Qaeda weapons programs and explosives training, the location of al Qaeda safe houses and training camps, identification of al Qaeda operatives, and information about plots to attack U.S. targets.

It is also important that we ensure that a captured terrorist is lawfully and effectively incarcerated so that he no longer poses a threat to our national security. The decision whether to prosecute an individual in federal court or by military commission is made on a case-by-case basis in close coordination with the Department of Defense and other key interagency partners, and taking all relevant factors into account. The issue of *Miranda* warnings and their possible impact on admissibility of certain statements at trial is only one of numerous factors that must be considered in evaluating where an individual should be prosecuted. There are of course some instances in which military commission prosecution is not a viable option due to jurisdictional limits and limits as to the types of crimes that are prosecutable by a commission. There are also instances in which law of war detention is not a viable option due to limits on who can be lawfully detained.

60. You testified that, on the same day you announced that Khalid Sheikh Mohammed would be tried before a civilian court, you also "sent a number of cases to the military commissions" and that you will continue to do so. However, you have also reiterated the administration's commitment to closing the detention facility at Guantanamo Bay.

A. If the administration continues to send cases to military commissions, but closes the detention facility at Guantanamo Bay, where will these cases be tried?

Response:

As of now, military commission cases are taking place in Guantanamo Bay. If Guantanamo Bay closes, the commission cases would likely be moved to a secure location in the United States.

B. During a Senate Intelligence Committee hearing in February, CIA Director Leon Panetta testified that if captured, high-level al Qaeda leaders such as Ayman Al-Zawahiri would likely be imprisoned at Guantanamo Bay. If Guantanamo Bay is closed, where will high-value targets be detained upon capture?

Response:

The decision where terrorist suspects not yet in U.S. custody will be detained will be made on a case-by-case basis, based on the facts and circumstances of each case and our national security interests.

61. What is the status of the investigation by U.S. Attorney Patrick Fitzgerald regarding whether lawyers representing certain Guantanamo detainees illegally compromised the identities of Central Intelligence Agency employees?

Response:

In March 2010, U.S. Attorney Fitzgerald was assigned the responsibility to determine whether any criminal charges are appropriate in connection with any matter arising out of the seizures of certain photographs from Guantanamo Bay detainees. The matter remains under active investigation.

62. You testified that the Department of Justice "continue[s] to protect the nation from other serious threats, including espionage and export control violators;" however, the ongoing WikiLeaks scandal went noticeably unmentioned. On April 24th, the *New York Times*, the *Washington Post*, and other media outlets obtained more than 700 classified military documents through WikiLeaks, which contained assessments of Guantanamo Bay detainees. As you know, this is the fourth time classified government documents have been released by WikiLeaks and the fact that the leaks have not been stopped by now is disconcerting.

A. Please explain what legal steps the Department has undertaken to prosecute and/or stop the WikiLeaks breaches.

Response:

The Attorney General cannot comment on any ongoing criminal investigation. As previously stated, the Department is investigating the unlawful disclosure of documents to Wikileaks and is actively supporting the Department of Defense in its investigation and prosecution related to this matter.

B. Are you aggressively pursuing a strong case against all parties legally chargeable with this dramatic breach?

Response:

The Attorney General cannot comment on any particular criminal investigation, but, as previously stated, the unlawful disclosure of classified information is a very serious offense, and the Department will aggressively investigate those persons who unlawfully disclose classified information.

C. Do you believe that the Espionage Act or another law currently on the books gives you the legal authority that you need to prosecute culpable individuals effectively?

Response:

The Attorney General cannot comment on any ongoing criminal investigation. As stated previously, the Department believes that the current criminal law provides legal authority for the investigation and prosecution for the unlawful disclosure of classified information.

i. If not, are you in favor of Congress passing new legislation giving you this authority?

Response:

While the current statutory scheme provides legal authority to investigate and prosecute the unlawful disclosure of classified information, the Department is currently reviewing those statutes for any areas in which that authority may be revised to augment our ability to investigate and prosecute such offenses.

63. In your February 23, 2011 letter to Speaker Boehner, you wrote that "the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional."

A. Is it this administration's view that all classifications based on sexual orientation warrant heightened scrutiny?

Response:

As the Attorney General stated in the above-referenced letter, "[a]fter careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." This conclusion follows from a close review of the factors that the Supreme Court has set forth to inform the proper level of scrutiny for legislative classifications: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Notwithstanding this determination, court adjudications of equal protection claims are necessarily context- and fact-specific, taking into account the setting in which a challenged classification is employed and the nature of the government interests asserted to justify the classification. For these reasons, the Administration's position on the constitutionality of Section 3 of DOMA, as applied to legally-married same-sex couples, should not be understood to suggest a broader position on the constitutionality of all legislative classifications based on sexual orientation.

B. Eleven United States Circuit Courts of Appeal have applied the rational basis test to such classifications. The Third Circuit has not had the occasion to address the issue, and the Second Circuit, in *Able v. United States*, 155 F.3d

628, 632 (2d Cir. 1998), applied rational basis review without deciding whether a higher standard would be warranted. In your letter to Speaker Boehner, you dismiss the eleven circuit court decisions as follows:

"many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003). Others rely on claims regarding 'procreational responsibility' that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings. And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*. But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard."

Is it the administration's position that the United States Circuit Courts mentioned above are incorrect in their application of the rational basis standard, rather than heightened scrutiny, in cases involving classifications based on sexual orientation?

Response:

The Administration believes that those decisions rest on the incorrect view that all classifications involving sexual orientation should be reviewed under the deferential rational basis standard. Many of those decisions pre-date the Supreme Court's overruling of *Bowers v. Hardwick,* 478 U.S. 186 (1986) – a case that has formed the basis for the reasoning applied in many of those lower court decisions. In addition, and as noted in the letter to Speaker Boehner, social science understandings about the procreative and child-rearing abilities of gay and lesbian Americans and the immutability of sexual orientation have evolved considerably since many of those decisions were issued.

64. Has the Department of Justice ever refused to defend a law based on its determination that a standard of review applies that is different from the standard of review employed by the majority of circuit courts and never employed by the Supreme Court?

Response:

The determination concerning Section 3 of DOMA is not the first time that the Department of Justice has concluded that the courts have applied an incorrect standard of review to a particular type of classification. For instance, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Supreme Court considered the constitutionality of certain congressionally-mandated minority preferences employed by the FCC. That Court previously had upheld congressional minority-preference programs under a standard less rigorous than strict scrutiny, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). But in *Metro Broadcasting*, the Department of Justice declined to defend the FCC's minority preference program, and argued affirmatively in the Supreme Court that the program was unconstitutional under strict scrutiny, a more rigorous standard of review than the Court had applied previously to federal (as opposed to state and local) minority preferences. The Supreme Court disagreed and upheld the FCC program under the more deferential standard it had applied to federal programs in the past.

More recently, in *United States v. Virginia*, 518 U.S. 515 (1996), the United States filed a lawsuit to challenge the Virginia Military Institute's (VMI) long-standing policy of admitting only male students. The Supreme Court, as it has in the past, evaluated this gender classification under intermediate scrutiny. Despite the holdings of the lower courts and Supreme Court on the applicable standard of review, the Department argued that "strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex, and that the complete exclusion of women from VMI's unique and valued public educational program should be reviewed under that standard." *See* United States Supreme Court Petitioner's Brief, *available at* 1995 WL 703403. The Court invalidated VMI's policy under intermediate scrutiny, and did not employ the more stringent and exacting standard urged by the Department. Though not an example of the Department refusing to defend a law, *VMI* represents a more recent example of the Department advocating for a higher form of scrutiny for a group than had been accepted by a majority of the courts of appeals for a classification that is often implicated in challenges to federal law.

65. **An important element of our federal bankruptcy law is the requirement that debtors receive a budget briefing and analysis from an approved credit counseling agency before filing a bankruptcy petition. I was a leading proponent of that requirement when it was added in 2005, because it was important to ensure that people are aware of the alternatives to bankruptcy and that only people who truly have no hope of repaying their debts are subject to the burden, expense and credit damage that a filing involves. I also thought it was important that we provide debtors with the knowledge and insight they need to emerge successfully from bankruptcy so that they will never have to file again. To ensure that debtors receive objective, professional advice that will further these goals, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 directed the Executive Office for United States Trustee (EOUST) to create a list of approved nonprofit budget and credit counseling agencies to provide these services.**

Recently, it has come to my attention that the EOUST has approved a number of credit counseling agencies that some people characterize as "certificate mills." These agencies appear to be primarily concerned with simply providing debtors with a certificate to prove they have completed the requisite pre-filing counseling, rather than helping debtors explore their alternatives to bankruptcy and to understand what types of behavior placed them in a position of financial distress. Of particular concern is that some approved agencies appear to be related through family or business ties with for-profit companies, including debt relief agencies and bankruptcy lawyers, which can lead to a conflict of interest. For example, bankruptcy lawyers associated with some of these approved agencies may try to cultivate relationships with credit counseling agencies that will, in turn, make no effort to help debtors avoid filing bankruptcy.

A. When considering whether to approve a credit counseling agency, does the EOUST evaluate the relationship between the credit counseling agency or its personnel and debt relief agencies or bankruptcy lawyers?

Response:

Yes. All applications received from agencies seeking approval to provide pre-bankruptcy credit counseling services are subject to a comprehensive review by the United States Trustee Program (USTP) to ensure compliance with Title 11 and the Interim Final Rule.[1] The USTP's review process has been credited by the GAO, the Consumer Federation of America, and others for its effectiveness in excluding unscrupulous and unqualified providers.[2]

On average, the USTP reviews 185 applications yearly for approval/re-approval as a pre-bankruptcy credit counseling agency. Each application is reviewed to assess: (1) compliance with laws requiring organization and de facto operation as a nonprofit entity; (2) familial or financial relationships with third parties; (3) counselor qualifications and credentials; and (4) counseling procedures and materials. In addition, the review process includes confirmation that the applicant provides mandatory disclosures to counseling clients and provides services without regard to a client's ability to pay.

In accordance with 28 C.F.R., §58.15, approved credit counseling agencies must: (1) avoid any conduct or transactions that generate or create the appearance of generating a private benefit for any individual or group related or connected to the agency; (2) have an independent

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[1] *Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instruction Course by United States Trustees,* 71 Fed. Reg. 38076-85 (July 5, 2006)(codified at 28 C.F.R. §§ 58.15-58.17, 58.25-58.27)(the "Interim Final Rule").

[2] U.S. Gov't Accountability Office, GAO-07-778T, Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear, at 2, 6-7 (2007); Consumer Protection and the Credit Crisis: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 111th Cong. 33 (2009) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America).

board of directors the majority of which do not receive a direct or indirect financial benefit from the outcome of the counseling services provided by the agency; and (3) agree not to pay or receive referral fees or other consideration for the referral of clients to or by the agency. *See* 28 C.F.R. §§ 58.15(d)(3)(ii), (d)(5); 58.15(h)(2)(vi). To ensure that these requirements are met, information on relationships between applicants and their boards of directors and officers with outside entities is solicited from applicants and evaluated. This evaluation includes a review of information concerning contemporaneous employment (or service on other boards of directors), corporate affiliations, written and oral contracts with third parties, and referral agreements with third parties, including, without limitation, lawyers, bankruptcy petition preparers, and approved debtor education providers. The review is based not only on information provided by the applicant, but also upon an independent examination of publicly available information. A determination is made whether any affiliations and agreements with third parties run afoul of the requirement that approved agencies operate as nonprofit entities and that they do not, either in reality or appearance, impermissibly benefit related persons or entities.

Further, while neither Title 11 nor the Interim Final Rule prohibits referral relationships between approved agencies and either debt relief agencies or lawyers *per se*, the Interim Final Rule does require that any such referrals be uncompensated.[3] Accordingly, referral agreements are evaluated to ensure that neither the agency nor the referring person/entity receives compensation in connection with the referral, whether financial or other valuable consideration.

The Attorney General would note that since the USTP implemented its approval process for credit counseling agencies, approximately 20 percent of the applications either have been withdrawn after USTP inquiry, or denied. The primary reasons are failure to demonstrate nonprofit status, the existence of an independent board of directors, or ability to perform adequate counseling.

B. Please explain the steps the EOUST takes to ensure that conflicted relationships do not arise between approved credit counseling agencies and debt relief agencies or bankruptcy lawyers.

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[3] The Interim Final Rule states that "by executing and submitting the [credit counseling application], the agency acknowledges and agrees to abide by the prohibitions, limitations, and obligations set forth in Appendix A . . . of the application." 28 C.F.R. § 58.15(h)(2). Appendix A explicitly prohibits the payment or receipt of referral fees by or to a credit counseling agency. The Program accepted post-promulgation comments on the Interim Final Rule and received comments seeking clarification concerning the prohibition against accepting or providing referral fees. In response, the Program published a notice of proposed rulemaking on February 1, 2008 (73 Fed. Reg. 6062), which defined referral fees as "money or any other valuable consideration paid or transferred between an approved agency and another entity in return for that entity, directly or indirectly, identifying, referring, securing, or in any way encouraging any client or potential client to receive counseling services from the approved agency; provided, however, that 'referral fees' shall not include fees paid to: (1) The agency under a fair share agreement; or (2) Any locator." See 28 C.F.R. §§ 58.12(34),[3] 58.20(d)(4). The final rule, which may have additional changes, to strengthen this language, has not yet been published.

Response:

In addition to the scrutiny given to this issue in the initial application process, the annual application renewal requirement provides a regular means of evaluating an agency and its relationships. The same standards applied to the review of an initial application as discussed above are conducted on renewal applications.

Further, the USTP employs two other important means to ensure continuing compliance with Title 11 and the Interim Final Rule. First, each fiscal year, the USTP conducts about a dozen Quality of Service Reviews (QSRs) of approved credit counseling agencies. Agencies are selected for a QSR based upon a number of factors, including whether there are allegations concerning an agency's failure to comply with applicable statutes or regulations, such as impermissible relationships. A QSR generally involves a review of agency records, including minutes of board meetings, state licensing documents, litigation matters, personnel files, and contracts; interviews with officers, supervisors, and counselors of the agency; observation of counseling sessions (with client permission); and a review of counseling session files. A findings letter is issued to the agency identifying any deficiencies or instances of non-compliance with Title 11 and the Interim Final Rule. Agencies are generally given an opportunity to respond and/or take corrective action; however, they may be subject to removal based on a finding in the QSR.

Second, the USTP investigates all complaints received regarding agencies. The primary sources of complaints are USTP field offices, courts, consumers, and approved credit counseling agencies. Any information received suggesting that an approved agency is providing clients a certificate without helping them explore their alternatives to bankruptcy and understand what types of behavior placed them in a position of financial distress, is investigated, and action taken as appropriate.

QUESTIONS POSED BY SENATOR GRAHAM

The Integrated Wireless Network (IWN) radio system has been deployed in the National Capital Region.

66. Please explain the Department's decision to cancel the IWN program now that it is being deployed.

Response:

Please see the response to Question 24, above.

67. If the Department does not consider IWN to be successful in providing federal agents with an upgraded system and interoperability, what is the Department's new plan to do so?

Response:

The Department considers IWN to be successful. IWN has not suffered from insurmountable technical problems, or ever-increasing costs with no final product. The Department has implemented IWN in the Pacific Northwest and in the greater San Diego region and is implementing IWN in the National Capital Region, among other successes. In short, the program has not failed. Moreover, the Department remains committed to the IWN project and is developing contingency strategies within available resources. Please see the response to Question number 66 above.

68. When do you intend to submit that plan to the Judiciary Committee for our review and comment?

Response:

This question appears to build on the assumption in Question 67, above, that the Department considers IWN to be unsuccessful. Please see the response to Question 67, above.

QUESTIONS POSED BY SENATOR CORNYN

69. The Joint Interagency Task Force-South (JIATF-South) is a DoD-led interagency enterprise that integrates and synchronizes U.S. Government counter-trafficking operations in the Caribbean Sea, Gulf of Mexico, and the eastern Pacific. At JIATF-South, 15 different USG agencies and liaisons from 13 partner nations are at work, detecting and monitoring illicit traffickers and other threats, and then facilitating their interdiction.

In contrast to JIATF-South, the USG takes a much less unified and less effective approach along the U.S. land border with Mexico, where counter-trafficking and border security operations are critical. Although the USG does have solid interagency coordination in the area of intelligence fusion on the border, there is no similar interagency integration and synchronization function in the areas of interdiction operations and border security.

Recently, Admiral Winnefeld, commander of NORTHCOM, testified before the Armed Services Committee that JIATF-South is a "very good model" that he supports "as a potential concept" for utilization on the Southwest border. He emphasized that it would be important for any such interagency task force on the U.S.-Mexico border to be civilian-led.

A) Do you agree with the DHS, the U.S. NORTHCOM commander, and the President's "Drug Czar"?

Response:

We do not agree with the assertion that USG law enforcement efforts lack "interagency integration and synchronization…in the areas of interdiction operations and border security." To be sure, while there is always room for improvement in our interagency operations, the USG law enforcement community effectively works together on a daily basis through several existing entities such as the Special Operations Division, the OCDETF Fusion Center, and the El Paso Intelligence Center, to name but a few. While the Department supports efforts to improve interagency law enforcement coordination the existing jurisdictional and geographic construct of the Southwest Border serves as good basis for those improvement efforts.

While aspects of the JIATF-South model are worth replicating, changes to the existing USG counter-trafficking efforts on the Southwest Border should not be based solely on the JIATF South model. We agree that JIATF-South, which has been in existence for over twenty years and which has developed and refined interagency and partner nation engagement process over that period of time, is a "gold standard" of interagency coordination. However, the principal driver at JIATF-South is the fact that under 10 U.S.C. § 124, DOD has the lead in detection and monitoring of aerial and maritime transit of illicit drugs into the United States. This authority is delegated to JIATF-South, providing unity of command over detection and monitoring of assets. Once the decision is made to interdict a suspect vessel, operational control

of the event passes to the U.S. Coast Guard, the agency with statutory authority to affect a boarding in the maritime domain. While the geographic construct and statutory framework under which JIATF-South has prospered does not exist on the Southwest Border, the model is still worth further consideration.

B) Do you think an interagency civilian-led task force on the Southwest border, modeled after the "gold standard" of JIATF-South, would enhance our counter-trafficking and border security efforts?

Response:

JIATF-South's area of responsibility is unique, consisting largely of international waters and airspace. The Southwest Border, in contrast, provides different geographic and jurisdictional challenges, and existing mechanisms already provide for interagency coordination and deconfliction. As we work together to improve those mechanisms, we believe that a discussion of whether a JIATF-South-type model would enhance our counter-trafficking and border security efforts should be accompanied by discussion on how best to achieve consensus on the existing gaps in interagency coordination.

Although aspects of the JIATF-South model certainly are worth replicating, changes to the existing USG counter-trafficking efforts on the Southwest Border should not be based solely on the JIATF-South model. The primary key to the success of JIATF-South is the ability to fully integrate its partners, synchronize intelligence efforts, and leverage information sharing to provide tactical cueing. While unity of command is the perceived driver of success, in reality JIATF-South's success is driven by unity of effort and the willingness of interagency partners to participate in the endeavor. It is this unity of effort – as opposed to unity of command – that we seek to model in our law enforcement efforts on the Southwest Border.

70. Mexican transnational criminal organizations (TCOs) annually generate, remove, and launder between $18 billion and $39 billion in proceeds, a large portion of which is believed to be smuggled in bulk out of the United States through the Southwest border. Other methods include use of Money Services Businesses, trade-based schemes, and stored value card systems. At most, officials seize $1 billion of this revenue.

A) What is DOJ doing to improve coordination between law enforcement agencies and focus resources on these criminal financial networks?

Response:

The Department of Justice is coordinating across agencies, jurisdictions, and state, federal, and international boundaries as never before to target the criminal financial networks. The lifeblood of drug trafficking organizations (DTOs) is their financial infrastructures. If such infrastructures are significantly disrupted, the DTOs cannot pay for new product, maintain their paramilitary organizations, bribe local officials or otherwise exercise the tremendous local

influence they currently wield. Particularly through multi-agency intelligence coordination centers such as EPIC, the OCDETF Fusion Center, and the Special Operations Division (SOD), we are coordinating all cases related to the Mexican Cartels, towards bringing our united focus to bear against criminal financial networks.

The Department has prioritized the targeting and disruption of the illicit flow of money from the Mexican Cartels and other associated criminal organizations. For example, using funds provided by the Southwest border supplemental funding bill, the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS) established a Mexico team whose top priority is the investigation and prosecution of these criminal financial networks. The Unit is staffed with both seasoned prosecutors and lawyers familiar with the complicated mechanisms by which money moves through the global financial system. The Unit is devoted to investigating and prosecuting complex criminal cases involving financial institutions and individual facilitators, who hide and obfuscate the financial flows that enable criminal organizations to operate. Also, DOJ has embarked on an initiative combining resources from the Criminal Division, SOD, the United States Attorney's Offices, the OCDETF Strike Forces and DHS to coordinate all cases related to the Mexican Cartels in efforts to identify, disrupt and dismantle the financial infrastructure of the Mexican Cartels and seize their assets. The Department also utilizes its regional and national SAR review teams to better identify patterns and places where illicit proceeds are being deposited in US financial institutions.

Similarly, the OCDETF Program has been working diligently to bring together all the resources and tools its investigators and prosecutors need to fully exploit and dismantle the financial resources and systems used by the illicit drug traffickers. Building on its ongoing partnership with the experts at AFMLS, in FY 2011, OCDETF updated a highly successful training program that enhances the financial investigative skills of prosecutors, agents, analysts, auditors, investigators, law clerks, paralegals, and support staff from more than 80 federal, state and local law enforcement agencies and offices and allows them to follow the money of a sophisticated drug trafficking organization. In addition, in FY 2011, AFMLS and OCDETF developed a new curriculum for an advanced level seminar to continue the education process for those who are ready to proceed to the next level in their financial investigations.

As a result of this prioritization, since the beginning of FY 2010, OCDETF implemented a new policy that requires a financial investigation to have been started in every OCDETF case prior to the approval of OCDETF designation. Therefore, 100% of OCDETF investigations initiated in FY 2010 and FY 2011 have an active financial component. Additionally, 99% of OCDETF's more than 4,800 active cases have an active financial investigation.

Working together in case-specific multi-agency task forces or in permanently co-located multi-agency Strike Forces, the OCDETF component agencies – DEA, FBI, ATF, USMS, ICE/HSI, USCG, IRS, the U.S. Attorneys' Offices, AFMLS, and the Criminal Division's Narcotic and Dangerous Drug Section (NDDS) – pursue comprehensive, prosecutor-led, multi-agency, intelligence-driven investigations that are the essence of law enforcement cooperation and coordination of effort.

Further, OCDETF component agencies, partnering with state and local law enforcement, have implemented a specific Southwest Region Bulk Currency Money Laundering Initiative to investigate bulk currency movement along transportation routes in the Southwest Region. Currently more than 80% of active OCDETF investigations initiated in the Southwest Region target organizations employing bulk cash smuggling. Since FY 2006, 76 separate OCDETF investigations have been initiated from this initiative, and these ongoing investigations have led to the return of 143 indictments, with 606 defendants indicted, and 399 defendants convicted so far.

Similarly, the creation of permanent, co-located OCDETF Strike Forces in Boston, New York, Atlanta, Tampa, San Juan, Houston/Laredo/McAllen/San Antonio, Phoenix/Tucson, San Diego, and El Paso, Texas/Las Cruces, New Mexico, fosters close working relationships across agencies and facilitate multiple, far-reaching, and highly effective multi-agency investigations. Moreover, these Strike Forces have taken innovative steps to leverage non-OCDETF resources to their great advantage. For example, working with the Assets Forfeiture Fund, OCDETF and the National Drug Intelligence Center have placed Document and Media Exploitation Teams in the Atlanta, Houston, El Paso, Phoenix, and San Diego Strike Forces. These DOMEX teams allow Strike Force analysts and agents to capture and exploit evidence in complex, fast-paced investigations, and to develop trial exhibits for prosecutors quickly and effectively. The Department also utilizes its regional and national SAR review teams to better identify patterns and places where illicit proceeds are being deposited in US financial institutions.

Another critical component in disrupting the financial networks of the Mexican TCOs is close collaboration with our Mexican counterparts. Both U.S. and Mexican authorities have expressed a strong commitment to using financial crimes enforcement, particularly forfeiture, to attack drug trafficking and related criminal organizations operating along the U.S.-Mexican border. In support of these goals, the Department of Justice is working closely with the Government of Mexico to disrupt the flow of illicit proceeds back to criminal organizations and identifying and prosecuting money laundering cases that affect both our countries. For example, in June 2011, AFMLS held a regional conference in Lima, Peru titled "Latin American Forfeiture: Dismantling Cartels." The conference brought together representatives from seven different countries, including the U.S, Mexico, Colombia and Panama, all with the united goal of sharing experiences and best practices regarding the drug cartels and other TCOs.

B) What legislative tools do you need to more effectively identify and prosecute money laundering threats through criminal investigations?

Response:

Federal money laundering laws constitute a powerful tool in combating some of our most pressing criminal concerns, including transnational organized crime and the Mexican drug cartels. However, gaps in our legal authority have emerged over time that hamper the government's ability to exercise the full weight of money laundering law. Some of these gaps include:

- The fact that not all serious crimes are predicate offenses for purposes of federal money laundering law, which prevents the government from prosecuting the laundering of proceeds for such violations.
- Inability to prosecute and seize the proceeds of foreign criminals who commit their crimes overseas and launder and maintain their assets in the U.S.
- Insufficient penalties for bulk cash smuggling, a commonly used method for international drug cartels to launder their criminal proceeds.
- An adverse U.S. Supreme Court ruling that inhibits the government's ability to prosecute the transport of concealed drug proceeds across the border. *See Cuellar v. United States*, 553 U.S. 550 (2008).
- Lack of wiretap authority for certain money laundering offenses.

The Department prepared legislative proposals, as part of the Administration's Transnational Organized Crime Strategy, to address these and other gaps in our money laundering laws. We look forward to sharing these proposals with Congress and working together to ensure that our capabilities to combat money laundering are as effective as possible.

71. On April 18, Representative Lamar Smith sent you a letter asking if the Department of Justice was going to sue the State of Utah, as it did the State of Arizona, over its recently enacted immigration laws.

A) How do you distinguish the Arizona case from the Utah law, especially given that both involve States enacting legislation in an area that should be controlled by the Federal Government?

B) Wouldn't you say that the Utah laws are subject to preemption as you argued in the Arizona case?

Response:

The enforcement provisions of Utah's immigration laws were scheduled to go into effect on May 10, 2011, but were temporarily enjoined by a district court on that date. *See Utah Coalition of La Raza, et al. v. Herbert, et al.*, No. 11-00401 (D. Utah), Doc. 43. The Department of Justice is continuing to evaluate how that law will affect federal enforcement of the immigration laws. As with any statute, the law raises individual issues that need to be carefully considered as part of the Department's analysis of preemption and other legal questions.

Utah's guest worker program raises preemption issues that were not addressed in the case against the State of Arizona. These provisions also have a different effective date. Unless Utah receives a waiver from the federal government granting permission to implement its Guest Worker Program, Utah would implement the program at some point after July 1, 2013. The federal government has exclusive authority over the immigration of guest workers. The United States will assess its legal options and take appropriate action before the law goes into effect.

72. **In April, the Government Accountability Office (GAO) released a report on criminal alien statistics. In the report, GAO noted that three individuals with links to international terrorism were able to become naturalized U.S. citizens.**

The ability to bar terrorists and people who are national security risks from obtaining immigration benefits is a recurring problem. As we know from the 9/11 Commission report, terrorists will exploit any legal avenue to gain entry into the United States. They have been able to use our current immigration system to advance their efforts to do harm to Americans. Whether they obtain a visa or U.S. passport or are able to come to the U.S. legally through a relative or employment – the end result is the same.

I have tried to address this problem through legislative amendments that would bar terrorists from establishing good moral character – a requirement for naturalization. However, this problem also requires additional authorities that would give you and the Secretary of Homeland Security the ability to bar terrorists or known security risks from obtaining U.S. citizenship as a matter of discretion.

A) Do you believe an individual who is a terrorist or has ties to terrorist organizations should be allowed to get U.S. citizenship?

Response:

No. Terrorists, including those who commit, plan, plot or aid terrorist acts clearly should not be granted U.S. citizenship.

B) What additional authorities do you wish you had available to you to better prosecute individuals suspected of terrorists activity?

Response:

Over the last decade, hundreds of domestic and international terrorists have been prosecuted. Recent terrorism investigations and prosecutions have generated valuable intelligence information about training camps in Afghanistan, insurgents in Iraq, and other plots to attack the United States and its allies.

In many cases, the success of these prosecutions has been the result of post-9/11 legislative, judicial, and structural changes – including the PATRIOT Act, the dismantling of the Foreign Intelligence Surveillance Act (FISA) wall, and other amendments to the Foreign Intelligence Surveillance Act – that have provided both law enforcement and the intelligence community with enhanced investigative authorities. Following 9/11, the FBI expanded beyond its traditional law enforcement focus to become a threats-based, intelligence-driven organization. In 2006, the Department of Justice – with Congress's approval – brought counterterrorism, counterespionage, and intelligence attorneys together in a single Division to enhance the synergy between the Department's law enforcement and intelligence activities and to bring the full weight of our resources to bear against those who threaten our security.

Congress's recent reauthorization of the PATRIOT Act was an important step in helping to ensure that the government continues to have the authorities it needs to address the threat of terrorism. The Department is prepared to work with Congress on other possible changes to our investigation and prosecution authorities as necessary.

C) Is there an administrative process that could be revised to ensure that no individual obtains U.S. citizenship until you or the Secretary of Homeland Security determines they are not a threat to the U.S.?

Response:

The Department of Homeland Security, United States Citizenship and Immigration Services (USCIS), is solely responsible for the administrative process by which it makes eligibility determinations regarding naturalization. The Attorney General, therefore, defers to USCIS on how best to revise its internal administrative procedures to remedy the concerns you have expressed.

73. Last year the American Bar Association (ABA) published a report suggesting three alternatives to reform the current immigration court system – creation of an Article I court, Independent Agency, or some hybrid of the two to oversee immigration proceedings.

I like the idea of an Article I Court and have drafted legislation to create such a court to replace the current immigration court system.

A) What are your views on the ABA's immigration court reform proposal?

Response:

The ABA report recommends that EOIR be restructured as an Article I court as a first option and that EOIR become an independent agency as the next best alternative. Such restructuring would require substantial statutory changes followed by significant regulatory changes, involving operations and jurisdiction. Moreover, any of the proposed restructuring would require Congress to appropriate significant levels of funding to create, operate and maintain either an Article I court or an independent agency. It is questionable whether the creation of an Article I court or independent agency would achieve the stated goals. In short, both recommendations would require substantial appropriations without the likelihood of any improvements to the immigration courts and appeals system.

B) Do you think that the immigration court function should be moved out of DOJ? If yes, why?

Response:

Some suggest that EOIR be made into an independent court system, separate from any executive branch cabinet officer. Those who advocate for an independent court system base these recommendations on the belief that making EOIR independent from the Department of Justice would improve perceptions of fairness and result in greater efficiency in the adjudication of removal cases.

EOIR's adjudicators are, however, already perceived as fair and independent of the influences of either party that appears before them. The type of civil administrative adjudications that EOIR conducts are designed to be handled within the structure of the Department and it would take significant resources to create an agency separate from an executive branch cabinet officer.

QUESTIONS POSED BY SENATOR COBURN

74. Following the April 2009 Justice Department Oversight hearing, I submitted written questions to you regarding the steps taken at the Justice Department to implement President Obama's promise to conduct "an immediate and periodic public inventory of administrative offices and functions and require agency leaders to work together to root out redundancy."

In your response, you stated, "the Department established an Advisory Council for Savings and Efficiencies (SAVE Council) in June 2010...The Council will ensure accountability for performance improvements resulting in cost savings, cost avoidance, and streamlined processes across the Department."

A. Your response merely described the SAVE Council, and what it proposed to do. Since it has now been in existence for almost a year, please describe its activities to date, cost savings implemented, how Department processes have been streamlined, and what, if any, recommendations were made to eliminate certain subdivisions to improve organizational efficiency.

Response:

In July 2010, the Attorney General created the Advisory Council for Savings and Efficiencies (the SAVE Council). The SAVE Council is responsible for developing and reviewing Department-wide savings and efficiency initiatives, as well as monitoring component progress to ensure positive results for cost savings, cost avoidance, and efficiencies. Representatives from numerous components were appointed by the Attorney General to serve as members on the Council. The members have the lead responsibility to develop and report out on the savings and efficiency initiatives.

The SAVE Council institutionalizes the Department's pilot savings efforts that began in June 2009, which resulted in over $48.5 million savings/cost avoidance from June 2009 through the second quarter of FY 2011. The creation of the SAVE Council paves the way for the development of future on-going initiatives that will result in cost avoidance, actual savings, and streamlining, while leveraging and instituting best practices.

There are numerous areas the SAVE Council is addressing in order to achieve its goal of cost savings, cost avoidance and efficiencies. Those areas include, but are not limited to, a reduction in the square footage occupied by the Department, efficiencies in the hiring processes, training and travel efficiencies, travel cost savings through on-line booking, coordinated procurement efforts for IT equipment and services, and consolidations of vendor contracts. A number of initiatives were stood up in FY 2010 and FY 2011, while some initiatives are still in their implementation planning phases; however, the Council expects these initiatives to produce savings during the current fiscal year and through FYs 2012 and 2013. The Council will continue to provide a framework to identify and implement best practices to save taxpayer dollars, realize efficiencies, and monitor our savings progress.

B. I also asked whether any proposals for organizational change included an in-depth review of current grant programs, their effectiveness, and whether any grant programs were identified as poorly managed, duplicative or in need of elimination. You stated grant program review had not occurred as part of the proposals from senior leadership at the Department, but that, "with the establishment of the Council, this is a potential program area that can be examined."

i. Has the Council examined grant programs as part of its goal to "ensure accountability for performance improvements resulting in cost savings, cost avoidance, and streamlined processes across the Department?" If not, why not?

Response:

Not at this time. The Council's focus has been on identifying and implementing Department-wide efficiencies.

ii. If so, please list the grant programs the Council identified as problematic in its review.

Response:

As stated above, the Council's focus to date has been on identifying and implementing Department-wide efficiencies, and it has not yet examined grant programs specifically.

75. The Department of Justice Office of the Inspector General has been preparing its "Top Management and Performance Challenges in the Department of Justice" since 1998. In its most recent list, published in November 2010, it states grant management has been "a top management challenge since the inception of this list." The Department faced even more challenges in this area when it had to award funds through the 2009 Recovery Act.

A. The OIG's 2010 memo on this challenge state, "as of the end of August 2010, the Department had expended about 52 percent of its Recovery Act funds." What is the current percentage of Recovery Act funds that have been expended to date?

Response:

i. The Recovery Act was signed into law over 2 years ago. It was allegedly needed to provide an immediate infusion of funding to jumpstart the economy. Why has the Department delayed its delivery of the entire amount of Recovery Act funding?

Response:

To ensure Recovery Act funds are spent as intended, the Department must find the appropriate balance between dispensing the funds quickly and dispensing them responsibly. Controls are put in place to protect the integrity of the funds, by releasing them at certain times and under certain conditions. For example, block grants are given to municipalities all at once, while others are released through a competitive process.

Over 99 percent of the Department's Recovery Act funds were obligated by the end of September 2009. So far, recipients have expended 66 percent of the entire amount that is available to them. In many cases, the rate of expenditures is on target as many awards will continue through 2015. In other instances, delays are due to preliminary activities that must take place before a recipient can drawdown funds.

For example, recipients of Community Oriented Policing Services (COPS) Hiring Recovery Program funds will not drawdown resources as quickly as other recipients due to the fact that additional time is needed to recruit, hire and train new police officers before the funds can be used for an officer's salary to be paid over the course of three years. The Department also obligated Recovery Act funds to build correctional facilities on tribal lands. Construction projects require a time consuming architectural and design phase before construction can even begin. In addition to funds being used to build correctional facilities on tribal lands, there were renovation funds allocated in some of the Office on Violence Against Women (OVW) Transitional Housing and Tribal awards that also require additional steps and documentation before actual funds for renovations are released. A special condition was added to all awards involving construction and renovation to ensure that environmental requirements were met before the funds are released.

Finally, a portion of the Department's Recovery Act funds is designated for oversight and will be used through the end of fiscal year 2013 to support audits, reviews and investigations.

ii. Is there a closeout date for grant funding provided by the Recovery Act? Does the Department plan to return to the Treasury any unused Recovery Act funds that are outstanding at this time? Why or why not?

Response:

Under the terms of the Recovery Act, all ARRA grant funds needed to be obligated by COPS, OJP and OVW no later than September 30, 2010. After that date, COPS, OJP and OVW lost the authority to obligate any remaining funds, and all such funds would have returned to the Treasury. As of that date, all of the ARRA grant funding for COPS and OJP had been obligated, and 99 percent of OVW's ARRA funding had been obligated. OVW's remaining unobligated balance was due to one grant recipient not accepting its award, three State Coalitions not being eligible for grant funding, and a remaining balance for STOP technical assistance.

Also, as provided in the Recovery Act, prime grant recipients must obligate awarded funds by the end of their respective award periods (plus any extensions), but in no case later than September 30, 2015. For example, as of May 20, 2011, the outlay percentage for OJP's grant programs is 79 percent and, overall, is on target based on expected expenditures and draw downs through the end of FY 2015. OJP is closely monitoring the progress of its grants programs and anticipates that all funds awarded to its grantees will be drawn down by the end of FY 2015.

Further, approximately 99 percent of COPS and OVW funds have been obligated and outlay percentages stand at 33 and 61, respectively. It is anticipated that all COPS and OVW funds will be drawn down within three years of the date awarded, which is consistent with the terms of the Act.

B. Testimony of the Inspector General in May 2010 before the Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies also noted the grant management problem in both Recovery Act and non-Recovery Act grant programs. While acknowledging improvement, the Inspector General's testimony noted "OJP needs to ensure that our audit recommendations regarding a particular grant program will be implemented throughout all applicable Department programs, rather than only in the specific program the OIG audited." He also stated, "considerable work remains in ensuring effective grant management..."

The Acting Inspector General recently testified before the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, and she described the grant management portion with the same sentiment, "considerable work remains before managing the billions of dollars the Department awards annually in grants is no longer a top challenge for the Department."

i. The Inspector General's 2010 testimony notes lack of consistent application of audit recommendations among grant programs. Do the individual program managers now coordinate to address concerns expressed by the Inspector General to ensure those recommendations are applied across all programs? Why or why not?

Response:

Proper grants management is a priority of the Attorney General's, and we have made huge strides to ensure the grant process is transparent and fair and that we manage the grants system in a manner that avoids waste, fraud, and abuse. The Office of the Inspector General (OIG) recently recognized the Office of Justice Programs (OJP) grants management improvements in its March 2011 report on the monitoring and oversight of OJP's Recovery Act and non-Recovery Act grants. The report states "OJP also developed comprehensive plans for overseeing its Recovery Act and non-Recovery grants...during [the] audit [the OIG] reviewed draft versions of these plans and provided comments to OJP. As [the OIG] identified concerns with OJP's plans, OJP generally took prompt actions to address those concerns." OJP will

continue to work closely with the OIG to ensure that we are addressing issues identified in grant and program audits.

Additionally, OJP has implemented a comprehensive approach to address grant management issues identified by audits. At every possible opportunity, OJP is implementing OJP-wide corrective actions to respond to program-specific audit recommendations made by not only the OIG, but also the GAO and OJP's Office of Audit, Assessment, and Management (OAAM). For example, to address recent OIG audit recommendations, OJP implemented the following corrective actions agency-wide:

- Policy directives requiring the documentation of all funding recommendations and decisions, including justifications for any deviations from peer review scoring.
- All award decisions are posted on the OJP website, including the type of award, the recipient, and the award amount.
- Procedures requiring all competitive solicitations to be posted for a minimum of 45 days to ensure applicants have sufficient time to identify funding opportunities and prepare quality proposals. Additionally, any changes to the solicitation deadline are to be announced on the OJP website, bureau or program office website, and Grants.gov.
- Revision of the competitive solicitation language to clearly describe what material is required to be submitted by the applicant and to notify the applicant of the implications if they fail to submit an application that contains critical specified elements (i.e., will not proceed to peer review or receive further consideration).
- Procedures to ensure that applications are consistently treated when determining whether they meet basic minimum requirements and should proceed to peer review process.

The Department has also made progress to enhance collaboration among the grant-making components, including the creation of a Grants Management Challenges Workgroup, led by the Office of the Associate Attorney General and comprised of grant officials from OJP, Community Oriented Policing Services (COPS) and Office for Violence against Women (OVW), to develop consistent grant administration and management practices. The DOJ grant making components have shared OIG and GAO audit findings and recommendations as appropriate, and implemented corrective actions across the Department. This includes addressing the recommendations from the DOJ Office of the Inspector General's February 2009 report entitled "Improving the Grant Management Process."

We are continuously striving to make improvements and are developing common procedures and tools for effective grant management across the Department.

ii. I believe it is irresponsible for taxpayer dollars to be funneled into grant programs the OIG has consistently classified over the past 13 years as being mismanaged by the Department. What changes do you believe are necessary within the Department to prevent grant management from appearing on the OIG's top management challenges list next year? How do you plan on implementing your proposed changes?

Response:

The Department has continuously worked to improve grant oversight by implementing policies and procedures to strengthen the management of grants funded with taxpayer dollars. Acting Inspector General Cynthia A. Schnedar acknowledged as much in her testimony before the House Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies. With regard to Recovery Act grant programs in particular, Ms. Schnedar stated that OIG reviews have found that the Department's grant management staff made extraordinary efforts to implement the Recovery Act programs and generally issued the Recovery Act grant funds in a timely, fair, and objective manner.

Further, a recent OIG report on the monitoring and oversight of the Office of Justice Programs (OJP) Recovery Act and non-Recovery Act grants, released in March 2011, highlights many of the significant improvements in the monitoring and oversight of grants, as well as acknowledges the collaborative relationship that has developed between the Office of Justice Programs (OJP) and the OIG. For example, the report states:

- "Since the establishment of OAAM [Office of Audit, Assessment, and Management], OJP has made a significant commitment to improving the monitoring and oversight of grants."
- "OJP and OAAM, while initially slow to implement this approach, have developed a reasonable process for providing monitoring to a high volume of grants. This approach has allowed OJP to monitor grants totaling almost 4 times the award amount required to be monitored by law." In FY 2010, OJP completed on-site monitoring activities for grants totaling about $3 billion out of the open and active grants totaling about $8.4 billion.

We are working closely with the OIG to ensure that we are addressing issues identified in grant audits. In one year, OJP closed numerous OIG grantee audit reports, which represented a return of $3.3 million to the Federal government for unallowable or unsupported costs. OJP has also worked with OIG staff to coordinate grant fraud training for OJP employees and for grantees at OJP-sponsored conferences and meetings. At every possible opportunity, OJP is implementing agency-wide corrective actions to respond to OIG and GAO audit recommendations.

The Department is dedicated to rigorous oversight and monitoring of its grants and grant programs, and to the continuous review and improvement of its procedures and internal controls.

76. **The Office of the Inspector General released its last Semiannual Report to Congress in the Fall of 2010, covering the period from April 1, 2010 – September 30, 2010. In that report, the Inspector General noted its audits of Office of Justice Programs (OJP) grants to state and local entities. One such audit included 10 Weed and Seed grants and 2 Bureau of Justice Assistance (BJA) grants totaling over $5 million awarded to Oklahoma City, OK. Over $300,000 in grant funds were questioned, and other internal control discrepancies were identified, such as inadequate**

property control records, and a city employee opening a bank account in the name of Oklahoma City, but giving himself exclusive signatory authority over the account.

A. The Report notes OJP agreed with OIG's eight recommendations and "agreed to coordinate with Oklahoma City to remedy the questioned costs and implement appropriate corrective action." Please provide these eight recommendations, and an update on the status of the implementation of those by both OJP and Oklahoma City.

Response:

Since the issuance of the OIG audit report on Oklahoma City on June 2, 2010, OJP has been working with Oklahoma City to address the audit issues. This process includes Oklahoma City developing a corrective action plan to address the OIG recommendations and submitting documentation, which will adequately support the implementation of corrective actions and expenditures questioned by the OIG. To date, Oklahoma City has implemented appropriate procedures to address one of the recommendations. However, OJP continues to work with Oklahoma City to address the remaining open recommendations and questioned costs. For more information, please see attached table.

B. Has Oklahoma City been forced to repay any of the questionable expenditures highlighted by the OIG's Report? Why or why not?

Response:

At this time, OJP is requesting that Oklahoma City return a total of $60,199 associated with unallowable costs charged to its Weed and Seed grants. It is OJP's practice to allow its grantees the opportunity to seek a final determination, from the awarding bureau/program office, regarding the allowability of expenditures questioned by the OIG. With regard to expenditures questioned under the Community Capacity Development Office (CCDO) grants, to date, CCDO has determined that $36,279 of the $306,601 in expenditures questioned by the OIG, were unallowable under the Weed and Seed grant program. Further, in a separate review of the actual expenditures Oklahoma City charged to its Weed and Seed grants, CCDO determined that Oklahoma City must return an additional $23,920 to OJP (which were not questioned by the OIG), because Oklahoma City exceeded the maximum travel and training costs permitted under the Weed and Seed grant program. As stated above, OJP is requesting that Oklahoma City return these funds ($60,199) associated with the unallowable costs.

OJP continues to work with Oklahoma City to obtain adequate documentation to support the remaining $271,869 in expenditures questioned by the OIG under Bureau of Justice Assistance (BJA) and CCDO grants. For any disallowed expenditures as determined by BJA and CCDO, OJP will request that Oklahoma City return the funds associated with these costs.

C. Has Oklahoma City continued to receive any Weed and Seed or other BJA grant funding since the OIG questioned its conducted in the April 1, 2010 Semiannual Report? If so, why?

Response:

The City has not received any Weed and Seed grants since the OIG issued the audit report for Oklahoma City on June 2, 2010. However, under the fiscal year (FY) 2010 Edward Byrne Memorial Justice Assistance Grant (JAG) Program, a Bureau of Justice Assistance (BJA) formula program in which the City was eligible to receive funds, the City received an award, in the amount of $690,393, on August 30, 2010.

In FYs 2010 and 2011, OJP performed programmatic and financial monitoring of Oklahoma City's active awards through a series of desk reviews. These desk reviews include a comprehensive review of materials available in the grant file to determine administrative, financial, and programmatic compliance, as well as grantee performance. Additionally, in FY 2010, BJA performed on-site programmatic monitoring, which allows grant managers to validate grantee reporting or gather information outside of documentation submitted by the grantee, of Oklahoma City's FY 2009 Recovery Act JAG award. OJP's monitoring of Oklahoma City's awards did not identify any substantive issues.

77. **In the Department's 2010 PRO IP Act Annual Report, you note Congress did not appropriate funds for the state and local law enforcement grants authorized under Section 401 of the PRO IP Act, yet the Office of Justice Programs (OJP) "offered competitive grants to support state and local IP law enforcement task forces and local IP training and technical assistance...."**

A. **Under which OJP competitive grant program were these funds awarded?**

Response:

Approximately $4 million was awarded in competitive grants under the Fiscal Year (FY) 2010 Intellectual Property Enforcement Program, using $2 million from Economic, High Tech and Cybercrime Prevention funding and $2 million from Byrne Competitive funding.

B. **The PRO IP Act Report notes, "on September 30, 2010, OJP announced that it had awarded approximately $4 million in grants to 14 state and local law enforcement agencies and three non-profit organizations...." Are these 17 grantees required to report to the Justice Department on the use of these funds and their enforcement success as a result of these grants? If so, please provide that information and comments regarding whether the Department is satisfied with the grantees' performance with the federal grant funds.**

Response:

All Department of Justice Intellectual Property (IP) enforcement grantees are required to provide reports on their use of these funds and document enforcement successes via official quarterly financial reports and biannual Categorical Assistance Progress Reports. In addition, the Bureau of Justice Assistance requires IP enforcement grantees to submit specific

performance measurement data quarterly to its Performance Measurement Tool. These current grantees have demonstrated and documented their success in addressing IP crime in their communities.

The relatively modest investment made to provide IP enforcement grants have enabled state and local law enforcement personnel to engage in and collaborate with federal law enforcement actors to carry out multi-agency enforcement and abatement operations, as well as to seize over $200 million in counterfeit and pirated goods in jurisdictions throughout the nation.

78. In the Department's 2010 PRO IP Act Annual Report, you also note, regarding the funds authorized under Section 403, Congress provided funding in 2009 "for the Department to appoint 15 new CHIP prosecutors to support CHIP Units nationwide."

A. The Report merely noted where these new positions would be located, but did not comment on the investigations and prosecutions that have resulted from the hiring of these new prosecutors. Have these new hires pursued any investigations and prosecutions? If so, please provide examples of the success or failure of these efforts.

Response:

After funding became available in April 2010, new prosecutors were hired in the United States Attorneys' offices in the Central District of California, the Northern District of California, the District of Columbia, Massachusetts, Eastern District of Michigan, New Jersey, Eastern District of New York, Southern District of New York, Eastern District of Pennsylvania, Southern District of Texas, Eastern District of Virginia, and the Western District of Washington. While it may be too soon to report on individual investigations and prosecutions of these individual prosecutors, we can report on some of the cases handled in these U.S. Attorney's offices.

For example, on May 17, 2011, a defendant was indicted for the sale of counterfeit diabetic test strips. The case was investigated by the Food and Drug Administration and is being prosecuted by the Eastern District of Pennsylvania.

In March 18, 2011, a former Goldman Sachs computer programmer was sentenced in the Southern District of New York to serve 97 months in federal prison for theft of trade secrets. The defendant developed computer programs for Goldman Sachs' high-frequency trading system valued at approximately $500 million. He accepted a job with a competitor and, on his last day, transferred substantial parts of the code to himself. The FBI arrested the defendant as he was on his way to meet with the new company to transfer the trade secrets.

On February 24, 2011, a defendant was taken in into custody in Paraguay to return him to the U.S. to face charges, including the sale of counterfeit goods. The defendant is alleged to have committed his crimes to raise money for the terrorist group Hezbollah. The case is being

prosecuted by the U.S. Attorney's Office for the Eastern District of Pennsylvania and the Department of Justice's (DOJ's) National Security Division.

On February 14, 2011, a father and son – both living in Canada – were sentenced for selling and dispensing counterfeit Viagra and Cialis. Over the course of a year, 22 packages with counterfeit drugs arrived from China and India at a mailbox in Blaine, Washington, near the U.S.-Canada border. The case was investigated by the FDA Office of Criminal Investigations, the U.S. Postal Inspection Service, and U.S. Customs and Border Protection (CBP), and was prosecuted by the U.S. Attorney's Office for the Western District of Washington.

On January 6, 2011, a federal judge sentenced a defendant to serve 60 months in prison for conspiracy to traffic in counterfeit goods, as well as to bribe CBP officials to get those counterfeit goods into the U.S. The defendant paid more than $700,000 to an undercover law enforcement agent in an attempt to ensure that 15 shipping containers of counterfeit goods were not seized or detained by CBP. The case was investigated by U.S. Immigration and Customs Enforcement (ICE) and CBP and prosecuted by the U.S. Attorney's Office for the District of New Jersey and CCIPS of the Department's Criminal Division.

On November 29, 2010, ICE Homeland Security Investigations (HSI) and the Department of Justice announced Operation In Our Sites v. 2.0. As part of "version 2.0," ICE HSI and DOJ obtained court orders to seize the domain names of 77 websites selling counterfeit goods such as sports equipment, athletic apparel, handbags, and sunglasses. ICE HSI and DOJ announced the seizures on Cyber Monday, a day on which online sales topped $1 billion. In addition to the seizure of those 77 domain names, the Operation also involved the seizure of the domain names of six websites selling pirated movies, music, and software. The Operation was led by the National Intellectual Property Rights Coordination Center (IPR Center). DOJ's Computer Crime and Intellectual Property Section (CCIPS) and nine U.S. Attorneys' Offices participated in the Operation, including the Central District of California, the District of Columbia, the District of New Jersey, the Southern District of New York, the Southern District of Texas, and the Western District of Washington. Operation in Our Sites has continued to result in prosecutions: In February, 2011, Operation In Our Sites v. 3.0, which coincided with the Super Bowl, resulted in the seizure of 10 domain names of websites that provided access to pirated telecasts of the National Football League, the National Basketball Association, the National Hockey League, World Wrestling Entertainment, and the Ultimate Fighting Championship. Prosecution was conducted by the U.S. Attorney's Office for the Eastern District of New York; On March 3, ICE arrested an operator of one of the seized sites, who is now facing charges in New York. On Valentine's Day, Operation In Our Sites v. 4.0 resulted in the seizure of 18 domain names used to sell luxury counterfeit goods. Prosecution was conducted by the U.S. Attorneys' Offices for the Southern District of New York and the Southern District of Texas.

In October 2010, a defendant was sentenced to 41 months incarceration following his conviction at trial of bribery and trafficking in counterfeit exercise equipment, including counterfeit Malibu Pilates, Bowflex, Beachbody and Ab Circle Pro equipment. The defendant operated a business that imported exercise equipment from China into the United States. After a shipment was detained in July, 2009, the defendant offered, and later paid, a bribe for the return

of the containers to an undercover agent. The defendant continued to import counterfeit equipment until her arrest in February 2010. The retail value of seized counterfeit equipment totaled approximately $580,000. The case was prosecuted by the Central District of California.

B. Did the Department receive any federal funding for these positions in FY 2010? If so, what was the amount? If not, does the Department plan to retain these prosecutors?

Response:

Yes, the United States Attorneys received $2,000,000 in FY 2010 for activities authorized under section 402 of the Prioritizing Resources and Organization of Intellectual Property Act of 2008 (Public Law 110403). Annualization funding has been requested for these positions (both in the FY 2011 and FY 2012 President's Budget request) but has not yet been appropriated.

C. If these prosecutors will be retained regardless of specific funding received, how will the Department use its current funding to accommodate these positions?

Response:

Currently, the United States Attorney community is absorbing these positions within the FY 2011 enacted budget that 1) does not provide annualization of these positions and 2) is less than our FY 2010 enacted budget.

79. In the Department's 2010 PRO IP Act Annual Report, you describe various prosecution initiatives conducted through the newly reestablished IP Task Force. In all four of the enforcement priorities you listed, there were cases involving products manufactured in China, offenders who were Chinese nationals, or espionage to benefit China.

A. Does the Department believe China poses the most serious threat to the United States' efforts to protect our intellectual property? Why or why not?

Response:

The threat to our intellectual property is diverse in nature and global in reach. Although no one country stands alone as the source of intellectual property crime, China is a significant source of counterfeit and pirated products imported into the United States as well as trade secret theft. According to statistics maintained by CBP, the majority of infringing goods seized each year originates in China. For example, CBP estimates that in 2010, 61% of its seizures originated from China. The piracy rate of music, motion pictures and software in China is estimated to be extraordinarily high. As a result, China continues to be on the United States

Trade Representative's (USTR) Special 301 Priority Watch List, and is a major focus of any strategy to protect the nation's intellectual property.

B. If the Department does view China as the most serious threat, does the Department have different investigative or enforcement techniques tailored to China and its offenses? Why or why not?

Response:

The Department has prioritized strengthening its law enforcement relationships and efforts with China. For example, since 2006, the Department's Criminal Division and the Chinese Ministry of Public Security (MPS) have co-chaired the Intellectual Property Criminal Enforcement Working Group (IPCEWG) of the U.S.-China Joint Liaison Group for Law Enforcement Cooperation (JLG), which has resulted in an open dialogue on intellectual property enforcement, the sharing of information on selected investigations, and a number of successful joint intellectual property operations. The IPCEWG last met in December of 2010. The meeting resulted in an agreement to increase cooperation and information sharing on cases involving intellectual property crime.

Another key component of the Department's international enforcement efforts has been the Department's IP Law Enforcement Coordinator (IPLEC) program. Through the IPLEC program, the Department has deployed two experienced federal prosecutors overseas to take the lead on our IP protection efforts in key regions including Asia and, until recently, Eastern Europe. To build upon the success of the IPLEC program, President Obama has asked Congress, in his 2012 budget request to fund a new Department program that would place six International Computer Hacking and Intellectual Property coordinators, or "ICHIPs," in key locations around the world with a goal to place an ICHIP in China. The ICHIP program could enhance not only the Department's bilateral enforcement efforts on intellectual property in China generally, but also the international enforcement aspects of organized crime as it relates to IP, online fraud, and large-scale data breaches that threaten U.S. economic security in targeted regions worldwide.

C. In October 2010, you traveled to China to participate in an IP Crime Conference and to meet with senior Chinese law enforcement officials on the importance of IP enforcement and cooperation with the United States.

i. Please provide more specific information regarding how you were received, the reaction to the proposed cooperation, and your opinion regarding China's commitment to enforce intellectual property laws.

Response:

The Attorney General attended meetings with China's Minister of Public Security, Chief Procurator and Politburo Member responsible for law enforcement, among others. The Attorney General was extremely well received. He emphasized the importance of IP enforcement and secured commitments from China both to enhance its domestic enforcement of IP rights and improve its cooperation on transnational IP crime investigations. The Chinese leadership was

very receptive and further agreed to emphasize to respective agencies that cooperation with the United States on IP enforcement was encouraged and expected. Coinciding with the Attorney General's meeting, China's State Council announced a six-month crackdown on counterfeit and pirated goods, known as the Special Campaign. The State Council also directed all state agencies to use only official, licensed software. By most accounts, the Special Campaign, which has been extended, has resulted in increased domestic enforcement as well as greater coordination among IP authorities in China. Although these efforts suggest a meaningful increase in China's commitment to enforcement IP laws, the true test of China's commitment will be whether it sustains its efforts over time.

ii. What actions has the Department taken to follow up on this visit and ensure China does engage in cooperation with the United States on this issue and makes efforts to change its policies that are conducive to violating intellectual property rights?

Response:

The Department focuses more closely on cross-border criminal enforcement efforts and developing training programs designed to increase regional capacity in China and elsewhere in Asia to investigate and prosecute IP cases. To this end, since the December meetings described above, the JLG IPCEWG has identified specific cases for increased cooperation with Chinese law enforcement and representatives from U.S. and Chinese law enforcement participated with other countries in a regional IP criminal enforcement training program in Southeast Asia. The IPCEWG expects to meet again in the late summer or early fall. The Department expects to use this meeting to continue to follow up on existing commitments and explore other opportunities for joint enforcement efforts and information sharing.

Other agencies in the federal government work closely with China on its IP policies that impact trade and commerce including China's domestic IP enforcement efforts and the effectiveness of its statutory and regulatory regime. As noted in the USTR's 2011 Special 301 Report, although China remains on the Priority Watch List, China has made a number of encouraging commitments on a range of important IP issues and the Special Campaign has already resulted in increased enforcement efforts and positive regulatory and judicial changes. The Department will work with other agencies to gauge the continuing effectiveness of these efforts in the coming year.

80. In November 2010, the Justice Department's Inspector General issued a report that said between 2007 and 2009 several U.S. Attorneys had consistently stayed at luxury hotels that exceeded the government per diem.

A. What controls are in place now to ensure that travel is not being abused by U.S. Attorneys?

Response:

The Department's Travel Order requires management review and authorization of travel before it occurs, and review and approval of all travel expense claims by a higher level official or the component's senior financial manager. The Department recently issued guidance reminding all travelers of this policy. Additionally, the Department is implementing eTravel, a travel service which helps enforce the Federal Travel Regulations, including justification to support the need for hotels that exceed the government per diem. All of the U.S. Attorneys' Offices are now using this software. Only the Director, Deputy Directors, and the Chief Financial Officer of the Executive Office of the United States Attorneys are permitted to authorize hotels that exceed the government per diem for U.S. Attorneys. In addition, eTravel enforces the Department policy which requires a higher level of authorization for hotels that exceed per diem.

B. The scope of the report was limited to U.S. Attorneys. Is there any similar oversight of the travel of employees at Main Justice? What about employees of U.S. Attorneys?

Response:

As noted above, the Department's Travel Order requires management review and authorization of travel before it occurs, and review and approval of all travel expense claims by a higher level official or the component's senior financial manager. Further, for all employees of the Offices, Boards, and Divisions (which includes "Main Justice" employees and all U.S. Attorneys employees), the Justice Management Division reviews and audits a statistically determined sampling of all travel claims on an ongoing basis.

C. While the report addressed travel at higher rates than are generally allowed, it did not address the *amount* of travel.

i. How often do employees travel for reasons other than a court appearance?

Response:

The Department can provide frequency of travel based on the categories required in the Federal Travel Regulation (operational, meetings, and conferences). For the United States Attorneys, 56% of their travel is categorized as operational travel. We cannot determine how much of that travel was specifically for court appearances.

ii. For what reasons do they travel?

Response:

These employees travel for various reasons, including investigating or supporting the investigation of federal crimes, litigation, research, professional training, and professional meetings.

D. When an Assistant Attorney General or other administration official travels to give a speech to an outside organization, does that organization pay for their travel? Or does the Justice Department subsidize their travel?

Response:

If the speech is for the furtherance of an official purpose, the Department ordinarily pays for such travel. However, there is statutory authority for the Department to accept payment of official travel expenses from an outside organization under limited circumstances. Acceptance of travel expense from a non-federal source requires component head approval and the ethics official concurrence of no conflicts or appearance issues in advance of the travel. Employees are prohibited from soliciting payment from the outside source and must be attending the event as part of official duties.

81. A June 2009 memorandum from the Inspector General identified potential overlap and duplication in grants administered by COPS, the Edward Byrne Memorial Justice Assistance (JAG) Formula Program, and the Edward Byrne Competitive Grant program. A report issued in May 2010 showed this could still be a problem, and remedies to duplicative grants generally occurred after the grants were awarded.

In response to that Inspector General's report have there been any efforts to ensure that grants administered by different sectors of DOJ are not duplicative?

Response:

The Department is actively engaged in focused collaboration - both within the Department of Justice and with other federal agencies to help prevent the duplication in grants. These essential efforts make us more efficient, eliminate unnecessary duplication, and ensure that every Federal dollar goes as far as it can. A few of these efforts include:

- The Department is working as a whole to coordinate and improve our grants management efforts. The Office of the Associate Attorney General leads the DOJ-wide Grants Management Challenges Workgroup, comprised of grants officials from COPS, OJP, and OVW, to share information and develop consistent practices and procedures in a wide variety of grant administration and management areas.

- For the first time, all of the Department of Justice's components and leaders are working together to provide the most efficient and timely information to tribal communities.
  - In FY 2010, the Department created the Coordinated Tribal Assistance Solicitation (CTAS), which coordinates most of the Department's tribal government-specific criminal justice assistance programs administered by OJP, OVW, and COPS under one solicitation. Through CTAS, tribes can apply for funding for many of their criminal justice needs with one application.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 30, 2011

The Honorable Frank Wolf
Chairman
Subcommittee on Commerce, Justice,
Science and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your questions during the Attorney General's March 1, 2011 testimony before the House Appropriations Committee, regarding allegations that the Department of Justice (Department) has politicized the manner in which it responds to Freedom of Information Act (FOIA) requests. During the hearing, you referred to allegations by a blogger that the Department's Civil Rights Division (Division) provides information in a timely manner to some, while delaying its replies to others, based on political favoritism. As discussed below, it appears that the allegations rest on comparisons of dissimilar requests.

President Obama and the Attorney General have emphasized the benefits of open government and the importance of responding to FOIA requests effectively and with a presumption of disclosure. While more remains to be done, the Department has made significant strides over the past two years. In responding to over 37,000 requests in which the Department analyzed responsive records for potential release during FY 2010, the Department increased its disclosures for the second consecutive year, releasing information in 94.5% of such requests—the highest release percentage since FY 2002.

With respect to the specific issues raised at the March 1, 2011 hearing, the Department's policy is to process records requests without taking into account any ideological or political affiliations of the requester. We are conducting a review of the Civil Rights Division's files regarding FOIA requests and requests for submission files under Section 5 of the Voting Rights Act of 1965. Our review to date has not found evidence to support claims that political considerations influenced the Division's response to FOIA requests.

The blog post you referenced did not note the significant differences between, on the one hand, the Department's practices in responding to FOIA requests, and, on the other hand, its longstanding procedures for implementing Section 5 of the Voting Rights Act of 1965. In fact,

the vast majority of the allegations cited in the blog post involved pending Section 5 submissions, which are not comparable to FOIA requests for the following reasons.

Section 5 provides, *inter alia*, that a jurisdiction covered by Section 5 can obtain preclearance of a change to its voting procedures if it submits the proposed change to the Department, and the Department does not interpose an objection within 60 days of the receipt of a completed submission. The Department's procedures for administration of Section 5 allow for public comment on proposed changes for which preclearance is sought. *See* 28 C.F.R. §§ 51.29-30. To facilitate public input, the Department's procedures provide for public access to Section 5 submission files, to the extent they are not exempt from inspection under the FOIA. *See* 28 C.F.R. § 51.50(d). Due to changes in the Department's technology systems and security policies, it became no longer feasible for the Voting Section to provide for physical inspection and copying of Section 5 submission files. Thus, since 2001, the Voting Section's practice has been to mail or email a copy of the file to each requester. Where redactions are needed, the Division's FOIA Office further processes the records.

The Voting Section prioritizes requests for Section 5 submission files when the jurisdiction's submission is pending before the Attorney General—*i.e.*, where the statutorily allotted 60-day review period has yet to expire, or where the Attorney General has requested more information or interposed an objection. This helps ensure that interested parties have a meaningful opportunity to receive and review a pending submission, and prepare and present a comment on that submission, as Congress provided in the Voting Rights Act of 1965, in time to be considered during the statutorily mandated 60-day review period. If the request letter cites the FOIA but seeks pending Section 5 files, it is treated as a pending Section 5 request and processed accordingly. Because of these procedures, it is not meaningful to compare the handling of requests for pending Section 5 records with the handling of requests for closed Section 5 files or FOIA requests for other types of records.[1]

For example, the blog post you mentioned alleges that Eugene Lee received responses to his FOIA requests only three days after submitting them. The Voting Section's log of document requests from members of the public, which we previously provided with our letter to you of August 12, 2010, includes three requests to the Division by Mr. Lee.[2] Two of these three requests, however, were requests for copies of pending Section 5 submission files that were handled under the procedure described above. On the other hand, Mr. Lee's third request was for a *closed* Section 5 submission file (which was processed by the FOIA office due to the need for redactions). It did not receive the same priority as pending Section 5 requests, and took 172

[1] The Voting Section also aims to reply promptly where practicable to requests for closed Section 5 submission files—*i.e.*, submissions with regard to which the 60-day review period has already expired where the requester demonstrates a need due to factors such as a litigation deadline, or other Section 5 issues such as potential unprecleared voting changes or a related pending file, as well as other requests that are simple or do not involve voluminous records.

[2] In response to your July 29, 2010 letter seeking the "Voting Rights Section log of Freedom of Information Act requests," we provided the log maintained in the normal course of business by the Voting Section. That log contained both FOIA requests (designated there with a number in the column titled "FOIA No."), and also requests processed under 28 C.F.R. § 51.50(d) (designated there with "NA"), because the Voting Section maintains those data in a single system.

days to fill. Another example is the request of Raul Arroyo-Mendoza, who is also alleged to have received "same day service." Mr. Arroyo-Mendoza has made many requests over the last two years. While he received quick turnaround for requests relating to pending Section 5 submissions, he waited 18 months for the Division to complete processing on his request for a closed Section 5 submission file, which included voluminous records and required numerous redactions.

The allegations you mentioned include a claim that Chris Ashby received completed responses more slowly than Susan Somach because of political favoritism. However, our files indicate that Mr. Ashby's request was for closed Section 5 submission files, and thus was treated in the same manner as other requests for Section 5 submission files not pending at the time of the request. Ms. Somach, by contrast, often requested records relating to pending Section 5 submissions. In some instances, she asked for both pending and closed submission records in the same request. In all those instances but one, she received a prompt response under the longstanding practice relating to pending Section 5 submissions, while her requests for records relating to closed submissions took longer to process.[3] To take a specific example, in a request she made on May 19, 2009, Ms. Somach received responsive records on May 27, 2009 for the four requested pending Section 5 submissions. However, the processing of the records from the closed submissions requested on that same date was not completed until two months later, on July 29, 2009. One of Ms. Somach's requests for a pending Section 5 submission file took over a month: she did not receive a response to her request dated December 7, 2009 until January 29, 2010.

In certain cases, to be sure, FOIA requests may be completed in a matter of days. But this typically occurs when the requested records are easily identifiable, are not voluminous, and are releasable without requiring many redactions. Our initial review indicates that this was not the case in the instances refereneed in your letter in which the Department has been criticized for delay.

For example, it is alleged that two FOIA requests for resumes—one submitted in February 2006 by a *Boston Globe* reporter and one submitted in 2010—received different treatment despite requesting "the exact same information," and, specifically, that a response to the 2010 request was unduly delayed. These two requests, however, were quite different in scope. The 2006 request was for copies of resumes and application-related documents for career attorneys hired into three of the Civil Rights Division's Sections from January 2001 to approximately January 2006. By contrast, the 2010 request sought nearly a decade's worth of resumes for the entire Division, including all 12 Sections as well as the Office of the Assistant Attorney General—in sum, nearly seven times as many new hires as the 2006 request. In accordance with the Division's usual protocol, the FOIA Office began processing that request immediately, sending an interim response the day after it was received.[4] That process requires a

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[3] The exception we have identified was a request for five pending submission files and one closed file. In that instance, the closed file consisted of a total of only nine pages requiring no redactions, and was included along with the pending files.

[4] Although the blog post referenced in your letter states that this request was originally submitted in the spring of 2010, our records indicate that it was first submitted on October 6, 2010, and received in the Division on October 13, 2010.

time-consuming line-by-line review of the resumes before public release, consistent with our obligation to protect the privacy of attorney hires.

In short, based on our initial review of the allegations that you referenced during the hearing, we are not aware of evidence that the Civil Rights Division allows politics or any improper factors to play a role in the handling of records requests.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Chaka Fattah
Ranking Minority Member

Corresponding Table to 76 A:

Recommendation Number	Recommendation	Status of Corrective Action
1	The City must implement procedures to ensure that all departments that handle OJP grant funds maintain a proper internal control structure.	**OPEN:** The City provided a copy of written procedures, but they were not sufficient to fully address the recommendation. Accordingly, we are requesting that the City provide updated internal control procedures.
2	The City must implement procedures ensuring that automatic restrictions prohibiting transactions from occurring on DOJ grants 90 days after the end of the performance period are in place.	**CLOSED:** In August 2010, the City implemented appropriate procedures to address this recommendation. As such, no further action is required of the City.
3	The City must provide documentation that substantiates the individual charges (totaling $11,849) to expired grant accounts were incurred prior to the end of the grant performance periods.	**OPEN:** Of the costs questioned, $10,509 were found to have been incurred prior to the end of the grant period and were deemed allowable. We are requesting that the remaining $1,340 be returned to OJP.
4 a	The City must provide documentation that substantiates the $212,361 in unsupported or unallowable expenditures charged to various grants.	**OPEN:** The program office (Community Capacity Development Office – CCDO) approved $34,732 of the costs questioned. Of the remaining amounts, we are requesting that the City: • Submit adequate supporting documentation for $7,717; • Provide justification and request program office approval for $133,633; and • Return $36,279 in unallowable costs. (The City must also return an additional $23,920 in unallowable costs identified by CCDO, which were not included in the OIG audit report.)
4 b	In addition, the City must provide documentation to support that the $94,240 in matching contributions for grant numbers 2007-WS-Q7-0042 and 2007-WS-Q7-0113 was met.	**OPEN:** The City did not meet the 25 percent matching contribution required under grant numbers 2007-WS-Q7-0042 and 2007-WS-Q7-0013. Once a final determination has been made regarding the allowable Federal costs for these awards, the final matching amounts will be determined, and the City will be required to return funds to the OJP, as necessary.

Recommendation Number	Recommendation	Status of Corrective Action
5	The City must provide documentation to substantiate that a timekeeping system has been implemented, which requires each employee to track their time spent working on each grant/project, including Federal grants.	**OPEN:** The City provided a copy of written procedures, but they were not sufficient to fully address the recommendation. Accordingly, we are requesting that the City provide updated payroll/timekeeping procedures.
6	The City must provide documentation to support that funds for each Federal grant are properly identified in their accounting system, and costs are tracked by approved budget categories.	**OPEN:** The City provided a copy of written procedures, but they were not sufficient to fully address the recommendation. Accordingly, we are requesting that the City provide updated grant accounting procedures.
7	The City must provide documentation which substantiates that a physical inventory has been completed, and that the inventory records include all nonexpendable property items purchased with OJP grant funds. In addition, the City must provide a copy of procedures implemented to ensure that accountable property records are maintained for all equipment and nonexpendable property items purchased with Federal grant funds.	**OPEN:** The City stated in its written response that the Police Department completed the physical inventory of all nonexpendable property items purchased with OJP grant funds, but did not provide complete information to address the recommendation. Additionally, the City provided a copy of written fixed asset procedures, but they were not sufficient to fully address the recommendation. Accordingly, we are requesting that the City provide updated information and procedures related to equipment and nonexpendable property.
8	The City must provide a copy of procedures implemented to ensure that Financial Status Reports (FSRs) are accurately submitted, and amended FSRs are prepared and submitted to correct any errors.	**OPEN:** The City provided a copy of written procedures, but they were not sufficient to fully address the recommendation. Accordingly, we are requesting that the City provide updated procedures for preparing FSRs.