



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 2013

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 June 12, 2012. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

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,

A handwritten signature in dark ink, appearing to read "Peter J. Kadzik".

Peter J. Kadzik
Principal Deputy 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
June 12, 2012

QUESTIONS POSED BY CHAIRMAN LEAHY

Maricopa County Sheriff's Office and State Criminal Alien Assistance Program

1. I wrote to you on May 15 to encourage the Department of Justice to take a close look at the question of whether Federal taxpayer dollars had been used by law enforcement officials in Maricopa County, Arizona in connection with civil rights violation of individuals in the County's jails. My letter followed the Department's investigation and findings into police practices in Maricopa County, which revealed evidence of very troubling policing practices.

The Department responded to me on June 7 that the County's use of Federal funds may be at issue in the litigation the Department is currently pursuing against Maricopa County and the Sheriff's office. I appreciate your attention to this matter.

Without getting into any specifics related the Department's civil rights lawsuit against Maricopa County, what is the Department's normal practice in relation to grant funds when it learns of unlawful or other conduct that is inconsistent with the standards grant recipients need to meet? Does the Department have the tools it needs to address the misuse of public funds by grant recipients apart from litigation?

Response:

Since Fiscal Year (FY) 2009, the Department of Justice (DOJ) has made effective grant management a priority. In FY 2009, the Office of Justice Programs (OJP) implemented the OJP high-risk designation program, which served as a model for the DOJ-wide high-risk program established in FY 2011. The criteria used to designate a grantee as high-risk are broadly defined in 28 C.F.R. § 66.12 and 28 C.F.R. § 70.14. More specifically, a grantee may be considered high-risk if an awarding agency determines that a grantee

- has a history of unsatisfactory performance on a DOJ grant;
- is financially unstable;
- has an unsatisfactory financial management system (based on 28 C.F.R. 66.20) § 66.20 and 28 C.F.R. § 70.21);
- is noncompliant with previous grant awards' terms and conditions; and/or
- is "otherwise not responsible."

The high-risk designation serves as an early warning system for DOJ. Any DOJ grantee falling into one of the following six categories is automatically designated as high-risk for all DOJ awards:

1. Audit (Office of the Inspector General [OIG] or Single Audit) recommendations remain open more than one year and grantee has not submitted documentation sufficient to close the recommendations.
2. No Corrective Action Plan is provided after 105 days of transmission of audit (OIG or Single Audit) to the grantee from DOJ (for questioned costs less than \$500,000) or after 75 days (for questioned costs of \$500,000 or more).
3. Grantee has open audit recommendations with legitimate (undisputed) questioned costs exceeding \$500,000 (regardless of how long the audit has been open).
4. Grantee has been referred to Treasury Offset Program for collection of unpaid grant funds on a prior DOJ grant.
5. Grantee is on the Community Oriented Policing Services (COPS) office active Restricted Grantees List.
6. Grantee has been recommended for government-wide suspension or debarment by DOJ.

Additionally, DOJ staff can refer grantees for consideration as high-risk to OJP's Office of Audit, Assessment, and Management (OAAM), which administers the high-risk grantee program for the Department.

When a grantee is designated high-risk, OAAM issues an official letter to the grantee notifying it of its status. The letter includes the reasons the grantee was designated as such, terms and conditions, information on what the grantee needs to do to be removed, future penalties that may be imposed if the grantee does not complete timely corrective action, and the process for requesting reconsideration of the high-risk designation or specific conditions.

A high-risk grantee may receive new grants; however, if it does, OJP imposes special requirements. These include withholding funding, increased monitoring, and mandating financial and grants management training until the high-risk issues are resolved. OJP designates grantees as high-risk to ensure appropriate stewardship of federal funds and to enhance OJP programmatic results. The high-risk designation puts a grantee at a substantial disadvantage in the competitive application process.

The high-risk list is one of the Department's tools to address and monitor serious violations, including those that may have crosscutting implications or systemic impacts, such as discriminatory personnel practices, improper grant accounting practices, delinquent audit report submissions, or substantial questioned costs. For instances and allegations of misuse of funds, program or financial non-compliance, and other issues that raise significant concerns about an organization's or an individual's integrity or ability to administer federal grant funds, the Department has created a grant-related suspension and debarment process. While a single agency may impose suspension or debarment, the effect is government-wide.

Additionally, in cases in which unlawful discrimination is alleged, DOJ's normal practice is to follow the enforcement authority pursuant to the nondiscrimination provision of the

Omnibus Crime Control and Safe Streets Act, 42 U.S.C. § 3789d (c)(3), implemented at 28 C.F.R. §§ 42.201, *et seq.* In addition, the Department relies on other civil rights laws, such as the Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d – 2000d-7, implemented at 28 C.F.R. §§ 42.101, *et seq.* and 28 C.F.R. §§ 42.201, *et seq.* Those provisions provide effective tools and procedures to address the misuse of public funds by the Department's grant recipients.

Pardon Attorney

2. **A recent investigation by ProPublica and the Washington Post suggested that there are significant institutional problems with the Office of the Pardon Attorney, the office within the Department of Justice that considers requests to pardon or commute the sentences of people in federal prison. The investigation revealed that, despite more and more people serving ever longer sentences in federal prison, the number of sentence commutations is decreasing. The investigation further found that applicants for commutation who are white are four times more likely to succeed than those who are black and, perhaps most disturbingly, that in very meritorious cases, the Pardon Attorney has failed to pass on to the White House key information that would have been crucial to making a fair decision. Some have called for an outside investigation into this issue.**

What steps are you taking to ensure that the Office of the Pardon Attorney is undertaking its important responsibility in a fair, responsible, and thorough way?

Response:

The Department of Justice is committed to providing a fair, careful, and merit-based evaluation to every clemency application submitted to the Pardon Attorney for the President's consideration. In response to the statistical analysis of a group of 494 pardon applications contained in the reports of ProPublica and The Washington Post, the Department is commissioning a statistical study to review the pardon recommendation process that will seek to assess the full range of important criteria that are considered in evaluating the merits of pardon petitions in an effort to determine whether evidence of a racial disparity in the recommendation process exists. It bears noting that the statistical analysis contained in the published articles did not account for a number of highly important criteria that are considered in the evaluation of a pardon application, such as an applicant's candor throughout the pardon process, remorse and atonement for his or her crimes, acceptance of responsibility for the criminal conduct, post-conviction character and reputation in his or her community, including community service, and the nature and seriousness of the underlying offense, including the actual facts and circumstances of the crime and the role the pardon applicant played in the criminal conduct.

Regarding the media assertions that the Pardon Attorney failed in December 2008 to convey accurately to the White House particular information his office had received concerning a given commutation case awaiting the President's decision, the Department's Office of the Inspector General has initiated a review of the Pardon Attorney's handling of that commutation application and any related issues that arise from that review, and we await these results. As to the numbers of commutations granted in recent years, it should be noted that as a general matter,

commutation of sentence is considered to be an extraordinary remedy that is rarely granted. This fact is demonstrated by the small numbers of such grants by successive Presidents over a period of more than 20 years prior to the administration of President George W. Bush. Specifically, President Carter granted 29 commutations, President Reagan granted 13 commutations during his two terms, all of which were issued between FY 1982 and FY 1985, and President George H.W. Bush granted three commutations during his administration. While President Clinton granted a total of 61 commutations before leaving office, only three were granted during the first six years of his administration, between FY 1993 and FY 1998.

Since 2008, the Office of the Pardon Attorney has undertaken a number of actions that reflect the Department's commitment to the integrity of the executive clemency process and to the merit-based and fair evaluation of all applicants. Among these are the additions of Spanish language and "Frequently Asked Questions" sections to the office website. These additions are intended to ensure that all clemency applicants understand the executive clemency process and the standards by which their petitions for relief will be evaluated by the Pardon Attorney and his staff, as well as the facts that applications are assessed solely on merit and that an applicant need not obtain counsel or secure the support of an elected official in order for his or her application to be considered. Moreover, since his appointment in April 2008, the current Pardon Attorney has increased the office resources devoted to the review and investigation of commutation applications. He currently utilizes a staff attorney and three paralegals to assist him in evaluating each commutation case and preparing the draft recommendation on the matter for the Deputy Attorney General, who determines the recommendation on the case that is transmitted to the Office of the White House Counsel for the President's consideration.

Bulletproof Vest Partnership Grant Program Reauthorization

3. **On February 8, the Committee held a hearing on the reauthorization of the Bulletproof Vest Partnership Grant Act. We heard from law enforcement leaders about its importance, and from the Government Accountability Office on ways to improve the program. I then worked closely with Senator Grassley to make sure this authorization was responsive to recommendations made by the Government Accountability Office in a recent report and at our hearing. On May 17, the Judiciary Committee reported a new 5 year authorization for the Bulletproof Vest Partnership Grant Act with the support of 17 Senators. Given the increase in the past two years of law enforcement officer line of duty deaths, I believe the continuation of this program is extremely important. There is no doubt that it saves lives. When FBI Director Mueller was before the Committee recently, he expressed the same.**

Do you consider the Bulletproof Vest grant program as an important part of the partnership between Federal and state law enforcement? Do you believe that this relatively small investment of taxpayer dollars is an effective and important?

Response:

The Bullet Proof Vest Partnership (BVP) Program provides essential support to state, local and tribal law enforcement to purchase critical life-saving body armor. In 2011, the lives of at least 29 law enforcement and corrections officers were saved by bullet- and stab-resistant vests. Seventeen were wearing protective vests purchased, in part, with funds provided through the Bureau of Justice Assistance's (BJA) BVP Program. In 2011, the program awarded more than \$24 million to nearly 5,000 jurisdictions across the U.S. to be used toward the purchase of more than 188,000 protective vests.

As resources to improve officer safety are being stretched locally and nationally, the BVP Program has provided approximately \$25 million each year to law enforcement and corrections agencies across the nation to help them purchase body armor for their officers. Through the BVP Program, state, local and tribal governments are reimbursed up to 50 percent of the cost of each unit of eligible body armor purchased for sworn law enforcement and corrections officers. In some cases, agencies may be eligible for a waiver, which allows them to be reimbursed the full cost of each unit. Agencies can purchase the best protection available to meet the needs of their officers, as long as the vests are compliant with the latest National Institute of Justice (NIJ) standards at the time of purchase. Pursuant to the authorizing statute, priority funding is made to smaller jurisdictions (population under 100,000), at 50% of the eligible amount requested on the applications. The remaining funds are distributed pro rata to the large jurisdictions (population over 100,000).

BJA is committed to ensuring that taxpayer funds dedicated to the BVP Program are being used wisely, making sure that vests purchased with these funds are actually being worn by officers and protecting lives. To accomplish this mission, beginning in FY 2011 the Department established a requirement that all agencies applying for funding through the BVP Program have a written, mandatory wear policy in place for all uniformed officers. The policy helps ensure accountability in the use of taxpayer resources while providing flexibility to local officials to grant certain exceptions to the policy, since local officials best know their agency and community needs. In developing the new policy, BJA collaborated with national law enforcement and labor groups. Further, both the International Association of Chiefs of Police Executive Board and the FBI's Law Enforcement Executive Development Associations have endorsed the mandatory wear policy by passing a resolution in support of the requirement.

Vests purchased with BVP funds are saving the lives of the officers wearing them. Informal data reports indicate that in fiscal year 2012, BJA has documented and confirmed that at least 33 officers' lives in 20 different states were saved by the protective vests they were wearing. At least 13 of those life-saving vests were purchased, in part, with BVP funds.

Trafficking Victims

4. **I appreciate the support of the Department of Justice to reauthorize the Trafficking Victims Protection Act. I know that fighting human trafficking in all its forms is a priority for the Administration, and I will continue to work to see that this important bill is reauthorized soon.**

I am concerned, however, by recent reports that suggest law enforcement officers may be reluctant to seek “continued presence” status for victims of trafficking. “Continued presence” is a temporary immigration status that enables trafficking victims to remain in the United States while their cases are adjudicated, or while they pursue a civil claim against their traffickers. The status can be granted to a trafficking victim by Immigration and Customs Enforcement (ICE) only when a law enforcement official requests it. We hear from trafficking advocates that some FBI agents are reluctant to request the status for victims in their cases. These stories are anecdotal, but the numbers give some credence to the complaint. In 2010, 574 persons applied for T Visas, but only 198 requests from law enforcement were made to ICE to grant continued presence to a likely trafficking victim. I also understand that although the total number of prosecutions for trafficking offenses went up last year, the number of requests for continued presence status declined. I recognize that there are important factors to balance in considering whether to request continued presence, but I also believe the current system can be improved.

A. What is the Department doing to train FBI agents on the importance of continued presence and when to request this status for victims?

Response:

We would be pleased to review any information indicating that FBI Agents may be reluctant to request “continued presence” status for victims of human trafficking, which is an allegation that is new to us and surprising given the important role victims play in our investigative success. As noted in the question, “continued presence” status enables trafficking victims to remain in the United States while their cases are being adjudicated. This is important to the FBI because having access to trafficking victims is often necessary for a successful prosecution. Both FBI Agents and Victim Specialists receive training regarding human trafficking investigations, including “continued presence” status, and each FBI Field Office receives a Civil Rights Resource Guide that includes information regarding “continued presence” status.

In February 2012, the FBI implemented a victim-centered protocol for working human trafficking cases, distributing this protocol to both Agents and Victim Specialists working human trafficking cases. Included in this protocol was guidance directing Agents to request “continued presence” status for identified undocumented victims in appropriate cases. Because FBI Agents work in tandem with Victim Specialists, the FBI’s Office for Victim Assistance (OVA) has emphasized “continued presence” training for our Victim Specialists to ensure that they are able to assist FBI Agents in requesting this status. The OVA provides training regarding “continued presence” status to each incoming Victim Specialist as part of program orientation, employs a Management Program Analyst to collect “continued presence” applications from Agents and process them through Immigration and Customs Enforcement (ICE), and is developing a guide to assist Agents and Victim Specialists in applying for “continued presence” status for human trafficking victims. This guide will include thorough procedural guidelines on how to apply for “continued presence” status along with other resources.

B. Will you work with me to find ways to ensure this protection can be made more readily available to eligible persons?

Response:

The Department of Justice is committed to ensuring that victims of human trafficking are provided the most comprehensive services possible. We look forward to working with the Committee to ensure that "continued presence" is made available to victims of human trafficking when appropriate.

QUESTIONS POSED BY SENATOR KOHL

5. **At a drug court graduation last month, you emphasized the Obama Administration's deep commitment to expanding drug courts across the nation. As we all know, drug courts not only help community members get back on their feet, they also reduce crime and save taxpayers money. And in this economic climate, drug courts and the programs that support them must do more with fewer dollars. Yet despite the economic downturn, Wisconsin has doubled its number of drug courts in the past two years, and has seen promising results. A recent GAO report applauded the Justice Department for revising the standards used to measure how well drug courts are performing. But, it noted that the Department still needs to determine how to assess and evaluate the results from these measurements to ensure that resources are used more efficiently. What steps has the Department taken to implement GAO's recommendation and improve the efficiency of drug courts?**

Response:

The Office of Justice Programs (OJP) agreed with the Recommendation for Executive Action described in the GAO report, "Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts" (GAO-12-53). In the fall of 2012, the Department's Bureau of Justice Assistance (BJA) completed an analysis of two quarters of performance measures data submitted by Drug Court grantees to identify possible inaccuracies, including, but not limited to, missing data, outliers, and duplicate counts. This analysis resulted in revisions that went into place on January 1, 2013. BJA anticipates that the assessment of data quality and refinement of performance measures will be an ongoing process. In the spring of 2012, BJA will publically release a Drug Court Program performance report for FY 2012.

In addition, OJP will continue to ensure that any revision to the Drug Court measures or the process to revise those measures is transparent, and results in high quality, successful metrics to inform management's key decisions on program operations. BJA will continue to keep a record of grantee feedback and will ensure that revisions to the measures are documented in accordance with GAO Best Practices standards regarding (1) whether the name and definition of the measure is consistent with the methodology used to calculate it; (2) whether the measure is reasonably free from bias; (3) whether the measure meets the expectation of the program; and (4) BJA's rationale for refining each performance measure, including the scope and nature of any relevant stakeholder comments. BJA continues to implement this recommendation.

6. **As you know, on March 31, 2010 the President signed into law the Prevent All Cigarette Trafficking (PACT) Act of 2009, Public Law 111-154. The PACT Act changed the laws governing the sale of smokeless tobacco and cigarettes, including "roll-you-own" (RYO) tobacco. In order to avoid the new law's shipping and record-keeping requirements, some sellers have relabeled RYO tobacco as "pipe tobacco," "alternative tobacco," or "dual-purpose tobacco" to appear to be exempt from the law. These sellers continue to sell their products online, often brazenly explaining on their websites why the RYO tobacco was relabeled and assuring**

customers that the relabeled products have changed in name only. Is the Justice Department aware of this problem, and does the Department have the authority to stop this blatant effort to circumvent the law?

Response:

ATF is aware of this problem through its attendance at the annual State Tobacco Administrator's Conference. Importantly, the Department of Treasury's, Alcohol and Tobacco Tax and Trade Bureau (TTB) regulates the manufacture, importation, and classification of tobacco products at the federal level under the Internal Revenue Code (IRC). If a remote tobacco seller is misclassifying its tobacco in order to avoid PACT Act requirements, then TTB would first need to determine that there was an IRC violation in order for there to be a potential PACT Act violation.

7. In 2010, the Justice Department, in conjunction with the Department of Agriculture, held workshops in several locations across the nation dealing with the issue of competition in agriculture. You testified at these workshops and heard from dozens of farmers and ranchers about these concerns that antitrust law was not being vigorously enforced in the agricultural sector.

A. Last month, the Justice Department submitted a report on these workshops, but many wonder if anything else will result from them. Beyond the few examples of antitrust cases to challenge mergers listed in the report, what concrete results or actions can you point to resulting from these agricultural competition workshops?

Response:

First, it is important to recognize that any merger challenge in the agriculture industry has a significant impact on competition in the industry as a whole. A merger challenge does more than just prevent harm from the specific merger at issue. It also serves an important deterrent function, letting the industry know that the Department will aggressively pursue and challenge proposed anticompetitive mergers (as well as other anticompetitive practices). Thus, the Department's merger challenges are significant actions that help all farmers and consumers, not just those immediately affected by the particular merger at issue.

In addition, a number of other concrete results and actions have resulted from the workshops. In addition to affording opportunities for the Department to hear and learn from farmers, ranchers, cooperatives, processors, and retailers, the workshops also provided opportunities to further solidify our working relationships with stakeholders and other agencies at the federal and state levels. Actions resulting from the workshops also include the following:

- The Department of Justice and the Department of Agriculture (USDA) have worked to improve interagency cooperation and explored new opportunities for harnessing each other's expertise and improving enforcement of laws designed to protect producers and

consumers. They have streamlined the process for considering producer complaints and addressing producer concerns. This has eliminated previously existing backlogs.

- USDA has taken a number of steps to improve enforcement of the Packers and Stockyards Act. The Grain Inspection, Packers and Stockyards Administration (GIPSA) has made major strides to improve its processes and to work more efficiently with essentially the same budget and staff. This aids GIPSA in investigating complaints and conducting routine inspections.
- In addition, GIPSA has issued two final rules related to competition. The first rule established basic fairness for poultry contracts, and, in particular, to ensure that producers no longer have their contracts arbitrarily cancelled without notice. The second rule was issued on December 9, 2011, and contained some of the revised provisions from the June 2010 proposed rule related to the 2008 Farm Bill. While smaller in scope than initially anticipated, the final rule contains significant provisions. It establishes new criteria to determine whether a poultry dealer has provided reasonable notice to growers when delivery of birds is suspended, when requiring additional capital investments is a violation of the Packers and Stockyards Act, and when determining if a packer, swine contractor, or live poultry dealer has provided a grower reasonable time to remedy a breach of contract. Finally, the rule allows growers to decline arbitration and provides criteria for determining if the arbitration process is fair for the producer.

We will continue our efforts to promote competition in the agricultural sector, as farmers and ranchers of all sizes deserve to compete in fair and transparent marketplaces. The Department continues to build on the foundation laid by the workshops as we look into potential anticompetitive practices in the agricultural sector. We received helpful information on a wide variety of crucial issues, including contracting practices, the standards that govern buyer power, and the implications of thin spot markets in industries such as dairy and livestock.

- B. Some have suggested that the Justice Department develop agricultural competition guidelines, describing more precisely what conduct in the agricultural sector violates antitrust law, just as the Department and FTC have done in other sectors, such as health care. This would provide great guidance for industry participants and spell out more clearly what conduct the Department targets. What is your view about writing such guidelines?**

Response:

The Department does not believe there is a need for any industry-specific merger guidelines involving agricultural competition. The revised (2010) Horizontal Merger Guidelines issued by the Department and Federal Trade Commission (FTC) already provide merger guidance and apply consistently to mergers across the entire economy. The Merger Guidelines have been and continue to be valuable because they apply to all sectors of the economy, and any review or update of these Guidelines would include consideration of unique factors to agriculture and all other sectors. Merger policy is sufficiently flexible to address market conditions that may be unique to agricultural markets.

It should be noted that when the Department and FTC revised the Merger Guidelines, particular attention was given to issues common in agriculture industries, including monopsony power, and the revised Guidelines include examples specific to agriculture. In addition, the Department and FTC's Commentary to the Horizontal Merger Guidelines (2006) provides several examples of how agricultural matters are reviewed. This commentary, the Department's merger challenges in agricultural markets, and competitive impact statements issued as part of those challenges demonstrate that merger policy under the Guidelines has protected and will continue to protect consumers and maintain competition in agriculture industries.

To date, the federal antitrust laws apply across virtually all industries, with the overriding objective of protecting competition for the benefit of consumers. Introducing different legal standards unique to agriculture industries could prejudice the analysis in both agriculture and non-agricultural industries, decrease transparency of antitrust enforcement, deter efficient transactions, and lead to inconsistent conclusions, which would be harmful to consumers and competition. The Department believes that the legal standard appropriate to deter anticompetitive behavior in all sectors of the economy should apply equally to protect competitive forces in agriculture industries, with the understanding that antitrust must be cognizant of the particular facts of competition in agriculture industries.

8. The Justice Department, working with the FDA's Office of Criminal Investigation, "OCI", has settled several high dollar, high profile cases involving illegal off-label promotion of prescription medication. Most recently, the Department won a \$1.5 billion case against Abbott Laboratories for promoting off-label use of anti-psychotics. In this case and others, the illegal conduct led to gross overuse of certain drugs in nursing homes, putting company profits ahead of patient well-being. The DOJ's success in winning large monetary penalties is commendable. Yet, despite dozens of hundred-million and billion dollar fines, companies continue to engage in illegal off-label promotion.

A. Are these monetary penalties sufficient to deter this harmful conduct? Do we need to be more aggressive in pursuing criminal penalties and prison sentences, particularly for corporate executives?

Response:

As the Attorney General stated in his prepared remarks, the Department has taken unprecedented enforcement actions against pharmaceutical companies and their executives. Our criminal and civil prosecutors have recovered billions of dollars for federal health care programs, collected billions more in fines, and put numerous individuals behind bars. The Abbott Laboratories Inc. matter that you mention in your question – a \$1.5 billion criminal and civil resolution announced on May 7, 2012 – and the more recent GlaxoSmithKline LLC matter – a \$3 billion criminal and civil resolution announced on July 2, 2012 – are only two in a series of history-making prosecutions the Department has brought since 2009.

These prosecutions result in much more than monetary payments, however. Working with our partners at the Department of Health and Human Services, we have demanded that pharmaceutical companies change the way that they do business. In plea agreements, in civil settlement agreements, and in Corporate Integrity Agreements, the government has included wide-ranging and innovative reform provisions that, among other things, require that pharmaceutical companies improve their internal compliance mechanisms, report possible violations of the law to the government, and modify their compensation structures for their highest-level executives and their sales forces.

Our coordinated efforts work. Pharmaceutical companies are changing.

That said, the Attorney General agrees that there is more to be done. We continue to devote considerable resources to an aggressive pursuit of investigations into unlawful conduct in the pharmaceutical industry. These ongoing investigations focus on companies and their employees. Where appropriate, we will not hesitate to indict responsible individuals, bring them to trial, and advocate for stiff prison sentences. Our record in this regard exemplifies our resolve: for example, we have successfully prosecuted individual corporate executives for engaging in off-label promotion of prescription drugs, for making fraudulent statements about the effectiveness of drugs, for carrying out unauthorized medical experimentation on human patients, and for failing to follow proper manufacturing procedures.

B. When the OCI brings cases to the Justice Department, how often does the Department decline to pursue criminal prosecutions and prison sentences? Is it the strength of the cases, resources, or something else?

Response:

The Department has a close and productive relationship with the Food and Drug Administration Office of Criminal Investigations (OCI). Working with OCI at every level, we have brought criminal prosecutions against companies and individuals all over the country, from the smallest prescription drug diversion matter to the largest pharmaceutical marketing case.

The decision to prosecute any organization or individual for violations of our nation's food and drug laws is no different from the decision to prosecute any defendant for violations of any criminal law. That profound decision, one with far-reaching consequences even in the smallest of cases, is guided by a set of principles that every Department attorney should look to in every case. The principles are set forth in detail at Chapter 9-27.000, et seq. of the United States Attorneys' Manual. The application of those principles in any given instance – that is, the decision to charge a particular organization or individual – will depend on the unique facts and circumstances of the criminal investigation.

QUESTIONS POSED BY SENATOR FEINSTEIN

Recommendations by Mayors Against Illegal Guns

9. **Gun violence continues to claim too many innocent lives. Although the Congress remains divided over how our federal government should safely regulate firearms, all sides agree publicly that we should better enforce existing laws.**

As you know, nearly three years ago, in August 2009, the Mayors Against Illegal Guns published 40 recommendations for the Administration to enhance enforcement of existing gun laws. Most of the recommendations were directed to DOJ component agencies. I have raised these recommendations with you on several occasions, but I have yet to receive a substantive response as to whether DOJ is implementing the recommendations. I am becoming increasingly frustrated by the Justice Department's apparent lack of progress on this issue.

Can you tell me what progress the Department has made to implement the Mayors' recommendations?

Response:

On January 16, 2013, President Obama announced a plan to reduce gun violence and protect our children and communities. The plan – entitled “Now is the Time” – is based on recommendations from Vice President Biden and a group of cabinet officials, including me, that were informed by meetings we conducted with over 200 groups, including Mayors Against Illegal Guns, following the tragic shooting at Sandy Hook Elementary School in Newtown, Connecticut. The President's plan contains a comprehensive set of legislative initiatives and executive actions aimed at reducing gun violence. For example, the President has called on Congress to pass legislation that will establish a universal background check system, ban assault weapons and high-capacity magazines, and take other common-sense steps to reduce gun violence. The President also announced 23 executive actions that will give law enforcement, schools, mental health professionals, and the public health community the tools they need to help reduce gun violence. These executive actions include strengthening our background check system, helping schools hire more resource officers and counselors, and directing the Center for Disease Control to conduct research into the causes and prevention of gun violence. The Department is working diligently to accomplish these executive actions, and stands ready to provide technical assistance on legislative proposals.

State Agency Reporting to NICS

10. **As you know, the FBI's National Instant Criminal Background Check System (NICS) contains the database of all prohibited firearms purchasers and assists in screening potential gun buyers to keep firearms out of the hands of convicted felons, the mentally ill, drug abusers, and other categories of dangerous people. However, the system is missing millions of records because state and federal agencies have been slow to report records. NICS is only as good as the quality of the records it**

contains – garbage in, garbage out. While I’m pleased that California has been a leader in submitting relevant records to the system, 23 states and the District of Columbia have submitted fewer than 100 mental health records.

Why are so many states not reporting mental health records as they are required to do?

Response:

The NICS Improvement Amendments Act of 2007 (NIAA) does not require states to submit information to the National Instant Criminal Background Check System (NICS). Instead, it relies on a series of financial incentives—both in terms of rewards and penalties—to encourage states to submit information to the NICS. States that do not meet the NIAA’s record completeness goals are not eligible for grant incentives (such as the waiver of the 10% matching requirement under the National Criminal History Improvement Program) and may be subject to grant penalties. Note that mental health information submitted to NICS is not complete mental health records for all persons with mental illness but a limited data set of administrative data for individuals with mental health adjudications and involuntary commitments.

The Department, primarily through the FBI and the Bureau of Justice Statistics, assists the states in their efforts to identify relevant information and make it available to the NICS. Numerous state agencies, however, have, alerted the Department to challenges they face in these efforts. For example, for certain categories of NICS-relevant information (such as information pertaining to mental health adjudications), state privacy laws may restrict the sharing of information in a way that renders it unavailable to the NICS. In addition, many states lack adequate infrastructure to allow for the effective and efficient sharing of information between local, county, and state agencies. Some states lack the human resources needed to collect, analyze, code, and organize records relevant to the NICS. In addition, there is widespread confusion over what federal and state privacy laws allow. Many states do not have a centralized file or database where these records are maintained, or records are in a legacy system that is no longer available for making inquiries, or information is contained in paper files that are not stored in a manner that allows for practical searching or automating. Many states are subject to budgetary constraints that limit their ability to address these challenges. In addition, in order to obtain NIAA grant funding, states must create and implement a qualifying mental health relief from disabilities program, which is time and labor intensive and requires resources. Each of the above factors may have affected the progress made by states in providing relevant records to the NICS, including those specific to mental health.

Notwithstanding these challenges, the states have made progress in submitting relevant information. From the passage of the NIAA in January 2008 to May 31, 2012, the number of records submitted to the NICS Index by state agencies increased by approximately 142 percent, while the number of disqualifying mental health submissions increased by approximately 270 percent.

These conclusions – both the increase in the number of mental health records available to NICS, and the challenges states face in providing them – are reflected in the GAO report entitled

“Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks,” released on July 16, 2012. GAO made two recommendations: (1) that the Department share state promising practices in making mental health records available; and (2) that the Department assess the effectiveness of the NIAA’s rewards and penalties and how to best implement them. The Department has agreed with both recommendations.

Federal Agency Reporting to NICS

- 11. The NICS Improvement Amendments Act requires all federal agencies to provide to the FBI, on at least a quarterly basis, “any record of any person” who is prohibited from purchasing firearms. (P.L. 110-180, § 101(a)(4).**

Despite this requirement, a document that I understand came from the FBI shows that 52 out of 61 federal agencies have never submitted a single mental health record.

- A. How does DOJ work with the FBI to collect this information from the federal agencies that are required to report records of prohibited firearms purchasers?**

Response:

The Department for the last few years has engaged in extensive outreach to assist federal agencies in their efforts to comply with the information-sharing mandates of the NIAA, providing resources regarding the requirements of the NIAA (including training conferences, written guidance, and available Web sites), assisting them (individually) in determining whether they create information relevant to the NICS, helping them to submit information to the NICS electronically, working to overcome information-sharing barriers, and helping those agencies that adjudicate mental health to address the requirements surrounding mental health disabilities programs.

On January 16, 2013, the President issued a Memorandum directing the heads of all executive departments and agencies to prioritize the submission on a regular and ongoing basis of relevant Federal records to the National Instant Criminal Background Check System (NICS). That Memorandum directed me to provide guidance to federal agencies regarding the identification and provision of relevant records within 45 days, and the Department has been consulting with affected federal agencies as it drafts that Guidance. Within 60 days of the issuance of the Guidance, the Presidential Memorandum further directs all agencies to submit a report to the Department advising whether they possess relevant records and setting forth an implementation plan for making information in those records available to the NICS. Agencies that possess relevant records are also directed to submit a report that describes their progress in submitting all relevant records to the NICS by October 1, 2013, and annually thereafter. We believe that these efforts are critical to maximizing the amount of relevant information submitted to the NICS and enhancing public safety.

- B. Does the FBI or DOJ send reminders to the agencies to encourage these submissions? If not, why not?**

Response:

Please see the response to question 11(A), above.

- C. Does DOJ plan to take steps to improve compliance with this requirement?**

Response:

Please see the response to question 11(A), above.

- D. How does DOJ enforce this requirement against agencies that have not submitted the required records?**

Response:

Please see the response to question 11(A), above.

Rogue Online Pharmacies

- 12. The unlawful sale of prescription drugs online by rogue websites is a dangerous and widespread problem. In a report published in April, the National Association of Boards of Pharmacy found that 96% of the nearly 10,000 Internet pharmacies it reviewed were not in compliance with pharmacy laws or established industry standards. That means that at least 9,000 Internet pharmacies pose a danger to patients.**

Illegitimate drug sellers appear to be licensed, but often sell counterfeit drugs with contaminated or inaccurate ingredients, such as paint, floor wax, and boric acid. Patients who have taken these drugs have suffered heart attacks, brain damage, and even death.

What action is the Department taking to investigate and prosecute online drug sellers who violate the Federal Food, Drug, and Cosmetic Act; the Ryan Haight Act; and other laws by selling counterfeit or contaminated drugs?

Response:

The National Association of Boards of Pharmacy (NABP) report found that approximately 11% of the sites reviewed purportedly sold controlled substances, a matter within the investigative jurisdiction of the Drug Enforcement Administration (DEA). The Ryan Haight Online Pharmacy Consumer Protection Act, enacted in 2008, and effective in April 2009, virtually eliminated the scourge of domestic-based brick and mortar pharmacies that were involved in internet controlled substance distribution, as well as the domestic-based internet sites that they serviced. The law,

among other things, requires pharmacies to obtain a modification of their DEA registration in order to dispense controlled substances by means of the internet. DEA conducts a comprehensive investigation of all applications for a special internet registration. To date, no modified registration has been approved. The DEA and the Department, however, remain vigilant in identifying online pharmacies that illegally distribute prescription drugs that contain controlled substances. Internet traffickers have adapted to the law, for example by selling legend drugs and Fioricet (containing butalbital, a Schedule III controlled drug), which is exempt from administrative regulations but not criminal sanctions under the CSA. DEA maintains a dedicated unit of Special Agents and Diversion Investigators in its Special Operations Division and the Pharmaceutical Investigations Section at DEA Headquarters to identify and coordinate investigations involving online pharmacies. Recent information and intelligence indicate that many of the existing online pharmacies are located offshore and not subject to the regulatory oversight of DEA, although they may be subject to criminal sanctions for unlawfully distributing controlled substances and misbranded, unapproved, and counterfeit drugs to United States customers. In many cases, internet pharmacies that are located overseas are not legitimate pharmacies. Instead, they are offshore criminal enterprises owned and operated by organizations, groups and individuals who utilize the internet and available technology to facilitate the distribution of controlled substance pharmaceuticals under the cloak of anonymity.

In the United States, pharmacies authorized to dispense prescription drugs are licensed in the states where they operate. Unlicensed individuals, that use the internet to facilitate the unlawful sale of adulterated, misbranded, counterfeit or contaminated legend pharmaceuticals, are in violation of the Federal Food, Drug, and Cosmetic Act (FDCA). Drug products that violate the FDCA are within the primary investigative jurisdiction of the Food and Drug Administration (FDA). The Department has a close and productive relationship with the FDA's Office of Criminal Investigations (OCI). Working with FDA at every level, we have brought criminal prosecutions against companies and individuals all over the country, from the smallest drug counterfeit matter to the largest pharmaceutical marketing case.

Synthetic Drugs

13. **The latest *Monitoring the Future* Survey on drug use indicates that one in nine high school seniors have used synthetic drugs in the past year. This means that synthetic drugs are now the second most used drug among this age group, after only marijuana.**

The FDA reauthorization bill that the Senate passed last week included a provision to place 28 synthetic substances in Schedule I of the Controlled Substances Act, making the sale and possession of these substances illegal. As importantly, the legislation included a provision to extend the timeline for the DEA to emergency schedule substances. This is significant, because it would allow the DEA to quickly pull new synthetic drugs from the market in a way that they have not been able to do in the past.

A. Considering there are hundreds of chemical compounds that can be used to produce these dangerous drugs, if this provision becomes law, how will your Department implement it?

Response:

On July 9, 2012, the Synthetic Drug Abuse Prevention Act of 2012 was signed into law as part of S.3187, the Food and Drug Administration Safety and Innovation Act. This legislation provided a critical boost to addressing the threat of synthetic drugs by placing 26 synthetic compounds commonly found in synthetic marijuana, synthetic stimulants, and hallucinogens in Schedule I of the Controlled Substances Act. In addition to explicitly naming 26 substances, the legislation creates a definition for "cannabimimetic agent," creating criteria by which similar synthetic compounds are controlled.

DEA routinely monitors the marketplace for individuals and organizations manufacturing and distributing dangerous and abused synthetic drugs with no accepted medical use in treatment, and DEA utilizes available tools to address the threat of these substances, including administrative and temporary scheduling and enforcement action. . With respect to the recent legislation, DEA will aggressively investigate those individuals and organizations engaged in the unlawful manufacture, distribution, possession, import, and export of the newly controlled synthetic substances.

DEA will continue to purchase products at retail outlets to analyze and identify new dangerous and abused synthetic drugs that were not controlled by the legislation and will utilize its administrative authority to schedule those substances. If appropriate, DEA will also utilize the analogue statute to investigate and refer for prosecution any individuals who manufacture or distribute any synthetic compound that is an analogue of a Schedule I or II controlled substance. DEA laboratories continue to experiment with emerging synthetic substances and analyze evidence for prosecutions and for use in administrative scheduling actions. DEA scientists are assisting federal, state and local prosecutors throughout the country as expert witnesses when needed. Information developed by DEA investigations and forensic laboratories is continually provided to state and local law enforcement, pharmacists, and the medical community at conferences across the United States. Finally, Special Agents and Diversion Investigators assigned to DEA's Synthetic Drugs and Chemicals Section are coordinating synthetic drug investigations with field investigators throughout the country to ensure that all available investigative resources are directed appropriately and all investigative leads are passed to the appropriate investigator for follow-up.

As an example of DEA's actions to address the problem of synthetic drugs, on July 25, 2012, the DEA led a multi-agency, nationwide takedown Operation Log Jam. Operation Log Jam was conducted jointly by the DEA and ICE, with assistance from the Internal Revenue Service Criminal Investigations, U.S. Postal Inspection Service, U.S. Customs and Border Protection, the FBI, Food and Drug Administration's Office of Criminal Investigations, as well as countless state and local law enforcement members in more than 109 U.S. cities. It targeted every level of the synthetic designer drug industry, including retailers, wholesalers, and manufactures. As a result of Operation Log Jam, more than 90 individuals were arrested and more than five million

packets of finished designer synthetic drugs were seized in the first-ever nationwide law enforcement action against the synthetic designer drug industry. Additionally, more than \$36 million in cash was seized.

As you note, the recent legislation also enhances the tools available to DEA to combat the abuse of new drugs that will appear in the future by doubling the length of time the DEA may temporarily place a substance in Schedule I pending permanent scheduling. The additional time will allow DEA to thoroughly conduct the complex requisite research and scientific analysis to support a final scheduling determination by the DEA Deputy Administrator in conjunction with the Secretary of Health and Human Services. For example, in September 2011, DEA used this temporary scheduling authority to initiate temporary Schedule I control of methylone. Prior to passage of the Synthetic Drug Abuse Prevention Act of 2012, the statute would have afforded the Administration with 1 year (plus a 6 month extension), or April 2013, to complete permanent control. However, with passage of this Act, the Administration will now have up to an additional 18 months to complete this control action.

- B. I have heard anecdotally that some gas stations and smoke shops are selling synthetic drugs that are reformulated to evade the DEA ban and marketing products to make it seem that they do not have illegal chemicals in them. One product is even called "Barely Legal." Once this new law is on the books, how will DEA dedicate resources to enforce it and keep synthetic drugs off the shelves?**

Response:

Please see the response to question 13(A), above.

Prescription Drug Abuse Epidemic

- 14. According to the Obama Administration, prescription drug abuse is the nation's fastest-growing drug problem. The Centers for Disease Control and Prevention (CDC) have classified prescription drug abuse as an epidemic.**

Obviously, the pharmaceutical industry needs help in properly regulating and enacting better safeguards surrounding this epidemic of illegal diversion and abuse. I want to help, as do most of my colleagues in the Senate.

- A. Can you offer any legislative suggestions or guidance to fix this problem? What steps do we need to take in order to aggressively address this epidemic?**

Response:

The Obama Administration has and continues to address prescription drug abuse on all fronts while ensuring that legitimate patients have access to the medications they need. In 2011, the Office of National Drug Control Policy released its Prescription Drug Abuse Prevention Plan,

which expands upon the Administration's National Drug Control Strategy. The Prescription Drug Abuse Prevention Plan includes four major areas to reduce prescription drug abuse, and the Department is fully engaged in all four areas in order to address this epidemic.

- **Education.** A crucial first step in tackling the problem of prescription drug abuse is to educate parents, youth, and patients about the dangers of misusing prescription drugs and proper storage and disposal of prescription drugs. Additionally, the Prescription Drug Abuse Prevention Plan, released by the Administration in April 2011, calls for requiring prescribers to receive education on proper opioid prescribing.
- Through a Bureau of Justice Assistance-funded project with the Partnership for a Drug-Free America (the Partnership), law enforcement agencies across the nation are collaborating to educate their communities about the dangers of prescription drug abuse and misuse and to provide information, tools, and resources to educate and empower concerned citizens so as to address these threats in a proactive and informed way
- **Monitoring.** Prescription Drug Monitoring Programs (PDMPs) are state-administered databases that monitor the prescribing and dispensing of controlled substances. To address this growing public health problem, we will implement PDMPs in every state to reduce "doctor shopping" and diversion, and enhance PDMPs to make sure they are used and can share data across states and are more easily used by healthcare providers to enhance their understanding of patients' controlled substance history and enable providers to intervene when there are signs of prescription drug misuse. Through the Bureau of Justice Assistance's Harold Rogers Prescription Drug Monitoring Program (PDMP), the Department has provided grants and technical assistance to states to enable them to track controlled substances prescribed by practitioners and dispensed by pharmacies and practitioners. The Substance Abuse and Mental Health Services Administration (SAMHSA) Prescription Drug Monitoring Integration and Interoperability Project also supports PDMPs with competitive grants to increase the interoperability between State PDMPs and to integrate PDMPs with Electronic Health Records (EHRs) within the States.
- **Proper Medication Disposal.** Develop convenient and environmentally responsible prescription drug disposal programs to help decrease the supply of unused prescription drugs in the home. A large source of the prescription drug abuse problem is a direct result of what is in Americans' medicine cabinets. To prevent diversion and abuse, the Department is committed to providing individuals with a secure and convenient way to dispose of medications. Between September 2010 and September 2012, the DEA led five National Prescription Drug Take Back Days from which the DEA and its state, local, tribal law enforcement, and community partners have removed over 1.5 million pounds (774 tons) of medication from homes across the country. The Secure and Responsible Drug Disposal Act, enacted in October 2010, amends the Controlled Substances Act to authorize ultimate users to deliver controlled substances to another person for the purpose of disposal in accordance with regulations promulgated by DEA, without violating the law. On December 21, 2012, DEA published a comprehensive Notice of Proposed Rulemaking on disposal. In order to combat the prescription drug abuse epidemic, DEA will continue to coordinate National Prescription Drug Take Back Days until final regulations are in place.

- **Enforcement.** Provide law enforcement with the tools necessary to eliminate improper prescribing practices and stop pill mills. With DEA as the lead agency, the Department continues its aggressive civil and criminal enforcement actions against all levels of the distribution chain, including prescribers, dispensers, and distributors to stem the flow of illegal drugs.

B. What about the Internet? How can we assist in dealing with rogue Internet pharmacies that are increasingly contributing to this problem?

Response:

As stated above, a recent review by the National Association of Boards of Pharmacy (NABP) found that approximately 11% of internet websites selling prescription drugs purportedly sell controlled substances, a matter within the investigative jurisdiction of the Drug Enforcement Administration (DEA). The implementation of the Ryan Haight Online Pharmacy Consumer Protection Act, enacted in 2008 and effective in April 2009, virtually eliminated the scourge of domestic-based brick and mortar pharmacies that were involved in internet controlled substance distribution, as well as the domestic based internet sites that they serviced. The law, among other things, requires pharmacies to obtain a modification of their DEA registration in order to dispense controlled substances by means of the internet. DEA conducts a comprehensive investigation of all applications for a special internet registration. To date, no special registration has been approved. The DEA and the Department, however, remains vigilant in identifying online pharmacies that illegally distribute controlled substance prescription drugs. DEA maintains a dedicated unit of Special Agents and Diversion Investigators in its Special Operations Division and the Pharmaceutical Investigations Section at DEA Headquarters to identify and coordinate investigations involving online pharmacies. Recent information and intelligence indicates that many of the existing online pharmacies are located offshore and not subject to the regulatory oversight of DEA, although they may be subject to criminal sanctions for unlawfully distributing controlled substances, and misbranded, unapproved, and counterfeit drugs to United States customers. In many cases, internet pharmacies that are located overseas are not legitimate pharmacies. Instead, they are offshore criminal enterprises operated by organizations, groups and individuals who utilize the internet and available technology to distribute controlled substance pharmaceuticals under the cloak of anonymity.

There remains a disparity between the Controlled Substances Act (CSA) and the FDCA in that the Ryan Haight Act, which amended the CSA, defines "valid prescription" for prescription controlled substances, but no such definition exists in the FDCA. This has led to online pharmacy organizations continuing to sell legend drugs without the benefit of a valid doctor-patient relationship. Such online drug sales open the door to counterfeit and contaminated drugs reaching U.S. citizens.

The significant reduction in unlawful domestic pharmacies gave way to domestic pain clinics—"pill mills"—as one of the primary sources of diversion. DEA is working diligently to address this problem at all levels within the distribution chain. For example, DEA conducted Operation Pill Nation I and II, designed to identify and investigate rogue pain clinics in south and central

Florida. These investigative efforts have resulted in the closure of more than forty clinics, the arrest of more than 105 individuals including physicians, clinic owners and employees, and the seizure of more than \$19 million in assets. DEA is also conducting civil and regulatory investigations of pharmacies and wholesale distributors that are not in compliance with the Controlled Substances Act or its implementing regulations. DEA is expanding the use of Tactical Diversion Squads (TDS) across the United States. These TDS groups combine the skill sets of Special Agents, Diversion Investigators and state and local law enforcement officers in a task force setting dedicated solely to diversion investigations. There are currently 48 operational TDS groups across the United States, and DEA plans to have additional groups operational by the end of FY 2012.

- C. There are significant gaps in educational training on pain management, substance abuse, and appropriate prescribing amongst healthcare prescribers. Do you think it is necessary for DEA registrants of controlled substances who prescribe Schedule II, III, IV, and V substances to have education or training related to abuse and addiction of the substances they prescribe?**

Response:

As outlined in the Administration's *Plan*, we continue to support mandatory education, notably on proper prescribing and identifying the signs of abuse, and efforts to work with Congress to achieve this. The Prescription Drug Abuse Prevention Plan points out that prescribers and dispensers, including physicians, physicians assistants, nurse practitioners, pharmacists, nurses, prescribing psychologists, and dentists, all have a role to play in reducing prescription drug abuse. It is important to note that many of these medical professionals receive little training on the importance of appropriate prescribing and dispensing narcotic pain relievers, which is the primary class of controlled substance pharmaceuticals abused today.

Educating prescribers and dispensers of controlled substance pharmaceuticals on the potential abuse caused by these substances is critically important.

Drug Endangered Children

- 15. Estimates suggest that roughly 9 million children live in homes with adults who use illicit drugs. The Obama Administration's 2010 National Drug Control Strategy mandated the formation of an Inter-Agency Task Force on Drug Endangered Children to support the identification of best practices to deal with this problem.**

While no federal policy recommendations came out of this task force, I believe we should discuss how federal assistance can address this problem and what states can do to implement a better strategy on drug endangered children.

- A. I would like to know your thoughts on how to ensure there is uniform training to assist state, local, and tribal governments in identifying, responding to, and providing services for drug endangered children?**

Response:

An essential mission of the Federal Interagency Task Force on Drug Endangered Children (Task Force) is to identify and coordinate training programs to better serve drug endangered children (DEC). While uniform training would be ideal, it may not be feasible at this time due to funding constraints on training availability and participation, and because local jurisdictions and law enforcement agencies will have different funding capacities for addressing this issue. The Department has, however, identified core concepts that all training programs should include. The Task Force supports collaborative models and specialized training for law enforcement officials, child protective services and health professionals, and other first responders that promote increased awareness of drug endangered children. The Task Force published these tools, and several others on an online toolkit of promising practices, which should improve the ability of professionals at all levels of government to identify and serve drug endangered children. The Department is also working to provide more training for state, local, and tribal governments tailored to their specific needs. For example:

1. The Office of Community Oriented Policing Services (COPS) funded the National Alliance for Drug Endangered Children, which developed a core curriculum and “train the trainer” program aimed at promoting awareness and developing a collaborative response to drug endangered children among multiple disciplines. Thousands of state, local and tribal law enforcement officers have received the training directly; it is now also available online.
2. The Executive Office for U.S. Attorneys (EOUSA) and the COPS Office coordinated trainings for professionals working in tribal communities, including a COPS Tribal Meth Summit and an upcoming Core DEC tribal “train the trainer” session.
3. The EOUSA is also developing a comprehensive training video for United States Attorney Offices on the obligations of Department personnel to report suspected child abuse. Included in this training will be ways to identify abused, neglected and drug endangered children.
4. The Office for Victims of Crime is creating culturally appropriate media tools/videos for training and raising awareness about drug endangered children in Indian Country.
5. The Drug Enforcement Administration (DEA) provides drug endangered children training at its headquarters and throughout its domestic and international offices. DEA’s Victim Witness/DEC Program makes drug endangered children training available to federal, state and local law enforcement and many nonprofit organizations, especially those focused on child victims and Indian Country. DEA routinely coordinates with organizations focused on drug endangered children, including the National Drug Endangered Children Training and Advocacy Center (NDEC-TAC) and Regional Offices, National Alliance for Drug Endangered Children (NADEC) State Alliances, the National Child Advocacy Center (NCAC), as well as the Administration for Children and Families (ACF).
6. The DEA is working with the U.S. Marshalls Service to provide training specific to federal law enforcement officers about how to work with state, local and tribal governments to protect these children.
7. The Department of Justice collaborated in 2012 with the Department of Homeland Security, Federal Law Enforcement Training Centers, to develop a Drug-Endangered

Children Training Program in support of the White House Office of National Drug Control Policy's Drug Endangered Children Initiative. The goal of this training program is to more effectively prepare federal, state, local, rural, and tribal law enforcement personnel to identify intervention strategies and improve investigations involving children found in homes where drugs are used, sold, and produced.

B. What policies can the government, at all levels, implement to better identify and respond to this problem?

Response:

Policies that promote interagency partnerships are critical for effective and systemic responses to the complex needs of drug endangered children. Governments are more likely to be proactive and effective if agencies and organizations coordinate their resources. Through the work of the Federal Interagency Task Force on Drug Endangered Children, the Department has found that the communities most successful in getting these children prompt access to treatment are those which have established multidisciplinary, multijurisdictional teams including representatives from law enforcement, child protective services, and the courts, as well as health professionals, educators, victim services specialists, and child advocates.

C. If the inter-agency policy committee were to reconvene to work on this issue, what federal policies deserve closer examination?

Response:

On March 15, 2011, the Department convened the Focus Group on Legislation and Policy Related to Drug Endangered Children to identify promising approaches to effectively address the issue of drug endangered children to inform the work of the Task Force's Legislative and Policy Subcommittee. The overall goal of the Subcommittee is to identify and analyze existing federal, state, and local laws and policies. Experts representing multiple disciplines were invited to share promising approaches and discuss current needs and challenges to consider in developing relevant legislation and policy. The focus group addressed five key topics: child welfare statutes, criminal statutes, sentencing, specialized courts, and reentry. Issues considered problematic and requiring closer examination included: mandatory reporting of suspected drug endangered children; variations of state statutes defining child abuse and neglect; and variations of state statutes identifying drug endangered children.

Detention of Daniel Chong

16. **In April, Daniel Chong, a 23-year-old student at the University of California, San Diego, was detained by the Drug Enforcement Administration for five days without food or water. The detention occurred after Mr. Chong and seven other suspects were taken into custody following a raid conducted by DEA on a house belonging to a friend of Mr. Chong's. Mr. Chong was not charged with any crime and was told at the beginning of his detention that he would soon be released. Despite those assurances, Mr. Chong was left alone for five days, with his hands cuffed behind his**

back, in a 5-by-10-foot windowless cell with no food, water, sink, or toilet. During his detention, Mr. Chong could hear guards and other detainees, but his screams for help went unheeded. In an attempt to hydrate himself, Mr. Chong was forced to drink his own urine. At one point, Mr. Chong attempted to commit suicide by cutting himself and ate shards of glass that he broke off from his eyeglasses.

When DEA agents found Mr. Chong on the morning of the fifth day, he was hallucinating and had to be treated for kidney failure, severe dehydration, and a perforated esophagus.

The Acting Special Agent in Charge of the DEA's San Diego office, William R. Sherman, has issued a public apology to Mr. Chong and has ordered a review of his office's policies and practices.

- A. How was Mr. Chong accidentally locked up for five days, without receiving food, water, medical attention, or access to a bathroom?**

Response:

The Attorney General is unable to speak to the specifics of Mr. Chong's detention between April 21, 2012 and April 25, 2012, due to the ongoing review by the Department of Justice's Office of Inspector General. A detailed account of Mr. Chong's detention should be identified through the course of the investigation.

- B. Are you investigating Mr. Chong's detention? If so, what are the status and preliminary results of that investigation?**

Response:

Yes. Reviews of Mr. Chong's detention by the Department of Justice's Office of Inspector General is ongoing and it would be inappropriate to comment on any results of the investigation prior to its completion.

- C. Have disciplinary proceedings been initiated against the responsible agents?**

Response:

Reviews of Mr. Chong's detention by the Department of Justice's Office of Inspector General is ongoing. DEA takes very seriously the conduct of its employees, and will take appropriate personnel action, if warranted, upon consideration of the results of the investigations.

- D. What actions are you taking to ensure that this deplorable neglect never happens again?**

Response:

DEA guidelines and policies direct the detention, processing, and transportation of arrestees and detainees. DEA policy outlines the protocol for agents and task force officers to follow from the time the individual is taken into custody until the time he or she is brought before a magistrate for an initial appearance. This protocol includes searching the arrestee; transporting the individual to the DEA office; fingerprinting, photographing, and interviewing the arrestee; and coordination with the U.S. Attorney's Office or state prosecutor's office.

As a result of the incident involving Mr. Chong, DEA issued an interim policy to enhance existing guidelines. The interim policy, which was issued on May 23, 2012, mandates new procedures in the following areas: (1) inspection of holding cells and interview rooms before arrestees or detainees are placed inside, to include the removal and processing of contraband or other items located during the inspection; (2) establishment of a process to determine if holding cells and interview rooms are occupied; (3) designation of a Special Agent or local law enforcement officer deputized by DEA as a federal Task Force Officer to monitor the holding area while it is being utilized; and (4) inspection of holding cells and interview rooms at the end of each day to ensure they are not occupied and do not contain contraband or other items. The inspection will be noted in a ledger, which will be reviewed by a DEA manager on a weekly basis. The policy directs each Special Agent in Charge to establish protocols in his or her respective offices that will address their compliance with these procedures.

In response to the interim policy issued on May 23, 2012, each of the 21 field divisions developed protocols to comply with the interim policy. The SACs implemented the protocols through the issuance of a Division Order. Certifications of the SACs' compliance were forwarded to DEA Headquarters in June 2012.

QUESTIONS POSED BY SENATOR WHITEHOUSE

17. **As you know, cybercrime poses a substantial and increasing threat. Law enforcement needs cutting edge technologies to respond. Advanced digital forensics provides one such tool. It is essential to the pursuit of criminals who hack into databases holding valuable intellectual property, distribute child pornography through online chat rooms and peer-to-peer networks, or use computers and other digital devices in crimes from wire fraud to murder.**

The continued availability of necessary digital forensics capabilities will depend in large part on continuing research and training in the field. Accordingly, please describe the Justice Department's plans to fund digital forensics research going forward.

Response:

In 2011, the Department of Justice funded through the National Institute of Justice nearly 1.2 million dollars in research and development in electronic crime and digital evidence recovery. (See <http://www.nij.gov/funding/awards/2011-table.htm> for a list of electronic crime and digital evidence recovery initiatives.) Numerous federal law enforcement agencies, such as the FBI and United States Secret Service, internally funded their own research and development in numerous areas of digital evidence forensics, including the collection of volatile data, digital evidence triage, and in-depth analysis of forensic artifacts that better attribute computer users' conduct. Additionally, the Criminal Division of the Department of Justice, and in particular the Computer Crime and Intellectual Property Section's Cybercrime Laboratory, provided awareness presentations, leadership, and direction to the forensic community as a whole on the challenges that prosecutors are facing with respect to the collection and analysis of digital evidence and the presentation of that evidence to the courts. The Department is committed to the continued research and development of digital investigative analysis and is considering additional areas in which resources could achieve the most results.

QUESTIONS POSED BY SENATOR KLOBUCHAR

- 18. In the last two Congresses, I introduced legislation addressing the issue of metal theft, and I plan to introduce new legislation in this Congress. An FBI Bulletin from a few years ago mentioned that there was a lack of deterrent to metal thieves. I would like to rectify that problem, and I am planning to include federal prison sentences and fines in certain cases of metal theft in my legislation. Are there any other steps you would recommend taking in order to create the appropriate level of deterrence?**

Response:

The Department participates in the "views" process and would be pleased to provide its views of possible legislation on this topic pursuant to that process.

- 19. I believe that the status quo is not working when it comes to combating the growing problem of synthetic drugs. During the June 12 hearing, you stated that the issue of synthetic drugs is one that we need to deal with as quickly as we can. I agree. As we continue to work in Congress on a federal ban of these dangerous substances, what can DOJ do at this point to help local law enforcement with this problem? What other steps should the federal government be taking to combat synthetic drugs in terms of research or public education?**

Response:

First, the Department thanks Congress for the passage of S3187. This legislation provided a critical boost to addressing the threat of synthetic drugs by placing 26 synthetic compounds commonly found in synthetic marijuana, synthetic stimulants, and hallucinogens in Schedule I of the Controlled Substances Act. In addition to explicitly naming 26 substances, the legislation creates a definition for "cannabimimetic agent," creating criteria by which similar synthetic compounds are controlled. It also enhances the tools available to DEA to combat the abuse of new drugs that will appear in the future by doubling the length of time the DEA may temporarily place a substance in Schedule I pending permanent scheduling. The additional time will allow DEA to thoroughly conduct the complex requisite research and scientific analysis to support a final scheduling determination by the DEA Deputy Administrator in conjunction with the Secretary of Health and Human Services. This legislation will help the Department efficiently prosecute those individuals and organizations responsible for unlawfully manufacturing, distributing, possessing, importing, and exporting these dangerous substances.

Unfortunately, since these are synthetic drugs, creative chemists are able to stay one step ahead of law enforcement by continually changing the molecular structure of a controlled substance. As a result, a number of compounds flood the market soon after one synthetic drug is controlled. DEA will utilize its administrative authority to permanently control new synthetic drugs and the analogue statute to prosecute individuals selling these substances if any of the compounds are found to be an analogue of a Schedule I or II controlled substance.

DEA's enforcement activities provide emerging synthetic compounds for further research in DEA laboratories. DEA laboratories continuously experiment with new synthetic substances and analyze evidence for prosecutions and for use in administrative scheduling actions. DEA scientists routinely assist federal, state and local prosecutors throughout the country as expert witnesses when needed. Information developed by DEA investigations and forensic laboratories is routinely provided to state and local law enforcement, pharmacists, and the medical community at conferences across the United States. Finally, Special Agents and Diversion Investigators assigned to DEA's Synthetic Drugs and Chemicals Section are coordinating synthetic drug investigations with field investigators throughout the country to ensure that all available investigative resources are directed appropriately and all investigative leads are passed to the appropriate investigator for follow-up.

Public education is also an important step in reducing the use of these substances. Many teens and young adults are unaware of the dangers posed by these substances.

QUESTIONS POSED BY RANKING MEMBER GRASSLEY

FBI Crime Lab

33. On May 21, 2012, Chairman Leahy and I wrote the FBI regarding the Department task force that worked from 1996 to 2004 examining potentially flawed forensic work in the FBI lab, which could have led to innocent people being jailed for crimes they did not commit. According to press reports, the task force identified more than 250 convictions in which the lab's flawed forensic work was determined to be critical to the conviction. When the task force wrapped up in 2004, it apparently only notified prosecutors in the problem cases of its findings, rather than all parties in these cases.

A. Why did the task force decide to notify only prosecutors instead of all parties in these cases?

Response:

As you are aware, the task force was created more than 15 years ago. The memoranda relating to the task force's creation and functioning do not appear to explain why the decision was made to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

An April 27, 1998 Memorandum for the Attorney General from Acting Assistant Attorney General John C. Keeney, however, addressed a request by the National Association of Criminal Defense Lawyers (NACDL) "that the Criminal Division Task Force overseeing the review notify a defendant's last counsel of record (or the defendant) of any possible evidentiary problems and/or case referrals to prosecutors." *Memorandum from Acting Assistant Attorney General John C. Keeney to the Attorney General* (April 27, 1998) at 1. That memorandum stated:

There are safeguards in place to ensure that the case reviews are conducted in a thoughtful and objective manner.

If a prosecutor determines that the forensic work of a criticized laboratory examiner was not material to a conviction, the prosecutor must provide the Criminal Division Task Force with the reasons for this determination in writing. If a prosecutor's reasons are incomplete or appear to be cursory, the prosecutor will be required to provide a more complete and detailed justification for this decision.

This review process is consistent with the Supreme Court's decision in *Brady v. Maryland* and its progeny. The Court recognized that prosecutors are in a unique position to evaluate the evidence before them for disclosure pursuant to the Constitution. In addition, under professional ethics rules, prosecutors are subject to a possible finding of misconduct if they attempt to conceal exculpatory information from a defendant.

Id. at 3-4. Similarly, an August 17, 1998 letter from Attorney General Janet Reno to Gerald Lefcourt, the President of NACDL, noted that:

The Department, like the courts, depends on prosecutors in all cases to make important decisions concerning the disclosure of information, such as determining what evidence must be disclosed under *Brady*. Prosecutors have an obligation to reveal potentially exculpatory or impeachment information, not only during the pendency of a case, but after conviction, to insure that justice is done. The Department trusts them to carry out this obligation.

Letter from Attorney General Janet Reno to Gerald Lefcourt (Aug. 17, 1998) at 2. Although the specific procedures followed by the task force appear to have changed over time in response to issues that arose as the task force performed its work, it does not appear that the Department revisited its decision to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

B. What were the notification procedures?

Response:

A June 6, 1997 memorandum from Acting Assistant Attorney General John C. Keeney to the Department's prosecutors explained the notification procedures as follows:

If you determine that the work and/or testimony of a laboratory examiner *was material* to the verdict, the FBI and Criminal Division will work with your office to arrange for an independent, complete review of the Laboratory's findings and any related testimony. The FBI is contracting with qualified forensic scientists to perform this work. . .

Once the independent scientific review is completed, you will be so notified so that you can assess any *Brady* obligation to further disclose information to the defense.

Memorandum from Acting Assistant Attorney General John C. Keeney to All United States Attorneys (June 6, 1997) at 4.

Similarly, a July 23, 1997 letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman stated:

6. If after receiving the additional input requested, or after initial review of the case, the prosecutor determines that the Laboratory's work was material to the conviction, a scientist outside the FBI will conduct a complete review of the Laboratory's findings and any related testimony. The FBI will be contracting with qualified scientists for this purpose; however, prosecutors may choose their own scientist to conduct the review, but must notify the Criminal Division Task Force of the name of the scientist or laboratory they plan to use.

7. As soon as the independent scientific review is completed, the FBI will furnish the results of that review to the Criminal Division Task Force, which will notify the prosecutor and obtain an assessment of any Brady obligation to further disclose the information to the defense.

[...]

The process outlined above should ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized Lab examiner.

Letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman (July 23, 1997) at 2-3 (footnote omitted).

Again, while the specific details of the notification procedures appear to have changed over time in response to issues that arose as the task force performed its work, it does not appear that the Department revisited its decision to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

- C. Please list each of the 250 convicted individuals in which the lab's flawed forensic work was determined to be critical to the conviction.**

Response:

At this time, the Department is not in a position to provide this information.

- D. Please name each prosecutor that was notified by the task force, as well as which conviction the notification was relevant to.**

Response:

At this time, the Department is not in a position to provide this information.

- E. Were there other prosecutors that should have been notified? If so, whom?**

Response:

At this time, the Department is not in a position to provide this information.

- F. What were the circumstances under which the decision of whom to notify was made?**

Response:

Please see the response to question 33(B), above.

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

Response:

At this time, the Department is not in a position to provide this information.

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

Response:

Please see the response to question 33(B), above.

- 34. When the Washington Post reported on April 17 and April 27, 2012, about the problems with FBI forensic analysis of hair that led to wrong convictions, several former senior FBI lab officials and FBI forensic experts endorsed calls for a broader review of such cases. FBI and then the Department said they were evaluating whether a further review of all related cases is warranted.**

- A. What steps have FBI or the Department taken toward such an evaluation or review?**

Response:

The Department and the FBI have determined that it is appropriate to review historical cases resulting in a conviction in which a microscopic hair examination conducted by the FBI was among the evidence presented. We set forth the scope of that review in our December 3, 2012 letter from former Acting Assistant Attorney General Judith Appelbaum. (See Attachment A.) Additionally, on January 31, 2012, we briefed committee staffers on the ongoing review, and we will continue to apprise you of the progress and results of the review.

- B. When is a decision anticipated?**

Response:

Please see the response to question 34(A), above.

- C. Which offices or officials are involved in the evaluation?**

Response:

Please see the response to question 34(A), above.

- D. Which offices or officials are involved in making the decision?**

Response:

Please see the response to question 34(A), above.

- E. What criteria will be used to decide whether a further review is warranted, and what standard or threshold would determine that a further review would not be warranted?**

Response:

Please see the response to question 34(A), above.

National Security Leaks

- 35. Leaks of classified information continue to plague the Obama Administration. The list of notable national security leaks includes: (1) a report detailing U.S. involvement in Stuxnet, a purported cyber weapon, and the cyber-attacks against Iran's nuclear reactors dubbed "Olympic Games"; (2) a report that U.S. national security agencies thwarted another underwear bomber plot to be carried out on the anniversary of Osama bin Laden's death; (3) a report that the U.S. had planted a spy in al Qaeda in Yemen; (4) revelation that President Obama is personally involved in choosing the "kill list," which prioritizes U.S. terrorist killings; (5) revelation of the identity of the Pakistani doctor who aided the CIA in the capture of Osama bin Laden; (6) allegations that the Administration leaked sensitive information about the capture of Osama bin Laden to filmmakers making a movie about it.**

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

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

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

Response:

The National Security Division has not been recused from any leak investigation. Only those members of the division who might have had exposure to the subject matter of the investigation are not participating. Others, including career prosecutors from NSD's Counterespionage Section, continue to participate in both investigations.

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

Response:

The Department of Justice takes the unauthorized disclosure of classified information extremely seriously and will investigate and pursue these cases. The U.S. Attorneys, career prosecutors, and career Special Agents investigating these leaks will pursue those investigations to the fullest. If the leaker or leakers are identified, and sufficient admissible evidence is gathered, consistent with the Principles of Federal Prosecution, we will pursue charges.

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

Response:

The investigations at issue have been assigned to U.S. Attorneys who will, as is the Department's longstanding practice, rely upon the sound judgment and skills of the career prosecutors and investigators assigned to those matters in making judgments consistent with the Principles of Federal Prosecution.

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

Response:

Special Attorney appointments under 28 U.S.C. § 515 permit the Attorney General to appoint an attorney to handle a particular matter when the matter is outside the attorney's geographic district. If it became necessary for either U.S. Attorney Machen or U.S. Attorney Rosenstein, or

the career prosecutors with whom they are working, to appear in a district other than their own, the Attorney General could make such an appointment in accordance with the statute.

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

Response:

Thomas Drake pleaded guilty to a violation of the federal criminal law involving the unauthorized access of a protected computer system in violation of 18 U.S.C. § 1030 following extensive litigation concerning the extent to which Drake would be entitled to disclose classified information at his trial. The case against Jeffery Sterling is currently on appeal to the United States Court of Appeals for the Fourth Circuit, and, therefore, the Department is unable to comment on that matter. However, neither of these cases represents a failure. Investigating and prosecuting national security leak matters is challenging not only in identifying the leaker, but also in ensuring that a trial does not cause additional or greater harm by disclosure or confirmation of classified information, including sensitive intelligence sources and methods, which may be the subject of or related to the unauthorized disclosure. Even in light of these challenges, however, the Department has not shied away from investigating and charging these important cases. This is reflected by the fact that since January 19, 2009, we have charged more leak matters than in the prior 30 years. As the Department has said before, the existing statutory framework allows us to charge those who unlawfully disclose classified information. Nevertheless, we are always willing to work with Congress to explore ways in which we can enhance our ability to protect classified information from unlawful disclosure.

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

Response:

CIPA has generally worked well for the government. It allows us to seek pretrial rulings to determine what classified information must be disclosed and what substitutions or summaries, if any, may be used in lieu of the disclosure of classified information. Consequently, we know what classified information we will be required to disclose before the case proceeds to trial in a given matter. CIPA is a carefully crafted statute designed to protect both the government's important national security interests as well as the defendant's constitutional right to a fair trial. CIPA has been a successful tool for the government, allowing the prosecution of a wide range of cases that implicate national security equities, of which leak cases are only a subset. Consequently, we must be careful that any changes to CIPA preserve that important (and legally delicate) balance. Although there are some ways in which the statute could be improved, the

Department is not currently proposing any statutory amendments to CIPA. We are, of course, always willing to review with you areas to make improvements.

Foreign Intelligence Surveillance Act Reauthorization

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

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

- A. Do you support a clean reauthorization of the FISA amendments Act?**

Response:

Yes, the Attorney General supported reauthorization of the FAA in its current form to 2017, which Congress enacted during the last session.

- B. Is there sufficient oversight and checks and balances to ensure that the rights of U.S. citizens are protected?**

Response:

Yes. At the outset, it is important to note that section 702 of FISA, the central provision of the FAA, may only be used to target non-U.S. persons located overseas to obtain foreign intelligence. Section 702 expressly prohibits the government from intentionally targeting the communications of U.S. citizens, lawful permanent residents, and all persons located in the United States. In addition, section 704 requires an order from the FISA Court (FISC) to conduct surveillance or physical search of U.S. persons located abroad—an additional protection for U.S. persons that did not exist prior to the FAA.

To promote compliance with these and other restrictions, the FAA established a robust framework of oversight by all three branches of government. First, the FISC plays a significant role in overseeing surveillance conducted under section 702. Under section 702, the FISC must approve annual certifications by the Attorney General and the Director of National Intelligence that identify categories of foreign intelligence targets and include certifications that the acquisitions comport with the statute, including prohibitions against intentionally targeting U.S. persons or any person known at the time of acquisition to be located inside the United States. In addition to the certifications, the FISC also must approve targeting and minimization procedures.

Targeting procedures are designed to ensure that the government only targets non-U.S. persons outside the United States and does not intentionally acquire wholly domestic communications. The minimization procedures protect the identities of U.S. persons and any nonpublic information concerning U.S. persons that may be incidentally acquired. The FISC reviews the targeting and minimization procedures for compliance with the requirements of both the statute

and the Fourth Amendment. By approving the certifications, as well as the minimization and targeting procedures, the FISC plays a major role in ensuring that acquisitions under section 702 are conducted in a lawful and appropriate manner.

Second, the Executive Branch conducts extensive internal oversight. Oversight within the Executive Branch begins with the intelligence agencies. For example, the National Security Agency (NSA) trains its analysts on the applicable procedures, audits the databases they use, and spot checks their targeting decisions. In addition to these internal agency processes, the National Security Division (NSD) of the Justice Department and the Office of the Director of National Intelligence (ODNI), at least once every 60 days, conduct oversight of the agencies' activities under section 702. These reviews are normally conducted on-site by a joint team from NSD and ODNI. The team evaluates and, where appropriate, investigates each potential incident of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions.

Finally, Congress plays a role in the oversight of surveillance under section 702. On a regular basis, the Executive Branch sends to the Judiciary and Intelligence Committees the numerous reports required by the FAA. In accordance with these requirements, the Executive Branch has informed the Judiciary and Intelligence Committees of acquisitions authorized under section 702; reported, in detail, on the results of the reviews and on compliance incidents and remedial efforts; made all written reports on these reviews available to the Committees; and provided summaries of significant interpretations of FISA, as well as copies of relevant judicial opinions and pleadings. The government has also provided the Judiciary and Intelligence Committees numerous briefings and participated in numerous hearings addressing the government's use of FAA authorities.

C. Are any changes in the FAA needed, either to enhance intelligence gathering capabilities or to protect the rights of U.S. citizens?

Response:

The Administration was pleased that Congress reauthorized the FAA in its current form to 2017 during its last session.

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

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

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

Response:

Under longstanding policy, the Department of Justice generally does not publicly confirm or deny the existence of an investigation into any particular matter.

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

Response:

Without confirming or addressing any particular program or operation, including whether there is an Office of Legal Counsel opinion on the subject addressed in the question, the Department has provided the Judiciary Committee with, and released publicly, a draft white paper that sets forth a legal framework for considering the circumstances in which the U.S. government could conduct a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated force.

Extradition of Ali Mussa Daqduq

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

On May 16, 2011, five Republican members of the Judiciary Committee sent a letter to the Attorney General, expressing their concern with bringing Daqduq to the U.S., and requesting further information. Ron Weich responded on behalf of the Attorney General on August 8, 2011. He failed to answer the specific policy questions raised, merely stating that DOJ “remains committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate.”

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

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

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

A. Has the Justice Department been involved in negotiations seeking to extradite Daqduq?

Response:

After being transferred to Iraqi custody, Iraq charged Daqduq with terrorism and related offenses for his role in the attacks. Shortly after his transfer to Iraqi custody, the United States submitted a request seeking Daqduq’s extradition. On May 7, 2012, the Central Criminal Court of Iraq, dismissed the Iraqi charges pending against Daqduq and on June 25, 2012, the Iraqi Federal Court of Cassation (FCC) subsequently affirmed the Central Criminal Court of Iraq’s decision. In response, on July 24, 2012, personnel from the Department of Justice, Office of the Justice Attaché, filed a request for correction with the FCC. That request for correction was denied on November 28, 2012.

On July 30, 2012, personnel from Office of the Justice Attaché attended Daqduq’s extradition hearing in Baghdad. In coordination with the Office of International Affairs (OIA) and the Civil Division’s Office of Foreign Litigation (OFL), the Justice Attaché presented a Statement in Support of Daqduq’s extradition both orally and through a written filing. The extradition request was denied.

Daqduq’s lawyer in the Iraqi proceedings was Abdul Mahdi Mitairi, who also sits on the political committee of Muqtaada al-Sadr, the anti-American Shiite cleric. On November 16, 2012, Iraq released Daqduq from custody and it is our understanding that he returned to Lebanon. While we strongly objected to his release, the Iraqi government informed us that it determined that it no longer had a legal basis to continue to hold Daqduq. We continue to believe that Daqduq should

be held accountable for his crimes, and we will continue to pursue all legal means to see that Daquq faces justice.

B. Can you confirm that a request has been made to extradite Daquq?

Response:

Please see response to question 38(A), above.

C. If so, does the extradition request indicate which forum, military commission or civilian court, that Daquq would be extradited to?

Response:

Attached please find a letter dated July 19, 2012, responding to your May 10, 2012 letter. (See Attachment B.)

Use of Drones by Law Enforcement

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

Response:

Law enforcement agencies within the Department are exploring the ways in which available new technologies, such as unarmed Unmanned Aircraft Systems (UASs), may increase the effectiveness of our nation's law enforcement and public safety initiatives. Although UASs are a new aviation technology, they remain just one of many types of aircraft from which lawful aviation-based surveillance can be conducted, and the same legal requirements that would apply to fixed and rotary-wing aviation platforms would apply to UASs. Accordingly, any DOJ law enforcement agencies that deploy UASs must comply with all applicable constitutional, statutory, privacy, and case-law requirements, as well as applicable Attorney General Guidelines. For example, in addition to other authorities, FBI's use of UASs must comport with the Attorney General's Guidelines for Domestic FBI Activities and the FBI's own Domestic Investigations and Operations Guide (Section 4, "Privacy and Civil Liberties, and Least Intrusive Methods").

The DEA recently acquired two robotic miniature helicopters with video capabilities (DOD surplus). Neither unit is currently in use. Only after DEA is able to comply with all relevant FAA requirements will testing begin to determine the equipment's capabilities and limitations. Following the testing process, if the DEA decides to use the equipment, DEA will establish a detailed protocol and policies on how and where they can be used. These policies will help to

ensure that DEA operations comply with all constitutional and statutory requirements and protect citizens' civil liberties and privacy rights.

DEA has received information for law enforcement purposes from UASs operated by U.S. Customs and Border Protection in the Southwest border region.

The ATF recently completed a one year research and development (R&D) project of rotary wing UASs; ATF's inventory currently consists of six UASs. As part of a collective department effort, an operational certification of authority (COA) has been submitted to the FAA. The UAS technology will be utilized by ATF for operational reconnaissance/surveillance and crime scene video evidence collection. ATF has drafted Standard Operational Procedures (SOP) for UASs, and the agency is currently amending its official aviation policy to reflect the inclusion of UAS operations. These policies will ensure that ATF operations comply with all constitutional and statutory requirements and DOJ guidelines while protecting citizens' privacy and civil liberty rights. ATF policy will prohibit its UAS inventory to be loaned to any local, state or federal law enforcement agency or used by ATF in furtherance of other agency investigations.

As a general matter, the Department of Justice does not disclose whether the Office of Legal Counsel has been asked to consider particular legal issues, nor does it disclose confidential legal advice provided by OLC. The Department is fully committed, however, to ensuring that any use of UASs by the Department's law enforcement agencies complies fully with all relevant constitutional and statutory requirements.

Ninth Circuit Deportation Cases

40. **On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases fit into the administration's immigration enforcement priorities.¹ In relevant part, the order in each case states:**

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

On March 1, 2012, House Judiciary Committee Chairman Lamar Smith and I sent a letter to you and Secretary Janet Napolitano expressing concern about the Ninth Circuit's order. Moreover, the letter asked the Department of Justice and the Department of Homeland Security to respond to questions about how they were handling cases before immigration judges, the Board of Immigration Appeals (BIA)

¹ *Rodriguez v. Holder*, Nos. 06-74444, 06-75524, 2012 WL 360759, at *1 (9th Cir. Feb. 6, 2012); *San Agustin v. Holder*, No. 09-72910, 2012 WL 360761, at *1 (9th Cir. Feb. 6, 2012); *Jex v. Holder*, No. 09-74038, 2012 WL 360764, at *1 (9th Cir. Feb. 6, 2012); *Pocasangre v. Holder*, No. 10-70629, 2012 WL 360774, at *1 (9th Cir. Feb. 6, 2012); *Mata-Fasardo v. Holder*, No. 10-71869, 2012 WL 360776, at *1 (9th Cir. Feb. 6, 2012).

and the federal courts of appeals. In particular, our letter contained four specific questions or requests for information:

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

Response:

Attached is former Acting Assistant Attorney General Judy Appelbaum's June 6, 2012 letter and the corresponding attachment, which respond directly to the questions above. (See Attachment C.)

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

Response:

The Department of Justice's Executive Office for Immigration Review oversees the immigration court system, which includes the immigration judges around the country and the Board of Immigration Appeals. EOIR's immigration judges adjudicate the cases of all individuals placed in removal proceedings before the agency and order removal in appropriate cases under established legal standards. As an adjudicative body, the Executive Office for Immigration Review does not exercise prosecutorial discretion regarding who is placed in removal proceedings or who is physically removed from the United States after entry of a final order of removal. The Department of Homeland Security has the authority to enforce immigration judges' orders of removal and may exercise prosecutorial discretion with respect to a removable alien.

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

Response:

The Board of Immigration Appeals adjudicates all appropriately filed appeals from the decisions of the immigration judges under established legal standards. As an adjudicative body, the Executive Office for Immigration Review does not exercise prosecutorial discretion regarding which properly filed appeals to adjudicate. The Department of Homeland Security has the authority to exercise prosecutorial discretion whether to appeal a decision in favor of the alien respondent in removal proceedings and to enforce the Board's final orders of removal.

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

Response:

Please see the attached June 6, 2012 letter from former Acting Assistant Attorney General Judy Appelbaum. (See Attachment C.)

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

The DOJ and the DHS are supposed to be prosecuting these cases and seeking to have illegal aliens deported. As part of that effort, line attorneys from the DOJ and DHS spend thousands of hours working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend hundreds of hours adjudicating these cases. Tens of millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges and court staff.

The answer to the Ninth Circuit's question set forth in the government's pleadings was nonresponsive. The government's pleadings tell the Court that the government does not presently intend to use prosecutorial discretion with the cases, but that the matter is totally within the discretion of the Executive Branch. If the government decides to use prosecutorial discretion while any of the cases are pending, it will inform the Court. What is unwritten is that the Obama administration can still use prosecutorial discretion after a case is concluded, even if a Court has issued a deportation order and after all the time, effort and money has been expended.

The DHS responded to the March 1 letter with a one-page letter dated April 23, 2012 and signed by Nelson Peacock, the Assistant Secretary for Legislative Affairs. The April 23 letter does not answer the four specific questions or requests for information in the March 1 letter.

The DOJ responded to the March 1 letter with a two-page letter dated June 6, 2012 and signed by Acting Assistant Attorney General Judith Appelbaum. The letter also had a one-page attachment with some information about the five cases before the Ninth Circuit. The DOJ's June 6 letter partially answers questions 1(a)-(g) from the March 1 letter. It also states that it cannot provide an accurate estimate of the number of hours worked on the five cases by immigration judges and their staffs, which was asked about in question 1(h). The DOJ letter does not acknowledge, let alone answer, questions 1(i)-4.

A. Did you review the June 6 letter before it was sent?

Response:

Yes.

B. Did you authorize the June 6 letter?

Response:

Yes.

C. Is the DOJ refusing to answer questions 1(i)-4 from the March 1 letter? If so, what is the legal authority for the DOJ's refusal? If the DOJ is not refusing to answer, how do you explain the June 6 letter's failure to answer the questions?

Response:

No, DOJ is not refusing to answer the questions. Indeed, we thought we and DHS had responded. We hope the information provided above gives you the additional information you seek.

- D. Provide complete and detailed answers to all of the questions and requests for information from the March 1 letter, which are quoted above.**

Response:

We have done so above and in the attached letter of former Acting Assistant Attorney General Appelbaum of June 6, 2012. (See Attachment C.)

Freedom of Information Act

- 42. On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration, and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a “new era of open government.”²**

President Obama’s memorandum on the Freedom of Information Act (FOIA) called on all government agencies to adopt a “presumption of disclosure” when administering the law. He directed agencies to be more proactive in their disclosure and to act cooperatively with the public. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads.

Pursuant to the President’s orders, you issued FOIA guidelines in a memorandum dated March 19, 2009.³ Your memorandum rescinded former Attorney General Ashcroft’s 2001 pledge to defend agency FOIA withholdings “unless they lack[ed] a sound legal basis.” Instead, you stated that the Department of Justice would now defend withholdings only if the law prohibited release of the information, or if the release would result in foreseeable harm to a government interest protected by one of the exemptions in the FOIA. Your memorandum extensively quoted the President’s memoranda.

The Department of Justice is supposed to be overseeing the Executive Branch’s compliance with the FOIA.

² Memorandum from President Barack Obama Re: Freedom of Information Act (Jan. 21, 2009) (available at www.whitehouse.gov/the-press-office/freedom-information-act); Memorandum from President Barack Obama Re: Transparency and Open Government (Jan. 21, 2009) (available at www.whitehouse.gov/the-press-office/transparency-and-open-government).

³ Memorandum from Attorney General Eric Holder Re: Freedom of Information Act (Mar. 21, 2009) (available at www.justice.gov/ag/foia-memo-march2009.pdf).

On March 30, 2011, the House Committee on Oversight and Government Reform released its 153-page report on its investigation of the DHS's political vetting of requests under the FOIA.⁴ The Committee reviewed thousands of pages of internal DHS e-mails and memoranda and conducted six transcribed witness interviews. It learned through the course of an eight-month investigation that DHS political staff has exerted pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people.

The report by Chairman Issa's Committee reproduces and quotes e-mails from political staff at the DHS. The report also quotes the transcripts of witness interviews. The statements made by the political staff at the DHS are disturbing.

- A. What is your response to each of the findings contained on pages 5-7 of the report?**
- B. What is your response to the disturbing statements made by DHS political staff, who are quoted in the report? In particular, what is your response to political appointees at the DHS referring to a career FOIA employee, who was attempting to organize a FOIA training session, as a "lunatic" and to attending the training session for the "comic relief"?**

Responses to A and B:

As part of the Attorney General's FOIA Guidelines issued in March 2009, agencies are directed to ensure that they have an effective system in place for responding to FOIA requests. The Guidelines emphasize that "[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 FOIA Guidelines also stress that "[t]imely disclosure of information is an essential component of transparency." Accordingly, if an agency employs procedures that are inefficient or that cause unnecessary delays in responding to requests, those procedures would be contrary to the FOIA Guidelines. Furthermore, as the FOIA Guidelines expressly state, the FOIA is everyone's responsibility and not just that of the FOIA professionals within an agency. As such, all federal employees should be aware of their obligations under the FOIA and work to assist their agencies' efforts to comply with the Act.

- C. What actions, if any, have you personally taken in response to Chairman Issa's report?**
- D. What actions, if any, has the DOJ taken in response to Chairman Issa's report?**

Chairman Issa's report and a report prepared by the Inspector General of the DHS find that political staff at the DHS lacks a fundamental understanding of FOIA.

⁴ The report is entitled "A New Era of Openness? How and Why Political staff at DHS Interfered with the FOIA Process" and is available at http://oversight.house.gov/images/stories/Reports/DHS_REPORT_FINAL_FINAL_4_01_11.pdf.

- E. What, if anything, have you personally done to address this situation? If you have not done anything personally, acknowledge that fact.**
- F. What, if anything, has the DOJ done to directly address this situation? If the DOJ has not done anything to directly address the situation, acknowledge that fact.**

Responses to C, D, E, and F:

As part of the Department's responsibility to encourage agency-wide compliance with the FOIA and to ensure that my FOIA Guidelines are fully implemented, our Office of Information Policy (OIP) provides training to thousands of federal employees each year, both at the courses offered by OIP and at agency-specific FOIA conferences. OIP also provides training at conferences sponsored by the American Society of Access Professionals and other organizations. OIP gives executive briefings to senior officials at agencies upon request and the Director of OIP routinely meets with the Chief FOIA Officers of the cabinet agencies to engage them on important issues concerning FOIA administration. These training courses cover all aspects of the FOIA, from procedural considerations, to the scope of the exemptions, to the requirements for assigning fee categories and assessing fee waiver requests, to litigation considerations. Some of the attendees at these various sessions are political appointees. Although there is no requirement that any group attend FOIA training, OIP does believe that it is important for all agency personnel to be aware of their obligations under the FOIA. My FOIA Guidelines make clear that the FOIA is everyone's responsibility and not just that of the FOIA professionals within an agency.

Since 2010, the Director of OIP has met with the Department of Homeland Security's Chief FOIA Officer twice to discuss their administration of the FOIA. OIP has also conducted six separate training sessions exclusively for DHS staff covering various aspects of the FOIA, including President Obama's Memorandum on the FOIA and my FOIA Guidelines, an overview of the FOIA's procedural requirements and its nine exemptions, fees and fee waivers, the proper procedures for handling document referrals and consultations, and separate, more specialized training on Exemption 2 after the Supreme Court ruling in *Milner* and Exemptions 5, 6, and 7(C).

In addition to providing training, OIP engages in a wide variety of initiatives to both oversee and assist agencies with their FOIA compliance. First, OIP publishes the *Department of Justice Guide to the FOIA*, which is a legal treatise addressing all aspects of the law, including all of its procedural provisions. Second, OIP issues guidance to agencies on the proper implementation of the statute and my FOIA Guidelines. Third, OIP provides daily legal counseling services to all agency personnel, who can call OIP on a dedicated phone line and speak to an attorney about any matter connected with the administration of the FOIA. Fourth, 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 the steps taken to improve transparency at the agency, including the steps taken to ensure that the agency has an effective and efficient FOIA process. OIP, 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 makes all the detailed statistics on agency FOIA compliance available to the public graphically on the Department's new government-wide comprehensive FOIA website, FOIA.gov. Through all of these initiatives, OIP is both encouraging proper compliance with the FOIA and ensuring agency accountability.

QUESTIONS POSED BY SENATOR SESSIONS

46. In 2009, this Committee considered the Free Flow of Information Act, which would have given journalists qualified immunity to withhold their sources from prosecutors unless a court made specific determinations by a preponderance of the evidence that the information should be disclosed. In an appearance before this Committee, you expressed your support for such a law.
- A. Would you agree that had the Free Flow of Information Act been passed, it likely would have hindered the ability of the two United States Attorneys you have appointed to investigate leaks of confidential information that implicate serious national security concerns?

Response:

On June 8, 2012, the Attorney General assigned the United States Attorneys for the District of Columbia and the District of Maryland to lead criminal investigations into recent instances of possible unauthorized disclosures of classified information. That investigation is ongoing and therefore it would not be appropriate to comment at this time on how the Free Flow of Information Act of 2009 might have affected the investigation. However, the Attorney General did not express support for that legislation as originally introduced, due in part to concerns about whether it provided appropriate protection for national security. The Attorney General and the Director of National Intelligence did support the "Specter-Schumer" amended version of the Free Flow of Information Act, which was revised to address (among other things) the Administration's concerns about the impact the bill might have otherwise had on the government's ability to obtain information in investigations concerning the unlawful disclosure of properly classified information.

- B. Would you still support a similar law in light of the dangerous leaks that are occurring within the Executive branch?

Response:

The United States Attorneys' investigation seeks to identify the source of possible unauthorized disclosures of classified information, whether occurring in the Executive Branch or elsewhere. As noted, the Director of National Intelligence and the Attorney General expressed support for the "Specter-Schumer" version of the Free Flow of Information Act, finding that it would enable the Government to take measures necessary to protect national security and enforce our criminal laws while also protecting the critical role the media plays in a free and democratic society. While the Department would be pleased to evaluate another bill similar to the Free Flow of Information Act, if introduced and presented for our views, we cannot express views on any such legislation without the opportunity to examine its precise terms.

47. Please describe in detail the scope of the authority and jurisdiction of U.S. Attorneys Machen and Rosenstein in both investigating and prosecuting the leaks of confidential information from within the Executive branch. Please also answer the following:

A. Is their investigation independent of the supervision or control of the Department of Justice and/or any of its officials?

Response:

They are conducting the investigations consistent with the authorities granted to every United States Attorney in the matters that they handle. Those authorities are fully set forth in the United States Attorneys' Manual.

B. Do you or anyone in the Department have the ability to remove them from the investigation?

Response:

In theory, the Attorney General or Deputy Attorney General could reassign the investigations, but there would be no reason to do that unless a legal conflict develops.

C. Do they have the authority to investigate and prosecute violations of any federal criminal laws related to the alleged unlawful disclosures of classified information?

Response:

Yes.

D. If so, do they have the same authority to investigate and prosecute violations of federal criminal laws that occurred outside of their jurisdiction as U.S. Attorneys?

Response:

Generally, United States Attorneys can investigate matters that could be prosecuted in their districts of appointment, and the venue for prosecution of any particular crime depends on the nature of the crime and those acts that are committed in furtherance of the criminal activity. If United States Attorney Machen or United States Attorney Rosenstein determines that he needs authority to investigate matters occurring outside his district, the Department could provide that authority by way of an appointment under 28 U.S.C. § 515.

E. Do they have the authority to investigate and prosecute violations of any federal criminal law committed with the intent to interfere with their investigation?

Response:

Yes.

- F. If so, do they have the same authority to investigate and prosecute violations of federal criminal laws that occurred outside of their jurisdiction as U.S. Attorneys?**

Response:

See response to question 47(D), above.

- G. Are they free to structure their investigation as they wish and to exercise independent prosecutorial discretion to decide whether charges should be brought, what charges should be brought, and against whom charges should be brought?**

Response:

Yes, consistent with the provisions of the United States Attorneys' Manual.

- H. Do they have the authority to request the assignment of additional Department of Justice or FBI officials to assist in the investigation?**

Response:

Yes.

- I. Do they have the authority to request the hiring or appointment of individuals outside the Department of Justice to assist in the investigation?**

Response:

They have the authority to request the hiring of additional Assistant United States Attorneys for their districts consistent with current Department policies and procedures. We do not expect them to request the authority to hire outside attorneys solely for the purpose of conducting the assigned investigations. Each of their offices has talented prosecutors who are fully capable of assisting them in the investigations.

- J. Are they required to notify you or any other officials within the Department of Justice before taking certain steps in their investigation or prosecution of any criminal offenses related to their investigation?**

- 1. If so, under what circumstances must they provide notification?**

2. **Must they comply with U.S. Attorneys' Manual 1-6.100, which provides that "no present or former employee of the Department of Justice may testify or produce Departmental records in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official"?**

Response:

They must comply with the notification and approval procedures set forth in the United States Attorneys' Manual, which is publicly available. Part 1-6.000 of the United States Attorneys' Manual sets forth procedures for complying with Department regulations pertaining to requests from outside parties for Department information. *See* 28 C.F.R. §§ 16.21 to 16.29. Therefore, those provisions would not restrict United States Attorneys Machen and Rosenstein's access to Departmental information.

48. **Why did you decide against assigning a Special Counsel to this investigation when there is an obvious conflict of interest with tasking Department of Justice officials to investigate leaks that may have come from within the Department of Justice?**
- A. **If U.S. Attorneys Machen and Rosenstein conclude that Department of Justice officials were likely involved in the unlawful disclosure of classified information, will you reconsider your decision?**

Response:

U.S. Attorneys Machen and Rosenstein are highly-respected and experienced prosecutors with proven records of independence in the exercise of their duties. U.S. Attorney Machen has recently overseen a number of public corruption prosecutions in the District of Columbia, and U.S. Attorney Rosenstein has overseen a number of national security investigations, including one of the five leak investigations prosecuted since 2009. The Department has complete confidence in their abilities to conduct thorough and independent investigations into these matters in close collaboration with career prosecutors and agents. The Department likewise expects that if their examination of the facts and the law leads them to conclude that any individual has unlawfully leaked classified information or otherwise violated federal criminal statutes, then they will take appropriate action whether that individual works at the Department of Justice or elsewhere.

49. **You testified before the Committee that "both the [FBI] Director and I have been already interviewed in connection with the knowledge that we had of those matters [related to the alleged leaks of confidential information]."**
- A. **By whom were you and Director Mueller interviewed?**

Response:

The FBI.

- B. In your opinion, which individuals or departments should be interviewed in connection with the investigation into the alleged unlawful disclosures of classified information?**

Response:

Those determinations will be made by United States Attorneys Machen and Rosenstein and their respective teams of prosecutors and agents.

- 50. You have yet to respond to our letter from May 10, 2012, regarding the administration's handling of the transfer of Ali Musa Daqduq to Iraqi custody in December 2011. Despite having Daqduq in custody for years, he was never transferred to the detention facilities at Guantanamo Bay or charged before a military commission for his role in the 2007 attack that resulted in the death of Private Jonathan Millican, of Locust Fork, Alabama, and the kidnapping and execution of four other U.S. troops.**

For whatever reason, after he was transferred to Iraqi custody, he was charged before a military commission, and a military spokesman stated that the U.S. government was "working with Iraq to effect Daqduq's transfer to a U.S. military commission consistent with U.S. and Iraqi law." In the meantime, however, an Iraqi court has dismissed all charges against Daqduq and has ordered that he should be released.

- A. Did the administration ever consider transferring Daqduq to Guantanamo Bay while he was still in U.S. custody in Iraq? Please explain your answer.**

Response:

A transfer of Daqduq to Guantanamo was a non-starter for the Government of Iraq, and transfer of additional detainees to Guantanamo is contrary to Administration policy.

- B. Will you aggressively pursue Daqduq's extradition before he is released from Iraqi custody?**

Response:

On January 23, 2012, we filed an extradition request with the Iraqi Government; that request was denied on July 30, 2012, by Iraq's Central Criminal Court following a two hour oral argument by our Justice Attaché. We continue to believe that Ali Musa Daqduq should be held accountable for his crimes, and we will pursue all legally supportable options that are consistent with U.S. policies to see that justice is done.

- C. What are the administration's plans for the handling of Daqduq's case whether he is extradited into U.S. custody, set free in Iraq, or released to the custody of another country?**

Response:

On November 16, 2012, Iraq released Daqduq from its custody and it is our understanding that he returned to Lebanon. While we strongly objected to his release, the Iraqi government informed us that it believed it no longer had any legal basis to hold Daqduq. We continue to believe that Daqduq should be brought to justice.

- 51. On June 6, 2012, Senator Chambliss wrote to you requesting that the Department of Justice investigate recent instances of "SWAT-ting" attacks against conservative bloggers based on their political speech. As you know, "swatting" occurs when a perpetrator contacts emergency dispatchers and makes a false report of an emergency situation at a target's location that will elicit the response of law enforcement officials (such as a SWAT team). Often, a perpetrator will telephone a target's local 911 dispatcher from faraway using techniques that disguise his location. The Department of Justice and the FBI would have jurisdiction over "swatting" attacks that occur across state lines. Is the Department of Justice investigating these attacks to determine if any federal laws have been violated?**

Response:

Yes, across the United States, the FBI and its law enforcement partners at the state and local levels are working with providers of Internet and telephonic communication services to address the activity referred to as "SWAT-ting." The majority of these cases are currently being investigated by state and local authorities; however, the FBI is also actively engaged in SWATting investigations. As with all criminal matters, investigative and prosecutorial decisions are based upon the unique facts and circumstances of each case. We will be happy to work with Congress to determine whether existing criminal authorities are adequate to address this problem.

- 52. You testified that "[o]ver the last fiscal year alone...we recovered nearly \$4.1 billion in cases involving fraud on federal health-care programs." Please provide a detailed breakdown of that figure. Specifically for fiscal year 2011, please provide, by agency, an itemized accounting of each source of recovery, the date of the recovery, the amount that was recovered, the means by which the amount was recovered, and where the recovered amount was deposited within the federal government.**

- A. In your response to questions submitted by Senator Grassley after your last appearance before the Committee on November 8, 2011, you stated that the Justice Department had collected \$2.9 billion in revenue for FY2011 from healthcare fraud related cases.**

- 1. What accounts for the discrepancy between that figure and the \$4.1 billion figure you cited in your recent testimony?**
- 2. Are there instances in which the Department of Justice and the Department of Health and Human Services both report recoveries of the same moneys? If so, does the \$4.1 billion figure represent duplication in reporting by any federal agencies? Please explain your answer.**

Response:

A detailed breakdown of the \$4.1 billion in health care fraud recoveries in FY 2011 are in Attachments A1-7 and Attachment B .

The \$2.9 billion in health care fraud recoveries that was cited in the response to Senator Grassley referenced the FY 2011 civil and criminal collections that occurred in FY 2011. The \$4.1 billion that I cited in my testimony comes from the FY 2011 Health Care Fraud Abuse and Control (HCFAC) Account Annual Report. The HCFAC report includes funding that is not included in the \$2.9 billion, such as recoveries from the Department of Health and Human Services Office of Inspector General audits into Medicare and Medicaid payments, payments to relators, amounts resulting from asset forfeiture, and gifts and bequests.

There are no instances in which the Department of Justice and the Department of Health and Human Services both report recoveries of the same funds in the HCFAC Annual Report. The report's total amount recovered does include amounts from both Departments; however, there are strict guidelines on which Department reports each specific type of health care fraud recovery to ensure that funds are not double-counted.

- 53. There have been many reports of Department of Health and Human Services and Centers for Disease Control grants being used to lobby for legislation before state and local legislatures, councils, and departments. Some of this activity is detailed in a letter to the Department of Justice submitted on March 16, 2012, by a group named "Cause of Action." Their website describes the group as a "non-partisan organization that uses public advocacy and legal reform tools to ensure greater transparency in government, protect taxpayer interests and promote economic freedom." More of this activity is detailed in a recent letter from Senator Collins to Secretary Sebelius. The Cause of Action letter asks the Justice Department to investigate a CDC grant program called "Communities Putting Prevention to Work (CPPW)." Cause of Action says their investigators have uncovered multiple instances where these grants may have actually been used for lobbying on tobacco and obesity legislation. The conduct detailed in both the Cause of Action letter and Senator Collins' letter appears to be blatant violations of the Anti-Lobbying Act (18 U.S.C. § 1913), which the Department of Justice is responsible for enforcing. It is also my understanding that the CDC continues to administer a similar grant program funded through the Affordable Care Act ("Community Transformation Grants"). Thus, this apparent misuse of federal dollars could be ongoing.**

A. Do you agree that expenditures of federal grant funds to persuade state and local governments to adopt new laws and regulations violate the Anti-Lobbying Act?

Response:

The Department is committed to investigating all credible allegations of illegal lobbying activity, which strikes at the heart of the democratic process. Two statutes address the illegal use of appropriated funds for lobbying: the Anti-Lobbying Act, 18 U.S.C. § 1913, and the Byrd Amendment, 31 U.S.C. § 1352. The Anti-Lobbying Act prohibits the use of appropriated funds, directly or indirectly, "to influence in any manner a Member of Congress, a jurisdiction, or an official of any government" with respect to "any legislation, law, ratification, policy or appropriation." The pre-2002 version of this statute also provided that "[w]hoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section," is subject to criminal fines and imprisonment. Citing this language, a federal district court concluded in 1982, that the Anti-Lobbying Act applied only to federal officers and employees. *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 826 n.6 (D.C. Iowa 1982).

In 2002, Congress amended the Anti-Lobbying Act by replacing the criminal sanction with civil penalties and making a violation of the Act a violation of 31 U.S.C. § 1352, the Byrd Amendment. The Byrd Amendment expressly prohibits "the recipient of a Federal contract, grant, loan, or cooperative agreement" from using appropriated funds to "influenc[e] or attempt[] to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress" in connection with specified "Federal action[s]." How these laws will apply in any given case depends on the particular facts, but I assure you that the Department will thoroughly investigate, and if appropriate pursue, every serious allegation of illegal lobbying to the full extent of the law.

B. Are you aware of the reported conduct by HHS and CDC grantees, and is the Department of Justice investigating that conduct?

Response:

As noted, the Department takes seriously allegations of illegal lobbying and will take appropriate action to ensure that violations are prosecuted.

C. Has the Department of Justice, including its Office of Legal Counsel, provided any guidance or advice to the CDC or the HHS on the restrictions the Anti-Lobbying Act places on their and their grantees' activities?

Response:

As a general matter, the Department of Justice does not disclose what legal questions it may have been asked to consider or confidential legal advice that it has provided. The Department is fully

committed, however, to ensuring that the United States complies fully with all relevant constitutional and statutory requirements, including applicable anti-lobbying laws.

- D. What has the Department of Justice done to implement Congress' 2002 amendments to the Anti-Lobbying Act, which banned all expenditures of federal funds to lobby or urge state and local governments to change their laws and which restricted all exceptions to that general ban to communications between Executive Branch officers and employees and the Congress?**

Response:

Please see responses to questions 53(A) - (C), above.

- 1. Has the Department of Justice, including its Office of Legal Counsel, given any advice or guidance to Executive Branch agencies regarding the effect of the 2002 amendments?**

Response:

With respect to your request regarding Department of Justice or Office of Legal Counsel ("OLC") advice, OLC has not published any guidance regarding the application of the 2002 amendments to the Anti-Lobbying Act. Again, as a general matter, the Department of Justice does not disclose what legal questions it may have been asked to consider or confidential legal advice that it has provided. The Department is fully committed, however, to ensuring that the United States complies fully with all relevant constitutional and statutory requirements, including applicable anti-lobbying laws.

- 54. During a speech to the Conference of National Black Churches on May 30, 2012 on voting rights, you said that "in-person voting fraud is uncommon." On another occasion you called it "extremely rare." Assistant Attorney General Thomas Perez said in his letter rejecting preclearance of Texas' Voter ID reforms under Section 5 of the Voting Rights Act that the State had failed to establish "significant in-person voter impersonation."**

- A. A 2012 report from the non-partisan Pew Center on the States found that 1 in 8 voter registration records are inaccurate, out-of-date, or duplicative. Doesn't that suggest to you that there is a reasonable and significant justification for voter ID reforms in states like South Carolina, Texas, and Florida where your Department has halted efforts to ensure the integrity of the electoral process?**

Response:

All Americans have a shared interest in modernizing our voter registration system to improve the currency, accuracy, and completeness of our voter registration rolls. Today, the single biggest

barrier to voting in this country is our antiquated registration system. According to the Census Bureau, of the 75 million adult citizens who failed to vote in the last presidential election, 60 million were not registered and, therefore, not able to cast a ballot.

All eligible citizens should be automatically registered to vote. Under our current system, many voters must follow cumbersome and needlessly complex voter registration rules. And every election season, state and local officials are required to process a significant volume of new applications manually, which can lead to errors in the registration records and can create challenges for effective election administration at the polls.

Modern technology provides a straightforward fix for these problems. It should be the government's responsibility to automatically register citizens to vote, by compiling – from databases that already exist – a list of all eligible residents in each jurisdiction. Of course, these lists would be used solely to administer elections and must contain strong privacy protections.

In addition, we should also address the fact that although one in nine Americans move every year, their voter registration often does not move with them. Many would-be voters do not realize this until they have missed the deadline for registering, which can fall a full month before Election Day. Election officials should work together to establish a program of permanent, portable registration so that voters who move can vote at their new polling place on Election Day. Until that happens, we should implement fail-safe procedures to correct voter-roll errors and omissions by allowing every voter to cast a regular, non-provisional ballot on Election Day. Several states have already taken this step, and it has been shown to increase turnout by at least three to five percentage points.

These modernization efforts not only would improve the integrity of our elections, but also would save taxpayer dollars.

- B. If it is racially discriminatory to require a voter to show a photo ID at the ballot box proving his identity, then what in your view may a state do in order prosecute or deter voter fraud and to keep ineligible people from voting?**

Response:

Where a state believes illegal election activity or fraudulent voting has occurred, states may not only enforce their own state criminal prohibitions, but also can refer concerns to their local U.S. Attorney's office or to the Federal Bureau of Investigation. The Department of Justice has and will continue to move aggressively to investigate and prosecute any voter fraud that occurs in connection with federal elections. The Department recently, in March 2012, obtained guilty pleas from the sheriff and county clerk of Lincoln County, West Virginia, with regard to a ballot-box stuffing scheme.

- 55. In response to my January 31, 2012, letter requesting that you answer certain questions pertaining to Justice Elena Kagan's involvement as Solicitor General in preparing for litigation concerning the Patient Protection and Affordable Care Act,**

Assistant Attorney General Ron Weich wrote on February 24, 2012, that you had declined to answer those questions based on “serious separation of powers concerns.” He also attached correspondence with House Judiciary Committee Chairman Lamar Smith in which he explained the Department’s position that inquiries into the pre-confirmation activities of Justice Kagan were not a legitimate subject of Congressional inquiry. I respectfully disagree with both conclusions.

The Supreme Court, including Justice Kagan, has heard arguments in the litigation concerning the Affordable Care Act, and the Court will have issued its decision before the Committee receives your response to these inquiries. Therefore, there is no risk whatsoever that this congressional inquiry could raise separation of powers concerns. These inquiries relate to this Committee’s constitutional responsibility to conduct oversight of the Department of Justice, its administration of existing laws such as the Freedom of Information Act, and the responsiveness of witnesses testifying before the Committee, including yourself and then-Solicitor General Kagan. As you know, according to the Supreme Court, “[t]he scope of [Congress’] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”^[1] The investigative power of Congress “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”^[2] As a member of the Senate Judiciary Committee, which is responsible for conducting oversight of Department of Justice as well as for providing assistance to the full Senate in exercising its Constitutional role to provide the President with advice and consent for his judicial appointments, I renew my request that you answer question 48, which I submitted to you following your appearance before the Committee on November 8, 2011, as a basis for such legislative and other action as the Senate may deem necessary and proper.

Response:

In a series of letters to Congress, we explained our serious separation-of-powers concerns regarding this congressional inquiry, which would circumvent the established practice regarding recusal determinations by a Supreme Court Justice by inquiring into the pre-confirmation activities of a sitting Justice. Whether a Justice should recuse himself or herself is a matter within the province of the Supreme Court. The separation-of-powers concerns are not based upon the status of a particular case before the Court, but rather, upon the fact that the Committee’s interest pertains to a judicial matter.

As we have previously informed you, we are unwilling to participate in the inquiry because it poses an unacceptable risk of inappropriate encroachment upon the judicial branch.

^[1] *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

^[2] *Watkins v. United States*, 354 U.S. 178, 187 (1957).

QUESTIONS POSED BY SENATOR COBURN

56. At the hearing, you were asked whether the Department of Justice's Preventing Violence Against Law Enforcement and Ensuring Officer Resilience and Survivability (VALOR) program was duplicative of existing federal programs, and you stated it was not. Can you explain what training and/or services VALOR provides that other federal programs do not?

A. According to DOJ's website, VALOR "provides training and technical assistance to state, local, and tribal law enforcement officers and conducts and disseminates analysis of violent encounters in various forms, including after-action reviews and lessons learned publications." Is that an accurate statement?

Response:

Yes, it is accurate. The VALOR Initiative, which is administered by the Bureau of Justice Assistance (BJA), is a unique program, unlike any other federal training program, and provides critical training to help officers identify and prevent potentially deadly encounters, or survive unpreventable ones. In the very short time that this program has existed, more than 5,000 law enforcement professionals have received VALOR training, in thirty-two sessions across the country. We have heard from sheriffs and police chiefs that the training has been incredibly valuable. Some officers have described the training as a "wake-up call;" "professional and relevant;" and even "the best training [they] have ever . . . had the opportunity to experience." In developing the VALOR program, BJA worked with federal law enforcement agencies such as FBI, ATF and USMS to coordinate the training through the U.S. Attorneys' offices. Nearly all of the VALOR training sessions to date have had some federal law enforcement representation, including USMS at the kick-off training.

VALOR builds upon the concept of the deadly mix (a foundational understanding to violent encounters) and moves beyond this concept by providing trainings that can be customized to meet the varying needs of requesting agencies. For example, two-day, one-day, and single-speaker trainings are available to facilitate VALOR's broad reach, and agencies can request specific topic areas. Additionally, VALOR provides training and resources for professionals of every rank, customized to their roles and responsibilities. For example, the CEO Brief addresses officer safety considerations best approached through policy issues and best practices, while VALOR Regional and Specialized trainings focus on the components that are critical to officer safety at the street level. The after-action reviews and lessons-learned publications are being used to ensure that the VALOR trainings are current and reflect the challenges being seen by the field.

B. Please explain in detail what the U.S. Marshal Service's National Center for Judicial Security, Office of Protective Intelligence does and what training and programs it offers that are available to state and local law enforcement.

Response:

The United States Marshals Service's National Center for Judicial Security (NCJS) is an outreach program for federal, state and local law enforcement and the judiciary. The purpose of NCJS is to increase security awareness among the judiciary and share best practices and intelligence with our law enforcement partners. The Marshals Service has been tracking threats and inappropriate communications against the federal judiciary for more than a decade. The number of threats and inappropriate communications has increased or remained steady each year, with many individuals crossing multiple jurisdictional levels and threatening multiple judicial and public officials.

Cross-jurisdictional communications and intelligence sharing regarding these threats is important to have an all-encompassing effort in the protection of the nation's judicial system, not just the federal judicial system. The mission of NCJS:

- To serve as the national subject matter expert for judicial system security;
- To provide a wide range of professional assistance, services and support to federal, state, county, and city judicial systems, as well to international agencies responsible for the judicial system security in their respective jurisdictions;
- To bring the federal sector perspective to those interested in judicial system security by initiating educational, operational, research, and technical programs directly related to achieving judicial system security;
- To serve as coordinator for national and international judicial system security activities; and
- To work collaboratively with those organizations and agencies responsible for court and judicial security.

In addition to programs focused on the Marshals Service's federal protectees, NCJS has conducted and/or coordinated domestic training events with the National Center for State Courts, National Judicial College and various state sheriffs' associations. Training topics have included: threat assessments, risk awareness in social media, courthouse design trends, judicial and courthouse attacks, protective intelligence, sovereign citizens, concerns and best practices in court and judicial security, courthouse vulnerabilities, and prisoner handling.

- NCJS, in conjunction with Marshals Service district offices and the Office of Protective Intelligence (OPI), conducts regional one and two-day seminars on court and judicial security that include threat investigations training.
- NCJS, in conjunction with OPI, conducts presentations and seminars at law enforcement conferences such as the National Sheriffs' Association's Annual Conference. Since 2009, NCJS has coordinated a one-day National Conference on Court and Judicial

Security at the NSA Conference that includes topics related to threat investigations along with other judicial security related topics.

- NCJS conducts or coordinates federal judicial nominee and federal chief judge security briefings with more than 75 briefings conducted in FYs 2011-2012.
- In FY 2011, NCJS provided training to 384 judges at nine events and 461 law enforcement officers at four events.
- As of June 30, 2012, NCJS has provided training to 1,191 judges at 11 events and 476 law enforcement officers at seven events for FY 2012.

As part of its educational mission, NCJS collaboratively created several security products for law enforcement and judicial experts. One product, Project 365, partnered NCJS and the Administrative Office of the U.S. Courts to create a video series which consisted of two videos addressing security topics ranging from travelling internationally to methods to use if a false lien is filed against a member of the judiciary.

The Office of Protective Intelligence (OPI) is an office in the Marshals Service's Judicial Security Division. OPI collects, analyzes and disseminates protective intelligence and coordinates the investigation of threats and inappropriate communications for the agency. OPI, in coordination with the National Center for Judicial Security (NCJS), continues to train personnel from the Marshals Service, as well as state, county, local and other federal law enforcement agencies, in the investigation of threats and inappropriate communications directed at judges and other public officials. This training, reporting and relationship-building is mutually beneficial as individuals often change targets, have multiple targets and move across jurisdictions.

OPI provides protective intelligence/investigation training to state and local law enforcement officers alongside Deputy U.S. Marshals through the Marshals Service's Protective Investigations Training Program (PITP) at the Federal Law Enforcement Training Center (FLETC).

- In FY 2011, twelve state and local law enforcement officers and seven non-Marshals Service federal law enforcement officers attended PITP training.

For FY 2012 to date, seventeen state and local law enforcement officers and five non-Marshals Service federal law enforcement officers have attended PITP training.

C. How many state and local law enforcement officers are trained each year through these programs?

Response:

In the very short time that this program has existed, more than 5,000 law enforcement professionals have received VALOR training, in thirty-two sessions across the country.

D. Please explain in detail what training and programs are offered to state and local law enforcement through the U.S. Marshal Service's National Center for Judicial Security Fellowship Program.

Response:

The inaugural NCJS Fellowship program began in 2008; there have been a total of three classes with eight state and/or local law enforcement officers completing the program through FY 2010. The Fellows must have had at least five years continuous experience in court security and all eight Fellows were mid-level managers within their department/office. No new NCJS fellowship classes have been held since then due to funding restrictions.

The Fellow goes through a ninety-day program to be trained in Marshals Service policies and procedures for court and judicial security, judicial protection, protective investigations, and prisoner handling. It also includes training with the National Center for State Courts, Federal Law Enforcement Training Center, U.S. Supreme Court and other private and federal security and law enforcement organizations.

1. How many state and local law enforcement officers are trained each year through these programs?

Response:

There have been a total of three fellowship classes with eight state and/or local law enforcement officers completing the program through FY 2010. No new NCJS Fellows programs have been held since then due to funding restrictions.

E. Please explain in detail what FBI's Uniform Crime Reporting (UCR) division does.

Pursuant to 28 U.S.C. § 534, the Attorney General is authorized to gather information on the occurrences of crime within the United States. The Attorney General has designated the FBI to collect this information, which is accomplished through the Uniform Crime Reporting (UCR) Program. This program has served as a nationwide, cooperative statistical effort with more than 18,000 city, county, state, tribal, college/university, and federal law enforcement agencies, representing 97.4 percent of the United States population, voluntarily contributing data on crimes brought to their attention. The UCR Program's primary objective is to generate reliable information for use in law enforcement operations, administration, and management.

The UCR Program is supported by the following data collection sub-programs.

- Summary Reporting System
- National Incident-Based Reporting System
- Hate Crime Statistics Program
- Law Enforcement Officers Killed and Assaulted Program

- Cargo theft data collection

Each of these programs involves different goals and characteristics. For example, the Summary Reporting System (SRS), which was established in 1930, collects data on the following eight classifications of crimes originally chosen in the belief that they gauge criminal activity.

Violent Crimes

Murder
Forcible Rape
Robbery
Aggravated Assault

Property Crimes

Burglary
Larceny-Theft
Motor Vehicle Theft
Arson (added by Congress in 1979)

In addition to the crime classification, the SRS includes information regarding: the weapon, victim/perpetrator relationship, and circumstances of murders; the age, sex, race, and ethnicity of arrestees; the numbers of monthly assaults on law enforcement officers; and other information.

More recently, recognizing the need to enhance the quantity, quality, and timeliness of crime data submissions, the FBI and major police associations determined that it was important to expand the information being collected regarding the nation's crimes. The National Incident-Based Reporting System (NIBRS) does this by improving the methodology used for compiling, analyzing, auditing, and publishing crime data. The resulting information is more meaningful to law enforcement officials, who use it for both operational and tactical purposes.

Currently, NIBRS collects detailed data regarding individual crime incidents and arrests using 58 prescribed data elements, including 23 offense categories and 49 specific crimes.

Whereas SRS addresses violent crimes and property crimes, in NIBRS there are three scoring categories: crimes against persons, crimes against property, and crimes against society. Using the data collected in both SRS and NIBRS, the FBI releases, on www.fbi.gov, the following annual publications.

- Preliminary Semiannual Uniform Crime Report, January-June
- Preliminary Annual Uniform Crime Report, January-December
- Crime in the United States

F. Please explain in detail what training and programs are offered to state and local law enforcement through the Law Enforcement Officers Killed and Assaulted (LEOKA) programs.

How many state and local law enforcement officers are trained each year through these programs?

Response:

The UCR Law Enforcement Officers Killed and Assaulted (LEOKA) Program collects statistics regarding deaths (both felonious and accidental) of local, state, tribal, college/university, and

Federal law enforcement officers and assaults on such officers under criteria established by the LEOKA Program. These criteria require that the officer be working in an official capacity, have full arrest powers, ordinarily wear a badge, ordinarily carry a firearm, and be paid from government funds set aside for the payment of sworn law enforcement officers. Law enforcement agencies are asked to report on serious assaults in which officers sustain injury with a firearm or cutting instrument such as a knife. This information is published in the annual *Law Enforcement Officers Killed and Assaulted* publication, which is available on www.fbi.gov.

To further assist law enforcement, the LEOKA Program has used almost 40 years of research to develop Officer Safety/Awareness Training, which it provides to local, tribal, state, college/university, and federal law enforcement agencies. The goal of this training is to provide relevant, high quality, potentially life-saving information to law enforcement agencies focusing on why an incident occurred as opposed to what occurred. Tactical issues are not a part of the LEOKA Program's training. This training is offered free of charge, with the only stipulation being that a minimum number of officers attend each session to ensure the appropriate commitment of resources.

Over the past four years the LEOKA Program has provided the following training.

<u>Fiscal Year</u>	<u># of Classes</u>	<u># of Officers</u>	<u># of Agencies</u>
FY 2009	61	6,358	2,065
FY 2010	162	17,283	8,043 ⁵
FY 2011	169	13,282	3,389 ⁶
FY 2012	204	15,125	4,034 ⁷

In addition to providing training, the LEOKA Program provides law enforcement and public safety information through various national publications and articles published on Law Enforcement Online, which is available to the law enforcement community. The LEOKA Program has been recognized twice by the University of Virginia for its research in the field of officer safety. Two publications, "In the Line of Fire" and "Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers," received the University's Thomas Jefferson Award for Research.

G. Please explain in detail what training and programs are offered to state and local law enforcement through the Law FBI's Law Enforcement Training for Safety and Survival (LETSS) program.

1. How many state and local law enforcement officers are trained each year through these programs?

⁵ This increase was made possible by an increase in LEOKA Program training staff.

⁶ This decrease was caused by staff transitions and staff health issues.

⁷ As reported through the 3rd quarter of FY 2012.

Response:

Although the primary focus of the FBI's Law Enforcement Training for Safety and Survival (LETSS) Program is on training federal law enforcement officers, it trains approximately 300 state and local law enforcement officers from various departments and agencies throughout the country each year.

The LETSS Program works to improve the tactics used when conducting arrests and engaging in other interactions in order to minimize the risks to law enforcement officials facing violent, and sometimes life-threatening, circumstances. The LETSS training includes interior tactics (such as hallway and stairway movement, room entry, and clearing techniques), subject control, combat shooting and weapons handling, ballistic shield usage, low light operations, felony car stops, arrest planning and execution, and site surveys.

2. Do any of the programs involve active shooter training?

Response:

The LETSS program is assisting with the Active Shooter Training initiative, and will be working with the Advanced Law Enforcement Rapid Response Training (ALERRT) program to provide active shooter training to various state and local law enforcement officers throughout the United States.

FBI LETSS Tactical Instructors (TIs) will be partnered with ALERRT to provide two-day active shooter schools. To date, there are well over one hundred (100) active shooter training requests from various state and local law enforcement agencies across the country.

H. Please explain in detail what training and programs are offered to state and local law enforcement through the Law FBI Field Police Training program.

1. How many state and local law enforcement officers are trained each year through this program?

Response:

The FBI provides instruction for state and local criminal justice practitioners both at the FBI Academy and throughout the United States at state and local training facilities. The principal training for state and local law enforcement officers is the FBI National Academy, a 10-week residential, multi-disciplinary program for mid-level to senior-level officers who are considered to have potential for further career advancement. Each year, approximately 1,000 state and local law enforcement officers participate in the National Academy program at the FBI Academy in Quantico, Virginia.

In addition to the National Academy, the FBI conducts and participates in state and local training sessions that cover a wide variety of topics, including computer-related crimes, death

investigations, violent crimes, arson, hostage negotiation, criminal psychology, forensic science, interview and interrogation techniques, statement analysis, instructor development, and leadership. On average, 97,000 criminal justice personnel receive training from FBI instructors at state and local training facilities each year.

The FBI also hosts the National Executive Institute (NEI), which provides strategic leadership development, current affairs, and liaison at the highest levels of the FBI and the largest U.S. and international law enforcement agencies. The NEI works collaboratively with the Major Cities Chiefs, the Major County Sheriffs, and the NEI Associates. Through NEI, the FBI trains approximately 45 participants from across the U.S. and International police agencies per year.

Through the Law Enforcement Executive Development seminar (LEEDS), the FBI trains local, state, and international law enforcement executives on management, leadership, strategic planning, labor relations, media relations, social issues, and police programs. Approximately 120 LEEDS participants are trained per year by the FBI.

2. Do any of the programs involve active shooter training?

Response:

From 2011 to present, NEI participants have received active shooter presentations. From 2012 to present, LEEDS participants have received active shooter presentations.

I. Please explain in detail what training and programs are offered to state and local law enforcement through the FBI's Law Enforcement Executive Development Association program.

How many state and local law enforcement officers are trained each year through these programs?

Response:

The FBI Law Enforcement Executive Development Association (FBI-LEEDA) is a non-governmental association with an IRS 501(c)(3) designation as a non-profit organization. FBI-LEEDA is separate and apart from the FBI and its publications typically carry a disclaimer indicating that they are not part of the FBI or acting on its behalf. FBI-LEEDA advised the FBI that during their May 2013 annual conference there will be active shooter training. This will be attended by 500 Law Enforcement Executives.

J. Please explain in detail what training and programs are offered to state and local law enforcement through the Advanced Law Enforcement Rapid Response Training (ALERT) program.

1. How many state and local law enforcement officers are trained each year through these programs?

2. Do any of the programs involve active shooter training?

Response:

The ALERRT Center at Texas State University - San Marcos was created in 2002. Since then, more than \$22 million in state, BJA, and other federal funding has enabled ALERRT at Texas State to deliver vital active-shooter response training to nearly 40,000 law enforcement professionals throughout the nation. The ALERRT trainings have become a national standard in active shooter response training. These dynamic, scenario-based, tactical training courses are instructed by a cadre of subject matter expert adjunct instructors and ALERRT staff and are highly regarded in the field. In addition to in-depth, after-action lessons learned through partnerships with agencies that have been involved in headline-making, active shooter situations, ALERRT has engaged a criminal justice research professor to evaluate and enhance the overall understanding of active-shooter events and assist in improving law enforcement best practices.

ALERRT works with BJA's VALOR Initiative to stem the violence directed against the officers themselves. Staff from the ALERRT team are involved in the VALOR trainings, and through VALOR, ALERRT is able to provide approximately forty active shooter training sessions per year to law enforcement throughout the nation. The ALERRT trainings offered are Level 1 Active Shooter (prepares the first responder to isolate, distract, and neutralize an "active shooter"); Level 2 Active Shooter (the officer learns to not only neutralize the gunman but also treat the wounded); First Responder Operations in Rural Terrain (prepares officers to respond to situations such as ambushes, and vehicle assaults in rural terrain); and Train-the-Trainer (experienced law enforcement trainers are taught the Level 1 training, given skills to teach the active shooter training, and time to practice teaching the skills learned).

To date there are over 120 requests, and the requests continue to come in, for ALERRT's active shooter trainings. BJA is currently working in close partnership with the FBI to provide Active Shooter Level I training to state and local law enforcement to meet the high demand for this training. Specifically, with BJA funding, ALERRT instructors are conducting four Train-the-Trainer sessions for 100 FBI Tactical Instructors during February-March, 2013. These FBI Tactical Instructors will then return to the field and conduct joint active shooter training, along with ALERRT instructors, to state and local law enforcement throughout the country. This arrangement will dramatically increase the number of new trainings that can be offered for state and local law enforcement by approximately 65 training sessions per year.

K. Please explain in detail what training and programs are offered to state and local law enforcement through the Community Oriented Policing Services programs (COPS).

It is evident that advancing community policing through knowledge resources increases the capacity of law enforcement agencies to implement community policing strategies. This is one of the primary objectives of the COPS Office. The COPS Office has historically provided outreach to law enforcement agencies and communities through training, technical assistance, conferences, publications, and best practices to expand the adoption of community policing nationwide. COPS Community Policing Development (CPD) funds are used to advance the

practice of community policing in law enforcement agencies through training and technical assistance that enhance the problem-solving skills of law enforcement professionals and the development of innovative community policing strategies, applied research, guidebooks, and best practices that emphasize crime prevention. To date, the COPS Office has disseminated over six million knowledge products and trained nearly 700,000 policing professionals and community leaders in topics such as violent crime reduction strategies, ethics and integrity, terrorism prevention and preparedness, school safety, partnership building, problem-solving, crime analysis, youth safety, and specialized training for military veterans, immigrant communities, and tribal and Alaskan natives.

1. How many state and local law enforcement officers are trained each year through these programs?

Based on total training numbers since FY2008, on average COPS has trained approximately 13,000 officers per year. To date, the COPS Office has disseminated over six million knowledge products and trained nearly 700,000 policing professionals and community leaders in topics such as violent crime reduction strategies, ethics and integrity, terrorism prevention and preparedness, school safety, partnership building, problem-solving, crime analysis, youth safety, and specialized training for military veterans, immigrant communities, and tribal and Alaskan natives.

Response:

L. Please explain in detail what training and programs are offered to state and local law enforcement through the Department of Homeland Security's Federal Law Enforcement Training Center (FLETC) programs.

How many state and local law enforcement officers are trained each year through these programs?

Response:

We would defer to the Department of Homeland Security to provide information responsive to this question.

M. Please explain in detail what training and programs are offered to state and local law enforcement through the Bureau of Alcohol, Tobacco, and Firearms' National Firearms Examiner Academy programs.

Response:

There are three distinct Training Programs offered under the auspices of the National Firearms Examiner Academy to State and Local Firearm and Toolmark Examiners:

National Firearms Examiner Academy

The National Firearms Examiner Academy provides training for apprentice/entry level firearm and toolmark examiners from federal, state and local law enforcement agencies. The Academy curriculum is composed of the fundamentals of firearms and toolmark examinations and serves as a basis for the trainee, under supervision, to develop into a qualified firearm and toolmark examiner.

Each session of the academy is divided into four distinct phases:

PHASE I – Following student selection and notification students will have a four-month period to complete reading and researching pre-course assignments as provided by the academy staff.

PHASE II - A 17-week instructional session at ATF's Forensic Science Laboratory - Washington in Ammendale, Maryland. Instruction and practical exercises cover numerous topics, to include laboratory and firearms-specific forensic protocols, the evolution and history of firearms, modern firearms operations and components, firearms identification, toolmark examination and identification, ballistics and shot patterns, gunshot residue and path analysis. This phase also includes a trip to an ammunition manufacturer as well as two separate one-week trips to firearm and tool manufacturers in New Hampshire, Connecticut, New York and Massachusetts. This session is very content-intensive and in order for the student to self-develop there is considerable study and research during many evenings and weekends.

PHASE III - A four-month period in which the student returns to his or her own agency laboratory. During this period, the student will complete a research project, which has been pre-approved by Academy instructors and the student's supervisor at their agency's laboratory. The student will also complete simulated firearms and toolmark cases prepared by Academy instructors. These will be presented in a courtroom scenario in Phase IV.

PHASE IV - A two-week follow-up school in the Washington, D.C. area guides the student in preparation for the presentation of expert testimony. This will also include pretrial conferences and the preparation of exhibits. Students will also present the research projects that they completed during Phase III.

Serial Number Restoration Training (SNR)

This is a 3-day class, which supports the identification and tracing of firearms recovered in criminal investigations. It is highly advanced and technical in nature. Students receive hands-on training utilizing various methods to raise obliterated serial numbers from firearms.

Students must be working currently in the position of Firearms/Toolmark Examiner or Trainee in a Forensic Laboratory or provide documentation verifying that they perform restorations for their department. Students must bring lab coat and protective eyewear to class.

For training scheduled at State and Local Enforcement Laboratories, host laboratories may invite students from their lab as well as other jurisdictions. Students attending training at host labs must bring 10 firearms for restoration. Firearms that have been designated for destruction by student's

department may be utilized. Serial numbers will be obliterated during class practical exercises. The training is additionally held at the ATF National Laboratory Center in Ammendale, Maryland, and is open to applicants from all law enforcement laboratories.

Toolmark Identification and Comparison Training:

Course Description: This class supports the identification and comparison of toolmarks commonly encountered in criminal investigations. It is highly advanced and technical in nature. Students receive training in tool manufacture, common tool action and the toolmarks they produce as well as perform fracture and physical match examinations. The class encompasses a full five (5) days of training, Monday through Friday. Applications for this training will be accepted from law enforcement laboratories. The training will be held at the ATF National Laboratory Center in Ammendale, Maryland. Students must be currently working in the position of a qualified Firearms/Toolmark Examiner in a Forensic Laboratory within the United States. The curriculum is not designed for an examiner trainee. Students may be requested to provide documentation verifying that they perform Toolmark Examinations for their department.

1. **How many state and local law enforcement officers are trained each year through these programs?**

Response:

- National Firearms Examiner Academy: 12
- Serial Number Restoration: 75
- Toolmark Identification and Comparison: 16
- Total: 103

57. **You testified that the Department supports the Senate version of the Violence Against Women Act. The Senate version mandates: “No person ... shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity ... sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act.” The bill provides an exception that allows sex segregation or sex-specific programming by VAWA grantees when necessary if the grantee provides comparable services to excluded individuals. Does the Department have evidence of discrimination by grantees based due to gender identity and sexual orientation?**

- A. **If so, please provide such evidence.**

Response:

These questions were posed regarding a previous version of the Violence Against Women Act (S. 1925 in the 112th Congress). A new version of VAWA (S. 47) passed the Senate on February 12, 2013. The answers remain the same for both versions of the bill.

Because the Department’s Office for Civil Rights only tracks complaints alleging discrimination based on federally protected classes (race, color, national origin, sex, disability, age, and

religion), it is impossible to quantify or describe the discrimination cases that the Department has been unable to pursue under existing authority against VAWA-funded grantees. Recent surveys, however, show that LGBT victims frequently are turned away when attempting to access services. For example, according to a 2010 survey by the National Coalition of Anti-Violence Programs of its member programs, only 55.4% of LGBT victims seeking shelter were admitted, and over 55% were denied protection orders.

- B. If the Senate version of VAWA became law, would a grantee with limited resources that cannot provide comparable services to any excluded individuals be violating the law?**

Response:

The nondiscrimination provision in S. 1925 (and now S. 47) would mandate that a VAWA-funded grantee may not exclude victims from its grant-funded programs or activities on one of the prohibited bases. In this way, it would operate in the same fashion as existing federal nondiscrimination laws that apply to federal grant funding, including Title VI of the Civil Rights act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act, and the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act).

- C. Could that grantee be subject to investigation and prosecution by the Department for discrimination?**

Response:

S. 1925 (and now S. 47) does not create criminal penalties for grantees that violate its nondiscrimination provision; no grantee would be subject to prosecution for discrimination under this law. As with the Safe Streets Act's nondiscrimination provision, 42 U.S.C. § 3789d(c), the Department could initiate an administrative investigation under S. 1925's (S. 47's) provision. In practice, the Department seeks voluntary compliance by grantees and works with them to ensure that federal funding and services may continue.

- D. Could a shelter that receives funding under VAWA but has limited resources and only provides services to women be subject to investigation and prosecution if it does not provide comparable services to men?**

- 1. If not, what provision of the law prevents prosecution?**

Response:

As noted in response to question 57(C) above, S. 1925 (and now S. 47) does not create a criminal enforcement scheme; therefore, there is no provision for prosecution.

- 58. Since 2002, 18 U.S.C. §1913 (the Anti-Lobbying Act) has prohibited all lobbying and public policy advocacy at all levels of government, including federal, state, and local, without express congressional authorization. Yet, recently, concerns have been**

raised by members of the Senate and outside, nonpartisan groups about the alleged lobbying activities of certain grantees of the Department of Health and Human Services Center of Disease Control in favor of legislation before state and local legislatures, councils, and departments. Is the Department aware of these claims?

A. Is the Department currently investigating any of this conduct?

1. If so, please explain.

Response:

Please see response to question 53(B), above.

B. Do you agree that expenditures of federal grant funds to persuade state and local governments to adopt new laws and regulations violate the Anti-Lobbying Act?

Response:

Please see response to question 53(A), above.

C. Has anyone at the Department provided any guidance or advice to the CDC or the HHS on the restrictions the Anti-Lobbying Act places on their activities and the activities of their grantees?

Response:

Please see response to question 53(C), above.

D. Has anyone at the Department of Justice provided any guidance or advice to the Executive Branch agencies regarding the effect of the 2002 amendments?

Response:

Please see response to question 53(C), above.