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UNITED STATES DEPARTMENT OF JUSTICE

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BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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UNITED STATES DEPARTMENT OF JUSTICE

THURSDAY, MAY 13, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Delahunt, Cohen, Johnson, Pierluisi, Quigley, Chu, Deutch, Gonzalez, Weiner, Schiff, Maffei, Polis, Smith, Coble, Goodlatte, Lungren, Issa, King, Franks, Gohmert, Jordan, Poe, Chaffetz, and Harper.

Staff Present: (Majority) Perry Apelbaum, Staff Director and Chief Counsel; Elliott Mincberg, Counsel; Renata Strause, Staff Assistant; Brandon Johns, Staff Assistant; (Minority) Sean McLaughlin, Chief of Staff and General Counsel; Richard Hertling, Senior Policy Director; Crystal Jezierski, Counsel, Caroline Lynch, Counsel; George Fishman, Counsel; Kimani Little, Counsel; Art Baker, Detailee; and Kelsey Whitlock, Staff Assistant.

Mr. CONYERS. We are always honored to have the chief of law enforcement of the United States visit with the Committee.

I wanted to note from the outset that Attorney General Holder has reinvigorated the Civil Rights Division, which suffered for a while from low morale; and under Assistant Attorney General Tom Perez the Division is I think doing a good job in protecting the rights, including voting, of all Americans.

There are several issues that I would like to raise for further discussion. The Attorney General has raised the issue of statutory modifications to the Miranda public safety exception into the national debate. I would hope that he can go into this in some detail.

Now the most important thing to me that we are dealing with in this country right now is the failure of the so-called war against drugs. We have spent more money incarcerating more nonviolent people under an antiquated mandatory minimum sentence to less and less effect. A million and a half people are arrested every year for drug violations. We spend $2 billion a year to imprison people who violate Federal drug laws. We incarcerate more people than any other nation on the planet Earth, but the drug use in the U.S. and around the world is more prevalent than ever.

If there is one thing that we could accomplish successfully between now and the next time the Committee meets with the chief

law enforcement officer of the country is that we get on top of the drug problem.

Now, one and a half years after the executive order of President Obama, we have still not closed the prison at Guantanamo. The plan to try Khalid Sheikh Mohammed and other 9/11 conspirators in the Federal Court in New York has been derailed. No institution that I know of is better equipped to show the world how America deals with miscreants than this Federal Court where the trial was originally intended to occur. I hope these plans can be put back on track.

Now the Administration has taken some steps to curb the misuse of the state secrets privilege. While the Justice Department has issued new guidelines, the privilege continues to be overused, and I think that the need for uniform and consistent handling by the Court still remains.

It is true, and I commend the Administration, for ending the practice of secret prisons and calling a halt to water boarding and enhanced interrogation techniques. These actions tarnish the Nation's reputation as a beacon of liberty and served as a recruiting tool for our enemies.

The Attorney General has released rejected torture memos and brought a much-needed attitude of transparency to the Department which has helped us understand the workings of the Office of Legal Counsel which had issued secret opinions that may have helped to insulate those responsible for torture and inhumane treatment from legal accountability; and the Attorney General has also directed an independent review of possible crimes relating to interrogation and torture.

Clearly, there was, as usual, pressure on all sides within and without the Administration to ignore the past and move on, but, to his credit, he came down in favor of the rule of law and accountability. And so, after almost a year and a half, we are moving beyond the past, and we are trying to deal with the present and also work on the future as well.

So I join every man and woman on this Committee and welcome you and look forward to the discussion that we will have.

I turn now to Lamar Smith, the Ranking Member of this Committee.

Mr. SMITH. Thank you, Mr. Chairman. Welcome, Mr. Attorney General.

Mr. Attorney General, in the last year, three serious terrorist attempts, one of which was successful, have occurred in the United States. Army Major Nidal Hasan went on a shooting rampage at Fort Hood, Texas, killing 14 innocent Americans and wounding 30 others. Umar Farouk Abdulmutallab boarded a plane headed for Detroit with explosives hidden under his clothes. His attack was thwarted by a poorly made bomb and alert passengers. And Faisal Shahzad, a naturalized citizen, parked a car loaded with explosives in New York City's Times Square. This attack was stymied by his ineptness and alert pedestrians.

Our national security policy should consist of more than just dumb bombers and smart citizens, because, sooner or later, a terrorist is going to build a bomb that works.

As Commander-in-Chief, the President is responsible for protecting the American people. Unfortunately, several of this Administration's policies have put Americans at greater risk.

First, the President's campaign promise to close the terrorist detention center at Guantanamo Bay, Gitmo, has not reduced the threat of terrorism. In fact, those transferred to other countries can be and are released; and former Gitmo detainees often return to terrorism.

Second, trying Gitmo terrorists in civilian courts is a dangerous proposal that has no legal precedent. Once in the U.S., terrorists can argue for additional constitutional rights, making it harder for prosecutors to obtain convictions.

Third, treating terrorists like common criminals makes Americans less safe. Giving terrorists the right to remain silent limits our ability to interrogate them and obtain intelligence that could prevent attacks and save lives.

According to news reports, Mr. Attorney General, you recently said that you now want to work with Congress to limit terrorists' Miranda rights. That is surprising, since it is this Administration that has insisted on extending constitutional rights to terrorists in the first place. If the Administration treated terrorists like enemy combatants and tried them in military commissions at Guantanamo Bay Detention Center, they wouldn't need to be read a Miranda warning.

Fourth, the Obama administration's opposition to REAL ID weakens national security. The Administration wants to repeal the law which was enacted after 9/11 to prevent terrorists from obtaining legitimate forms of identification. This would give terrorists cover to plot and carry out attacks inside the United States.

And, fifth, the Administration's push for amnesty for illegal immigrants makes America less safe. The arrest of the Times Square bomber, a recently naturalized citizen, is another reason why we must reject proposals to give amnesty to millions of illegal immigrants. If we can't detect a potential terrorist who submits himself to our security process as Shahzad did, how can we identify other potential terrorists who will apply for amnesty? Amnesty could legalize many would-be terrorists who are already in the U.S. and give them cover to plot attacks against innocent Americans.

It makes no sense to deny the link between immigration enforcement and national security. If we want to prevent attacks, we need to keep terrorists from getting visas and stop them from coming to the U.S. and obtaining citizenship. That means enforcing our immigration laws. If we don't enforce our immigration laws, terrorists are not slipping through the cracks, they are coming through the front door.

Success in the war on terror means preventing attacks, not just responding to attempts. The goal is to detect and to deter, not just make arrests after the bomb is set.

But to achieve this goal we need to improve our intelligence gathering by interrogating terrorists, not reading them their Miranda warnings. We need to end the failed policy of releasing terrorists overseas, and we need to prevent terrorists from using our immigration system to enter or stay in the U.S.

Thank you, Mr. Chairman. I will yield back.

Mr. CONYERS. Thank you.

Chair Nadler, Chairman of the Subcommittee on the Constitution.

Mr. NADLER. Thank you, Mr. Chairman.

I want to welcome the Attorney General back to the Committee.

The work of the Department of Justice touches on some of the most important matters of life in this Nation, from fighting crime and terrorism to vindicating of fundamental rights. We ask a lot of the Department of Justice, and we expect a lot.

I want to commend you, to begin with, for recognizing the success that we have had in prosecuting terror suspects in Article III courts. We all want to bring terrorists to justice, and our criminal justice system has been an effective tool in doing so.

Until the recent change in the Administration, that didn't seem to bother my friends on the other side of the aisle. During the Bush years, there were no attempts to tie law enforcement's hand, no opposition to bringing them to trial, no complaints about sending terrorists to jail, no complaints about reading them their Miranda warnings so that we can prosecute them successfully.

I hope to hear from you today about the Department's continued use of the state secrets privilege in particular. As you know, I have introduced legislation, along with the Chairman and some others, to formalize and regulate the treatment of the privilege in court in a matter that will both protect bona fide state secrets and that will ensure that individual rights can get vindicated in our courts.

In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. There is an ancient maxim in law that there is no right without a remedy; and if the Government violates someone's rights, if it wiretaps your phone without a warrant, if it ransacks your house and steals your guns or your papers, if it invades and ransacks your house, if it kidnaps and tortures you, your only remedy, the only way you have to make the rights guaranteed you in the Bill of Rights, the Second or the Fourth or the Fifth Amendments, real is to sue the government for an injunction to stop the action or for damages after the fact.

But if the executive can have any case dismissed on the mere incantation of the magic phrase "state secrets" without having to prove to a court that the concerns about revelation of sensitive national security information are real and not simply an excuse to shield embarrassing or illegal acts or information, then we have no remedy and no rights, and the executive can get away with anything, regardless of anything the laws of the Constitution may say, and no one will ever be the wiser. There can be no law, no rights, and no liberty if the executive can do anything it wants behind an impenetrable wall of secrecy.

I'm aware and I appreciate that this Administration has adopted some rules for the exercise of the privilege, but those rules still reserve unaccountable discretion to the executive without any meaningful judicial review. The guidelines still violate the observation by the 9th Circuit in the Jepson case that "the executive cannot be its own judge." That is the key.

I will submit the balance of my statement for the record.*

Mr. CONYERS. Thank you very much.

The Chair recognizes the senior Member of the Judiciary Committee, Howard Coble of North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

General, it is good to have you back on the Hill.

General, the alarm that was created by the Administration's announcement that it was planning to prosecute detainees from Gitmo in a New York Federal Court was astounding. I'm relieved, however, to hear that this plan has been scrapped, at least temporarily. But it appears that there may be some thinking, General, in the Department that the criminal justice system is well suited to prosecute terrorism suspects effectively and efficiently; and if that is the rule of thumb, I disagree with that.

Criminal trials give terrorists the upper hand, in my opinion, General. They are not ordinary citizens and will use our civil rights to undermine our laws.

Secondly, trials are lengthy and expensive. Why should our citizens pay for additional rights for terrorism suspects?

And, finally, criminal trials are open to the public and will undoubtedly achieve one of the terrorists' main objectives, and that is to promote their cause against our country.

With regard to the war on terror, Mr. Chairman, I have been balanced. I have supported the dispatching of troops to Iraq, but I subsequently became critical of the Bush administration for what appeared to have been a failure to formulate a post-entry strategy.

I support the rule of law and heartily support it. But simply to say that I'm an advocate for the rule of law, therefore, terrorists deserve criminal trials in Federal courts is simply illogical. The notion that transferring detainees to another facility in Illinois, which at one time was discussed, General, I think that is equally illogical.

Meanwhile, I'm advised, General and Mr. Chairman, that detainees who have been released would oftentimes return to the battlefield to fight our troops, and that is frustrating at best and infuriating at worst.

General, these are some issues that bother me, that trouble me, and perhaps some illumination can be forthcoming today. Again, good to have you here.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. The Chairman of the Subcommittee on Crime, Bobby Scott of Virginia.

Mr. SCOTT. Thank you, Mr. Chairman; and thank you, Attorney General, for being with us today.

We have been dealing with violent crime for juveniles in such a way that we have ended up generally codifying slogans and sound bites to the point where we now lock out more people in the United States than anywhere on Earth by far. The Pew Research Center has suggested that we are locking so many people up that it is actually counterproductive. We are injecting more social pathology into the communities than we are solving.

*The information referred to was not received by the Committee at the time of the printing of this hearing.

That is why I'm pleased to be working with you on the Youth Promise Act and the Second Chance Act. We had a hearing yesterday where Texas showed that by investing in prevention and early intervention programs they are in the process of saving hundreds of millions of dollars because they won't have to build prisons that were previously on the agenda. So I appreciate working with you on that.

There are a lot of things we can do without changing the Criminal Code in terms of resources. Many across the country, DNA rape kits have not been analyzed, have not been included in the DNA system. We could solve a lot of crimes if we would invest the money into rape kits. And financial crimes, especially identity theft and credit card fraud, could also be solved with more resources. And I would be interested in what you have asked for in terms of resources on that level.

There is an Office of Legal Counsel memo dated June 29, 2007, that interpreted the Religious Freedom Restoration Act of 1993 as providing a blanket override of statutory nondiscrimination provisions; and I would be interested in knowing the status of that.

And, finally, I'm looking forward to your comment on the terrorism trials and commenting on how the civilian courts actually provide longer and more certain sentences than the military tribunals that have been plagued with constitutional complications and been overridden in several court decisions and how we are actually better off and more secure by using the civilian criminal courts.

Thank you, Mr. Chairman; and I yield back.

Mr. CONYERS. Former Attorney General of California and distinguished Member of the Committee, Dan Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Attorney General, when we get time to ask questions, I hope to ask you questions about the clash between Mirandaizing terror suspects and our ability to gain information that is necessary. But something that the Chairman said caused me pause, and that is he said that we need to use our civilian criminal justice system in order to deal with miscreants. Miscreant, definition, is an evildoer, a villain, an infidel, or a heretic. Now that may describe the kind of individuals who are involved, but it doesn't help us in terms of our legal analysis of how we deal with these people.

And, Mr. Attorney General, I am concerned that we treat people in these regards more as criminal suspects than as what they truly are, which are illegal or unlawful enemy combatants. And I hope to ask you about the difference in treatment of Faisal Shahzad and the December bomber in terms of the amount of time that was given toward interrogating them to seek information that would potentially save this country before either one of them was given Miranda. The disparate treatment suggests to me that there has been a different policy by your Justice Department, and I would like to find out what that is.

The suggestion that your Department is going to bring forward legislation to in some ways amend Miranda brings up an entire host of issues. That is, what is the capacity of the Congress to change statutorily that which is a rule that has been imposed under constitutional obligations by the Congress? And, further, with that limitation, does it make more sense for us to deal with

this in an entirely different vein, that is, recognizing we are at war, we are dealing with someone who has been captured on the battlefield, as it has been extended by reality, and whether or not that would be in the greater protection of the American people?

Thank you very much, Mr. Chairman.

Mr. CONYERS. Thank you.

The Chairman of the Subcommittee on Courts, Magistrate Hank Johnson from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this hearing today; and I appreciate your efforts in ensuring that Members of this Committee have these opportunities to conduct oversight of the Justice Department.

General Holder, I welcome you; and I thank you for making yourself accessible so that we can engage in one of our most important responsibilities and that is oversight of the Justice Department.

Congressional oversight is a key component of the system of checks and balances. While you have been Attorney General, the Justice Department has done many things well; and you should be applauded. Most importantly, you have taken steps to depoliticize the Department; and, to a notable degree, you have restored public confidence in the ability of the Department to fulfill its mandate, which is equal justice for all.

We still have a ways to go in removing the strain—or the stain left by the previous Administration on the operations of your Department, however; and I look forward to working with you to do just that.

The Justice Department has renewed its commitment to local law enforcement, also; and that has resulted in putting more officers on the street, which has made our communities safer. This has helped local communities attract business and spur economic development.

I thank the Department for its commitment to the Byrne Justice Grant Program and the COPS Hiring Recovery Program, which are vital sources of funding for police departments.

Further, the Justice Department has fought tirelessly to combat terrorism. The attempted Christmas Day bombing on a Northwest Airlines flight and the FBI's interception of a recent plan to attack the New York subway system reminds us of the constant struggle against those who wish to harm Americans. In that regard, I'm eager to hear what the Justice Department may propose in the way of legislative changes regarding the public safety exception to the Miranda warnings. Being a staunch advocate for the preservation of constitutional rights, I will be looking carefully at that.

In addition, I want to thank you for revitalizing the Antitrust Division. You have made it clear that the antitrust laws are going to be enforced, and this means improved competition and real price protection for consumers. As Chair of the Subcommittee on Courts and Competition Policy, I'm grateful for your focus on antitrust issues.

General Holder, I look forward to hearing your testimony today, and I appreciate the Justice Department's efforts in protecting the safety and constitutional rights and resources of the American people.

I yield back the balance of my time.

Mr. CONYERS. Darrell Issa, Ranking Member on the Oversight Committee and the person who may hold more copyrights than anybody on this Committee, except perhaps our newest Member, Jared Polis.

Mr. ISSA. Thank you, Mr. Chairman; and, Jared, welcome. We now have two nonlawyers who are, in fact, holders of the Entrepreneur of the Year award. So I would say that we definitely have the edge over all these guys with law degrees now.

General Holder, I believe that members of the Administration should never be surprised when they come to hearings, nor do they often walk away happy that it was an easy experience. Today I expect will be no exception.

On April 21, I wrote to you about a serious allegation of multiple crimes. Under title 18 of the U.S. Code, section 211, which deals with bribery of public officials; section 595, which prohibits interference by government employees into nominations or elections of candidates for office; and section 600, which deals with corrupt government officials who use Federal jobs for political purposes, General Holder, I will be asking you, and hopefully you have brought all the people necessary to answer a series of questions.

First of all, do you recognize these as felonies?

Second of all, when those allegations come and are repeated by a Member of this body, a United States Congressman, a former Navy admiral, and when the White House has not denied these claims but rather says, and I quote, "I have talked with several people in the White House. I have talked with people who have talked to others in the White House. I am told that whatever conversations have been had are not problematic. I think Congressman Sestak has discussed that—this is whatever happened is in the past and he is focused on the primary election."

So I will be asking you a series of questions in order to find out whether these allegations of multiple felonies asserted against the White House are worth appointing a special prosecutor; and why since February when these were first alleged and through this series of many months we have seen no witnesses questioned and the White House allowed to simply say that, in the opinion of a nonattorney, a press secretary, that these were not problematic.

Mr. CONYERS. Thank you very much.

Mr. ISSA. I yield back.

Mr. CONYERS. The Chair recognizes Pedro Pierluisi of Puerto Rico, a former Attorney General of that nation.

Mr. PIERLUISI. Thank you, Mr. Chairman; and thank you, Mr. Attorney General, for testifying before this Committee today.

In the brief time that I have, I would like to focus your attention on the Department's drug control policy. As you know, in recent years, drug courts and other problem-solving courts have reduced the rate of recidivism among substance-abusing offenders by providing intensive treatment and supervision in lieu of incarceration. By lowering rearrest rates, drug courts save taxpayers considerable money. In fact, for every dollar invested in a drug court, taxpayers save roughly three times that amount.

Despite the successes these courts have enjoyed at the State level, in the Federal system drug courts have been implemented in less than one-third of Federal judicial districts.

I understand the Department of Justice is conducting an across-the-board review of Federal sentencing policy. I urge you to look seriously at the role that drug courts can play at the Federal level, both as an alternative to incarceration for nonviolent offenders and as a reentry court for offenders who have just completed a prison term. We in Congress must do more to support drug courts, and I am drafting legislation that would provide a dedicated stream of funding for Federal drug courts.

Now, finally, I have to say that I look forward to hearing from you regarding this new Arizona immigration law which I find offensive to all Hispanics in America, including the millions of U.S. citizens and legal residents of Hispanic origin that we have in this country. So I hope you address that subject matter as well during the course of your testimony.

Thank you very much, Attorney General and Chairman, for yielding this time to me.

Mr. CONYERS. The distinguished gentleman from Iowa, Ranking Member of Immigration Subcommittee, Steve King.

Mr. KING. Thank you, Mr. Chairman; and thank you, General Holder, for coming here today.

I would echo some of the remarks that Mr. Issa made about the experience of testifying here. We understand that there are certainly political messages going back and forth, constitutional statutory messages and public policy messages going back and forth here today. Most of us will engage in that.

I have some concerns that I want to voice, a concern about the focus of the Department of Justice on the opposite side of the gentleman from Puerto Rico in that, as I look at the Arizona immigration law, it appears to me to be a mirror and a reflection of Federal law. I am concerned that we would have Federal resources that would be apparently directed by the White House itself to use the Justice Department to examine the Arizona immigration law for its constitutionality or any potential violation of Federal statute. I'm concerned that we might have those resources at the direction of the President, and I know we will hear how independent the Justice Department is, at the same time that we can't find a single dollar or individual resources to examine ACORN, which has been all over the news for months and pervasive in their negative influence on elections and many other areas.

So I'm looking forward to getting into those subjects a little more deeply; and I will want to hear from you as to your view on Arizona immigration law, the look into the alleged civil rights violations of the sheriff of Maricopa County and the intense focus of the Justice Department on that.

Other subjects that do come to mind would be the cancellation of I think the most open-and-shut voter intimidation case in history and the direction of the Justice Department to cancel the results of a legitimate referendum to remove the political party and have local nonpartisan elections in Kinston, North Carolina. Those things seem to run contrary to the justice that I think that you are pledged to support, and I intend to bring up some of those subject matters.

But I very much appreciate being here today, and this is a very good exercise for our constitutional republic.

I would yield back the balance of my time. Thank you, Mr. Chairman.

Mr. CONYERS. Anthony Weiner of New York, Crime Subcommittee.

Mr. WEINER. Thank you, Mr. Chairman. Mr. Attorney General, welcome.

I don't believe there is a Republican or Democratic way to do your job. I don't believe there is a conservative or liberal way to do it. I believe that law enforcement should transcend politics. That has led me to support you in your decision to hold the trial of Khalid Sheikh Mohammed in the Southern District where we have perhaps the best prosecutors anywhere in the world, the most experienced in prosecuting terrorism cases, judges, court officers who know their business; and I frankly think that, sooner or later, you should stop the Kabuki dance and tell us where that trial is going to be held. And I think if you make a good case and you sell it and you get the facts out there it will be supported.

But I have to tell you, as the chief law enforcement officer of this country, some of the funding decisions made by this Administration have been mind-numbingly, insanely wrong.

First, we see that the COPS funding—something that, as you know, I fought very hard for to get included in the stimulus bill—denied the New York City Police Department its application; and, when it did, it said we are going to limit it to 50 police officers. Essentially saying that the notion of the 5 percent cap and more, that a city like New York should not get what it asked for, it should get some miniscule number, if any.

And then yesterday we find the Department of Homeland Security proposes a 35 percent cut in transit funds; a 3 percent cut in Port Authority funds; total transit funding, a 30 percent cut; a 25 percent cut in port security. You know, I have to tell you that, while you might not be the Secretary of Homeland Security, I would be shocked if anyone who watched your press conference after the attempt on Times Square would come back and propose these things.

I think there is something to be said for the idea that if you are going to say we need more boots on the ground you have to realize that in New York City today we have fewer police officers than September 11. You have to realize the COPS program which someone like me who has fought very hard to get is not necessarily only for towns that don't have minor league baseball teams. Big cities like New York that are targets have to get the resources they need. And I would urge you to tell your colleagues within the Administration that when it comes to COPS, these types of funding, you have to give us the resources to do our job so that when you hold your trials we can make sure that they are safe.

And I yield back the balance of my time.

Mr. CONYERS. Bob Goodlatte of Virginia, distinguished senior Member of the Committee.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Attorney General Holder, we are delighted to have you here today. You will hear many different perspectives, I think, on what we should do with terrorists and where they should be tried. I don't believe it should be in New York City, and I don't think it should

be in our civilian courts. But I'm most in agreement with the gentleman from New York in wanting to know your perspective on that and to remind my colleagues that the Supreme Court's Miranda decision does not apply in the context of a trial by a military commission because military commissions try people for violations of the laws of war, and Miranda warnings are only required when a defendant is tried in civilian courts.

And as the Supreme Court explained in the 1942 case of Ex Parte Quirin, the Fifth Amendment does not apply to unlawful enemy combatants who are at war with the U.S., and I would hope that the Attorney General and our current Justice Department would uphold that and honor that Supreme Court decision.

The Quirin case involved a group of saboteurs who were landed by German U-boats on American beaches. Their assignment from the German military authority was to destroy domestic military targets and war production facilities. All of the saboteurs were Germans except one, Haupt, who was a naturalized U.S. citizen. After they were captured by the FBI, the saboteurs were placed in military custody and tried by a military commission. The commission found them all guilty and sentenced all but two of them to death.

They then challenged the authority of the military tribunal, and the tribunal's denial to them during the proceedings of their constitutional rights afforded domestic criminals by the Fifth and Sixth Amendments. Their arguments were rejected by the Court. As the Court explained, those who take up arms against the United States are designated as enemy combatants, and enemy combatants can be lawful or unlawful, and if the latter they can be dealt with by the military courts.

The Supreme Court upheld the military commission's authority, concluding that the President, as Commander-in-Chief, has the power to seize and subject to disciplinary measures those enemies who in their attempts to thwart or impede our military effort have violated the law of war.

Today terrorists, just like the plain-clothed Nazi saboteurs in Ex Parte Quirin, are considered unlawful enemy combatants because they fight in disguise without uniforms, and under Quirin they can be detained and tried by military tribunals.

Finally, the Court in Quirin rejected Haupt's claim of constitutional rights by virtue of his American citizenship. The Court held that American citizenship does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.

I would very much appreciate hearing your views on that when the appropriate time comes. Thank you for joining us today.

Thank you, Mr. Chairman.

Mr. CONYERS. Distinguished Member of the Committee, Maxine Waters, Los Angeles, California.

Ms. WATERS. Thank you very much, Mr. Chairman, for scheduling today's oversight hearing for the Department of Justice. I am very pleased to have the Attorney General join us today, and I have a number of concerns that I would like to bring to his attention.

In the limited time that I have this morning, I would like to discuss a few issues with you, Mr. Attorney General, and then submit

additional questions in writing so you and your staff can provide additional information.

First, I have been concerned with the lack of diversity reflected within the Department of Justice and throughout the judicial system. I'm especially concerned about the FBI and all of the discrimination complaints that have been filed in that division and want to know exactly what is happening with the backlog that they had at one time and what you are doing to correct some of the problems of that division.

I would also like to know what actions this Administration has taken to ensure that the Department of Justice and all of its internal agencies and divisions more closely reflect the diversity of this country.

As you are aware, many of the disparities that exist within our Justice Department can be linked to the agents, prosecutors, and attorneys that enforce the law. Since our laws afford judges, lawyers, prosecutors, and Federal agencies a great deal of discretion, it is critically important that diversity is counted among the Department of Justice's goals in hiring and recruiting Federal agents, attorneys, and staff.

I know that many people will often cite the Attaran decision in order to diminish the efforts or authority of the Federal Government to provide opportunities for a diverse candidate pool. However, I strongly believe that it is within our national interest that individuals charged with enforcing the law include people from diverse communities and backgrounds.

Secondly, today I would like to express my concerns with the Department of Justice review of the proposed Comcast-NBC merger. Over the past 20 years, our Federal antitrust laws have been so eroded that many believe that our regulatory agencies will simply rubber stamp any large transaction that comes before them. Corporations and institutions do not become too big too fail overnight. At some point, there is a failure of oversight.

I just heard someone commend you for the changes that you had made, but I'm not aware of them, and maybe you can talk a little bit about that today.

Moreover, many legal experts argue that the guiding principles that have historically framed the Department of Justice merger review proceedings are obsolete and there is no real way for the American public to gauge how the Department of Justice will review transactions such as the Comcast-NBC merger. In fact, many industry insiders believe that, ultimately, the DOJ and FCC will uphold this merger without fully considering the public interest.

Comcast Corporation is already airing commercial advertisings giving the impression that its merger with NBC Universal is a done deal, and you need to know that we did get the cooperation of the FCC to extend the comment period, and now we are organizing, and about 60 Members of Congress have signed a petition to get public hearings. And I hope that before DOJ makes its decision that they would ask the FCC if, in fact, they are going to hold those hearing and you have the benefit of that information.

Therefore, to the extent you are able to discuss, I would like to hear from you about what this DOJ is doing to ensure that Federal

anti-trust principles are respected within current and future merger reviews.

And, more broadly, I would like to know if the Department of Justice is or intends to take a look at some of the current antitrust exemptions that are on the books, such as the Sports Broadcasting Act, which has enabled organizations like the National Football League to make billions of dollars while functioning as a nonprofit, exempt organization.

Therefore, I look forward to asking you questions and continuing to communicate my concerns to you in these and other areas.

I yield back.

Mr. CONYERS. Mr. Trent Franks of Arizona, Ranking Member on the Administrative Law Subcommittee.

Mr. FRANKS. Well, thank you, Mr. Chairman. Thank you for holding this Committee hearing.

And, General Holder, I would start by saying that I know that it is a very difficult job that you are in and that trying to secure this country in a myriad of different ways is not an easy job.

With that said, I am very concerned about the seeming subordination of some of the critical protections of Americans to the political correctness that seems to be exhibited by this Administration. We have all heard about the security apparatus, how it failed on Christmas Day when a Muslim militant failed in his attempt to carry out Jihad by bombing an airliner. Having some familiarity with certain types of explosives, the type this gentleman was using could have been devastating.

And then, of course, we learned about the attempted New York Times Square bombing; and the type of weapon there used, it occurs to me, looked like it was an attempt to construct a fuel bomb weapon, which instead of just blowing the fuel in a fireball was to blow the fuel into the air and then ignite it. And we use fuel bombs, as you know, in the military apparatus that are some of the most powerful yield conventional weapons that we have. And if that had been successful I think hundreds would have died.

In both of these cases, it was the incompetence of our enemies that saved us, rather than the competency of our policies. And, again, it occurs to me that the political correctness in the aftermath and even prior was a consideration that we should look at far more carefully.

Now the disturbing part of this trend, of course, is that once in a while terrorists find a modicum of competence, as in the case of Major Hasan at Fort Hood. But Major Hasan advertised his tendencies with everything but a flashing neon sign, and yet this Administration failed to recognize it.

The militant Muslim cleric Awlaki was communicating with Major Hasan at the time and has taken to taunting this Administration. He said of Mr. Obama, "His Administration tried to portray the operation of brother Nidal Hasan as an individual act of violence by an individual. The Administration practiced the control on the leak of information concerning the operation in order to cushion the reaction of the American public."

This seems, again, another example of this Administration failing to protect the people in the greater emphasis on the political correctness and once again in the name of political correctness

which has, in this case, become deadly in the most literal sense of the word. We face an ongoing challenge here that I believe that this Administration needs to face head on.

One of the ancient generals, Sun-Tzu, said, If we cannot identify the enemy honestly and accurately, we cannot defeat them. The muzzle of political correctness that this Administration has used has kept us from identifying our enemy.

I was disappointed last month to see Mr. Obama announce that words like "Islamic radicalism" and "Jihad" will now be prohibited in the national security strategy lexicon. And I know the Department of Justice is just one part of this Nation's security apparatus, but it is a critical part. The performance of the Department over these several months of the Administration, the year and a half, has not instilled confidence in this country; and there seems to be no strategic approach to fighting terrorism or even an ability or a willingness to identify the enemy.

So I'm pleased, Mr. General, that you have shown up for the hearing and look forward to hearing what this Administration's strategic plan is to defend this Nation from terrorism.

Thank you, Mr. Chairman.

Mr. CONYERS. Steve Cohen, Chairman of the Subcommittee on Administrative Law, Tennessee.

Mr. COHEN. Thank you, Mr. Chairman; and thank you, General Holder, for appearing, as I know you would.

I just want to thank you for the job you are doing for helping bring the Justice Department into the 21st century; and I would like to ask you to specifically look, and I know you would, at the bill that Senator Webb has introduced to do a review of our criminal sentencing and our criminal laws.

I was with Chairman Conyers last night at the leadership conference where Senator Leahy was honored as well as Harry Belafonte. And Mr. Belafonte commented on the 2 million or so people who are incarcerated, many of whom should not be—in his opinion and in my opinion as well—incarcerated because many of those people's presence in jail is a reflection on the failure of our system to educate, to prepare for jobs, and to provide jobs over the years.

A system of warehousing and criminalizing, incarcerating individuals for terms beyond what is necessary is injurious to the country and to the country's soul and to its morality. And I know that you will give a close look at all of our laws, particularly victimless laws, where our laws really there is a cultural lag and they reflect more of an attitude that was 30 or 40 years ago which time has shown us is incorrect and is unjust.

Thank you, sir; and I yield back the balance of my time.

Mr. CONYERS. Judge Louie Gohmert of Texas, Ranking Member on the Crime Subcommittee.

Mr. GOHMERT. Thank you, Mr. Chairman.

General Holder, you must be sitting there thinking, what is going on? You probably have never seen this many opening statements. I haven't. You probably came over expecting to get grilled, and everybody is making a statement, and you are getting a pass.

The dynamics are these. We are expecting to vote shortly, and most everybody here knows if we don't take an opening statement,

we don't get to address things to you directly. So let me just say I don't believe in ambush, and I will send a letter asking these, because I doubt I will have the chance to ask.

But one of the things I have been curious about in this discussion about potential terrorists on our soil was the Military Commissions Act of 2006 addressed these as enemy combatants. For some reason, somebody felt like that just was too offensive and requested a change to—and the law has now been changed. We no longer have enemy combatants, as you know. It is "alien unprivileged enemy belligerents," and I'm just curious if somebody at Justice knows how that helps fight the war on terror, to change the name.

Also, I appreciate your coming. It is a great thing. I know when the Nixon administration claimed executive privilege, people were properly outraged. But when a Committee here asks for the social secretary to find out about how the Salahis got into the Christmas party inappropriately, we were told that the social secretary would not be allowed to testify, and I'm curious about what kind of executive privilege or what that was and if that advice came from your Department.

Also, I'm not mentioning some of the things that had been mentioned by others that are concerns, but we previously had the testimony of the Civil Rights Division Chief Perez, and he was indicating things, requirements that seemed different from what 1965 Attorney General Nicholas Katzenbach testified regarding requirements to prove this kind of voter intimidation which was captured on video that a civil rights era marcher advocate said was the worst voter intimidation he had ever seen.

I'm still concerned why that wasn't pursued more vigorously. Chief Perez kept saying that he was going to look forward to the report by the Office of Professional Responsibility, and it should never have gotten to that. It should have been pursued.

And, also, the other area that I will ask for your assistance on—and it is a bipartisan issue—we have nearly 5,000 criminal statutes. We have got people going to jail, not necessarily under Justice, EPA, different, for violations that nobody in this room ever knew were even violations. And we have got to do some kind of job of cleaning up this overcriminalization where Congress slaps on a criminal penalty to send people to jail, people outside of Justice and departments outside look forward to getting a badge and a gun and a siren, and I look forward to your advice on how we can work together to clean that situation up.

But thank you for your appearance here today.

Mr. CONYERS. Attorney Mike Quigley, Chicago, Illinois.

Mr. QUIGLEY. Thank you, Mr. Chairman.

I welcome the Attorney General as well as our two new Members of the Committee.

I'm here a year now, and while it doesn't make me a wily veteran, it does occasionally make me feel like Bill Murray in the movie Groundhog Day, because the opening statements sound like the opening statements from last year. And, obviously, the arguments and the issues and the problems we face are similar to last year. What is always troubling is the fact that sometimes we don't get to the root causes again and again and again, and we are facing the same day over and over again.

And just by example, I would point out my colleagues have talked about international terrorists, domestic terrorists, Mexican drug trafficking cartels. And, to me, one of the root causes of the problems with that, or certainly the issues that exacerbate, are the issue I brought up last year, which is the gun show loopholes which Mayor Bloomberg in an amazing study brought out this year pointed out that the majority of people in their study who were able to obtain guns in gun shows could not have passed background checks, which is extraordinary because we see now that gun shows are linked to the Pentagon shooting, to shootings at Columbine, to international terrorists, to domestic terrorists, and, of course, to Mexican drug trafficking cartels.

So I know there are those who live in fear of not having a 100 percent voting record with the NRA, but it does seem there are commonsense attempts to tie rationale loopholes so we aren't arming domestic or international terrorists and that we are not putting ourselves at risk.

And I know, Mr. Holder, you discussed assault weapons in February of last year. I know it is a difficult time to raise those issues. But we are reminded that, as Secretary Clinton said, the majority of the assault weapons used in the Mexican drug cartel fights are brought in from the United States.

So I hope we can address those issues. Otherwise, I'm just going to save this presentation for next year.

Thank you.

Mr. CONYERS. Mr. Jason Chaffetz of Utah.

Mr. CHAFFETZ. I appreciate that. It is getting good, Mr. Chairman, thank you.

Thanks to the Attorney General. Thank you, sir, for being here. We need you to do well. We support you. As the top law enforcement officer, your job is as critical as any in the Administration; and I recognize the difficulties that you have.

Two issues that at some point I hope you would address: In February of 2009, the High-Value Detainee Interrogation Group was unveiled. You say in your written testimony that it is "used informally over the past year in support of counterterrorism." Some clarification. Sometimes we read in the media that they are highly used, they are used a lot, but when you say they are used "informally" it doesn't give us necessarily the greatest confidence that this group is really up and rolling and used to the degree that it was originally intended to do.

The second thing is, at the end of 2008, it was pointed out in the Wall Street Journal today, New York City Police Commissioner Ray Kelly slammed FISA as, quote, an unnecessarily protracted risk-averse process that is dominated by lawyers, not investigators and intelligence collectors. The Federal Government is doing less than it is lawfully entitled to do to protect New York City, and the City is less safe as a result." From Commissioner Kelly.

At some point, I would love to hear your comments and perspectives on FISA and how that is working and is it actually, as Commissioner Kelly suggested back at the end of 2008, putting us in a worse position and giving you less tools than you need to do what you need to do.

I recognize the time constraints and thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Dr. Judy Chu of California.

Ms. CHU. Thank you, Mr. Chair; and thank you, Attorney General Holder, for being here today.

I have great concerns about the passage of Arizona law SB 1070. It raises important questions about civil rights in the U.S. It is a cruel and misguided effort, and it basically institutionalizes racial profiling and has already led to American citizens being detained by the police simply because they forgot their drivers' licenses at home.

I think that it is unconscionable for any of our citizens to have to live in fear and carry multiple forms of identification with them everywhere they go. This is something that one would expect from a Cold War Eastern Bloc country and not America in the 21st century.

But what is worse is there is a disturbing pattern of racial profiling emerging when local law enforcement is tasked with enforcing immigration laws, making the risk of abuse in Arizona of even more concern.

As Attorney General, you have a heavy responsibility to make sure that new and old immigration enforcement programs don't tread on our civil liberties; and I would like to hear what you have to say about this.

I also would like to add that I'm deeply concerned about comments that you made this weekend suggesting that the Department might seek a legislative expansion to the public safety exception to Miranda. I believe such a move by Congress would be unwise and unconstitutional. Most importantly, there is no reason to believe that advising suspects of their rights obstructs effective law enforcement. To the contrary, our experience shows that informing suspects of their rights actually benefits law enforcement.

While I understand there is enormous political pressure to be tough on terrorism, I strongly believe we should never put political considerations ahead of protecting the constitutional rights guaranteed to all citizens; and I would like to hear your comments on that as well.

Thank you, and I yield back the balance of my time.

Mr. CONYERS. Mr. Greg Harper, Mississippi.

Mr. HARPER. Thank you, Mr. Chairman; and thank you, Mr. Attorney General, for being here with us today.

I know a lot of important issues have already been mentioned, but one I would like to discuss a little further would be the ongoing problem that we have had for years with the Association of Community Organizations for Reform Now, or ACORN.

ACORN has stirred up controversy in regard to its Federal funding and charges of embezzlement and fraud, especially relating to allegations that arose about 2008 voter registration drives conducted by that organization. And, of course, several well-known videos surfaced several months ago that I believe were more than enough evidence to warrant a thorough investigation of ACORN by the Department of Justice. So I would hope to hear more about that on what the Justice Department is doing.

I know that Ranking Member Smith and other Members of this Committee have requested that the Department of Justice investigate ACORN, and I know that some State Attorneys General have launched their own investigations into the corrupt practices of that organization.

The 2010 mid-term elections are only about 6 months away; and for the sake of all American voters and our very-much-envied election process, I hope that the Department of Justice is doing all that it can to ensure that ACORN is being held to a high and proper standard. States and localities, as well as all American voters, need to be able to see that the Department of Justice has responded to the complaints of fraud that it has received so that the public can have confidence that their complaints have been addressed and not ignored.

I look forward to hearing your testimony, and I yield back.

Mr. CONYERS. Adam Schiff, who serves with distinction on this Committee and the Intelligence Committee as well.

Mr. SCHIFF. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General. It is great to have you back in the Committee, and I want to thank you for the hard work you are doing in focusing on these unprecedented issues.

On the Miranda issue, I think it was quite sensible to establish the HIG team as we bring in experts from various agencies to make quick decisions about how a suspect ought to be treated, when Miranda warnings ought to be given. And I agree with I think the strong presumption that probably guides that group that when you arrest an American on American soil that there is a strong presumption that Miranda is given after the public safety exception has been realized, after you have gotten the information necessary to protect the public.

I would be interested to learn what you have in mind in terms of codifying that public safety exception. In the case that gave rise to the exception, you had someone arrested in a market with an empty holster. He was asked, where is the gun? Told them where the gun was. They sought to suppress that. The court quite sensibly found, no, the public safety has to be paramount here.

That is quite easy when you have an empty holster. When you arrest someone on terrorism charges like the Times Square case, very different situation. Clearly, under that exception, you would be able to spend time interrogating the suspect about are there other cars? Are there other bombs? Are there other plots?

But where that public safety—what the parameters of that public safety exception are or how they would develop under case law, the degree to which Congress can codify, the degree to which we can provide input in that, what the constitutional limits are, I would be interested to hear your thoughts and look forward to working with you on that issue.

Also, I appreciate the work you are doing and the superb committee that was put together to analyze the detainees at GITMO, case by case, to figure out what is the best disposition, who can be repatriated, who has been detained as an unlawful combatant. It is very hard, hard work.

We need to follow up on that work, though, and address a tough issue together; and that is, how do we do the status reviews going

forward? So those that are ordered detained as unlawful combatants who may or may not be prosecuted as well, but particularly if they are not prosecuted, we need to work together and I think codify what the standards should be going forward in those periodic reviews. Who ought to undertake them? What kind of oversight?

And as we move people from GITMO, and I think as we move to close down Gitmo and open up a prison, whether it is Thomson or elsewhere, we always want to make sure we have legal mechanisms in place that if there are cases we lose—and you know there have been cases of detainees at Gitmo where the habeases are being successful—we need to have a legal mechanism to make sure that they are not released into the United States. And I look forward to working with you on that issue well.

Finally, one last thing, if I could, Mr. Chairman, and that is the DNA backlog in Los Angeles. It is really imperative that we work with you. We would like to establish a pilot in Los Angeles where samples analyzed by private labs can be uploaded into CODIS by the public lab, and the technical review can be done after there is a match. That will save millions. It will take violent people off the street. LA is ready to be test area for this, and we would love to work with you on that.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

Attorney General Eric Holder, a graduate of Columbia University, appointed by President Reagan to the bench and then to the U.S. Attorney for the District of Columbia by President Clinton, elevated to Deputy Attorney General in 1997, private practice with Covington & Burling, and then on February 3rd of last year was sworn in as Attorney General of the United States.

We have your statement, which will be entered into the record. We appreciate your patience and consideration and welcome you to this hearing.

TESTIMONY OF THE HONORABLE ERIC HOLDER, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. HOLDER. Well, good morning, Chairman Conyers, Representative Smith, and distinguished Members of the Committee.

I'm very pleased to appear before you today to discuss the accomplishments of the Department of Justice in the past year, but first let me thank you for your ongoing support of the Department's work and your recognition of the essential role that the Department plays in defending our Nation and its highest principles.

Now throughout my confirmation process and since becoming Attorney General last February, I worked to establish and to articulate a clear set of goals for the Department: protecting the American people against foreign and domestic threats; ensuring the fair and impartial administration of justice; assisting State and local law enforcement; and defending the interests of the United States. I have repeatedly pledged, just as I did when I appeared before this Committee last May, to pursue these goals in service to the cause of justice and in a way that honors the Department's commitment to integrity, transparency, and the rule of law.

The thousands of men and women who serve the Justice Department have made, I believe, meaningful progress in meeting these

goals, whether in the pursuit and prosecution of terrorists, in the fight against crime, or in protecting our civil rights, preserving our environment, ensuring fairness in our markets, seeking justice in our tribal communities, promoting transparency in our government, and enforcing our tax laws.

Despite the unprecedented challenges and new demands that have emerged, we are on the right path to fulfilling our obligations and achieving our goals. Protecting Americans against terrorism remains the highest priority of the Department of Justice. The Administration will continue to use all lawful means to protect our national security, including, where appropriate, military, intelligence, law enforcement, diplomatic, and economic tools and authorities. We will aggressively defend our Nation from attack by terrorist groups consistent with our Constitution, our laws, and our values, as well as our international obligations.

Now as one of the counterterrorism tools available to us, the criminal justice system has proven its strength in both incapacitating terrorists and gathering valuable intelligence, most recently in the case of Faisal Shahzad. Twelve days ago, we believe that he attempted to detonate a car bomb in Times Square. Less than 53 hours later, thanks to the outstanding work of the FBI, the Department's National Security Division, the U.S. Attorneys' Offices, and our partners at the New York Police Department and the Department of Homeland Security, Shahzad had been identified, located, and arrested. When questioned by Federal agents, he provided useful information. We now believe that the Pakistan Taliban was responsible for this attempted attack. We are currently working with the authorities in Pakistan on this investigation, and we will use every available resource to make sure that anyone found responsible, whether they be in the United States or overseas, is held accountable.

Just this morning, we executed search warrants in several locations in the Northeast in connection with the investigation into the attempted bombing. Several individuals who were encountered during those searches have been taken into Federal custody for alleged immigration violations. These searches are the product of evidence that has been gathered in the investigation since the attempted Times Square bombing and do not relate to any known immediate threat to the public or active plot against the United States. I share that information just to indicate that this is an ongoing investigation and that we are actively pursuing all those who were involved in it.

This attempted attack is a sober reminder that we face aggressive and determined enemies. For example, since January of 2009, 14 individuals have been indicted in Minnesota in connection with travel to Somalia to train or to fight with the terrorist group al Shabaab; David Headley was indicted in Chicago and pleaded guilty in connection with a plot to bomb a Danish newspaper and for his involvement in the November, 2008, terror attacks in Mumbai; Umar Farouk Abdulmutallab was charged with Federal crimes in connection with the attempted bombing of Northwest Airlines Flight 253 near Detroit last Christmas.

In addition, in February, 2010, Najibullah Zazi pleaded guilty in the Eastern District of New York to conspiracy to use weapons of

mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and providing material support to al Qaeda. Zazi admitted that he brought explosives to New York as part of a plan to attack its subway system. This was one of the most serious terrorist threats to our Nation since September 11, 2001, and, but for the combined efforts of the law enforcement and intelligence communities, it could have been devastating. Several associates of Zazi have also been charged with participating in the plot and related crimes, including Zarein Ahmedzay, who has also pleaded guilty to terrorism charges and faces a sentence of up to life in prison.

The Department's work to combat terrorism includes civil as well as criminal proceedings. For example, the Department successfully defended the Treasury Department's designation and attendant asset freeze of a Saudi Arabia-based charity engaged in the widespread financial support of terrorist groups around the world, including al Qaeda.

In addition to these efforts to protect our Nation from terrorism and other threats over the last year, we have reinvigorated what I have come to call the traditional missions of the Department. We have strengthened our efforts to protect our environment, to combat health care fraud, and to enforce our anti-trust laws. We have worked to safeguard civil rights in our workplaces and in our neighborhood. We have made strides in ensuring that prisons and jails are secure and rehabilitative, and we have worked to make Federal criminal laws more fair and more effective. And, as part of our focus on securing our economy and combating mortgage and financial fraud, the Department is leading the Financial Fraud Enforcement Task Force that President Obama established last year, using new legal tools provided by Congress.

Once again, I thank you for your support of the Department's most urgent and most essential work. I look forward to working with this Committee and with the Congress, and now I'm more than happy to answer any questions that you might have.

[The prepared statement of Attorney General Holder follows:]

PREPARED STATEMENT OF THE HONORABLE ERIC H. HOLDER, JR.

Department of Justice

STATEMENT

OF

ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HEARING ENTITLED

"OVERSIGHT OF THE U.S DEPARTMENT OF JUSTICE"

PRESENTED ON

MAY 13, 2010

TESTIMONY OF ATTORNEY GENERAL ERIC HOLDER

BEFORE THE HOUSE JUDICIARY COMMITTEE

MAY 13, 2010

Good morning, Chairman Conyers, Representative Smith, and members of the Committee. I am pleased to appear before you today to discuss the accomplishments of the Department of Justice in the past year. During my confirmation and over the course of the past year I have articulated a very clear set of goals for the Department: protecting the public against threats both foreign and domestic; ensuring the fair and impartial administration of justice; assisting state and local law enforcement; and defending the interests of the United States. I have pledged to accomplish these goals in service of the cause of justice and free from politics and partisanship, as transparently as possible, and in accordance with the rule of law.

The American people can be confident that the thousands of men and women of the Department of Justice are tirelessly meeting these goals each and every day, whether in the pursuit and prosecution of terrorists, in the fight against crime, or in protecting our civil rights, preserving our environment, ensuring fairness in our markets, or fulfilling the many other daily responsibilities of the Department.

FIGHTING TERRORISM

Protecting America against acts of terrorism remains the highest priority of the Department of Justice. The Administration will continue to use all lawful means to protect the national security of the United States, including, where appropriate, military, intelligence, law enforcement, diplomatic, and economic tools and authorities. We will

aggressively defend America from attack by terrorist groups, consistent with the Constitution and laws of the United States, including our international obligations.

As a counterterrorism tool, the criminal justice system has proven its great strength in both incapacitating terrorists and gathering valuable intelligence. The criminal justice system contains powerful incentives to induce pleas that yield long sentences and gain intelligence that can be used in the fight against al-Qaeda and other terrorist groups. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 2001. The cases include fourteen individuals indicted in Minnesota in connection with travel to Somalia to train or fight with the terrorist group al Shabaab; an individual indicted in Chicago who recently pleaded guilty in connection with a plot to bomb a Danish newspaper and for his involvement in the November 2008 terror attacks in Mumbai; seven individuals charged in North Carolina with providing material support to terrorism and conspiring to murder or injure persons abroad; two individuals indicted in undercover operations in Texas and Illinois after they separately attempted to blow up an office building in Dallas and a federal courthouse in Springfield; and an individual who was charged with federal crimes in connection with the attempted bombing of Northwest Airlines Flight 253 near Detroit last Christmas.

A leading example of the effectiveness of the criminal justice system is the case of Najibullah Zazi. In February 2010, Zazi pleaded guilty in the Eastern District of New York to a three-count superseding information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and providing material support to al-Qaeda. Zazi admitted that he brought explosives to New York on Sept. 10,

2009, as part of plan to attack the New York subway system. This was one of the most serious terrorist threats to our nation since September 11th, 2001, and, but for the combined efforts of the law enforcement and intelligence communities, it could have been devastating. Several associates of Zazi have also been charged with participating in the plot and related crimes, including Zarein Ahmedzay, who has also pleaded guilty to terrorism charges and faces a sentence of up to life in prison.

On May 1, another suspected terrorist drove an SUV containing a bomb fashioned from rudimentary ingredients into Times Square and attempted to detonate it. An alert bystander reported the car to authorities, thereby helping save lives and thwart a potentially devastating attack. Over the next two days, men and women from the FBI, the Department's National Security Division, and U.S. Attorney's Offices worked with NYPD, DHS, and state and local partners to track the evidence in the case and identify the culprit. He was identified, located and arrested. When questioned by federal agents, he provided useful information to us. I want to commend the dedicated agents and prosecutors from the Department and various other law enforcement agencies for their exemplary investigative efforts that allowed us to identify and arrest this individual. We are continuing to pursue leads and gather intelligence relating to this attempted terrorist attack.

These cases are a sober reminder that we face aggressive and determined enemies. The Department has worked effectively to ensure that terrorists are brought to justice and can no longer threaten American lives. We will continue to use all available tools whenever possible against suspected terrorists.

The Department's work against terrorism includes civil as well as criminal proceedings. In 2009, the Department litigated scores of habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defended our national security interests in a manner consistent with the rule of law. The Department also successfully defended the Treasury Department's designation and attendant asset freeze of the United States branch of the Al Haramain Islamic Foundation, Inc., a Saudi Arabia-based charity engaged in the widespread financial support of terrorist groups around the world, including al-Qaeda and Chechen mujahideen.

In addition to these litigation matters, I am also pleased to report the completion of the work of three task forces established by the President by Executive Orders on January 22, 2009: one on interrogation and transfer policy, one on Guantanamo detainees, and one on detention policy more generally.

Based on recommendations of the Interrogation and Transfer Task Force, the Administration has established a High Value Detainee Interrogation Group – also known as the "HIG" – an interagency team that combines some of our country's most effective and experienced interrogators with support personnel, including subject matter experts. This specialized, interagency approach to interrogation has been used informally over the past year in support of counterterrorism activities to interrogate high-value detainees who are identified as having access to information with the greatest potential to prevent terrorist attacks against the United States and its allies.

The Guantanamo Review Task Force rigorously reviewed all relevant information throughout the government regarding 240 Guantanamo detainees,

determining their suitability for prosecution or for transfer to another country – or, if neither of those options is available, continued detention under the Authorization for the Use of Military Force, consistent with the rule of law. Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review – the Departments of Justice, Defense, State, Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff.

The Detention Policy Task Force developed recommendations for the President on bipartisan military commission reform legislation that was adopted as part of the 2010 National Defense Authorization Act. This legislation will help ensure that the commissions are fair, effective, and lawful. The Task Force also developed options for our future detention policies that remain under review.

CRIME AND FRAUD

Day in and day out, the men and women of our law enforcement agencies, the U.S. Attorney community, the Criminal Division, and the Civil Division investigate and prosecute our nation's most serious crimes. From international organized crime and drug trafficking, to complex cyber crime, to violent crimes and crimes against children, to financial fraud, public corruption, and much more, the Department of Justice continues to disrupt sophisticated criminal conduct across a broad range of areas.

We have taken a variety of steps to eliminate the threat posed by Mexican drug cartels controlling the domestic drug market and plaguing our Southwest border. Through stepped up enforcement and a coordinated multi-agency Southwest border strategy, including the Merida Initiative, we have made significant progress in addressing

this serious threat. The Department is deeply concerned that international organized crime has grown dramatically in scale and scope in the last 15 years and constitutes a national security threat to the United States. To counter this, the Department is implementing a comprehensive law enforcement strategy against international organized crime, which is being carried out with its other Federal law enforcement partners.

In addition to addressing the threat of violent crime, we are hunting down all those who commit serious frauds against the American people. In the wake of the economic crisis, pursuing financial fraud, mortgage fraud, health care fraud, and fraud in government spending have been among the Department's top priorities. We are seeking prison time for fraud offenders, working tirelessly to recover assets and criminally derived proceeds, and striving to make whole the victims of such crimes.

Late last year, the Administration announced the creation of the Financial Fraud Enforcement Task Force, an inter-agency organization that will spearhead our financial fraud enforcement strategy. Through a coordinated effort, we have brought to justice those in the finance industry who have embezzled their clients' money, who have attempted to defraud the U.S. government of millions of dollars, who engage in discriminatory lending practices, and many more. We have seized the assets of these wrongdoers, and we will not let up.

On mortgage fraud, the FBI has more than doubled the number of investigating agents and has created the National Mortgage Fraud Team at FBI headquarters. As of January 12, 2010, the FBI was investigating more than 2,944 mortgage fraud cases and 45 corporate fraud matters related to the mortgage industry. U.S. Attorneys' Offices are participating in 23 regional mortgage fraud task forces and 67 mortgage fraud working

groups and are leveraging both criminal and civil tools, including civil injunctions and civil monetary penalties, to combat mortgage fraud and related abuses. The Civil Division participates in several mortgage fraud working groups and investigates mortgage fraud allegations, applying remedies such as the False Claims Act and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).

We have a renewed commitment to fighting health care fraud as a Cabinet-level priority at both the Department of Justice and the Department of Health and Human Services. Through the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), a senior-level joint task force, we are marshaling the combined resources of both agencies in new ways to combat all facets of the problem. Our Medicare Fraud Strike Force prosecutors and agents are using billing data to target a range of fraudulent health care schemes, deploying appropriate criminal and civil enforcement tools in hot spots around the country. Since it began operating in 2007, the Strike Force has charged more than 500 defendants in 250 cases totaling approximately $1.1 billion in fraudulent billings to Medicare. All told to date, more than 280 defendants have been convicted, and already 230 have been sentenced to an average of approximately 45 months in prison. Because this is a model that works, as part of the HEAT initiative, we are working to continue the expansion of Strike Force operations.

Finally, the Department has also brought successful civil enforcement actions to protect taxpayer dollars and the integrity of government programs from fraud. In Fiscal Year 2009, our recoveries under the False Claims Act topped $2.4 billion – the eleventh time that our annual recoveries under the Act have exceeded $1 billion. Since 1986, when the False Claims Act was substantially amended, the United States has recovered

nearly $26 billion under the Act For example, last month, Secretary Sebelius and I announced the AstraZeneca settlement for the illegal marketing of Seroquel. Within a week of that announcement, the Department announced additional settlements totaling more than $175 million with Schwarz Pharma, Inc., two Johnson and Johnson subsidiaries, and Novartis, for false claims for reimbursement and off label marketing violations. In addition, the Department has brought successful criminal actions under the Food, Drug, and Cosmetic Act against various medical entities.

ADVANCING CIVIL RIGHTS

Over the last year we renewed the Department's focus on civil rights, ensuring that the Civil Rights Division is prepared to address both existing and emerging challenges. This work is a priority for the Administration, for the Department, and for me personally.

In the wake of the nationwide housing crisis and the resulting wave of foreclosures, the enforcement of fair housing and fair lending protections are among the most pressing civil rights needs facing Americans. During the Department's first year under my leadership, the Division's Housing and Civil Enforcement Section initiated 183 matters, filed 41 lawsuits, including 22 pattern or practice cases, and entered into 24 consent decrees. We also have reinvigorated the Department's critical relationship with HUD to expand our collaborative efforts and leverage each department's resources and tools. In keeping with the Administration's commitment to combating financial crime, and working with the Financial Fraud Enforcement Task Force, we have established a Fair Lending Unit in the Division and hired a Special Counsel for Fair Lending. We have

begun to see the fruits of this labor. In March, we announced a more than $6 million settlement with two subsidiaries of AIG to resolve allegations of discrimination against African-American borrowers by brokers with whom the subsidiaries contracted.

Prosecution of violent hate crimes also remains a top priority. The Division is working to implement the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, training attorneys and law enforcement officers in its enforcement, and the Division has several open investigations under the new statute. In the meantime, we have seen increased activity in hate crimes prosecutions under our existing authority. In fact, in the final three months of 2009, there was activity in the form of filings, sentencings, or pleas in at least 13 hate crime cases brought by the Department -- more than the entire number of such cases filed in Fiscal Year 2006 or 2007. In 2009, the Division filed 19 hate crime cases, charging 43 defendants.

As President Obama mentioned during his State of the Union address, the Civil Rights Division is once again vigorously pursuing cases of employment discrimination. In the first year of the Administration, the Division filed 29 employment-related lawsuits, the largest number ever filed by the Division in a single year. Of the 29 lawsuits, 19 were brought under the Uniformed Services Employment and Reemployment Rights Act, and 10 under Title VII. The Civil Rights Division has more than a dozen active pattern or practice investigations. In addition, in New Jersey, the Division is challenging examinations used by all of the municipalities in the state that are part of the civil service system for promotion to police sergeant, which we believe have had a disparate impact upon both African-Americans and Hispanics. The Department is also playing a leading role in the Administration's Equal Pay Enforcement Task Force to ensure federal equal

pay laws are enforced throughout the country.

The Civil Rights Division is also working to strengthen enforcement of the Voting Rights Act. The Division is preparing for review of thousands of redistricting plans that jurisdictions will submit pursuant to Section 5 of the Act after release of the 2010 Census results. The Division is stepping up enforcement of prohibitions against discriminatory voting practices and procedures and has obtained consent decrees in Section 2 cases for minority vote dilution arising from at-large methods of electing municipal governing bodies. It is also working to ensure compliance with the language minority requirements of the Act. The Division has begun an aggressive initiative to ensure compliance with the provisions of the National Voter Registration Act requiring that eligible voters be able to register at state social services agencies. The Division has begun inquiries of seven states, and intends to expand its inquiries elsewhere. The Division is also gearing up for enforcement of the new Military and Overseas Voters Empowerment Act of 2009.

ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

One of the goals I established for the Department is to reinvigorate its traditional role in fighting crime. Since the vast majority of criminal offenses are investigated and prosecuted at the state and local levels, we have a duty to provide states and communities the resources they need to prevent and fight crime and manage prisoners. I am proud to say that the Department is meeting this charge through the efforts of our Office of Justice Programs (OJP), COPS Office, and Office on Violence Against Women.

Last year, OJP awarded $5.6 billion to states, localities, tribal communities, and others to support the full range of justice system activities, from prevention and

enforcement through corrections and reentry. This funding is being administered by OJP within a framework of accountability and transparency. All grant solicitations and awards are now posted on the OJP Web site, and OJP has strengthened internal control practices and procedures to ensure that the grants process is open and fair.

Of this $5.6 billion, $2.5 billion -- $2 billion from Recovery Act funds and $500 million from Fiscal Year 2009 funds -- went to support front-line law enforcement operations under the Edward Byrne Memorial Justice Assistance Grants program, a vital source of funding for police departments and sheriffs' offices across the country. In addition, OJP administered more than $200 million in other Recovery Act grants for a total of 3,800 Recovery Awards. These awards serve the dual purpose of creating and preserving critical public safety jobs and fostering local innovation. For example, more than $22 million went to help state and local law enforcement agencies hire civilian staff to serve as dispatchers, trainers, and intelligence analysts. These funds allow agencies not only to move toward smarter, data-driven methods of policing, but also to free up sworn personnel for street duty. We also awarded more than $10 million to state and local prosecutors' offices to combat mortgage fraud and crimes related to vacant properties. These grants are part of the Department's priority effort to fight financial fraud in all its forms. We will continue to help communities combat mortgage fraud through additional funding and by providing training and technical assistance to investigators and prosecutors.

OJP has also led the Department's efforts to encourage evidence-based practices. Research funded by our National Institute of Justice has shown that innovations at the local level, such as mapping crime hot spots and using targeted enforcement to address

drug and gang violence, are at least partly responsible for the recent drop in crime rates that we have seen in many cities; place-based policing, drug market interventions, and other methods do, indeed, work in reducing crime. OJP has undertaken a comprehensive effort to integrate evidence-based approaches such as these into our program development and policymaking activities. The President's budget proposal for Fiscal Year 2011 includes a number of items intended to further those efforts, and we look forward to working with Congress to expand our knowledge base and to disseminate that knowledge to the field.

In addition to the assistance provided to our partners in state, local, and tribal law enforcement through OJP, the COPS Office last year awarded $1.26 billion, including $1 billion through the Recovery Act for its COPS Hiring Recovery Program, which will put approximately 4,699 police officers and sheriffs deputies on America's streets. The mission of the COPS Office is to advance the practice of community policing as an effective strategy in communities' efforts to improve public safety by helping law enforcement build relationships and solve problems. The Administration remains committed to providing communities across the country with resources to support the hiring (or rehiring) of 50,000 police officers.

TRIBAL JUSTICE

In the past year, the Department has made significant strides in strengthening relationships between the United States government and tribal nations. Improving public safety and law enforcement in tribal communities remains a top priority for the Department of Justice. Earlier this year, I issued a directive to all United States

Attorneys with federally recognized tribes in their districts to develop, after consultation with those tribes, operational plans for addressing public safety in Indian Country. This approach recognizes that the public safety challenges in Indian Country are not uniform and that the success of any intergovernmental relationship is based on consistent and effective communication.

In developing district-specific operational plans for public safety in tribal communities, I asked each of these United States Attorneys to pay particular attention to violence against women in Indian Country and to work closely with law enforcement to make those crimes a priority. To that end, and at the request of tribal leaders, the Department is creating a task force on prosecuting violent crimes against women in Indian Country. In addition, I am creating a Tribal Nations Leadership Council to advise me on issues critical to Indian Country. The Council will be made up of one tribal leader from each of twelve B.I.A. tribal regions and will be selected by the tribes of that region. Constituting this landmark Council is an important step in the Department's efforts to improve communication and coordination with tribal nations.

On December 7, 2009, the Department reached a settlement in the extraordinarily lengthy and contentious *Cobell v. Salazar* class-action case involving the government's handling of over 300,000 individual Indian trust accounts. The agreement, which is contingent upon legislation and a district court fairness determination, provides for approximately $1.4 billion to be distributed to class members and another $2 billion to fund a buy-back program to address the continuing "fractionation" problem caused by land interests being repeatedly divided as they pass through succeeding generations.

ENSURING COMPETITION

The Antitrust Division has focused on efforts to promote and protect competition, standing firmly in the corner of the American consumer, helping ensure that consumers receive innovative, high-quality products at the lowest prices. It has acted to protect consumers in merger matters, conduct matters, and criminal matters, as well as actively advocating for both domestic and international competition. The Division has focused on important sectors of the economy, including agriculture, defense, energy, finance, health care, telecommunications, and transportation, among others. Because addressing antitrust issues increasingly demands a global approach, the Division has increased its focus on the international front as well, seeking to engage foreign enforcers on both policy and particular enforcement matters.

The Department has acted against nine merger transactions already in Fiscal Year 2010, reaching settlements to protect competition in the vast majority, including the combination of Ticketmaster and Live Nation, and is currently litigating against Dean Foods, the nation's largest dairy processor, seeking divestiture of milk processing plants. Non-merger aspects of the civil antitrust enforcement program have been active as well. The Department has presented its views in important court proceedings, such as filing statements of interest with the court regarding competitive concerns about Google's proposed settlement with the nation's largest book publishers as well as competitive concerns about so-called "pay-for-delay" agreements in the pharmaceutical arena, whereby firms agree to delay the entry of generic-drug competition through settlement of a patent dispute, forcing consumers to pay substantial increased costs for needed drugs.

On the criminal side, our cartel enforcement has remained active. Over $1 billion in criminal fines were obtained against Antitrust Division defendants in Fiscal Year 2009, and nearly a quarter of a billion so far in the current fiscal year. But fines are only one part of the story; individual accountability in terms of jail time is a major focus of our criminal antitrust program. In Fiscal Year 2009, the Antitrust Division obtained jail sentences against 80 percent of its defendants, amounting to 25,396 total jail days imposed in its sentencings. Ongoing investigations of price fixing in the liquid-crystal-display and cathode-ray-tube industries continue and anticompetitive conduct in the municipal bond industry has and will result in significant criminal fines and jail time. The Department has also taken an active role advocating on behalf of competition and consumers, including providing comments to the Federal Communications Commission on broadband competition and embarking on an important series of joint workshops with the USDA to examine agricultural issues in greater depth. Through these efforts we are ensuring that American consumers have an ally in protecting their pocketbooks from illegal marketplace conduct.

PROMOTING TRANSPARENCY

The President has pledged to make this Administration the most open and transparent in history, and the Department is doing its part to make that pledge a reality. As the lead agency responsible for encouraging government-wide compliance with the Freedom of Information Act, we have worked diligently to implement the President's Memorandum on Transparency and the Freedom of Information Act, most significantly by issuing new FOIA Guidelines which address the presumption of openness the

President has established and which hold agencies accountable for their administration of FOIA. Through outreach, education, guidance, and the review of cases in litigation, additional information was – and continues to be – disclosed to the public through careful application of the guidelines at the agency level.

To ensure that these Guidelines are taking effect, the Department recently announced that it will be creating a website, called a "FOIA Dashboard," that will apply the principles of transparency and openness to the administration of the FOIA itself. This website will be designed to enable the public to easily track information about FOIA compliance. The Dashboard will allow the public to generate statistics on FOIA compliance across the government and from year to year. Not only will this visual report card promote transparency, it should also have the effect of encouraging the Department's FOIA offices – and FOIA offices across the government – to improve their compliance efforts and release as much information to the public under FOIA as possible.

PROTECTING THE ENVIRONMENT

The Department continues to vigorously enforce environmental laws through its Environment and Natural Resources Division. In light of the recent oil spill in the Gulf of Mexico, the Justice Department stands ready to vigorously enforce the laws that protect the people who work and reside near the Gulf, the local wildlife, the environment, and the American taxpayers. I recently dispatched a team of attorneys to Louisiana to monitor the oil spill, and the Department will continue to provide critical legal advice and support to the agencies involved in the federal response.

The Department is also working every day to protect the environment in countless other ways. In 2009, the Environment Division brought actions to protect the nation's air, water, land, wildlife, and natural resources; upheld its trust responsibilities to Native Americans; and defended important federal programs. In Fiscal Year 2009, the Division secured nearly $69 million in civil and stipulated penalties and $2.6 billion in corrective measures through court orders and settlements. In addition, the Division successfully concluded 41 criminal cases against 85 defendants, obtaining over 42 years of jail time and nearly $73 million in fines.

Our enforcement priorities include reducing harmful air emissions from large coal-fired power plants and oil refineries, cleaning up environmental sites, and preventing water pollution, especially from municipal sewer systems and contaminated stormwater runoff. In one case, *In re Asarco, L.L.C.,* the successful conclusion of the largest environmental bankruptcy reorganization in U.S. history also resulted in the largest recovery of money for hazardous waste cleanup ever -- $1.79 billion to be used to pay for past and future costs incurred by federal and state agencies and environmental restoration at more than 80 hazardous waste sites in 19 states. Last year, we also entered into a landmark agreement to clean up the contaminated Hanford nuclear site, a matter in which both Secretary of Energy Chu and I were personally involved.

The Environment Division also successfully brought criminal prosecutions against a number of companies and individuals who have intentionally discharged pollutants from vessels en route to American ports, and it continued to work with the Environmental Protection Agency to obtain the cleanup of major river bodies in the United States, including the Fox River (Wisconsin), the Kalamazoo River (Michigan),

and the Hudson River (New York). Protecting the environment will continue to be one of the Department's most important objectives.

ENFORCING TAX LAWS

In support of its mission to defend and enforce the nation's tax laws, the Tax Division continues to assist the Internal Revenue Service (IRS) in tracking down tax cheats, shutting down tax schemes and scams, and combating abusive tax shelters. In a time of high deficits, it is essential to reassure the overwhelming majority of law-abiding taxpayers that nobody is immune from paying taxes. Tax Division prosecutors work closely with United States Attorneys' offices to ensure that criminal tax statutes are administered fairly and uniformly throughout the country. The Tax Division continues to aggressively investigate and prosecute individuals who use offshore accounts to hide income and assets in order to evade U.S. taxation. The Division's efforts have resulted in a number of high-profile prosecutions of not only the citizens who sought to evade their tax obligations, but also the professionals who helped to develop and implement these illegal schemes. The Tax Division continues to devote significant resources to assisting the IRS in obtaining more information about individuals who maintain undeclared foreign accounts. The worldwide publicity surrounding the Tax Division's enforcement efforts reflects the dramatic impact that the government has had in combating the negative impact on tax administration of tax haven jurisdictions and traditional notions of bank secrecy.

Unscrupulous lawyers, accountants, and tax return preparers present a serious tax administration and law enforcement problem. While some professionals dupe unwitting

clients into filing false or fraudulent returns, others serve as willing "enablers," often providing a veneer of legitimacy to otherwise illegitimate or illegal transactions. The Tax Division employs a range of civil and criminal enforcement tools to ensure that schemes are detected and shut down, and that the participants are held accountable either civilly or criminally.

CONCLUSION

Mr. Chairman, I trust that the foregoing will help the Committee appreciate just some of the wide-ranging efforts that the Department of Justice is undertaking to protect the safety, rights, and resources of the American people. We have accomplished much, but we are not standing still. I again recognize and applaud the thousands of conscientious employees of the Department who have made these accomplishments possible.

Mr. CONYERS. Thank you very much, Attorney General.

We will recess for some votes, and we will return immediately. The Committee stands in recess.

[Recess.]

Ms. JACKSON LEE. [Presiding.] The Judiciary Committee is now called to order.

And, Mr. Attorney General, we are in the round of questions. And before I pose a motion, let me suggest that, by the opening statements of the Members, you have heard a number of concerns.

And I would only add to those concerns, and not all in totality, is a very serious matter of mergers and particularly the merger between Continental and United. And I know that we will have an opportunity to raise that very important question either today or prospectively.

And so we are at the point of questions, as I indicated. But I would like to indicate to you that our Chairman, who has presided over this Committee with excellence and great leadership, and presided earlier today, was approached by Members on the floor having a number of conflicts and flights to catch on important district business. Because of his chairmanship of the Committee leadership, he thought it would be a service to the Members if we could adjourn the hearing and schedule it at a later date.

Therefore, I am asking unanimous consent to adjourn the hearing at this time.

Mr. SMITH. Madam Chairman, I object, and I would like to be recognized to explain my objection.

Ms. JACKSON LEE. The Ranking Member objects, and I will yield to him for his explanation.

Mr. SMITH. Thank you, Madam Chairman.

The Chairman and I had a discussion about this subject, whether we should adjourn now because we are finished with votes for the day and perhaps return next week or the week after we get back from our Memorial Day break. Had the AG been able to assure us that he would be able to give us a time and a date to have that hearing and continue this hearing and be able to ask him questions, I certainly would have agreed to do that.

I understand the AG's travel schedule, I can appreciate the fact that he might not be able to give us a hard date, but I am uncomfortable adjourning this oversight hearing without that time and date specific. And that is why I feel that we should go forward, and we clearly have a critical mass of Members to do so.

And, Madam Chair, I would be happy to yield to the AG, who looked like he was getting ready to respond as well.

Ms. JACKSON LEE. Thank you.

Mr. Attorney General, I am not sure if you were interested in being yielded to at this point.

Mr. HOLDER. I am sorry?

Ms. JACKSON LEE. Are you interested in being yielded to at this point. Otherwise, I would have a Member that I will call on.

Mr. HOLDER. No, I am ready to proceed.

Ms. JACKSON LEE. Mr. Schiff of California.

Mr. SCHIFF. Thank you, Madam Chair.

I was just going to say, to respond to my colleague from Texas, I understand the concern he has.

On the other hand, the Attorney General has demonstrated no reticence or reluctance whatsoever to come before the Committee, not only this Committee, but others, and I am confident he will return at the first available opportunity. If that is the case, it would be nice to have more full representation of the Committee. I know a lot of Members who couldn't stay would love to participate in the hearing, and they will lose that opportunity if we go forward without them.

Mr. SMITH. Would the gentleman yield?

Mr. SCHIFF. I would be glad to.

Mr. SMITH. Several responses to the gentleman's point.

First, it is obvious that the Attorney General has indicated a willingness to stay and answer questions for as long as they might be.

Second of all, all Members of Congress were on notice that we expected to be in session today until at least 3 or 4 this afternoon. The fact that the votes ended earlier was not anticipated, so Members have not had to change any plans if they wanted to participate in this hearing.

And then, thirdly, as I said, to repeat myself, had the AG been willing to commit to a date some time in the next 3 weeks, I would have certainly gone along with the suggestion that we adjourn today. But without that commitment from the AG, and despite the assurance of the gentleman from California—he seems to be more confident in the appearance of the AG in the coming weeks than the AG himself, or I think the AG would have given a commitment to a specific time and date. But absent that, I think it best that we proceed.

Mr. SCHIFF. Madam Chair, reclaiming my time, that being said, we will just go forward.

Thank you, Madam Chair.

Ms. JACKSON LEE. Thank you.

The objection being heard on the request for unanimous consent to adjourn, and the objection being raised, the meeting will now proceed.

At this time, I would like to yield 5 minutes for his questioning to the gentleman from Virginia, the Chairman of the Subcommittee on Crime, Mr. Scott.

Mr. SCOTT. Thank you.

Mr. Attorney General, the last time you were here, I asked you about whether or not if someone had been tortured to death, whether or not a crime almost certainly would have been committed, and you answered in the positive.

My question is what is the statute of limitations for torture if someone dies, and the statute of limitations if someone does not die? I have a lot of questions, and if you would prefer to respond in writing, that would be fine.

Mr. HOLDER. I think I would like to respond in writing to at least the second part of that question.

With regard to the first part, there is no statute of limitations where death results.

Mr. SCOTT. Thank you.

There has been a lot of controversy on Miranda rights. The last case in the Supreme Court on Miranda rights was ruled on a con-

stitutional basis, not statutory interpretation. If we tried to change the statute might we not cause more problems than we solve because nobody would know until that hits the Supreme Court whether what we did was constitutional or not? And how would that affect the practice on the ground if a police officer has to sit up there and wonder, well, I have got all these exceptions, I might have to give a Miranda warning, I might not, are they a citizen, maybe they are a terrorist, maybe they are a citizen, not a citizen? Might you end up messing up a lot of cases where Miranda turned out to be required rather than fixing something? Will it make matters worse by trying to change anything?

Mr. HOLDER. Well, I think it is our view that the use of the public safety exception, I want to make clear to everyone that what we are focusing on is the potential modernizing, clarifying of the public safety exception, not the Miranda rule itself, but to come up with a way in which we give to agents, to police officers, greater clarity as to how the public safety exception can be used.

The public safety exception was crafted back in the 1980's in connection with case Quarles that involved a police officer asking a person, "where's the gun?"

We now find ourselves in 2010 dealing with very complicated terrorism matters. Those are certainly the things that have occupied much of my time. With regard to that small set of only terrorism-related matters, not in any other way, just terrorism cases, any act on modernizing, clarifying, making more flexible the use of the public safety exception would be something beneficial.

Mr. SCOTT. But at the point of time the interrogation starts, a profile for somebody might not be able to tell whether it is terrorism or not. And thinking wrongly that it is terrorism, you can mess up an otherwise fairly good case. But we will look to see what you come up with.

The Bureau of Prisons is under your jurisdiction, is that correct?

Mr. HOLDER. That is correct.

Mr. SCOTT. And the Federal Prison Industries is an important program. Do you have any statement on how we can make that program stronger and any support you want to give to that program of why it is so important?

Mr. HOLDER. It is a critical part I think of our effort to make our prisons more than places that simply warehouse people, to give people an opportunity to gain skills that make them successful upon leaving prison.

I think what people have to always focus on is that the vast majority of people who go into prisons are going to come out at some point. And to the extent that we can provide rehabilitative services to them through the vocational opportunities that the Federal Prison Industries program provides, I think those should be supported. I am a big, big supporter of that program.

Mr. SCOTT. Thank you.

I mentioned in my opening remarks, the Office of Legal Counsel memorandum, June 29, 2007, that essentially suggested that the Religious Freedom Restoration Act of 1993 provides a virtual blanket overriding statutory nondiscrimination provisions. Has your office reviewed that memorandum, and if so, could you tell us the

status of what you are going to do with it, or would you want to get back to us in writing on that?

Mr. HOLDER. Well, I think I would like to get back to you in writing about that one. I have not had a chance to have, I think, in-depth conversations that I need to have about that in order to respond in the way that I would like to your question.

Mr. SCOTT. Okay.

You are aware that the President, during his campaign in Zanesville, Ohio, indicated, and I quote, if you get a Federal grant, you can't use the grant money to proselytize to the people you help and you can't discriminate against them, or against the people you hire on the basis of religion, at least that is what he wanted to do.

Since then, there is a suggestion that discrimination would be allowed on a case-by-case basis. It seems fairly unusual that you would allow discrimination on a case-by-case basis. Do you have any comment on where we are on restoring the civil rights for employees that existed from 1965 until about 2001 or 2002?

Mr. HOLDER. Well, I think the Administration is committed to partnering with faith-based organizations in a way that is consistent with the law, consistent with our values, and consistent with the way in which I think this Administration has conducted itself.

The Department will continue to evaluate any legal questions that arise with regard to how we do that on a case-by-case basis. But I think overall——

Mr. SCOTT. I think the law apparently allows discrimination as a policy. I mean, you have to set the policy through executive orders and statutes. Is it the policy of this Administration now to allow the discrimination on a case-by-case basis, and one group can say, well, we don't hire people based on race and religion, and another group, well, we are not going to allow you to discriminate on race and religion? Or is it the policy of this Administration to allow discrimination?

Mr. HOLDER. No, that is not the policy. The policy of the Administration is to interact with faith-based organizations or any organization.

Mr. SCOTT. Which you can do without discriminating and without proselytizing.

Mr. HOLDER. We can operate with them and interact with them in a way that is consistent with the law, consistent with our values, and consistent with the way in which this Administration, I think, has postured itself on a whole range of issues.

Mr. SCOTT. Well, let's just be clear. Is it the policy of this Administration to allow—is the policy of the Administration going to be discrimination will not be allowed?

Mr. HOLDER. We are—yes, that is not the view that we share. We do not have a view that discrimination is appropriate.

And we want to, as I said, interact with these organizations where these issues are presented in such a way that we are acting consistent with the law and acting, again, consistent with what our values are, both as a Nation and as an Administration.

Ms. JACKSON LEE. The gentleman's time has expired.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Madam Chair.

Mr. AG, the Times Square bomber, Shahzad, was a naturalized citizen, just became a naturalized citizen a year ago. As you know, current law allows us to denaturalize anybody who in the last 5 years——

Mr. HOLDER. I am sorry, I can't hear Mr. Smith.

Ms. JACKSON LEE. Can the technician check the microphones, please?

Mr. HOLDER. I am sorry.

Mr. SMITH. I regret all of my earlier comments might not have been heard earlier.

Okay. There it is.

Mr. Attorney General, the Times Square bomber, Mr. Shahzad, became a naturalized citizen less than a year ago. Under current law, we can denaturalize an individual who has become a naturalized citizen in the last 5 years if they are a member of an organization whose intent is to overthrow the Government of the United States.

Do you consider terrorist organizations to be among the prohibited organizations that would allow us to denaturalize somebody? And when I say "terrorist organization," I am using the definition of the Immigration and Nationality Act of a terrorist action.

Mr. HOLDER. I am not familiar with the immigration laws, or that particular immigration law. And I don't have an ability to, without having had a chance to study it, answer that question in an intelligent way.

Mr. SMITH. Well, you are unsure whether someone who is a member of a terrorist organization would be able to be denaturalized, is that correct, from your answer?

Mr. HOLDER. Well, my answer is that if, in fact, there is a statute that allows that to occur, it is not a statute that I am conversant with, and I am not in a position to answer your question.

Mr. SMITH. That was section 240, but I look forward to you getting back to me.

Would you consider the Pakistani Taliban to be a terrorist organization?

Mr. HOLDER. If not formally designated, I think we have certainly seen through their actions and certainly in their attempt through Mr. Shahzad, that they are certainly a terrorist organization.

Mr. SMITH. But you consider them to be a terrorist organization?

Mr. HOLDER. I would, even if not formally designated.

Mr. SMITH. Would you take action, and the DOJ can initiate this, to denaturalize the Times Square bomber?

Mr. HOLDER. I am sorry?

Mr. SMITH. Would you take action to denaturalize the Times Square bomber on the basis that he was a member of the terrorist organization the Pakistani Taliban?

Mr. HOLDER. We have a wide range of things that we can do with regard to the potential defendant in this matter. We have an ability to put him in jail for extended periods of time.

Mr. SMITH. So you don't intend to denaturalize him?

Mr. HOLDER. Well, I am saying that we have the ability to do a whole variety of other things. And whether or not there is an ability to denaturalize him, by the way, is something that has been dis-

cussed, and whether or not there are constitutional issues that are involved in that process, they certainly have been raised, and I think those would have to be considered as well.

Mr. SMITH. I read your answer to mean that you are not prepared today to say you would denaturalize him.

Let me go to my next question, which is, in the case of all three attempts in the last year, the terrorist attempts, one of which was successful, those individuals have had ties to radical Islam. Do you feel that these individuals might have been incited to take the actions that they did because of radical Islam?

Mr. HOLDER. Because of?

Mr. SMITH. Radical Islam.

Mr. HOLDER. There are a variety of reasons why I think people have taken these actions. One, I think you have to look at each individual case. I mean, we are in the process now of talking to Mr. Shahzad to try to understand what it is that drove him to take the action he took.

Mr. SMITH. But radical Islam could have been one of the reasons?

Mr. HOLDER. Well, there are a variety of reasons.

Mr. SMITH. Is radical Islam one of them?

Mr. HOLDER. There are a variety of reasons why people do these things. Some of them are potentially religious based.

Mr. SMITH. What I am asking is if you think, among those variety of reasons, radical Islam might have been one of the reasons that the individuals took the steps that they did?

Mr. HOLDER. We see some radical Islam—I mean, I think those people who espouse a version of Islam that is not——

Mr. SMITH. Are you uncomfortable attributing any of their actions to radical Islam? It sounds like it.

Mr. HOLDER. No. I don't want to say anything negative about a religion that is not——

Mr. SMITH. We are not talking about Islam. I am talking about radical Islam. I not talking about the general religion.

Mr. HOLDER. Right. And I am saying that a person, like Anwar al-Awlaki for instance, who has a version of Islam that is not consistent with the teachings of it and who espouses a radical version——

Mr. SMITH. Could radical Islam have motivated these individuals to take the steps that they did?

Mr. HOLDER. I certainly think that it is possible that people who espouse a radical version of Islam have had an ability to have an impact on people like Mr. Shahzad.

Mr. SMITH. And could it have been the case in one of these three instances?

Mr. HOLDER. Could that have been the case?

Mr. SMITH. Yeah. Again, could one of these three individuals have been incited by radical Islam or at least feel that they could have been?

Mr. HOLDER. I think potentially incited by people who have a view of Islam that is inconsistent with——

Mr. SMITH. Mr. AG, it is hard to get an answer yes or no, but let me go on to my next question.

This has to do with the transfer of individuals from Guantanamo Bay to other countries. Do we know, and I am not asking you about

specifics or individuals, but I hope our Federal Government, and do you have assurances from those countries that have received these transferees, that we know where these individuals are? Do we know whether they have remained in those countries and have been detained or not?

Mr. HOLDER. When we make these transfer decisions, we work out in advance secure arrangements with the receiving nations so we have a sense of where they are, what steps are going to be put in place to monitor their activities and their movement.

Mr. SMITH. Have any of these transferees made under this Administration returned to terrorism?

Mr. HOLDER. I have read reports of that by one person, but I cannot confirm that.

Mr. SMITH. Let's just say that one person did, and that could well be the case. Doesn't that give you pause about transferring anyone from Gitmo to foreign countries if even one person goes back to the battlefield, returns to terrorism, and might kill innocent Americans? Doesn't that give you pause about the whole program?

Mr. HOLDER. Well, we put in place a very comprehensive program that looked at the 240 people who were at Guantanamo when we got there.

Mr. SMITH. But it is not working if anybody that has been transferred does return to terrorism, as you just acknowledged might have been the case. It seems to me you would want to stop the program and reevaluate the safeguards that you have.

Mr. HOLDER. Well, I am confident that by putting together law enforcement, our military people, our intelligence people, and looking at those 240 people and making determinations as to where they should go, the best determinations we could make we actually did make.

Mr. SMITH. But it is obviously not working if you had people return to terrorism who were transferred to other countries who you didn't need to transfer to other countries.

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. HOLDER. Let me be clear here. I have not said that, on the basis of anything that I know that is credible or authoritative, that anybody that we have released——

Mr. SMITH. I thought you just said one may have.

Mr. HOLDER. I read reports, I said, but in newspapers. That is all I am saying. I am not in a position at this point to say that, in fact, is accurate. I am not going to comment on the intelligence.

Ms. JACKSON LEE. The gentleman's time has expired.

I now allow myself 5 minutes for questioning.

Mr. Attorney General, you have had numerable challenges, I would almost call it, for fear of using a play on words, a mine field. Let me thank you for the deliberative manner in which the Department of Justice has handled the matters for the American People. You are to be credited for working through difficult issues and being thoughtful, along with your staff. We have difficult issues before us.

And I would like to start off with my questioning on the whole concept of too big to fail. The Department of Justice is now involved. You are involved in the financial markets. You are involved in the communications markets, and you are involved in the avia-

tion market, because there have been efforts to merge. Certainly there is a communication merger that is before the Department of Justice and another agency, but I will focus my time on the Continental Airlines and United, and raise several questions quickly so that you can comment on what kinds of, what structure the investigation will take. Unlike Comcast and NBC, which has a number of other agencies, it appears that the Department of Justice in this instance may be the overriding agency.

So the question becomes, do we have a concept merger that represents something too big to fail? Are there major Clayton Section 7 anticompetitiveness involved routes and otherwise? And do we hold to the comments made by one of the CEOs that this is, in essence, my words characterizing theirs, an easy do, a piece of cake, and we will be done in a certain period of time?

The question is, the American people will be drastically impacted, my words, closing routes, closing hubs, changing locations, losing jobs; my direct question to you, is the Justice Department going to be guided by public statements by CEOs, it is a piece of cake? Are they going to be guided by comments, it is an Illinois deal, and they will look the other way? And are they going to be guided by the fact that the Star Alliance, which you also reviewed and thank you for doing so vigorously, was supposed to, by many points, represent making these entities strong enough to stay on their own, but maybe it was a step toward monopoly; what will be the structure of that investigation? And do we expect that you will finish it in 2 months, as we have been represented to?

Mr. HOLDER. Well, we have, I think, a revitalized Antitrust Division that is headed by a very capable woman, Christine Varney. And whenever a proposed transaction or agreement raises significant competition issues, the Department's Antitrust Division will conduct a very vigorous investigation, and that is what we would plan to do here.

And to the extent that the merger of United and Continental would substantially lessen competition, we would take the appropriate enforcement action. The Department will examine this merger, as it does all of those that are within our responsibility, very seriously, take into account all of the information that we can, and take very, very seriously the responsibility that we have.

I am very proud of the work that the Antitrust Division under Christie Varney has taken.

Ms. JACKSON LEE. Will you put any self-imposed deadline on yourself, on the Department of Justice?

Mr. HOLDER. We will take the time that is necessary for us to look at it, to make sure that we are comfortable in the decisions that we are making. We will not unnecessarily delay things, but we will certainly take the time that we need to come up with a reasoned decision.

Ms. JACKSON LEE. Thank you.

Let me just, very quickly, two major questions have come up. The Arizona law that seems to racially profile a number of classes of individuals, the basic question I have beyond racial profiling is the preemption question as it relates to immigration law. Have we yielded, and does the Justice Department intend to vigorously pur-

sue, the question of this law as it may relate to Federal preemptiveness?

And let me ask the other two. Dealing with the Times Square bomber, based on your experience, can you compare the effectiveness of the interrogation methods used for the attempted flight 253 and Times Square bomber, on the one hand, and so-called enhanced interrogation, which you have addressed now in the past, such as methods like water boarding, those calling for that approach? Do you believe that the flight 253 suspect's family, as you have indicated, would have come to the United States, persuaded him to cooperate and provide significant valuable intelligence, which I think is very important, if he had been water boarded, rather than giving Miranda warnings, which have been given to terrorists, alleged terrorists, by the Bush administration? Effectively, what are we trying to show as we present ourselves to the world on fighting the war on terror?

Mr. HOLDER. Well, I think that if one looks at the facts and looks at the questioning that was done by experienced FBI agents with regard to Abdulmutallab, with regard to Shahzad, and with regard to Headley, one would see that the customary FBI techniques that do not involve the use of enhanced interrogation procedures have proven to be effective. We have gotten useful information, and useful intelligence, from all of these individuals as a result of the use of techniques that are recognized as traditional, and that are recognized as consistent with our values.

There is not a tension between conducting ourselves in law enforcement in a way that is consistent with our values and being effective and having the ability to protect the American people. And I think if one looks at what has happened over the past year, one would see dramatic proof of that.

Ms. JACKSON LEE. The Arizona law Federal preemption and the Justice Department's intention?

Mr. HOLDER. As I have indicated, we are in the process of looking at that law. We are concerned about the potential impact that it has, and whether it contravenes Federal civil rights laws potentially leading to racial profiling. We are also concerned about whether there is the possibility that it crosses the line with regard to preemption.

There is certainly an immigration issue, an immigration problem, an illegal immigration problem that this country needs to face. The concern that we have is this is something that ought to be done on a national basis as opposed to trying to do it on a State-by-State basis.

Ms. JACKSON LEE. I thank the gentleman.

I now recognize the gentleman from California, Mr. Lungren, for 5 minutes.

Mr. LUNGREN. Thank you very much.

And I appreciate your appearance before us, Mr. Attorney General.

I do have to comment though, we seem so careful not to use terms like radical Islam for fear of offense, but we readily refer to racial profiling being either the consequence or the motivation of the voters and elected officials in Arizona. And I find that remarkable.

Mr. HOLDER. Well, I am sorry.

Please do not misinterpret what I said. I did not say that that was why, that that was the motivating factor for the people in Arizona.

I understand their frustration. I am saying that one of the things that we need to look at, at the Department of Justice, is whether or not we should have a national answer to a problem that is very real to them.

Mr. LUNGREN. I appreciate that, Mr. Attorney General.

It must be frustrating to the people of Arizona who write in the law, there shall not be any racial profiling, by specifying you cannot use that as the reason for stopping an individual or questioning an individual, and yet immediately there is a comment on this panel and other places that that must be racial profiling. When is something not when they say it is not, may be the real question here?

I only half-facetiously ask, can we assure the American people that Mr. Shahzad was not motivated by anger developed because of the passage of the health care bill?

Mr. HOLDER. Excuse me?

Mr. LUNGREN. Well, that was suggested by the mayor of New York as the possible reason for the activities, and we seem to be reluctant to talk about radical Islam possibly being the case.

Let me ask this, Mr. Attorney General, on the Miranda warnings. What is the position of your Administration, what is the position of the Justice Department on this question: Do we believe that no Miranda warnings should be given until we have gotten from suspected terrorists, for whom we have reasonable suspicion they are involved with terrorism, that we have got from them every bit of information that they have with respect to public safety demands?

Mr. HOLDER. We do these on a case-by-case basis. And what we try to do is make use of the law as it exists. And we certainly know that in those initial interactions with people who we suspect to be terrorists, there are public safety questions that can be asked of them. We try to use the public safety exception to glean as much information as we can appropriately and consistent with what the Supreme Court has said that we can do.

Mr. LUNGREN. I appreciate it.

My question is, at what point in time do you believe that you must cease that and give Miranda warnings before further interrogation can take place?

Mr. HOLDER. Well, a decision has to be made about whether or not you are going to give Miranda warnings at the time when you feel that you have exhausted all the questioning that you can do under the public safety exception, whether you have made the determination that there is perhaps no immediate threat to the public or to the officers who are involved.

Mr. LUNGREN. That is the question I have.

There is a distinction, at least in my mind, between the public safety exception as previously understood by court decision; that is, it is the case of imminent danger. You have the case where a gun is missing; you know it is in that location, and someone might pick

it up and do harm immediately. You have the case of a ticking time bomb; you have to get that information immediately.

But in this case or in cases involving suspected terrorists, presumably we are trying to get more information than just the immediate danger. We are trying to solicit information with respect to perhaps a terrorist network. And so my question is, is it not a somewhat different application of law or the foundations of the exception of the law to use it in these circumstances involving terrorists as opposed to the conventional notion in regular criminal cases?

Mr. HOLDER. I think the definition of immediate danger really can be different if one looks at, to use your words, the traditional context as opposed to the terrorist context. That is one of the reasons why we think that we should think about modernizing, and clarifying, the public safety exception so that we would have a public safety exception that is prepared—that we can use and deal with that.

Mr. LUNGREN. I understand that. And what I am trying to get at is, what is the basis of that?

For instance, Mr. Abdulmutallab, as I understand it, Abdulmutallab gave you information some weeks after you arrested him. Or at least, based on statements that have been made from the Justice Department, one would ascertain that. If that be the case and that information was valuable in allowing us to further understand terrorist plots, then one would question whether or not we should have tried to get that information earlier, prior to the time that we gave him the Miranda warnings. And if, in fact, the justification is that it is danger not of this immediate, short time period, that is, do we know whether he has another bomb, but rather we are trying to gain information with respect to terrorist activity, then that notion is different and the underlying legal argument made before the court is different.

I am trying to glean from you, what is the basis for your use of the imminent danger exception in terrorist cases as opposed to criminal cases?

Mr. HOLDER. Well, if the question is, let's say, in Quarles case, where is the gun, a simple question, and that was allowed.

In a terrorist situation, there are a whole variety of other questions that one would want to put to a person. Are there other people who are similarly engaged are we concerned about? We know how al Qaeda likes to do things in tandem. Are there other bombs that are——

Ms. JACKSON LEE. The gentleman's time has expired. Finish your answer.

Mr. HOLDER. Are there other bombs that we need to be concerned with? Are there other people who are going to be coming this way as a result? Are you maybe the first in a—are you in the vanguard of a terrorist attack? These are all questions that we think can appropriately be asked under the public safety exception. We want to have—our view is that we would like to have a greater degree of clarity with regard to what the public safety exception would entail, and that would be useful for agents, police officers, who have to deal with terrorist suspects.

Ms. JACKSON LEE. The gentleman's time has expired.

I recognize the gentleman from North Carolina for 5 minutes, Mr. Watt.

Mr. WATT. Thank you, Mr. Attorney General.

I appreciate you being here.

And this has been a little disjointed process. I hope it hasn't blown up your whole day, but I am happy to have you here.

Let me ask three quick questions. And to the extent you can comment publicly, that would be great. To the extent you want to follow up in writing, it would also be great.

We got some information several weeks ago that Professor Laurence Tribe was coming over to assist you all with the Access to Justice Program, and then it has kind of gone quiet since then. So one of the things I would like to try to find out is, what he is doing and whether we are making, you know, any progress on the Access to Justice Program? And maybe you are not ready to roll that out, and I respect that if you are not ready to do that publicly here, but at some point, it would be great to get a report on that.

Mr. HOLDER. Well, I can tell you that——

Mr. WATT. Go ahead. I was going to ask all three of them, and then let you wax and wane, and stay out of it.

Mr. HOLDER. Okay.

Mr. WATT. The second thing is, I note that there was a settlement with AIG for $6.1 million to African American customers. While I never thought I would live to see a day that I thought $6.1 million was a paltry sum, given the magnitude of distress that AIG and others caused African American customers, that seems like a fairly modest settlement. To the extent that you are able to provide any details on that case without violating whatever ethical standards you have, it would be helpful to get some information on that.

And then, finally, I wanted to applaud, obviously, the objections that you all have interposed to the proposal of Kingston, North Carolina, to change its voting system under the Voting Rights Act preclearance provisions. And I would like to get, perhaps in writing again, because I am not sure if 5 minutes will do justice to it, some assessment of the kind of preparation you are making for the onslaught of cases that are likely to come. As soon as this Census is over, I suspect there will be a whole new round of voting rights cases filed, and I think we need to be as prepared, and DOJ needs to be as prepared as possible to meet that onslaught.

So those are the three areas of inquiry. And I will shut up, and you can use the rest of my 5 minutes to respond, and whatever you don't respond to in the 5 minutes, then perhaps you can send us something in writing.

Mr. HOLDER. I will. I will take you up on your offer to respond in writing with regard to the second and third questions that you raised about the settlement and about the question of the Census and the interaction that has with the position we have taken in Kingston.

With regard to the Access to Justice initiative that Professor Tribe is involved with, that is something that is really critical to me as Attorney General and to the President as well to come up with ways in which we make sure that people, irrespective of their economic condition, irrespective of their socioeconomic status, have an ability to enjoy all the fruit of our great system.

One of the things that we are focused on and one of the things that Professor Tribe is focused on is this whole question of indigent defense and whether or not people get adequate representation or not based on their economic condition. We have seen studies, we have seen reports about people in critical parts of criminal proceedings acting without a lawyer. We are trying to understand what the various systems look like around the country. Professor Tribe will be intimately involved in that effort in particular, but then more generally to make sure that all American citizens have equal access to justice.

He is a very eminent scholar. He is just stepping up, but I expect that he will make a major contribution to this Justice Department.

Mr. WATT. Thank you so much, Madam Chair.

I will yield back. My time is expired anyway, so I can't yield any time back, but I yield back anyway.

Ms. JACKSON LEE. I thank the gentleman for yielding what he might not have, but for his courtesy.

I now recognize the gentleman from Virginia, Mr. Goodlatte, for 5 minutes for his questioning.

Mr. GOODLATTE. Thank you, Madam Chairman.

And, Attorney General Holder, welcome. We are pleased to have you here today.

As you know, and I have had some conversations with your staff regarding a case that is of great importance in Virginia, in the last days of his gubernatorial term, former Virginia Governor Tim Kaine inexplicably requested that Jens Soering, a man convicted in the Virginia State courts of the brutal and violent murders of two residents of central Virginia, in my congressional district, be transferred from Virginia's prison system to Germany.

Soering is currently serving two life prison sentences. However, if he is transferred to Germany, it is my understanding he could be released within 2 years. The decision to approve or deny a proposed transfer is committed to the discretion of the Department of Justice and in your hands.

I understand that the seriousness of the offense and the potential public outrage at the transfer are factors that the Department considers in evaluating such transfers. I can attest to you that these crimes were heinous and that the public outrage about the potential transfer is extremely high. I have been contacted by many constituents expressing opposition to this transfer, including some involved in the original case.

In addition, I forwarded to you a letter signed by 75 of the 100 members of the Virginia House of Delegates opposing this transfer. The letter was signed by Republicans, Democrats and Independents alike, and in addition, Governor McDonald contacted the Department to revoke Governor Kaine's request.

And I wonder if you can tell us what the status is of that process.

Mr. HOLDER. Well, first, I would agree with you. Those were heinous and very serious crimes.

The question I think that the Justice Department has to deal with is to see what, in fact, is the position of the State going to be, whether or not the revocation recision by Governor McDonald of what Governor Kaine did is in fact going to be upheld by the courts in Virginia? So until that, I think, determination is made,

the Justice Department really cannot act. And so I guess we are waiting to see that.

But I will agree with you, we are talking about the most serious crimes that one can imagine. Lives were lost as a result of the actions taken by this defendant. And in making any kind of assessment, that would be uppermost in our minds. But I guess we are waiting to see what the resolution is of the contrary positions of the two Governors.

Mr. GOODLATTE. Well, General Holder, it seems to me that you, in your capacity, could make the decision not to honor the recommendation of Governor Kaine whether or not Governor McDonald's letter overturning Governor Kaine's request is recognized or not. It doesn't seem to me that you need to get to that question in order to simply make a determination. And I find it hard to believe that the Department could contemplate transferring this man to Germany when the public outrage over this is so overwhelming; and justice is being served by the Virginia criminal justice system, and then, in Germany, he could be released in as little as 2 years or less, certainly not what has occurred in Virginia, which has required him to serve, so far, the full two life sentences that have been imposed upon him.

Mr. HOLDER. Well, I think in making the determination, it makes a lot of sense to get what the State's position is actually going to be.

And I think that, in that case, it makes sense for us to await the official determination of what the position of the State of Virginia is with regard to the request that has been made.

But factoring that in, I want to emphasize that I have been a prosecutor, for a good portion of my life. I have prosecuted violent crime cases and dealt with them as a judge. This is as serious a case as I have seen. And that would obviously be something that would weigh into any decision that we had to make.

Mr. GOODLATTE. Let me ask another question about another issue that is pending here in the Congress and of importance.

Congressman Barney Frank has introduced H.R. 2267, legislation to repeal the recently enacted Unlawful Internet Gambling Enforcement Act, a bill that passed with overwhelming bipartisan support. His repeal bill also legalizes and regulates Internet gambling at the Federal level under the Financial Services Regulatory Agency.

Among its various provisions, the bill, in my opinion, guts the Wire Act, U.S.C. 1084, by stating that the Wire Act will not apply to any activities regulated by the licensing scheme envisioned under the bill.

So I would like to know, first, do you believe that currently illegal offshore gambling operations should be legalized by the Federal Government, and do you support or oppose this legislation?

Mr. HOLDER. We do not support the legalization of offshore gambling.

When one looks at the negative impact that that has had on the lives of individuals, potential that it has for problems that it might create, even on a community-wide basis, it just seems to, I think, us that that is not something that we necessarily want to support.

Mr. GOODLATTE. Well, thank you. I appreciate your understanding the risks that Internet gambling imposes on our citizens.

Madam Chairman, I see my time has expired.

Ms. JACKSON LEE. The time has expired of the gentleman from Virginia. Thank you so very much.

The Chair will now recognize the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much.

I want to try and get responses on three issues that I have.

The first one that I talked about was diversity, particularly focused on FBI, and whether or not you have the responsibility for working with the FBI to ensure that the discrimination complaints that have come from within are being settled and whether or not there is a backlog. And I will be writing you some more on this, but I want to hear from you just briefly what you know and what you have done.

Mr. HOLDER. Well, just 2 weeks ago, I issued a directive, a diversity plan, for the Department of Justice that includes all of the Department's components, including the FBI, the DEA, the ATF, and the other components that make up the Department.

There are people who are going to be in place to monitor this situation, to monitor these diversity efforts. All of the components have to come back, I believe, by the end of June with what their plan is to diversify their ranks. This Department of Justice is committed to diversity. This Department of Justice is at its strongest——

Ms. WATERS. Do you still have backlogs in the FBI of discrimination complaints?

Mr. HOLDER. I am sorry?

Ms. WATERS. Do you have a backlog of discrimination complaints in FBI?

Mr. HOLDER. I don't know. I will have to check, and I can get back to you on that.

Ms. WATERS. All right.

And that report is public, that information?

Mr. HOLDER. The diversity plan?

Ms. WATERS. Yes.

Mr. HOLDER. Yes.

Ms. WATERS. All right. We will get a copy of that.

Quickly, moving to antitrust, the big one, the media merger of the purchase of NBC by Comcast and how you view these things. We are concerned because of the size of this purchase, and we are concerned that this consolidation will cause Comcast to own movie studios, Internet, cable, broadband, you name it. And some of these mergers, they don't have any public hearings on. We work with the FCC, and they did agree to extend the comment period. Now, what is your responsibility?

Mr. HOLDER. Well, we certainly look at these for their impact on competition and whether or not they unnecessarily consolidate things that should be separate.

The Justice Department does not typically hold hearings or does not hold hearings when we conduct our antitrust investigations. I understand that the FCC perhaps has had one or is planning to have one, and that certainly, I think, is in there for them to decide.

The work that the Justice Department does is typically done in a nonpublic setting.

Ms. WATERS. Would you be advantaged in any way if you had information from a public hearing from all kinds of production groups and people involved in media about the lack of access to ownership and programming and management and all of that? Would that help you in any way with your decision?

Mr. HOLDER. Sure. I mean, we make our best decisions when we have access to the greatest amount of information.

Ms. WATERS. So public hearings that would draw this information out could be helpful to you, is that right?

Mr. HOLDER. It could be.

But we will be taking our own steps to try to reach out to affected, potentially affected parties and individuals and get information from them. But certainly, anything that develops the record that gets more information out there that we have that we can have access to would be something that would be good.

Ms. WATERS. And can I have my staff talk with you about what steps you will be taking? We would like to know. Perhaps we can be of assistance, coming from the Los Angeles area, where we have lots of people in production, et cetera, that are really concerned about this purchase, okay?

Mr. HOLDER. Sure. I would be glad to talk to you. But, again, there are limits that when we have ongoing investigations, there is only so much that we can discuss. But I think, in terms, there may be——

Ms. WATERS. Whatever you can discuss.

Mr. HOLDER. There may be things we can discuss, though.

Ms. WATERS. And finally, let me just ask you about the militias and the right wing terrorist organizations.

I am particularly concerned about the one who had planned to kill a police officer, and once the police arrived, that they would have a lot in plain view to kill. I haven't heard of terms like domestic terrorism. I am concerned about a possible Timothy McVeigh type incident with some of these militias. I know Homeland Security has some responsibility. What is your responsibility, and what are you doing?

Mr. HOLDER. You know, I think you raise a very good point.

We have focused a great deal on international terrorists, as we should, but we cannot take our eyes off the fact that we have within our own country domestic terrorism that we also must confront. The case that you described, the Hutaree case, is an example of that. And their plot to kill a police officer and then to try to kill more police officers who came to the funeral is an indication of the kind of activity, the kind of heinous acts that we have to be concerned with.

If one looks at the statistics that have been developed, you see that there has been a pretty dramatic rise in the number of these domestic hate groups, and that gives us great concern.

The FBI monitors these groups, always being mindful of the fact of that people have First Amendment rights. But we monitor these groups to make sure that they don't cross the line from that which is protected by the First Amendment and crosses into that which is criminal.

Ms. WATERS. So is there a formal kind of definition or way of approaching domestic terrorism and to raise the level of attention on domestic terrorism the way we have done on foreign terrorism?

I don't hear it talked about. I don't hear anything coming over to us to talk about domestic terrorism. I did hear this morning that a kid was accused of being a terrorist in school because this autistic kid drew some pictures, what looked like violent pictures, but I have never heard of this kind of terrorism being described domestically. And what can you do to help focus this country and this Congress on domestic terrorism?

Mr. HOLDER. Well, I start my day at 8:30 with a briefing with the FBI Director about——

Ms. JACKSON LEE. If the General can wrap up, the gentlelady's time has expired, but I will allow you to finish the answer, please.

Attorney General HOLDER [continuing]. Where we review the threat stream for the past 24 hours. And a component of that conversation, that briefing, focuses on what is going on domestically. And so the American people should, I think, be reassured that their law enforcement agencies, the FBI, their Justice Department, is focused not only on international terrorism but on domestic terrorism as well.

Ms. WATERS. The gentlelady's time has expired.

The gentleman from California, Mr. Issa, is recognized for 5 minutes.

Mr. ISSA. Thank you, Madam Chair.

General Holder, as I said in my opening statement, I am deeply concerned that a seated Member of Congress, a distinguished Member of this body, has alleged what amounts to three felonies. The former U.S. Attorney, now Senator, Arlen Specter, has confirmed that, in his opinion, if the allegations are true, they are felonies.

What are you presently doing and what will you commit to do, including hopefully a special prosecutor or a special investigator, about these allegations by a former admiral in the Navy and now U.S. Congressman?

Mr. HOLDER. Well, I can say that, with regard to the appointment of a special prosecutor, that is something that is done on a case-by-case basis.

Mr. ISSA. And what could be more a case by case than an allegation that this White House has committed three felonies in offering a Member of Congress a high-ranking position in this Administration in return for his getting out of the primary? What could be more appropriate than that? And if it is not appropriate and you are not conflicted, then what are you doing about it?

Mr. HOLDER. Well, there are regulations that are in place. And there are requirements that have to be met before a special prosecutor, an independent counsel, is appointed. I have great faith in the people in the Public Integrity Section who would typically handle these kinds of matters. I was a member of the Public Integrity Section for 12 years.

Mr. ISSA. Fine. I sent you a letter, you have not responded to it. What is the response to investigating this? These are allegations of three crimes. There is an election to be held in a matter of days, greatly influenced in the entire State of Pennsylvania by these unanswered allegations of White House criminal activity?

Mr. HOLDER. Well, I thought we had responded to your letter. If we had not, I apologize for that. These are matters, all of these matters, any matter that comes up like that are obviously fact-specific and deals a lot with what the intent of the person was. I am not speaking specifically about the matter that you have raised, because I don't talk about any matter that might come into the purview of the Department of Justice.

Mr. ISSA. Okay.

Well, then let's talk hypothetical for a moment, Mr. General.

Section 211, which prescribes what bribery is, the offer of a government job, which is Section 600, by an official; are these serious matters?

Mr. HOLDER. Simply offering somebody a job?

Mr. ISSA. If I offer you a job in the White House, let's say Secretary of the Navy, in return for your doing something, such as dropping out of an elected office to clear a primary, is that a serious crime?

Mr. HOLDER. Well, I think we are talking about more than a hypothetical now.

Mr. ISSA. I am asking if that hypothetical is a crime. You don't answer specifics, Mr. General.

Do you answer hypotheticals? Is that a crime?

Mr. HOLDER. I don't answer hypotheticals.

Mr. ISSA. Okay. So let me understand this. There has been an allegation by a Member of this body. The allegation is that he was offered a position, a high-ranking position in the Administration, in return for getting out of the primary, which he declined and stayed in the primary.

You are saying, let the ethics section, the integrity section, handle it. You don't comment on it.

Then I asked you, if allegations similar that I have alleged were true, would there be a crime? And you are saying you don't answer hypotheticals.

Well, look, you are here before us today. If you won't answer literals and you won't answer hypotheticals, you don't answer or apparently investigate, we have an allegation of three felonies, the Congressman says are felonies and a seated U.S. Senator, a member of the same party has said is if true is a crime and you are not investigating whether it is a false statement by a Member of Congress or a crime by the White House, what are we to do.

Mr. HOLDER. You see the danger in dealing with hypotheticals is because you can never spin out in its totality what a real case would look like.

Mr. ISSA. General Holder, it is not a hypothetical when Congressman Joe Sestak says he was offered a job by this White House in contradiction to at least three sections of the U.S. Code. I have asked you what you are doing about it and apparently you are not willing to say that it is being handled by the public integrity section. You are only willing to say that those kinds of things are handled.

Have you put any attention into following up on our letter and the allegation of Congressman Sestak?

Mr. HOLDER. As I said, I thought we had responded to your letter, but you are saying the premise——

Mr. ISSA. It could be in the mail, but it is very slow sometimes. We have not received it.

Mr. HOLDER. I apologize if we have not done that. The premise that you make, though, that there are violations of these statutes, again, things that would have to be examined would have to be looked at by——

Mr. ISSA. I'm only asking you if you have followed up on the allegations by a Member of Congress and an assertion by a U.S. Senator. That is all I'm asking. I'm not asking for all the details of how you would follow up.

Have you followed up on these allegations that we brought to your attention that, to be honest, national press has brought to your attention?

Mr. HOLDER. As I said, it is the Department's policy not to comment on anything, not to comment on pending matters to say there is an investigation to say there is not an investigation, that is not the way in which the Department of Justice under Republican or Democratic attorneys general have conducted. That is not what we do. And that is the way I answered the question you pose to me.

Mr. ISSA. I'm sorry, you can't answer the question. I yield back.

Ms. JACKSON LEE. The gentleman's time has expired. The Chair is being sensitive to Members who are in the midst of questions so Mr. General, you will see the light red, but we want to allow Members to be able to finish their question and their answer. And Members, we recognize that there are people who are still traveling.

With that, I will recognize in Pierluisi for 5 minutes.

Mr. PIERLUISI. Thank you, Madam Chair. Thank you again, Attorney General.

I would like you to address a bit further the Arizona matter. I heard you say that you are looking into the matter. The way I see it, and you heard me before, I find the whole matter offensive on behalf of all Hispanics in America, but I bet I can speak for others as well. This is a Nation of immigrants. And most of them are either U.S. citizens or legally residing in this country. So I am very disturbed by this law. And regardless of the motives, I'm talking about a law that lends itself, on its face, to racial profiling.

Now the way I see what the Department could be doing, I see that the Department could be doing any of three things. First, challenge the law in court, second, clarify its position on the preemption issue that this matter raises, and third, deal with, assuming the law ends up being in effect and it is not challenged, dealing with its implementation, civil rights actions to the extent that there are civil rights violations.

So I just want you to be a bit more specific. What are you looking at? And what can we reasonably expect from the Department in this matter in the near future?

Mr. HOLDER. Well, we are examining the law and trying to determine if it contravenes the Federal responsibility for the immigration question, whether or not what the Arizona legislature has tried to do is actually preempted by Federal law, by Federal statutes. In addition to that, we are looking at it from a civil liberties perspective to see whether or not the law contravenes Federal civil rights statutes. That inquiry, that look at the law is presently un-

derway, and we are in the process of trying to determine what action, if any, we are going to take.

Mr. PIERLUISI. I see. If I have time, and I will add one thing that troubles me as a former attorney general, I think community policing is so effective in America, and this matter also raises the possibility of affecting the ability of local law enforcement to deal with our communities, gain the trust of residents in our communities when they are under siege by all crimes, not only immigration violations. So that troubles me. I would like to hear from you on that.

Mr. HOLDER. Though I understand as I think I said before the frustration of people along the border and Arizona I guess here specifically one of the concerns I have is exactly the one that you have just talked about, and whether or not the passage of this law will serve as a wedge between law enforcement and the communities that law enforcement is supposed to serve.

If a community feels that it is being treated unfairly, that it is being profiled, you are less likely to have people share information with law enforcement, you are less likely to have an ability to solve crimes in that community. And those are the kinds of issues that I think we have to take into consideration as we look at the law.

Mr. PIERLUISI. Thank you.

Ms. JACKSON LEE. The gentleman yields back?

Mr. PIERLUISI. I do.

Ms. JACKSON LEE. The gentleman yields back. We now recognize Mr. Coble for 5 minutes. The gentleman from North Carolina.

Mr. COBLE. Thank you, Madam Chairman. General, let me extend from my opening remarks this morning. What criteria, General, set apart Khalid Sheikh Mohammed and his co-conspirators from other Gitmo detainees that require or who require civilian rather than military commission trials?

Mr. HOLDER. Well, the determinations that I have tried to make in making assessments as to where these cases can be tried are case specific, where can the case best be tried. On the same day that I made the announcement that the case would be tried in a civilian court, I sent five or six other cases, I don't remember exactly how many, to military commissions. The question of military commissions deals in some ways with the acquisition of evidence on the battlefield. But we make these cases—I make these determinations on a case-by-case basis following a protocol that I have with—that is used by me and by the Department of Defense.

And so each case is assessed and a determination made about where we can best try the case, where justice can best be accomplished.

Mr. COBLE. Thank you, General.

General, you recently stated that the Department is still reviewing where to try Khalid Mohammed and his co-conspirators. What issues is the Department still addressing?

Mr. HOLDER. Well we have not—there is a review underway about the determination that I made, I guess, back in November about the location of the trial. We take into account a variety of things: the reaction of political leaders in particular areas, the reaction of the public in that area. And we are taking into account a whole variety of things in making that determination. We are not

ruling anything in or ruling anything out at this point. That review is still underway.

Mr. COBLE. General, how many venues are you considering?

Mr. HOLDER. Well, I would say that we are considering a variety of places in which and forums in which that case might be held.

Mr. COBLE. I guess specifically what I am driving at is, in your opinion, does the capital venue statute that indicates the punishable by death violation shall be in the county where the offense was transmitted, would that limit it to New York, Pennsylvania and Virginia?

Mr. HOLDER. Yeah, that is a very good point. That is a statute that we have to deal with in making these determinations. There is a statute that says if you are going to seek the death penalty, the trial has to occur in the place where the offense actually took place which does limit, in some ways, our ability as to where the trial could be venued, though there is some question about how directive, how strong that particular statute is. But that statute certainly is a factor that has to be taken into consideration.

Mr. COBLE. Thank you, General Holder.

Madam Chair, I yield to the gentleman from Virginia my remaining time.

Ms. JACKSON LEE. The gentleman from Virginia is recognized for the remaining time.

Mr. GOODLATTE. I thank the gentleman for yielding. General Holder, following up to the comments of the gentleman from California, I'm not taking a position for or against the Comcast/NBC Universal merger, but I do want to make the point that I think the Department's job is to conduct a fair, thorough and expeditious review, apply the facts to the law and make a decision based on that analysis, and I have every confidence that you and the Department will do just that.

Mr. HOLDER. Thank you.

Mr. GOODLATTE. I yield back the gentleman.

Mr. COBLE. I reclaim it and yield back, Madam Chairwoman.

Ms. JACKSON LEE. The gentleman yields back, and I now recognize the gentleman from Tennessee, Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Madam Chair.

General Holder, we had talked about racial disparities earlier last year when you were before us. And I have a bill which I have introduced, the Justice Integrity Act originally introduced also in the Senate by Senator Biden, and it was to look at a study of racial and ethnic disparities. We have held back on the bill at the request, I believe, of the Justice Department because you were doing an internal study. Have you concluded that study?

Mr. HOLDER. The studies that we are doing are still, they are fairly close to, as I like to say, coming into a landing, and I'm starting to hear now back from the task forces that we created, and on the basis of some of the reports that I am receiving, I will be announcing a variety of things over the next 2 weeks or so. But the one that you are talking about, I have not yet seen a report.

Mr. COHEN. When do you think you might see a report on that one? You don't have one on racial disparities yet, do you have others?

Mr. HOLDER. Well, we certainly have, we have been looking at the question of looking at racial disparities, geographic disparities as well, with regard to the criminal law, and I have received a report on that. And we will be issuing some guidance in that regard very soon.

Mr. COHEN. Very soon. That is good and that report will be released to the Judiciary Committee and the public, I presume?

Mr. HOLDER. It is something that will be public. It will be certainly released in the field, and I'm sure that the public will have an ability to look at my pronouncement.

Mr. COHEN. Also, I have introduced legislation which I will be introducing today to require States and localities that receive funds through the Byrne program, JAG program, to study racial and ethnic disparities in their criminal justice systems work to reduce those. Do you agree that States and localities have a responsibility to make sure Federal funds such as Byrne grants are not used to perpetuate in any way whatsoever racial and ethnic disparities in reports would be a good way to put them on notice and maybe ferret out those situations?

Mr. HOLDER. Sure. The Byrne and JAG grants are one of the chief ways in which we support our State and local counterparts, and we would expect that that would be done in a nondiscriminatory manner and done in a way that would not promote disparities and that would be responsive to the needs of particular communities. We are trying to make sure that those grants further the cause of equal justice as opposed to retarding it.

Mr. COHEN. I mentioned in my opening statement my support for Senator Webb's bill, which I believe Congressman Delahunt is a sponsor of here. Has the Justice Department done any, or intend to do any comprehensive looks at our sentencing laws and try to reform them so that they are in the 21st century?

Mr. HOLDER. One of the task forces that I put in place has looked at the Federal sentencing laws, and it is as a result of that, again, there will be something issued very shortly from me to the field. We have looked at the Webb bill as modified and it is one that the Administration again has modified and now supports.

Mr. COHEN. There was an April 22 Federal District Court sentencing ruling by Judge George Wu. Are you familiar with Judge Wu? He issued a 41-page written order concerning a man named Charles Lynch, who was convicted of medical marijuana dispensing, and in that opinion he said much of the problem could be ameliorated by the reclassification of marijuana from Schedule I.

What are your thoughts that you could share with us about how the Department will approach a rescheduling hearing of marijuana, which is right now in the highest class that the Federal Government knows, means it is at a level with Dilaudid, opium, heroin, as far as being habit forming, addictive and troublesome and expensive and bad and all those other things?

Mr. HOLDER. One has to look at the issue of marijuana in its totality. The Mexican cartels get the greatest amount of their revenue from the trafficking of marijuana. It is something that fuels, helps to fuel the violence we have seen in Mexico. It is potentially something that can—the trafficking of this substance can have an effect on violence in the United States.

What the Administration has done is to say that in those States, where a determination has been made that medical use can be made of marijuana that we would not use our limited resources to go after marijuana being used in that way but to focus our attention on those people who are major traffickers of marijuana and other drugs that have such a negative impact on so many communities in this country.

Mr. COHEN. If I could ask the Chair for just 30 more seconds. Thank you, Madam Chair.

On that subject, I concur and commend you on that. But I would like to suggest that possibly the reason that there is such a demand for that product that causes all the violence is because it is illegal, and maybe if it wasn't a class 1 and maybe if there was some other determinations maybe you would, and obviously it must be popular some place with someone. And that is why maybe we should take into consideration the popularity and demand and maybe changing cultural norms and values and maybe supply and demand then we could reduce violence through another way, violence with violence, and violence with incarceration and instead kind of work our way through this, get to a higher place so to speak.

Ms. JACKSON LEE. The gentleman's time has expired.

Do you have a response?

Mr. HOLDER. Well, I would only say that I think one of the things we ought to try to do is reduce demand for marijuana and other drugs that will help our Mexican counterparts. It is, I think, the responsibility of the United States to try to do that. This Administration has tried to do that through the use of drug courts and treatment, added money for treatment facilities, and, I think, that is the way in which we can decrease the amount of violence that we see.

Ms. JACKSON LEE. The gentleman from Iowa, Mr. King is recognized for 5 minutes.

Mr. KING. Thank you, Madam Chair. General Holder, thanks for coming forward to testify today. I appreciate it. It is a long day. It comes to mind that Representative Chu spoke earlier in her opening remarks about how Arizona's immigration law institutionalizes racial profiling. And she also said that people are already being detained because they forgot their driver's license at home. Could you add some clarity to that statement for this panel, please?

Mr. HOLDER. Well, I am not familiar with the incident perhaps that Congresswoman Chu was talking about. The concerns that I have expressed are with regard to the whole question of preemption and whether the statute gets into areas that are more properly handled by the Federal Government and what the impact of the law will be on law enforcement and its interaction, its relationship with certain communities in Arizona.

Mr. KING. Perhaps if I just state into the record that the Arizona law isn't an Act, it doesn't go into effect until 90 days until its passage and signature by the Governor, then we could agree that any action that would be taking place on Arizona's immigration law would not take place until 90 days after it is signed by the Governor, and the balance of any activity might have been inspired by the press or public dialogue, but nothing on the authority of the

legislation could possibly be taking place at this point. Would you agree?

Mr. HOLDER. Again, I'm not familiar with the fact situation that she mentioned——

Mr. KING. Wouldn't that generally be the standard, though, if it were Federal law or a State statute that until it is enacted, it can't have an effect legally and so her remarks that she has made could not be relevant to the law's enactment itself?

Mr. HOLDER. Again, I don't know whether some police officer thinking that the law is going to be taking effect has acted in a way that is inappropriate. I just don't know anything about the fact situation that she has described.

Mr. KING. Then let's try this down the path of the Constitution preemption which you mentioned. And as I understand Arizona law, and I could probably list a couple of minor exceptions, it mirrors Federal immigration law, and the question and the charge that seems to come from the President was that the Department of Justice was going to be looking into Arizona's immigration law and presumptive, presumably to evaluate its constitutionality, which you had referenced, and whether it would violate any Federal statute under that preemption clause. Could you, today, point to anything in the Constitution that would prevent Arizona from passing and enforcing immigration law provided it didn't go beyond the bounds of Federal immigration law within the idea of mirroring that Federal immigration law, and is there anything in the Constitution you could point to that would define Arizona's immigration law as unconstitutional or potentially unconstitutional?

Mr. HOLDER. Well, the regulation of our borders and the immigration that occurs by crossing our borders is something that is inherently something I believe for the national government to take responsibility for.

As I indicated, I understand the frustration that people feel in Arizona. We have not done, I think, enough as a Nation to deal with a very real problem that people in the Southwest border have to deal with. But it is really more than them. It really is a national problem. I think that is why the President has said that a comprehensive look at this issue, dealing with the causes of illegal migration as well as what we do with those people who are here without documentation is a way in which we can hopefully solve this problem.

Mr. KING. But General Holder, now we have now digressed into policy, and as far as specificity, with regard to the Constitution or current Federal statute, and you have already gone in and investigated this, I presume, at the direction of the President, so you should know today whether there is a constitutional point that can be made or a Federal statutory point that can be made, and I will suggest that I have looked at this and I have asked our attorneys to look at this, and we have not found a constitutional argument that would indicate that Arizona has violated the Federal Constitution, nor have we found a way that Arizona has gone beyond the bounds of Federal immigration statute. And I point out also that in the Constitution there is nothing there that defines immigration law as the exclusive province of the Federal Government. Only two places, protection from invasion and then Article I, Section 8 that

says to establish a uniform rule of naturalization, the balance of that is implicit. And case law supports local law enforcement enforcing Federal immigration law. So how would you respond to that?

Mr. HOLDER. Our view is still underway. We have not made a determination yet whether or not Federal law preempts the Arizona statute. That is something that we are examining. I was saying that was one of the two bases upon which we might take some legal action. But we are not at that stage. We are not at that point where we have made a determination that, in fact, it contravenes Federal law.

Mr. KING. Just to respond briefly to that inconclusive answer. I would point out there have been a significant amount of resources that have beeninvested in looking at Arizona immigration law. It appears to follow a pattern of political actions of your office. And the ACORN investigation couldn't seem to get started with one single individual or one single investment of dollars, which has this country entirely tied up in knots and it threatens the very, the underpinnings for our Constitution are legitimate elections. The threat to our legitimate elections, that is the one thing that would break, tear this country down is if we lost our confidence in the electoral process.

Yet we can't investigate ACORN, but we can investigate Arizona and we still can't find out what might have brought your attention to that, as you haven't pointed out anything in the Constitution or Federal statute or case law that would direct anyone to look into the Arizona law. So I would be happy to conclude my statement with that and yield back the balance of my time.

Ms. JACKSON LEE. Thank you. The gentleman's time has expired.

Mr. HOLDER. I just want to make one point very clear. The determinations that we make as to what statutes we look at, what cases we investigate, are done in an apolitical way. I am quite proud of the time I have spent in this Department of Justice. I consider myself a career guy. I have served very proudly under both Democratic and Republican attorneys general. I understand the traditions of this Department. I will not allow this Department of Justice to be politicized. People may not agree with the decisions that I make. But I want the American people to know, right or wrong, the decisions I make are based on the facts and the law and have no basis in politics. That is not what this Justice Department is about. That is not what this attorney general is about.

Ms. JACKSON LEE. The gentleman from Georgia, Mr. Johnson, is recognized for 5 minutes for his questioning.

Mr. JOHNSON. Thank you, Madam Chairwoman.

General Holder, there have been a number of myths that have been perpetrated by the politicians seeking to inject politics into the political process. And one of these myths that has once again reared its ugly head has been the notion that the Obama administration and you as the attorney general place the U.S. at risk by prosecuting terrorists in Federal Court, including the Christmas Day bombers and the 9/11 defendants, and now the Christmas Day underwear bomber and the gentleman who was recently arrested for leaving a car packed with explosives in Times Square.

And now prior to this issue becoming a political football, the Bush administration had tried numerous terrorist suspects in the Federal courts, including the shoe bomber, Richard Reid, whose case is strikingly similar to the underwear bomber's case, and also Zacarias Mousawi, the so-called 20th 9/11 hijacker. And is it true that according to the Bush administration numbers itself, that there have been over 300 antiterrorism cases that were prosecuted in civilian courts after 9/11——

Mr. HOLDER. Yes, that is a number that I think is accurate. And I think that we learn from that number and from what we have been able to do in the 15, 16 months or so that this Administration has been in existence that our Federal criminal courts can handle these matters. History shows that. The facts demonstrate that.

The concern I have is that to the extent that people want to take away from us the ability to bring cases in the Federal courts, you take away from us an extremely valuable tool. You actually weaken this country, you weaken our ability to fight this war against those who would do this Nation harm. We have to be able to use our military power. We need to use our military commissions. We need to use our diplomatic power, our economic strength, as well as the Federal criminal justice system if we are going to be really effective and ultimately win this war. We should not have this tool taken away from us.

Mr. JOHNSON. Well, now tell me during the Bush administration when these 300 or so cases, antiterrorism cases, were making their way through Federal Court to final disposition, the success rate in those prosecutions was phenomenal, was it not?

Mr. HOLDER. I don't have the exact numbers but the numbers were in the very, very high 90 percentage rate.

Mr. JOHNSON. Now if you could, I have been having trouble with this. If you could tell me what has actually changed from the time that these 300 Bush administration cases were prosecuted in the civilian courts to the current time, where we say that the civilian courts are inadequate, ill equipped and incompetent and unable to do what it has already established a track record of doing? What has changed now other than the ascent of the current party in power to that position?

Mr. HOLDER. Well, I often ask myself that same question as I look at people who hold themselves out as experts, pundits on television and who I think were notably silent when actions that we are taking now were taken by the Bush administration previously. I will leave to them to decide exactly what it is that has caused them to change their views when we have a consistent policy when it comes to the use of the Federal criminal justice system to handle these terrorism cases. But I do think that your suggestion that the party that is now making these determinations has changed, is certainly a factor.

Mr. JOHNSON. Well, if I might add a little commentary or editorial commentary onto the back of that, I think it is another illustration of the politicization of the notions of justice and fair play that I have come to respect during my 30 years as a lawyer.

Mr. HOLDER. I would say that is something that is extremely worrisome. I would think that the one place in which politics might not enter is when we talk about issues involving the national secu-

rity that we could as Americans put aside the idea of gaining political advantage when the stakes are as high as they are.

We are talking about protection of the American people, protection of American interests around the world. If ever there was something that should unite us—I'm not saying we have to agree on everything—but the notion that I see, I think, too often about using this particular subject to try to gain political advantage is, from my perspective, very distressing.

Ms. JACKSON LEE. The gentleman's time is expired.

Mr. JOHNSON. Thank you, Madam Chair.

The JACKSON LEE. The gentleman from Texas, Mr. Poe, is recognized for 5 minutes.

Mr. POE. Thank you Madam Speaker.

Thank you for being here. We know that terrorists use weaknesses in our immigration laws and our border security laws to come into the United States to carry out attacks. So Arizona, since the Federal Government totally fails to secure the border, desperately then passed laws to protect its own people. The law is supported by 70 percent of the people in Arizona, 60 percent of all Americans and 50 percent of all Hispanics according to the Wall Street Journal NBC poll done just this week.

And I understand that you may file a lawsuit against the law. It seems to me the Administration ought to be enforcing border security and immigration laws and not challenge them and that the Administration is on the wrong side of the American people. Have you read the Arizona law?

Mr. HOLDER. I have not had a chance to. I have glanced at it. I have not read it.

Mr. POE. It is 10 pages. It is a lot shorter than the health care bill which was 2,000 pages long. I will give you my copy of it if you would like to have a copy. Even though you haven't read the law, do you have an opinion as to whether it is constitutional?

Mr. HOLDER. I have not been briefed yet. We as I said have had underway a review of the law. I have not been briefed by the people who have are responsible for that review.

Mr. POE. Are you going to read the law?

Mr. HOLDER. I am sure I will read the law in anticipation of that briefing. I know that they will put that in front of me, and I will spend a good evening reading the law.

Mr. POE. Well, I have gone through it, and it is pretty simple. It takes the Federal law and makes it, enacts it as a State statute, although it makes it much more refined in that it actually says in one of the sections that no State or subdivision may consider race, color, national origin in implementing the requirements of any subsection of this law. It seems to outlaw racial profiling in the law. I know there has been a lot of media hype about the legislation.

Do you say see a difference in the constitutionality of a statute and the constitutionality of the application of that statute? Do you see there is a difference in those two?

Mr. HOLDER. Sure, there is a potential for challenging a law on its face and then challenging a law as it is applied. So there are two bases for challenging a particular statute.

Mr. POE. And when do you think you will have an opinion as to whether the law is constitutional?

Mr. HOLDER. I have used this term a lot, but I think this is relatively soon. I think that we have to. There has been much discussion about this. The review is underway. The Department of Justice, along with the Department of Homeland Security, is involved in this review, and I would expect our view of the law will be expressed relatively soon.

Mr. POE. You have some concerns about the statute, and it is hard for me to understand how you would have concerns about something being unconstitutional if you haven't even read the law. It seems like you wouldn't make a judgment about whether it violates civil rights statutes, whether it violates Federal preemption concepts, if you haven't read the law. So can you help me out there a little bit how you can make a judgment call on that, but you haven't read the law and determined whether it is constitutional or not?

Mr. HOLDER. What I have said is I have not made up my mind. I have only made the comments that I have made on the basis of things I have been able to glean by reading newspaper accounts obviously on television, talking to people on the review panel, on the review team looking at the law. But I have not reached any conclusions as yet with regard to it. I have just expressed concerns on the basis of what I have heard about the law. But I am not in a position to say at this point, not having read the law, not having had the chance to interact with the people doing the review exactly what my position is.

Mr. POE. The 287(g) program is Federal law that helps implement Federal immigration statutes and gives States the authority to implement and enforce Federal statutes. Do you believe that is constitutional?

Mr. HOLDER. Section 287?

Mr. POE. 287(g).

Mr. HOLDER. Yes. I believe that is constitutional.

Mr. POE. Just a couple more questions in the minute that I have left.

The folks in Arizona, it seems to me, are like the folks in Texas. They see people coming across the border, illegal entry, people being in the country illegally, still against the law. The Federal Government is supposedly, according to you and others, that is the Federal Government's job to secure the borders. We secure the borders of foreign countries; Third World countries protect their borders better than we do. I think for political reasons we don't secure the border. This is not the first Administration that hasn't secured the border. I hope it is the last Administration so that it actually does secure the border.

The law, it seems, should be enforced and if the Federal Government performed its role, Arizona wouldn't need to have these desperate measures. Other States are talking about the same thing. They wouldn't have to have these measures if the Federal Government just did its job.

Last question. Do you think if the Governors asked for the National Guard on the border that that is a constitutional request?

Ms. JACKSON LEE. The gentleman's time has expired. I will allow the General to respond to his question.

Mr. HOLDER. As I said earlier, I think we have to have as a comprehensive look at this. And we have to have, we have to secure our borders. We have to also deal with the millions of people who are here in an undocumented way. This is a national issue. It requires, I think, a national response, not necessarily, even understanding the frustration the people feel in Arizona, but not doing this State by State. This is something that requires our national government working with the States to come up with a solution, a comprehensive, a comprehensive solution.

Ms. JACKSON LEE. Ms. Chu of California is recognized for 5 minutes.

Ms. CHU. Thank you so much.

I have grave concerns about the civil rights aspect of the Arizona law, SB 1070, as I said in my opening statement. And I believe that it is unconscionable for any of our citizens to live in fear and carry multiple forms of identification with them everywhere they go, and this is something one would expect from a Cold War eastern bloc country, not America in the 21st century.

I know you have said you are looking into a review of this law and that you will make a final decision relatively soon I think is what you said. But if you decide not to challenge the law, do you intend to monitor its implementation to address concerns about civil rights violations?

Mr. HOLDER. I think we would do that in any case. I don't know exactly again what we are ultimately going to do with regard to our review of the law, but with regard to the law, and any other law, that exists in this regard, we would constantly be monitoring it to see if there are civil rights violations, civil rights concerns, that are generated by the implementation of the law should we decide not to challenge it, for instance.

Ms. CHU. There are also three lawsuits that have been filed against this law, the National Coalition of Latino Clergy and Christian Leaders filed a suit claiming it is illegal because it usurps Federal authority in immigration enforcement and it could lead to racial profiling, and two police officers are suing because it would hinder police investigation in Hispanic prevalent areas and violates the 14th Amendment rights of equal protection. Would you consider intervening any litigation by any other party?

Mr. HOLDER. Again, our review is underway, and exactly what procedural step we are going to take we have not yet decided. I will need to interact with our team that has been looking at the law and has been conducting this review and on the basis of that interaction, we will decide what action we are going to take, if any.

Ms. CHU. Well, another troubling aspect of the Arizona law is that it requirements local law enforcement to confirm with Federal authorities the legal status of anyone who is arrested regardless of the offense. And in many cases, it would take days for the Department of Homeland Security to respond to such a request. If the police decide not to press charges based on the underlying offense, wouldn't it violate the rights to due possess if the person were held without charges for extended periods? And also, do you believe that the Federal Government could realistically and promptly respond to all such inquiries for every person arrested in Arizona?

Mr. HOLDER. That is an interesting question. We are working with our partners at the Department of Homeland Security. And I am sure that one of the questions we are trying to deal with is what is the impact of this statute when it goes into effect? What is the potential impact of that statute on the Federal Government and then the resources that the Federal Government would be able to bring to bear on this very difficult issue. So that is a part of the mix that we will consider in determining what action we will take.

Ms. CHU. Well, in 1996, the Office of Legal Counsel concluded that the State and local police lacked legal authority to detain individuals solely on the suspicion of being in the country illegally. However in 2002, assistant attorney general Jay Bybee issued an Office of Legal Counsel memorandum concluding that Federal law did not preempt State police from arresting aliens on the basis of civil deportability.

Have you officially asked the Office of Legal Counsel to reserve this policy?

Mr. HOLDER. I have not as yet, but as we go through our review, one of the things that has to be taken into account is the 2002 opinion that you reference, its continued viability, and whether it is a correct assessment of the law. That is all a part of what our review team is, in fact, looking at.

Ms. CHU. Well, why would you keep that 2002 opinion in force while it is under review if it is under review, especially given the widespread opposition and civil liberties complaints?

Mr. HOLDER. Well, I don't think, as I said, that it is going to take us an extended period of time to decide what action we are going to take, but before we decide to take any action, I think we need to understand this statute in its totality, the impact that it will have, understand and take into account what policies the Federal Government has put in place including OLC opinions, and history that is involved in all of this.

There is a wide variety of things that go into the determination that ultimately we will have to make, and I want to make sure that we take as comprehensive a look as we can before we make what I think is going to be a very consequential decision.

Ms. CHU. And turning toward another issue that the Department of Justice actually had some action on with the investigation against Maricopa County Sheriff Arpaio for civil rights violations and unfairly targeting Hispanics and Spanish-speaking people, what is the status of that investigation by the special litigation section against Sheriff Arpaio?

Mr. HOLDER. That matter is under investigation. It is under review. I can't say an awful lot about that because it is a matter that is under review. The sheriff has unfortunately decided not to cooperate with the investigation, and so I think that makes our task a little more difficult, but it is a matter that is underway. The review is underway.

Ms. CHU. Thank you. I yield back.

Ms. JACKSON LEE. The gentlelady's time has expired. The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Thank you, Madam Chair.

General your office announced some months ago that Khalid Sheikh Mohammed would be tried in a civilian trial in New York

and I have to be very direct with you. Some of us were kind of stunned because of the discovery that this offered terrorists their ability to penetrate much of our intelligence gathering, the potential of them having a platform before the world, a recruiting mechanism, it just seemed like a terrorist's dream. And I just have to be honest with you. I just think it was an incredibly misguided comment. But ostensibly, it was so that we could show that America's system was superior to the others in the world. And that sounded like at least an honorable commitment.

But then the Administration said, there were several voices in the Administration that said, well, if they are somehow not convicted that we won't let them go.

In an interview with NBC news to November 18, 2009, President Obama declared that Khalid Sheikh Mohammed will be convicted and executed. And then in testimony before the U.S. Senate, you stated that in relation to the prosecution of KSM "failure is not an option."

Now I don't know how that undermines our system if we really hold that notion because you as the attorney general of the United States and certainly Mr. Obama must know that KSM and his co-conspirators are afforded, in our civilian courts, the presumption of innocence. And in light of this, does the Department honestly believe that it could successfully defend against an assertion by KSM and others that these statements have tainted a civilian jury or commission members to such degree as to deny them the presumption of innocence?

Mr. HOLDER. Well maybe I can clear this up once and for all. When I said failure is not an option that was not a prediction about the course of the trial. It was from my perspective an exhortation similar to the way in which a coach talks to his players and tells them you guys got to go out there and win this game because failure is not an option. That is what I was saying.

Mr. FRANKS. I will give you that. But the notion then that the Obama administration says that Khalid Sheikh Mohammed will be convicted and executed, the notion that the Administration has said many times that we will not let them go regardless. Not only does that undermine our system, but does it not afford the attorneys of KSM the opportunity to say, well, you have tainted the jury pool here and we are not afforded the presumption of innocence? That seems like that is not a hard question, but I don't know if you are willing to address it or not.

Mr. HOLDER. We would have an extensive voir dire that we would have to go through, and I am sure you could find people who would be able to judge the case based on only the evidence and testimony that was introduced during the course of the trial. The notion that somehow, some way, something that I have said has so tainted a jury or so tainted a potential jury pool that we would not be able to give Khalid Sheikh Mohammed and his confederates a fair trial I think is belied by the facts that we have done this in the past with high profile terrorism cases, in the Bush administration. We have cases that are underway right now in New York that are being handled I think in an appropriate way and defendants are being given fair trials.

So I think we have done it in the past. We can do it in the future and I don't think anything anybody has said in this Administration has tainted our ability or impacted negatively our ability to——

Mr. FRANKS. Khalid Sheikh Mohammed will be convicted and executed. You don't think that that is potentially suggesting that there may not be a presumption of innocence?

Mr. HOLDER. Well, from my perspective, I think that the lawyers who will try this case are experienced, the evidence that we have is good, and I am hopeful that we will have a good outcome. That prediction on my part doesn't necessarily mean that I think the ability to say that the trial was fair is in some way——

Mr. FRANKS. General, respectfully, I don't think you are going to answer the question. But I do think you put a judge in the impossible position of either trying to do what is right and protect the country or break the rules as a judge that he is required to—I mean, Khalid Sheikh Mohammed, the Administration is all too quick to say well this person was waterboarded. If you are a defense attorney there, you have got a plethora of options to try to undermine the trial. I think everyone knows that. I certainly do. I think you do, sir. So let me shift gears.

You stated on Meet the Press last weekend that if 9/11 mastermind Khalid Sheikh Mohammed were brought to the U.S. for a trial and acquitted, that if he were acquitted that "there are other mechanisms we might have to employ like immigration laws that we could use, the possibility of detaining him using the wars of law. Now I think you meant laws of war and I think that is understandable.

Were you referring to the PATRIOT Act provision found in section 236(a), the Immigration Nationality Act which allows for an indefinite detention of an alien you certify is a terrorist? Is that your basis for saying that?

Mr. HOLDER. Well, I am not sure about the particular section but the laws of war certainly allow us to detain people who are engaged in conflict with the United States. They certainly have habeas corpus rights and can challenge that detention as has happened in the Federal District Court here in Washington, D.C. So, yes, there is the possibility that Khalid Sheikh Mohammed could be detained under the laws of war.

Mr. FRANKS. Well, my final question, Madam Chair, is what, sir, is your backup plan to protect the safety of Americans if you cannot rely on an immigration detention law? What is the plan here if those things fail.

Mr. HOLDER. Well, as I think I indicated in the interview that you mentioned, I have great confidence in our abilities in the first instance to try the case fairly and effectively and to get a good result.

Beyond that, though, there are other options that we have beyond the trial. There are immigration laws. There are the laws of war, and with regard to Khalid Sheikh Mohammed, there are other charges that could be brought against him because of other acts that he did beyond what happened on September 11.

Mr. FRANK. I guess time will tell. Thank you, Madam Chair.

Ms. JACKSON LEE. The gentleman's time has expired.

I am now very delighted to yield to the distinguished new Member of this Committee, Mr. Deutch from Florida, for 5 minutes.

Mr. DEUTCH. Thank you, Madam Chair. I am delighted to have the opportunity. Attorney General Holder thank you for being here. I wanted to just spend a minute after some lengthy discussions today about terrorism and preventing terrorism and trying terrorists. On the prevention piece in particular the terrorists screening database which, as I understand, is comprised of those individuals who are known or reasonably suspected to be or have been engaged in conduct constituting in preparation for, in aid of or related to terrorism, those are the individuals included.

The question is, and what I would like to hear from you about is the Department's view on selling weapons to those terrorism suspects, and if you could speak to the government's determination that someone may be too dangerous to board a plane but not too dangerous to purchase an assault rifle, and then specifically, if you can clarify the Administration's current position on halting gun sales to suspected terrorists and whether the Administration supports congressional efforts to keep weapons out of the hands of those individuals that are contained within the terrorist screening database.

Mr. HOLDER. We certainly want to work with Congress with regard to that question about the access that people in the terrorist watchlist have to obtaining weapons. We have to keep in mind, and this will be part of the dialogue, that the FBI is notified when somebody on the terror watchlist, in fact tries to obtain a weapon. And there are, I have to be careful, but there are law enforcement equities, reasons, why that is something that is valuable to us. And so I think taking into account the law enforcement equities we have, the law enforcement realities that we now have, we would want to work with Congress to talk about the very real issue that you have raised.

Mr. DEUTCH. General Holder, if in order to balance these law enforcement equities, wouldn't it be possible to both prevent those weapons, those assault rifles in particular, from being sold to that suspected terrorist, while at the same time, still deriving the benefit of these equities and notifying the FBI?

Mr. HOLDER. I don't want to get into too much detail with regard to techniques and how the FBI uses actions by certain people on terrorist watchlists and what that leads to, but it is part of the conversation that I think we should have in dealing with a very real issue. And I don't mean to denigrate the issue that you have raised. But the very real issue that you have raised is something I think we should work together and try to resolve.

Mr. DEUTCH. I appreciate that. I would point out as we try to prevent all forms of terrorism the terrorists in Mumbai that killed 173 people, dozens of those murdered and injured were murdered or injured with an AK-47, and it does seem, and I appreciate your willingness to work with us, but if we have an opportunity to keep those sorts of weapons in particular out of the hands of would be terrorists, it would be therefore possible for us to prevent tragedies of that magnitude from occurring here in this country. And I look forward to having the opportunity to work together to make that so.

Mr. HOLDER. Please do not takeay what I said as disagreeing with your last statement. There are a variety of things that we need to do and can appropriately do. I just, as I said, would want to make sure that in looking at this question, looking at this problem, that we surface all of the law enforcement equities that we have and deal with the very real problem, the very real concern that you have identified especially in the last statement that you made.

Mr. DEUTCH. I appreciate that, General, and I hope we have the opportunity to do that soon. Thank you, and I yield back the time.

Ms. JACKSON LEE. The gentleman yields back his time and it gives me great pleasure again to yield to another distinguished new Member of the Committee, Mr. Polis from Colorado, for 5 minutes.

Mr. POLIS. Thank you, Madam Chair. My first question is with regard to Federal policy with regard to Drug Enforcement Administration and marijuana policy building off of what my colleague, Mr. Cohen, asked earlier.

I certainly applaud it and agree with warm representing one of the States that has medical marijuana law and regulates the sale of marijuana the memo describing the intent of DEA and U.S. attorneys. I would like you to describe the objective processes the DEA and U.S. attorneys are using in order to make a determination about whether individuals are in "clear and unambiguous compliance with State law." How is that determined?

Mr. HOLDER. Well, it is done, and people get, I guess, tired of hearing this but it is true, it is done on a case-by-case basis. We look at the State laws and what the restrictions are, how the law is constructed, and then there are a number of factors in that memo that are guides. Is marijuana being sold consistent with State law? Are people or firearms somehow associated with the sale? There are a variety of factors that are contained within the memo that went out from the deputy attorney general that the United States attorneys and assistant U.S. attorneys are supposed to apply, supposed to consider when trying to make the determination about whether or not Federal resources are going to be used to go after somebody who is dealing marijuana.

Mr. POLIS. I would certainly encourage the question of whether or not it is consistent with State law would certainly be left to State enforcement actions. In particular, I brought to your concern in a letter of February 23 requesting a clarification of your policies regarding medical marijuana, with regard to several statements that were made by one of your agents in Colorado, Jeffrey Sweeten, along the lines of the quote, as quoted in the paper, the time is coming when we go into a dispensary, we find out what their profit is, we seize the building and we arrest everybody. They are violating Federal law. They are at risk of arrest and imprisonment."

I would like to ask what steps you might take to make sure that the spirit of the enforcement mechanisms that you outlined to me in the answer to your previous questions are not contradicted by the statements of agents that, in fact, then strike fear into legitimate businesses in the eyes of our States.

Mr. HOLDER. It is incumbent upon me as attorney general to make sure that what we have set out as policy is being followed by all of the components within the Department of Justice and to

the extent that somebody at the DEA, somebody at some assistant United States attorney office is not following that policy, it is my responsibility to make sure that the policy is clear, that the policy is disseminated, and that people act in conformity with the policy that we have determined.

Mr. POLIS. Do you believe, do you agree that statements that could be recently taken as threatening to businesses that are legal in our State are, in fact, contrary to your stated policy?

Mr. HOLDER. Well, again, if the entity is, in fact, operating consistent with State law and is not, does not have any of those factors involved that are contained in that deputy attorney general memo, and given, again, the limited resources that we have and our determination to focus on major traffickers, that would be inconsistent with what the policy is as we have set it out.

Mr. POLIS. Moving on to immigration, I am worried about denying immigrants access to Federal judicial review in light of the Arizona law when they will be dragged into State courts in a fashion when the ultimate responsibility and authority regarding immigration is supposed to be that of the Federal Government. Are we worried about Arizona courts effectively trying to enforce Federal immigration laws?

Mr. HOLDER. One of the primary concerns that we have is whether or not the impact of the Arizona statute preempts, whether it improperly interferes with what is ultimately a Federal responsibility. Wwhether or not Federal law preempts the Arizona statute, is one of the things that we are looking at.

Mr. POLIS. And finally, there is a significant backlog in our immigration courts, and I would like you to briefly outline the steps that you are taking to restore fairness and efficiency to immigration courts which have been identified by several studies as a need of major structural reforms as well as additional financial resources.

Mr. HOLDER. We have really been engaged this fiscal year and next fiscal year in hiring a very substantial number of immigration judges which is one of the problems we had. We simply need more people to process these cases. We have also engaged in I think training to make sure that the people who serve as judges and who are a part of the system are conducting themselves appropriately. We have a new chief judge who I think is doing a good job in the training component, and we are trying to make sure that he and the people in the system have all the tools that they need so that our responsibility with regard to immigration is done in an appropriate way.

Mr. POLIS. Thank you, and I yield back.

Ms. JACKSON LEE. The gentleman has yielded back.

General, I believe that we are better as a Nation for having a U.S. Department of Justice, and I think we are better as a Nation to have a lawyer who represents the American people. I think it is important, as I close, to try to give you an opportunity to clarify a few points that may still be somewhat unclear.

One is an inquiry that I would appreciate if you would respond in writing within the parameters of that investigation and that is of course regarding the Harris County jail which is located in Harris County Texas. There has been an inquiry and a comment as to what Federal funds under the Department of Justice could be help-

ful to local jurisdictions with jail overcrowding problems impacting mental health issues and the health and security of the incarcerated persons.

And if I could have that in writing I would appreciate it. But I would like to pursue to be clear on the record there are a lot of overlapping jurisdictions. I happen to be on homeland security and there are overlapping jurisdictions between the Department of Justice and homeland security. So let me just focus on what the Administration is for and what it is against, what positions it has taken.

Has the administration Department of Justice taken any position to be against strong border security both at the northern and southern border of the United States?

Mr. HOLDER. No. Not at all. We understand that the primary responsibility for protecting our borders is a national responsibility. It is one that this Administration takes very seriously. It is one component that we think has to be taken seriously as part of the comprehensive view of immigration reform.

Ms. JACKSON LEE. And if this Congress was to undertake what we call a comprehensive immigration reform on the issue of benefits falls under the Judiciary Committee, does the Administration hold that that reform is mutually exclusive to being strong in its position on securing the border, both northern and southern border?

Mr. HOLDER. I think if one looks at the totality of this problem, there are a lot of moving pieces but there is not necessarily tension between them. How we deal with people who are here and undocumented; the whole question of what benefits people have, should have, and should not have; the maintenance of strong borders along our southern frontier and our northern frontier are all things that have to be a part of this solution. And the resolution of that big problem does not necessarily mean that there is a tension between the component parts.

Ms. JACKSON LEE. So fixing, for example, the opportunity for a child not born but raised in the United States to attend college, for example, which is a problem plaguing a lot of nonstatus immigrants, is not mutually exclusive if that was to occur if Congress was to move from the Administration's position on securing the borders.

Mr. HOLDER. Well, yeah. We can certainly secure the borders. And then the whole question of how we deal with people who are here illegally and putting them on a pathway to citizenship, which is what we talked about and which has been talked about in previous Congresses. I think these are all the kinds of things that we need to discuss.

Ms. JACKSON LEE. Following up on the Arizona law, it is my understanding—and I think you have made it clear, but I think it is important—is there is nothing in your testimony that would suggest that you would not read this bill, but presently you have tasked your staff to do a thorough review of this legislation at this point, is that my understanding?

Mr. HOLDER. I am old enough now that I don't read things too far in advance and then forget them before I need to know them. Believe me, the statute will be read. I will understand it. I will re-

view all the reports that the review team puts before me. I will meet with that review team. And, on the basis of all of that, make an informed decision.

Ms. JACKSON LEE. We would not want the record to reflect that America's lawyer did not read either legislation we wrote or legislation that was relevant that was written by any State.

But pursuing that question, I first focused on Federal preemption, and I think my colleagues have probed that sufficiently, but if you want to make that clear that you understand what that means in terms of the assessment of a State law.

But I want to raise in terms of the Arizona law this question of potential racial profiling, and I say it in this sense. You don't have jurisdiction over the census, but there are reports suggesting that States like—and they are still members of the larger body of States, albeit they are unique States—California, New York, Arizona, and Texas, among others, have been impacted negatively by a lot of, should I say, reflections on immigration in terms of account.That truly impacts an authority embedded in the Constitution and certainly designated to the Department of Commerce to count everybody, and it does not put qualifications on who gets counted.

On the question of racial profiling, if your team is reviewing this and if you read this law and there is grounds for seeing that this broadly, without basis, racially profiles, I think one of our Members indicated that you might be stopped for a traffic, that is a legal contact, and you might have someone knock on your door trying to solicit funds for the local police department, I don't know if that is a legal contact or not. But if you find that there is a racial profile which is under jurisdiction of the Justice Department, for example, if you find that there is racial profiling going forward on Pakistani Americans—obviously, the Pakistani Americans or Pakistanis have been in the news. I tell you that the community is frightened. What is the position of the Department of Justice on unfair racial profiling within your jurisdiction?

Mr. HOLDER. I think that, first and foremost, people have to understand that racial profiling is not good law enforcement; and we should understand that those who want to do this Nation harm are trying to take advantage of the possibility of racial profiling.

What you see is their desire to come up with people who they call have clean skins, people who do not fit profiles, people who do not come from certain countries, people who come from the United States, people who do not look like what you would expect a terrorist to look like. Those are the people who they are trying to recruit. And if we restrict ourselves to profiling we will be handing a tool to those who seek to do this Nation harm. And so that is certainly in that context.

But racial profiling just more generally is never good law enforcement. It has all kinds of collateral negative impacts that drive wedges between law enforcement and certain communities. There is no good basis. I have never seen a good basis for racial profiling.

Ms. JACKSON LEE. And as your staff reviews in particular the Arizona law, I would imagine, without predicting all that they review, that is certainly an element as you review the Arizona law as re-

lates to the stopping and arresting individuals with surnames and other aspects of that law.

Mr. HOLDER. I think we will look at the law as it is written, look at the law as it is applied, potentially applied, in trying to make our decision about whether or not we should take any action with regard to it.

Ms. JACKSON LEE. Let me also—thank you—just to follow up and just put into the record, some language that I paraphrased dealing with the Clayton Act, Section 7.

The Act seeks to capture anticompetitive practices in their incipiency by prohibiting particular kinds of conduct not deemed in the best interest of a competitive market. If there is ever a question of a competitive market, I think, or one that we are attempting to have competitive, it is the aviation industry. As I read the law, and I would like you to correct me if I am incorrect, it seems as if submissions dealing with aviation mergers is presented to the DOJ, but there is notice given to the FTC. And if you would either correct that or suggest that it is. And if you would give the procedure, if that is the case, as to whether or not the FTC is in fact just notified and the DOJ takes the lead. Or my question would be whether the DOJ would take the lead.

The second question would be, and I just want this to be further confirmed, have you set or has the Justice Department set a December, 2010, deadline for your review of this present merger in particular that I have mentioned, and that is Continental Airlines and United?

And if you speak just from the law, the Clayton Act, Section 7, or any aspects of antitrust law is, obviously, appropriate, is the question of pricing and price increase, are those variables that will be under the eye and scrutiny of the Department of Justice?

And, lastly, I would ask—and this is a pointed question. I want to pay tribute to Chairman Conyers, who developed an Antitrust Task Force under his initial leadership of this Committee, showing how important it is that a vigorous review taking into consideration President Theodore Roosevelt's initial I guess thought on this process of conglomerates recognizing that we are a capitalist society. I understand one of his quotes is that we have to save capitalism from the capitalists.

But Chairman Conyers thought the antitrust review was extremely important, and so we had a task force that we ultimately merged into one of our Subcommittees, and the question that I now pose is, which I think someone has asked on another approach, whether there is any politics that would play in any decision that you would make on really any matter, but in this instance, for example, that one of the parties involved happens to be housed in Illinois? All of these comments that are going around, and again I said to you that one of the CEOs said this was a done deal, this will be done by, we see no problem in its completion—I yield to the General.

Mr. HOLDER. Well, the Justice Department has primary responsibility for the assessment of the Continental/United merger and whether or not that has an anticompetitive impact. There is no deadline with regard to how long it will take us to do that. We will do the job as best we can and use the amount of time that we need,

and I can assure you that political considerations will not be a part of that process.

As I said, we have an Antitrust Division that I think has been revitalized by the woman who heads it now, the Assistant Attorney General, Christine Varney. She has been I think appropriately aggressive in looking at mergers and will do so with regard to this one. I am confident that we will give this a good, thorough, vigorous look and make a decision on the basis of that examination.

Ms. JACKSON LEE. Let me close very quickly. I know that you have been very gracious. Just give me these last two points that I wish to clarify, and that is a question of national security.

I started out by saying that you have traversed a lot of land fields, a lot of mines, and I believe deliberation is key to being an American and as well the lawyer for America. There is a lot of talk about the initial decision for Khalid Sheikh Mohammed, politics and whether or not we said something first. I complimented the DOJ for its deliberation and its studiousness. I would like you to clarify that.

And I will say this. The comments made by a President, a Commander-in-Chief, who is also a politician and a citizen, are among many comments that have been made. The President has a right to make comments, because he has the First Amendment right of freedom of speech.

My understanding is that lawyers go into courtrooms many times around America, in this instance, U.S. Attorneys, against all kinds of comments being made in the general forum. But that does not take the place of a vigorous prosecutorial presentation, as I understand it.

So if you would comment and clarify again with the Times Square bomber whose family members came and encouraged that individual to participate fully, and I think you said—there is so many bombers, but let me just finish the sentence, and I will clarify—but came and asked them to fully participate and to give answers, and that individual was initially questioned under civilian justice Miranda rights. And, of course, that was the Christmas Day bomber. Yet the Times Square bomber likewise provided additional enhanced information. Give us your sense that that does not undermine the justice system in this country and the ability to defend the American people against terrorism and does not show weakness as it relates to national security.

Mr. HOLDER. I think all that I can point to is the facts and history, which has shown that the giving of Miranda warnings has not had a negative impact on our ability to get information from people charged with terrorist offenses.

One can look at Abdulmutallab in Detroit; Shahzad here, the Times Square bomber; Headley, the person in Chicago; all of whom were given their Miranda rights and nevertheless decided to continue talking, sharing information, and sharing intelligence with us. There is a misconception that people have that the giving of Miranda warnings necessarily means that somebody is going to stop talking. That is inconsistent with the facts.

The facts in the cases that I have just mentioned, and certainly what I think you see through the criminal justice system is that the determination that people make as to whether or not they are

going to continue to talk or talk at all to law enforcement is not determined solely by Miranda warnings. There is a lot more that goes into it: the rapport that interrogators are able to make with people they are questioning and the strength of the evidence of the case that we can bring.

I actually think that we also have to consider the reality that once a person is given Miranda warnings and if that person decides he wants to take advantage of them and get a lawyer involved in the processes, that frequently a defense attorney looking at the facts that are arrayed against his client frequently becomes an advocate on behalf to try to convince that person to cooperate with the government in the hope that a sentence would be lessened. So that even where Miranda warnings have that initial impact of stopping an information flow, it does not necessarily mean that that flow of information is forever stopped.

But I think one thing that I would really want to clear up is this whole notion that the giving of Miranda warnings necessarily means that people stop talking. That is inconsistent with the facts.

Ms. JACKSON LEE. My final question to you is something both of us have spoken about, and I think it is very close to your personal beliefs. Chairman Scott has worked very closely on this whole broad issue of juvenile crime, juvenile justice, and we have managed with his leadership I believe to pass out of this Committee something called the Promise Act. But I want to point—and that is looking at best practices to deal with the question of juvenile justice.

You have a section that deals specifically with the issues dealing with juveniles. If we look at our history over the last two decades, we really have done poorly. We had two 16-year-olds, among others, shot and killed at a 3-year-old's birthday party in New York. Tens upon tens of juveniles have been murdered in Chicago. The lacrosse murder at my alma mater, University of Virginia, and down in Houston, a fine college student at a party shot dead without any hopes of survival.

What is the focus of the Department as relates to juvenile violence and also the access of juveniles to guns, and how can we work together as a Committee and a Department of Justice and the Administration on this ongoing sickness and violence?

Mr. HOLDER. Well, I don't know if you remember that in Chicago, I would say late last year, there was an incident where a young man who was taped being killed by a gang, other young people, when a board hit him over the head. Arne Duncan and I, the Secretary of Education and I, went out to Chicago to assess what had happened there and to get a better understanding of what was going on in Chicago with regard to youth violence. That has led to an effort that—I keep saying this—that very soon the Administration is about to announce with regard to how we are going to deal with this issue of proposals that we have with regard to this issue of youth violence in a select number of cities where we are trying a variety of different things and see what actually works.

When we deal with the problem of youth violence, I think too often we think of it in a microcosm; and we don't understand that what we are talking about, in essence, is the future of this Nation. And kids who can't go to school and feel safe don't learn as well.

Violence has negative impacts on the lives of children who are exposed to it as the children get older. So we want to try to deal with this problem.

As we like to say, to be not tough on crime but to be smart when it comes to crime, and to come up with solutions that will prevent youth violence to the extent that we can, but then deal with the impact of people who are either victims of youth violence, or who witness violence. Because that also is something that has an impact on young people and impacts them as they mature.

Ms. JACKSON LEE. And guns and juveniles.

Mr. HOLDER. Obviously, a very large problem. The prevalence of guns in certain communities, the possession of guns by juveniles and the way in which they use them is a primary concern. A disproportionate number of these unfortunate homicides happen because too many young people have too easy access to guns. We have to deal with that.

Ms. JACKSON LEE. Let me thank you very much for your openness and your integrity and honesty during these hearings.

Let me as well thank Chairman Conyers for convening this hearing and for the leadership that he has given on any number of these issues that we have addressed throughout this hearing.

This will conclude our questioning. I will add that there will be potentially, potentially a number of hearings on some of the questions that Members have asked, some having to do with the antitrust question and mergers. I would hope that the Justice Department would receive the transcripts of those hearings as they might be very helpful in the deliberation for those particular issues. I acknowledge that the General is nodding "yes" on those comments.

And I would like to thank you, Attorney General Holder, again for being with us today.

Without objection, Members will have a minimum of 5 legislative days to submit any additional written questions for you which we will forward and ask that your answer be forwarded to us as promptly as you can and that they be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of other additional materials, including those from the Department of Justice. And I noted for the record that you indicated that you would respond to a number of Members, including the Chair's questions, by writing; and we appreciate that.

I believe the hearing has been a useful contribution to our efforts to help ensure that the Nation's premier law enforcement agency is dedicated to being a shining example not only in how effectively it pursues its cases but equally in how it respects the questions that we hold particularly near and dear, and that is the fundamental question of freedom that is a hallmark of American democracy. Today, I believe we made one more step toward promoting democracy in this Nation and protecting the Constitution as it should be.

General Holder, thank you for your presence here today; and, with that, the hearing is adjourned.

Mr. HOLDER. Thank you.

[Whereupon, at 3:45 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS POSED TO THE HONORABLE ERIC HOLDER, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 4, 2011

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Conyers:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on May 13, 2010, at an oversight hearing. We hope that this information is of assistance to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Lamar Smith
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
U.S. House Committee on the Judiciary
May 13, 2010

QUESTIONS POSED BY CHAIRMAN CONYERS, JR.

1. **In March, 2009, the Inspector General issued a report of an audit concerning the Convicted Offender Backlog Reduction Program covering the years FY 2005 to FY 2007. The IG found that while the program had resulted in increased analysis of DNA samples, several financial awards went to state laboratories for which no activity pursuant to the Backlog Reduction Program had occurred and additional funding was granted to laboratories that had not used all of the previous' year's award.**

   a. **What steps is the Department taking to ensure that Backlog Reduction Program financing is properly used?**

Response:

This issue was resolved to the satisfaction of the Office of Inspector General (OIG) on July 31, 2009. The funds provided by this program have been properly used by states to reduce backlogs of convicted offender samples; the issue raised by the OIG was related to the timely use of the funds.

The National Institute for Justice (NIJ) has worked closely with the award recipients to help ensure funds are obligated in a timely manner. In late 2007, the Department of Justice's Office of Justice Programs (OJP) began utilizing a new software tool that provides program managers a single report detailing the programmatic and financial activity of each award. Using this new software tool, program managers provide feedback to grantees on the management of their funds. NIJ also provides annual mandatory training for each award recipient on how to best manage their award. Additionally, beginning in FY 2008, NIJ has included a statement in the Convicted Offender and Arrestee DNA Backlog Reduction Program solicitation that indicates applications may be rejected from applicants with prior awards under this program that remain entirely unobligated as of the posting date of the solicitation.

Please see the attached report, entitled *Department of Justice's Grantmaking Components Response to Improving Grant Management and Oversight: Addressing Key Issues Identified by the Office of the Inspector General* for an expanded discussion of the OIG recommendations and the corrective actions undertaken by OJP, and NIJ specifically.

b. During the hearing, Mr. Schiff discussed a pilot program in Los Angeles that would allow for private companies to analyze DNA samples among those in the backlog, and provide for them to be uploaded into CODIS after a technical review by a public lab. Does the Department have plans to implement a pilot program like the one Mr. Schiff described, either in Los Angeles or elsewhere, to improve the DNA backlog reduction efforts?

Response:

Existing standards allow DNA records generated by private laboratories to be entered into the Combined DNA Index System (CODIS) following technical review by a public forensic laboratory. The Federal Bureau of Investigation (FBI) Laboratory is currently re-evaluating the policies, standards, and protocols that guide the operation of the National DNA Index System (NDIS) in an effort to increase efficiency and improve the process for entering DNA records into the system. The FBI has reached out to the stakeholder groups most likely to be affected by any change in NDIS processes and practices to gather information and obtain a better understanding of their concerns and needs. The Bureau will maintain contact with these groups and continue to seek their input on the acceptability and feasibility of any proposed changes to NDIS operation. The FBI Laboratory also plans to collect information and suggestions from jurisdictions that have been successful in reducing their DNA backlogs. Once the relevant information has been obtained, the FBI will evaluate it and determine if a pilot project is appropriate.

2. According to the IG's 2009 management assessment, DOJ's lack of a uniform financial management system, which has been the case for many years, presents a continuing challenge to meeting the demand for improved financial transparency and accountability.

a. When will DOJ's Unified Financial Management System (UFMS) be implemented fully throughout the Department?

Response:

Implementation of the Unified Financial Management System (UFMS) is underway. The Drug Enforcement Administration (DEA) was the first Department of Justice (DOJ) component to fully implement UFMS as the system of record. It did so in January 2009. The Bureau of Alcohol, Tobacco, and Firearms (ATF) adopted the system on November 5, 2010; implementation of UFMS for the U.S. Marshals Service began in March 2010 and is targeted for completion in the second quarter of FY 2012. Funding for FBI's UFMS implementation has been identified. Assuming that funding continues to be available, full implementation of UFMS throughout the Department in the remaining DOJ components is scheduled to occur by FY 2013.

b. What, if any, additional resources are required to complete the UFMS implementation?

Response:

The FY 2011 President's budget includes $42 million for the continuation of UFMS implementation. For FY 2012 and FY 2013, the Department anticipates spending $125 million to complete the UFMS implementation.

3. A September 2009 OIG report raised concerns about the fairness and openness of grants made by the National Institute of Justice (NIJ) during fiscal years 2005 through 2007, including the possibility of conflicts of interest involving NIJ employees reviewing certain grant applications. The Inspector General has identified grant management as a high-priority challenge for the Department each year since 2000 and in early 2009, issued a list of 43 specific recommendations for improving the grant management process across the Department.

a. What steps is the Department taking to implement the Inspector General's recommendations for improving grant management?

Response:

Please see the attached report, entitled *Department of Justice's Grantmaking Components Response to Improving Grant Management and Oversight: Addressing Key Issues Identified by the Office of the Inspector General,* which lists the 43 specific OIG recommendations, referenced in the November 13, 2009, OIG Report on Top Management and Performance Challenges of the Department of Justice (DOJ), and how each of DOJ's grant-making components is responding or has responded to the recommendations.

b. What changes have been made in the NIJ grant management system to avoid the possibility of conflicts of interest for grant reviewers in the future?

Response:

NIJ has taken many steps to address this issue. In November 2009, NIJ staff attended mandatory ethics training conducted by OJP's Office of the General Counsel (OGC). The training was tailored specifically to address NIJ issues identified in the OIG report. Similar training will be required for all NIJ staff annually. NIJ also recently implemented the following changes to avoid possible conflicts of interest:

- Published and distributed the *National Institute of Justice Guidelines on the Administration and Management of NIJ Grant Programs* (the "Guidelines") to NIJ staff, which documented new and additional policies and procedures for the administration and management of all NIJ grant programs. Sections II and III and Appendices 1 and 2 in the Guidelines, which are attached, specifically address the

issue of conflicts of interest. The Guidelines, which were effective as of February 2010, will be updated annually.

- Conducted several mandatory training sessions for all NIJ staff to convey the new guidance and discuss the impact that the Guidelines would have, beginning with the FY 2010 grant award season.

- In collaboration with OGC, developed guidance for submitting and evaluating NIJ's internal conflict of interest forms and a Conflict of Interest Memorandum to be completed by all staff members involved in the pre-award evaluation process.

In addition, NIJ has worked with OGC and OJP's Office of Audit Assessment and Management on the guidance for the peer review process involving conflicts of interest. As each peer reviewer is confirmed by the OJP peer review contractor, each peer reviewer will be sent, via email, a conflict of interest form. The signed form must be returned to the peer review contractor within five business days of receipt. If a reviewer fails to return the form, the NIJ program manager will be notified and the reviewer will be removed from the panel. The peer review conflict of interest form will be maintained in the OJP Grants Management System (GMS). If a reviewer reports a potential conflict of interest, the contractor communicates this to the NIJ program manager, the assigned NIJ Office of Operations primary point of contact, and the Contracting Officer's Technical Representative (COTR). The program manager resolves the issue by making a determination (e.g., assigning the reviewer to another application or removing the individual from the review), as appropriate, to retain the integrity of the peer review process.

QUESTIONS POSED BY REPRESENTATIVE NADLER

4. **In September 2009, you issued an internal policy governing invocation of the state secrets privilege. This was an important first step, but it is not enough. The courts still need guidance and the policy is voluntary and for this Administration only. That is why my bill, and legislative reform, remain critical.**

   Can you commit to a concrete timeline within which we might identify any areas of concern for the Administration and obtain an answer on whether the Administration will support my bill (H.R. 984)?

Response:

As you know, President Obama is committed to governing in an open and transparent manner. With the goal of limiting the exercise of the state secrets privilege to as small a number of cases as possible, the Attorney General issued a new policy for reviewing state secret assertions within the Department. The new policy "sets out clear procedures that will provide greater accountability and ensure the state secrets privilege is invoked only when necessary and in the narrowest way possible." As this policy recognizes, there will likely still be some instances in which it will be necessary to assert the privilege because allowing the case to proceed could cause significant harm to the national defense or foreign relations. The Department remains willing to discuss H.R. 984 to ensure that it strikes the appropriate balance between safeguarding our national security and operating as transparently as possible.

5. **When you issued the internal policy governing invocation of the state secrets privilege, there was an announcement that a full report detailing task force findings and recommendations regarding the state secrets privilege would be forthcoming. Please confirm whether and when that report will be finalized and provided to Congress.**

Response:

This matter remains under review, but as you know, on September 29, 2009, the Attorney General issued a policy pertaining to the privilege. The policy states that "[t]he Department will provide periodic reports to appropriate oversight committees of Congress with respect to all cases in which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege." Pursuant to that policy, the Department intends to provide such a report to the Congress soon after the first year of operation under the policy. Moreover, it is worth noting that the courts have favorably cited policy as informing the court's review of the state secrets privilege. *See Mohamed v. Jeppesen Dataplan, Inc.*, 2010 WL 3489913, at *20 (9th Cir. 2010) (recognizing that the government's certification that the state secrets privilege was properly invoked under the Attorney General's policy and was "consistent

with [the court's] independent conclusion" that the privilege was invoked to protect legitimate national security concerns).

6. The Department recently obtained an indictment of former National Security Agency (NSA) executive Thomas Drake for leaking information regarding the NSA's warrantless surveillance program. Three federal judges, most recently Judge Walker in the Al-Haramain case, have found that the warrantless surveillance program itself was unlawful.

a. Has the Department opened an investigation or appointed a special counsel to investigate the underlying surveillance, which has been found unlawful, as well?

Response:

The Department has not appointed a special counsel to investigate the NSA program referenced in your question. The *Al-Haramain* matter is one of several cases collectively being litigated in the Federal courts and styled *In Re National Security Agency Telecommunications Records Litigation*. The United States District Court for the Northern District of California has not issued a final judgment in *Al-Haramain*; when it does, the Department will follow its usual procedures for deciding whether to appeal any adverse ruling. These civil litigation matters are distinct from the criminal case brought against Thomas Drake. Relative to the case against Mr. Drake, it is important to note that the grand jury did not indict Mr. Drake for leaking information about the warrantless surveillance program. Rather, the indictment charges Mr. Drake for, among other things, retaining classified information. The indictment makes no mention of the warrantless surveillance program, the existence of which had been publicly acknowledged by the President of the United States in December 2005.

b. If not, how do you possibly reconcile the failure to investigate the warrantless surveillance itself with the aggressive investigation and prosecution of a whistleblower who provided information about it?

Response:

Please see response to Question 6.a.

c. Will you appoint a special counsel, or expand the scope and authority of an existing counsel, to investigate the NSA's terrorist surveillance program?

Response:

Please see response to Question 6.a.

7. **By letter dated August 6, 2009, asked the Department to investigate and answer some questions in the cases of two individuals – Maher Arar and Binyam Mohamed. Please provide a response to that letter or indicate a reasonable time within which I will receive a response.**

Response:

We apologize for the delay in our response, but your letter raised a number of issues that required careful consideration. We intend to respond to your letter as soon as possible.

8. **In my August 6, 2009 letter, I asked for an explanation of our national security objection to publication by a court in the United Kingdom of seven paragraphs that allegedly described Binyam Mohamed's treatment while in US custody. The UK court has since published those paragraphs, over our continued objection.**

   Those paragraphs reveal that Mr. Mohamed was interviewed "as part of a new strategy designed by an expert interviewer" sometime prior to May 2002. That his treatment in the course of these interviews included "continuous sleep deprivation," threats that he would be removed from US custody and disappeared, and shackling. The UK court concluded that this treatment was "at the very least cruel, inhuman and degrading treatment by the United States authorities."

   a. **Having seen the 7 paragraphs, it is unclear how they pose any national security threat. Instead, it seems that the US objected because the information is embarrassing and reveals unlawful conduct. This Administration promised it would not use claims of secrecy to cover-up conduct that is embarrassing or unlawful. Yet even after the UK court published these, a spokesman (Ben LaBolt) for President Obama reiterated the threat that the US would re-think intelligence sharing with the UK. What is the possible justification for such threats?**

Response:

The United States does not seek to classify information for the purpose of concealing information because it is embarrassing or reveals unlawful conduct. Rather, in general, and in this case, the United States sought to prevent public disclosure of information because the Intelligence Community assessed that the release of this information would harm national security.

   b. **In Mr. Mohamed's case in the United Kingdom, the court recently denied the British Government's argument that information related**

to his treatment must be kept secret and declared that the British public has a right to know about its government's alleged complicity in mistreatment of Mr. Mohamed while he was in US custody. Isn't the US public equally entitled to know what its government has done and how would you propose that we achieve this?

Response:

The Department of Defense has acknowledged that it detained Mr. Mohamed in Afghanistan and at Guantanamo Bay and later released him to authorities in the United Kingdom. In addition to Mr. Mohamed's case in the United Kingdom, Mr. Mohamed and four other foreign nationals brought a private civil action for money damages against a private company in the U.S. District Court for the Northern District of California, in which they made certain allegations of wrongdoing by U.S. government officials. In that case, the United States Court of Appeals for the Ninth Circuit sitting *en banc* ruled — after noting that the truth of the plaintiff's allegations had not been decided — any further litigation in the case would present an unacceptable risk of disclosing state secrets. *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693, Slip op. (9th Cir. Sep. 8, 2010). In reaching that conclusion, the court specifically noted that it had conducted an independent review of the claim of state secrets privilege and had concluded that "the government is not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies," but instead "to protect legitimate national security concerns." Slip Op. at 13,537-13,538, 13,545-13,546, 13,553. While recognizing that the court was not able to explain its ruling fully without disclosing state secrets, the court noted that "[t]he government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of" the information sought to be protected "would seriously harm legitimate national security concerns." Slip op. at 13,545-13,546.

c. **The interviews of Binyam Mohamed described in the recently released paragraphs apparently took place prior to May 2002 and the techniques used on Mr. Mohamed, as set forth by D.C. Circuit Court Judge Gladys Kessler, C. went well beyond anything outlined and approved as lawful in the OLC memos that we've seen. According to Judge Kessler, Binyam Mohamed "was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell."**

One rationale given for failing to investigate credible allegations of torture is that DOJ lawyers approved techniques as lawful.

(1) Was legal advice sought and provided regarding the specific interrogation techniques used in Binyam Mohamed's interviews? Who asked for and who provided that advice? To the extent written advice was provided, please also provide a copy of that advice.

Response:

As noted in response to Question 8.b., *supra*, the United States has declined publicly to confirm, deny, or otherwise respond to these allegations because doing so would be harmful to national security.

(2) If legal advice was not provided, what possible justification exists for failing to investigate Mr. Mohamed's allegations of torture while being by or at the behest of the United States?

Response:

See response to Question 8.c.1., above.

9. More generally, I and several of my colleagues repeatedly have called for appointment of a special counsel authorized to investigate allegations regarding the torture of detainees held in connection with counter-terrorism operations in the aftermath of the September 11, 2001 terrorist attacks on the United States.

a. Please confirm whether special counsel has been appointed and authorized to conduct such an investigation.

b. If a special counsel has not been authorized to conduct such an investigation, please detail the steps that the Department itself has take to conduct that investigation.

Response to a-b:

On August 24, 2009, the Attorney General announced that he had expanded the mandate of John Durham, an Assistant United States Attorney in the District of Connecticut, to conduct a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. Mr. Durham previously had been appointed by then Attorney General Michael Mukasey to conduct an investigation into the destruction of interrogation videotapes by the Central Intelligence Agency (CIA). In his announcement, Attorney General Holder explained that his decision to have Mr. Durham conduct the preliminary review was based, in part, on Mr. Durham having gained great familiarity with much of the relevant information as a result of his earlier appointment. The preliminary review is ongoing. The Attorney General

also made clear in his announcement that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel (OLC) regarding the interrogation of detainees.

10. In disagreeing with the Office of Professional Responsibility (OPR) conclusion that Office of Legal Counsel lawyers violated their ethical duties in rendering advice regarding harsh interrogation techniques, Associate Deputy Attorney General David Margolis relied heavily on the fact that OLC lawyers Jay Bybee and John Yoo gave advice with regard to a particular detainee – Abu Zubaydah – and specific techniques to be used only for that detainee.

Did OLC or other lawyers provide similar, specific advice and approval for all interrogation? Who asked for and who provided that advice? To the extent written advice was provided, please also provide a copy of that advice.

Response:

The OPR report describes in detail advice given by OLC lawyers about the CIA interrogation program. In addition, the Department has released in the past year a number of OLC opinions addressing the use of certain interrogation techniques, including, in some cases, with respect to particular detainees. They are available on the OLC website in the FOIA reading room.

11. Lawrence Wilkerson, Secretary of State Colin Powell's former Chief of Staff, has alleged that former high-ranking Administration officials knew that many individuals shipped to and held at Guantanamo Bay were innocent.

He also makes several additional allegations – that 50-60% of the individuals detained at Abu Ghraib also were likely innocent, and that – as he put it – the Administration "tortured and abused those it detained at the facilities at Guantanamo Bay and elsewhere and indefinitely detained the innocent for political reasons."

Have Mr. Wilkerson's claims been investigated? If so, please provide an explanation of the results of that investigation. If not, will you pledge to do so and inform us of the results?

Response:

Regarding treatment of individuals at Guantanamo Bay and Abu Ghraib, these facilities were under the control and supervision of the Department of Defense and personnel generally subject to the Uniform Code of Military Justice. The Department of Defense has engaged in a number of inquiries concerning these facilities (*see, e.g.*,

Taguba Report, http://www.dod.gov/pubs/foi/detainees/taguba/ (addressing claims at Abu Ghraib)), and the Department of Defense should be consulted on such inquiries.

With respect to your inquiry concerning the detainability of individuals, pursuant to Executive Order 13492, the Executive Branch conducted a comprehensive interagency review of all detainees held at Guantanamo Bay at the time that President Obama took office. The results of that review, and the process by which it was conducted, are described in the Final Report of the Guantanamo Review Task Force (available at http://www.justice.gov/ag/guantanamo-review-final-report.pdf).

12. In the past, many duly qualified voters have been purged from the voting rolls.

a. What steps are you taking to ensure that no duly qualified voter is purged from the voting rolls?

Response:

The Voting Section of the Department's Civil Rights Division enforces the provisions of federal law which govern the process of maintaining voter rolls for federal elections, found in the National Voter Registration Act (NVRA) and incorporated into the Help America Vote Act (HAVA). Vigorous enforcement of the NVRA is one of the Voting Section's priorities and the Section will aggressively pursue allegations of improper purging of voters in violation of federal law. The Voting Section has published on its website a comprehensive set of questions and answers providing guidance on compliance with the provisions of the NVRA, including an extensive discussion of the list maintenance provisions of Section 8. This information provides both election officials and the public a guide to the "dos and don'ts" of voter registration list maintenance in an effort to ensure that any purging of voters is conducted in a lawful manner.

b. Will you be reviewing the lists that federal agencies are preparing for matches to ensure that they cannot be used to disenfranchise duly qualified voters?

Response:

Although we are not certain to which lists this question refers, please be assured that the Department of Justice will review any allegations it receives that individuals who are duly qualified to vote are being prevented from voting in violation of federal voting rights laws. The Department does work with the Social Security Administration on issues that arise regarding the Help America Vote Verification (HAVV) list prepared by the Social Security Administration for matching under the Help America Vote Act, such as potential state mis-use of the HAVV matching process, but does not review the lists or

perform the actual matching. That is the responsibility of the Social Security Administration.

c. **In the current anti-immigrant climate, what steps will you be taking to ensure that racial profiling and harassment will not be used to disenfranchise voters?**

Response:

The Civil Rights Division will respond promptly to allegations that qualified voters are being disenfranchised on the basis of race, color, or language minority status. In particular, both the Criminal Section and the Voting Section of the Division have jurisdiction to pursue allegations of illegal voter harassment/intimidation on the basis of race and will be prepared to take appropriate action where deemed necessary to enforce federal law.

13. **In the prior administration, the Civil Rights Division was politicized and its resources severely depleted. In light of the approaching redistricting, I am concerns about the current state of the Voting Section.**

What steps are you taking to ensure that there will be adequate personnel and resources to protect the rights of voters during redistricting?

Response:

Ensuring that the Division has the personnel and resources to fulfill its mission of protecting federal civil rights is an important priority for the Department of Justice. Since January 2009, the Department has taken numerous actions to restore the health of the Division to its previously robust status. Importantly, the Department is in the process of filling 21 new staff positions in the Voting Section, including 14 new Section 5 analysts. All of the new hires, along with the rest of the Section, will undergo significant training to prepare to process the thousands of administrative preclearance submissions, as well as a number of judicial preclearance actions, that the Section anticipates will be forthcoming during this redistricting cycle. The Voting Section also continues to make substantial improvements to the Section 5 submission process to provide for a more efficient review procedure, including the recent publication of proposed revisions to its procedures for administering the Section 5 process. The Department expects to be fully ready to carry out our important responsibilities in this area when redistricting begins.

QUESTIONS POSED BY REPRESENTATIVE SCOTT

Faith Based Initiative

The Bush-Cheney Administration changed a decades-old policy to allow religious organizations to utilize the Title VII exemption to permit them to discriminate on the basis of religion in hiring for federally funded programs and positions. Religious organizations are entitled to the Title VII hiring exemption when they are using their own funds, but the government cannot and should not allow them to discriminate in hiring when using government funds. The current Director of the White House Office of Faith-Based and Neighborhood Partnerships has reported that the hiring issue has been assigned to the Department of Justice, which, he says, engages in a "case-by-case" analysis each time a religious organization receiving federal funding wishes to discriminate in hiring.

14. Are the civil rights policies in the Faith-Based Initiative currently under review by the Justice Department? Which components of the policy are the Department looking into?

Response:

As a general matter, the Department of Justice does not disclose or opine on pending legal questions that it may be considering. The Department is fully committed, however, to ensuring that the United States complies fully with all relevant constitutional and statutory requirements, including applicable antidiscrimination laws, when providing grants and contracts for criminal justice related services.

15. Is it legal for Faith Based organizations administering federally funded programs to have an articulated policy of not hiring Catholics and Jews or a policy of only hiring active Members of a particular church? If so, will the Administration change its policy to conform to the statement of then Presidential candidate Obama – "... I believe deeply in the separation of church and state, but I don't believe this partnership will endanger that idea – so long as we follow a few basic principles. First, if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them – or against the people you hire – on the basis of their religion. Second, federal dollars that go directly to churches, temples, and mosques can only be used on secular program."

Response:

As a general matter, it is unlawful for any employer to have a policy specifically discriminating against employees of a particular religion, such as Catholics or Jews. Under federal law, however, qualifying religious organizations generally may give

employment preferences to coreligionists. The question of whether and under what circumstances a particular religious organization may prefer coreligionists in employment with respect to positions and programs funded by the United States is complicated, and is often fact- and context-dependent. In any particular case, various constitutional provisions and statutes might bear on the question. The Department is committed to ensuring that the United States complies fully with all relevant constitutional and statutory requirements, including applicable antidiscrimination laws, when providing grants and contracts for criminal justice-related services.

In regard to the discretionary and formula grants that OJP administers, a DOJ regulation states in relevant part that "[o]rganizations that receive direct financial assistance from [DOJ] under any [DOJ] program may not engage in inherently religious activities such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance." 28 C.F.R. §§ 38.1(b)(1), 38.2(b)(1).

16. Has the Justice Department been engaged, to your knowledge, in a "case by case" adjudication of whether government funded religious organizations can discriminate in hiring? If so, who is making decisions? What standards are being applied in making these decisions?

Response:

In response to the June 29, 2007 OLC Opinion entitled *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, commonly referred to as the "World Vision opinion," DOJ's OJP developed a policy that allows for a case-by-case review of applicants seeking a similar exemption. Under the policy, a religious organization that applies for funding and requests an exemption under the Religious Freedom Restoration Act to enable it to prefer coreligionists in employment, notwithstanding a statutory prohibition on religious employment discrimination, is required to submit documentation to either OJP or the Department's Office on Violence Against Women (OVW) certifying to each of the following statements:

a) The Applicant will offer all federally-funded services to all qualified beneficiaries without regard for the religious or non-religious beliefs of those individuals, consistent with the requirements of 28 C.F.R. Part 38, Equal Treatment for Faith-Based Organizations;

b) Any activities of the Applicant that contain inherently religious content will be kept separate in time or location from any services supported by direct federal funding, and, if

provided under such conditions, will be offered only on a voluntary basis, consistent with the requirements of 28 C.F.R. Part 38; and,

c) The Applicant is a religious organization that sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of a particular religion is important to its religious exercise; and that having to abandon its religious hiring practice in order to receive the federal funding would substantially burden its religious exercise.

Office of Legal Counsel Memorandum On RFRA

On September 17, 2009, 57 religious, education, civil rights, labor, and health organizations wrote to Attorney General Eric Holder, asking him to review and withdraw a Bush-era, June 29, 2007 Office of Legal Counsel Memorandum ("OLC Memo"). The OLC Memo at issue determined that the Religious Freedom Restoration Act of 19932 ("RFRA") provides for a blanket override of binding, statutory nondiscrimination provisions for religious organizations that provide government funded social service programs, such as Head Start and the Workforce Investment Act. The OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal statutory nondiscrimination provision tied to a grant program. The Memo has been criticized by many legal scholars as fundamentally unsound. Many civil rights organizations – including those that supported the passage of RFRA – never foresaw that RFRA would be used as a weapon to overturn decades-old statutory civil rights protections.

17. Do you know whether the Office of Legal Counsel is reviewing the Memorandum at issue?

Response:

As a general matter, the Department of Justice does not disclose pending legal questions OLC has been asked to consider, nor otherwise disclose ongoing OLC matters or analysis—a practice that ensures that Executive branch officers will not be deterred from asking OLC difficult or sensitive questions, and that encourages the candid and comprehensive submission to OLC of agency and component views on such questions.

18. Do you have a position on whether the Memorandum should be sustained, reformed, or overturned?

Response:

The Department is committed to ensuring that it partners with faith-based and

other organizations in a manner that is consistent with all our laws. It would not be appropriate to express any views publicly at this time, however, concerning the legal question at issue in the 2007 OLC memorandum in particular. As a general matter, the Department does not express views regarding the correctness of existing OLC opinions except where OLC or the Attorney General modifies or withdraws such opinions, or otherwise refers to them in other formal opinions.

19. Will the Justice Department respond to the letter signed by the 57 organizations?

Response:

The Department regrets the delay in responding and will finalize a response as soon as it is in a position to do so.

Civil Rights Division

Under the Bush Administration, the Civil Rights Division, through the Employment Litigation Section, filed an amicus brief in Lown v. Salvation Army. In that brief the United States contended that, even though the Salvation Army receives direct government funding, it could not be a state actor and therefore could not violate the Establishment and Equal Protection Clauses in discriminating on the basis of religion in government-funded Salvation Army jobs. This marked the first time that the Civil Rights Division has ever filed a brief in federal court contending that government-funded religious discrimination is lawful and does not implicate Establishment Clause concerns.

20. Would your Civil Rights Division take a position like that which was taken in the Salvation Army amicus brief?

Response:

We take discrimination on the basis of religion very seriously. Title VII of the Civil Rights Act of 1964, as amended, allows religious hiring by religious organizations in very specific circumstances, but does not allow other kinds of discrimination. The Department will enforce Title VII and all of the laws within its jurisdiction.

The Department has not had occasion during the current Administration to address the issues raised in *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005). The Department cannot speculate regarding what arguments we would or would not make in future amicus briefs, since whether to file an amicus brief, and what arguments might be made, are case-specific determinations that depend on the particular facts presented.

21. What are the priorities of the Civil Rights Division?

Response:

Under the leadership of Assistant Attorney General Tom Perez, the Civil Rights Division is undergoing a period of restoration and transformation to restore its core capacities and to ensure it is prepared to tackle emerging challenges. In addition to establishing new, non-political hiring processes and using them to hire new attorneys to make up for attrition in the previous administration, the Division is expanding its enforcement efforts and renewing its commitment to enforce all of the laws under its jurisdiction.

The Division is particularly focused on increasing its efforts to combat fair lending violations, creating a new fair lending unit to focus on this work. Additionally, the Division has committed considerable energy to implementing the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, engaging in a process of nationwide education and training in addition to opening a number of investigations under the new statute. Since enactment of the Military and Overseas Voter Empowerment Act (MOVE Act) in 2009, the Division has dedicated considerable resources to ensuring its nationwide implementation. As the upcoming redistricting process nears, the Division is preparing for the influx of submissions that it will have to review under Section 5 of the Voting Rights Act. The Division also has focused considerable efforts on enforcement of the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), so that more individuals with disabilities can receive services in community-based settings when appropriate, rather than facing unnecessary institutionalization.

Crime

22. What is the statute of limitations for the federal offense of torture? What is the statute of limitations for conspiracy to commit torture? What is the statute of limitations for acting as an accessory after the fact with respect to torture? What is the statute of limitations for conspiracy to commit torture, if the torture takes place and kills the person or persons who were tortured? What is the statute of limitations for acting as an accessory after the fact, if the tortured person is killed by the torture?

Response:

The federal crime of torture and conspiracy to commit torture (18 U.S.C. § 2340A) is covered by the limitations period of 18 U.S.C. § 3286. In most cases, an act of torture would "result[] in, or create[], a foreseeable risk of death or serious bodily injury to another person" so there would likely be no limitations period pursuant to Section 3286(b).

Moreover, if the act of torture results in death, that offense is likely death penalty-eligible, and therefore there is no statute of limitations under 18 U.S.C. § 3281.

Accessory after the fact, in violation of Title 18 U.S.C. § 3, has a five year limitations period pursuant to 18 U.S.C. § 3282.

23. Please identify the amount of funding requested by the Justice Department for FY 2011 for investigating and prosecuting financial crimes generally and consumer financial crimes, such as identity theft, in particular.

Response:

The FY 2011 President's Budget includes a total of over $684 million – including $97 million in new program resources – for investigations and prosecutions related to economic fraud. Within this total, $331 million supports corporate fraud efforts and $178 million is attributable to mortgage fraud efforts. These dollars span multiple Department of Justice components, such as the FBI; the United States Attorney's Offices; and the Criminal, Civil, Antitrust and Tax Divisions.

While the Department does not track identity theft funding specifically, approximately $176 million dedicated to other economic crimes supports the investigation and prosecution of these types of consumer financial crimes.

24. Please identify the amount of funding requested by the Justice Department for FY 2011 for the analysis of DNA samples in rape kits.

Response:

The President's Fiscal Year 2011 budget request includes $150 million for "DNA-related and forensic programs and activities (including related research and development, training and education, and technical assistance)[.]" This program (referred to in the President's budget request as the "DNA Initiative") is a comprehensive strategy to maximize the use of forensic DNA technology in the criminal justice system that includes grants to address the backlog of unanalyzed DNA samples and biological evidence from crime scenes (which may include evidence from rape and sexual assault crime scenes).

Addressing rape kit backlogs continues to be a priority for the Department. Last month, the Department's Office on Violence Against Women (OVW) and OJP held a roundtable discussion on forensic DNA backlogs and their impact on victims of sexual assault. At the roundtable, victim advocates, prosecutors, law enforcement officials, crime laboratory analysts, and survivors of sexual assault discussed the current state of backlogs in the country, the obstacles to eliminating backlogs, how and when victims should be notified when a rape kit is sent to the crime laboratory, and promising approaches to reducing backlogs in this country. The information gleaned from this

multi-disciplinary discussion will help inform OJP and OVW's research agenda, as well as inform plans for further forensic DNA backlog reduction assistance.

25. When you testified before the Committee last year, you said you directed that a task force be established in the Department to examine sentencing laws and how to make them more equitable, including looking at mandatory minimums. Please tell us what the task force has concluded.

Response:

The efforts of the Department's Sentencing and Corrections Working Group constitute the most comprehensive review of sentencing and corrections in the Executive Branch since the passage of the Sentencing Reform Act. The Working Group is guiding the Department's policy and leading to Department initiatives intended to improve and achieve more effective and efficient federal sentencing and corrections.

In connection with its study of the structure of federal sentencing (which included a study of mandatory minimum penalties in the federal system), U.S. Attorney Sally Yates testified on behalf of the Department at a May 2010 hearing of the United States Sentencing Commission ("Sentencing Commission") on federal mandatory minimum penalties. She indicated that decreasing uniformity and increasing disparity in the imposition of federal sentences since the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), has diminished predictability in sentencing somewhat and has begun to erode the deterrent value of federal sentencing. Thus, under the current federal sentencing structure that, by evolution rather than design, now includes mandatory minimum penalties and an advisory system of sentencing guidelines, the Department supports the limited and judicious use of statutory mandatory minimum sentencing statutes for serious crimes. The Department recognizes that any undue severity in existing mandatory minimum statutes should be eliminated and that reforms might include modest new mandatory minimum penalties for certain offenses where undue leniency and disparate sentencing have been demonstrated. The Department recently urged the Sentencing Commission to make review and analysis of the federal sentencing structure – including a determination of whether reform of the current structure (including mandatory minimums) is warranted – a priority for its 2010-11 amendment year.

The work of the Department's Sentencing and Corrections Working Group extends far beyond the examination of the structure of federal sentencing, however. For example, as a result of the Group's examination of the Department's internal policies, on May 19, 2010, the Attorney General issued a memorandum addressing charging and sentencing policy. The memorandum, which reiterates the values of the longstanding Principles of Federal Prosecution, requires that prosecutors act in a consistent and fair manner, while simultaneously recognizing that prosecutors, in discharging their obligation to seek justice, must fully and carefully evaluate the facts and circumstances of each case and the criminal culpability of each offender. The memorandum updates

Department policy regarding sentencing, acknowledging the realities of post-*Booker* sentencing and giving prosecutors the flexibility needed to become more actively and effectively involved in sentencing.

The Working Group also reviewed federal cocaine sentencing policy, and we urged the House to pass the remedial legislation on cocaine sentencing policy approved unanimously by the Senate in April of this year. The Department is very pleased that the Congress recently passed legislation that reduces the disparity in cocaine sentencing from 100:1 to 18:1. In addition to these developments, we anticipate additional initiatives resulting from the Working Group to be announced in the coming months.

26. Over the past few years, the Crime Subcommittee has learned a lot about the serious threat to our retail industry posed by Organized Retail Theft. I am not talking about local, small-time shoplifting. I am talking about large, sophisticated, interstate crime rings that cost retailers tens of billions of dollars per year. We have reached out to the Department and the FBI to ask that you work with us in establishing a more robust federal role in targeting these rings, even if much of that role is in an intermediary capacity between law enforcement and retailers. And this could be subject to our giving you additional funding for this purpose.

Response:

The Department of Justice and the FBI have been and remain actively engaged with the retail industry in exploring means of improving private-public information sharing and other cooperation on organized retail theft, including through the Law Enforcement Retail Partnership Network (LERPNet). Also, the FBI is identifying and targeting multi-jurisdictional organized retail theft groups by using existing task force resources. As of the end of 2009, there were seven FBI-led Major Theft Task Forces, located in the Chicago, El Paso (2), Memphis, Miami (2) and New York Field Offices. These task forces, which combine the resources of local, state and federal law enforcement, as well as retail loss prevention professionals, are applying investigative techniques and strategies, including the development of a solid intelligence base and the use of undercover operations.

27. We understand that the DOJ recently held its human trafficking conference. Significant emphasis was placed on the trafficking of individuals across international boundaries. Several cases of American girls who were trafficked across state lines for coerced prostitution, whose traffickers solicited customers on the internet, via Craigslist and other web sites have recently been brought to my attention. What is DOJ doing to ensure that sites like this do not facilitate the trafficking of children?

Response:

The Department vigorously enforces federal laws prohibiting domestic child prostitution, largely through the FBI's *Innocence Lost Initiative*, a joint effort begun in 2003 by the FBI, the Criminal Division's Child Exploitation and Obscenity Section, and the National Center for Missing & Exploited Children. The *Innocence Lost Initiative* now operates through 38 task forces and working groups throughout the U.S. involving federal, state and local law enforcement agencies working in tandem with U.S. Attorney's Offices. Since the Initiative's inception, these task forces and working groups have recovered over 900 children and convicted in federal and state courts over 500 pimps, madams, and their associates who exploited children through prostitution.

The Department is aware that websites such as Craigslist have been used to facilitate the commercial sexual exploitation of children, and we have responded by incorporating such websites into our overall law enforcement strategy. For instance, as part of its continuing efforts to fight child prostitution through the *Innocence Lost Initiative*, the FBI is actively monitoring websites that are known to have advertisements for child prostitution.

As another example, the U.S. Attorney's Office for the Western District of Missouri and the local Human Trafficking Rescue Project, a joint task force comprised of the Independence Police Department, the FBI, Immigration and Customs Enforcement, and the Kansas City, Mo. Police Department, developed what came to be called "Operation Guardian Angel." During the undercover operation, task force officers placed Internet ads offering children for sex in exchange for money. According to court documents, the ads clearly stated that the children were "little girls" and were "young." Those who responded to the ads were given directions to an undercover location. When they arrived at the undercover residence and paid cash to have a sexual encounter with a child, they were arrested by task force officers.

28. I commend the Department for creating the Access to Justice Office and appointing Lawrence Tribe to head the office. What specific measures will the Access to Justice Office take to address the indigent defense crisis that states are facing?

Response:

A key priority of the Access to Justice Initiative (ATJ) is working to improve the provision of indigent legal defense. ATJ has met and continues to meet with a wide range of national indigent defense advocacy groups, public defenders, and other stakeholders from across the country to listen to their concerns and learn their suggestions for ways that we can help address the indigent defense crisis. ATJ is working closely with the Office of Justice Programs and the Bureau of Justice Assistance to identify and strategically deploy already-existing training and technical assistance resources to maximize their reach and effectiveness, as well as to identify and expand existing grant

programs to help ensure that indigent defense providers are eligible for a range of programs, where such eligibility is practicable and consistent with governing legislation. ATJ is working in close collaboration with NIJ to issue a new grant solicitation in Fiscal Year 2011 for access-to-justice related research on indigent defense issues. ATJ also is coordinating its efforts with those of the Office of Legislative Affairs in exploring areas where congressional action might be indicated to improve the provision of indigent defense nationwide in other ways.

In addition, ATJ is reaching out to both state chief justices and federal circuit courts as well as major law-firm pro bono departments to encourage the creation of institutional arrangements that recognize and reward high levels of pro bono performance not only in civil legal services, but also in indigent defense. For instance, in its work with state chief justices, ATJ encourages them to implement rule changes governing a range of indigent defense issues – particularly including the critical issues of waiver of counsel in juvenile proceedings. ATJ also is working with public defenders to help them identify ways in which pro bono assistance could be helpful, such as a model successfully implemented in the San Francisco Public Defender's Office, under which local law firms provide "loaner" attorneys to work in the public defender's office for six-month periods, or the program of the Miami-Dade Public Defender's Office, which has two full-time attorneys whose law firm employment has been deferred for a year. ATJ fully recognizes that the states are responsible for providing counsel for indigent defendants, but as we work with the states and counties to help improve the indigent defense services, we believe law firms can and do provide valuable support for public defender offices struggling with high caseloads and other challenges.

29. As you know the Federal Prison Industry program provides federal inmates with critical job experience to prepare them for reentry back in to their communities. In July 2009, BOP announced that it has begun closing FPI factories at 14 prisons and scaling back operations at four more. What can this Administration do to demonstrate support for FPI and the employment opportunities it provides to prisoners?

Response:

The Administration regards Federal Prisons Industries (FPI) as an important correctional program of the Bureau of Prisons (BOP), both because FPI reduces recidivism and because it assists in managing crowded federal prisons. The Department is aware that FPI has incurred reductions in earnings over the past few years and as a result has reduced the number of inmate participants. To guard against future losses, FPI began reorganizing operations in FY 2009 to further reduce overhead expenses, including: reducing inmate employment, delaying factory activations at new federal prison facilities, consolidating operations, and closing a few existing factories. Despite these efforts to create additional savings and efficiencies, it is possible that there may be another round of closures. FPI and BOP are working to explore options to help further support FPI's operations.

30. Extensive research has revealed that misguided policies purporting to be "tough on crime" in fact increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate the problem of gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse disorder into the justice system, and often make communities less safe. Meanwhile, research from top scholars in a variety of fields including criminal justice, economics, education, psychology, and public health reveals that public dollars spent on effective prevention and education programs are far more effective in stemming violence, curtailing crime and delinquency, and discouraging gang affiliation than broadening prosecutorial powers or stiffening criminal penalties for young people accused of crimes.
In light of this research,

a. What steps will the Department of Justice take to prioritize juvenile justice and youth violence prevention in this Administration?

Response:

This Administration and the Department of Justice are committed to juvenile justice and to preventing gang and youth violence. The subject of children and violence have been both a personal and a professional concern of mine, for decades, going back to my experience as a prosecutor, as a judge, and as the Deputy Attorney General. While statistics show a general decline in juvenile violent crime in the United States in recent years, too many communities continue to experience persistently high levels of gang and youth violence. Too many youth and their families cannot break free from the conditions that lead to such violence. This is especially true when it comes to minority youth.

With gang and youth violence, there are no quick and easy fixes. Through evidence-based research, we know much about what works in preventing juvenile crime. Successful initiatives generally involve multi-disciplinary partnerships, balanced approaches and the use of data-driven strategies. Prevention, intervention and reentry programs should complement the use of targeted enforcement strategies. While we must continue to strengthen our law enforcement capacities and capabilities, these efforts must work in combination with strong prevention, intervention, family and community engagement, and reentry initiatives.

In an ongoing effort to address juvenile justice and delinquency prevention issues, the Administration and Department of Justice continue to promote cross-agency collaboration and coordination through a number of interagency efforts, to include: the Coordinating Council on Juvenile Justice and Delinquency Prevention, working to prevent and respond to juvenile delinquency and youth victimization, specifically exploring issues of race, ethnicity and gender disparities, education and prevention approaches, and tribal and reentry concerns; the National Forum on Youth Violence Prevention where federal agencies and localities come together to share evidence-based, data-driven approaches to prevent youth and gang violence; and the Attorney General's

Defending Childhood initiative designed to address children exposed to violence and mitigate its negative effects.

The Department of Justice, and our federal agency partners, are working together to make sure federal resources--including funding, information-sharing, and training, and technical assistance--are available to help communities tackle these complex issues. This year, for example, the Department's OJP, through its Office of Juvenile Justice and Delinquency Prevention (OJJDP), made almost $9 million available for a Community-Based Violence Prevention Initiative to help communities develop comprehensive strategies for preventing youth violence. OJP's Bureau of Justice Assistance (BJA) has provided anti-gang training to about 4,000 law enforcement and non-law enforcement personnel since 2007. And, last year, through the American Recovery and Reinvestment Act and Fiscal Year (FY) 2009 funding, OJP awarded more than $2.7 billion to support state and local crime-fighting efforts.

This commitment continues in FY 2011. The President's FY 2011 budget request includes an additional $12 million for a Gang and Youth Violence Prevention Initiative that will target at-risk and gang-involved youth. There is also $25 million requested for a Community-Based Violence Prevention Initiative, which would fund comprehensive approaches that investigate the causes of youth violence and implement a community-based strategy to prevent youth violence by addressing both the symptoms and causes of neighborhood violence.

Additionally, this year, the Department will devote $5 million to address the alarming incidence of children's exposure to violence. Last fall, the Justice Department released findings from the *National Survey on Children Exposed to Violence*, the first comprehensive look at children as victims and witnesses of crime, abuse, and violence from infancy to age 17. The survey concluded that more than 60 percent of our children have been exposed to violence, crime, or abuse either directly as victims or indirectly as witnesses in the home, school and community. Of these children, nearly half had been physically assaulted; 13 percent were bullied; 6 percent suffered sexual abuse; and 10 percent had been maltreated in the past year. Through this national survey, we have also learned that 1 in 10 children witnessed an assault in their family with about 9 percent were exposed to family violence in the past year, this number increased significantly over the child's lifetime.

Research indicates that early exposure to violence significantly impacts a child's behavior, ability to learn and development of coping strategies. It is associated with increased delinquency and later adult criminality, academic failure, depression and other mental health issues, aggression, and substance abuse. Research also shows that early intervention is effective in countering the effects of violence. In addition to the $5 million available this year, the President's FY 2011 request includes $37 million for the Children Exposed to Violence (CEV) Initiative. These funds will help us provide critical resources, research, and services for communities nationwide.

We must also assist juvenile offenders as they transition back into the community so they do not continue to be part of the system. Through the Second Chance Act, the Department funds a variety of services such as mentoring, literacy classes, job training, education programs, substance abuse, and rehabilitation and mental health programs for both adult and juvenile offenders. In FY 2009, OJP awarded more than $25 million in grant funding to states, local governments, and non-profit organizations under the Second Chance Act Offender Reentry Initiative to support re-entry programs. In FY 2010, OJP was appropriated $100 million for awards to support re-entry programs. Of that $100 million, $10 million has been set aside for research to identify what works and what doesn't in offender reentry. The Administration seeks to continue this support. For FY 2011 the President has requested an additional $100 million for the Second Chance Act Offender Reentry Initiative.

b. Will the Department support legislation and policies that invest in effective prevention and education programs designed to stem violence, curtail crime and delinquency, and discouraging gang affiliation, including the Youth PROMISE Act, Reauthorization of the Juvenile Justice and Delinquency Prevention Act and Reauthorization of the Juvenile Accountability Block Grant?

Response:

As mentioned in the response to Question 30a, this Administration and the Department of Justice are committed to addressing juvenile justice, as well as gang and youth violence. The Department supports the goals of the Youth PROMISE Act, the reauthorization of the Juvenile Justice and Delinquency Prevention Act, and the reauthorization of the Juvenile Accountability Block Grant, and would be happy to work with the Committee on these important pieces of legislation.

31. An abundance of research reveals widespread, racially disparate treatment across the entire spectrum of America's juvenile and criminal justice systems. Poor and minority youth and adult criminal defendants receive disproportionately severe treatment at every stage of the system – from the initial law enforcement contact, through sentencing. The perpetuation of such racial disparity in the criminal justice system threatens to undermine the principle of equal justice under the law, and challenges the notion of our criminal justice system as fair, effective and just.

In his testimony before the United States Senate Judiciary Committee, Subcommittee on Crime and Drugs, in the hearing on "Restoring Fairness to Federal Sentencing," Assistant Attorney General Lanny Breuer testified that "Ensuring fairness in the criminal justice system is ... critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines

governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials."

What steps will the Department of Justice take to address racial disparity in the criminal justice system?

Response:

The Department of Justice shares the concern expressed in this request regarding unwarranted racial and/or ethnic disparities resulting from the implementation of the federal criminal justice system. The Department has been guided in its approach to federal criminal justice and corrections policy by the principle that those who commit similar offenses and have similar criminal histories should be treated similarly. Race and/or ethnicity should play no role in the treatment of an offender at any stage in the system from initial contact to arrest to charging to disposition (be it through declination of charges, plea bargaining, or sentencing). The Department already has taken steps to address racial disparity in the criminal justice system. To begin, the Sentencing and Corrections Working Group convened last year reviewed federal cocaine sentencing policy, and, as a result, the Department urged the House to pass the remedial legislation on cocaine sentencing policy approved unanimously by the Senate in April of this year. The Department is very pleased that the Congress recently passed legislation that reduces the disparity in cocaine sentencing from 100:1 to 18:1. The legislation will significantly reduce the disparity that currently exists between statutory penalties for cocaine base (that is, crack) and powder cocaine. While the legislation decreases the disparity to 18:1 – rather than to 1:1 as originally urged by the Department – the Department has supported the legislation as an appropriate significant step toward eliminating inequity in the criminal justice system.

Also, in the context of its study of the structure of federal sentencing, the Department's Sentencing and Corrections Working Group has considered evidence of increasing racial and/or ethnic disparity as a result of statutory mandatory minimum penalties and post-*Booker* advisory federal sentencing guidelines. The Department continues to consider and analyze this data as well as to investigate ways to reduce such impact. The Department also continues to consider ways to systematically monitor its own policies and guidelines in an effort to detect and eliminate any unintended unwarranted racial and/or ethnic disparity. Finally, the Sentencing and Corrections Working Group continues to study various issues related to implementation of the federal death penalty, including ways to eliminate unwarranted racial and/or ethnic disparity in its application. Reports and initiatives resulting from these studies are forthcoming.

32. On September 22, 2003, then-Attorney General John Ashcroft ordered federal prosecutors to seek the maximum penalties against defendants and to limit the use of plea bargains.[2] The tough new Department policy was

outlined in a memo distributed to all 93 U.S. attorneys, dramatically reducing prosecutors' discretion in federal criminal cases ranging from drug trafficking to money laundering to terrorism. Under former Attorney General Janet Reno, prosecutors were given greater discretion to assess individual cases and determine the most appropriate charge for each offense. Will you maintain the policy implemented by former Attorney General Ashcroft, or will you return to the flexibility and discretion provided for by Attorney General Reno?

Response:

On May 19, 2010, the Attorney General issued a memorandum to all federal prosecutors reaffirming the guidance in charging and sentencing practice provided in the Principles of Federal Prosecution and reflected in Title 9 of the U.S. Attorneys' Manual (USAM), Chapter 27. For decades, these Principles have guided federal prosecutors in deciding whether to initiate charges, what charges and enhancements to pursue, when to accept a negotiated plea, and how to advocate at sentencing. In accordance with these long-standing principles, the Attorney General's memorandum points out that a federal prosecutor should ordinarily charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." USAM 9-27.300. This determination, however, must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime" *Id.* My memorandum also reflects the changes in sentencing law and practice brought about by the Supreme Court's decision in *Booker v. United States* and other related decisions.

The memorandum is based on a belief that equal justice demands that persons who commit similar crimes and have similar culpability, to the extent possible, be treated similarly; and that equal justice depends on individualized justice. It superseded previous Department guidance on charging and sentencing, including the September 22, 2003 memorandum issued by Attorney General John Ashcroft.

QUESTIONS POSED BY REPRESENATIVE LOFGREN

33. **In August 2008, a man named Hiu Lui Ng died in the custody of U.S. Immigration and Customs Enforcement (ICE) under extremely troubling circumstances. Mr. Ng was a computer engineer who owned a home, was married to a U.S. citizen, had no criminal history and posed no danger to the community. At the time, Chairman Conyers and Chairwoman Lofgren sent a letter to the Secretary of Homeland Security calling for an investigation, and ICE subsequently terminated its agreement to house detainees at the facility in question, the Donald W. Wyatt Detention Facility in Central Falls, Rhode Island. According to public reports, the Department of Justice initiated a criminal investigation into violations of Mr. Ng's civil rights, some of which were reportedly recorded by the facility's security cameras. What is the status of that criminal investigation and when do you expect it to be completed?**

Response:

The United States Attorney's Office for the District of New Hampshire and the Criminal Section of the Civil Rights Division are undertaking a thorough review of the facts and circumstances surrounding this incident. The Department cannot comment further on the status of an ongoing investigation.

34. **What role do you expect the Department of Justice to play in addressing future violations of civil and constitutional rights that take place in immigration detention settings?**

Response:

The Department's Civil Rights Division is committed to upholding the civil and constitutional rights of all individuals, particularly the most vulnerable members of our society. The Division enforces federal statutes designed to protect the civil rights of all individuals and prohibit discrimination on the basis of race, color, sex, disability, religion, and national origin. The Division, along with its investigative partners, like the FBI and DHS, will continue to investigate and identify violations of civil and constitutional rights that occur in immigration detention settings. Investigations that reveal violations of statutes prohibiting abuses by official actors will be prosecuted to the fullest extent of the law.

35. **On February 12, 2009, the Judiciary Committee called for an investigation into reports of misconduct by the Maricopa County Sheriff's Office (MSCO), including racial profiling and unlawful detention. The Department of Justice initiated an investigation one month later into alleged civil rights violations committed by the MCSO, and the investigation remains pending to date.**

What is the status of the investigation into MCSO and when do you expect that investigation to be completed?

Response:

The investigation is ongoing, and the Department is undertaking a thorough review of the relevant facts and circumstances. The Department cannot comment further on the status of an ongoing investigation.

QUESTIONS POSED BY REPRESENTATIVE COHEN

Youth Violence

As you know, the Department of Justice has recently partnered with the Department of Education and the City of Memphis to develop strategies for reducing youth violence in Memphis. I want to personally thank you for this initiative and I'm very excited by the work you're doing.

One thing that concerns me in our approach to communicating with young people is how negative the tone often takes. Too often we just try to scare them into shaping up rather than offering a positive message of hope and the value of education. To combat this negativity, I introduced legislation called the Positive Reduction of Incarceration by Maximizing Education (PRIME) Act of 2010, which would establish national, regional, and local public awareness campaigns focused on promoting the advantages of continued education among youth.

36. Do you think that we would benefit from a public service campaign of positive messages directed toward youth?

Response:

Public service campaigns can be effective tools, and the Department of Justice has used public service campaigns as a means to reach a diverse audience, as well as a tool to spark community involvement. Recently, as part of the Department's Children Exposed to Violence Initiative, the Office of Justice Programs' Office for Victims of Crime released a solicitation looking to raise public awareness and target outreach for victims in underserved communities. The overall goal of this program is to raise the awareness within traditionally underserved populations about the needs of children exposed to violence, as well as to improve their knowledge about accessing services available to child victims.

Medical Marijuana

As we discussed, marijuana is considered a Schedule I drug under the Controlled Substances Act. The Merck Manual describes Schedule I drugs as "substances [that] have a high potential for abuse, no accredited medical use, and a lack of accepted safety. They can be used only under government-approved research conditions."

While I agree that the federal government should work to reduce the violence caused by drug cartels, my question was focused on whether marijuana meets the criteria for Schedule I drugs, particularly in light of the evidence that it has medicinal value and low potential for abuse.

Marijuana is currently being prescribed in 14 states plus the District of Columbia to relieve nausea, increase appetite, reduce muscle spasms, relieve chronic pain, and relieve anxiety in association with such conditions as Cancer, Glaucoma, HIV/AIDS, Crohn's Disease, Hepatitis C, and Multiple Sclerosis.

37. Why should marijuana continue to be considered a Schedule I drug when there is ample evidence that it has medical use?

Response:

The Controlled Substances Act (CSA), enacted by Congress in 1970, generally revised the federal regulation of narcotics and other dangerous drugs, and designated marijuana as a schedule I controlled substance. *See* 21 U.S.C. § 812(c), schedule I(c)(10). By statutory criteria, schedule I controlled substances have a high potential for abuse and have no currently accepted medical use in treatment in the United States. *See* 21 U.S.C. § 812(b)(1). In addition, there is a lack of accepted safety for use of these drugs under medical supervision. *See id.*

"Ample evidence" of "medical use" is not the statutorily-imposed standard to remove a substance from the schedules, or to transfer a substance between schedules. Rather, these actions must be accomplished by federal statute or through an intricate administrative procedure. Congress may designate any substance as a controlled substance or transfer a substance between schedules pursuant to its legislative authority. Or, the DEA Administrator (the Attorney General's designee for these matters) may add, remove, or transfer a substance between schedules pursuant to the Administrator's rulemaking authority. *See* 21 U.S.C. § 811(a). This rulemaking procedure may be initiated by the DEA Administrator or the Secretary of Health and Human Services (or his designee), or on the petition of any interested party. *See id.*

In order to initiate the administrative procedure to transfer marijuana between schedules, the DEA Administrator must find that the substance has a potential for abuse, and make specific findings regarding the proposed schedule. *See* 21 U.S.C. § 811(a)(1)(B). Before the DEA Administrator may initiate the above-referenced administrative procedure, the Administrator must request from the Secretary of Health and Human Services (HHS) a scientific and medical evaluation, and recommendations as to whether the drug should be scheduled. *See* 21 U.S.C. § 811(b). The findings by the HHS Secretary relate to a substance's abuse potential, legitimate medical use, and safety or dependence liability. *See* 21 U.S.C. § 812(b). The Secretary's written recommendations regarding scientific and medical matters are binding on DEA. If the Secretary recommends that a substance not be a controlled substance, it cannot be designated as such. Therefore, absent a statutory amendment, and unless and until the Secretary determines that marijuana has an "accepted medical use," or "accepted medical use with severe restrictions," marijuana will remain a schedule I controlled substance.

38. Given the years of experience with medical marijuana and the lack of any evidence that addiction has increased as medical marijuana has become more widely available, shouldn't the Department of Justice move marijuana off of Schedule I so that it can use its limited law enforcement and correctional resources on greater priorities?

Response:

As outlined in response to Question 37, the Department of Justice does not have the statutory authority to unilaterally reschedule a substance. The number of years of experience with the substance for medicinal purposes; the purported absence of evidence that addiction to the substance has increased as it becomes more widely available; and law enforcement resources and correctional resources are not statutory factors to be considered when determining a substance's appropriate schedule under the Controlled Substances Act.

39. Do you agree that since 14 states plus the District of Columbia have approved of medical marijuana, the people of those 14 states plus the District of Columbia have found that there is a medical use for marijuana and therefore labeling it as having no medical use is per se invalid?

I am not advocating legalization of marijuana, but millions of people each year are being deprived of their liberty because of arrests for possession of small amounts of marijuana.

Response:

The Department does not agree with the statement that because some jurisdictions have adopted legislative initiatives approving medical marijuana "labeling it as having no medical use is per se invalid." The Food and Drug Administration (FDA) has not approved smoked marijuana for the medical treatment of any condition or disease, and the FDA has noted that there is currently sound evidence that smoked marijuana is harmful. In addition, the National Highway Traffic Safety Administration has found that marijuana significantly impairs one's ability to safely operate a motor vehicle. Regardless of what individual states have recently legislated, Congress determined that marijuana had no accepted medical use in treatment in the United States and placed marijuana in schedule I in 1970. Congress has not modified marijuana's status as a schedule I controlled substance to date. Congress gave the Secretary of Health and Human Services the authority to determine, for scheduling purposes, the medical and scientific matters pertinent to whether a substance should be scheduled, i.e., whether the substance has a currently accepted medical use in treatment in the United States. The Secretary has not determined that marijuana has any accepted medical use in treatment; therefore, as noted in response to Question 37 above, the Department cannot agree that "labeling it as having no medical use is per se invalid."

With regard to your concern about individuals' deprivation of liberty, the DEA complies with all procedural and substantive safeguards necessary to ensure that individual liberties are respected. In addition, the DEA uses its resources to target significant drug trafficking organizations. Few defendants are incarcerated in federal prison for simple possession of marijuana.

40. Do you agree that our limited law enforcement and correctional resources would be better spent if marijuana were shifted away from Schedule I so that law enforcement resources and correctional facilities could be used for citizens that are selling and becoming addicted to drugs that have a high potential for abuse, no accredited medical use, and a lack of accepted safety?

Response:

The Department of Justice and its component agencies are committed to enforcing the Controlled Substances Act, and, as noted above, the Department of Justice does not have the statutory authority to unilaterally reschedule a substance, regardless of law enforcement and correctional resources.

As discussed above, marijuana has a high potential for abuse, no currently accepted medical use in treatment, and lacks accepted levels of safety for use under medical supervision. The 2008 National Survey on Drug Use and Health reported approximately 15 million current users of marijuana—ranking it as the most abused illicit drug in the United States. The sale and illegal distribution of marijuana is a serious crime that generates billions of dollars in illegal revenue every year for trafficking organizations, in turn strengthening these organizations and enabling them to continue operating in violation of federal law.

With respect to allocation of resources, on October 19, 2009, Deputy Attorney General David Ogden distributed a policy memorandum to Department of Justice components that provided clarification and guidance to federal prosecutors in states that have enacted laws authorizing the purported medical use of marijuana. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provided uniform guidance to focus federal investigations and prosecutions in these states on core federal enforcement priorities. The memorandum reinforced the traditional focus of Department of Justice priorities and resources on the investigation and prosecution of significant traffickers of illegal drugs and the disruption of illegal drug manufacturing and trafficking networks. This memorandum also directs resources toward the most significant problem in the cycle of abuse: the organizations that provide drug seekers and abusers with controlled substances. Cutting off the supply of any controlled substance by attacking the organizations that control the illicit market ultimately limits the supply available for abuse.

U.S. Bankruptcy Trustee Program

The U.S. Trustee Program is charged with ensuring the fair administration of the bankruptcy system. But particularly under the prior Administration, I heard many complaints about the program devoting disproportionate attention to debtor conduct without equal attention to creditor conduct.

41. Can you tell me what efforts the Trustee Program has undertaken or plans to undertake to ferret out creditor abuse and to ensure that honest debtors obtain the bankruptcy relief they're entitled to?

Response:

The United States Trustee Program (USTP) has compiled an impressive record of policing creditor violations of the Bankruptcy Code over the past several years, particularly in the mortgage servicing area. From FY 2008 to FY 2009, the number of actions that USTP filed to protect filers from fraud, abuse, and error almost doubled, from 5,201 in 2008 to 9,136 in 2009. As of mid-year 2010, the USTP was on pace for a further increase. The number of criminal referrals that the USTP made involving mortgage or real estate fraud rose 60%, from 190 in 2008 to 306 in 2009.

The USTP has taken several important steps to institutionalize its efforts to combat creditor abuse. First, it established an internal creditor abuse working group to devise a coordinated approach to address issues and develop litigation strategy. It has developed information-sharing processes to ensure the efficient exchange of information about pending investigations and actions involving abusive practices by creditors in bankruptcy cases, to provide instant access to pleadings and other pertinent documents, and to keep staff updated on recent case law. The USTP also has offered extensive training to its staff at its National Bankruptcy Training Institute of the National Advocacy Center and through LiveMeeting training sessions.

The USTP's aggressive consumer protection efforts are exemplified by two major nationwide settlements with major financial institutions. Most recently, on June 7, 2010, the Federal Trade Commission (FTC) and the USTP announced a comprehensive settlement of an FTC complaint and USTP litigation against Countrywide Home Loans, Inc. The relief obtained is one of the largest monetary remedies in the history of the FTC and is the largest in the history of the USTP. Over a long investigation, the USTP worked closely with the FTC to carry out parallel investigations relating to Countrywide's improper conduct in servicing home loans, including its imposition of illegitimate charges. The agreement will compensate homeowners in bankruptcy who were victimized by Countrywide's improper business practices, and will help prevent future harm to homeowners in dire financial straits who legitimately seek bankruptcy protection. Under the consent order, debtors who were victimized by Countrywide's wrongful actions will receive compensation from a $108 million redress fund administered by the FTC; Countrywide will establish internal procedures to be verified by an independent third party to ensure the accuracy of the data used to service

homeowners' loans; and Countrywide will provide homeowners in bankruptcy with adequate notice of its charges.

Prior to the Countrywide settlement, in July 2009, the USTP and First Tennessee bank reached a settlement agreement to resolve complaints involving the bank's improper disclosure of more than 2,500 Social Security numbers on proofs of claims filed in bankruptcy courts in 48 judicial districts. Under that agreement, the bank notified affected debtors, filed appropriate papers to correct the court filings, and took remedial steps to prevent a recurrence of these impermissible breaches of privacy. This case is one of many that the USTP has taken against creditors who have failed to comply with legal requirements to protect the personal information of their customers in bankruptcy.

These efforts not only result in strong relief from the particular defendants, but send a strong message to other industry players regarding the consequences of engaging in unlawful practices.

42. Will there be any efforts to replace Bush era appointees whose actions are not consistent with the priorities of this Administration to ensure that debtors are treated fairly in the bankruptcy system?

Response:

It is of great importance to ensure that the individuals charged with fulfilling the USTP's mission meet the Department's highest standards of integrity and performance in carrying out the Department's and the USTP's priorities and mission.

Two new United States Trustees were recently appointed in Regions 3 and 18. These individuals are long-time career employees of the USTP who are recognized experts and highly regarded in the professional community. Any future United States Trustee appointments will reflect consideration of candidates who possess the highest qualifications and demonstrate a commitment to the mission and policy priorities of the USTP.

Accommodations for Liberty Bowl

We have had discussions before about the Liberty Bowl, which is the football stadium in Memphis, and the negotiations over expanding its ADA-compliant seating. This is a stadium that never sells out and has never come close to using all of the accessible seats it already has.

43. What is the status of these negotiations?

Response:

The Department cannot comment on the status of an open investigation or compliance review, or about the specifics of any negotiations.

44. Shouldn't there be some recognition of how a facility is actually used when determining its ADA compliance?

Response:

A facility that is owned and operated by a public entity must comply with the program accessibility requirements of title II of the ADA. The Department does not determine whether a public entity is in compliance with the ADA at a particular facility based on past attendance of persons with disabilities at particular sporting events. Instead, compliance with the program access requirements is determined by reviewing several factors in addition to the number of wheelchair seating areas provided in relation to the number of fixed seats, including whether an assembly area provides wheelchair seating areas that comply with the minimum space and width dimensions necessary to accommodate a wheelchair user, whether an assembly area provides wheelchair users with a line of sight over standing spectators, and whether wheelchair seating areas are dispersed horizontally and vertically throughout a facility.

QUESTIONS POSED BY REPRESENTATIVE WEINER

45. The administration through the annual budget has stated that your goal is to hire 50,000 new police officers through the COPS program but has failed to provide a timeline for hiring these new officers. What is the timeline that the administration is using for hiring these officers?

Response:

In Fiscal Year (FY) 2011, the Department of Justice is requesting $600 million to continue the hiring program. This funding, coupled with the $1 billion in American Recovery and Reinvestment Act of 2009 (ARRA or the "Recovery Act") funding and the $298 million in FY2010, will be used as the next installment of grants to support the Administration's goal of hiring an additional 50,000 community policing officers throughout the country. The FY 2011 COPS Hiring grants will directly assist state, local and tribal governments in hiring additional law enforcement officers for deployment to community policing activities, and will enable agencies to increase their community policing capacity to improve public safety.

While this Administration is committed to putting an additional 50,000 police officers on the street, the Department of Justice and the COPS Office want to ensure that the hiring of these officers is done not only efficiently, but more importantly, effectively. Because of the competing priorities for law enforcement funding to state, local and tribal agencies, it is difficult to set a timeline for hiring all of the additional officers. The FY 2009 ARRA funds as well as the FY 2010 funding cover the full salary and benefit costs of entry level positions. While this was an important alteration of the traditional COPS Hiring programs that have had local matches and salary caps, it is not yet established how the program may look in FY 2011 and beyond.

It is also important to keep in mind that the COPS Hiring grants are only one piece that contributes to the overall success of the COPS program. The FY 2011 request also includes funding for much-needed training and technical assistance, for programs to improve police-community relationships, and for other innovative collaborations between law enforcement and the citizens they serve. Equipping police and communities with these valuable tools and knowledge resources is as integral to the success of community policing as the hiring of officers, and should be taken into consideration when looking at the overall FY 2011 COPS Office budget request.

46. As part of the COPS Hiring Recovery Program, the COPS office capped the maximum number of officers at 50 per jurisdiction. I believe that this cap discriminated against large cities, such as New York and instead the department should institute a cap based on a percentage of the total sworn police force. Have you reviewed the impact of this numerical cap on COPS awards to large cities and what has the department done to fix this situation?

Response:

Because of the extremely strong demand for COPS Hiring Recovery Program funds, and the desire to maximize the effect of the Recovery Act while still keeping the awards at a meaningful level, the COPS office instituted two different limitations on the numbers of officers available to applicants:

- all agencies were capped at no more than 5% of their current actual sworn force strength, and
- no agency received funding for more than 50 officers.

The COPS office concluded that these restrictions were a better alternative to simply giving the first-ranked applicants all of the officers they requested, regardless of the size of their requests. Without these caps, a very small number of agencies would have consumed all of the available funding. With them, only a very small number of agencies received less than a 5% boost in their staffing levels. To date, all agencies that were awarded 50 officers have accepted their awards and have begun the recruitment, hiring and training process.

The COPS Office is continually seeking better ways to balance fulfilling the full requests of individual agencies with the need to distribute the funds to a greater number of agencies across the entire country. The 5% and 50 officer caps will remain in place for FY 2010. The COPS Office has not yet made any decision regarding potential caps in FY 2011, if funds become available.

47. What percent of the sworn police force did the COPS Hiring Recovery Program provide in the top 10 largest cities? How many officers would have been provided to the top 10 largest cities had there not been a 50 officer cap per jurisdiction?

Response:

In the top 10 largest cities (all applied under the COPS Hiring Recovery Program), COPS funded 5 cities for an average of 1.1% of their sworn force. If the 50 officer cap had not been in place, COPS would have only funded three of the top 10 cities (Chicago would have received 400 officers, Philadelphia 200 and Dallas 150). Additionally, Los Angeles and San Antonio, who were funded under the 50 officer cap, would not have received awards.

48. At a recent Crime Subcommittee hearing, members heard testimony on the importance of testing all rape kits. One witness was a rape victim who testified that her rape kit was untested and that a major obstacle to the kit being tested was funding to state labs.

a. What is the current status of the backlog?

Response:

A recent study funded by NIJ, *The 2007 Survey of Law Enforcement Forensic Evidence Processing*, showed that 14 percent of all unsolved homicides and 18 percent of unsolved rapes involved forensic evidence that was not submitted by law enforcement agencies to a crime laboratory for analysis.

Another NIJ-funded study, *2007 DNA Evidence and Offender Analysis Measurement: DNA Backlogs, Capacity and Funding*, showed that 153 crime laboratories reported a beginning backlog for forensic DNA case analysis of more than 54,000 requests and an end-of-year backlog of more than 70,000 requests.

NIJ synthesized findings from these two recent reports, other research, and data from grantees to provide a full picture of backlogs. The NIJ report, *Making Sense of DNA Backlogs: Myths and Realities*, is available at: http://www.ncjrs.gov/pdffiles1/nij/230183.pdf.

Two major points must be kept in mind when examining the state of DNA backlogs. First, there is no industry-wide definition of what a backlogged forensic case is. NIJ defines a backlogged case as one that has not been tested 30 days after submission to the crime laboratory. However, many laboratories refer to any case in which the final report has not been submitted as a backlogged case. Using that definition, the moment a new case was logged into the laboratory it would become a part of the backlog. Second, the DNA backlog is not static, but is constantly changing. According to the research, there has been tremendous growth in forensic DNA testing between 2005 and 2008. The capacity of laboratories to complete cases grew at approximately the same rate as new cases were submitted. However, the number of new cases submitted grew a bit faster. Hence, the backlog continues to grow in proportion to the increase in demand for services.

Because violent crime is generally prosecuted at the state/local level, the FBI does not receive the same number of sexual assault cases that a state/city crime laboratory would be expected to receive. (Generally, sexual assault cases make up 60-70 percent of the DNA casework of a state and/or city laboratory.) Currently, the FBI Laboratory has 200 criminal case submissions related to alleged sexual assaults out of 1945 total active submissions awaiting nuclear DNA testing. The sexual assault case submissions include 5,049 items of evidence out of a total of 17,773 items of evidence either in or awaiting processing for nuclear DNA examinations. Therefore, 10 percent of the FBI Laboratory's pending case submissions and 28 percent of the specimens awaiting analysis are related to sexual assault cases.

In August 2010, the FBI Laboratory received an interim technical assistance report from the Office of the Inspector General of the U.S. Department of Justice regarding the Laboratory's Forensic DNA Case Backlog. This report contained five

recommendations with which the FBI Laboratory concurred. These recommendations advised that the FBI Laboratory define the term "backlog," address the needs of a Laboratory Information Management System, establish formal time tracking procedures for analysts, resolve evidentiary transfers with the District of Columbia Metropolitan Police Department, and examine the effectiveness of outsourcing agreements. In the meantime, the FBI Laboratory has worked to increase staffing resources, which has resulted in a 25% decrease in its nuclear DNA forensic case backlog during the last 9 months of Fiscal Year 2010.

It should be noted that the reason for the increased submission of evidence is good news. Law enforcement officers are more aware of the power of DNA technology than in the past and are making more requests for testing. In addition, forensic DNA testing requests have risen due to the retesting of older "cold cases" with DNA technologies, increased requests for post-conviction cases, and increasing submissions from property crime cases.

The Department has worked diligently with our state and local partners to support increased collection and testing of forensic DNA evidence in rape kits. We are eager to work with Congress to determine the best ways to address issues raised by the forensic DNA backlog.

b. Does the administration support increased funding to state and local crime labs for DNA testing?

Response:

As stated in the response to Question 24, the President's Fiscal Year 2011 budget request includes $150 million for "DNA-related and forensic programs and activities (including related research and development, training and education, and technical assistance)[.]" This comprehensive approach, designed to maximize the use of forensic DNA technology in the criminal justice system, has been developed – with the input of state and local forensic practitioners – to target the greatest areas of need in the nation's forensic community, including addressing the forensic community's need for resources to supplement state and local resources for forensic DNA testing activities.

49. How many rape kits are untested by state and local enforcement and crime labs each year?

Response:

As noted in the response to Question 48.a., NIJ has supported research to measure forensic DNA backlogs in state and local law enforcement agencies and crime laboratories. A recent NIJ study showed that 14 percent of all unsolved homicides and 18 percent of unsolved rapes involved forensic evidence that was not submitted by law enforcement agencies to a crime laboratory for analysis. Another NIJ funded study

showed that 153 crime laboratories reported a beginning backlog for forensic DNA case analysis of more than 54,000 requests and an end-of-year backlog of more than 70,000 requests.

This research does not separate rape kits from other types of evidence in criminal cases. We do not know the exact number of untested rape kits that have not been submitted to the nation's crime laboratories. However, most crime laboratories have an established policy of analyzing evidence from violent crimes before evidence received from property crimes. In many labs, the bulk of their backlog may be related to property crimes. The Department of Justice is working with crime laboratories and agencies to assist in reducing sexual assault evidence collection kit (rape kit) backlogs, and to identify the best practices to submit and process these cases while, at the same time, being sensitive to the needs of the victims in each case.

QUESTIONS POSED BY REPRESENTATIVE KING

50. At a press conference in Phoenix on March 25, 2010, you said, "Our Civil Rights Division is working on [the investigation of Maricopa county Sheriff Joe Arpaio] in conjunction with the U.S. Attorney's office here in Arizona. And I expect we will produce results." What did you mean by the comment that the investigation "will produce results"?

Response:

In opening this investigation, the Civil Rights Division informed the Maricopa County Sheriff's Office (MCSO) that the Division had received complaints of discrimination and would seek to determine whether there were violations of Title VI of the Civil Rights Act of 1964, the Safe Streets Act, or 42 U.S.C. §14141. In conducting the investigation, the Division has considered and will continue to consider all relevant information, including MCSO's efforts to ensure compliance with federal law. If the Division concludes that there are no systemic violations of the applicable constitutional or statutory rights, we will notify MCSO that we are closing the investigation; if, on the other hand, the Division concludes that there are such violations, we will inform MCSO of those violations and seek MCSO's cooperation to remedy any such violations. Whatever the conclusion, the investigation will produce results when the allegations of discrimination have been fully investigated and a determination regarding compliance with federal law has been made.

51. Your comments suggest that the Civil Rights Division will file a complaint and that the grand jury will issue an indictment even though both investigations are ongoing. Your comments appear to violate Federal regulations, the U.S. Attorney's Manual, and ethical rules that bar an attorney from opining on pending cases. Do you think it's appropriate for the sitting U.S. Attorney General to comment publicly on an ongoing investigation?

Response:

We do not believe that the public comments to which the question refers included any improper suggestions.

52. Are you concerned that your comments could unfairly pressure Department lawyers into seeking an indictment and filing a lawsuit?

Response:

The Department's only objective is to conduct a full investigation and to assist MCSO in correcting any identified deficiencies.

53. How else could the Department's lawyers and the grand jurors interpret your comments other than as an instruction to bring an indictment and file a lawsuit?

Response:

As noted in response to Question 50, the Civil Rights Division is considering all relevant information to determine whether there are or are not systemic violations of federal law. If there are no violations, the Division will close its investigation; and if there are applicable violations, the Division will seek to work with MCSO to remedy those violations.

54. As shown by the overwhelming support for Arizona's immigration law, the public is fed up with the problem of illegal immigration. Sheriff Joe Arpaio is doing his best to combat illegal immigration, yet the Justice Department has spent more than a year investigating him. Why is DOJ concentrating so many resources on Sheriff Joe Arpaio rather than fighting illegal immigration? Are you concerned that your activities could deter other law enforcement agencies from fighting illegal immigration?

Response:

Individuals are understandably concerned about the issue of illegal immigration, and the federal government has a responsibility to comprehensively address those concerns. That's why the President and Administration officials have reached out to Congressional leaders from both parties to develop a path toward fixing our broken immigration system. Moreover, this Administration, including the Justice Department, has devoted unprecedented resources over the past 18 months to law enforcement, immigration, and border security enhancements in Arizona and elsewhere along the southwest border. However, the Justice Department also has a responsibility and the legal authority to enforce our nation's civil rights laws. In particular, the Department has authority under federal statute 42 U.S.C. § 14141 to investigate and bring civil actions against state and local law enforcement agencies that engage in unlawful discrimination or other constitutional or civil rights violations.

The Department has investigated several police departments and sheriff's offices in the past several years. The Department's investigation of the New Jersey state police, for example, led to a lawsuit, resolved through a consent decree, which emphasized non-discrimination in policy and practices, as well as improved data collection, training, supervision, and monitoring of officers. That consent decree was implemented successfully and expired in 2009. The Department has signed similar settlement agreements with police departments in Montgomery County, Maryland, and Highland Park, Illinois. The Department has also signed consent decrees with police departments

in Los Angeles, Pittsburgh, and Steubenville, Ohio, which contain measures to address racial profiling issues.

The Department hopes these efforts serve to deter unlawful discrimination or other constitutional or civil rights violations by law enforcement agencies.

55. In your written testimony, you listed a number of ways in which the Justice Department provides assistance to state and local law enforcement officers to ensure our laws are enforced. You mentioned OJP and COPS, Byrne-JAG and even mortgage fraud. How can you support our state and local law enforcement while threatening to sue the State of Arizona for helping to enforce our federal immigration laws?

Response:

The Department of Justice filed suit against Arizona on July 6, 2010, because the Arizona state law conflicts with national immigration policy. Arizona seeks to substitute its own public policy of "attrition through enforcement" in place of the balance of national law enforcement, foreign relations and humanitarian concerns which characterize federal immigration policy. The fact that the Justice Department contends that the Arizona law is preempted by federal law is not inconsistent with our support of state and local law enforcement. First, both the Department of Homeland Security (DHS) and some local law enforcement officials told us that the state law conflicts with their priorities of prosecuting and removing serious criminals. Second, the Justice Department is supporting state and local law enforcement in Arizona in ways that directly target border-related violent crime. The Drug Enforcement Administration has eleven task forces working with 23 state and local law enforcement agencies to identify, target and dismantle major drug trafficking organizations operating or transiting through the state of Arizona. The FBI has more than 450 employees in Arizona and either leads or participates in such efforts through the Organized Crime Drug Enforcement Task Force, Project Safe Neighborhoods, Home Invasion and Kidnapping Enforcement, Border Liaison Officer Program, and the Human Trafficking Task Force. The ATF is active throughout Arizona and in May it established the Gun Runner Impact Team to target firearms related violent crime on the southwest border.

56. There have been several cases that demonstrate the Department of Justice's politicization. In 2008, by a 2 to 1 margin, the City of Kinston, North Carolina voted to end the practice of noting the party affiliation of candidates in local elections. But, in August 2009, as The Washington Times reported, Acting Assistant Attorney General for Civil Rights, Loretta King, informed the City that the removal of party affiliations in its city council and mayoral elections violated the Voting Rights Act. Ms. King is quoted as stating, "Removing the partisan cue in municipal elections will, in all likelihood, eliminate the single factor that allows black candidates to be

elected to office." Based on this statement, is it true that the VRA requires "partisan cues" on the ballot because only partisan cues will allow African-American candidates to get elected? What if African-American voters, themselves, voted overwhelmingly to get rid of partisan elections? Isn't the Department pushing a racially motivated ballot? How can stopping African-Americans from adopting a nonpartisan election system further the goal of racial equality?

Response:

Consistent with its regular practice, the Civil Rights Division conducted a thorough, fact-based review before interposing an objection under Section 5 to the proposed voting change from Kinston. At issue in this matter was the extent to which white voters in Kinston will cross over and vote for an African American candidate of choice in a non-partisan election. Given that there is a high degree of racial polarization present in the city's elections and that African American voters relied on white crossover votes to elect their candidates of choice, whether this crossover voting would continue in non-partisan elections was the critical inquiry. We concluded that the city did not meet its burden of proving that it would and, therefore, could not establish that the proposed change to non-partisan elections would not have a discriminatory or retrogressive effect on African American voters.

57. **Further politicization arises in relation to the dismissal of the case against the racist hate group, the New Black Panther Party. The Justice Department has refused to answer many of the questions raised by the U.S. Commission on Civil Rights. It is also reported that the Department is not allowing the lawyers who have been subpoenaed by the Commission to testify about the case. Have you invoked executive privilege as to the documents the Department has not produced and the questions the Department has not answered?**

Response:

The Justice Department has received questions and requests for information and documents from the United States Commission on Civil Rights, and it has not refused to answer. The Department has provided the Commission with a great deal of information about the specific reasons for its decision to pursue an injunction against the only defendant in the case who brought a night stick to the polls and to dismiss claims against other defendants. Specifically, the Department has provided the Commission with answers to numerous interrogatories, detailed testimony from the Assistant Attorney General for Civil Rights, and over 4,000 documents requested by the Commission. Some information was withheld because -- although the Department worked to accommodate the Commission's interests -- the Department also has significant interests in the confidentiality of internal deliberations on law enforcement decisions. However, the

information provided to the Commission addressed its questions in detail and made clear the reasons for the Department's decisions.

You have asked about executive privilege. Executive privilege is the constitutional privilege belonging to the President, and he has not asserted the privilege here.

58. On November 4, 2008, three members of the New Black Panther Party intimidated voters outside a polling location in Philadelphia. These individuals were wearing paramilitary-style uniforms, waving weapons, and uttering racial epithets. Only one of the three individuals received a penalty for his actions. Mr. Shabazz received narrow injunction against him, which prohibits him from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia. Isn't it true that a broad injunction against Mr. Shabazz could have been sought prohibiting him from displaying a weapon within a 100 feet of any open polling location across the United States?

Response:

The civil litigation filed by the Department of Justice in January 2009, against the New Black Panther Party and three individuals, *United States v. New Black Panther Party for Self Defense, et al.*, C.A. No. 09-cv-0065-SD (E.D. Pa.), was brought to enforce Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973i(b). Section 11(b) prohibits coercion or intimidation, or attempted coercion or intimidation, of individuals who are, among other things, voting or attempting to vote, or aiding or attempting to aid individuals to vote. In a civil lawsuit brought to enforce Section 11(b), the only penalty the Department may seek is injunctive, or preventive, relief. *See* 42 U.S.C. §1973j(d). This is exactly the kind of relief the Department sought and obtained in this litigation – a permanent injunction against defendant Minister King Samir Shabazz, the only defendant who brought a night stick to the polls. The injunction will remain under the supervision of the Federal judge in the case until 2012. Other kinds of remedies or penalties, such as imprisonment, monetary fines, or monetary damages, are not available in a Section 11(b) action. Indeed, Congress specifically repealed the criminal penalties for a violation of Section 11(b) in 1968. The scope of the injunctive relief sought by the United States and ultimately obtained in this case was based on an analysis of the facts and application of the law to those facts. The Federal judge in the case determined that the relief sought by the United States in the case was appropriate, as evidenced by the entry of the court's May 18, 2009 Order granting our requested relief.

59. Is it true that this narrow injunction against Mr. Shabazz does not prohibit him from carrying weapons to any open polling location if the weapons are hidden under his paramilitary uniform?

Response:

The court injunction against defendant Minister King Samir Shabazz prohibits him from "displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b)." A determination as to whether the conduct described in this question would constitute a violation of the injunction would have to be made based on an analysis of the specific facts involved and an application of the law to such facts. If the defendant takes any action that violates the cited anti-intimidation provisions of the Voting Rights Act, those actions would be covered by the injunction. There also may be local statutes that criminalize the carrying of a concealed weapon at any location, including at a polling place. Such statutes are enforced by local authorities.

60. Is it true that this narrow injunction does not prohibit Mr. Shabazz from making intimidating comments to potential voters outside any open polling location in the United States?

Response:

The court's injunction against defendant Minister King Samir Shabazz prohibits him from "otherwise violating 42 U.S.C. § 1973i(b)." A determination as to whether the conduct described in this question would constitute a violation of the injunction would have to be made based on an analysis of the specific facts involved and an application of the law to such facts. If the defendant's particular actions were such that they violated the cited anti-intimidation provisions of the Voting Rights Act, they would be covered by the injunction.

61. Is it true that the initial case against all three members of the New Black Panther Party sought a broad injunction that would prohibit these individuals from intimidating voters outside any polling location in the United States?

Response:

The complaint in this case was filed in January 2009 against the New Black Panther Party and three individuals and sought relief then determined as appropriate by the Department. Following a review of the facts developed in the case and the applicable law, however, the United States concluded that the claims should be dismissed against three of the four defendants. As previously indicated, the relief which the United States can obtain in Section 11(b) litigation is injunctive relief. The Federal judge in the case determined that the relief the United States sought with respect to the claims against the remaining defendant was appropriate.

62. So, the maximum penalty under Section 11 of the Voting Rights Act was not sought or obtained for Mr. Shabazz?

Response:

As previously indicated, in a lawsuit to enforce Section 11(b), the penalty the Department may seek is injunctive, or preventive, relief, which is the kind of relief sought and obtained in this litigation. As a general rule, injunctions must be narrowly tailored to prevent recurrence of the unlawful conduct described in the complaint, and a court must review the scope of an injunction sought to ensure that it does not sweep too broadly. *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 771 (3rd Cir. 1994) (invalidating catch-all portion of an injunction prohibiting Kmart from building on easement, noting that "injunctions, which carry possible contempt penalties for their violation, must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law" (citations omitted)). In this case, an injunction was obtained against the individual, Minister King Samir Shabazz, who held a baton on one Election Day, at a single polling place in Philadelphia. The Federal judge in the case determined that the injunction obtained was appropriate under the circumstances. His May 18, 2009, order provides:
"The scope of the injunction sought -- i.e., prohibiting the defendant from displaying a weapon within 100 feet of a polling location -- provides the Government with the appropriate, prophylactic protection against another violation of 42 U.S.C. § 1973i(b), and only prohibits the defendant from displaying a specific type of object at a focused area, and thus the defendant suffers no material harm if we grant the Government the injunction it seeks . . . ."

63. Can you explain why the Department changed course and only secured a very narrow injunction against the fourth, in what was a clear and obvious case of voter intimidation?

Response:

Under relevant case law, injunctions must be narrowly tailored to prevent recurrence of the unlawful conduct described in the complaint, and a court must review the scope of an injunction to ensure that it does not sweep too broadly.

The Department concluded that a nationwide injunction was not legally supportable in the case against Minister King Samir Shabazz. The Supreme Court has emphasized that an injunction must be "no broader than necessary to achieve its desired goals." *Madsen* v. *Women's Health Ctr.*, 512 U.S. 753, 765 (1994). To that end, a reviewing court must pay "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech" in keeping with the "general rule . . . that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *See id.* (citation omitted).

Because injunctive relief is tailored to its objectives, a focus upon the facts alleged by the Department was critical to determining the scope of the injunction that could have been obtained. The Department alleged that Minister King Samir Shabazz is a resident of Philadelphia and is the leader of the Philadelphia chapter of the New Black Panther Party. *See* Complaint ¶ 5. The complaint alleged that on November 4, 2008, Minister King Samir Shabazz brandished a nightstick and made racially threatening and insulting remarks while standing in front of the entrance of a polling place in Philadelphia. *See* Complaint ¶¶ 8-10. The complaint further alleged that on this specific occasion Minister King Samir Shabazz pointed the nightstick at individuals, tapped it in his hand and elsewhere, and made menacing and intimidating gestures, statements and movements toward individuals who were present to aid voters. *See* Complaint ¶¶ 9-10.

The evidence was insufficient to show that Minister King Samir Shabazz had engaged or planned to engage in a nationwide pattern of such conduct as he exhibited at the polling place in Philadelphia, or that he was inclined to disregard the injunction. *Cf. United States* v. *Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996) (finding the scope of a nationwide injunction in a Freedom of Access to Clinic Entrance Act (FACE) case appropriate because of a protestor's "consistent, repetitious, and flagrant unwillingness or inability to comply" with the proscriptions of the law, his "serious intent to do bodily harm to the providers and recipients of reproductive health services," and the possibility, if the injunction were geographically limited, that he "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility" (quotation and citation omitted)). Absent such facts, in other FACE Act cases, the geographic scope of injunctions the Department has obtained has been quite narrow, generally limited to a certain number of feet from a given clinic, *see United States* v. *Scott*, No. 3:95cv1216 1998 U.S. Dist. LEXIS 10420 (D. Conn. June 25, 1998), or preventing protestors from impeding ingress and egress to a particular clinic. *See United States* v. *Burke*, 15 F. Supp. 2d 1090 (D. Kan. 1998); *United States* v. *Brock*, 2 F. Supp. 2d 1172 (E.D. Wis. 1998).

Given the facts presented, the injunction sought by the Department prohibited Minister King Samir Shabazz from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. 1973i(b). See Order of May 18, 2009, at 4. The Department considers this injunction tailored appropriately to the scope of the violation and constitutional requirements, and will fully enforce the injunction's terms.

64. It is my understanding that Judicial Watch was able to obtain documents from DOJ through FOIA that demonstrated the suppression of voter registration fraud. The documents show that the FBI and DOJ opened investigations into this issue, but the Obama Administration closed down the investigation in March 2009 claiming ACORN broke no laws.

a. Are you aware that ACORN admits to over 400,000 fraudulent voter registrations?

Response:

No.

b. Does this not concern you as the Attorney General of the United States?

Response:

The Attorney General is always concerned about the possibility that there have been violations of federal criminal law. Moreover, as we have previously advised Members of Congress, the Department of Justice places a high priority on investigating and prosecuting federal crimes affecting voting rights and the integrity of the federal election process, such as voter registration fraud. All credible allegations are investigated and, where warranted, prosecuted to the full extent of federal law. Indeed, we have obtained 12 ACORN-related registration fraud convictions in this area over the past few years, as well as one such conviction not related to ACORN.

c. Are you concerned that this corrupt criminal enterprise could be damaging the integrity of our elections?

Response:

See answer to Question 64b above.

Department of Justice's Grantmaking Components
Response to Improving Grant Management and Oversight:
Addressing Key Issues Identified by the Office of the Inspector General
May 2010

Report Section	#	Report Element	Activity	Description
1. Grant Program Development	1.1	Ensure that program objectives are developed in a timely manner to focus the efforts of all participants and to clarify expectations.	Improving the Solicitation Development and Review Process	***Office of Justice Programs (OJP) Response:*** OJP maintains an automated solicitation review process. The Office of Audit, Assessment, and Management (OAAM) will continue to assess and streamline this process to ensure established timelines are met and solicitations are issued in a timely manner. This includes the periodic review and update of the OJP-wide solicitation template to ensure it contains key elements of the program announcement, such as program purpose, eligibility, performance measures, and selection criteria. In FY 2010, the solicitation review process was revised to include an expedited review for recurring solicitations, allowing for solicitations to be announced sooner. In addition solicitations are now generally posted for a minimum of 45 days to provide adequate time for applicants to identify the funding opportunity and prepare a quality proposal. OJP also ensures that solicitation extension deadlines are publicly announced through the OJP web site, bureau and program office websites, Grants.gov, and available listservs, if applicable. ***Community Oriented Policing Services (COPS) Office Response:*** In accordance with recommended practices, program objectives have already been established and approved by the Office of Management and Budget (OMB) for all COPS Office programs, including the new COPS Hiring Recovery Program (CHRP) to be funded through the American Recovery and Reinvestment Act of 2009. The overall program objectives focus on increasing the capacity of law enforcement agencies to implement community policing strategies to enhance their capacity to prevent, solve, and control crime. In addition, CHRP-specific program objectives include the creation and preservation of sworn law enforcement officer jobs. ***Office on Violence Against Women (OVW) Response:*** OVW's program development practices already meet the standards that OIG proposes. OVW engages in various activities to ensure a grant

				program is well developed and to broaden our understanding of the issue(s) before we release a program solicitation. These include: reviewing the legislative history, if any; clarifying program scope and objectives; consulting with experts in the field; developing policies that are consistent with the legislative intent of the program; identifying and reaching out to eligible applicants; and developing program specific technical assistance. Before issuing a general grant solicitation, OVW ensures that each of these steps has been taken and that a plan is in place to implement the program within a given Fiscal Year. We also may use this process when updating or restructuring an existing OVW grant program to meet new legislative requirements. OVW is currently drafting a Grant Program Development Manual to provide guidance to OVW staff on developing new grant programs. Several sections are in final draft, and we hope to have the entire manual completed in FY 2011. OVW does not issue awards to grantees prior to submission of an application.
1. Grant Program Development	1.2	Ensure that each program solicitation has measurable and obtainable performance measures to ensure that legislative intentions and program objectives are met.	Developing Performance Measures	***OJP Response:*** OAAM facilitated a business improvement process to examine the development and use of performance measures to assess program results. Recommendations are currently being implemented, including establishing procedures for developing standard performance measures and verifying data, and instituting the use of a comprehensive catalog of all performance measures used by the program offices. The Office of the Chief Financial Officer (OCFO) also has a performance management team dedicated to developing performance measures, aggregating data, and maintaining the performance measures catalog. ***COPS Office Response:*** Three measurable and obtainable performance measures specific to the Recovery Act have been created by the COPS Office and approved by OMB. These measures – the average community policing capacity of COPS Hiring Recovery Program grantees, the number of jobs created, and the number of jobs preserved – will be measured through quarterly progress reports assessing the number of new sworn officer jobs created and/or

				preserved, as well as through an annual survey that gauges the community policing capacity implementation rating of grantees. Non-Recovery Act grants will also include the measure pertaining to increasing the capacity of law enforcement agencies to implement community policing strategies to enhance their capacity to prevent, solve, and control crime. This OMB-approved measure applies to all grant programs. ***OVW Response***: OVW has identified detailed performance measures for each of its grant programs. These measures are included in OVW grant program solicitations and are collected through grantee progress reports. All OVW grant program solicitations include Government Performance and Results Act (GPRA) measures. Program solicitations also include a link for applicants to access samples of the progress report forms that grantees must complete during the life of the grant. These semi-annual progress reports (for OVW discretionary grantees) and annual progress reports (for OVW formula grantees and subgrantees) collect data regarding program measures for each of OVW grant programs. Although there are some similarities across progress report forms, OVW spends a significant amount of time developing these forms based on the goals and objectives of the individual grant programs.
2. Grant Applications	2.1	Establish and publicize an internet site where grantees or potential grantees can submit questions and receive answers within 1 business day, and a	Technical Assistance	***OJP Response:*** OJP maintains a dedicated toll-free number to offer real-time support on general requirements for receiving funds, assistance with the Grants Management System (GMS), and referrals to program offices regarding OJP grant programs. GMS is a web-based, data-driven application that provides end to end support for the application, award, management, and audit of grants for OJP, OVW, and the Department of Homeland Security's Federal Emergency Management Agency, Grants Program Directorate. Recipients of OJP funding can submit questions about payments or any other financial matters to the OCFO Customer Service Center through a toll-free phone number or by e-mail at ask.ocfo@usdoj.gov Program Office Points of Contact. Each helpdesk refers callers to appropriate

		telephone hotline to speak with a grant advisor.		OJP staff for programmatic questions. Program office points of contact and phone numbers are provided on the cover page of each program announcement for project-specific inquiries. For Recovery Act grant applications, many offices created designated mailboxes or hotline numbers for grantees with an established response time of 1 business day. Program offices will continue to convene conference calls with grantees and stakeholders with the participation of representatives from the OJP Office of General Counsel, OCFO, and OAAM to answer legal, financial, and grant management questions. OJP leadership will continue to encourage this practice for new and complex programs, as well as for those programs under which a large number of applications will be submitted. ***COPS Office Response:*** The COPS Office maintains a highly developed Internet site through which applicants have been able to submit questions (and receive answers via e-mail), review categories of frequently asked questions, listen to a "podcast" pertaining to CHRP funding, and download program materials for use during the on-line application process. COPS also maintains an in-house call center for law enforcement agencies to contact for assistance with both grant application and award maintenance questions; more complex grant matters are immediately transferred to Grant Program Specialists for resolution. In fact, during the solicitation period for CHRP (March 16 – April 14, 2009), COPS received and responded to more than 18,200 calls and 4,300 e-mails through the call center and website. ***OVW Response:*** OVW maintains public e-mail accounts for each of its grant programs. OVW publishes the addresses for these accounts in its program solicitations, and potential applicants are advised to submit questions by e-mail to these accounts. In the past, each grant program unit within OVW established its own protocol for responding to e-mail inquiries from potential applicants. Due to current staffing limitation and the high volume of inquiries, OVW continues to work to improve its response time. With our anticipated staffing increases in FY 2011, OVW will address this issue.

				Although OVW does not operate a hotline for potential applicants, OVW offers its main phone number in each program solicitation and suggests that potential applicants call if they have questions or concerns about the solicitation or application requirements. OVW's receptionist answers all applicant calls and routes them to an OVW Grant Program Specialist who has expertise in the program requirements. On average 1/3 of each program's applicants are applying for supplemental/continuation funding. These applicants routinely address their questions to their assigned OVW program specialist. In addition, OVW identifies an OVW Grant Program Specialist as the point of contact for each OVW grant program solicitation. At present, OVW does not have sufficient staffing to establish a dedicated toll-free hotline to respond to applicant inquiries about its solicitations. OVW will continue, however, to encourage applicants to submit their questions by e-mail to the public e-mail addresses included in each program solicitation. OVW also will continue to route applicants who call to one of the Grant Program Specialists from the unit that issued the relevant solicitation. In addition to responding to applicant e-mails and calls, OVW provides more formal pre-application venues for potential applicants to new programs or programs that draw a less-sophisticated pool of applicants. Starting in FY 2007, OVW's Grants to Indian Tribal Governments Program hosted a series of pre-application conference calls to offer potential applicants an opportunity to hear from OVW staff about the program and the application requirements. Callers were given an opportunity to ask questions about the requirements and to discuss whether specific activities would be allowable under the program. Each of the calls was scripted and the number of participants was limited to ensure that all callers received consistent information and had ample opportunity to ask questions. Members of the Tribal Unit recorded questions posed by participants that they could not answer during the calls without consulting with OVW's attorneys. After obtaining the answers, Unit members e-mailed

				the question and OVW's response to all teleconference participants. Staff also encouraged participants to e-mail or call Tribal Unit members directly if they had further questions. OVW staff also participated in pre-application webinars designed to provide information and answer questions related to the DOJ Consolidated Tribal Assistance Solicitation. Since then, the Office has held pre-application conference calls for several other grant programs, including the FY 2009 Culturally and Linguistically Specific Services Program and the Recovery Act Transitional Housing Program. In FY 2010 seven additional programs held pre-application calls. During these calls, participants were given the name, e-mail address, and direct phone number of a member of OVW's staff who could answer their follow-up questions. In addition, to accommodate the overwhelming demand for Recovery Act information, OVW added the script that staff used for the Recovery Act Transitional Housing calls, as well as a fact sheet about the grant program, to the OVW website. We will continue to use pre-application calls and outreach, particularly as we launch new grant programs with new groups of eligible grantees. For example, the Culturally and Linguistically Specific Services Program supports community-based, grassroots programs that serve specific racial, ethnic, and other cultural groups who have never before applied for OVW funds. Pre-application calls provided a vehicle for us to answer their many questions about the application process and the solicitation. Pre-application calls were also used very successfully as an outreach tool to encourage new applicants to apply for Recovery Act monies.
2. Grant Applications	2.2	Expand opportunities for e-training for grantees, such as tutorials and grant do's and don'ts.	Expanded E-Training for Grantees	***OJP Response:*** OJP provides grantees with customized, intensive training to ensure they are managing their grants effectively. OAAM has recently expanded on-line training opportunities for grantees. <u>Current Training:</u> *GMS On-line Training Tool*. The GMS On-Line Training Tool provides step-by-step instructions to complete various functions within GMS, such as grant adjustment notices, progress reporting, and closeouts, as well as guidance on administrative policies.

				Post-award Grant Administration: A training presentation on post-award grant management is available to grantees on the OJP funding resources webpage. *Recovery Act Requirements and Reporting grantee training*. OJP, in cooperation with the OVW and COPS Office, has hosted three webinars on Recovery Act requirements and implementing guidance. Key areas covered include calculating and reporting jobs data, recipient reporting requirements, and using the central reporting solution, www.FederalReporting.gov. These webinars remain accessible to grantees through the OJP Recovery Act Website. *Grants 101*: A step-by-step on-line tutorial on the grant process designed to help prospective grantees prepare more effective applications. The tutorial includes an overview of the OJP grant process for both competitive and noncompetitive programs; description of the application review process; and expert tips to help applicants find new funding opportunities and write strong proposals. Forthcoming Training: *How to Write a Quality Application*. This training is an on-line course that provides instructions, job aids, and expert advice on the planning, researching, and writing of a grant application. ***COPS Office Response:*** In preparation for the COPS Hiring Recovery Program, COPS has awarded funding to establish an interactive CHRP "eLearn Center" to deliver both grants management training and community policing training to grantee agencies. At their own convenience and at far less cost than instructor-led training, CHRP grantees will have access to information and resources on-line that will help them effectively administer their grant and employ sound community policing practices. The COPS website also provides substantial guidance to grantees regarding proper award maintenance, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. Going

				forward, the COPS website will also serve as a portal to access the on-line training being created for CHRP grantees, and which is likely to be expanded to future grantees of other COPS programs. ***OVW Response:*** OVW does not currently have the capacity to offer its grantees programmatic e-learning opportunities. However, OVW joined the OJP and the COPs Office in conducting a series of web-based seminars for recipients of the Recovery Act funds. Recovery Act grantees who were unable to participate in the live seminars were able to access video recordings on OVW's website. OVW is working with the Department's Office of Public Affairs to update our website, and we hope to provide more e-learning opportunities in the future. OVW will continue to work with OJP and COPs to identify areas for e-learning on which we can collaborate. OVW grantees do have access to on-line training for OJP's Grants Management System (GMS). OVW currently has a contractual agreement with OJP to use GMS, a web-based, data-driven application that provides end-to-end support for the application, award, management, and audit of OVW grants. GMS includes an On-line Training Tool that provides step-by-step instructions to complete various grants administration functions within GMS.
2. Grant Applications	2.3	Use the application process to identify red flags for granting agencies to follow-up on prior to making awards.	Risk Assessment and Application Analysis	OJP, OVW, COPS Office, and the Associate Attorney General's Office are currently working together to develop DOJ-wide procedures for managing the Department's high-risk grantee program. The OJP/OAAM will maintain the consolidated listing of all DOJ high-risk grantees, and will determine special conditions to be applied to new DOJ grants awarded to high-risk grantees. ***OJP Response:*** In September 2007, OJP created a high-risk grantee designation policy to ensure that program offices address a grantee's risk status during the grant award process, consistent with government wide regulations concerning high risk grantees. OJP deems grantees to be high-risk if the grantee: 1) has a history of unsatisfactory

				performance; 2) is not financially stable; 3) has a financial management system which does not meet the government-wide established standards; 4) has not conformed to terms and conditions of previous awards; 5) has open Office of the inspector General (OIG) audit report recommendations that have been open more than one year; 6) is subject to an OIG investigation where grant non-compliance issues were noted that require corrective Response; or 7) is otherwise not responsible. Beginning in FY 2009, additional special conditions are imposed on high risk grantees, including but not limited to, increased monitoring, required training, and prohibitions on drawing down funds until requirements have been met. Prior to awarding grants but once tentative grant decisions have been made, OJP's OCFO conducts a fiscal integrity and financial capability review before approving an applicant's budget. This review includes a review of the applicant's past performance with OJP (if applicable), including compliance with quarterly financial and annual audit reporting requirements, cash management, and resolution of monitoring findings and recommendations. New applicants which are not state, local, or tribal governments are required to submit a financial capability questionnaire signed by an independent CPA and audited financial statements. OCFO also queries the Dun and Bradstreet database to obtain information on the applicant's credit worthiness, bankruptcies, etc. In some instances, other federal agencies are contacted for information regarding past performance. Program Office Review: During the application review process, program offices review prior grantee performance as it can be a major factor in consideration for future funding. ***COPS Office Response:*** For the COPS Hiring Recovery Program, once all applications had been submitted, COPS staff immediately reviewed the data they contained. In some cases, COPS called applicant agencies to verify information provided in their applications. In total, the COPS Office contacted more than 1,700 agencies to validate their data, and reviewed more than 275,000 individual data

				points. This data process, while time-consuming, was crucial to ensuring that all applicants were properly evaluated based on accurate and reliable economic, crime, and community policing data. Once the initial data were verified, the next phase of the review process included in-depth budget reviews and evaluations of the retention requirement information and other aspects of the applications. Finally, in preparing the CHRP award list, COPS looked at the total number of sworn positions being requested by each agency to determine how to best allocate the funds available. ***OVW Response:*** OVW has recently established an in-house Grants Financial Management Division (GFMD) and is in the process of staffing that division. While the OVW GFMD is developed, we will continue to contract with OJP for certain financial management services and support. Once established, OVW's GFMD staff will review all applicant budgets and ensure that potential grantees are not delinquent on any A-133 audits; do not appear in GSA's Excluded Parties List System; and are current on all financial reports. GFMD will then conduct a financial review of the budget and supporting documentation submitted by applicants to assess the reasonableness, allowability, and appropriateness of proposed costs for project activities. They will determine the adequacy of the applicant's accounting system and operations to ensure that Federal funds, if awarded, will be managed and expended in a judicious manner. Based on OIG's recommendations, OVW has revised its program solicitations to require all applicants to provide detailed descriptions of the following: (1) mechanism for segregation of grant funds; (2) written accounting procedures; (3) existing inventory systems; (4) accounting mechanisms for tracking all grant draw downs and expenditures; (5) tools to assess risk and processes to help identify and mitigate potential risks; and (6) records retention policy.
2. Grant Applications	2.4	Include verification in	Grantee Time and Attendance	***OJP Response:*** As a condition of receiving an award and stipulated in the OJP Financial Guide, recipients must agree to establish and

		the application process that timesheets for all personnel are maintained to document hours worked for grant and non-grant related activities.	Policies and Procedures	maintain adequate accounting systems and financial records to accurately account for funds awarded to them, and ensure that an adequate system exists for each of its subrecipients. For grantees that have received OIG audit findings relating to the implementation of time and attendance policies and procedures, OJP imposes a special condition on new awards requiring submission of time/attendance policies and procedures and documentation stating how grant-related payroll costs will be allocated. The recipient may not obligate, expend, or draw down funds under this award until the OJP program office has received, and OJP has reviewed and approved the time/attendance policies and procedures. ***COPS Office Response:*** In the CHRP application guide, agencies were advised that they must have an accounting system in place that would be able to track all grant expenditures if awarded funding. Awarded agencies were instructed in the CHRP Grant Owner's Manual that all grant expenditures (salary and fringe benefit payments) must be based on payroll records supported by time and attendance records or their equivalent. [All such financial records must be maintained for at least three years from the date that the COPS Office officially closes the grant.] ***OVW Response:*** FY 2011, all OVW solicitations will require that applicants submit information pertaining to their time and attendance policies as part of their proposal for funding. As noted above, OVW is in the process of developing in-house grants financial management services. This new division will be responsible for providing grants financial management training at OVW grantee orientations starting in FY 2011. OVW's GFMD will ensure that time and attendance issues are included in these trainings.
2. Grant Applications	2.5	Enhance pre-award screening to ensure only	Pre-award Screening	***OJP Response:*** As outlined in the OJP Grant Manager's Manual, program offices are responsible for conducting a programmatic review of applications prior to the application being submitted for peer review. Program office staff review the application to make sure that proposed

		applications that meet solicitation objectives and requirements are sent to peer reviewers.		activities are reasonable, measurable, and achievable, as well as consistent with program or legislative requirements and agency objectives. Since 2008, OAAM has coordinated an OJP-wide peer review process to ensure peer reviews are rigorous, cost-effective, consistent, and transparent across all OJP program offices. In July 2008, OJP issued an OJP-wide peer review policy and procedures to further improve the peer review process by establishing a sound methodology for scoring applications and common peer review forms. In March 2009, the peer review policy was revised to promote the independence of the OJP science agencies. In February 2010, based on an assessment of its peer review process, OJP implemented changes to its scoring methodology that integrates a banding process. ***COPS Office Response:*** The peer review process will not apply to funds awarded under ARRA. In FY2009, the only COPS program to utilize a peer review process will be the Child Sexual Predator Program (CSPP). For CSPP, only those applications which meet solicitation objectives and requirements will be sent to peer reviewers. ***OVW Response:*** OVW already engages in a careful internal review process that meets this standard. As specified in each of OVW's grant program solicitations, all applications submitted to OVW undergo an initial review by an OVW Grant Program Specialist. The Specialist reviews the application using an internal review scoring form based on the objective criteria included in all OVW grant program solicitations. This internal review identifies whether an application is eligible and complete, ensures that activities proposed in the application are within the statutory scope of the grant award program and do not compromise victim safety, and identifies potential problems or issues that may need to be addressed if the application is selected for funding consideration. Applications that are ineligible, substantially incomplete, or do not meet solicitation requirements will not be forwarded to peer review. OVW also uses pre-award screening to assess whether to continue to fund current grantees. OVW requires its current grantees to submit a Status of the Current Project section if they are seeking continuation

				funding from the same OVW grant program. The Grant Program Specialist reviews this section, as well as the grantee's programmatic and financial reports, on-site monitoring reports, and other documentation, to ensure that the grantee has made good progress towards implementing the goals and objectives of its current OVW-funded project, has not spent grant funds on unallowable costs, and has otherwise satisfied each of the special conditions of its current award. In FY 2010 enhanced its Grant Assessment Tool (GAT) to improve the internal application review process. The GAT enhancements will make the process of identifying compliance issues with current grantees faster and more efficient by enabling Program Specialists to access a succinct and comprehensive overview of the grantee's performance on each of its current OVW grant awards. (Current OVW grantees are not required to submit a Status of the Current Project section if they are seeking new funding from a different OVW grant program; the GAT can query the grant award status of any current grantee.) This will significantly improve OVW's intra-office coordination of the review of proposals that have been submitted by one applicant to multiple OVW grant award programs.
2. Grant Applications	2.6	Establish criteria to gauge the risk associated with new grantees. For new grantees assessed to be high-risk, agencies should conduct background checks.	Timely Risk Assessment	***OJP Response:*** OJP uses a Grant Assessment Tool (GAT) to rate individual grants against a set of criteria to determine monitoring priority. New grantee status is a factor in this risk calculation. In FY 2010, OAAM established a process to run quarterly reports on Recovery Act grantees, many of which are new grantees, to review performance metrics, such as reporting compliance and drawdown activity, to identify potential at-risk grantees in real time. OAAM works with the program offices to conduct the necessary follow-up with the grantees. OJP gathers and assesses information on new grantees during the application review process. The OCFO conducts a fiscal integrity and financial capability review before approving an applicant's budget. New applicants which are not state, local, or tribal governments are required

				to submit a financial capability questionnaire signed by an independent CPA and audited financial statements. OCFO also queries the Dun and Bradstreet database to obtain information on the applicant's credit worthiness, bankruptcies, etc. In some instances, other federal agencies are contacted for information regarding past performance. ***COPS Office Response:*** The COPS Office determined that no additional risk would be associated with awarding grants to agencies that had never before received a COPS grant. However, first-time COPS grantees, as well as those grantees which have not received COPS awards for some time, will be assessed with higher point values within the risk assessment model established for monitoring grantees. ***OVW Response:*** OVW does not presently have the capacity to perform extensive background investigations on each of its applicants. As specified in all OVW grant program solicitations, OVW currently considers whether or not an applicant has complied with the OMB Circular A-133 Single Audit submission requirement that is a standard special condition on every Department of Justice grant award. (Legal entities, such as state and tribal governments, and nonprofit organizations, who are subject to OMB Circular A-133 are required to conduct an independent audit if they have expended $500,000 or more in Federal funds during the entity's most recent fiscal year. The results of that audit must be submitted to the Federal Audit Clearinghouse within nine months of the conclusion of the entity's fiscal year.) Starting in FY 2010 OVW's GFMD will identify if an applicant is delinquent on its required Single Audit. To improve coordination, DOJ established a Grants Challenges Working Group with representatives from OVW, OJP, and COPs. This working group meets bi-weekly and serves as a forum for cross-cutting grant issues. OVW also receives monthly updates from OAAM on grantees that have been designated as high-risk. OVW uses OAAM's monthly list to identify high-risk applicants during the internal review process. The protocol that OVW has established with OAAM is that OAAM provides OVW with a list of special conditions that must be added to any award

				that OVW makes to a grantee on the high risk list. OVW adds these mandatory special conditions during its award-making process. The aforementioned meetings between OVW, OJP, and COPs are streamlining this process. As part of OVW's Recovery Act efforts, OVW developed its own high-risk assessment tool. In addition, OVW staff involved with reviewing Recovery Act grant applications used the online National Federal Audit Clearinghouse database that is maintained by the U.S. Department of Commerce to check the status of each applicant's Single Audit submission status. OVW plans to continue to enhance its high-risk evaluation process by incorporating a check of the Excluded Parties List that is maintained online by the General Services Administration
2. Grant Applications	2.7	Review open OIG Audit and Inspections reports to determine whether grantee progress in implementing corrective action is sufficient to award additional grants.	Timely Corrective Action on Audit Findings	***OJP Response:*** The OJP Risk Assessment Program includes a review of applicants' risk status during the grant award process. All grantees with open audit recommendations for over one year are placed on the high risk designation list. If an award is made, special conditions are imposed related to the particular audit findings. OJP also tracks grantees with audit reports open for less than one year to closely monitor their progress in establishing and implementing corrective actions or addressing questioned costs. ***COPS Office Response:*** Our vetting process provides an opportunity for various COPS divisions and certain relevant U.S. Department of Justice (DOJ) components to identify entities to which it may be inappropriate or inadvisable to award a grant. As part of the vetting process, a vetting list is generated of applicants eligible to receive funding under a specific grant program based on a review of agency applications. This vetting list is distributed pre-announcement to relevant points of contact within the COPS Office, including the COPS Audit Liaison Division (ALD). COPS ALD provides feedback to the grant-making division regarding whether grantee progress in implementing corrective action for any open audit reports is sufficient to award additional grants.

				OVW Response: OVW currently relies on OJP/OAAM to identify grantees as high-risk and to maintain a list of grantees with open OIG audits. Some of the grantees who have open audits from OIG are included on OJP/OAAM's high-risk list. OJP also maintains another list of grantees who have not been identified as high-risk, but who have an open OIG audit. OVW consults both lists during its application review process. OVW has an Audit Liaison to support OVW's efforts to more effectively and efficiently work with grantees to resolve findings from OIG Audit and Investigative reports. The Liaison will also be able to quickly provide OVW Grant Program Specialists with an update on the status of the grantee's efforts to resolve audit findings.
2. Grant Applications	2.8	Ensure that no ongoing OIG or other criminal investigations are in process before deciding to make awards.	OIG Coordination	***OJP Response:*** OJP meets quarterly with the OIG Fraud Detection Office to discuss on-going criminal investigations of DOJ grant recipients. Based on the nature of the investigation, and the grantee's high risk status, OJP determines whether to issue new awards or adjust grant conditions to account for identified issues. ***COPS Office Response:*** As mentioned above, our vetting process provides an opportunity for various COPS divisions and certain relevant U.S. DOJ components to identify entities to which it may be inappropriate or inadvisable to award a grant. As part of the vetting process, a vetting list is generated of applicants eligible to receive funding under a specific grant program based on a review of agency applications. This vetting list is distributed pre-announcement to relevant points of contact within the COPS Office and within the following DOJ components: U.S. Attorney's Offices; the Civil Rights Division; OIG Investigations; the OJP Office for Civil Rights; the Public Integrity Section; and the Criminal Division. In addition to a description of the program being vetted, the COPS Office provides guidance to these components in the memorandum that accompanies every vetting list instructing reviewers to provide reasons why it would be inadvisable or inappropriate to award an applicant on the list. This direction is

				purposefully kept broad, in order to give reviewers complete discretion to advise COPS of any reason why funding should be withheld from any agency. ***OVW Response:*** The OVW Audit Liaison and Associate Directors work with OIG and OJP/OAAM to identify whether applicants recommended for funding are a part of an ongoing OIG or other criminal investigation.
3. Award Process	3.1	Document key aspects of the award process and maintain this documentation	Documenting Funding Decisions and Maintaining Records	***OJP Response:*** Since May 2008, OJP has implemented a policy issued by the Associate Attorney General requiring DOJ grant-making components to maintain documentation to support all discretionary funding recommendations and decisions. Such documentation must clearly explain the choices made, the reasons for the choices, and the policy consideration on which the decisions were based. In March 2009, the OJP Acting Assistant Attorney General issued a memo to continue the practice of documenting all discretionary funding recommendations and decisions. Since that time, the OJP bureaus and offices have maintained records supporting their selection decisions. In March 2010, OJP Assistant Attorney General issued additional guidance to ensure that all award requirements are accurately stated in the funding recommendation memorandum. The OJP peer review policy requires program offices to fully document all grant award decisions including a description of factors that were used to make decisions regarding which applications to recommend for funding. All peer review documentation is maintained in the GMS official files. Formula allocations are posted on program office web sites. In addition, beginning in FY 2009, all of OJP's award decisions are posted on the OJP website, including the type of award, the recipient, and the award amount. The GMS is the source for the official grant file and includes auditable documentation for all actions taken during the life of the grant. ***COPS Office Response:*** COPS independently sought the assistance of senior-level business analysts to complete a Business Process Review (BPR) effort – begun in FY2005 and ongoing since that time –

				with the goal of ensuring continuous process improvement by analyzing current business processes, identifying weaknesses, and taking proactive steps to implement solutions. This effort has been integral to COPS' success in ensuring that proper internal controls are in place within the grants management process as required by Office of Management and Budget (OMB) guidelines, and the advances and improvements which have been made will be both evident and especially valuable as the COPS Office begins the rollout and management of funding to be provided through the Recovery Act. As part of the BPR procedures, all aspects of the award process are mapped out carefully, and documentation for every step of the process will be maintained appropriately. ***OVW Response:*** OVW already has procedures in place to ensure that these – and other – aspects of the award process are well-documented. 1) Non-competitive awards: Although OVW manages two formula grant programs, the vast majority of OVW's awards are made on a competitive basis. (OVW's two formula grant programs are the STOP Violence Against Women Formula Grant Program and the Sexual Assault Services Formula Grant Program. In addition, grants under OVW's Grants to State Domestic Violence and Sexual Assault Services Program are made to coalitions identified by the U.S. Department of Health and Human Services and the Centers for Disease Control.) For those awards that OVW makes non-competitively that are not part of its formula grant programs, we prepare detailed justifications before making those awards. Generally, OVW only uses non-competitive awards when making awards to entities with particular expertise and/or to support initiatives that address emerging issues (e.g., children exposed to violence.) OVW is often able to fund stronger and more effective technical assistance projects through a non-competitive process because there are a limited number of experts in the field able to provide effective training and technical assistance to OVW grantees. When OVW has determined that its grantees need technical assistance regarding complex topics (e.g., firearms prohibitions, inter-state custody, fathering after violence, assisting battered immigrant women,

				addressing police officers who batter), it may reach out to a qualified agency or organization and request that it submit a concept paper or full proposal for consideration by the Director. OVW documents all key aspects of the award process when non-competitive technical assistance awards are made. (2) Peer Review Consensus: OVW has contracted with Lockheed Martin/Aspen Systems to provide logistical support for OVW's peer review process. During peer review, panels of three are responsible for rating and scoring applications within OVW's guidelines. Each peer review panel is supported by a recorder who records the panel's discussion. The recorder captures the reviewers' consensus comments for each application and prepares a summary that is sent to all unsuccessful applicants. Complete and accurate consensus reports are critical to the peer review process because they assist program staff in making funding recommendations to the Director and are also used to provide constructive feedback to the applicants. (3) Deviations from Peer Review Scores: OVW has procedures in place to document the basis for award recommendations and selections that may differ from peer review. Reasons for such deviation include geographic distribution of awards, past performance, or areas of special need. OVW documents and justifies the basis for all funding recommendations in a comprehensive recommendation notebook for each grant program. Each of these recommendation notebooks are standardized across programs and include: the funding recommendation memorandum, which includes a justification for recommending any proposals that scored below the cut-off score; funding recommendations sorted by State; program funding availability; lists of all applications received sorted by State and by score; applications not forwarded to peer review and the reasons why; continuation grantees not recommended for funding and the reasons why; and applications scoring above the cut-off but not recommended for funding. (4) Conflicts of Interest: OVW has procedures in place to identify,

				remedy, and document conflicts of interest among agency staff and external experts involved in peer review. All OVW Program Specialists are required annually to complete confidential financial disclosure forms (OGE-450s), which are reviewed by supervisors and the Office's Deputy Designated Agency Ethics Official for potential conflicts. When reviewing applications, OVW staff are also required to identify the college and/or university from which they graduated or any other institutions or agencies with which they have an affiliation. During the peer review process, OVW's contractor requires peer reviews to identify all potential conflicts of interest by completing a conflicts form
3. Award Process	3.2	Establish a DOJ-wide procedure that allows granting agencies to share information on high-risk grantees prior to awarding funds.	Managing a High-Risk Grantee List	***DOJ Response:*** The DOJ-wide Grants Management Challenges Workgroup is a newly-created interagency initiative established by the Office of the Associate Attorney General. This group, led by the Deputy Associate Attorney General and consisting of representatives from COPS, OJP, and OVW, meets bi-weekly to share information and develop consistent practices and procedures in a wide variety of grant administration and management areas, including high-risk grantee criteria. The workgroup is currently developing DOJ-wide procedures for managing the Department's high-risk grantee program. The OJP/OAAM will maintain the consolidated listing of all DOJ high-risk grantees, and will determine special conditions to be applied to new DOJ grants awarded to high-risk grantees.
3. Award Process	3.3	Granting agencies should consider mandating that high-risk grantees maintain separate bank accounts for grant funds.	High-Risk Special Conditions	***OJP Response:*** Beginning in FY 2009, high-risk grantees who were found to have commingled DOJ grant funds and/or had other significant accounting-related concerns, as a condition of their award, are required to maintain a separate bank account to be used solely for transactions and expenditures related to the award. The recipient may not obligate, expend, or draw down funds under the award until OJP has reviewed the bank account information submitted. ***COPS Office Response:*** As detailed in the CHRP Grant Owner's Manual, grant recipients agree to maintain accounting systems and records that adequately track, account for, and report on all funds from

				this Recovery Act award (including officers hired, salaries and fringe benefits paid, and the number of jobs created and jobs preserved) separately from all other funds (including other COPS and federal grants awarded for the same or similar purposes). ***OVW Response:*** OVW proposes adding the following special condition on all awards made in FY 2010 to high-risk grantees, emphasizing the particular issues related to any high-risk designation: "The recipient agrees to maintain a separate bank account to be used solely for transactions and expenditures related to this award. Documentation of the establishment of the separate bank account must be provided to OVW. The recipient may not obligate, expend or draw down funds under this award until OVW has reviewed and approved the bank account information submitted."
3. Award Process	3.4	Granting agencies should determine a grantee's progress on implementing the requirements of prior grants before awarding additional grants for identical purposes.	Prior Grantee Performance Review	***OJP Response:*** OJP has a vigorous application screening process to review prior grantee performance as it can be a major factor in consideration for future funding. During the application review process, program offices review prior grantee performance as it can be a major factor in consideration for future funding. ***COPS Office Response:*** As indicated by the OIG, COPS reviewed grantee progress on the implementation of prior grants before awarding CHRP funding. ***OVW Response:*** As described in the Awards section above, OVW has strong application screening processes in place to review prior grantee performance. When OVW is reviewing applications for funding, OVW carefully reviews the status of any currently funded project to measure the progress of the current project. This helps to determine if the project can be made stronger with additional funding. OVW determines if additional funding can enhance the current project or if it is not needed. OVW also conducts a desk review on grants applying for additional funding. Information collected as part of the desk review includes whether progress reports submitted by the applicant demonstrate the effectiveness of the current project, whether the

				grantee has adhered to programmatic, financial and OMB audit reporting requirements, and whether the grant funds have been spent in a timely manner.
3. Award Process	3.5	Granting agencies should include information on fraud awareness in grantee award packages.	Information Dissemination through Award Documents and OIG Fraud Training for Grantees	***OJP Response:*** OJP imposes a special condition on all awards requiring grantees to report potential fraud, waste, and abuse, and similar misconduct. The condition states that the recipient must promptly refer to the DOJ OIG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other person has either 1) submitted a false claim for funds under the False Claims Act; or 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving funds. OJP works with the OIG to provide grant-fraud training to grantees at high-attendance conferences or other appropriate venues. In FY 2010, OAAM is expected to release an on-line post-award training for grantees, which will include information on preventing and detecting grant fraud. OCFO conducts grant fraud training as part of their regional financial training sessions. The OJP Recovery Act website provides information on how to report fraud, waste, and abuse to its grantees and the public and provides links to the DOJ OIG website. ***COPS Office Response:*** Both the CHRP application guide (provided to all applicants) and the CHRP award document and Grant Owner's Manual (included in every grantee's award package) include information on fraud awareness and instructions for how to report potential fraud, waste, abuse, and similar misconduct. Similar information will be included as part of the CHRP e-Learn Center's on-line grantee training. ***OVW Response:*** OVW imposes a special condition on all awards requiring grantees to: " . . . promptly refer to the DOJ OIG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other person has either 1) submitted a false claim for

				grant funds under the False Claims Act; or 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving grant funds. This condition also applies to any subrecipients. Potential fraud, waste, abuse, or misconduct should be reported to the OIG by - mail: Office of the Inspector General, U.S. Department of Justice, Investigations Division, 950 Pennsylvania Avenue, N.W., Room 4706, Washington, DC 20530 e-mail: oig.hotline@usdoj.gov hotline: (contact information in English and Spanish): (800) 869-4499 or hotline fax: (202) 616-9881 Additional information is available from the DOJ OIG website at www.usdoj.gov/oig." OIG staff makes presentations regarding fraud awareness, waste, and abuse at all of OVW's new grantee orientations, which are mandatory for new grantees to attend. OVW also has similar OIG presentations at its annual STOP Administrators meetings, which are attended by officials from the 56 States and Territories that administer funding under the STOP Formula Program. OVW will include OIG presentations at all conferences directed at grantees and will require that current grantees attend OIG grantee orientations on an annual basis or when there is a key staff change on their grant. OVW will coordinate with OJP and COPS to ensure that all three agencies are posting OIG fraud awareness information on our websites and placing OIG letters in award packages. Lastly, OJP conducts grant fraud training as part of their regional financial training sessions. OVW grantees are encouraged to attend these regional financial training sessions.
3. Award Process	3.6	Designate "distressed" municipalities or those in receivership as high-risk.	Researching Municipalities that are Distressed or in Receivership	***OJP Response:*** OAAM is conducting research on "distressed" municipalities and those in "receivership," and how these designations affect a jurisdiction's ability to manage grant funds. Current research shows that most states have their own processes or criteria for making these designations, and it is not always clear that these designations will be defined the same in all circumstances, or that they require the same response from OJP. DOJ may modify its high-risk policy and practices based on the continued research and analysis of these issues.

				COPS Office Response: Given the fiscal distress experienced by many state, local, and tribal law enforcement agencies, the Recovery Act required that CHRP funds be allocated to preserve and promote economic recovery, to assist those most affected by the recession, and to stabilize state and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases. In asking a variety of fiscal health questions, the COPS Office focused on getting as complete a view as possible of the fiscal distress being experienced by applicants through objective and verifiable indicators that all agencies, from rural communities to large cities, could accurately report. Indication of fiscal distress was therefore not a factor in categorizing applicants as high-risk. ***OVW Response:*** As discussed above, OJP/OAAM is responsible for OVW's review of single audits. OAAM is currently conducting research on "distressed" municipalities and those in "receivership," and how these designations affect a jurisdiction's ability to manage grant funds. Current research shows that most States have their own processes or criteria for making these designations, and it is not always clear that these designations will be defined the same in all circumstances, or that they require the same response from OVW. DOJ may modify its high-risk policy based on the continued research and analysis of these issues.
4. Monitoring	4.1	Establish a risk-assessment model for monitoring grants	Determining Monitoring Priority of Grants Based on Risk Factors	***OJP Response:*** OJP program offices use the Grant Assessment Tool to systematically and objectively assess risk associated with grants and grantees. The monitoring assessment process involves assigning a monitoring priority level to individual grants based on a standard set of risk indicator criteria. The tool assists managers in prioritizing monitoring activities based on potential vulnerabilities and promotes consistency across the OJP program offices. In FY 2010, risk factors related to Recovery Act requirements and objectives were added to the grant assessment tool to identify those Recovery Act grants most in need of on-site monitoring. In addition, a risk criteria related to grantees on the OJP high risk list was added. ***COPS Office Response:*** OAAM which maintains oversight of the

				grant monitoring process for COPS and OJP has begun working with the grant-making components to enhance and refine the risk assessment models and site visit monitoring procedures and practices already in place. COPS staff will continue to conduct on-site visits, perform office-based grant reviews, and review citizen complaints regarding grant administration concerns, as well as monitor the timely and appropriate implementation of grant projects through the careful review of programmatic progress reports and grantee extension and modification requests. ***OVW Response:*** Since FY 2008, OVW has been engaged in an ongoing initiative to improve grant monitoring. In FY 2008, OVW convened a Monitoring Working Group to update its Monitoring Manual, and all OVW Program Specialists received monitoring training. During FY 2010, the OVW Monitoring Working Group decided to completely overhaul the Monitoring Manual, delaying its release. The newly revised Monitoring Manual will be released by the end of July to be used by Program Specialists in developing FY 2011 monitoring plans and promote consistency in monitoring across programs. (At the beginning of each fiscal year, Program Specialists are required to submit a monitoring plan to supervisory staff for approval. This monitoring plan is a proposed schedule for conducting site visits to grantees within an 8 to 12 month period. Grantees are selected for on-site monitoring based on a set of priorities: current performance, high-risk indicators, and promising practices.) The OVW Grant Assessment Tool (GAT), developed as part of the monitoring upgrades occurring in 2008, was automated and rolled out January 2009. OVW uses the GAT, which was updated in FY 2010, to carefully and impartially assess grant activities. Using this tool, OVW Program Specialists identify and set monitoring priorities for potentially at-risk grantees based on a standard set of criteria. The GAT also enables OVW to track risk assessments completed by Program Specialists and better coordinate site visits to grantees receiving multiple program awards. All OVW Program Specialists are required to use this tool to perform initial risk assessments for all new grants and

				supplemental grant awards. In preparing monitoring plans and scheduling site visits, the GAT assists Program Specialist in identifying and prioritizing high-risk grantees. As a result, staff members are more aware of potential risks and better prepared to advise grantees during on-site monitoring activities. OVW is currently committed to conducting on-site programmatic monitoring of 10% of its active grantees. With additional staff, that percentage would increase. On-site programmatic assistance primarily entails ensuring grantees meet the mission and spirit of the Violence Against Women Act (VAWA). This typically includes discussing goals and objectives relating to project implementation, observing project activities, identifying promising practices, and assessing technical assistance needs. Also, high-risk grantees are prioritized and generally covered within the 10% on-site monitoring goal. Without a grants financial management component, OVW has relied on its contractual relationship with OJP/OCFO for that office to conduct financial monitoring of the grants.
4. Monitoring	4.2	Increase monitoring of grantees and subgrantees by increasing site visits and reviewing reporting, particularly for new grantees.	Monitoring Levels	***OJP Response:*** OJP's program offices monitored 21% of open, active award funding through on-site programmatic monitoring visits in FY 2009 representing approximately $1.4 billion in FY 2009 grant funding. OJP's OCFO conducted financial monitoring for over 400 of grants in FY 2009 representing over $900 million in FY 2009 grant funding. OCFO conducts financial monitoring reviews of OJP, OVW, and COPS grantees and provides technical assistance, including, on-site direction and policy decisions, to grantees and program offices. The reviews conducted by OCFO accountants include: assessing the adequacy of the grantees' accounting systems and financial record keeping; testing financial transactions; assessing program compliance; providing financial management technical assistance; and making recommendations for improvement. OCFO is responsible for following up with grantees to ensure recommended improvements are implemented

				In May 2009, OJP released an updated monitoring module that enables grant managers to communicate the outcomes of site visits to grantees in a timely manner, and has several functional improvements, including: system workflow, such that grant managers may send reports and letters to their supervisors for review; the ability to track monitoring on a site-visit basis, and not just by individual grant; issue/finding resolution and tracking; and a grantee interface for sending formal correspondence. Effective in FY 2010, OJP program offices are required to provide on-site monitoring for at least 10% of the number of open, active awards, in addition to the statutory requirement of 10% of open active award dollars. Because of its large volume of awards, BJA on-site monitoring will be conducted for at least 5% of its active awards. In addition to on-site visits, desk reviews are required on every open, active award each fiscal year. In developing FY 2010 annual monitoring plans using the Grant Assessment Tool, OJP placed greater weight on risk associated with new Recovery Act programs. In FY 2011, OJP will be considering the "new" status of grantees as a risk factor for monitoring purposes. ***COPS Office Response:*** As mentioned above, COPS staff will continue to conduct on-site visits, perform office-based grant reviews, and review citizen complaints regarding grant administration concerns, as well as monitor the timely and appropriate implementation of grant projects through the careful review of programmatic progress reports and grantee extension and modification requests. Furthermore, information gathered through both grantee quarterly programmatic progress reports and quarterly financial status reports will satisfy all reporting requirements defined within the Recovery Act implementation guidance issued by OMB. First-time COPS grantees, as well as those grantees which have not received COPS awards for some time, will be assessed with higher point values within the risk assessment model described in section 4.1.

				OVW Response: Outside of the Recovery Act initiative, OVW has had a significant increase in new programs but has not had the Salaries and Expenses funding to hire new staff to assist with developing and administering these programs. This makes it difficult to increase the number of site visits to grantees. In spite of this, some OVW Program Specialists are able to conduct above the minimum required site visits within the fiscal year, and OVW recognizes this effort in work performance ratings wherein monitoring is one of the critical criteria. In May 2009, OVW created a Discretionary Programs Risk Assessment Check Sheet used to determine the level of risk a Recovery Act applicant poses if awarded federal funding. OVW used this check sheet to assess a Recovery Act applicant's potential strategic risk, operational risk and reporting and compliance risks. Through this assessment, OVW has distinguished low, moderate and high-risk applicants, and established priorities for specialized monitoring of higher-risk applicants that are selected for funding. To date, this assessment has revealed that the majority of the OVW Recovery Act applicants pose a low to moderate risk. Very few were deemed to be high-risk applicants. OVW Program Specialists conduct desk reviews of all active grant files. Desk reviews facilitate monitoring of grant activities throughout the grant award period, assist Program Specialists in preparing for site visits, and can occur in conjunction with or independent of a site visit. A desk review consists of reviewing grant files to ensure they are complete, accurate and up-to-date, and helps Program Specialists in prioritizing and determining the level of risk based on factors such as: non-compliance with special conditions, significant delays in project implementation without reasonable justification, or history of delinquent reporting. Desk reviews are required once per 24-month grant award and twice per 36-month grant award, but there is no established cycle for when desk reviews must occur. OVW is considering developing a desk

				review cycle for Program Specialists to incorporate into their annual monitoring plans. These requirements are being revisited and will be finalized in the new OVW Monitoring Manual. In spite of this, OVW has increased monitoring efforts with the implementation of the Grant Assessment Tool (GAT). The GAT has helped Program Specialist prioritize and spot grantee issues quicker. Yet even with the capability of identifying grantee issues utilizing the GAT and freezing drawdown access to minimize the misuse of funds, capacity is still a major dilemma for OVW. OVW Program Specialists are currently required to review and approve grantee progress reports. These semi-annual reports (discretionary programs) and annual reports (formula programs) are extremely detailed: grantees submit extensive quantitative data regarding funded activities and performance measures and provide detailed narrative descriptions of their progress meeting the goals and objectives of their grant awards. OVW staff also review OMB Required-Recovery Act Reports on a quarterly basis. Program Specialists also conduct general reviews of financial reports and grant expenditures as they compare to the approved budget. This review entails: • appraising the SF-269 for completeness and identifying delinquent financial reports; • addressing unreasonableness and/or unallowable expenditures; • reviewing match/cost sharing requirements; and • coordinating with OJP/OCFO's Monitoring Division to conduct site visits where significant financial irregularities are discovered. As mentioned above, OVW annually hosts mandatory grantee orientation meetings required for all new grantees and optional for continuation grantees. These orientation meetings are generally held within the first quarter of the grant cycle and are specifically designed to bring grantees together shortly after receiving their awards but before their projects are in full implementation. The orientations include presentations from the OIG, OJP/OCFO, as well as OVW Program

				Specialists and attorneys, who advise grantees of mandatory programmatic requirements and critical fiduciary obligations. In order to holistically manage and monitor grants and cooperative agreements, programmatic and financial staff must work in concert with one another. Specifically, these personnel must both understand the purpose of OVW grant programs and work closely together, within the same organization, to achieve the same goals and implement statutory guidance and policies. Connecting programmatic and financial monitoring efforts can achieve more comprehensive oversight and may reduce potential vulnerabilities. For this reason, OVW requested and received approval to establish an in-house Grants Financial Management Division which will work in close collaboration with our well established Program Division. In addition, to more efficiently and comprehensively monitor grantees, OVW has requested additional Program Specialists in order reduce program grant loads. This will allow for more direct contact and oversight with grantees.
4. Monitoring	4.3	Conduct site visits earlier in the grant period to catch potential problems. As part of the site visit, ensure that grantees are maintaining accurate accounting records and adequate expenditure support.	Developing an Annual Monitoring Plan and Site Visit Checklist	***OJP Response:*** OAAM coordinates the development of a programmatic and financial monitoring plan for OJP and the COPS Office, which includes all planned on-site monitoring for the upcoming fiscal year. With this plan in place, the OJP and COPS Office grant management and financial staff have the ability to coordinate their monitoring efforts within and between program offices and with the OCFO. The plan has helped OJP achieve a more comprehensive, coordinated oversight effort. In FY 2011, OAAM will work with OJP, the COPS Office, OVW, and OCFO to issue a coordinated monitoring plan in early October which will allow for increased joint on-site monitoring. While conducting site visits, program office grant managers use the Grant Monitoring Site Visit Checklist to document that while onsite they have reviewed grantees activities to ensure that accurate financial records and documentation are being maintained. The OCFO conducts detailed onsite financial reviews to ensure that grantees are maintaining adequate accounting systems and financial records that accurately account for funds, and grantees are monitoring subrecipients to ensure that adequate financial systems are being maintained.

				COPS Office Response: Site visits for CHRP grantees began in FY2010. As with all COPS monitoring site visits, each agency visited is reviewed to ensure that they are maintaining accurate accounting records and adequate expenditure support. [For CHRP, it should be noted that many factors can delay the hiring of police officers at the local level, including recruiting, training, and other budgetary issues. Historical hiring practices by COPS grantees reflect that it can take an average of 12 to 18 months to fill officer positions. Therefore, the majority of site visits to take place in FY2010 will be to grantee agencies with previously awarded, active grants under other COPS programs as well as newly-awarded CHRP grants.] ***OVW Response:*** Annually, OVW Program Specialists submit detailed on-site monitoring plans. When developing these plans Program Specialists consider the following: how long a grantee has been receiving OVW funds; how much funding a grantee has received; and whether the grantee has ever had a site visit. Program Specialists also consider unique circumstances when determining site visits. For example, if a grantee is implementing an innovative project that may demonstrate promising practices, OVW will take the initiative to observe this project first-hand. Also, site visits to high-risk grantees are frequently given top priority. Although OVW on-site visits are programmatic in nature, Program Specialists routinely ensure that grantees are implementing a project that is consistent with their approved budget. At present, however, OVW relies on OJP/OCFO to conduct financial on-site monitoring, which should include review of records and support for expenditures. With our anticipated increase in program staff, OVW hopes to be in a position to conduct some joint monitoring visits with OJP's OCFO. In addition, please see OVW's responses to recommendation 4.13 below, which discusses the issue of conducting site visits earlier in the grant period.
4. Monitoring	4.4	Require more	Grant Reporting	***OJP Response:*** OJP requires all grantees to submit quarterly financial

		specificity in grantee reporting	in GMS or other reporting vehicles	status reports, as well as progress reports (intervals for progress reports vary by program). All OJP grantees are required to submit progress reports that contain a narrative summary of their activities for the reporting period, as well as performance measurement data that is specific to their particular program. For several programs, OJP offices have elected to build out progress reports that collect narrative data in response to specific, targeted questions for that program. Program managers are encouraged to request additional information from grantees to support information contained in reports (including programmatic and financial data) if the reported information is not informative or raises questions or concerns. ***COPS Office Response:*** Grantee performance under CHRP will be measured through quarterly progress reports assessing the number of new sworn officer jobs created and/or preserved, as well as through an annual survey that gauges the community policing capacity implementation rating of grantees. Information gathered through both the grantee quarterly programmatic progress reports and quarterly financial status reports will satisfy all reporting requirements defined within the Recovery Act implementation guidance issued by OMB. [Non-CHRP grantees are required to submit progress reports based on their agency type. For example, law enforcement and tribal agencies must submit reports annually, while universities and non-profit organizations must submit reports on a quarterly basis.] ***OVW Response:*** All OVW grantees are required to submit quarterly financial status reports and semi-annual or annual progress reports. If questions or concerns arise when reviewing these documents, Program Specialists can request a history of the grantee's drawdown from OJP/OCFO's Financial Management Division or additional information from the grantee. OVW Program Specialists also conduct general reviews of financial reports and grant expenditures to verify proper use of funds for travel expenses, budget modification requests and requests for no-cost project period extensions. This is done in preparation for site visits and at the time of required annual desk reviews. Where a significant expenditure is beyond the scope of the program or blatantly

				unreasonable, OVW's GFMD will attempt to resolve such infractions, recommend that OCFO conduct additional monitoring, and/or freeze grant funds. OVW's GFMD in coordination with OVW's program specialist will work with grantees to resolve any financial discrepancies.
4. Monitoring	4.5	For grantees designated as high-risk, grant managers should periodically require the submission of supporting documentation so reported expenditures can be verified.	Grantee Submission of Expenditure Data	***OJP Response:*** OJP imposes special conditions on all high-risk grantee awards notifying the grantee of enhanced monitoring requirements. During onsite visits, OCFO financial monitors sample grant expenditures to ensure that expenses are reasonable, allowable, and supported. In circumstances where warranted, grantees are required to submit supporting expenditure documentation to OCFO prior to drawdown. As part of the desk review process high-risk grantees may also be asked to submit additional expenditure documentation. ***COPS Office Response:*** The COPS Office will consider requiring the periodic submission of supporting documentation from high-risk agencies so that reported expenditures can be verified. However, site visits will be performed for those agencies determined to be at highest risk through the monitoring risk assessment model. ***OVW Response:*** Currently through OVW's reimbursable agreement with OJP/OCFO, financial specialists conduct desk reviews and site visits to sample grant expenditures to ensure that expenses are reasonable, allowable, and supported. In circumstances warranting additional clarification, grantees are required to submit supporting expenditure documentation to OCFO prior to drawdown.
4. Monitoring	4.6	Ensure the state administering agencies engage in and report back to the granting agencies on	Subgrantee Monitoring Oversight	***OJP Response:*** As part of the OJP monitoring procedures, OJP grant managers review prime recipient monitoring of subrecipients. Using the Grant Monitoring Site Visit Checklist, OJP documents grantee oversight of subgrantee compliance with the conditions of the subaward. All Recovery Act awards include a special condition notifying grantees that they are required to have established policies and procedures for subgrantee monitoring.

		their specific monitoring and oversight of subgrants		***COPS Office Response:*** Not applicable under CHRP (grantee agencies may not award subgrants). ***OVW Response:*** OVW is collaborating with one of our technical assistance providers and State STOP Administrators to develop a STOP Administrator's Manual. This manual will serve as a source of guiding principles for STOP Administrators and will be developed over the next 36 months. Monitoring is one of the areas being addressed in this manual. OVW does not, however, have the authority to mandate that State STOP Administrators report on their monitoring of subgrantees. Through the collaboration on the manual, OVW emphasized accountability to STOP Administrators. Over the next 12 months, OVW will take the lead in developing the monitoring component.
4. Monitoring	4.7	Require state agencies to make subgrant award documents readily available to the public.	FFATA Subgrant Reporting	***OJP Response:*** Prime and subrecipients of Recovery Act funding are required to submit award information for posting on FederalReporting.gov. In addition, the Federal Funding Accountability and Transparency Act (FFATA) requires prime award recipients to report detailed information on subawards. OMB is currently working on policies and procedures for reporting this information for posting on USAspending.gov. When the OMB guidance is finalized, OJP will provide support to grantees in meeting these reporting requirements. ***COPS Office Response:*** Not applicable under CHRP (grantee agencies may not award subgrants). ***OVW Response:*** State agency grantees are restricted by their governing body as to what information can and cannot be released on the internet. OVW is currently developing a matrix to be completed by State STOP Administrators on how they are implementing the STOP program priorities and purpose areas in their own States. When completed, the matrix will provide a snapshot of how States are achieving the goals and objectives of their State implementation plans and it will highlight local project descriptions and grant award amounts. This project is currently in the data collection phase and information will

				be posted on the OVW webpage during FY 2010. OVW has also successfully persuaded State STOP administering agencies to adopt specific special conditions from their OVW awards and incorporate them in their subgrant awards to provide better monitoring insight. OVW is coordinating this effort with 56 jurisdictions and will host webinars to convey pertinent information and obtain feedback.
4. Monitoring	4.8 and 4.9	Have a process to ensure that all instances of alleged misuse of grant funds are properly documented and reported to the agency authorities and the OIG for follow-up. Strengthen procedures for referring problem grantees to the OIG.	Grant Fraud and Abuse Reporting Policy and Training	***OJP Response:*** *Training:* In 2009, over 500 OJP staff attended OIG-led training on detecting and preventing fraud and in FY 2010 additional fraud-related training will be provided across OJP. OJP works with OIG staff to coordinate grant fraud training at OJP sponsored conferences and meetings. Additionally, a grant fraud component has been included in the OCFO Regional Financial Management training seminars. *Reporting:* Instructions to communicate any concern to supervisors and, as appropriate, to OCFO, OAAM, OGC, or directly to the OIG's Fraud Detection Office have been posted on the OJP Portal. Program offices are given an opportunity to submit recommended grants or grantees for inclusion in the OIG's annual audit plan, as well as the OCFO financial monitoring plan. OJP Instruction 7140.2B sets forth OJP policy and procedures for: 1) examining allegations of misuse of funds; 2) examining allegations of program or financial non-compliance by a recipient of a grant or cooperative agreement; 3) examining alleged conflicts of interest; and 4) referral of those allegations to the OIG, when appropriate. *Monitoring:* In FY 2010, the OJP Grant Monitoring Guidelines were modified to include guidance for grant managers to ensure that while on-site they have checked for potential indicators of fraud, waste, and abuse. ***COPS Office Response:*** All COPS staff responsible for awarding, administering, and monitoring grants are aware of their responsibility to report anomalies or other indicators or instances of the misuse of grant funds. The OIG's Fraud Detection Office (FDO) provides periodic fraud

				awareness training to COPS Grant Program Specialists, Monitoring Specialists, and audit and legal staff, and conducted fraud prevention training specific to the Recovery Act in April 2009. The COPS Office meets on a quarterly basis with the OJP-OCFO, OIG/FDO, and OIG Audit Division to discuss the status of ongoing grant investigations and provide referrals of possible grant fraud to OIG/FDO. Furthermore, COPS coordinates closely with the OIG/FDO on any investigation initiated by other federal offices that may involve COPS grant funding, and provides documentation and witnesses for prosecutions as appropriate. ***OVW Response:*** OVW does not currently have a protocol on receiving and processing complaints from grantees and members of the general public about grant fund misuse or fraud. Historically, OVW has received infrequent reports alleging misuse of OVW grant funds, and has assessed each of these reports on a case-by-case basis to determine the best course of action following-up on the allegations. In order to establish consistent guidelines, OVW will address this issue with the DOJ Grants Challenges Working Group previously mentioned. OVW also plans to work with the OIG to address these issues with our grantees. During the first quarter of 2009, OVW staff attended training conducted by DOJ OIG on grant fraud and abuse. OVW continues to incorporate this training into its annual grantee orientations, which OVW program specialists are required to attend. As described above OVW and OIG will work together to develop policies and procedures that ensure OVW staff take the necessary steps required to provide detailed information regarding grant fraud, waste and abuse to the OIG for audit and investigation.
4. Monitoring	4.10	Require grantees to display OIG hotline posters in common	OIG Materials Included in Award Packages	***OJP Response:*** OJP will work with DOJ/OIG to obtain flyers or other materials to provide to grantees. Grantees will be requested to post the materials in common areas. ***COPS Office Response***: Rather than requiring the display of OIG

		areas to ensure proper referrals of fraud issues to the OIG		hotline posters within law enforcement agencies, COPS believes that those grantee agency personnel directly involved with the administration and oversight of COPS grants will benefit most from having such information included within the CHRP grant management materials, such as the grant award document, Grant Owner's Manual, COPS website, and CHRP "eLearn Center" training site. ***OVW Response:*** OVW will work with OIG to obtain posters and additional awareness material to provide to grantees. Also, the OVW's annual new grantee orientations, which usually occur in the same fiscal quarter that awards issue, will provide OIG will an excellent opportunity to promote the hotline posters during their presentation segment. OVW will request grantees to post this information in common areas.
4. Monitoring	4.11	Include a requirement for Recovery Act grantees and subgrantees to promptly refer evidence of fraud, etc., to the OIG	Grant Fraud and Abuse Reporting Special Condition	***OJP Response:*** OJP imposes a special condition on all awards requiring grantees to report potential fraud, waste, and abuse, and similar misconduct. The condition states that the recipient must promptly refer to the DOJ OIG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other person has either 1) submitted a false claim under the False Claims Act; or 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct. ***COPS Office Response:*** As part of grant condition #16 ("Recovery Act Accountability and Transparency") for each CHRP award, the grantee "...agrees to promptly refer to the Office of the Inspector General any credible evidence that a principal, employee, agent, contractor ... or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving Recovery Act funds." ***OVW Response:*** OVW imposes a special condition on all grant awards, in addition to Recovery Act ones, requiring grant recipients to promptly refer to the OIG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other

				person has either: 1) submitted a false claim for grant funds under the False Claims Act; or 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving grant funds. This condition also applies to any subrecipients. Potential fraud, waste, abuse, or misconduct should be reported to the OIG. There is no approved special condition that requires grantees or subgrantees to notify OIG and OVW of overpayment. OVW will work with JMD's Office of General Counsel to develop a special condition addressing overpayment of funds. OVW Recovery Act awards also include a special condition advising grantees that misuse of award funds may result in a range of penalties, including suspension of current and future funds, suspension or debarment from federal grants, recoupment of monies provided under an award, and civil and/or criminal penalties.
4. Monitoring	4.12	For grantees with the potential for significant problems, maximize the use of special conditions.	Increased Use of Special Conditions	***OJP Response:*** OJP has created a number of new special conditions to Recovery Act awards as well as those recipients designated as high-risk that may necessitate actions such as increased monitoring and/or prohibitions on the drawdown of funds until certain requirements are met. ***COPS Office Response:*** All COPS grantees are required to comply with the grant conditions associated with their COPS awards. [In limited circumstances, awards may also be subject to special conditions that prevent agencies from drawing down or accessing grant funds until the special conditions are satisfied as determined by the COPS Office.] For grantees funded under CHRP, there are 16 grant conditions associated with their awards, including (but not limited to) those pertaining to reporting requirements, allowable costs, nonsupplanting, grant extensions and modifications, monitoring and evaluations, community policing activities, assurances and certifications, and Recovery Act accountability and transparency. ***OVW Response:*** OVW has been proactive with implementing measures that are meant to safeguard grant funds that are awarded to

				grantees that have the potential for significant problems. For example, individuals are statutorily eligible to apply for grants from OVW's Tribal Domestic Violence and Sexual Assault Coalitions Program. Private individuals can receive a grant award on behalf of a group of individuals who are interested in starting a nonprofit tribal coalition. Out of concern for the increased risk involved in making grant awards to individuals, OVW automatically denotes such awards as high-risk and tracks them through the GAT system. To reduce risk of misuse or waste, OVW restricts drawn down for individuals who are grantees and access to funds is limited to a maximum of $65,000. Also, OVW's Tribal Unit worked very closely with JMD's Office of General Counsel to create a special condition that allows for individuals who are grantees to designate the incorporated tribal coalition as its successor-in-interest on the grant award and addresses other potential legal issues that may be encountered under such arrangements. Another special condition imposed on such awards also restricts the grantee's access to grant award funds until the grantee submits proof to OVW that the tribal coalition has been incorporated, has created by-laws, and has established a board of directors.
4. Monitoring	4.13	Establish early intervention teams to make site visits to high-risk grantees within 30 days of award.	Mitigating Risk with On-site Monitoring	***OJP Response:*** Grantees that have been designated as high-risk have a special condition on their awards to acknowledge that they will be subject to additional financial and programmatic on-site monitoring, which may be on short notice, and agree that they will cooperate with any such monitoring. High risk grantees must also promptly provide, upon request, financial or programmatic-related documentation related to their award, including documentation of expenditures and achievements and within 120 days of the award, agree to ensure that at least one key grantee official completes a DOJ-sponsored financial administration training, which includes a session on grant fraud prevention and detection. OAAM tracks on-site monitoring visits for high-risk grantees through quarterly monitoring updates. OAAM provides program offices with a

				summary of high-risk grantee site visits conducted and will report on program office compliance with this requirement in the FY 2010 Monitoring Report. ***COPS Office Response:*** As explained earlier, site visits for CHRP grantees began in FY2010. It should be noted that many factors can delay the hiring of police officers at the local level, including recruiting, training, and other budgetary issues. Historical hiring practices by COPS grantees reflect that it can take an average of 12 to 18 months to fill officer positions. Therefore, the majority of site visits to take place in FY2010 will be to grantee agencies with previously awarded, active grants under other COPS programs as well as newly-awarded CHRP grants. ***OVW Response:*** During early stages of project implementation, OVW subjects high-risk grantees to more intense fiscal and programmatic monitoring. When developing monitoring plans, OVW Program Specialists prioritize high-risk grantees. OVW, however, will not make visits to high-risk grantees within 30 days of the award. Thirty days after grant awards are issued, most grantees have not accepted the award, agreed to grant award terms, hired project staff, or executed any project activities. Thus, monitoring even high-risk grantees at this stage, or even 30 days after award acceptance, may not disclose any issues. OVW will consider implementing a process for conducting site visits to high-risk grantees within the first 6 months of the award cycle. OVW will, however, require high risk grantees to attend the program grantee orientation regardless of the grantee's status as new or continuation. Also, as a preventive measure, OVW and OJP's OAAM have designated several Special Conditions specifically for high-risk grant recipients. These Special Conditions mandate that high-risk grantees: • participate in OJP's financial grant administration training with 120 days of receipt of award; • maintain a separate bank account to be used solely for transactions and expenditures related to the OVW grant award, and provide

				documentation of the separate bank account to OVW; • periodically provide OVW with financial or programmatic-related documentation directly upon request; • promptly cooperate with additional financial and programmatic on-site monitoring on short notice; • submit a copy of its subrecipient monitoring policies and procedures to OVW; and • submit a copy of their time/attendance policies and procedures, which must include how grant-related payroll costs will be allocated. OVW also restricts high-risk grant recipients from accessing newly awarded grant funds until: 1) outstanding audit issues are resolved; 2) procurement policies and procedures are submitted and approved by OVW; or 3) grantee's time/attendance policies or monitoring procedures have been submitted and approved by OVW.
4. Monitoring	4.14	Consider seeking supporting documentation from all grantees for randomly-selected drawdown requests	Monitoring Grantee Drawdowns	***OJP Response:*** OAAM reports quarterly on the drawdown status of Recovery Act grantees to determine whether there are anomalies that would warrant further review by a program manager or OCFO and/or require more documentation from grantees. In addition, OJP's Enterprise Reporting Tool (an online report generator using data from GMS and the FMIS2, the DOJ financial management system) now allows grant managers to check drawdown patterns in real time. Beginning in FY 2008, a review of drawdown patterns is required as part of conducting the annual desk review and as preparation for on-site grant monitoring. ***COPS Office Response:*** After preliminary implementation of the CHRP program, COPS will consider whether it would be of any benefit to seek supporting documentation from all grantees for randomly-selected drawdown requests. ***OVW Response:*** OVW will work with OJP to integrate the use of OJP's Enterprising Reporting Tool. This is an online report generator using data from the Grants Management System, the Financial Management Information System II, and the DOJ financial management system.

				Unfortunately at this time, OVW does not have direct access to this tool, as it is accessed on OJP's Portal. If OVW Program Specialists or GFMD analysts had access to this tool, they could check drawdown patterns in real time.
4: Monitoring	4.15	Review and modify existing internal policies of grant-making agencies so that it is clear that personnel are required to report anomalies or other indicators of the misuse of grant funds.	Grant Fraud and Abuse Reporting Policy and Training	***OJP Response:*** Training: In 2009, over 500 OJP staff attended OIG-led training on detecting and preventing fraud and in FY 2010 additional fraud-related training will be provided across OJP. OJP works with OIG staff to coordinate grant fraud training at OJP sponsored conferences and meetings. Additionally, a grant fraud component has been included in the OCFO Regional Financial Management training seminars. Reporting: Instructions to communicate any concern to supervisors and, as appropriate, to OCFO, OAAM, OGC, or directly to the OIG's Fraud Detection Office have been posted on the OJP Portal and will be posted in OJP common areas. Program offices are given an opportunity to submit recommended grants or grantees for inclusion in the OIG's annual audit plan, as well as the OCFO financial monitoring plan. In addition, OJP has policy and procedures in place for: 1) examining allegations of misuse of funds; 2) examining allegations of program or financial non-compliance by recipient of grant of cooperative agreement; 3) examining alleged conflicts of interest: and 4) referral of those allegations to the OIG when appropriate. Monitoring: In FY 2010, the OJP Grant Monitoring Guidelines were modified to include guidance for grant managers to ensure that while on-site they have checked for potential indicators of fraud, waste, and abuse. ***COPS Office Response:*** As mentioned previously, all COPS staff responsible for awarding, administering, and monitoring grants are aware of their responsibility to report anomalies or other indicators of the misuse of grant funds. The OIG's Fraud Detection Office (FDO) provides periodic fraud awareness training to COPS Grant Program Specialists, Monitoring Specialists, and audit and legal staff, and conducted fraud prevention training specific to the Recovery Act in April

				2009. Furthermore, COPS staff are trained through a variety of courses that focus on federal grant management and oversight responsibilities for federal grant monies, and the COPS Office Legal Division provides frequent training to employees on the nonsupplanting requirement. ***OVW Response:*** As described in OVW's response to OIG recommendation 4.8, OVW plans to work with OIG throughout the next fiscal year to develop policies and procedures that ensure OVW staff take the necessary steps required to provide detailed information regarding grant fraud, waste and abuse to the OIG for audit and investigation.
5. Performance	5.1	Establish a better policy for determining when to allow retroactive approval for violations of requirements and conditions versus requiring the grantee to repay questioned-costs.	Enhancing OCFO Monitoring Protocols	***OJP Response:*** In FY 2009, as part of an OAAM assessment of OCFO monitoring practices, OAAM examined OCFO's policies on retroactive approval. OAAM made recommendations that OCFO should lead the development of guidance on retroactive approval for unauthorized expenditures to ensure it is offered only in appropriate circumstances. In FY 2010, OCFO will be convening a working group to develop guidance/instruction to ensure that questioned costs are treated consistently within each program office and across OJP, when feasible. OCFO anticipates that guidance will be developed by July 31, 2010. ***COPS Office Response:*** COPS determines whether to allow retroactive approval for violations of requirements and conditions (versus requiring the grantee to repay questioned costs) on a case-by-case basis, taking into consideration such factors as the severity and extent of the specific violations and the grantee's ability to repay the costs in question. Apart from retroactive approval and repayment, other actions that may be taken by the COPS Office to remedy grant violations include temporarily withholding payments pending correction of the situation by the grantee; disallowing all or part of the cost of the activity or action not in compliance; wholly or partly suspending or terminating the grant; conditioning a future grant or electing not to provide future grant funds to the agency until appropriate actions are taken to ensure compliance; withholding or barring the agency from obtaining future awards; recommending civil or criminal enforcement by

				other agencies, and/or taking other remedies that may be legally available. ***OVW Response:*** Historically, OVW has considered grantee requests for retroactive approval of unallowable costs identified as part of an audit on a case-by-case basis. OVW will raise this issue with the DOJ Grants Challenges Working Group.
5. Performance	5.2	Assist grantees in determining the appropriate information to collect in order to assess program performance.	Enhancing Performance Measurement System	***OJP Response:*** Program performance measures are defined in the grant program announcements. Grantees are required to report routinely on performance measures in progress and performance reports, as well as sophisticated systems, such as the Performance Management Tool, currently used by the BJA and the Office of Juvenile Justice and Delinquency Prevention (OJJDP). In addition, OCFO and OAAM are providing technical assistance to program offices in the use of logic models, development of performance measures, and data collection and validation methods. As part of its program assessment function, OAAM will continue to assess grantee performance data, review program logic model feasibility, and measure program outputs and outcomes against these logic models. ***COPS Office Response:*** COPS Action: CHRP grantees were notified in their Grant Owner's Manual that the following information will be collected through Recovery Act progress reports: • Total amount of funds received, and of that, the amount spent on projects and activities; • A list of those projects and activities funded by name to include: »» Description »» Completion status »» Estimates on jobs created and preserved The reports submitted directly to the COPS Office will request information about the status of an agency's hiring and/or rehiring of additional career law enforcement officers and its grant-related community policing activities. ***OVW Response:*** Since 2001, OVW has implemented the VAWA

				Measuring Effectiveness Initiative, an intensive effort to improve how we measure and monitor the work of OVW grantees. In 2001, OVW entered into a cooperative agreement with the Muskie School of Public Service's Catherine E. Cutler Institute for Child and Family Policy (the Muskie School) to develop and implement state-of-the-art reporting tools to capture the effectiveness of OVW grant funding. Since that time, the VAWA Measuring Effectiveness Initiative has developed, revised, and refined computerized progress report forms for grantees to collect this information and report online through GMS. A significant part of this effort has been to establish strong, clearly defined, measurable performance measures for OVW grant programs. Many of these quantitative measurements are standard across OVW grant programs, while others are tailored to reflect the different statutorily authorized activities that grantees perform. Over the years, OVW has worked closely with the Muskie School to create new reporting forms and to revise older forms to capture statutory changes made by VAWA 2005. OVW collaborated with the Muskie School to develop new progress reporting forms for the grant programs that OVW launched in Fiscal Year 2009, and is currently working with the School to develop forms for the programs being launched in Fiscal Year 2010. The Muskie School also has created free Access databases that grantees may use to help collect necessary data over the course of a reporting period.
5. Performance	5.2	Assist grantees in determining the appropriate information to collect in order to assess program performance	Technical Assistance for Grantees	***OJP Response:*** Many OJP program offices offer direct technical assistance to grantees in the areas of performance measurement data collection. In particular, the OJJDP and BJA have web pages dedicated to guidance on collecting, aggregating, and reporting on performance measures. ***OVW Response***: The Muskie School also plays an ongoing role in training OVW grantees on how to complete these forms. They make presentations at each of OVW's annual, new grantee orientation conferences and offer training by teleconference on a semi-annual basis for each OVW grant program.

5. Performance	5.3	Have procedures in place to ensure that all decisions made in response to grantee requests are documented in writing.	Documenting Decisions Made in Response to Grantee Requests	***OJP Response:*** OAAM will work with the program and support offices to develop procedures to ensure that all decisions made in response to grantee requests regarding a particular course of action are documented in the official grant file. This is particularly important in cases when approval is given to the grantee relating to the allowable use of funds. ***COPS Office Response:*** COPS' grant administration procedures require that decisions made in response to grantee requests for specific grant action, including those for award extensions, modifications, and withdrawals, are documented in writing. ***OVW Response:*** OVW staff emphasize to grantees at each of the agency's grantee orientation conferences the importance of establishing and maintaining ongoing communication with their assigned OVW Grant Program Specialist. Grantees are advised to seek approval from their Program Specialist prior to making changes to their grant-funded projects. Some OVW policies about the steps required for grantees to change their project are specified in OVW's standard award special conditions. For example, every OVW grantee that receives an award from an OVW grant program that requires applicants to execute a Memorandum of Understanding (MOU) has a special condition on its award that clearly states that they must obtain approval from OVW before adding or removing any of the agencies or organizations that signed the original MOU. Historically, when OVW issues guidance that affects all of the recipients of one its grant programs, OVW has shared that guidance with all those grantees. For example, over the years, OVW has issued and revised lists of Frequently Asked Questions for its State STOP Administrators. All OVW grantees receive a special condition on their awards that specifies that they must obtain prior approval from OVW before spending any OVW grant funds on travel to a non-OVW sponsored training event. OVW grant program units vary in their policies regarding the enforcement of the travel special condition. Some units require grantees to complete and submit a written form for review and approval,

				while others instruct their grantees to submit a formal Grant Adjustment Notice requesting approval for a change in project scope. While both policies result in written documentation that the grantee can add to its file to show that OVW approved its request, the discrepancy in the policies from one program unit to the next will be addressed. OVW will develop a standard policy regarding the documentation of OVW's approval process for grantee-initiated changes to the scope of their project. OVW's working group on improving its grant management process will develop this policy, as well as the other new policies and protocols that are necessary to improve our administration of grant funds.
5. Performance	5.3	Have procedures in place to ensure that all decisions made in response to grantee requests are documented in writing.	Maintaining Official Grant Files in an Automated System	***OJP Response:*** As of May 2009, with the enhancement of the monitoring module, GMS is a full-service "one stop shop" for grant monitors and funding recipients to manage their awards. The web-based system tracks the life cycle of a grant and interfaces with both the program and support offices and the funding recipients. Each stage of the grant process, including application, award, reporting, monitoring, and closeout, is documented within the system. Correspondence and records are maintained as part of each individual grant file. Automatic notification e-mails are generated from the system relating to the award of a grant and reminders to submit reports on time. ***OVW Response***: OVW has a reimbursable agreement with OJP which includes use of the OJP Grants Management System which provides an automated mechanism for administering and managing grant awards. OVW's Records Management Working Group is currently considering the advisability of and requirements for establishing GMS as the official grant file.
5. Performance	5.4	Ensure that granting agencies have a process to carefully review	Assessing and Resolving Problems with Program and Financial Status Reports	***OJP Response:*** OJP requires grantees to submit periodic progress reports and financial reports through the GMS progress reporting and financial reporting modules. Program offices and OCFO have immediate access to these reports to ensure that project activities are on track, and meeting established timelines. When questions or concerns arise from the review of the report, the grant manager can

		grantee's narrative progress reports, to identify any grantees at risk of failing to fulfill stated goals and mission		send the progress report back to the grantee with a change request. The grantee can make the necessary changes and resubmit the report. The OCFO performs a financial review and contacts the award recipient to advise of any errors, provides technical assistance, and requests a revised SF 425, if necessary. If the recipient does not submit a revised copy, OCFO Customer Service Center Staff notify the recipient in writing that funds may be withheld until the recipient submits a revised report. ***COPS Office Response:*** COPS Office staff will review CHRP progress reports to assess grantee performance and compliance in terms of officer hiring (the number of new sworn officer jobs created and/or preserved) and community policing implementation and enhancement. Furthermore, questions regarding the anticipated retention of officer positions will be asked of CHRP grantees annually through their COPS progress reports, and any agency indicating potential problems in this area will be contacted by COPS staff. As necessary, such grantees may be offered program implementation guidance or technical assistance with regard to retention planning, and/or may be monitored through on-site visits or other follow-up activity. ***OVW Response:*** OVW's grantees are required to submit their annual and semi-annual programmatic progress reports online through OJP's GMS. The OVW Grant Program Specialist assigned to manage the award reviews the report online and will follow-up with the grantee if there are questions or concerns about the content of the report. OVW's grantees are required to submit their annual and semi-annual programmatic progress reports online through OJP's GMS. The OVW Grant Program Specialist assigned to manage the award reviews the report online and will follow-up with the grantee if there are questions or concerns about the content of the report. Generally, on each OVW grant program unit, each Program Specialist is assigned to monitor grant awards by State. Grantees submit their semi-annual program progress reports online via GMS. The reports are in user-friendly format that enables the Program Specialist to carefully

				review each section of the report. Program Specialists routinely send the reports back to grantees to seek further clarification on statements made in the reports, or to perform necessary corrections on the information in the reports. Grantees are able to respond to the Program Specialists in GMS, which makes the process of correcting reports easier. Program Specialists initiate follow-up contact with grantees that appear to be having difficulty developing or implementing their grant-funded projects. There are no additional reporting requirements imposed on these grantees; however, OVW Grant Program Specialists use OVW's GAT to create an individualized monitoring plan for every OVW grantee. Grantees that are identified by GAT as being in need of additional assistance are contacted more frequently by their assigned Grant Program Specialist. The increased frequency of e-mails and phone calls, and possibly an on-site monitoring visit, means that grantees who might be struggling will receive more intensive supervision. The use of intensive supervision techniques will enable OVW to attempt to identify program development and implementation problems earlier on and offer the grantee access to technical assistance if necessary.
5. Performance	5.4	Ensure that granting agencies have a process to carefully review grantee's narrative progress reports, to identify any grantees at risk of failing to fulfill stated goals and	Addressing Late Reports	***OJP Response:*** Grantees must submit financial reports 30 days after the reporting period and progress reports 45 days after the reporting period. If the grantee has not submitted either the financial or progress report timely, an automatic action is taken that prohibits the grantee from drawing down the grant funds. GMS notifies the grantees by e-mail of this action. Once the grantee submits the overdue report, GMS immediately generates a "release of funds" notice and the funding freeze is lifted. ***OVW Response:*** As stated in 5.3, OVW uses the OJP's GMS for many grants administration functions, including the receipt of grantee progress reports. GMS has a function which now automatically freezes grant funds for grant recipients whose progress reports are not submitted on time.

		mission		
6. Training	6.1	Key grantee officials should be required to take annual grant administration training	Providing Grantee Training Opportunities	***OJP Response:*** *Financial Management.* Monthly Regional Financial Management Training Seminars are available for anyone involved in financial administration of formula or discretionary grant programs administered by OJP. The sessions include the application process, procurement, methods of payment, matching requirements, financial reporting, indirect costs, confidential funds, program income, up-to-date information on grant-related financial regulations and Office of Management and Budget circulars, and hands-on exercises. The seminars are free to recipients of Department of Justice funding. Beginning in FY 2010, OCFO provides training to Recovery Act grantees focused on general risk-prone areas, as well as those specific to or more likely for grantees funded by the Recovery Act. The OJP Financial Guide, available on-line, serves as a primary reference manual to assist award recipients in fulfilling their fiduciary responsibility to safeguard grant funds and ensure funds are used for the purposes for which they were awarded. The Guide serves as a day-to-day management tool for OJP award recipients and may also be used by subrecipients in administering their grant programs. The provisions of the Guide apply to all OJP awards. OAAM provides grantees with customized, intensive training to ensure they are managing their grants effectively. Grantees designated as high risk are required to attend DOJ-sponsored financial management training. OAAM has recently expanded on-line opportunities for e-training grantees. Current Training: *GMS On-line Training Tool.* The GMS On-Line Training Tool provides step-by step instructions to complete various functions within GMS, such as grant adjustment notices, progress reporting, and closeouts, as well as provide guidance on administrative policies. *Post-award Grant Administration* A training presentation on post-award grant management is available to grantees on the OJP funding

				resources webpage. *Recovery Act Requirements and Reporting grantee training*. OJP in cooperation with the OVW and COPS has hosted three webinars on Recovery Act requirements and implementing guidance. Key areas covered include calculating and reporting jobs recipient reporting requirements, and using the central reporting solution, www.FederalReporting.gov. These webinars remain accessible to grantees through the OJP Recovery Act Website. *Grants 101*: A step-by-step on-line tutorial on the grant process designed to help prospective grantees prepare more effective applications. The tutorial includes an overview of the OJP grant process for both competitive and noncompetitive programs; description of the application review process; and expert tips to help applicants find new funding opportunities and write strong proposals. Forthcoming Training: *How to Write a Quality Application*. This training is an on-line course that provides instructions, job aids, and expert advice on the planning, researching, and writing of a grant application. ***COPS Office Response:*** As described previously, the COPS website provides substantial guidance to grantees regarding proper award maintenance, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. Additional on-line resources specifically related to funding to be provided under the Recovery Act include detailed information on nonsupplanting and retention requirements, tips for maintaining fully complete award files, and an instructional podcast for CHRP program applicants. In preparation for the COPS Hiring Recovery Program, COPS has awarded funding to establish an interactive CHRP eLearn Center to deliver both grants management training and community policing training to grantee agencies. At their own convenience and at far less cost than instructor-led training, CHRP grantees will have

				access to information and resources on-line that will help them effectively administer their grant and employ sound community policing practices. After the initial implementation of this CHRP-based training, COPS will evaluate the success of the eLearn Center to assess the potential for enhanced development of the system, including its use for either mandatory training or specific training tailored to high-risk grantees. ***OVW Response:*** Currently, OVW conducts grantee orientations for all new grantees receiving support from each of our discretionary grant programs. These orientation sessions are mandatory for new grantees and new project directors of continuation grants. Continuation grantees with experienced project directors may also attend. We provide new grantees with comprehensive information and resources on grants management and substantive guidance on how to effectively implement the OVW program from which they are receiving support. We provide guidance on how to utilize OJP's Grants Management System to conduct required grant activities, including the submission of required reports (financial and programmatic reports); initiating Grant Adjustment Notices (no-cost extension requests, change of scope, budget revisions, and change of contact information); and closing out the award. To ensure that grant recipients understand how to comply with relevant federal regulations and policies, several Department of Justice agencies are also represented at our new grantee orientations, including OJP's Office of Civil Rights and the DOJ Office of the Inspector General. The Office of the Inspector General's Fraud Detection Office participates in orientation addressing grant fraud awareness and risk assessment training to remind participants of the specific risks to these funds, encourage discussion of fraud prevention and detection techniques, and emphasize employees' obligations when they identify indicators of misuse or fraud. As previously mentioned, the OIG also makes a presentation at our annual conference for State STOP Administrators and State Coalition Directors. We will add those presentations to the agenda of all OVW sponsored grantee

				conferences. During FY2011, OVW will develop training opportunities for all grantees to take advantage of throughout the life of their award. Specifically, we will: • Add a section on our website devoted to grants management. We will include all of the information presented at new grantee orientations so that new project staff can easily access it. In addition, we will develop and post "Frequently Asked Questions" on grants management; • Explore the possibility of conducting webinars or conference calls throughout the year on grants management issues that have been identified as problematic by the OIG and/or OVW staff; • Determine the feasibility of implementing an on-line grant administration training program that can administer a test to ensure the recipient understands the basic requirements and can track the recipient's completion of the training; • Send out e-mail alerts to our grantees providing information and resources about particular issues we identify as grants management problems and trends in the OVW quarterly Grants Management Forums; and • Encourage FY 2010 applicants to include funds in their budgets to attend Financial Management Training Seminars.
6. Training	6.2	Offer annual training to grant managers to reinforce administrative, financial, and programmatic requirements for the types of grantees they award	Providing Grant Manager Training Opportunities	***OJP Response:*** OAAM maintains a continuous schedule of training courses for OJP staff: *Accountability for Federal Grants.* Focuses on developing measurable objectives and assigning performance measures; reviewing a project application for measurable objectives, meaningful measures, and achievable targets; reporting on project performance; analyzing progress reports; and developing a plan for improving performance. *Annual Grant Managers Manual Training.* Covers new OJP and DOJ policy and changes existing policy and procedures. Topics discussed in FY 2010 training included the following: Recovery Act requirements, monitoring, high risk grantees, federal financial reports, conference cost

				reports, and closeouts. *Processing an Award*. Covers the award process, from generating the electronic pre-award documents (redbook) through issuing the award to the grantee. OJP's policies and procedures are described as well as various types of funding mechanisms. *Post Award Grant Management*. Focuses on the grant manager's role in approving changes to grants, reviewing progress reports and financial reports, monitoring grants, and closing grants. *Effective Grant Monitoring*. Focuses on grant monitoring and oversight as an integrated process of programmatic, financial, and administrative management that occurs throughout the grant life cycle from award through the closeout of program activity. ***COPS Office Response:*** As mentioned previously, the OIG's Fraud Detection Office (FDO) provides periodic fraud awareness training to COPS Grant Program Specialists, Monitoring Specialists, and audit and legal staff, and conducted fraud prevention training specific to the Recovery Act in April 2009. Furthermore, COPS staff are trained through a variety of courses that focus on federal grant management and oversight responsibilities for federal grant monies, and the COPS Office Legal Division provides frequent training to employees on the nonsupplanting requirement. ***OVW Response:*** OVW's grant program specialists attend the new grantee orientations which are offered to our grantees and described in answer 6.1. OVW has conducted internal grants administration training for OVW staff. Additionally, grant administrators have attended external grant management courses, as well as, the OJP Financial Management class. OVW's "Senior" Grants Program Specialists are currently developing an internal grants administration and management training curriculum which will be mandatory for all OVW grant administrators.
6. Training	6.3	Provide	Collaborative	***OJP Response:*** OJP supports several working groups and boards that

		opportunities for grant managers to discuss common questions and problem areas of grantee performance and compliance.	Opportunities for Grant Managers	meet regularly with agendas developed in advance and minutes recorded and distributed to group members. Examples of these groups include: the Grants Management Board to discuss policy and management issues; the GMS Users Group to discuss technical issues with GMS; the Business Process Improvement Steering Committee to discuss grant management policies and procedures; and the Monitoring Working Group to discuss common monitoring practices and emerging issues. OJP is currently working on formalizing communication strategies for discussing grantee performance matters and evidence-based practices for grantees. OJP has developed a portal page for grant managers, which includes documents and announcements around grant management best practices, policies, and procedures. ***COPS Office Response***: Grant managers are always able to provide feedback, ask questions, and discuss areas of concern by calling or e-mailing the COPS Grant Program Specialist assigned to their state or the COPS Office Response Center. In addition, as the CHRP on-line eLearn Center is developed, the possible use of a variety of different interactive mechanisms, including webcasts, "chat sessions," and other methods of discussion, will also be explored. ***OVW Response:*** OVW manages grants in units or teams. These teams meet each week to discuss a variety of programmatic and grant related issues. OVW periodically holds "all program specialists" meetings. As part of the training curriculum currently being developed for OVW grant administrators, opportunities also will be provided for all program specialists to convene and collaborate. Additionally, many of OVW's special initiatives are developed and managed across programmatic units, providing opportunities for grant managers to collaboratively problem solve and exchange ideas.
7. Communications	7.1	Increase communication with grantees and new grantees in	Communicating Through the OJP Web Site, USASpending.gov, and	***OJP Response:*** OJP maintains an active website to inform its users about current news, research, and opportunities for funding. OJP continues its timely submission of grant award information to the public web site, USASpending.gov (and for Recovery Act funding, to FederalReporting.gov). OJP also offers a free e-mail subscription

		particular.	Recovery.gov	service through GovDelivery. This service allows visitors to OJP web sites to receive notifications by e-mail when new information is available. ***COPS Office Response:*** As described previously, the COPS Office maintains a highly developed Internet site through which applicants have been able to submit questions (and receive answers via e-mail), review categories of frequently asked questions, listen to a "podcast" pertaining to CHRP funding, and download program materials for use during the on-line application process. The COPS website also provides substantial guidance to grantees regarding proper award maintenance, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. Going forward, the COPS website will also serve as a portal to access the on-line eLearn Center training being created for CHRP grantees, and which is likely to be expanded to future grantees of other COPS programs. Use of this training module will be tracked via the on-line learning system. Also as mentioned, COPS maintains an in-house call center for law enforcement agencies to contact for assistance with both grant application and award maintenance questions; more complex grant matters are immediately transferred to Grant Program Specialists for resolution. ***OVW Response:*** OVW uses a number of vehicles to foster communication with current grantees, both new and continuation. As previously stated, each OVW grant program hosts a new grantee orientation, which typically occurs within the first quarter of the grant project period. The orientation provides the opportunity for OVW Program Specialists to meet one-on-one with each grantee assigned to them. In addition, all OVW grant programs host technical assistance trainings and events, which are available to grantees throughout the project period. Several of the meetings create time on the agenda for grantees to meet with their assigned Program Specialists for an extensive period of time. During these opportunities, Program Specialists and grantees discuss topics such as project implementation,

				pressing concerns, or products developed utilizing OVW grant funds. OVW strives to conduct on-site monitoring visits to 10% of OVW's grantees, annually. Typically, site visits are one to two days in duration. They are excellent opportunity for the Program Specialist and grantee to meet for a significant period of time and for the Program Specialist to monitor the grant project. Although site visits are an ideal form of communication between the granting agency and the grantee, OVW does not have the resources needed to conduct a site visit with all OVW grantees. Program Specialists, on average, manage a grant load of approximately 90 active grants. OVW has entered into a number of cooperative agreements with organizations that are experts in the fields of domestic violence, dating violence, sexual assault, stalking and topic specific issues, such as elder abuse, disability, immigration, culture and the criminal justice system. These experts, known as technical assistance providers (TA providers) provide technical assistance to OVW grantees. TA providers interact with grantees using a number of mediums: on-site assistance; telephone; conference calls; e-mail and web-based training. TA providers have a firm understanding of what is occurring at the service level and within the organizations that OVW funds. OVW and the TA providers are in frequent, regular contact and discuss the grant program and grantees. Although TA providers are not the granting agency, they do represent the grant program and act as a contact for grantees. Various OVW grant programs have offered TA providers funding to provide on-site technical assistance to some grantees. The purpose of the on-site assistance can vary. Sometimes it is offered to provide grantees who may be struggling with the technical expertise necessary to help them develop and implement their grant-funded project. OVW TA providers have also used on-site assistance to provide local communities with customized training events as a cost-effective means of delivering training to a larger local audience. (Although TA Providers greatly enhance communication between OVW grantees and OVW, as well as among OVW grantees, they do not play a role in grant

				monitoring. Program monitoring is an inherently governmental function, which is performed by OVW staff. Moreover, TA providers are subject-matter experts in the field of violence against women; they are not qualified or well-suited to provide grantees with assistance on administrative compliance issues.) OVW has several policies around communicating with grantees. OVW's goal is to have Grant Program Specialists respond to all inquiries received from grantees within the USDOJ standard 24-hour response time. Telephone calls and e-mails must be returned within 24 hours when the Program Specialist is in the office and not on travel. When Program Specialists are on travel, telephone calls and e-mails must be returned within 24 – 48 hours. As a means to improve communication and increase work productivity, all Program Specialists have been issued Blackberries and laptop computers, which allow access to DOJ and OVW computer systems. OVW's previous attempts to establish a back-up system for its Grant Program Specialists have not met with much success due to general staffing resource issues. However, OVW does have a policy that requires each of its Grant Program Specialists to set up an out-of- office reply for e-mails that they may receive during their absence from the office. The reply states the dates of absence for the Specialist, and provides a phone number that grantees can call if they require immediate assistance. If the Specialist is on personal leave and is unable to respond to inquiries, the reply will indicate that as well.
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Performing Recovery Act Outreach Efforts	***OJP Response:*** Immediately upon passage of the Recovery Act, OJP employed an outreach effort using various communication vehicles to ensure that all potential and eligible applicants were informed of the funding opportunities, the process of applying for funds, and the reporting requirements of the Recovery Act. Outreach includes, but is not limited to— conducting Recovery Act recipient reporting trainings at program office and OCFO-sponsored conferences; OJP leadership and staff attending intergovernmental meetings and conferences to present and answer questions on Recovery Act requirements; and developing FAQs and tools to provide information to recipients and make available

				on the OJP website ***OVW Response:*** OVW, through TA providers, conducts conference calls and occasionally, webinars. A Program Specialist usually participates in such events, which allows for another opportunity to interact with grantees. OVW participated in a series of web-based seminars for recipients of OVW Recovery Act funds. OVW will explore how it can expand the use of this technology for all OVW grant recipients.
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Enhancing GMS	***OJP Response:*** To increase communication with grantees, OJP has enhanced a number of internal and external interfaces in GMS. The recent addition of a monitoring module in GMS provides an interface to enable grant managers to communicate the outcomes of site visits to grantees in a timely manner. ***OVW Response:*** As stated earlier, OVW utilizes OJP's Grants Management System. As such, OVW has a representative on the GMS board and will continue to work with OJP to identify needed enhancements to GMS.
7. Communications	7.1	Increase communication with grantees and new grantees in particular	Providing a Customer Service Center and GMS Support	***OJP Response:*** Recipients of OJP funding can submit questions about payments or any other financial matters to the OCFO Customer Service Center through a toll-free phone number or by e-mail at ask.ocfo@usdoj.gov GMS maintains a dedicated toll-free line available to offer support on general requirements for receiving funds, assistance with GMS, and referrals to program offices regarding OJP grant programs. ***OVW Response:*** While OVW does not have the staff capacity to provide a standalone Customer Service Center and GMS support, for a number of years, OVW has used the services of in-house contractors who provide direct GMS and other IT customer service to OVW grantees. OVW program specialists and managers provide grantees with programmatic customer service.

7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Providing Programmatic Support E-mail Systems	***OJP Response:*** OJP program offices encourage all users to send comments, suggestions, and information inquiries to e-mail accounts set up for this purpose. Users receive a response directly from program office staff, providing them with requested information or recommendations for other sources of information. ***OVW Response:*** As described earlier, OVW has established program specific e-mail address for each of its grant programs which are typically used when solicitations are open to the public. Additionally, since FY 2008, grantees have been able to communicate with OVW through an "ask OVW" email box. Some OVW grant programs also use quarterly newsletters to enhance communication with grantees.
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Conducting Webinars	***OJP Response:*** OJP has recently started to implement the use of webinars to disseminate timely information and communicate directly to targeted communities, such as tribal entities, new grantees, or Recovery Act grantees. ***OVW Response:*** OVW does provide opportunities for peer learning and information sharing. However, the methods, format and opportunities vary from program to program. Some of the grant programs maintain a dedicated list serve for grantees. Only a few of the grant programs have private log-in areas on a grant program-specific website for grantees. OVW will explore how the different grant programs are fostering communication, peer learning and information-sharing among the grantees. Once this information is obtained, OVW will determine the efficacy of creating standards of communication for all grant programs.
7. Communications	7.2	Facilitate communication with and among grantees, using tools such as RSS	Communicating through Press Releases and Media Advisories	***OJP Response:*** The OJP Office of Communications issues press releases announcing grant awards for significant grant programs. Announcements of grant awards are made available from the OJP web site as well. The OJP Office of Communications has recently set up an OJP RSS Feed for press releases and media advisories. ***COPS Office Response:*** Please see response to 7.1. In addition to

		feeds.		the information provided above, COPS has scheduled a redesign of our Recovery Act page that includes an RSS feed. An RSS feed is also in place for our monthly COPS Office "Community Policing Dispatch" newsletter. ***OVW Response:*** OVW communicates with grantees, potential grantees, and partners in the field on a monthly basis via the OVW Director's Message which addresses current news and upcoming events. When appropriate, OVW utilizes press releases as a communication vehicle. OVW also provides a Technical Assistance Calendar and Directory which provides OVW grantees with up-to-date information about technical assistance providers and upcoming training opportunities. DOJ has not approved the use of blogs, wikis, etc. on our public websites. All ARRA updates are published in RSS formats.
7. Communications	7.3	Reach out to state audit agencies that provide coverage of grantee management and solicit coverage and feedback on grantees' use of funds.	Single Audit Coordination	***OJP Response:*** OAAM provided a compliance supplement to OMB, for distribution to state audit agencies that is specific to Byrne/JAG. OAAM is considering creating additional compliance supplements for other, high-dollar value grant programs managed by OJP. In addition, OMB is considering a compliance supplement for state auditors to review Recovery Act grants. After reviewing this guidance, OAAM will determine whether additional compliance information should be provided to OMB specific to OJP's Recovery Act programs. OAAM is also responsible for resolving issues identified through grant Single Audits and maintains a database of these issues for analysis. OAAM continues to implement new methods of preventing recurring financial management issues identified in grantee organizations. ***COPS Office Response:*** The COPS Office does not work directly with state or local audit agencies that provide coverage of grantee management. OJP serves as the liaison between grantees and auditors in the conduct of Single Audit Act audits. ***OVW Response:*** OVW has a reimbursable agreement with OJP which includes financial monitoring services. OVW's Audit Liaison is responsible for office-wide coordination with OJP's OAAM and the OIG.

8. Financial Statements and Information Systems	8.1	OCFO's should consider the effect that new grants and grant spending programs will have on grant accrual estimate methods.	Quarterly Grant Accrual Meetings	***OJP Response:*** OCFO conducts an internal meeting at least quarterly to discuss grant accrual methods and modify those accrual methods based on anticipated need. For example, OCFO has made modifications to its accrual estimate methods for Recovery Act, based on expected changes to expenditure and drawdown patterns. ***COPS Office Response:*** The COPS Office will consider the effect that new grants and spending programs will have on grant accrual estimate methods. COPS plans to meet with JMD Finance to discuss the grant accrual methodology and whether or not we will need to adjust this methodology for CHRP grantees. ***OVW Response:*** As stated earlier, OVW has recently established a Grants Financial Management Division which will coordinate with the OVW Program Division and Budget Officer to assess the impact of new grants and grant spending programs. GFMD will also charged with collaborating with COPs and OJP on appropriate solutions.
8. Financial Statements and Information Systems	8.1	Develop procedures to alleviate the strain on information systems resulting from Recovery Act grants.	Enhancing Information	***OJP Response:*** The Office of the Chief Information Officer is in the process of making significant enhancements to it hardware and infrastructure to accommodate the increased use of the Grant Management System and the data contained therein. This includes additional servers and new switches/routers to further stabilize the system. ***COPS Office Response:*** The COPS Office does not anticipate any strain on our information systems resulting from Recovery Act grants. ***OVW Response:*** OVW's reimbursable agreement with OJP includes OVW's use of the Grants Management System. OVW will also work with the Justice Management Division to determine if the additional grants have had an impact on OVW's IT infrastructure.

OFFICE OF JUSTICE PROGRAMS

NATIONAL INSTITUTE OF JUSTICE (NIJ)

GUIDELINES ON THE ADMINISTRATION AND MANAGEMENT OF NIJ GRANT PROGRAMS

For NIJ Use Only

February 2010

Version 2 – Modified June 2010

PURPOSE OF THESE GUIDELINES

These modified Guidelines document new and additional policies and procedures for the administration and management of all NIJ grant programs with the objective of addressing several Office of Inspector General (OIG) findings and recommendations noted in Audit Report Number 09-38, *National Institute of Justice's Practices for Awarding Grants and Contracts in Fiscal Years 2005 through 2007.*

6-11-2010

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GUIDELINES ON THE ADMINISTRATION AND MANAGEMENT OF NIJ GRANT PROGRAMS

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I. BACKGROUND

In the Fiscal Year (FY) 2008 Appropriations Act, Congress directed the Office of the Inspector General (OIG) to audit competitive NIJ programs, projects, and activities, including contracts and grants, awarded in the last three fiscal years to determine whether these grants and contracts were awarded through a fair and open competitive process. In response, the OIG initiated an audit to: (1) evaluate whether competitive NIJ grants and contracts awarded in fiscal years (FY) 2005 through 2007 were awarded based on fair and open processes; (2) determine whether non-competitive NIJ grants and contracts awarded in those fiscal years were properly justified; and (3) identify costs related to NIJ grants and contracts that were administrative in nature and explain how those costs were determined[1]. OIG performed audit work at the NIJ headquarters in Washington, D.C., from March 2008 through July 2009.

A. OIG Audit Focus Areas

The OIG accomplished their objectives by first obtaining data from OJP that showed that NIJ awarded the following grants and contracts from FYs 2005 through 2007:

- 1,459 grants and grant supplements totaling more than $567 million, and
- 131 contract actions totaling more than $64 million.

B. OIG Results in Brief

Overall, for the grant awards OIG tested, deficiencies in administrative practices and controls did not allow OJP and the NIJ to demonstrate that grant award practices were based on fair and open competition. NIJ did not maintain adequate pre-award records to document that its grant award process ensured a fair and open competition. In addition, OIG identified instances where NIJ staff involved in the grant award process had potential conflicts of interest with grantees receiving awards, but nevertheless participated in the approval process for the grants in question. OIG also found that the NIJ's grant application review process, including initial program office reviews, peer reviews, documentation of program office recommendations, and documentation of NIJ Director selection, raised concerns about the fairness and openness of the competition process. In addition, OIG found that NIJ did not have knowledge of grantees' lobbying activities when making the award decisions because NIJ grantees and sub-grantees did not fully disclose lobbying activities that were potentially related to the NIJ grants or sub-grants.

For the non-competitive grants OIG tested, NIJ usually did not document the basis for non-competitively awarding discretionary grant funds. OIG also found instances where the NIJ improperly directed a grantee to use a specific organization to perform sub-grantee work without documenting the basis for directing that the work be non-competitively awarded to the organization.

For the competitive contract awards OIG tested, OIG found that certain aspects of the award process, such as approved requisitions, certifications of fund availability, and conflict of interest

[1] While the audit work concentrated on the NIJ's grant and contract awards in FYs 2005 through 2007, the OIG expanded their testing to awards made outside this time period, as necessary, to fully explore the NIJ's competitive award practices.

forms, were not consistently documented for the awards. For the non-competitive contract awards OIG tested, OIG found that NIJ did not adequately justify the sole-source basis for some awards. As a result, NIJ could not demonstrate that these contract awards were properly exempt from the competitive process required by government contracting regulations.

OIG also attempted to identify costs related to NIJ grants and contracts that were administrative in nature to examine how those costs were determined. However, OIG was not able to do this for all of the 1,459 grants listed on the grant universe listing provided by OJP. OIG found that 2 of the 1,459 grants were adjusting accounting entries and not actual grant awards for the period they reviewed. For 57 of the remaining 1,457 NIJ grants awarded during FYs 2005 through 2007, the grant budgets maintained in the OJP's Grants Management System (GMS) did not match the grant award amounts. Without the final budgets, OIG was unable to determine the administrative costs for these 57 grants. For the remaining 1,400 grants, OIG reviewed the final grant budgets and determined the administrative costs for the grants totaled about $64.1 million, or about 12 percent of the $551 million awarded for these grants. OIG found that 812 of the 1,400 grants had no administrative costs, while the administrative costs for the remaining 588 grants ranged from 0.03 to 65.65 percent of the total grant award amounts.

For 130 of the 131 contracts awarded by NIJ during FYs 2005 through 2007, OIG determined the administrative costs totaled about $990,000, or about 1.5 percent of the $64 million awarded for these contracts. The administrative costs were not readily identifiable for the other contracts. OIG found that 86 of the 130 contracts had no administrative costs, while the administrative costs for the remaining 44 contracts ranged from 0.02 to 41 percent of the total contract award amounts.

C. OIG Notable Findings

The audit report contains three findings related to NIJ's competitive award practices, NIJ's non-competitive award practices, and the administrative costs included in grants and contracts.

Finding 1 – Competitive Award Practices

- Grant Award Processes and Practices
- Pre-award Records
- Management of Conflicts of Interest Between Employees' Official Duties and their Private Financial Interests
- Application Review Process
- Contract Award Processes and Practices
- Lobbying Activities
- Program Oversight

Finding 2 – Non-competitive Award Practices

- Grant Award Processes and Practices
- Smith Alling Lane Awards
- National Forensic Science Technology Center (NFSTC) Awards
- Relationship Between NIJ and NFSTC
- Contract Award Processes and Practices

Finding 3 – Administrative Costs

D. OIG's Recommendations

There are nine recommendations for improving NIJ's grant and contract award practices to ensure fair and open competition, which include:

1. Establish procedures to ensure that key aspects of the pre-award and award process for grants and cooperative agreements are documented, such as:

   - identifying and working with OJP's Office of General Counsel to remedy any conflicts of interest, or the appearance of conflicts of interest, among agency staff involved in the pre-award evaluation process;
   - maintaining Disclosure of Conflict of Interest forms for peer reviewers selected to review grant applications and ensuring that peer reviewers are not allowed to participate when they identify conflicts of interest;
   - maintaining the NIJ Director's approved list of peer reviewers for each solicitation and ensuring that peer reviewers selected are on the approved list;
   - maintaining individual peer review comments or evidence that the peer reviewers agree with the peer review consensus report; and
   - ensuring that the reasons for denying applications are accurately recorded in GMS and that copies of rejection letters sent to rejected applicants are maintained.

2. Establish procedures to ensure that key aspects of the pre-award and award process for contracts are documented, such as:
   - completion of requisitions,
   - completion of fund certifications, and
   - identifying and remedying conflicts of interest among individuals involved in evaluating proposals.

3. Establish procedures to ensure that the required lobbying disclosure forms are submitted for all grantees, sub-grantees, and contractors and that the disclosures are considered when evaluating grant applications for award.

4. Ensure that the Office of Audit, Assessment, and Management (OAAM) periodically reviews the NIJ's process for awarding grants to ensure that NIJ grants are awarded based on fair and open competition.

5. Require NIJ to document the basis for non-competitive grant awards and issue guidelines for what constitutes a reasonable basis for making non-competitive grant awards.

6. Require NIJ to assess the independence of grant applicants for performing research studies before awarding the grants.

7. Require NIJ to document the basis for requiring grantees to use specific sub-grantees to perform work related to the grants.

8. Ensure that non-competitive justifications for contract awards fully explain the circumstances that led to the sole-source awards.

9. Ensure that the final approved grant budgets for formula grants are maintained in GMS and that the budgets match the amount of funds awarded to the grantees.

The final OIG audit report may be found at http://www.usdoj.gov/oig/reports/OJP/a0938.pdf

II. CONFLICTS OF INTEREST

Beginning in FY 2010, all NIJ staff members involved in the pre-award evaluation process (including Program Managers, Office Directors, Associate Office Directors, Division Directors, Assistant Division Directors, Grant Program Managers, Program Operations Specialists, Grant Management Officer, etc.) will review the Guidance on Conflicts of Interest (Appendix 1) and grant proposals submitted for all assigned solicitations. After reviewing the Guidance and grant proposals, the employee will prepare and submit a memorandum to his/her immediate supervisor for each assigned solicitation. See Appendix 2 for a sample memorandum. If no conflict is noted, the employee will deliver the signed memorandum to his/her immediate supervisor and a copy to the Office of Operations primary points of contact. Jamissen Freitag is the primary point of contact for the Office of Investigative and Forensic Sciences and Office of Science and Technology. Sherran Thomas is the primary point of contact for the Office of Research and Evaluation and International Center.

If an employee reports a potential conflict of interest, the signed memorandum should be delivered to the employee's immediate supervisor for action. The supervisor will review the signed memorandum, consider the conflict, review the subject employee's Confidential Financial Disclosure Report - OGE Form 450, and make a determination about whether or not a conflict exists. If the supervisor determines a conflict exists, he or she may require the staff member to recuse from dealing with a specific grant application or from an entire solicitation. The immediate supervisor will make a case by case determination. The determination will be noted in the memorandum and communicated to the employee. The signed memoranda will be provided to the Office of Operations primary points of contact for retention for a period of three years.

If the supervisor requires assistance from the Office of General Counsel (OGC) to make a determination, the Office of Operations primary points of contact will work with OGC and the supervisor to obtain OGC input.

III. CONFLICTS OF INTERESTS – PEER REVIEWERS

As each peer reviewer is confirmed by the OJP peer review contractor, each peer reviewer will be sent via email a conflict of interest form. The signed form must be returned to the peer review contractor within five business days of receipt. If a reviewer fails to return the form, the program manager will be notified and the reviewer will be removed from the panel. The Office of Operations primary points of contact will be responsible for ensuring that the conflict of interest forms are returned to the contractor prior to the start of the peer review process and maintained in the Grants Management System (GMS).

If a reviewer reports a potential conflict of interest, the contractor will communicate this to the program manager, the assigned Office of Operations primary point of contact, and the COTR. The program manager will resolve the issue by making a determination (e.g., assigning the reviewer to another application or removing the individual from the review), as appropriate, to retain the integrity of the peer review process. The assigned Office of Operations primary point of contact will maintain documentation on the final action taken to address the potential conflict of interest.

IV. APPROVAL OF PEER REVIEWERS LISTS

The program manager will identify and compile a list of proposed reviewers including contact information and take into consideration any specific reviewers the program office would like to use, the number of times a reviewer has reviewed for the particular organization, and new reviewers who possess the desired expertise. Working with the program manager, the assigned Office of Operations primary point of contact will prepare a memorandum for the program manager's signature to the NIJ Director through the appropriate Deputy Director, Office Director, and Division Director requesting approval of the proposed peer reviewers. See Appendix 3 for a sample template. Using NIJ's Consultant Information System (CIS), the Office of Operations primary points of contact will reformat a list of recommended peer reviewers and attach this list to the memorandum. The Office of Operations primary points of contact will ensure that peer reviewers are registered in both the NIJ CIS and the OJP Peer Reviewer data base.

If additional reviewers are needed, the Office of Operations primary points of contact will work with the program manager to prepare an addendum and request approval from the NIJ Director to add those reviewers to the reviewer pool.

The original list, addenda, and record of approval will be retained in a centralized location by the assigned Office of Operations primary point of contact for a period of three years.

V. PEER REVIEWERS' FINAL SCORES AND CONSENSUS REVIEWS

At the conclusion of the consensus call or meeting, reviewers have two business days to update their assessments (scores and narratives) in GMS based on the consensus review discussions. Once each reviewer on a panel has submitted his or her final scores and comments, the program manager will ensure that the final comments reflect the discussion of the peer reviewers. If necessary, at the direction of the program manager, the peer review contractor will follow up with reviewers to resolve any discrepancies.

The peer review contractor will prepare a final scoring matrix within two business days of final reviewer submission (either posting of initial assessments if that concludes the review phase or posting of consensus reviews by lead reviewers). If there is both an initial and final assessment, the final assessment from GMS becomes the summary of the application which is then edited and formatted by the peer review contractor.

OAAM will work with the peer review contractor to ensure that formal concurrence on consensus reviews is obtained from each peer reviewer and maintained in GMS. At the conclusion of the peer review process, the Office of Operations primary points of contact will check GMS to ensure that formal concurrence on consensus reviews are maintained in GMS. If not, the primary points of contact will notify the peer review contractor and COTR.

VI. DENIAL NOTIFICATION

Program Manager Initial Review Process

During the initial review process, all applications received in response to a solicitation announcement will be reviewed and evaluated by the program manager to determine whether or not they are complete and responsive to the scope of the stated objectives outlined in the solicitation document. Once the initial review is completed, the program manager will identify for the National Institute of Justice (NIJ) Director those applications that fail to meet the Basic Minimum Requirements (BMR) of the solicitation, or which are non-responsive to its stated objectives. The NIJ Director will make a final determination regarding whether or not to deny these applications during the initial review process. Applications that are approved during initial review, as being complete and responsive, will continue on to peer review to be scored on their technical merit by the peer reviewer panel. Those applications that fail BMR, or which are non-responsive to the solicitation, will not be submitted for peer review. To ensure that decisions are adequately documented, the responsible program manager will submit for approval to the Office Director and Deputy Director a list of all applications recommended for denial, along with the denial reason for each application. After receiving approval from the NIJ Director, these applications will be denied in Grants Management Service (GMS), and the applicants will be notified, in writing, of the reasons for rejection. Examples of reasons for first stage rejection include, but are not limited to, applications proposing activities other than those called for in the solicitation document and applications from agencies or organizations that do not possess the qualifications specified in the solicitation document. All rejection/denial letters will be maintained in the GMS.

External Peer Review Process

Following the initial review process, the program manager will submit to the peer reviewer panel those applications that have been determined to be responsive for review on their technical merit. After completion of the external peer review process, the program manager will prepare a memorandum to be routed through the Office Director and Deputy Director to the NIJ Director, of the applications recommended for funding. The peer review contractor will prepare and mail or email non-successful applicants for funding, a summary that specifies the strengths and weaknesses of their individual proposal with scores and panelist identification removed. Mailing of non-successful applicant letters must be coordinated with Congressional notification of successful applicants; the goal is for dissemination of letters within 20-30 days of award decision.

VII. NON-COMPETITIVE GRANT AWARDS

NIJ funds research, development, and evaluation activities to meet the challenges of crime and justice primarily through competitive grant solicitations. The focus of the solicitations varies from year to year based on research priorities and available funding.

To a lesser extent, NIJ funds research, development, and evaluation activities through agreements with other Federal agencies. Those agreements may be non-competitive in nature.

Exclusive of its formula grants programs, as of Fiscal Year 2009, less than one percent of the total amount of NIJ's annual awards was non-competitive. NIJ's policy is to make non-competitive awards only under the following circumstances:

- Only one reasonable source—instances where only one responsible applicant can perform the work of the proposed award. Circumstances under which this may occur include when the NIJ Director has determined in writing that:
  - The applicant has proprietary information or proposes a project involving a unique idea, method, or approach toward advancing criminal justice, policy, and practice in the United States.
  - The applicant has made a substantial investment in an activity that would advance criminal justice policy and practice in the United States. The majority of NIJ's non-competitive awards to other Federal agencies fall into this category. These agreements are developed to leverage the investment or infrastructure of these agencies to criminal justice application.
  - The applicant is the only entity known to possess the capability to perform the work.

- Compelling public interest—instances where the NIJ Director has determined in writing that exigent, urgent, or other compelling circumstances exist that make it in the public interest to make an award non-competitively. One example of such an instance might be an unusual and compelling urgency to execute a pilot project within a short window of opportunity to affect a public policy decision.

- Statutory requirements—instances where a funding recipient is specified by an appropriations act or other applicable law.

- Recommendations in Congressional reports, when a non-competitive award would be consistent with applicable law—instances where a House, Senate, or Conference Report accompanying an appropriations act or other law recommends an award to a particular recipient, and an award may be made consistent with applicable law, including any applicable executive orders.

In keeping with Executive Order 12988, nothing in this guideline is intended to create any legal or procedural rights enforceable against the United States.

To ensure that the public is aware of NIJ's policy on making non-competitive awards, Appendix 4 contains an announcement posted on NIJ's website.

VIII. ASSURANCE OF INDEPENDENCE REGARDING RESEARCH

NIJ provides objective, independent, evidence-based knowledge and tools to improve criminal justice policy and practice in the Untied States. NIJ is committed to ensuring that each applicant provides an assurance of independence regarding the research study proposed. This assurance will be evaluated by peer reviewers and internal reviewers, along with other review criteria for grant award recommendations and decisions.

For the purposes of NIJ's Research, Evaluation, and Development Project Grants Program (CFDA No. 16.560) "research independence and integrity" pertains only to ensuring that the design, conduct, or reporting of research funded by NIJ grants, cooperative agreements, or contracts will not be biased by any financial interest on the part of the investigators responsible for the research or on the part of the applicant.

The program narrative must explain the process and procedures that the applicant has put in place to identify and manage potential financial conflicts of interest on the part of its staff, consultants and/or sub-grantees and sub-contractors.

The program narrative must also identify any potential organizational financial conflicts of interest on the part of the applicant with regard to the proposed research. If the applicant believes that there are no potential organizational financial conflicts of interest, the applicant must provide a brief narrative explanation of why it believes that to be the case.

Where potential organizational financial conflicts of interest exist, the program narrative must identify the safeguards the applicant has put in place to address those conflicts of interest.

A thorough discussion of process and procedures related to identifying and managing potential financial conflicts of interest on the part of researchers can be found at www.grants.nih.gov/grants/policy/coi/. Though this information solely reflects the policies of the National Institutes of Health, the guidance offered may be helpful to NIJ applicants. It is offered purely as an example of best practices.

The Office of Operations will also ensure that all FY 2010 solicitations contain the following language:

Research Independence and Integrity

Regardless of a proposal's rating under the criteria outlined above, in order to receive funds, the applicant's proposal must demonstrate research independence, including appropriate safeguards to ensure research objectivity and integrity.

Considerations in evaluating research independence and integrity will include, but may not be limited to, the adequacy of the applicant's efforts to identify factors that could affect the objectivity/integrity of the proposed staff and/or the organization in carrying out the research, development, or evaluation activity; and the adequacy of the applicant's existing or proposed remedies to control any such factors.

IX. USE OF SPECIFIC SUB-GRANTEES TO PERFORM WORK RELATED TO NIJ GRANTS

All sub-grant determinations will generally be at the discretion of the grantee. Effective immediately, no NIJ staff member may require or infer that a grantee should use a specific sub-grantee to perform work related to a grant without compelling, contemporaneously documented reasons and specific prior approval of the NIJ Director. All such documentation shall be retained in the Grants Management System (GMS).

X. FINAL APPROVED GRANT BUDGETS FOR FORMULA GRANTS

To ensure that the final approved grant budgets for formula grants are maintained in GMS and that the budgets match the amount of funds awarded to the grantees, the procedures outlined below will be followed:

Formula Grants

NFISA - Paul Coverdell Forensic Science Improvement Grants Program (Formula)

The Paul Coverdell Forensic Science Improvement Grants Program (Formula) requires award recipients to submit a revised budget to reflect the total amount of the award once it is made. Due to the nature of the formula in the Coverdell Program, the solicitation provides an "estimated" amount for each state based on their population. Because of this, 90% of the Coverdell Program award recipients have a Special Condition, which freezes grant funds until the budget is approved. Once the final award amount is determined, the Program Manager will notify the grantees of their award and the grantees will be instructed to submit a revised budget reflecting the total award amount to the program office. The Coverdell Program team then reviews the budgets for accuracy and to determine if the awardees have followed the OJP Financial Guide. Once the budgets have been reviewed, the Coverdell Program Manager creates a Grant Adjustment Notice (GAN) to remove the Special Condition for each individual award.

To review the revised budgets, a search must be conducted in GMS under Search/Process Search/Grant Adjustment. The search may be completed on an individual award or an entire program.

Convicted Offender and/or Arrestee DNA Backlog Reduction Program

Funding requests under the Convicted Offender and/or Arrestee DNA Backlog Reduction Program are made based on a demonstrated and justifiable need (i.e., a backlog of DNA database samples taken from convicted offenders and/or arrestees) and the per cost basis must be provided to justify the total funding amount requested.

Budget documents submitted with applications for funding undergo an initial review by the DNA Backlog Reduction program office staff using a documented checklist that is attached to GMS with the final award. Mandatory checklist questions such as "Did the application include a budget narrative?" and "Does the application include a budget worksheet and summary?" ensure

that budget documents for applications for funding under this program are maintained in GMS. The mandatory checklist question "Does the federal assistance requested match the budget figures in the detail budget worksheet?" ensures that the reviewer confirms that the budget matches the amount of funds requested for award. Additional questions such as "Does the narrative contain a statement of the number of DNA database samples the applicant will analyze in-house using FY 2009 Convicted Offender and/or Arrestee DNA Backlog Reduction Program funds" and "Did the applicant provide their actual cost estimates with which they based their federal assistance request?" ensure that the award amount is consistent with the proposed need. Each time an application is modified or revised by the applicant in GMS, the program office performs another review using the checklist to ensure that all information remains consistent with existing and updated documentation. This checklist process has been used for the review of all applications under this program since fiscal year 2008.

In addition to the program office review, the Office of the Chief Financial Officer (OCFO) began performing budget reviews of awards made under this program in FY 2008, and all awards are issued a final financial clearance memorandum (FCM) prior to the release of award funds. Budgets were reviewed again in FY 2009, and will continue to be reviewed in future years. This OCFO review is in addition to the program office review, and provides additional assurance that the budget matches the amount of funds awarded to grantees. The OCFO will not issue an FCM unless the final approved grant budget for the reviewed award is uploaded to GMS and is consistent with the GMS award amount.

Using these procedures (established in fiscal year 2008), the program office is able to ensure that the final approved grant budgets for formula grants under the Convicted Offender and/or Arrestee DNA Backlog Reduction Program are maintained in GMS and that the budgets match the amount of funds awarded to the grantees.

Forensic DNA Backlog Reduction Program (Formula)
Funding for the Forensic DNA Backlog Reduction Program is distributed using a formula based on Unified Crime Reporting statistics published by the FBI, and the total funding amount requested in each application (not to exceed the formula amount).

Budget documents submitted with applications for funding undergo an initial review by the DNA Backlog Reduction program office staff using a documented checklist that is attached to GMS with the final award. Mandatory checklist questions such as "Did the application include a budget narrative?" and "Does the application include a budget worksheet and summary?" ensure that budget documents for applications for funding under this program are maintained in GMS. The mandatory checklist question "Does the federal assistance requested match the budget figures in the detail budget worksheet?" ensures that the reviewer confirms that the budget matches the amount of funds requested for the award. The question "Does the federal assistance requested match the dollar amount approved in the Solicitation table (Appendix 1, page 19) or in the State funding split if multiple laboratories are applying in this State?" ensures that the award amount is consistent with the amount allowable by the formula distribution. Each time an application is modified or revised by the applicant in GMS, the program office performs another review using the checklist to ensure that all information remains consistent with existing and updated documentation. This checklist process has been used for the review of all applications

under this program since FY 2008. Using this procedure (established in FY 2008), the program office is able to ensure that the final approved grant budgets for formula grants under the Forensic DNA Backlog Reduction Program are maintained in GMS and that the budgets match the amount of funds awarded to the grantees.

In previous years, residual funds remaining after all applications were received (generally due to funding requests totaling to less than the amount budgeted for the entire program) were granted to applicants by performing another formula distribution and increasing the amounts awarded to each applicant. Once the final award amounts were determined, the program office staff would notify grantees of the revised amounts and instruct them to submit revised budgets reflecting the revised award amounts to the program office. The DNA backlog reduction program office staff would then review the budgets and if acceptable, would create grant adjustment notices to remove the Special Condition withholding award funds. The process of including withholding special conditions with these awards ensured that the final approved grant budgets for formula grants under the Forensic DNA Backlog Reduction Program were uploaded to GMS and that the budgets matched the amount of funds awarded to the grantees prior to initiation of funded projects.

This process for the redistribution of funds has not been used since fiscal year 2006, and new methods for allocation of these funds have been implemented (e.g., in FY 2008, discretionary awards were made to projects proposed under the DNA Unit Efficiency Program using residual funds). Discontinuing the process off awarding amounts higher than application amounts further ensures that the final approved grant budgets for formula grants under the Forensic DNA Backlog Reduction Program match the amount of funds awarded to the grantees; however, if this practice were reinstated in future fiscal years, the checklist and special conditions would continue to be used to ensure that the final approved grant budgets for formula grants under the Forensic DNA Backlog Reduction Program are maintained in GMS and that the budgets match the amount of funds awarded to the grantees.

Appendix 1

National Institute of Justice
Guidance on Conflicts of Interest

December 10, 2009

Basic Obligation of Public Service

Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in the Standards of Conduct for Executive Branch Employees, 5 C.F.R. Part 2635.

General Principles

1. Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees shall not hold financial interests that conflict with the conscientious performance of duty.

3. Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

4. An employee shall not solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees shall put forth honest effort in the performance of their duties.

6. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

7. Employees shall not use public office for private gain.

8. Employees shall act impartially and not give preferential treatment to any private organization or individual.

9. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

11. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

12. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those – such as Federal, State, or local taxes – that are imposed by law.

13. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards. Whether particular circumstances create an appearance that the law or ethical standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

The Standards of Conduct for Executive Branch Employees, 5 C.F.R. 2635.101.

Conflict of Interest

The conflict of interest rules require that you avoid situations where your official actions affect or appear to affect your private interests, whether these interests are financial or non-financial. As an NIJ employee, your official actions must be motivated solely by the interests of the agency. If your personal interests (like family or a stock you own) benefit or appear to benefit from your official actions as a Federal employee, then you have a conflict of interest.

Financial Conflicts of Interests

As a Federal employee, you are prohibited by a Federal criminal statute (18 U.S.C. § 208) from taking action or otherwise participating in agency business that affects your financial interests or the financial interests of your spouse, child, or a business partner. Also, you cannot take action on a matter affecting the financial interests of an organization in which you serve as an officer or employee, or an organization with whom you are discussing future employment.

In brief, you are prohibited from involvement in agency business that will financially benefit yourself, your family, business partners, and an organization in which you are an officer or employee or an organization with which you are discussing possible employment. For purposes of violation of this rule, it is immaterial if your action actually results in an increase in wealth; even a negative impact on financial interest is still a violation of the statute. Furthermore, be aware that you are prohibited from participation in all business related to a grant to an organization where your spouse is employed or serves as a consultant, even if this business does not involve awarding funds to the organization.

Impartiality as an Agency Employee

The second types of conflicts are those situations that reflect adversely on your impartiality as an agency employee. The ethics rules require you to discharge your public duties in an impartial manner. You must not give preferential treatment to any individual or group. The Standards of Ethical Conduct not only prohibit your participation in matters which may affect your financial interests, but these rules also prohibit you from participating in matters that could reflect on your image of impartiality as a public official. Under this Standard of Conduct, you must disqualify yourself from a matter if someone with whom you have a personal or business relationship is a party or could benefit from your actions if the circumstances of your participation in this matter would cause a reasonable person to question whether you are being impartial. This prohibition includes, for example, actions that may affect a member of your household, a person with whom you have a business relationship, a close personal friend or relative, a fiancé or steady date, a former employer where you had worked within the last year, or an organization in which you are active. The test as to whether or not a violation has occurred is whether the circumstances of the situation would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter. It is an "appearance" question. 5 C.F.R. § 2635.202

For grant and contract administrators like yourselves who must always appear impartial in the performance of your duties, this ethics rule requires that you avoid personal relationships with the staff and officials of your grantees or contractors. Do not cross the line from a professional relationship to a personal relationship with your grantees or contractors, which could compromise your appearance of impartiality and could, for example, give a basis to a disgruntled applicant for a grant or contract to protest the award on the grounds that you were biased. If you establish a personal relationship with a grantee or contractor, you should discuss this issue with your supervisor in order that your work assignment can be adjusted appropriately.

If you are confronted with any of these situations, then you should immediately recuse yourself from the matter. Recusal may be achieved by merely explaining to your supervisor that you are unable to be involved in the matter. Written notice to your supervisor is not required, but is recommended.

Conflict of Interest Advice

Gregory Brady, Office of the General Counsel, extension 6-3254
Charlie Moses, Office of the General Counsel, extension 5-2536
Sue Dirham, Office of the General Counsel, extension 6-3232

Appendix 2

MEMORANDUM FOR (Name and Title of Immediate Supervisor, Office, and Division)

FROM: (Name and Title of NIJ Employee, Office and Division)

SUBJECT: Disclosure of Conflict of Interest

DATE:

EMPLOYEE:

I have read the attached OGC Guidance on Conflict of Interest dated December 10, 2009, and have considered whether I may have a conflict of interest with any of the proposals to which I have been assigned to review for the grant solicitation titled:
"_____."

☐ It is my belief that I have no conflict of interest with any of the proposals to which I have been assigned.

☐ I believe that I have or may have a conflict of interest with one or more proposals. (List application number and applicant name for any and all such proposal(s)).

_____

_____

Nature of the conflict or possible conflict (check all that apply):

☐ My spouse, child, or other family member is an employee or consultant to the applicant or is seeking employment with the applicant.

☐ My spouse, child, other family member, or business partner would be employed under the proposal or a subpart.

☐ I am or will be seeking employment with the applicant or a sub-contractor or sub-grantee under the proposal.

☐ I am a former employee of the applicant. I left there on __<date>__.

☐ I have a pension plan or other financial interest in the applicant.

☐ I have or have had within the past 12 months a collaborative professional or business relationship with the proposal's author(s), project staff, or the organization submitting the proposal.

☐ I am an officer, trustee, board member, or committee member of the applicant.

☐ I have a close personal relationship with staff of the applicant or the author(s) of the proposal.

☐ Other: Any circumstances which would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the review of the proposal.

For each item checked, describe below the nature and facts of the potential conflict for agency review. (Please attach additional sheets as necessary, with each additional sheet labeled with your (the employee's) name and the solicitation name.) OGC may review this information and the potential conflict of interest in addition to the immediate supervisor. OGC's guidance or recommendation may be recorded on this Disclosure form if OGC review is deemed necessary. (In the bulk of potential conflict cases, it is likely that OGC review will not be required because the conflict will be clearly a disqualifying conflict or it will be clearly not a disqualifying conflict.)

_____

_____

_____

_____

AGENCY DETERMINATION: (to be completed by NIJ Supervisor)

Decision by NIJ Supervisor after consideration of potential conflict, which included review of the subject employee's Confidential Financial Disclosure Report, OGE Form 450:

_____

_____

_____

_____

Signature: _____ **Date:** _____

Title: _____

Appendix 3

SAMPLE MEMORANDUM
REQUESTING APPROVAL OF PEER REVIEWERS

MEMORANDUM FOR THE NATIONAL INSTITUTE OF JUSTICE DIRECTOR

THROUGH: Name, NIJ Deputy Director

Name, Office Director
Name of Office

Name, Division Director
Name of Division

Name of Office of Operations Primary Point of Contact
Office of Operations

FROM: Name of Program Manager
Name of Division

DATE:

SUBJECT: Peer Reviewers for the Solicitation for (Title of Solicitation) FY 2010

The Solicitation for (Title of Solicitation) FY 2010 seeks proposals for (briefly describe the objectives of the solicitation). This solicitation focuses on .

The attached list is a collection of potential peer-reviewers for this solicitation and other solicitations with similar project areas.

This list is submitted for your consideration and approval.

_____ _____
Approve **Disapprove**

Appendix 4

NATIONAL INSTITTE OF JUSTICE
Guidelines Regarding Non-Competitive Awards

January 2010

The National Institute of Justice (NIJ's) core mission is to provide objective, independent, evidence-based knowledge and tools to advance criminal justice policy and practice in the United States. NIJ also carries out equipment, training, and technical assistance programs that are intended to enhance the capacity of law enforcement and corrections agencies, public crime laboratories and related agencies, and criminal justice courts agencies.

NIJ's work is conducted primarily through extramural grants, agreements, and contracts. NIJ uses both cooperative agreements, which are a type of grant, and agreements with other Federal agencies.

As of Fiscal Year 2009, grants, including cooperative agreements, represented approximately 69 percent of the total amount of NIJ's annual funding actions. Also as of Fiscal Year 2009, approximately 49 percent of NIJ's annual grant awards were formula grants intended to assist the nation's public crime laboratories and related agencies. NIJ's formula grant programs make non-competitive awards in amounts based on a predetermined formula. NIJ formula grant programs in Fiscal Year 2009 included the Paul Coverdell Forensic Science Improvement Grants Program and the Forensic DNA Backlog Reduction Program.

NIJ funds research, development, and evaluation activities to meet the challenges of crime and justice primarily through competitive grant solicitations. The focus of the solicitations varies from year to year based on research priorities and available funding.

To a lesser extent, NIJ funds research, development, and evaluation activities through agreements with other Federal agencies. Those agreements may be non-competitive in nature.

Exclusive of its formula grants programs, as of Fiscal Year 2009, less than one percent of the total amount of NIJ's annual awards was non-competitive. NIJ's policy is to make non-competitive awards only under the following circumstances:

- Only one reasonable source—instances where only one responsible applicant can perform the work of the proposed award. Circumstances under which this may occur include when the NIJ Director has determined in writing that:
  - The applicant has proprietary information or proposes a project involving a unique idea, method, or approach toward advancing criminal justice, policy, and practice in the United States.
  - The applicant has made a substantial investment in an activity that would advance criminal justice policy and practice in the United States. The majority of NIJ's non-competitive awards to other Federal agencies fall into this category. These

agreements are developed to leverage the investment or infrastructure of these agencies to criminal justice application.
  - The applicant is the only entity known to possess the capability to perform the work.

- Compelling public interest—instances where the NIJ Director has determined in writing that exigent, urgent, or other compelling circumstances exist that make it in the public interest to make an award non-competitively. One example of such an instance might be an unusual and compelling urgency to execute a pilot project within a short window of opportunity to affect a public policy decision.

- Statutory requirements—instances where a funding recipient is specified by an appropriations act or other applicable law.

- Recommendations in Congressional reports, when a non-competitive award would be consistent with applicable law—instances where a House, Senate, or Conference Report accompanying an appropriations act or other law recommends an award to a particular recipient, and an award may be made consistent with applicable law, including any applicable executive orders.

In keeping with Executive Order 12988, nothing in this guideline is intended to create any legal or procedural rights enforceable against the United States.

Read the full text of Executive Order 12988 — Civil Justice Reform (pdf, 8 pages).

The final Guidelines Regarding Non-Competitive Awards may be found at http://www.ojp.usdoj.gov/nij/funding/non-competetive-awards.htm

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QUESTIONS

Questions regarding the guidance noted in this document may be directed to:

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