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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JUNE 17, 2009

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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, JUNE 17, 2009

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

The Committee met, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

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

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

Chairman LEAHY. I was talking with Senator Sessions just a couple of minutes ago. Like so many of us, he has to vote in another Committee, and I told him for a traditional opening statement, the Ranking Member, once he arrives, we will yield to him. But he said he had no objection to us going ahead.

I do welcome Attorney General Holder back to the Senate Judiciary Committee. I do enjoy welcoming him as Attorney General and not as the nominee for Attorney General. And I want to commend, you, Mr. Attorney General, and your team for your hard work and your commitment to the task, an absolutely vital task in this country, to restore the Department of Justice back to being the Department of Justice.

We have all talked on both sides of the aisle about the political manipulation that had occurred previously with the Department of Justice, particularly its law enforcement and civil rights functions, that struck a devastating blow to the credibility of Federal law enforcement and undermined the people's faith in our system of justice, something that if that happens in a democracy it can be almost a fatal blow to democracy. So you have been given the job of restoring that trust, and I thank you for the start.

You have recommitted the Department to aggressive investigation and prosecution of mortgage and financial fraud, and I am confident you will implement the Fraud Enforcement and Recovery Act, which was signed into law by the President a few weeks ago and backed by virtually everybody on this Committee.

The Attorney General also recognized the need to include Federal assistance to State and local law enforcement in the Economic Recovery Act and is now working hard to get needed resources out to

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our States and our cities and our towns to keep our communities safe and to strengthen economic recovery.

It is my hope that the Justice Department will work with this Committee, with the Judiciary Committee, on such important issues as the state secrets privilege, shielding members of the press from being forced to reveal their sources, passing hate crimes legislation, and effectively cracking down on health care fraud. In addition, our Subcommittees are hard at work on a wide range of issues ranging from comprehensive immigration reform to the reauthorization of the PATRIOT Act.

I have no bones of the fact that I have been troubled to see the continuation of the Bush administration's practice of asserting the state secrets privilege in an attempt to shut down lawsuits. I believe that accountability is important and that access to the courts for those alleging wrongdoing by the Government is crucial. I support making use of the many procedures available to the courts to protect national security rather than completely shutting down important cases without true judicial review. I hope, Mr. Attorney General, that you will work with me and others on this Committee to find a mutually acceptable solution to what I see as an unacceptable situation.

An issue on which I believe Attorney General Holder has shown great courage in the face of political pressure is his commitment to the process of safely and effectively closing the detention facility at Guantánamo Bay. I think this step will bring to an end a disgraceful period in our country's history but also, more importantly, will help to restore our commitment to the rule of law and our reputation in the rest of the world.

I believe strongly that we can ensure our safety and security. We can bring our enemies to justice. We can do it in ways that are consistent with our laws and our values. When we have strayed from that approach—when we have tortured people in our custody, when we have sent people to other countries to be tortured, or held people for years without even giving them the chance to go to court even to argue that, "Look, you picked up the wrong person"—then we have hurt our national security immeasurably.

Changing our interrogation policies to ban torture was an essential first step. By shutting the Guantánamo facility down and restoring tough but fair procedures, I think we can restore our image around the world, and we have to do that if we want to have a strong national security policy.

Recent debate has focused on keeping all Guantánamo detainees out of the United States. I believe in that debate, political rhetoric has drowned out reason and reality. Our criminal justice system handles extremely dangerous criminals, and more than a few terrorists, and it does so safely and effectively. We are the most powerful Nation on Earth. We ought to be able to handle the worst of criminals.

We have tried very dangerous people in our courts. We hold very dangerous people in our jails and prisons, from the little State of Vermont throughout the Nation. We have tried terrorists of all stripes in our Federal court system. Think of Oklahoma City bomber Timothy McVeigh, or Sheikh Omar Abdel-Rahman and others who planned the 1993 World Trade Center bombing, or Zacarias

Moussaoui. Senator Graham on this Committee, an experienced military prosecutor himself, said recently, "The idea that we cannot find a place to securely house 250-plus detainees within the United States is not rational."

We have spent billions of dollars on high-security facilities. We can do that.

Now, key questions remain. Prolonged detention and military commissions, both of which are being discussed by the administration, carry with them the risk of abuse, and I expect, Attorney General, that you and President Obama will face these issues with the same commitment to our Constitution, our laws, and our values, and the same dedication to our security that you and the President have shown so far. I trust you will work with us to find the right solutions to these problems.

Another area where we have to rapidly come together is the sadly resurgent problem of hate crimes. Last week's tragic events at the Holocaust Museum, together with other recent incidents, have made it all too clear that violence motivated by bias and by hatred remains a serious problem with tragic real-world consequences. Senator Kennedy and I, together with a strong bipartisan group of cosponsors across the political spectrum, have once again introduced a bill that will take substantial and important steps to strengthen our enforcement of hate-based violence. It was crafted with due consideration of the First Amendment so that only those who engage in brutal acts of violence will be culpable. It has been stalled for too long. I believe it is now time to act. I know you have supported this. I know the President has.

You have made important steps toward ensuring a more open and transparent Government. You have implemented a much improved Freedom of Information Act policy. I know Senator Cornyn and I have worked together on this for years, and I hope the direction will continue.

I have thrown out a whole lot of things, but I think it is an important hearing, and I was talking a little longer than I was going to because I was waiting for Senator Sessions to come back. He is here, and I will put my full statement in the record. I yield to Senator Sessions.

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

Senator SESSIONS. Thank you, Mr. Chairman, and I appreciated the opportunity to discuss with you some of the details of the confirmation hearing for Judge Sotomayor, and maybe we can develop a good plan for that.

Attorney General Holder, I am glad you are here today to address the Committee as we fulfill our oversight responsibility for the Department of Justice. The Department plays a critical role in protecting the rule of law and preserving national security, and it must be free from political pressures and ideological excess.

Mr. Holder, I supported your nomination to be Attorney General. I think I was in the minority in my party by doing so. But I do so because I believed that your previous experience within the Department would serve to elevate the Department and its mission

above politics and bad policy, and I was assured by your promises during the confirmation process to that effect.

So it is difficult for me to tell you this: I am disappointed. During your confirmation hearing, you promised to adhere to the Constitution and put the rule of law over political or other considerations. You said you had learned from the past and that you would not return to pre-9/11 criminal law concepts in protecting the American people from terrorist attacks. You told Senator Lindsey Graham that you agreed with him that, "Every person who commits to going to war against America or any other peaceful nation should be held off the battlefield as long as they are dangerous." And I do not think your actions that we have seen so far are consistent with that commitment.

Since your confirmation, you have done a number of things, I think, that you pledged not to do. Time and again I find myself reading about political appointees who have overruled career Department attorneys to further some agenda or left-wing activity. One such instance came when you rejected the Office of Legal Counsel's conclusion that Congress' recent legislation on District of Columbia voting was unconstitutional, as it appears plainly to be.

During your confirmation hearing, you emphasized that your review of OLC opinions would not be a political process. So when OLC, the Office of Legal Counsel, which is assigned this responsibility, had prepared an opinion for you that said that Congress' legislation was unconstitutional, I would have expected you to have listened to their opinions and followed them, or to have explained precisely why you did not. Instead, you moved around them and sought a second opinion from the Solicitor General's office, an office that is really required to defend whatever is passed, and asked them for their legal advice.

You again, I think, followed pressure from the left to override common sense when you allowed the Department of Justice to release OLC opinions regarding interrogation, even though high-profile members of the intelligence community warned you that it was unwise to do so. Former Attorney General Michael Mukasey, a former Federal judge who has tried terrorism cases, and CIA Director Michael Hayden wrote a joint op-ed in the Wall Street Journal stating that the release of the memos would be "unnecessary as a legal matter"—and I think they are clearly correct there—and "unsound as a matter of policy." And I think that is correct. They predicted that the effect of the memos' release "will be to invite the kind of institutional timidity and fear of recrimination that weakened intelligence gathering in the past and that we came sorely to regret on September 11, 2001."

The lawful and wise thing to do would have been to keep our secrets secret, yet you did not. Instead, you have now given a critical piece of information to our enemies.

Just in the last 3 weeks, I received word again that, on May 29th, the Washington Times had reported that the Department of Justice voluntarily dismissed a case against three Black Panther members for voter intimidation outside a polling place in Pennsylvania. In that case, three Black Panthers wore military-style uniforms, one armed with a nightstick, and used racial slurs to scare would-be voters at the polling location. Bartle Bull, a long-time

civil rights activist, called the conduct "an outrageous affront to American democracy and the rights of voters to participate in an election without fear."

DOJ had been working on the case for months and had already secured a default judgment on April 20, 2009. Inexplicably, political appointees at the DOJ overruled career attorneys, dropped the case, dismissing two of the men from the lawsuit entirely with no penalty, and won an order against the third man that simply prohibits him from bringing a weapon to future elections—something that is already prohibited.

Instead of supporting the career attorneys who fought to protect the civil rights of voters in Pennsylvania, the political officials in the Department of Justice wiped out their good work. This flies in the face of your statement at your confirmation hearing about career attorneys at the Department that you would "listen to them, respect them, and make them proud of the vital goals we will pursue together."

It also, I think, contradicts your statement during your confirmation hearing that, "The Justice Department must also defend the civil rights of every American."

Another concern that this Committee raised with you during confirmation was whether you would operate under pre-9/11 criminal law mind-sets when fighting terrorists. You assured the Committee that you learned from the past, and that you would do your best to aggressively continue the war on terror. In fact, you listed as your first priority as Attorney General that you would "work to strengthen the activities of the Federal Government and to protect the American people from terrorism." Yet, instead of taking the lead in protecting the American people, you have enacted some poor policies and stayed silent on other issues of importance.

One primary example of this pre-9/11 mind-set is a recent report that the Obama administration is requiring that enemy combatants in Afghanistan be given Miranda warnings. Last week, Michigan Congressman Mike Rogers revealed that the administration had begun administering Miranda rights to enemy combatants detained in Afghanistan. Just this March, in a "60 Minutes" interview, President Obama mocked the giving of Miranda warnings to enemy combatants. He said, "Now, do these folks deserve Miranda warnings? Do they deserve to be treated like a shoplifter down the block? Of course not."

So what has changed in 3 months? The administration's new Miranda approach to battlefield detainees will inevitably hamper intelligence gathering in the war on terror. Even though the new approach is something founded and intended to preserve a Federal court criminal prosecution, it is not necessary because we can use and should use and historically have used the military commission for battlefield captures.

Under the Obama administration's global justice initiative approach, even captured high-level al Qaeda operatives may be advised that they may remain silent and seek counsel before talking.

According to Congressman Rogers, this has already begun to have an adverse effect. The International Red Cross has begun advising detainees, "Take the option. You want a lawyer." The Weekly Standard reported, "In at least one instance, a high-level de-

tainee has taken that advice and requested a lawyer rather than talking."

Likewise, the American people remain in limbo as they have waited for your word about whether detainees at Guantánamo would be transferred into the United States. I think we got a letter from you either last night or this morning on that finally. The solutions that you have suggested, I think, are dangerous. In March, you said some detainees could be released into the United States. A few days later, the Director of National Intelligence expanded your statement to say, "Some sort of public assistance for them is necessary to start a new life." The American people deserve to know what the plan is and how you are going to protect national security.

I think you should have weighed in on dangerous legislation such as the State Secrets Act and the media shield law that has been opposed by your predecessors, and you have stood silent on bills that need to be passed this year, such as the reauthorization of the PATRIOT Act. We need your support on that. So I think you need to take the lead in a number of these areas.

Mr. Holder, I am disappointed and I am worried. I do not think the American people are happy with the agendas that we are seeing now. I think these are very serious matters. When the Office of Legal Counsel attorneys told you something was unconstitutional, I am not happy that you ignored that and went around them. When security officials came to you and said, "We should keep our interrogation methods confidential," you said no. When the civil rights of Americans were trampled on by members of the Black Panther Party at the voting place, you let the offenders get away. And as the American people look to you to lead in the war against terrorism, you have remained too silent. You even granted the release of dangerous detainees, including Jose Padilla's alleged accomplice and another detainee who reportedly killed an American diplomat.

There are some things that you are doing, I think, that deserve commendation. Your Department has defended the Nation's secrets this year at least three times in Federal courts by invoking the state secrets privilege. That is something you need to do and it is right. In standing up for our Nation's secrets, you faced a lot of criticism, I know, from the left. But I think you did the right thing.

I am encouraged that you listened to Members of Congress and the intelligence community to oppose the release of interrogation photos. I thought the suggested release was an awfully unwise thing. The release of these photos was not necessary, and it would have placed American soldiers at greater risk.

So even though I am disappointed by your long delay in answering my question about the Uyghurs, I am encouraged that you understood that there is not a legal authority to release them into the United States.

So as I said at the time of your confirmation, I respect you. You know this Department well. I support you. I want you to succeed. I want to do what I can to help you. But some of these decisions you made are baffling to me. I do not think they are good. I think they will set a precedent for the future that is also not good.

I love the Department of Justice. I spent 15 years in it. I have the highest ideals for it. I hope that you will begin to evaluate some of these matters more critically, and sometimes you are going to have to tell people in the administration no, as you and I discussed during your confirmation.

So I look forward to your testimony today, and you will be given a full opportunity to respond. And I want to tell you again: I believe we can work together on some important things, but I am troubled at this time.

Chairman LEAHY. As you may have gathered, Attorney General Holder, there are somewhat differing views by the two leaders of this Committee. But we will let you speak for yourself. Please go ahead. And your full statement will be made part of the record, but go ahead.

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

Attorney General HOLDER. Good morning, Chairman Leahy, Ranking Member Sessions, and Members of the Committee. Thank you for the opportunity to appear before you today to highlight the work and priorities of the United States Department of Justice. I would also like to thank you for your support of the Department. I look forward to working with the Committee and appreciate your recognition of the Department's mission and the important work that we do.

In the 4½ months that I have been in office, we have begun to pursue a very specific set of goals: working to strengthen the activities of the Federal Government that protect the American people from terrorism within the letter and spirit of the Constitution; working to restore the credibility of a Department badly shaken by allegations of improper political interference; and reinvigorating the traditional missions of the Department in fighting crime, protecting civil rights, preserving the environment, and ensuring fairness in the marketplace.

Now, before answering your questions, allow me to talk briefly about several of our current initiatives. I have also provided more detail on each of them in my written statement.

The highest priority of the Department is to protect the American people against acts of terrorism. Working with our Federal, State, and local partners, as well as international counterparts, the Department has worked tirelessly to safeguard America and will continue to do so.

We will continue to build our capacity to deter, detect, and disrupt terrorist plots and to identify terrorist cells that would seek to do America harm. And we are committed to doing so consistent with the rule of law and with American values.

Consistent with our commitment to national security as the Department's No. 1 priority, we are leading the work set out by the President to close Guantánamo and to ensure that policies going forward for detention, interrogation, and transfer of detainees live up to our Nation's values. Congress has expressed strong views on this subject in the supplemental appropriations bill and elsewhere. We will continue to work with the legislative branch to ensure that

the appropriate disposition of individuals currently detained after the Guantánamo Naval Base occurs.

The Department has developed and begun to implement a multi-pronged approach to confront the threat posed by the Mexican cartels and to ensure the security of our southwest border. Addressing the southwest border threat has two basic elements: policing the actual border to interdict and deter the illegal crossing of contraband goods, and confronting the large criminal organizations operating on both sides of the border. Our strategy involves using Federal prosecutor-led task forces that bring together Federal, State, and local law enforcement agencies to identify, disrupt, and dismantle the Mexican drug cartels through investigation, prosecution, and extradition of their key leaders and facilitators, and seizure and forfeiture of their assets.

The Department is also fully committed to defending the civil rights of every American, and we are rededicating ourselves to implementing the range of Federal laws at our disposal to protect rights in the workplace, the housing market, and in the voting booth. I have made restoring the proper functioning of the Civil Rights Division a top priority for this Justice Department.

Now, as many Americans face the adverse effects of a devastating economy and an unstable housing market, the administration announced a new coordinated effort across Federal and State government and the private sector to target mortgage loan modification fraud and foreclosure rescue scams. The new effort aligns responses from Federal law enforcement agencies, State investigators and prosecutors, civil enforcement authorities, and the private sector to protect homeowners seeking assistance under the administration's Making Homes Affordable Program from criminals looking to perpetrate predatory schemes.

I appreciate the Committee's work in enacting the Fraud Enforcement Recovery Act which will enhance the Department's criminal and civil tools and resources to combat mortgage fraud, securities and commodities fraud, money laundering, and to protect taxpayer money that has been expended on recent economic stimulus and rescue packages.

With the tools and the resources that the bill provides, the Department and others will be better equipped to address the challenges that face this Nation in difficult economic times and to do their part to help the Nation respond to this challenge. In addition, the Department has been investigating and prosecuting financial crimes aggressively and has been very successful in identifying, investigating, and prosecuting massive financial fraud schemes, including securities and commodities market manipulation and Ponzi schemes.

As part of the administration's ongoing commitment to fiscal responsibility and accountability, the Department is working with the Department of Health and Human Services to combat the tens of billions of dollars that are lost every year to Medicare and Medicaid fraud. Those billions represent health care dollars that could be spent on services for Medicare and Medicaid beneficiaries, but instead are wasted on fraud and abuse. The Secretary of Health and Human Services, Kathleen Sebelius, and I have launched a new effort to combat fraud that will have increased tools and re-

sources and a sustained focus by senior leadership in both of our agencies.

We recognize that health care fraud has a debilitating impact on our most vulnerable citizens—the elderly and those in long-term care facilities. Our Elder Justice and Nursing Home Initiative coordinates the activities of our attorneys and agents throughout the country to better understand and address the abuse, neglect, and financial exploitation of these victims and to bring to bear the full weight of my Department to ensure that these types of crimes are prevented and/or prosecuted.

Finally, the American Recovery and Reinvestment Act of 2009 included $4 billion in Department of Justice grant funding. This funding is being used to enhance State, local, and tribal law enforcement efforts, including the hiring of new police officers to combat violence against women and to fight Internet crimes against children. In addition, it will help reinvigorate the Department's traditional law enforcement missions, a key element of which is partnerships with local, State, and tribal law enforcement agencies, and is vital to keeping our communities strong.

Chairman Leahy, Ranking Member Sessions, and members of the Committee, I want to thank you again for this opportunity to address the Department of Justice's priorities, and I would be pleased to answer any questions that you might have. Thank you.

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

Chairman LEAHY. Thank you very much.

Incidentally, there was some mention of the new Black Panther Party. I understand that a career attorney in the Department's Civil Rights Division made the final decision regarding which defendants to charge and which defendants to dismiss. That is a career employee who was there during the Bush administration and past administrations. I just thought I would point that out so that it does not end up—I just want to have the facts here.

And I am also glad the Department has decided to seek an injunction and civil penalties against the person who was charged with intimidating, again, career decisions being made.

It would be helpful if we had the President's nominee in the Civil Rights Division—and I would also note that we do not have that—to make these kind of decisions because my friends in the Republican Party have so far held up that nominee from confirmation.

I want to make sure we have accurate views of what is happening.

Now, last week's tragic shooting at the Holocaust Memorial Museum here in Washington reminded us of the ongoing serious problems of violence motivated by bias and hatred. Certainly the reports I received both in open sources and in classified areas show that the number of hate groups is growing, and their positions are hardening. I think we have to strengthen the hand of law enforcement to respond to these very vile threats and vile crimes.

A report issued yesterday by the Leadership Conference and Civil Rights Education Fund noted an increase in hate crimes in recent years linked to the rise in extreme anti-immigrant rhetoric on the Internet and throughout the country. In this free country of

ours, it is a blot to see these hate crimes. We should do everything we can to stop them.

The Matthew Shepard Hate Crimes Prevention Act of 2009 would give Federal as well as State and local law enforcement additional tools to prosecute hate crimes. It is long overdue. We owe it to the memories of Officer Stephen Johns, the murdered guard at the museum, and Matthew Shepard and so many others.

Do you agree that this Hate Crimes Prevention Act that we have had pending for some time is a good tool for investigators and prosecutors?

Attorney General HOLDER. Absolutely, Mr. Chairman. If there was ever a doubt about the need for this legislation, I think that has been pretty much done away with by the events that we have seen in our Nation here in Washington, D.C., what we saw in Kansas, and what we saw in Arkansas as well. Also, if you look at the statistics that indicate there has been a rise in hate crimes over the last few years, I am particularly troubled by the amount of hate crime violence that has been directed at Latinos.

Ten years ago, I testified in favor of this bill, which is, I think, limited in its scope but rational in what it is trying to do. It expands the scope of the Federal hate crimes legislation to include gender, disability, sexual orientation, and does away with what I believe are unnecessary jurisdictional requirements and would allow the Federal Government to assist State and local counterparts in prosecuting and investigating these offenses. I think the time is right, the time is now for the passage of this legislation.

Chairman LEAHY. Thank you. Last year, we passed the Foreign Intelligence Surveillance Amendments Act of 2008. I had objected to it because I felt there was a lack of adequate protections in it. Today, the New York Times is reporting that the National Security Agency is violating even the very permissive standards imposed by our collection authorities. It is collecting and reading immense numbers of e-mails to and from United States citizens, being done without any warrants. It calls to mind the abuses that we discovered in the FBI's use of national security letters.

I do not know how we justify continuing these expansive authorities, whether it is FISA or the search powers authorized by the PATRIOT Act, when they are being—even the expanded authorities are being abused this way.

What is the Justice Department doing looking into these reports of abuse?

Attorney General HOLDER. Well, the Department works closely with our partners in the intelligence community to ensure that national security is conducted in a way that is consistent with the legal authorities that are designed to protect privacy and our civil liberties.

There is a framework, I believe, that we always try to follow. Congress establishes statutory safeguards in a variety of statutes, among them FISA. The Department of Justice and the intelligence agencies follow strict regulations when we actually do this surveillance. There are strict policies and guidelines.

Chairman LEAHY. But the article today—and the concern I have is that more and more we find out about these kinds of abuses not from the intelligence agencies, not from our Government, but by

picking up the newspaper. We are reaching a point where we mark the New York Times "Top Secret" and we get the information quicker, we get it in more detail, and we get the crossword puzzle.

I mean, what are we doing to correct that? Because if this continues, I do not know how we reauthorize any of these things if they are going to be abused that way.

Attorney General HOLDER. Well, the Department and the intelligence agencies take very seriously the requirements that we are supposed to follow. In at least a couple of instances where the problems were detected by those of us in the Department, we halted the programs, informed the FISA Court, informed members of the Intelligence Committee and members of this Committee about what we had found, corrected the problem, and only after all those things had occurred did I reauthorize the beginning of the program again.

Now, I have not had a chance to review in any great detail the article that appeared in the New York Times——

Chairman LEAHY. I wish you would because also I wrote to you about 3 months ago to ask you to provide the Department's legislative proposals for extending or modifying PATRIOT Act authorities. We really need that answer. It has been raised on both sides of the aisle. If we are going to reauthorize it, we want to know what the Department wants. And I would hope that you would look at this article. I found it very troublesome because I have heard similar rumblings, and it is the first time I have seen it in any kind of detail. If the article is accurate, then we have some real problems. And we want us to be secure. We want us to be able to use the abilities to gather intelligence. But we also want Americans who are not the subject of any criminal investigation or terrorist investigation to at least feel they can send e-mails back and forth to their families and their friends and their businesses without it being read by somebody who is just having fun doing it.

We had similar things when we saw the IRS looking through people's reports because of interest, and this goes way beyond that. And I hope you will look into it, and I would also hope you will redouble your efforts to work with me on a media shield bill.

I have gone over my time. I yield to Senator Sessions. But it is a matter—did you want to respond to any of that?

Attorney General HOLDER. Well, I think all I would say is that with regard to PATRIOT Act reauthorization, I know that some members are frustrated at the lack of a position, at least at this point, with regard to those measures. And I think that what we have seen in the paper today is an indication of at least some of the things that we need to look at and consider. And one of the reasons why I think we have not yet settled on a firm position, we want to take into account how these measures have been used, see if there are issues/problems with the way in which they have been used before. We take a final position—I know they do not expire until December, and I know the time grows short. But to base our position on as much experiential information as we can I think is a wise course.

Chairman LEAHY. Senator Sessions.

Senator SESSIONS. Mr. Chairman, I just would say that with regard to these intercepts, legally I do not think there would be any

difference between intercepting an e-mail as part of a legitimate foreign intelligence operation and intercepting a telephone call. And there is no exceptional preference due one or the other, it seems to me. And we have wide authority to do that in foreign intelligence dealing with foreign intercepts.

Senator COBURN. Mr. Ranking Member, would you mind yielding? I read the New York Times article this morning. I do sit on the Intelligence Committee, and I will assure you there are inaccuracies in that report. And the assumption that it is right is an erroneous assumption.

Senator SESSIONS. Well——

Chairman LEAHY. As the Senator knows, I said in my question I asked him, if the article is right.

Senator COBURN. It is not right.

Chairman LEAHY. Well, I would like to hear this from the Attorney General.

Senator SESSIONS. Thank you, Senator Coburn. I would offer for the record Senator Grassley's statement, and, Mr. Holder, I have been disappointed that you have been so late in responding to my letter about the Uyghurs. Senator Grassley specifically says that he has three letters that have gone unanswered by the Department, and he has serious concerns about that. I am sure you will want to address that.

Mr. Chairman, I would just briefly note, with regard to the hate crimes legislation, that I would suggest we have a hearing on that. It is a matter that is worthy of our attention, and I would offer for the record a June 16, 2009, letter from the United States Commission on Civil Rights. I believe six of the eight members signed it, and they write to us and the President and Vice President urging that we vote against the Hate Crimes Prevention Act. They think it will do "little good and great harm." So I would offer that for the record, and hopefully we will be able to have a hearing and not just have it pop up in legislation on the floor.

Mr. Holder, on January 22nd, President Obama signed an Executive order to establish procedures to close the Guantánamo detention facility and to review the case of every detainee to determine whether the detainee should be transferred, released, prosecuted, or handled in some other way.

The Executive order makes clear that you as the Attorney General are the person responsible for coordinating the review, and I guess the other agencies of the Government, too.

Do you agree that, as the person in charge of this Guantánamo task force, you bear responsibility for the release or transfer of detainees from Guantánamo Bay?

Attorney General HOLDER. I think I bear responsibility along with the other Cabinet members who make up the principles committee, but I think I am primarily responsible for it, yes.

Senator SESSIONS. They are looking to you to coordinate, at least, and file the consensus or set the agenda. The administration has released or transferred some controversial figures already without any form of military commission or criminal time. For example, on Friday, the administration transferred Ahmed Zuhair to Saudi Arabia. Zuhair is allegedly responsible for the murder of William Jefferson, a U.S. citizen and diplomat, in 1995; planting a car bomb

in Mostar, Bosnia, in 1997; and involvement with the attack on the USS Cole.

Did you approve the release of Zuhair to Saudi Arabia?

Attorney General HOLDER. I did, as did the former administration. He was approved for release by the Bush administration. The determination that we made was that there was not sufficient proof to bring a case against him. Also, he was transferred, not released—transferred to Saudi Arabia where he will be subject to judicial review and, in addition to that, to the reeducation program that they have.

Senator SESSIONS. Was that based on a question of evidence that could not be utilized? I understand that military intelligence showed that Zuhair was responsible for the shooting death of William Jefferson when he was a diplomat to Bosnia. Was there evidence that you felt was inadmissible to make this case?

Attorney General HOLDER. No. The determination that we made was that—and I think consistent with the Bush administration—there was insufficient proof to tie him to those very serious and regrettable crimes. It was not a question of the admissibility of the evidence; it was more with regard to the sufficiency of it.

Senator SESSIONS. Another detainee, Binyam Muhammad, reportedly received instructions directly from Khalid Sheikh Mohammed and is believed to be Jose Padilla's accomplice in the al Qaeda plan for a second wave of attacks after 9/11. Military commission charges against Muhammad tie him to a plot to blow up high-rise apartment buildings and explode a dirty bomb in the United States.

Did you approve his release?

Attorney General HOLDER. The releases that have occurred have all been done with my approval, and I take responsibility.

Senator SESSIONS. And were you aware of the serious allegations that he was involved with or facing?

Attorney General HOLDER. In the determinations that we made, we made the conclusion that with regard to any charges or allegations that had been lodged against people, there was either insufficient—there was insufficient proof to bring those cases. Anybody who poses a danger to the United States or who has committed an act against the United States or American interests will be held, will be tried. And the President has been clear about that. This process is designed to protect the American people, and that is what I have tried to do, to the best of my ability.

Senator SESSIONS. Well, if he has been captured as part of the war on terror, is the United States, or any government in the world, really, entitled to maintain that person in custody until the hostilities are over or until you can assure us that the suspect is not a danger?

Attorney General HOLDER. Well, I think the last part of your statement is where I would focus, to ensure that the person no longer poses a danger to the United States or American interests. And the determination that we made with regard to the releases that we have so far ordered, which I think are above 50 at this point, we have all made the determination based on the reviews that have been done by career people in the Justice Department and the intelligence agencies that these people do not pose a dan-

ger to the United States and that, in releasing them or transferring them, we can do so with measures in place that we minimize the danger that they could pose to this country.

Senator SESSIONS. Well, you are taking on an awesome responsibility to divine these peoples intent, people who pretty clearly had serious involvement in plans to attack and kill Americans and attack the United States.

My time is up. I will not run over. I thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, at your confirmation hearing you said that Guantánamo will be closed. The administration has been making progress in finding countries that will accept those detainees who have been cleared for release and recently began court proceedings for one detainee in Federal court in New York, and this is good progress.

However, President Obama has indicated that some detainees may have to be held for "prolonged detention" because some detainees who pose significant threats cannot be tried for their crimes.

Are we really meeting the goals behind closing Guantánamo if we simply bring detainees to the United States for what could be indefinite retention?

Attorney General HOLDER. What we are trying to do, Senator, is make individualized determinations about what should happen to the people who are presently held at Guantánamo. Some we think will go into a category where they will be tried, either in Article III courts, Federal courts, or military commissions. Some can be transferred or released, and the possibility exists that some will be in a third category where they will be detained in a way that we think is consistent with due process, both in the determination as to whether or not they should be detained, and then with regard to periodic reviews as to how long that detention should occur. Do they continue to pose a danger to the United States?

It is not clear to me that they are going to be people in that third category, but the President in his speech indicated the possibility exists that people could be placed in that category, but it would only happen pursuant to really, I think, pretty robust due process procedures.

Senator KOHL. So there are some who might be retained indefinitely without due process?

Attorney General HOLDER. No. With due process consistent with the laws of war. The due process that I would focus on would be in the initial determination. Due process would be afforded them with regard to making the decision that they would be placed into that detention mode and then a periodic review that would be done.

We would want to work with members of this Committee and with Congress to come up with the exact parameters of that due process, but we would only want to do that in conjunction with Congress and with the assurance that what we are doing is consistent with our values and with our commitment to due process.

Senator KOHL. Last week, the Washington Post reported that the administration has "all but abandoned plans to allow Guantánamo

detainees who have been cleared for release to live in the United States." Is this true? In the last week, multiple countries have either agreed to accept detainees or have already accepted detainees. But what will happen if there are others who do not have countries to go to? What will we do with them?

Attorney General HOLDER. Well, we are going to work with our allies, with our friends to try to place these people who have been approved for transfer or for release. I think we made pretty significant progress last week where nine people were placed in different countries. The Italians have indicated a willingness to accept three additional ones. We are in constant conversation with our allies in attempting to place these people.

So we will continue our efforts. The State Department is working with us. Dan Fried is working with us. Dan Fried is flying all over the world meeting with people, meeting with various countries, trying to come up with ways in which we place these people. So those efforts will continue.

Senator KOHL. And those for whom we cannot find a place overseas, what will we do with them?

Attorney General HOLDER. Well, I would say I am not sure that we are not going to be able to. I think that by sharing information about who these people are, responding to the questions that are posed by our allies who might be the recipients of these people, that we can come up with a way in which we can assure them that they will not pose a danger to their countries, will not pose a danger to us. And I think that we are going to be successful in placing these people.

Senator KOHL. At your confirmation hearing, you committed to restoring the integrity of the Justice Department by ensuring its independence from politics. What steps have you taken to accomplish this goal?

Attorney General HOLDER. Well, I have certainly—with regard to the Civil Rights Division, for instance, I have met every employee of the Civil Rights Division in a series of meetings to make sure that they understand, as the Division that I think had the greatest amount of political harm done to them, that is no longer what is going to be accepted; that they are to not be timid in the enforcement of civil rights laws; that they are to report to me any kind of political interference that they might detect; and that they are to work in the tradition of good Justice Department lawyers in the Civil Rights Division have always worked under, be it under Republican or Democratic Attorneys General. So we have tried to get that message out.

I visited with and continue to visit with other divisions and have tried to bring that message there as well. Telling people that, you know, it is a new day in the Justice Department, and especially in those places where there was the greatest amount of political interference in the past.

Senator KOHL. Mr. Attorney General, under current law the Department of Transportation has the power to grant antitrust immunity to international aviation alliances. This enables international airlines to form alliances in which they can jointly set fares, coordinate schedules, and market the alliance together.

Critics of such alliances argue that they can lead to higher prices for consumers and make it difficult for smaller airlines to compete. Critics also argue that it is not appropriate for the Department of Transportation to grant such antitrust immunity as its agency has little expertise in antitrust policy and often pays little heed to competition concerns.

What is your view? Do you think that it is appropriate for the Department of Transportation to be able to grant antitrust immunity to international airline alliances without input, recommendations, and coordination with the Department of Justice?

Attorney General HOLDER. Senator, that is actually a very timely question. There is presently under consideration by the Department of Transportation one of those alliances, and we have reached out to the Department of Transportation. The Deputy Attorney General has spoken to the Deputy Secretary. I have had conversations with Secretary LaHood. And they have said that they will work with us in making a determination about how this particular alliance should be viewed. So the Justice Department will have input into that determination, and I think we will come to a joint resolution of how that issue should be resolved.

Senator KOHL. Well, that is very good to hear. If I am interpreting what you are saying, it is that the Department of Transportation as well as the Department of Justice will be working together on these matters and hopefully will arrive at some kind of a joint agreement as to how to proceed.

Attorney General HOLDER. That is correct. Our Antitrust Division will be working with attorneys from the Department of Transportation in trying to resolve that issue.

Senator KOHL. Thank you so much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Kohl.

I am advised by Senator Sessions that Senator Graham is next.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Mr. Attorney General, one of the reasons that we would contemplate closing Gitmo is that our commanders in the field have suggested it would help the overall war. Are you familiar with their statements?

Attorney General HOLDER. Yes, I looked at the statements from General Petraeus, Senator McCain; I have actually looked at a couple statements that you have made.

Senator GRAHAM. Well, and I am just echoing what they are saying. The people on the ground in different regions of the world indicate to me that Gitmo has hurt our effort to bring people over to our side, and starting over with detainee policy would probably be a good idea. Do you share that view?

Attorney General HOLDER. Yes, I do. I mean, as I look at it and have spoken with members of the military about the impact that Guantánamo has had as a recruiting tool and as a thing that has alienated us from people, nations that should be our allies, I think that the closure of Guantánamo—the decision to close Guantánamo by the President was a correct one.

Senator GRAHAM. And I think Secretary Clinton shares the view that it would help us abroad if we had kind of a start-over regarding detainee policy.

Attorney General HOLDER. Yes, that is correct.

Senator GRAHAM. And one thing I would just like to mention to my colleagues on the Committee, in every war detainee policy becomes very important. It can hurt the war effort or it can help the war effort. The way you treat people in your capture really does matter. The German and Japanese prisoners that were housed here in the United States were, I think, well taken care of, and it made it easier for us to win over the German and the Japanese people over time. And I see a chance to start over here, but the problem the American people have—and I think members of the Committee on both sides of the aisle—is that we need a plan. And let us talk about how we view the Guantánamo population.

There are basically three buckets: those that can be repatriated—that is one pathway forward. Is that correct?

Attorney General HOLDER. That is correct.

Senator GRAHAM. Now, some of the countries that we are talking about repatriating these detainees concern me. Bermuda is probably OK, but I am not so sure Bermuda is going to take many more than the Uyghurs.

The Saudi Arabian rehabilitation program, what is your view of that program? How successful has that been?

Attorney General HOLDER. Well, I think it has been successful, pretty successful. There have certainly been people who have gone through the program who have returned to the battlefield. I mean, we have to——

Senator GRAHAM. Well, that is true in our own system.

Attorney General HOLDER. We have to be honest about that. And so it has not been 100 percent correct or right, and yet I think it provides a useful tool. I think if you combine that program, for instance, with what we will be doing on our side in making determinations as to who can be transferred, then we can probably increase the success rate of that program. And I would hope that we would be using that tool in at least the transfer or release of some of the people who are presently held at Guantánamo.

Senator GRAHAM. I would certainly urge you to do that. And as you try to find countries to repatriate the detainees, I think it is important to look at the security of that country, their willingness to make sure these people are followed and taken good care of. So that is one bucket.

The second bucket is the people that will actually be tried in a United States court. You know my position. I prefer the military commission system. But of the 250 people we have at Guantánamo Bay, what percentage do you think at the end of the day will go through a military commission or Article III court?

Attorney General HOLDER. It is hard to say at this point. I am not sure the trends have necessarily developed. We have gone through about half of the detainees at this point. I do not think we are going to have a very huge number.

Senator GRAHAM. Would you say less than 25 percent, 25 percent or less?

Attorney General HOLDER. That might be about right.

Senator GRAHAM. Yes, I just want the public to understand that in terms of disposition forward, repatriation has its limits, but a possibility. Trial is a way forward. It is the preferred way forward. But only, I think, about 25 percent will actually ever go to trial, and that leaves us with a third bucket of people that we have in our custody that we are not going to repatriate, that we are not going to go through a criminal process. It goes back to Senator Kohl's view.

That third bucket is the most problematic, but as I understand the administration's thinking on this, it is that we want to make sure that we have a legal system that would allow every detainee in that third bucket to have their day in Federal court, that no one would be held indefinitely in this country without a Federal judiciary review. Is that correct?

Attorney General HOLDER. Yes. As I said, we want to work with members of the Committee and with Congress and determine exactly what the parameters would be. But the thought we had was that it would be some kind of review with regard to the initial determination, and then a periodic review with regard to whether or not that person should continue to be detained.

Senator GRAHAM. I think you are on the right track. The one thing we want to avoid is to say to the world that anyone who is in a military prison or a civilian prison held as an enemy combatant without their day in court, I want an independent judiciary basically validating what the intelligence community and the military says about this person. And if the labeling is correct in the eyes of an independent judiciary, we would want an annual review process or some collaborative effort that would meet on a regular basis to ensure that the detainee has a pathway forward.

Is that sort of what we are looking at?

Attorney General HOLDER. Yes, something along those lines. Again, as I said, the exact parameters of which we want to work with Congress.

Senator GRAHAM. Sure.

Attorney General HOLDER. But I think what we want to stress is that due process has to be a part of this component should people end up in——

Senator GRAHAM. I could not agree more. It has to be robust and it has to be transparent, and no one would be held based on an arbitrary decision by one group. It would be a collaborative effort. So I think you are on the right track.

Now, when it comes to Bagram Air Base, I know you have been to—have you been to Afghanistan?

Attorney General HOLDER. I have not. Not yet.

Senator GRAHAM. I would encourage you to go because I think beyond Guantánamo Bay detainees, there is a group within Bagram Air Base that are foreign fighters, that are non-Afghan fighters, that are probably never going to go into the Afghan legal system for lots of reasons. Some of them have been there 3 or 4 years, quite frankly, and we need to sort of evaluate that population and see if we can reintegrate—bring them back to this new system, whatever it is, reintegrate them into this new system.

I would urge you to do that, Mr. Attorney General, to get some of your folks to look at the Bagram detainee population, because

I think some of them are going to have to be brought back here in our system, and we are likely to capture more during the upcoming surge of troops.

Finally, the photo issue, the detainee photo issue. I know I have only got 30 seconds here. I appreciate your willingness to appeal the Second Circuit decision. The President has said publicly that he would so what is necessary to prevent these photos from seeing the light of the day. I am working with my colleagues here in the Senate to see if we can have a legislative fix that would protect the photos from being released, working with Democrats and Republicans to achieve that goal.

But can you tell me the game plan of the administration, if necessary, the time limits of an Executive order? If the court rules against the administration, I think the Second Circuit order stands. When would the Executive order, if necessary, when should it be issued in this case?

Attorney General HOLDER. Well, we hope obviously that we will be successful in the courts, and if we are not, we will consider the options that we have. The President has made the determination that he thinks the release of those photos would have a negative impact on our soldiers in the battlefield, and it was for that reason that he made the decision to withhold the release of them. That concern continues. It was based on his interaction with the commanders in the field. So if we were not successful in court, we would then have to consider our options. But the concern that the President expressed and that I believe in would remain.

Senator GRAHAM. Mr. Chairman, could I ask one follow-up question? I apologize.

Chairman LEAHY. Go ahead.

Senator GRAHAM. My concern is the timeliness of the order. The one thing, we are a Nation of laws, and an Executive order just cannot wipe out a court decision. The courts will not stand for that.

If the Supreme Court denies the petition for certiorari, then the Second Circuit order to release stands. What would you do in that case? If you lose in court or the Supreme Court refuses to hear the case, wouldn't the order to release the photos be imminent, go forward? And how would the Executive order stop it then?

Attorney General HOLDER. Well, again, I would have to look at the Second Circuit order, see what flexibility there is there, what options we would have. The concern, as I said, that the President expressed and that I agree with remains. We do not think that the release of these photos would be a good thing for our troops, and we would want to, consistent with the law, work with Congress and consider our own options to ensure that these photos are not released.

Chairman LEAHY. Thank you.

Senator Feinstein.

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

I would just like to clear up a bit of repartee between you and Senator Coburn on the e-mail surveillance concerns that were written up on the front page of the New York Times, and I would like to speak as Chairman of the Intelligence Committee.

We saw the April article. The Intelligence Committee held a hearing. We asked the questions. We were assured that it was not

correct. I have since spent time with General Alexander. I have gone over this chapter and verse. I do not believe that any content is reviewed in this program. We will hold another hearing, and we will go into it again.

I am surprised by this article because they are two very good journalists that have written it, and yet everything that I know so far indicates that the thrust of the story, that there are flagrant actions essentially to collect content of this collection just simply is not true, to the best of my knowledge.

Now, we will look more deeply into, Mr. Chairman, and I would be very pleased to let you know what we find.

Chairman LEAHY. Once you have, if you could brief Senator Sessions and myself and cleared staff on that issue.

Senator FEINSTEIN. We would be happy to do that.

Chairman LEAHY. Thank you.

Senator FEINSTEIN. And we are well aware of the concerns about it. So we will continue with this.

If I may, welcome, Mr. Attorney General.

Attorney General HOLDER. Thank you.

Senator FEINSTEIN. And I am one that thinks you are a refreshing breath of fresh air in the Department, so welcome.

Attorney General HOLDER. Thank you.

Senator FEINSTEIN. For almost a year, I asked the Attorney General, naming Mukasey, to release a 2001 OLC opinion, as has the Chairman and others on the Committee. And that opinion concluded that the Fourth Amendment did not apply to military operations on United States soil.

The opinion was finally made public this March. It was released together with a memo written in 2008, which instructed attorneys that "caution should be exercised before relying" on the 2001 opinion, called the opinion's conclusions incorrect or highly questions, and rendering much of the opinion void.

What I would like to know is: Has this opinion ever been withdrawn in its entirety?

Attorney General HOLDER. Senator, I would have to check on that. I believe so, but let me just check to make sure on that and maybe get back to you. I am not sure about—I do not have in my memory right now what the impact of the President's withdrawal of a variety of OLC opinions early on, whether that was concluded in——

Senator FEINSTEIN. Well, this is a big opinion on the Fourth Amendment with respect to American citizens and American military. So I think it is important that we clarify it.

Could you bring us up to date on what you are doing to review the OLC opinions and what actions you have taken?

Attorney General HOLDER. Well, we released some of the OLC opinions some weeks ago. I am not sure exactly when. The review that led to that release continues, and as we finish that review and make the determination that opinions can be released in a way that is consistent with our national security and protects also internal deliberations of the executive branch, we will make further releases.

One of the things that would be very helpful in that regard is to—this is an advertisement, I suppose, maybe not totally respon-

sive, but it would be great to have Dawn Johnsen confirmed as the head of OLC. That is, I think, a critical part in getting that review underway, having the person who will ultimately head that critical part of the Department in place.

But the people there now are doing the best that they can, and we will continue the process that led to the release of those other opinions.

Senator FEINSTEIN. Thank you very much.

Recently, I had a meeting in the San Diego area on the southwest border. It was a meeting of the top officials of all of the Departments—FBI, DEA, DA, et cetera. And I learned something quite surprising, and I would like to say what it is and ask you to take a good look. That is, virtually all of the narcotics traffic in this country, the routes that drugs travel, the people who control those drugs, the hits that are ordered are essentially controlled by certain gangs in Federal prisons and some State prisons today. And they even gave me the names of the prisons.

I spoke to Bob Mueller. I have told him about this. I want to bring it to your attention publicly. It is not acceptable that narcotics-trafficking directions be given out of Federal or State prisons, and I would like to ask you to make a thorough investigation. I would be happy to give you the information that I have that I am not going to discuss here, but what I am asking you for is a commitment to take a big, strong, in-depth look at this.

Attorney General HOLDER. Sure, I will certainly do that. There are certainly measures in place—the monitoring of telephone calls, the monitoring of people who visit with people who are detained certainly in the Federal system for which I am responsible. But I will certainly look at the information that you have expressed concern about and see if there are things that we need to do better on the Federal side and also interact with our State partners to see if there are ways in which we can help them in that regard.

Senator FEINSTEIN. Thank you very much, and I am happy to fill you in.

I wanted to just pick up on what Senator Kohl and Senator Graham said about this one group of detainees. As you said, the laws of war provide for the detention of a combatant for the length of the conflict. Once a military commission declares somebody an enemy combatant and the decision is made that they remain a national security risk, there is a necessity, as we have all discussed, to provide a due process review of that individual periodically.

Has that due process review been decided upon? If so, who would conduct it? And how often would those reviews take place?

Attorney General HOLDER. No, we have not decided that, both with regard to where that review would occur and how frequently it should occur. We are discussing that internally. It is something, though, that I think we would want to work with the members of this Committee and Congress more generally in coming up with how that should occur, who should be responsible for both the initial determination and the review, and then how frequently it should occur. We are going to have ideas, but we want to interact with, as I said, members of the Committee to get your ideas as well so that the process that ultimately is put in place is one that will have the support of Congress.

Senator FEINSTEIN. Well, please do. Senator Graham and I have discussed this. Others have. We are very interested and I think have a point of view that we would like the opportunity to express to you. Thank you.

Let us go back to the southwest border for a minute. More than 10,000 people, as we all know, have been killed in Mexico by drug violence since December of 2006. And Mexico's Attorney General, Mr. Mora, estimates that $10 billion worth of drug proceeds crosses the United States into Mexico each year in the form of bulk cash.

We held a hearing; we talked to the Attorney General of the State of Arizona, who more or less confirmed a lot of this.

So my question is: How much of that cash has been intercepted at the border in 2009? And what role today does the BATF and the DEA play in stemming this flow?

Attorney General HOLDER. I would have to get you some numbers on how much we have intercepted in 2009, but we have certainly stepped up our efforts in conjunction with our partners at DHS. Secretary Napolitano and I went to Mexico, I guess in the early part of the year, to talk with our Mexican counterparts about the inflow of bulk cash and weapons into Mexico, and we are trying to come up with ways in which we interdict and stop that amount.

DEA has moved significant resources, about 20 agents, toward the southwest border. ATF has moved about 100 to the southwest border. The FBI has put together a new intelligence capability along the southwest border—all designed to stop the flow of that material into Mexico, but also to stop the flow of drugs from Mexico into our country. This is a priority for us.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman.

Mr. Attorney General, welcome. Thank you for your service. At your confirmation hearing, we talked about the Emmett Till unresolved civil rights crimes, and you had made a commitment to me at that time that you would do whatever you could in your power, if Congress failed to act, to make sure that that was funded.

Number 1, my first question is: Have you been successful? And, Number 2, the group that actually motivated the response for that bill—and Senator Dodd and myself had an amendment to try to fund that that was rejected by our colleagues on the omnibus bill—would like to have a meeting with the Justice Department and have been turned away. And I just think in the nature of your commitment to me, can you answer what have you done to get the funding for the Emmett Till bill? And, Number 2, would you agree to meet with the principals of that organization so that we can get these crimes resolved?

Attorney General HOLDER. I would have to look and see, Senator, quite frankly, where we stand with regard to the budget for next year. I just do not offhand remember how much money, if any money at all, was dedicated to the project that you talk about. But I will check that and get back to you.

But I would be glad to meet with the people you are talking about, the organization that you are speaking with, and I will——

Senator COBURN. I will communicate that today. That is Mr. Alvin Sykes. He is the president of that organization.

Attorney General HOLDER. That is fine.

Senator COBURN. You know, it really is interesting. We pass a bill and we pound our chests around here, and then we do not give the money to do it on a very real issue that time is a major factor. Because if we do not fund this in an appropriate time, we are not going to solve those, and we are not going to bring to justice those people who should be brought to justice.

Attorney General HOLDER. As I said at my confirmation hearing and I will reiterate today, I am going to share the concern that you expressed, and I will do what I can to give life to the mechanism that is in place. But I want to give you——

Senator COBURN. I will be happy to help you shuffle that money around. I put out a report last year on $10 billion worth of waste at the Justice Department, so I will be happy to offer a critique, if I might, on where you might find that money.

I am a little concerned about what happened in Arkansas and also what happened in Kansas and the differential in response. Do you view the murder of one of our soldiers in Arkansas as a hate crime?

Attorney General HOLDER. I do not know all the facts there, but it is potentially a hate crime. The response that we use with regard to what happened to the killing of Dr. Tiller was one where the Justice Department has historically used its resources to protect doctors who engage in reproductive activities.

With regard to the killing of the recruitment officer, that is one the Department of Defense has primary responsibility for, though we have offered our assistance in that regard.

Senator COBURN. The prosecution of that would be outside of the Department of Justice?

Attorney General HOLDER. Oh, no, no. I thought you were talking about the protection efforts.

Senator COBURN. No, no. I am not talking about the—I am talking about the prosecution of that.

Attorney General HOLDER. That would be the responsibility of the Justice Department in conjunction with our local partners. As happened in Kansas, a component of that is being done by the local prosecutor; some will be done by us.

Senator COBURN. I understand. Do current hate crimes laws cover that act in Arkansas?

Attorney General HOLDER. If there were a determination made that the killing was based on the race of the victim, yes, I think it is at least arguable that that is. But if the motivation was because of his military status, I do not think that would be cognizable under the hate crimes statute that President——

Senator COBURN. Regardless of what his stated motivations might have been?

Attorney General HOLDER. Well, I mean, that would be one of the things we would have to consider, what is the motivation of the person.

Senator COBURN. Should we consider legislative proposals to protect U.S. soldiers at recruiting offices?

Attorney General HOLDER. Well, I guess we would have to look at the extent of the problem. That is not to minimize the seriousness of what happened there. I mean, what happened there was deplorable and not something that should in any way be tolerated. But I think we would want to look at what is the nature and extent of the hate crime that we are trying to legislate. The categories that we have now, I think we can certainly show that there are substantial numbers of crimes that happen, and also with regard to the categories that the administration thinks we ought to expand it to.

With regard to military personnel, I would want to look and see what the statistics shows and what the facts shows.

Senator COBURN. OK. Thank you. Well, we will get into that again.

One of the other things that you and I discussed during your hearing—and you and I have a different position on this, and I respect your position. But a commitment you made was to rigorously review *Heller* prior to making any commitments or recommendations on additional laws restricting the Second Amendment. Have you, in fact, done that? And did you, in fact, do that before you issued your recommendation on so-called assault weapons?

Attorney General HOLDER. I was going to say, I am not sure that I have done anything with regard to weapons. I am obviously cognizant of the *Heller* determination, *Heller* decision, but I do not think the Department has issued any rules or regulations with regards to weapons. At least that——

Senator COBURN. Well, in terms of a recommendation, though, basically you are on record of wanting us to re-propose an assault weapons ban, and the comment that you made during your confirmation hearing was, in fact, that you would do a rigorous review of *Heller* before any recommendations were made. And my question simply is: Did you do that? And what were the results of that rigorous examination of *Heller* that caused you to propose a new assault weapons ban?

Attorney General HOLDER. Well, I do not think that I have, in fact, said that we need a new assault weapons ban. What I have said is that we need to look at the situation that we have, look at the violence that we have that is gun related, and come up with measures that will effectively deal with that issue.

Senator COBURN. Actually, on February 25th at a news conference, you said you endorsed reinstating the ban on assault weapons. February 25th. And my question is—the commitment you made to this Committee was that you would do a rigorous analysis of *Heller* before you made any recommendations, and all I am wanting to know is: Did you do that, or was this just impromptu at this press conference?

Attorney General HOLDER. Well, there is a firearms review that is ongoing and obviously will take into account the *Heller* decision. But the administration has not taken a position with regard to reinstituting the assault weapons ban.

Senator COBURN. All right. I thank you very much for your answer to my question.

I do have a few additional questions I would like to submit to the record, Mr. Chairman.

Chairman LEAHY. Of course.

Senator COBURN. Thank you again.

Chairman LEAHY. All Senators have that right, and we will keep the record open throughout this week.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

I understand, Mr. Attorney General, you had exchanges with Senators Graham and Feinstein and Kohl about the issue of prolonged detention. I chaired a hearing on this topic last week and would simply urge you and the Department to consider the various legal and policy concerns that are involved. Any system of indefinite detention raises those kinds of issues. I would say even with the kind of due process protections that you discussed, I do think this could be a very big mistake, especially because of how such a system could be perceived around the world, frankly, after some of the progress that the administration is making through the President's good work on our relationships around the world.

On another topic, I wrote to the President Monday about my continued concern that the administration has not formally withdrawn certain legal opinions, including the January 2006 white paper that provided legal justifications for the Bush administration's warrantless wiretapping program. The letter was prompted in part by a recent speech by the Director of National Intelligence in which he asserted that the program was not illegal.

In a speech to the American Constitutional Society in June 2008, you said the following: "I never thought that I would see the day when a President would act in direct defiance of Federal law by authorizing warrantless NSA surveillance of American citizens." The President himself also said several times as Senator and during the campaign that the program was illegal.

Now that you are the Attorney General, is there any doubt in your mind that the warrantless wiretapping program was illegal?

Attorney General HOLDER. Well, I think that the warrantless wiretapping program as it existed at that point was certainly unwise in that it was put together without the approval of Congress and as a result did not have all the protections, all the strength that it might have had behind it, as I think it now exists with regard to having had congressional approval of it.

So I think that the concerns that I expressed in that speech no longer exist because of the action that Congress has taken in——

Senator FEINGOLD. But I asked you, Mr. Attorney General, not whether it was unwise but whether you consider it to have been illegal, because that is certainly the implication of the quote I read and the explicit statement of the man who is now President of the United States.

Attorney General HOLDER. Yes, well, what I was saying in that speech was that I thought the action that the administration had taken was inconsistent with the dictates of FISA. I think I used the word "contravention." And as a result, I thought that the policy was an unwise one, and I think that the concerns that I expressed then have really been remedied by the fact that Congress has now authorized the program.

Senator FEINGOLD. But did you think it was illegal?

Attorney General HOLDER. Well, I thought that, as I said, it was inconsistent with the FISA statute and unwise as a matter of policy.

Senator FEINGOLD. Has something happened that has changed your opinion since your June 2008 statement that would make it hard for you to just simply say what the President said, that it is illegal?

Attorney General HOLDER. No, I do not think so, and I do not think what I am saying now is necessarily inconsistent with what I said at the ACS convention speech that I gave.

Senator FEINGOLD. Well, it sounds awfully mild compared to some very clear statements and a very important principle here, which is not only that this has to do with the scope of the FISA law, but the underlying constitutional issue that people like me and many other people believe, that if the statute is that explicit under the third test, under Justice Jackson's test, that it is, in fact, unconstitutional for the President and illegal, of course, for the President to override the express will of the Congress.

Attorney General HOLDER. Well, as I said, I think I said "contravention of," "inconsistent with." I am not sure I have used the term "illegal." And I would adhere to what I said then, and I think what I am saying now is consistent with what I said in the speech.

Senator FEINGOLD. Well, that may well be, but I would hope you would use the word "illegal" now, and I requested in the letter I sent to the President on Monday and also in a letter dated April 29th that the administration withdraw the January 2006 white paper and other classified OLC memos providing legal justification for the program. I know you have initiated a review of the Bush era OLC memos, and, of course, certain memos that authorized torture have been withdrawn. Apparently, you discussed this a bit already with Senator Feinstein.

What is the status of your review of the memos concerning the warrantless wiretapping program?

Attorney General HOLDER. Well, I asked the Office of Legal Counsel to review these prior opinions, including those that deal with surveillance with a goal of making as many of these opinions public as we can consistent with our national security interests and also consistent with ensuring that robust debate can happen within the executive branch.

It is my hope that that process, which is ongoing, will lead to the release of several opinions in a relatively short period of time.

Senator FEINGOLD. I just want to reiterate how important it is for the legal justification for this program to be withdrawn. I am concerned these memos that make unsupportable claims of executive power will come back to haunt us if they remain in effect. And if you believe, as I think the President has indicated in the past, that the program was illegal, they cannot stand.

In his national security speech on May 21st at the National Archives, the President indicated that he is concerned about the overuse of the state secrets privilege. He stated that the administration is undertaking a thorough review of the practice and then said that, "Each year we will voluntarily report to Congress when we have invoked the privilege and why, because as I said before, there must be proper oversight of our actions."

Since February, I have been seeking a classified briefing from the Department about its position in the three cases in which it has continued to assert the state secrets privilege. These are controversial cases, and I want to understand why the administration is asserting the privilege. I am a member of the Intelligence Committee and the Judiciary Committee, and as you know, state secrets legislation is before the Committee.

I think my request is consistent with the President's desire to brief Congress and cooperate with oversight. Will you make sure that I can receive this briefing?

Attorney General HOLDER. I will try to get the information to you, Senator. What we are trying to do is look at the state secrets issue in such a way that—we are looking in two ways: one to see whether or not the doctrine was properly invoked with regard to the 20 or so cases in which it has been used, and then what can we do going forward.

We have some proposals that we have been working on that I think we are going to make public in a matter of days that we would put forth for consideration by this Committee and by Congress generally about the way in which we think we should handle the state secret issue.

Senator FEINGOLD. Is there any reason why I cannot get this briefing at this time?

Attorney General HOLDER. No, as I said, we will try to get the information to you and make you aware of the things that you sought.

Senator FEINGOLD. I thank you, Mr. Attorney General.

Chairman LEAHY. Thank you.

Senator Hatch.

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

Welcome, General. We are happy to have you here. We know you have a difficult job, and we always want to be helpful to you if we can.

There is something that really bothers me over this last weekend. After a 2-year investigation, the FBI, in cooperation with the Department of Interior, arrested 19 Utahans trafficking in Indian artifacts from Federal lands. Now, I am extremely concerned by the manner in which these warrants were executed. They came in in full combat gear, SWAT team gear, like they were going after, you know, the worst drug dealers in the world, and in the process—now, I do not believe anybody should be taking Indian artifacts, to establish that right off. But in the process, one of the leading figures in the whole county down there who is a leading doctor, had delivered almost everybody who lived in the county as a doctor, committed suicide. He was by all intents and purposes an upstanding member of the community, a decent, honorable man, critical to the community from a health and welfare standpoint. And the way they came in there—I mean, you know, I have no problem with going after people who violate the law. But they came in there like they were the worst common criminals on Earth, and in the process this man—it became overwhelming to him, I suppose—a really strong individual, a good person, goes out and commits suicide. Now, you know, this bothered me.

Now, media reports state that over 100 Federal agents were used in this operation, and that extreme show of force and presence has been perceived by the community out there and the civic leaders in San Juan County as not only unnecessary but brutal.

Now, I am questioning the motivation of some of the higher-ups at Justice and of the Interior. The day after these raids were conducted, Secretary Salazar and Deputy Attorney General David Ogden appeared before the media touting how successful this investigation was.

Now, I have been in the Senate for—now in my 33rd year, and I felt like it was a dog-and-pony show to me. I know one when I see it, and this has all the classic signs of one.

The offenses for which these warrants were issued were nonviolent offenses. One has to think that the manpower and resources allocated to this operation were usually reserved for, like I say, arresting truly violent felons.

Now, let me contrast this case and compare it to another Federal sweep that also occurred last week. In North Texas, after a 2-year investigation, the FBI arrested 17 people involved in a large drug-trafficking organization that extended from Texas to Massachusetts. The FBI seized cash, weapons, real estate, and vehicles. FBI officials say that this ring allegedly distributed $22 million in cocaine. Ironically, there was not a major press event regarding the drug sweep in which the Deputy Attorney General Ogden addressed the media.

And I guess what I am saying, I know you well. We have been friends all these years. I have great respect for you. We may differ on some things, but that is normal, as far as I am concerned.

But for all these reasons, can you just explain to me what, if any, factors were used to measure the appropriate level of force and personnel for the Utah operation? Here is the article on the 17 arrests for these violent drug situations. That is about it. But give me some reason for all this. Our people out there are up in arms, and I think properly so.

Attorney General HOLDER. Well, first let me express my sympathy for the family of the doctor who took his own life. Obviously, that is a very sad thing, and if it was related to this operation, it is something that saddens me. It is not something certainly that we intended to have happen.

Senator HATCH. It has completely destroyed good feelings toward the Government in that whole community.

Attorney General HOLDER. The arrests that were done were felony arrests, and as best as I can tell, they were done in accordance with the FBI and Bureau of Land Management standard operating procedures.

When arrests are made in even cases that seem to be nonviolent, there is always a danger for the law enforcement officer who is effecting that arrest, and it is a difficult thing to ask them to assume certain things as they are——

Senator HATCH. I am with you on that, but in this case, this is a doctor who everybody respected, everybody loved in the community. I am just centering on his case since he was so overwrought by it he took his life. And that community—you know how hard it

is to get upstanding doctors to move into some of these rural communities and do what this man was doing.

Now, again, I do not justify stealing or taking Indian artifacts, if that is what happened here, but I would, I guess—nor do I want to put you through a lot of pain here. I hope you will do something about that type of activity in the future. You can bring all the force you want against drug dealers and people who clearly are violent felons where our people might be in danger. But in this case, there was not the slightest possibility anybody could have been in danger down in that county.

Attorney General HOLDER. Well, we want to use the appropriate amount of force that is necessary, but we also want to keep in mind the protection—the responsibility I have to make sure that the lives of law enforcement officers engaged in these operations are not put at risk.

Senator HATCH. I am with you, but, again, I would say in that instance, that should not happen.

Let me just change the subject for a minute because I am concerned about the state secrets privilege. General Holder, the Department of Justice has been conducting a review of pending cases in which the state secrets privilege has been invoked by the Bush administration. In the first 100 days of the Obama administration, the Department of Justice elected to defend this privilege three times. I have no problem with that at all. I think it has been correct.

The administration has picked up where the Bush administration left off in three pending cases: *Al-Haramain Islamic Foundation* v. *Obama, Mohamed* v. *Jeppesen Dataplan,* and *Jewel* v. *NSA*.

Now, during an April television interview, you stated that, in your opinion, the Bush administration correctly applied the state secrets privilege in these cases. Now, tomorrow, the Senate Judiciary Committee will begin marking up a bill entitled "The State Secrets Protection Act." Last year, after hearings were held on this matter in the 110th Congress, Attorney General Mukasey sent a letter to the Senate Judiciary Committee expressing the Justice Department's views on the State Secrets Protection Act. The Department of Justice had several concerns regarding this legislation. Chief among them was the constitutional questions raised by the proposed legislation. This bill seriously limits the ability of the executive branch to protect national security information under the well-established standards articulated by the Supreme Court in *U.S.* v. *Reynolds*.

My time is up, but let me just finish this question, if you would, Mr. Chairman. I would be grateful for that courtesy, but I also do not want to get on the wrong side of the Chairman.

Chairman LEAHY. You never have.

Senator HATCH. I never have, that is for sure. Any attempt to reallocate national security decisionmaking from the executive to the judicial branch usurps the executive branch's power to make such determinations.

Now, that was the Department's view last year after hearings were held on the state secrets privilege. The same bill has been introduced again, and there were no changes in the language and no

attempt on the part of the bill's authors to address the Justice Department's concern.

Now, this bill has been on the Committee's calendar since late April, and we have yet to hear the Justice Department's view on this legislation. So while I have you here, would you be kind enough to give the Justice Department's view on the State Secrets Protection Act of 2009?

Attorney General HOLDER. Well, we want to work with this Committee and with Congress in dealing with this whole issue of state secrets and the doctrine of state secrets privilege. We have and are about to release, I think, what our views are as to how this problem can be handled, to the extent that it is one. I think it is our view that the proposals that we are going to make will deal with many of the concerns that I think generated the feeling in some people that there was a need for legislation.

So I would hope that we would have a chance to have members of this Committee and Congress to look at the proposal that we are going to make and see if that will be sufficient, and then work with the members of the Committee on any legislation that might be contemplated.

I actually think, though, that the proposals that we are going to make I think will be sufficient.

Senator HATCH. When are you going to release those to us, do you know?

Attorney General HOLDER. It would be my hope that we can do this within a matter of days. This is not something that I think is going to——

Chairman LEAHY. I might note for the Senator from Utah, as the Attorney General knows, I have been pushing for that kind of a response because, otherwise, we will mark up the bill. I would like to have, as I would with any Department of either party, I would like to have the Department's views. But if we don't have them, we will go ahead and mark up the legislation.

Senator HATCH. That is incentive enough right there, it seems to me.

Attorney General HOLDER. You will have our views.

Senator HATCH. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Durbin.

Senator DURBIN. Mr. Attorney General, thank you for being here.

First, I would like to ask a question related to an issue in Chicago. I recently met with Ron Huberman, who is the head of the Chicago Public School System, and he told me an absolutely stunning statistic. In this last school year recently completed, over 500 school children in Chicago were shot, at least 36 of them fatally. I think you will share my view that this is unacceptable in Chicago or any place in America.

I think under the Second Amendment people have the right to own a gun responsibly and legally, but children also have the right to be able to walk to school without being caught in the cross-fire of a gang war.

I would like to ask for your help, along with the help of Secretary of Education Arne Duncan and other members of the administration, to work with Mayor Daley and State and local officials to deal with this serious problem in President Obama's hometown.

Attorney General HOLDER. Yes, the problem that you have detailed is simply unacceptable. I met with Mayor Daley last week here in Washington, and we discussed that problem and some other crime issues in Chicago. And what I told him then and what I will tell you now is that we are committed to working with him as partners in trying to come up with ways in which we can deal with that issue.

You know, one is too great a number, but the numbers that are coming out of Chicago are simply unacceptable, and we have to take really strong measures to try to come up with ways in which we deal with it.

Senator DURBIN. There are many aspects of it. Gang activity is clearly one of them; the proliferation of the sale of guns to these drug gangs by irresponsible gun dealers. There is a Federal aspect of this, and I appreciate your being willing to help us and cooperate in dealing with that.

There were two investigations you inherited from the Bush administration related to activity that preceded your arrival. One was a Bush administration investigation of the destruction of CIA interrogation videotapes, and the second involved an investigation of Jay Bybee, John Yoo, and Steven Bradbury, the Justice Department attorneys who authorized the use of abusive interrogation techniques like waterboarding.

Senator Whitehouse and I asked then-Attorney General Mukasey to give us a copy of the investigation and report of the Office of Professional Responsibility about the activities of these three persons. He did not do that. Although I understand that the OPR completed its investigation, he determined that he would do something which I thought was extraordinary. He submitted the report before he gave it to the public or Congress to those who had been investigated to review and comment on the investigation. I understand that they have submitted their replies to that some 6 weeks ago.

So the obvious question is: When can we expect to receive a copy of this report?

Attorney General HOLDER. I sat down just yesterday, actually, and talked to Mary Pat Brown, who is the head of the Office of Professional Responsibility, and this is one of the things that we discussed. They are pretty close to getting to the end of their process. It was lengthened by the responses that they received from the people who are the subject of the investigation. Ms. Brown indicates that what they wanted to do was to look at those responses, and there are some changes they are making to the report in light of the contentions that were contained in the responses that they examined.

So I think that we are pretty close to the end of that, and my hope is to share as much of that report as I can with Members of Congress and with the public. There are some potentially classified portions of that report that I think we want to work to declassify because it has been expressed by the head of OPR—and I agree with her—that you cannot get the full context for this report unless the entirety of the report or close to the entirety of the report is declassified.

Senator DURBIN. Can you give me a timeframe when we can expect to receive the declassified or unclassified portions of this report?

Attorney General HOLDER. I think we are talking about a matter of weeks. I think they are pretty close to the end, and then I think we have to try to work through the declassification process. But we would be in a position to release the classified portion—though I really worry about that because as people look at the work that the OPR has done, I would like them to have the full range of information that OPR had and considered, and that is why I think the declassification process is so important. I would not want to put in the public record an incomplete report, so we have to work our way through that as well.

Senator DURBIN. Mr. Attorney General, you made a point, which we have discussed before, about the question of race and justice in America. It was one of your earliest statements. You are aware, as all of us are, that African Americans are incarcerated nearly 6 times the rate of whites in our country. One of the major reasons for that is the so-called crack/powder disparity when it comes to cocaine. I use this simply as an illustration that, under our current laws, someone who is guilty of selling this amount of cocaine is subject to the same incarceration as someone who sells this amount of crack cocaine.

This disparity, sadly, I voted for. Many of us did, 20 years ago. We did not know how terrible crack would be, but we were told it would completely change narcotics in America. It was so cheap, so plentiful, and so devastating that we had to do something extraordinary. The net result was this 100:1 disparity in terms of sentencing.

There are men and women presently incarcerated in the United States for 10 and 20 years because of this 100:1 disparity between two forms of cocaine.

We held a hearing in the Crime Subcommittee of Judiciary, and we had expert testimony, not just from those who said there is no scientific basis for this disparity, but also from law enforcement officials, including a gentleman who came to us from Miami, Florida, and said that—John Timony, the Miami police chief, who said police departments face a much more difficult challenge gaining trust of their communities because of the glaring inequities in the justice system that are allowed to persist.

I know you have come out for ending this disparity, but I would like to ask you if we need to move with dispatch on this issue to restore justice and to restore confidence in our justice system among people in America who are presently the victims of this disparity.

Attorney General HOLDER. Senator, I do think we need to move with dispatch. This is one of the first initiatives that we had people testify about. The Assistant Attorney General for the Criminal Division, Lanny Breuer, testified against the disparity, and I think you are exactly right that the disparity as originally intended—originally proposed and enacted I think was well intentioned. I do not think anybody had any negative motives. But as we have seen how it has played out—and I think in the graphic demonstration that you have made—and also when one looks at the racial impli-

cations of the crack/powder disparity, it has bred disrespect for our criminal justice system. It has made the job of those of us in law enforcement more difficult. And I think it is time for us to make the determination that is consistent with what the science tells us, consistent with what law enforcement officials on the State and local levels have told us, certainly something that I observed as a judge here in Washington, D.C., that it is time to do away with that disparity. That will have, I think, an immediate impact on how people—not only people of color, but people generally look at our criminal justice system, and it will be a very positive thing for those of us in law enforcement.

Senator DURBIN. Thank you, Mr. Attorney General.

Thank you, Mr. Chairman.

Chairman LEAHY. Just so we know where we are, Senator Cornyn will be next, Senator Cardin, Senator Kyl, and I know a lot of the Senators have been going back and forth. In a discussion with Senator Kyl, he is working on health care, which a number of us are.

On the thing that Senator Durbin raised, on the crack cocaine/powder cocaine, I would like to see us move legislation this year to remove that disparity, make it more realistic. I understand some of the negotiating room it gives prosecutors, but I also have this image of people, wealthy people, well-established in society, using their powder cocaine with virtual immunity, and a lot of young people from a far less affluent area, often minorities, getting hit on crack cocaine. And I think as a disparity it is destructive to our whole penal system and our justice system and to our respect for the rule of law.

I will work with Senators on both sides of the aisle who have expressed for some time the problem with this disparity. I do not want what appears to many people to be one rule for white America and a different rule for black America.

Senator SESSIONS. Mr. Chairman, could I just say——

Chairman LEAHY. Sure, of course.

Senator SESSIONS. I share those concerns. Senator Hatch and I have, I guess for 9 years, had legislation to make a substantial improvement in that. Senator Cornyn and Senator Pryor and former Senator, now Secretary, Salazar have all pushed a bipartisan bill, and four former Attorneys General have also supported substantial improvements in the way that is done. I think it is not healthy now. We need to fix it.

I would just note one reason we are having a hard time, Mr. Chairman, on our side is the Finance Committee. Those masters of the universe are setting our health care policy. Senator Grassley let me know that he is, of course, ranking on that Committee. Senator Hatch, Senator Cornyn, and Senator Kyl are also members of that important Committee. So I am glad they can at least be here for a while.

Chairman LEAHY. Thank you. I am glad, too, and, of course, I will keep the record open for the rest of the week for additional questions to be submitted.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Welcome, Attorney General Holder. And I just want to note for the record, Mr. Chair-

man, there is no more important Committee in the Senate than the Judiciary Committee.

[Laughter.]

Chairman LEAHY. I liked you, anyway. You did not have to say that. No, but I do think the Finance Committee and the HELP Committee are taking a lot of our members, and I understand why.

Senator CORNYN. Mr. Attorney General, I just have two areas I want to ask you questions about. In November 2008, the Department of Transportation declared the record complete in the Continental Airlines, which is headquartered in Houston, Texas, their application to join Star Alliance, an antitrust-immunized alliance of international airlines. According to the U.S. Code, this means that the Secretary of Transportation was obligated to make a final decision by May 31, 2009. In late April 2009, the Secretary issued a preliminary decision tentatively approving that membership in Star Alliance, but then the May 31 deadline came and went.

I wanted to ask you about this because some have indicated that the Transportation Secretary's failure to meet the statutory deadline was due in part to requests from the Department of Justice, specifically the Antitrust Division, encouraging the Secretary to delay the decision until the DOJ Antitrust Division could have some input.

I am concerned about the deadline having come and gone and sort of the open-ended nature of this and wonder if you can shed any light on why that deadline was not met and what you anticipate the timetable might be. I think Senator Kohl asked some questions about this.

Attorney General HOLDER. Yes, Senator Kohl asked the question earlier. We did ask the Transportation Department to allow our Antitrust Division to have input into the decision that he will ultimately reach, and the Secretary agreed to allow us to participate in that. I do not think that this will extend the time. It is regrettable that the deadline has passed, but I do not think this will extend it a matter of months or even beyond a few weeks. And I expect that the determination will be made by the Secretary of Transportation after having consulted with the lawyers in our Antitrust Division.

Senator CORNYN. I can certainly understand the desire to have input, and I appreciate that. However, I know there are others who would appreciate a decision as soon as practicable, so I would appreciate that.

I want to ask you a little bit about the D.C. voting rights issue, and as you know, I wrote a letter to you expressing my concerns about a Washington Post story that said you had solicited a second opinion from the Solicitor General's office after the Office of Legal Counsel originally concluded that the D.C. Voting Rights Act was unconstitutional. I requested that you produce the OLC memorandum questioning the bill's constitutionality, and in response, as you will recall, you said that you declined to make that memorandum public, saying that it was not final. And so I wanted to ask you about that.

What is there that remains to be done before that opinion will be final?

Attorney General HOLDER. Well, I guess no decision has actually been made by the administration yet with regard to the position it is going to take concerning the constitutionality of the statute. So that process is still ongoing, and as long as that is ongoing—and also the concern I think I expressed was it reflected—I was concerned about releasing documents that reflected internal deliberations in the Justice Department.

So those were the two concerns that I—if I did not express both, those were certainly the two concerns I have now with regard to the release of the documents.

Senator CORNYN. Given the fact that the memorandum was signed by the acting head of the Office of Legal Counsel, in what sense was the memorandum not final? Is it because the—you say the administration will now make a decision whether or not it disagrees with the Office of Legal Counsel or not?

Attorney General HOLDER. Yes, the determination has not been made by the President, by the administration, as to what the position is going to be of the administration. And so while that matter is ongoing, that was one of the two concerns I expressed about releasing the materials that you requested.

Senator CORNYN. Well, would you foresee a situation where the Office of Legal Counsel would render a legal opinion that a statute was unconstitutional where the President would take a contrary position?

Attorney General HOLDER. You have to look at, you know, the specific fact situation. OLC has some of the best and the brightest in the Justice Department, but even the best and the brightest can get it wrong. We look at what they say. I review what it is that they say. Great deference is given to what OLC says. It is extremely rare for an Attorney General to take a contrary position. And I understand that is why this has at least gotten some—generated some interest.

But it is possible—I mean, the OLC has delegated power from the Attorney General. I think ultimately it is my responsibility to make sure that the opinion that comes out of the Justice Department, even an OLC opinion, is one that I am fully comfortable with.

Senator CORNYN. I understand the difference between lawyers having different opinions. That happens all the time. But what you are suggesting is that the President of the United States would make a policy decision on a question of law and essentially overrule the decision of the Office of Legal Counsel? Is that what you are suggesting?

Attorney General HOLDER. No, I am not saying that. I mean, one of the things the President has got to decide in preparing policies, making policy judgments, there are a whole variety of legal things that come in from the Justice Department, legal opinions. There are obviously policy considerations. I would not say that the President for pure policy reasons would necessarily overrule an OLC opinion. The President might have a different legal view than the Office of Legal Counsel, a different view than the Justice Department with regard to a particular statute or policy initiative.

Senator CORNYN. Well, I certainly understand the role of the OLC in informing the executive branch about what the law, in fact,

is. Indeed, in the area of enhanced interrogations and rendition and other controversial areas that you are well familiar with and I am as well, the question is what is the law. And, of course—but here, on the discrete issue on the constitutionality of a statute, how in the world would the President of the United States have an opinion that would be anything other than a political decision that might overrule a legal judgment of the Office of Legal Counsel? Isn't that the kind of politicization that we have heard decried here in this Committee and in Congress over the last few years?

Attorney General HOLDER. Well, you are talking about a hypothetical, the likes of which I am not sure I have ever heard. But it would seem to me——

Senator CORNYN. Well, excuse me, but you are the one who said that the President, the administration may or may not agree with the opinion, so that is not a hypothetical in that sense, I would submit.

Attorney General HOLDER. Well, I think I was focused really more on the Attorney General not necessarily agreeing with what an OLC opinion—an OLC position might be.

The OLC plays an important role, a vital role in saying what the Justice Department's view is on the constitutionality of a statute and a whole variety of other things. The President, in formulating policy, takes into account a wide range of things, things that come from the Justice Department, opinions that come from other places. There are policy determinations that go into it. And it is not—I do not know. I am not as bothered as you are apparently by the notion that a President in taking into account the wide range of advice and opinions that he or she gets comes up with a determination that might be different from what the Justice Department has recommended.

Senator CORNYN. Well, would that have to be based on a legal argument, or could that be based purely on political considerations?

Attorney General HOLDER. I mean, usually the experience that I have had is that—we are talking about legal arguments. The Justice Department takes a view, I do not know, maybe the State Department, the Defense Department takes a different view with regard to a legal determination. The President weighs those legal determinations and then decides one way or the other which legal view he thinks is most appropriate.

Chairman LEAHY. Senator Cornyn——

Senator CORNYN. Mr. Chairman, I know my time is up. I find troubling, though, the idea that the Office of Legal Counsel would render an opinion on the constitutionality of a statute and that the administration might in its discretion overrule that decision. I understand informing policy by saying what the law is, is going into an overall policy judgment. But on a discrete legal question involving the constitutionality of a statute, I am troubled——

Chairman LEAHY. And probably all the more reason why we should get on with confirming the head of OLC.

Senator CORNYN. Well, not if we are going to overrule him at the White House. I do not think that makes——

Chairman LEAHY. Well, we——

Attorney General HOLDER. Just to be clear here, I mean, with regard to the particular thing that we are talking about, the D.C.

voting rights, this did not involve the President. This involved me. It was my determination that the better view of the statute was that it was constitutional. I based that on my review of the constitutional authorities who, in fact, said the same thing, among them Ken Starr, Viet Dinh, people who are certainly conservative in their views, but who I thought had a better view of the constitutionality of the statute. The President was not involved in this at all. Let us be clear. This was the determination that I made.

Senator CORNYN. But just to be clear, the reason you will not release the memo is because you disagree with the legal conclusion?

Attorney General HOLDER. No. The reasons that I think the memos should not be revealed is because this is an ongoing matter, and also because I am concerned about revealing internal deliberations in the executive branch, and specifically within the Justice Department.

Senator CORNYN. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Cardin.

Senator CARDIN. Attorney General Holder, it is a pleasure to have you here, and I very much appreciate your comments, particularly as it relates to the Civil Rights Division and the message that you have sent in so many other areas. I want to talk about a few.

Let me first, if I might, talk about predatory lending. The civil rights movement was responsible for the passage of significant legislation that was intended to end discrimination in housing—the Fair Housing Act, the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act, just to mention a few. And I think it did an incredible job in ending redlining. But the problem today is that we have reverse redlining where minority communities have been targeted particularly for subprime loans. Let me just give you some of the statistics that we have for 2006, leading up to the current housing crisis.

We find that the high-cost loans, that 35 percent who were placed in these high-cost mortgages could have been placed in traditional fixed-rate loans. But the disturbing fact is that of those placed in high-cost loans, it was 53.3 percent for black borrowers, 46.2 percent for Latino, and 17.7 percent for white borrowers. The subprime rate of foreclosure is much higher than in the traditional fixed-rate loans.

Now, let me, if I might, quote from—the National Association for the Advancement of Colored People Legal Defense and Education Fund noted that, "A case brought by the Civil Rights Division of the Department of Justice reverberates throughout the community, the State, and the region. It can have industry-wide impact in terms of deterrence and reform. The broad-based injunctive relief that the Division can pursue cannot be matched through the efforts of individuals or private lawsuits."

My question is that we have not seen a case brought since 2000 as it relates to predatory lending by the Department of Justice. I sent you a letter about a week ago concerning the circumstances in Maryland where minority communities were targeted with subprime mortgages. My question to you or my request is that the Department of Justice investigate and look at the circumstances concerning predatory lending particularly in minority communities to see whether there is a need for aggressive action by the Depart-

ment of Justice in order to protect our communities. And I would just request that you do this and get back to us on it.

Attorney General HOLDER. Sure, we will do that, although, Senator, I will tell you now that I think there is the need for aggressive action by the Justice Department in this field. We announced an initiative, a joint initiative with the Treasury Department, the FTC, the Department of Housing and Urban Development, and the Justice Department, and the Justice Department component of that initiative was to look at the very thing that you have talked about—that is, the use of these mortgage instruments disproportionately in areas where minorities are found and the impact that that has had, the devastating impact that has had on minority communities as people have not been able to make payments and have abandoned their houses, with all the negatives that then flow from that. So this is something that we will aggressively be looking at.

Senator CARDIN. I thank you. It is not just in home mortgages to buy homes. We find that in refinancing the minority communities were targeted, and a large number were convinced to go into refinancing in the subprime market and now are losing their homes. So it appears like it was an intentional effort, and I think the Department of Justice activities here could be very helpful to make it clear that we will not tolerate reverse redlining.

Attorney General HOLDER. Right.

Senator CARDIN. Let me weigh in on the Guantánamo Bay issues, and I must tell you, I thank you very much for your comments as it relates to placing due process in regards to those that are going to be detained. And I agree with the analysis that was made by Senator Graham and others about that process.

I chair the Terrorism Subcommittee, and we intend to have some hearings. The Chairman has authorized us to have some hearings, and Senator Feingold has already had hearings in regards to the long-term detainees. As you start, as Senator Graham said, a fresh start and how we are going to deal with detainees, it is important that it be an open process. And I just would urge us, we need to develop what is right for America. But we also need to engage the international community because we need to have better understanding from the international community as to what America is doing in regards to its detention policies as we try to lead internationally on human rights issues.

I would just urge you as part of this process to be open and go beyond just our country in trying to get better understanding as to what we intend to do and the reasons why we are pursuing these policies.

Attorney General HOLDER. I think you are absolutely right, Senator. I have made two trips to Europe so far and have spent a good portion of both of those trips talking about the issue of Guantánamo with our allies. The State Department has a gentleman, Dan Fried, who has been literally traveling the world to talk about this issue with other countries. And so what we are trying to do is to make the world understand that we are trying a different approach, and an approach that I think is consistent with who we are as a Nation and that I think will stop the ability of our adversaries to use Guantánamo as a recruiting tool and I think

rehabilitate some of the relationships with other countries that have been frayed over the last few years.

Senator CARDIN. Well, I think you are off to a good start there. I think some of the things that you have already announced are helpful. We want to be supportive, and as has been indicated on both sides of the aisle, I think there is support for what you are trying to do.

The last point I want to bring up is what some of my colleagues have already brought up, and that is the surveillance statutes. Let me just focus on the three that expire at the end of this year, and, again, the Terrorism Subcommittee is going to do some work here. We have the lone-wolf provisions, the revolving wiretaps—roving wiretaps, and the business records. Those three expire at the end of this year, and I very much appreciate the fact that you need adequate time to review the effectiveness of these provisions, whether they need to be extended, and if they need to be extended whether there needs to be further modifications, but understand that we have an incredibly busy schedule here in Congress as far as floor time is concerned, and these issues are not always without controversy.

I would just urge you as quickly as possible to share information with this Committee so that we can make adequate judgments on the reauthorization of these tools that at least the FBI Director said are important for national security.

Attorney General HOLDER. We will endeavor to do this as quickly as we can because we are mindful of the fact that this is obviously a very busy Committee, a very busy Congress. But we want to make sure also that we have a good gauge of how effective these tools are, whether or not modifications, slight or major, need to be made. We want to be cognizant of the fact that there are civil liberties interests that have to be examined as well as the law enforcement equities that we have.

So we will be getting, I think, our views to you all relatively soon, and certainly I think with enough time so that they can be considered as you will have to consider the reauthorization question.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

I second Senator Cardin's motion and appreciate your response. The sooner we get your views on these three issues, the sooner we will be able to deal with them in appropriate way.

Second, since I am the Ranking Member on the same Subcommittee and I have been advised we are going to have a hearing on the detainees at Guantánamo, I would like to also ask you to get some information to us on that. I had asked in a letter that I sent back in May for some information following up on the President's speech when he talked about the fact that our super-max facilities hold hundreds of convicted terrorists. I had written asking if you could break that down for us. I do not have a response, so let me just do this. I am going to submit for the record a question, because I know you cannot answer it just sitting here, but to find

out who they are, what kind of categories of folks they are, if there are any that are really comparable to the high-value detainees that are at Guantánamo today. That would be very helpful to us.

Second, if you would like to comment on it right now, fine, but to get a sense of what kind of capacity we have. My understanding is that we are way overcrowded in the super-max facilities today. By the way, can you just tell us, do you know whether that is true or not right now? Or do you want to respond for the record?

Attorney General HOLDER. Whether they are overcrowded?

Senator KYL. Yes. My understanding is there is a capacity of like 13,000-something, and there are like 20,000 being held.

Attorney General HOLDER. Senator, I would have to get you those statistics. I just do not know offhand.

Senator KYL. All right. I appreciate that.

Two other follow-up questions on that same matter. One has to do with the recruitment of terrorists in jail. We know that is a big problem with this particular kind of militant Islamist, and it is something that the FBI Director testified in the House of Representatives about. Is there anything that you would like to offer us today on that question about how we could prevent that from occurring? Or if you would like to respond in the same way, I am happy to receive that.

Attorney General HOLDER. I understand the concern, but I think there are measures that can be taken to minimize that possibility. Terrorists, people who are considered terrorists, are generally held out of the general population, so there is not the ability to interact with other prisoners in the way that some might and have an ability then to try to radicalize them. And then beyond that, what we have tried to put in place are programs to deal with, to occupy the time of the people who are in these facilities so that they have alternatives, they have the ability to think of a life outside the prison; and if they have options, if they think that they have a life that they can lead on the right side of the law, they are far less susceptible to these radicalization efforts.

Senator KYL. Of course, Guantánamo was constructed in such a way as to accommodate this particular requirement. It may be more difficult to do that with the super-max facilities. Without asking you to respond to that today, would you include some information in your response to this? I think all of this would be helpful in preparation for our hearing.

Attorney General HOLDER. We will detail for you how we think the facilities that we have can be used to minimize the concerns that you have expressed.

Senator KYL. Good. And then the final question in this area is Senator Sessions has pointed out that it would be against the law today to release a terrorist or accused terrorist into the United States, into our society. Can you comment on—if that is not an option, in other words, the resolution of the President's dilemma here about closing Guantánamo, does not mean releasing anyone into the United States, then I guess we do not have to worry about it. But if it does include that option, what is your response to the point that existing law, the Immigration and Nationality Act, would make that a crime—or would prevent it from happening?

Attorney General HOLDER. Well, certainly the House has already passed as part of a supplemental appropriations bill—I guess it is going to be considered by the Senate, and what I am hearing, my intelligence tells me it is going to be passed by the Senate, so there will be provisions in that bill that would forbid the bringing into the United States of people who are presently detained at Guantánamo. And, obviously, we will respect that law, and efforts are underway to try to—to those people who would be either transferred or released, to place them in other countries. That is the focus of our efforts.

Senator KYL. Thank you. Let me quickly switch now to immigration and drug violence on the border. I tie the two together because, unfortunately, as you undoubtedly know better than most of us, the cartels that are now controlling the drugs have basically taken over control of all of the things that are being smuggled, including illegal immigrants, much to their disadvantage as individual human beings, I might add.

Two general lines of questioning here, and, again, I can ask you to respond to some of this for the record if it would be easier for you.

You and I talked about Operation Streamline. This is the idea where we use existing law to actually prosecute people who are caught crossing the border. They get jail time, and as a result of that, it is a huge disincentive for them to cross because they cannot do what they want to do, which is mostly to work, if they are in jail. And I asked you if you would get some information for us that would be helpful in seeing whether or not we could pursue this across more of the border than just in the Del Rio, Yuma, and Tucson sectors, since it does seem to be a program that is really working. We met on May 5th, and I asked you to provide me with the estimate of resources, increases in personnel and so on that would be required for this.

Do you know whether your folks have been able to come up with that yet?

Attorney General HOLDER. I do not know as yet if we completed it. I know that we are working on it. I am not sure that we have completed that yet.

Senator KYL. OK. Well, then, let me include that question in the record as a reminder of the information we were seeking, and as soon as you can get that to us, I think it would be very helpful because we cannot get the funding for these things until you tell us what is needed. And, obviously, we have already gone by one budget cycle.

Also helpful in that regard would be information—and I will just ask this for the record—of how many people have been involved in this program, how well we think it has worked and so on, if you would provide that for us.

Attorney General HOLDER. Sure. We will do that.

Senator KYL. Finally, on the matter of the State criminal alien and assistance program, you are aware that the Federal Government is authorized to pay States money as compensation for the housing of illegal immigrants who have committed crimes. Our former Governor, Janet Napolitano, now Secretary of Homeland Security, used to write the Attorney General every year and demand

payment. Senator Feinstein and I actually got an authorization of $975 million a year.

We need to know whether the Department of Justice has sought that funding. There was no funding in the President's budget. Is there any way that you can ask for supplemental funding to cover that? And, second, will you ask for funding for at least a portion of that authorized amount in the budget for next year?

Attorney General HOLDER. I think the administration has made the determination that in dealing with that issue there are better ways to do it than through the use of the program that you mentioned, and I think that is why that is reflected as having been zeroed out in the 2010 budget. So as I said, I think that is the administration's position at this point.

Senator KYL. Well, my time is up, but that certainly did not used to be Governor Napolitano's position, and I would be very curious to know whether she agrees with the proposition given the fact that she understands what the burdens on States are as a result of the Federal Government failing to do its job in controlling the border.

Attorney General HOLDER. I think, regardless of the position that the administration has taken, that you do raise a valid point, and that is that the Federal Government has to be sensitive to the burdens that are placed on our State and local partners as a result of enforcement efforts that happen along the border, and we have to find ways in which we alleviate those burdens in working with them.

I think that the administration's position is that, with regard to this particular program, there are better ways perhaps that we could do this.

Senator KYL. And I would submit Operation Streamline is one of them, so let us pursue that.

Attorney General HOLDER. OK.

Senator KYL. Thank you.

Chairman LEAHY. Senator Whitehouse.

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

Very briefly, let me first express my view that the release of the OLC opinions was proper, was necessary, and was wise, and was particularly important in light of the damage that had been done to that office by its politicization during the Bush era. Frankly, those were opinions that had to be seen to be believed. And it really, I think, gave the legal community around the country a far better appreciation of the depth of the dive that that office took in that period to have those out, entirely apart from all the other considerations. I think it was the right call, and I respectfully but completely disagree with our Ranking Member on that subject.

Following up on OLC, Senator Durbin asked a few questions about the OPR investigation and its status. When we first asked, we were told on February 18th of 2008 that this investigation was already pending. So we know it pre-dated February 18th of 2008. We know that OPR completed its investigation and provided a draft report in late December of 2008. We know that on May 4th of this year the comment period for those who were the subjects of the investigation closed in their chance to respond to the draft. And

we also know that the CIA was given an opportunity for both substantive comment and for classification review.

My first question is: Is it now the CIA, through its request for either substantive comment or through its role in classification review, that is holding up the release of this report?

Attorney General HOLDER. No, it is not. Though that process might not be complete, there are other things that still have to be done within the Justice Department. I met yesterday with the head of OPR, who indicates there are still some things that they are working on in the preparation of the report, chiefly in response to the responses that were received, I guess in early May or so, and they are dealing with that. She is new to the Office of Professional Responsibility, understands the seriousness of this particular report, and that has also had an impact on the timing of the release.

Senator WHITEHOUSE. The role of the CIA both in substantive comment and in classification review raises some interesting potential conflicts of interest. Can you tell me what assurances the Department of Justice has received from the CIA that those who seek to influence the OPR report through substantive comment or those who have the effect of delaying the report through classification review are not complicit or involved in the underlying conduct? Have you got essentially a clean scrub of those at the CIA who are involved in those processes to assure that they are not tainted by the program that is the subject of the report?

Attorney General HOLDER. As I think I testified earlier, it is our hope to release as complete a report as we can, and one of the things that I think we want to do is to declassify as much of this report as we can so that when people read it, either in this body or the general public, they will have a full feeling for what it is our lawyers in the Office of Professional Responsibility dealt with and what is the basis for the conclusions that they reached. And so we will be pushing, as I said, to declassify as much of this report as we can so that the American people will have a real sense of what it is that drove the conclusions that we reach.

Senator WHITEHOUSE. I appreciate that, but it does not address the question of whatever assurances you got from the CIA that in the discharge of their either substantive comment or classification review roles, that the people involved in that you can assure us actually had clean hands with respect to this program and are giving legitimate, untainted, unbiased, unimplicated advice.

Attorney General HOLDER. Yes, I do not think we have gotten anything yet from the CIA, at least nothing that I am aware of, with regard to what their position is concerning the declassification issue. And so I think I have to wait for that and see—this may be not an issue at all. And to the extent that it is an issue, then I would interact with Director Panetta and raise the questions that you raise in addition to just our general feeling that we want to have as much of this declassified as we possibly can. It will be the Director, I think, who will ultimately make the decision, who I do not think is actually tainted by it. I would be dealing with him in trying to make determinations as to what should be and should not be declassified.

Senator WHITEHOUSE. And on the question of their substantive comment on the contents of the report, how do you assure that that is not tainted by people who are implicated in the program?

Attorney General HOLDER. I am actually less——

Senator WHITEHOUSE. Isn't that an important point? I mean, maybe we are talking across each other.

Attorney General HOLDER. Yes, yes. No, I——

Senator WHITEHOUSE. Is it not important that the CIA in exercising its substantive comment role that it sought and in performing the declassification review should be doing so in a manner that keeps the agency's hands clean of implication in the underlying subject of the report?

Attorney General HOLDER. Yes, I am less worried about the substantive comments. I think we certainly would invite the comments from any involved agency, but ultimately it would be the Justice Department lawyers who will make the determination as to what goes in the report, the conclusions that the report reaches, and so I certainly want to give them the opportunity to express whatever their views are. But that—but the content——

Senator WHITEHOUSE. Would they be likely to evaluate the recommendations of the CIA differently if, on the one hand, the CIA had not assured the Department that its recommendations were coming from individuals who had clean hands versus those who did not? Is that not an important factor in evaluating the substantive comment that the CIA would seek to propose?

Attorney General HOLDER. Yes, I guess those are things that one would take into consideration, but so much of this is really fact driven. That I think is what people will find in the report. It is fact driven, really, and the conclusions that one draws from the facts I guess can differ. But ultimately it will be the Justice Department's view that will control based on the facts that we have uncovered but, as I said, taking into account whatever other views people have of those same facts.

Senator WHITEHOUSE. Thank you, Attorney General. My time has expired, Chairman.

Senator CARDIN. [Presiding.] Thank you very much.

Senator Klobuchar.

Senator KLOBUCHAR. Mr. Chairman, thank you. Thank you for being here, Attorney General Holder. I was listening to some of my colleagues going through some of the cases and the concerns that they had and, I think, a misplaced argument about politicization. And as you were talking, I was thinking what was the most high-profile case that you have dismissed, white-collar case, since you came into office. What would you say that is?

Attorney General HOLDER. Well, I would probably say it was the Senator Stevens case.

Senator KLOBUCHAR. That would be correct, yes, the Republican Senator. Then I was also thinking of a decision you made early on to allow the Republican-appointed U.S. Attorneys to stay in place until new U.S. Attorneys had been appointed. Was that the policy, do you know, when Bush came into office of allowing the previous U.S. Attorneys to stay on for a length of time?

Attorney General HOLDER. To be honest with you, I do not know what exactly the policy was. The concern that we had, though, was

to maintain continuity in the U.S. Attorneys' Offices and to leave in place those people who were doing a good job. There has been turnover, but we have not pushed anybody out. We are starting now to get our nominees before this Committee and hope to have them confirmed and in place relatively soon.

Senator KLOBUCHAR. And how many nominees have been confirmed by this Committee so far for the U.S. Attorney?

Attorney General HOLDER. None so far.

Senator KLOBUCHAR. OK. So you would like to move that along, I would hope.

Attorney General HOLDER. Yes, that would be for us a priority, to get our U.S. Attorneys in place as quickly as possible. It is good for the offices. It is good for our law enforcement effort. It is good for us as we try to get our program together.

I would also urge, respectfully, that this Committee and the Senate act on the other nominees for other Justice Department positions that have been sent up, everything from Tax to the Environmental and Natural Resources Division, OLC. There are a variety of positions that are still awaiting Senate approval.

Senator KLOBUCHAR. Very good. And I can tell you in our State it has worked very well. We had, as you know, a lot of uproar over a political appointment, and then Attorney General Mukasey put someone new in. He is still staying on until the person I suggested who has now been recommended by the President, and we are hoping that we can get him in there soon. We have some major cases pending in our jurisdiction.

The other interesting thing, this is just my most interesting thing I learned this week, Attorney General Holder, as I recommended a marshal. Do you know—there are 94 marshals. Do you know how many are women in the country?

Attorney General HOLDER. No, I do not.

Senator KLOBUCHAR. There is only one, in the State of Florida, and I thought that was quite interesting. I thought I would share that with my colleagues as we recommend people as we go forward.

I am going to just ask a few questions about things that are a little closer to home that people have been focused on in my State, and that is, some of the white-collar fraud. The Madoff case hit a lot of people in our State. As we know, that came out through a whistleblower to the SEC, and nothing was done. Could you talk about what is going on with the initial steps to implement FERA as well as some of the other changes to enforce some of the white-collar laws, as we look at a large amount of money going out there, we look at the TARP money, things like that, that there could be even more white-collar fraud.

Attorney General HOLDER. We are in the process of ironing out what I will call the last wrinkles in what is going to be a comprehensive announcement about the program that we are going to have with regard to financial fraud, white-collar crimes more generally, mortgage fraud. We have been working with our State and local counterparts, with the other Federal agencies, to come up with this effort.

This is a priority for this Department of Justice to hold people accountable who have defrauded huge numbers of people with almost unheard of amounts of money or those who would seek to

misuse the recovery money that is now trickling into the economy. These are things that we will be taking very close looks at and will be emphasizing in our enforcement efforts.

Senator KLOBUCHAR. And I know you are also working with Secretary Sebelius on the health care fraud prevention. As we are going into the summer focusing on health care, there is still a significant problem with health care fraud. Estimates could be 3 to 10 percent of the total amount of spending, you know, amounting to billions of dollars. I saw cases myself as a prosecutor of identity theft in hospital settings and things like that.

I think that it will be very important as we move into this health care debate that the work that you are doing with this new focus is understood. Do you want to talk a little bit about that?

Attorney General HOLDER. I would totally agree with that. If you look at the statistics for last year, I think it was about $1.2 billion that was recovered as a result of the fraud found in the health care system. That is why Secretary Sebelius and I have made this a priority, and it is why we have announced a joint effort to look at these issues in two additional cities in addition to what we are doing more generally. I mean, that is a lot of money when you think about it, $1.2 billion in actual money received by the Federal Government as a result of its enforcement efforts, and we plan to keep those efforts as strong as they are, as robust as they are.

Senator KLOBUCHAR. And one of the things that came out in the FBI's financial crimes report for 2007 was that they are actually seeing some cases—and I care about this a lot because I come from a State where we really value high-quality health care, and we have not had a lot of issues with this. But there have been recent health care fraud cases which included medical professionals risking patient harm with unnecessary surgeries and things like that.

What are you doing to combat this particular kind of fraud?

Attorney General HOLDER. That is a very good point. There is not only an economic consequence to some of the fraud that we see; there are health care outcomes that get affected in a negative way by at least some of the things that we have seen. And that I found, to be very honest with you, very surprising when I became Attorney General and saw the results of some of these FBI efforts. And so we are going to be looking not only at the financial aspect of this but in some ways the ultimate fraud, whether or not patients are getting the care or the Government's getting the care for which it is paying, and whether or not people's lives are being put at risk.

To the extent that we prioritize this, although the financial component obviously will be important, what we really will emphasize is making sure that no one's life is put at risk and that the kinds of treatment that people are expecting to get they are, in fact, actually receiving.

Senator KLOBUCHAR. And one last issue, and I can talk to you about it later, but it is just the upcoming reauthorization for the Violence Against Women Act. We had a very good hearing here that Chairman Leahy conducted, and we had a focus on some of the new trends and things that are happening there. And one of them is, just because of economic problems, States not being willing or are unable to pay and help with things like rape kits and other things, and a line-up—I think L.A. County is the worst of

these tests that have not been done on some of the rape kits, when, in fact, we could be potentially finding and prosecuting people who are committing sexual assault. And so that is just something I am sure we talk about in the future, but it is something I am very concerned about.

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

Senator KLOBUCHAR. Thank you.

Senator CARDIN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Attorney General, I join my colleagues in welcoming you here and compliment you on your many abilities, including handling a marathon. I begin on the question of the immunity for the telephone companies. It has been subject to a lot of analysis and a lot of consideration by the Congress. I had pressed an amendment to substitute the Government for the telephone companies as the party's defendant. The provision on immunity I thought very troublesome because what it does, in effect, is take away the jurisdiction from the district court to determine what has happened. It is a more sophisticated way for court stripping, which on constitutional issues I find unacceptable. It is not the Supreme Court of the United States, but *Marbury* v. *Madison* established judicial supremacy here. And the position which I pressed was to have the Government substituted as the party defendant. I thought the telephone companies were good citizens; they ought not to be subject to damages, not subject to the costs of litigation.

What is wrong with that as the preferable course to immunity which keeps the courts open to determine what happened and not deprive party's plaintiff of their constitutional rights and let the Government bear the cost of whatever is involved, because it is something for the benefit of the Government?

Attorney General HOLDER. Well, this was obviously something that was debated at great length months or so ago, many months or so ago, I think, and a determination made that given what the telecom companies had done, the reasons why they had done it, their interaction with the Government that the immunity provision was appropriate.

We have been conducting ourselves on the basis of what I consider to be at this point settled law, and as I said, I think the debate was a robust one. There are people who certainly have disagreed——

Senator SPECTER. This debate within the Department of Justice?

Attorney General HOLDER. No. I meant in Congress, and more generally, I suppose.

Senator SPECTER. Well, I know about that debate. I wouldn't say it was robust. I would say it was fallacious. But how about the Attorney General's position, the position of the Department of Justice? Why not do that, have a substitution?

Attorney General HOLDER. Well, I think the administration has taken the position that we are now dealing with a determination that has been made by Congress. We are dealing with existing law, and we are proceeding in that way.

Senator SPECTER. On the issue of the substitution, this is not obviously determinative, but then-Senator Obama voted in favor of the substitution. Would that influence you at all?

Attorney General HOLDER. Well, I will talk—I mean, you know, if this were something the President wanted to revisit, I would certainly listen to where he is now. I do not know if he is in the same place——

Senator SPECTER. Do you think there is a difference in institutional approach from being a Senator to being a President?

Attorney General HOLDER. Possibly. Possibly. He may have the same position, he may not. I do not know, but he is my boss so I would listen to him.

Senator SPECTER. Well, Mr. Attorney General, Attorney General Mukasey, your predecessor, invoked the immunity defense. Did you make an independent determination after becoming Attorney General as to whether the immunity defense should be invoked?

Attorney General HOLDER. Should be—I did not hear the——

Senator SPECTER. Should be invoked.

Attorney General HOLDER. I am not sure I——

Senator SPECTER. There was a period of time before the court decided the case after you became Attorney General, and there was speculation, at least in the media, that the new administration might not seek to invoke the immunity defense in that case. And my question to you is: Did you consider not using the immunity defense?

Attorney General HOLDER. Well, as I said, I think we dealt with the question based on the law as it existed, and given the fact that Congress had spoken, it did not seem to me that there was a huge amount of flexibility that the Department had. And so it seemed to me, the immunity having been conferred, that that pretty much settled the question.

Senator SPECTER. Well, you are the Attorney General. I recollect that even district attorneys have discretion as to how you handle cases, quasi-judicial, if you think it is an unfair defense, you do not have to invoke it. But let me move on.

Chief Judge Walker has some really fascinating cases in front of him in a number of directions, and I am concerned about having a determination made on these matters by the Supreme Court of the United States. I have introduced legislation, Senate bill 877, which would mandate the Supreme Court to take up issues like the Terrorist Surveillance Program. That case was never decided. The Federal court in Detroit found the Terrorist Surveillance Program unconstitutional. The Sixth Circuit reversed on grounds of standing, a very flexible standard, with the dissent, in my opinion, being much more authoritative than the majority opinion. It looks to me like it is a matter they just did not want to decide. And then the Supreme Court of the United States denied certiorari. And there you have a classic case of conflict between congressional authority under the Foreign Intelligence Surveillance Act, which provides the exclusive means for obtaining warrants and the assertion of the President of his Article II power as Commander-in-Chief.

One of the questions that I intend to explore with the nominee, Judge Sotomayor, is her standards for what cases should be taken. I would not ask her a question as to how she would decide some-

thing, but I think it is fair to ask a question, sometimes it is more important what cases the Court turns down than what they decide in cases.

Would you think it worthwhile, would you think it appropriate to have a mandate that the Court take cases like the Terrorist Surveillance Program?

Attorney General HOLDER. I am not familiar—I have not read the proposed statute. I would be a little concerned about—I do not know—you know, I am not sure if this has been done in the past, but it is just a separation of powers concern about mandating Supreme Court review in a particular matter. Obviously, the Court's jurisdiction can be defined in some way by——

Senator SPECTER. Well, Congress has the authority to do that and has done it in a fair number of cases.

Attorney General HOLDER. Right. But, I mean, my only concern would be, you know, not a technical separation of powers question, because I think the Congress probably does have that ability, but whether or not it is an appropriate use of Congress' authority. As I said, I have not had a chance to review the proposed bill, and I would have to look at that before I can comment in a more intelligent way.

Senator SPECTER. Would you take a look at the proposed legislation and respond?

Mr. Chairman, I ask consent that a letter that I sent to Attorney General Holder be included in the record concerning health care costs. The Subcommittee had a hearing on that, and we had testimony that there are some people who are claiming money under Medicare and Medicaid who are deceased and doctors who are submitting claims who are deceased, and looking at ways to save money, that is really on the front burner. If you could take a look at that letter and respond, I would appreciate it.

Senator CARDIN. Without objection, the letter will be made part of the record.

Senator SPECTER. Thank you, Mr. Chairman. Thank you, Mr. Attorney General.

Attorney General HOLDER. Thank you, Senator.

Senator CARDIN. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. It is good to call you "Mr. Chairman." I have three questions. We will try to get them done quickly. I know you have to get to the House and do the same thing here. So my appreciation and sympathies.

First, on hate crimes, I know you have spoken about the need to pass improved hate crimes legislation. I think we have to move this legislation quickly. It is hard for me to believe that people oppose hate crimes legislation, you know, aimed to protect any group, whether it be religious, racial, ethnic, or sexual orientation.

Would the administration support a move to bring hate crimes up very quickly here and help us try to get that through?

Attorney General HOLDER. Absolutely, Senator. This is a priority for us. I testified on behalf of this hate crimes bill 10 years ago when I was the Deputy Attorney General, so I do not think this is something that we are doing in great haste. I mean, this is something we have been thinking about for a decade, and given the re-

cent events that we have seen in this Nation, I think the need for this legislation is all that much more apparent.

Senator SCHUMER. Second, as you know, my staff has been working with yours and the White House on a reporter's shield bill. Senator Specter and I, when we were on opposite sides of the aisle, had a bipartisan bill. Now it is, I guess—it is still a bipartisan bill. There are other members of the other side who support it, although they are welcome to come over like Senator Specter did and make it a partisan bill. But, in any case, we are talking about it.

Two questions. Can the Department of Justice support a well-balanced reporter's shield bill? And can you commit to working with Senator Specter, myself, and, of course, Chairman Leahy to get such a bill to the floor as quickly as possible so we can pass it this year?

Attorney General HOLDER. Yes, I think the Department can support, the administration can support such a bill. The concern we have, again, is with protecting, making sure that the bill does not impede our ability to protect national security or our ability to prosecute those who would leak national security information. But even given those concerns, I think there is a way in which we can construct a bill that all would find acceptable.

Senator SCHUMER. Good. I would just urge—your staff and my staff have had good negotiations, but to move those and conclude those. I do not think we are that far apart.

Attorney General HOLDER. I think that is right.

Senator SCHUMER. And I think we can still protect whistleblowers and people like that, and at the same time not deal with state secrets. There was a bill, as you know, that was way over and just said almost no recognition of either secrecy, grand jury secrecy, or things like that, or secrets. That is not our bill. Our bill is a balanced bill, and we need you to get on board as quickly as possible, and we are willing to make changes.

The third and last question I have is ICE authority. Senator Feinstein talked a little about some drug trafficking, and we are facing a sustained and organized effort by sophisticated cartels. But ICE does not have clear Title 21 authority to deal with all forms of illegal contraband, particularly in the context of border enforcement and enforcement at our ports. The issue was just raised yesterday in the New York Times by a senior Bush adviser on homeland security. It makes no sense for the main agency stationed along the border to lack power to arrest criminals there.

So two questions, my two last: Do you intend to remedy the arrangement you currently have with ICE to give ICE agents authority to arrest drug smugglers on the border? And what is the status of any discussions you are having with the Department of Homeland Security about remedying this problem?

Attorney General HOLDER. This is an unbelievably timely question. As we left the White House last night at about 7:15, 7 o'clock, Secretary Napolitano and I were talking about——

Senator SCHUMER. Yes, I talked to her about it this week.

Attorney General HOLDER. Right. We were talking about this very issue, and I think we are in a position to announce that we have an agreement. I do not want to steal anybody's thunder here,

but we have reached, I think, essentially an agreement, and I think it is going to be announced within days.

Senator SCHUMER. Well, I think you just announced it, and I am glad you did.

Attorney General HOLDER. Don't count this as the formal announcement.

Senator SCHUMER. It is not a formal announcement. It is an informal announcement of an agreement, but it makes eminent sense to do, and it really hampers our ability to control our borders when the agency that is doing all the patrolling has to call somebody up, they have to get in a car, especially when you are dealing with people you are tracking down and chasing and everything else. And so I am glad that you and Secretary Napolitano have come to an agreement. I spoke to her last week about it, and she seemed very positive as well.

Mr. Chairman, I yield my remaining 2 minutes and 25 seconds so that the Attorney General can have some lunch before he has to get over to the House.

Senator CARDIN. With your indulgence, Mr. Attorney General, there are a few members who would like to have a second round, and I think we can handle it pretty quickly, if you are prepared to continue.

Attorney General HOLDER. That is fine.

Senator CARDIN. Senator Sessions.

Senator SESSIONS. Thank you.

Mr. Attorney General, with regard to the questions earlier about the Inspector General's report of the OLC memorandum, I understand that the Department of Justice under your leadership has stated that they think it was appropriate to allow the lawyers who participated in that to be able to respond to the report's initial draft. Is that right?

Attorney General HOLDER. Sure. I think that is fine, yes.

Senator SESSIONS. Somebody suggested otherwise, but that is what the Government Accountability Office does. When they make a report, they give the people a chance to respond. And I understand that Attorney General Mukasey and maybe others have asked that they be able to submit a letter as a part of that report. Have you decided whether they would be able to have their response made a part of that record?

Attorney General HOLDER. Yes, we actually have views expressed by former Deputy Attorney General Filip and former Attorney General Mukasey. It would be my intention, subject to their approval, to include their comments, their views as part of the release of the report. I have not checked with them, but I assume that they would not have objection to that. And assuming they did not, I would make that a part of the report.

Senator SESSIONS. Previously you have heard reference to warrantless wiretapping, suggesting this was a great violation of constitutional rights. But for the most part, as I understand these difficulties, they arise from a lawful intercept, maybe in a foreign country, maybe of a satellite phone or something in Afghanistan. Those are legally intercepted—and I think e-mails could be, too—as part of an intelligence-gathering operation, and that is lawful. It is lawful with regard to that individual.

Now, if they all of a sudden make a phone call to some terrorist cell in the United States, someone could argue that that is illegally wiretapping an American citizen. But, in truth, the intercept is of a person identified as part of an intel operation outside the United States, and that has never been considered something that is controlled by warrants.

Attorney General HOLDER. So you are saying that you actually have existing authority on somebody who is overseas who happens to place a call into the United States.

Senator SESSIONS. That is correct.

Attorney General HOLDER. It would seem to me——

Senator SESSIONS. That is what we have been arguing over, frankly. If you wiretap a Mafia leader and he calls somebody whom the court does not have an approval for, you can listen in on that conversation. Isn't that right? Isn't that part of the approval? So if you have a lawful tap on a foreign person, I think the principle is the same. That is all I am saying, and I think we have exaggerated the extent to which this is somehow violative of our Constitution. That is just my personal view of it.

Attorney General HOLDER. I would agree with that, except there are obviously minimization requirements that——

Senator SESSIONS. There are minimization requirements, and if you go to the center here that deals with that, they have incredible discipline on those issues. But with regard to your statement concerning the Office of Legal Counsel's opinion apparently concluding that the D.C. voting bill that was passed, is unconstitutional, you say you are hesitant to release those internal memoranda. But apparently members of this Committee think it is right to demand those kinds of releases and have demanded, for example, the terrorist interrogation memoranda, and actually they have had the legal analysis of that for some time. But it bothers me that you had no real concern, or the President did not, about releasing portions of those memoranda that deal explicitly with techniques that could be used, information that I think could be helpful to the enemy. That is the way I would see that.

Attorney General HOLDER. Well, with regard to those memos, the decision the President made was based on, I guess, a couple of factors. One, the information that was contained in those reports was largely public. The techniques that were described in those memos had been banned by the President. And we also thought that the continued use of those techniques—or the thought that those techniques were going to be continued to be used also gave a propaganda victory to those who wanted to do us harm. And for all those reasons, we thought that the release of those OLC memos was appropriate.

Senator SESSIONS. Well, it was disapproved of by your predecessor, Judge Mukasey, and Mr. Hayden, the CIA Director. They did not approve of that at all. And I do not think it was necessary, and I think it makes your opinion that you are hesitant to release internal memoranda concerning the D.C. voting less persuasive, frankly.

Attorney General HOLDER. Well, I would disagree because I think they are fundamentally different, but I—you know.

Senator SESSIONS. One is political and one has to do with life and death. They are different, in my opinion.

Attorney General HOLDER. Well, no, I would not agree with that. I think we use neutral and detached principles in making the decisions in both cases. There is not a political component in the decision to seek the—in releasing some material and withholding others. There is no political consideration on my part at all.

Senator SESSIONS. Well, one involves nothing but a matter of important legislation of a political nature here in the Congress, and that is what you do not want to release, but you were willing to release matters that the DNI and the Attorney General believed were damaging to our national security.

Attorney General HOLDER. Well, one Attorney General thought that. I am the Attorney General of the United States, and it is this Attorney General's view that the release of that information was appropriate, as well as the President of the United States. I respect their opinions, but I had to make the decision holding the office that I now hold.

Senator SESSIONS. With regard to Guantánamo, I just would offer that we do perform a thorough initial review when someone is brought into Guantánamo, and we give them an annual status review. So I am not sure what else you are going to add to that. I am willing to hear, but we are doing those things, and Senator Graham has worked to try to make them effective and appropriate under the case law and statutes of our country.

Do you think, with regard to the firearms question, that the right to keep and bear arms is a fundamental right under the Constitution?

Attorney General HOLDER. Sure. It is a Second Amendment right.

Senator SESSIONS. And it is a fundamental right?

Attorney General HOLDER. Yes. The Supreme Court has indicated as such.

Senator SESSIONS. Actually, they have not.

Attorney General HOLDER. I am sorry. I did not——

Senator SESSIONS. Actually, they have not. It is a matter of some significance that in the *Heller* case they simply held that the Second Amendment applied to the Federal Government. They footnoted that they were not saying whether or not it applied to the states, and apparently, the test as to whether it applies to the States is a question of whether it is a fundamental right.

Attorney General HOLDER. That is a good point, and I need to go back to law school. You raise a very good point, Senator.

Senator SESSIONS. It is a big deal, because the Second Amendment will be eviscerated if it is not considered to be a fundamental right and made applicable to the States.

Thank you. My time is up. I look forward to working with you. We will disagree on some things. You are a good advocate for your views. I congratulate you on that. But this is a serious matter we are dealing with—national security.

Attorney General HOLDER. Sure, and obviously, you know, we have worked together well. You have been supportive of me when you thought that was appropriate; you have taken me to task when

you thought that was also appropriate. And you have actually been a teacher for me today, so thank you for that.

Senator CARDIN. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I know you have got to go to lunch, and I appreciate your patience. You have done a very good job of testifying before the Committee.

I just talked to the White House a moment ago, Rahm Emanuel, and he has indicated to me that the President will not let these photos see the light of day, that he would prefer the Congress to act. Have you seen the Lieberman-Graham amendment to the supplemental that would prohibit the release of these photos for a 3-year period if the Secretary of Defense certifies them to be a danger to our troops and civilians overseas?

Attorney General HOLDER. I have not seen that, Senator, but that——

Senator GRAHAM. OK. Fair enough. I will get it to you. And do you agree with me that it would be the preferred route, in terms of impressing the Court, that Congress would act on this subject matter rather than an Executive order?

Attorney General HOLDER. Yes, I think that having Congress act would be a preferred way in which to——

Senator GRAHAM. Would give us a stronger hand and the better way to deal with this issue.

Attorney General HOLDER. Yes, I do think——

Senator GRAHAM. And I would just like to let the Committee know, my beef is not with the courts. I think unless these documents are classified or Congress acts, the courts are making a reasonable interpretation of the Freedom of Information Act as it exists today. And I want to applaud the administration for asking them to stay and have the Supreme Court review that case. But, quite frankly, Mr. Attorney General, I would be very—I would not be surprised if the Supreme Court decided not to hear this case or honor your petition for certiorari and let the order stand. So I think it is very imperative that one of us act, the Congress or the administration. I have been assured by Rahm Emanuel and yourself, I think, that the President's position is not to let these photos see the light of day. The Majority Leader is going to give us another vote in the Senate, and I would ask the administration after that vote to urge the House to take it up, because that is the best way to protect the troops. Do you agree with that?

Senator GRAHAM. I do. I think that there are compelling reasons why these photos should not be released.

Senator GRAHAM. Sure, and I would like to introduce into the record the statements of Generals Odierno and Petraeus that were filed by the Government as part of the—their declarations, as part of the lawsuit indicating the danger to our troops if the photos were released, to back up what you are saying.

Now, the military——

Senator CARDIN. Without objection, that will be included in the record.

Senator GRAHAM. Thank you, Mr. Chairman.

The Military Commissions Act, I am amazed. We are 8 years into this war, basically, since 9/11. This September will be the eighth

anniversary, and we are still talking about how to do this. And it is very complicated, and most of your questioning today has been about matters, legal matters surrounding the war. And I will continue to call it war. You can call it anything you would like. But the Military Commissions Act, the administration would like to make some changes. I agree with that. I am working with Senators Levin and McCain in the Armed Services Committee to make some changes in the next few weeks for the defense authorization bill.

I would urge you to get with us soon. Will you do that?

Attorney General HOLDER. Yes, we will. We have been discussing this internally. We have some thoughts and proposals, and I think it is time for us to share those.

Senator GRAHAM. And I would like to do more than just amend the Military Commissions Act, and I would like to deal with this third bucket, the folks who may not be subject to trial but too dangerous to let go. And the reason I say that is that we are losing, you know, whatever damage we are trying to repair with the international community over Guantánamo Bay, we are losing the public here about closing the facility. When you look at the polling data, there has been a severe change against the idea of closing Guantánamo Bay. Have you noticed that?

Attorney General HOLDER. Believe me, I have noticed.

[Laughter.]

Senator GRAHAM. I am sure the President has.

Attorney General HOLDER. I think it was raised, I don't remember by whom, one of the Senators, about the notion of having our plan out there. And I think that is something that we are planning to do and that we need to do as quickly as possible. I think we need to have our views on the entirety of this——

Senator GRAHAM. Exactly.

Attorney General HOLDER. Our comprehensive views on buckets one, two, and three, and all the related things out as quickly as we can.

Senator GRAHAM. And habeas review, one, I want to congratulate you for appealing the district court's decision to apply habeas corpus rights to detainees at the Bagram Air Base. Why did you do that?

Attorney General HOLDER. It is our view of the law—I mean, he is a very good judge, a person whom I have worked with.

Senator GRAHAM. Sure.

Attorney General HOLDER. I think that the judge is just wrong. I just do not think that habeas applies to theaters of war.

Senator GRAHAM. It would really disrupt the war effort if our troops and their commanders would be subject to appearing before Federal judges, called off the battlefield all the way back to the United States. It would really be disruptive, and something that has never been done before. Is that correct?

Attorney General HOLDER. As far as I know, and that was the reason why we decided to seek the appeal.

Senator GRAHAM. Now, Senators Leahy and Specter a couple years ago introduced a habeas reform bill allowing detainees at Guantánamo Bay, who now have habeas rights, a one-time shot at it, and they could not bring money damages suits against our troops. Are you supportive of making sure that any habeas petition

does not allow the terrorist, the accused terrorist to sue our own military members?

Attorney General HOLDER. I have not looked at that bill, but I have to tell you they have a visceral positive reaction to that view. Clearly, we want to have habeas rights that protect the welfare of the people who are being detained. But the notion that our troops might be the subject of lawsuits is something that I would be very wary of.

Senator GRAHAM. And the only reason I mention it is because lawsuits were brought against an army doctor for medical malpractice by one of the detainees. So we have streamlined habeas procedures in other areas of domestic law. Is that correct? Post-conviction relief?

Attorney General HOLDER. We do.

Senator GRAHAM. So there is no right of anybody to an unlimited habeas appeal.

Attorney General HOLDER. That is true. I mean, I would like to look at what the specific proposal might be.

Senator GRAHAM. Sure. What I want you to consider is that since these detainees have habeas rights that we can look at consolidating their cases, the uniform standards, so we do not have different standards by different judges and to, you know, put the burden on the Government to make sure that we have a uniform way of looking at this. And this is something we need to talk about sooner rather than later, because as the Armed Services Committee moves forward on amending the Military Commissions Act, I think there will be a comprehensive proposal coming out from Senator McCain and myself, and I would like to work with you about how to do that.

Attorney General HOLDER. Sure. I look forward to working with you.

Senator GRAHAM. Final thing. If we are following a satellite phone in Afghanistan, and we believe the person in question is a member of the enemy force, what is your understanding of the law if they are talking to someone else in Afghanistan, but due to the routine system it goes through an American interchange? Do we have to get a warrant in that situation? And does that make sense, if we do?

Attorney General HOLDER. So we have two parties overseas, two parties in Afghanistan——

Senator GRAHAM. Being monitored by our military.

Attorney General HOLDER. Monitored by the military.

Senator GRAHAM. Right. They are active combatants. They are being monitored by our mortgage intelligence services. They are talking to each other in Afghanistan. And the only connection to the United States is that due to the phone system in question, they have to go through an interchange in the United States. What is your view of the law as to that circumstance?

Attorney General HOLDER. It is not my view that we would need a warrant, if that is the question you are asking me, in order to intercept that conversation. But let me make absolutely certain that is—I do not believe we would need a warrant. I think it depends on the location of the parties.

Senator GRAHAM. The only reason I mention this—and I know I have run over my time—is that when we had the two soldiers kidnapped in Iraq, during this whole debate about wiretapping, they picked up communications from one of the kidnappers to someone else in Iraq, and because it went through an exchange in the United States, it took 2 hours to get approval to continue to monitor that conversation, and we lost valuable time.

Please look at this and make sure that we are not, in the name of, you know, making ourselves to be a rule-of-law Nation, not doing something unrequired and, quite frankly, stupid. I do not want Americans to be monitored as being suspected fifth column movement members of al Qaeda. If you think I am a member of al Qaeda, I want you to go get a warrant if I am talking to somebody overseas. I want you to—you know, any American in that situation. But when it comes to battlefield communications, let us do not let this debate hamper our ability to protect our troops. And I am afraid that is where we are headed.

Attorney General HOLDER. Yes, again, just to clarify, if we have two non-U.S. persons speaking to one another, I do not think there is the need for——

Senator GRAHAM. But I can tell you in this case, because an American phone company's interchange was involved, they lost valuable time. Please look at that, and I will talk with you further about it.

Attorney General HOLDER. OK. Thank you.

Senator CARDIN. Attorney General Holder, let me ask you, if I might, about voting rights cases, because we have not really touched on that too much during this hearing. Section 5 of the Voting Rights Act, we all know that this is on appeal—this is on hearing now before the Supreme Court. I was there during the oral arguments. But the preclearance Congress has felt was a very valuable tool to deal with potential and actual discrimination against voters. And Congress recently acted to reauthorize the Voting Rights Act.

I just want to get your views as to how important you think the preclearance provisions are and how you will be monitoring what the Supreme Court decision might restrict.

Attorney General HOLDER. Well, obviously, we await the Supreme Court's decision, but that portion of the Voting Rights Act is a key for our efforts in trying to protect the voting rights of all Americans.

If you look at just the numbers, the number of—even though we have made great progress in this Nation, the number of cases that are brought under that section have not dwindled. The fact that Congress unanimously 3 years ago, 2 years ago, reauthorized the Act I think is a recognition on the part of Congress that the need still exists.

We argued, I think, very strongly for the continued viability of that section, and it is our hope that the Court will agree. We will see what the Supreme Court opinion is and then obviously have to react to it. But it is our view, it is this administration's view, that Section 5 is a critical part of the Voting Rights Act.

Senator CARDIN. Well, I am glad to hear that. I strongly agree with you, and I think most of the Members of Congress strongly

agree with you, with that statement, and we hope the Supreme Court will likewise see the relevancy of continuing the Voting Rights Act in preclearance. But it needs to be monitored closely, and one of the issues that I have raised in previous hearings with you is the aggressive action of the Department of Justice in protecting the fundamental rights of all Americans to be able to cast their votes and to have those votes properly counted. And we will continue to monitor that situation.

I just want to also add my support for your statements in regards to the hate crimes statute in response to your initial statement and Senator Schumer's comments. We really are looking for an opportunity to advance the statute for all the reasons that you have said in your statement and response to questioning.

Then, last, I just want to make sure I put on the record legal services and pro bono. I mention it frequently, and I do not want this hearing to go without a strong effort to make sure that the Department of Justice is the leader in access to our legal services by all of the people of this Nation. I think the Attorney General and the Department of Justice can play a very important role.

Attorney General HOLDER. I agree with that. We talked about this during my visit with you during the confirmation process, and the concerns that you raised at that point I think are extremely legitimate ones. I think the Attorney General has to take a leadership role in this in the way that President Clinton did and Attorney General Reno did and the Lawyers for One America project that I had a role in effectuating. So I think that your concerns are very serious ones and ones that we will try to work with you on.

Senator CARDIN. We thank you for that, and it has been very refreshing to hear from the Attorney General here today and such candid responses to our questions. I think you have restored the confidence of the American people in the Department of Justice being there for all the citizens of our country, and we look forward to continuing to work in a constructive way as we deal with some very difficult challenges, whether it is how we handle the detainees at Guantánamo Bay or in Afghanistan, or how we deal with the surveillance programs of this country. These are all issues in which we have to work together. We will not always agree, but I think it is important that we have these candid discussions.

We thank you very much for your attendance here today.

Attorney General HOLDER. Thank you.

Senator CARDIN. With that, the Chairman has indicated that the record will stay open for questions from the members of the Committee. With that, the Committee will stand adjourned. Thank you very much.

Attorney General HOLDER. Thank you, Mr. Chairman.

[Whereupon, at 1:03 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

October 29, 2009

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

Dear Mr. Chairman:

Please find enclosed responses to questions for the record, which were posed to Attorney General Eric Holder following his appearance before the Committee at an oversight hearing on June 17, 2009.

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

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

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Sessions
Ranking Minority Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Senate Judiciary Committee
June 17, 2009

QUESTIONS POSED BY CHAIRMAN LEAHY

Media Shield

1. **Carefully balanced legislation to create a qualified privilege for journalists that protects the identity of their confidential sources is pending on the Judiciary Committee's legislative agenda. During your confirmation hearing, you expressed support for a well-crafted media shield bill, and you committed to work with me and others on this legislation. The legislation (S. 448) before the Committee does not give the press a free pass, and it contains reasonable exceptions to the limited privilege in cases where information is needed to prevent terrorism or to protect national security.**
   Does the Justice Department support S. 448, the Free Flow of Information Act of 2009, currently before the Committee, and will you work with me and others to enact this legislation this year?

Response: As the Attorney General stated at his confirmation hearing, the Attorney General favors the concept of a media shield law that enables journalists to maintain the confidentiality of their sources, provided it does not undermine the Department's ability to protect national security and enforce the criminal laws. The Department is in the process of working with this Committee to produce mutually acceptable legislation that protects both a free and robust media as well as the core functions of the Department.

The Justice Department's Role in Reforming Forensic Sciences

2. **In February, the National Academy of Sciences issued a comprehensive report on the urgent need to improve forensic sciences in the United States. One of the core findings in the National Academy of Science Report is that science needs to be the guiding principle in determining the standards and procedures for forensic science. Among other things, the Report calls for the federal government to set national standards for accrediting forensic labs and for certifying forensic scientists. The report also makes clear that a great deal of work needs to be done to conduct new research into traditional forensic disciplines.**

   a. **Do you agree that there should be a nationwide forensics reform effort including national standards to be set for accrediting forensic labs and certifying forensic scientists?**

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Response: Yes, the Attorney General agrees that there should be a nationwide forensics improvement effort. For some time, it has been clear that forensic science is in need of improvements. A 1999 report published by the Department's National Institute of Justice (NIJ) identified lapses in training, standardization, validation, and funding, and in 2004, responding to a Congressional directive, NIJ published a survey of forensic science organizations that emphasized the need for more research; personnel and equipment resources; education; professionalism through accreditation and certification; quality assurance; and enhanced coordination among Federal, State, and local stakeholders.

In response to the report, the Administration convened an inter-agency group under the auspices of the Office of Science and Technology Policy's National Science and Technology Council. The Subcommittee on Forensics has assembled scientists from across the Executive Branch to develop ways to implement the study's recommendations, as appropriate. Although the work of the Subcommittee is ongoing, some early reactions to the recommendations are appropriate at this time.

With regard to the specific issue of accreditation, much progress has already been made on this front. Ninety-seven percent of the public forensic science laboratories are accredited, including virtually all of the U.S. federal government's labs. More should be done, however. For example, although more than 40 private laboratories have been accredited, accreditation of all private forensic science service providers is paramount. Furthermore, accreditation through the International Association for Standardization (ISO), the world's largest developer and publisher of international standards, should become the norm. ISO has developed standard 17025 (ISO 17025), based on the standard for the accreditation of calibration and testing laboratories, and it should become one of the cornerstones of a comprehensive forensic laboratory accreditation program. Finally, operational units external to the crime laboratory, such as latent print and firearms units housed within police departments, while not traditional laboratory environments amenable to accreditation under ISO 17025, should be required to demonstrate compliance with some professional standards.

Likewise, certification of individual forensic practitioners should be examined as part of the effort to improve the forensic science community. Each forensic practitioner should be required to demonstrate that he or she possesses the knowledge, skills, and abilities to competently perform analysis in his or her individual discipline or sub-discipline. A blended approach for demonstrating competencies could include, but not be limited to, passage of proficiency tests, compliance with continuing education requirements, and adherence to a code of ethics. Certification should be recurring and, perhaps, could be stipulated as a requirement before their work or expert opinion can be proffered in a court of law. The Department of Justice is currently examining whether, and if so, how to promote, or even require, certification of our own criminalists.

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

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

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

As noted earlier, NIJ sponsored the reports that highlighted the need for a comprehensive effort. NIJ provides annual funding for some of the most important research studies in the forensic disciplines and is currently collaborating with the National Institute on Standards and Technology (NIST) on an Expert Working Group on Human Factors in Latent Print Analysis, the first of several working groups which are envisioned to address validation and practice to limit contextual and other biases in qualitative forensic disciplines. The FBI, DEA, and ATF laboratories are models of professionalism for the entire field, with many of their practices adopted by peers. For example, the FBI Lab, with 600 employees, the largest in the world, has been at the forefront of developments in forensic techniques and led the way for the forensic use of DNA. The ATF Lab was the first federal lab to be accredited, and it operates a state-of-the-art fire research facility, the first scientific research laboratory in the United States dedicated to supporting the unique needs of the fire investigation community. An official of the National Fire Protection Association called the Fire Research Laboratory, "one of the best examples of the government spending its money wisely." The DEA Laboratory System was the first forensic laboratory to achieve accreditation under the ASCLD/LAB-ISO International standard and operates a research laboratory recognized internationally for its drug signature and profiling work. And for many years, the FBI and DEA have operated Scientific Working Groups (SWGs), composed of experts in nine forensic disciplines from local, state, and federal agencies across the world, that set uniform guidelines for methods, processes, procedures, practices, standard specifications, and test methods in their respective disciplines.

In sum, the wealth of experience and expertise at DOJ is unparalleled and mandates that the Department have a leading role in the effort to improve the forensic sciences.

Public Corruption Prosecution Improvements Act

3. **We have seen a shift of resources away from public corruption investigations and prosecutions over the past seven years. Recent prominent corruption cases have made clear that public corruption continues to be pervasive problem that victimizes every American by chipping away at the foundation of our Democracy.**

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Senator Cornyn and I introduced the bipartisan Public Corruption Prosecution Improvements Act of 2009 (S. 49) that would provide needed funds to the Justice Department for the investigation and prosecution of public corruption offenses and legal tools for federal prosecutors closing loopholes in corruption law and bringing clarity to key statutes. The Department of Justice supports this bill and has submitted a favorable views letter on the legislation. Why does the Department of Justice need this legislation? Do you believe it should be promptly passed?

Response: The Department continues to strongly support S. 49, the "Public Corruption Prosecution Improvements Act of 2009." The Department has worked closely with Congressional staff in the development of this legislation over the course of several years, and we believe that it will bolster the Department's ability to investigate and prosecute public corruption offenses. Combating public corruption is a top priority of the Department of Justice, and this bill would strengthen our ability to carry out that mission by closing significant gaps that exist under current law, providing additional tools to public corruption prosecutors and investigators, and providing needed resources for the investigation and prosecution of public corruption. Some examples of the bill's important provisions include: extending the statute of limitations and increasing the penalties for key corruption offenses; expanding our ability to bring charges in an appropriate venue to enable the Department to charge all of the offenses and offenders most effectively; adding corruption offenses to the list of offenses that may be investigated and charged using Title III wiretaps and the Racketeering Influenced and Corrupt Organizations Act (RICO); and remedying problems and barriers that have resulted from narrow judicial interpretations of the corruption statutes by providing clear legislative coverage. The Department urges that this legislation be passed promptly.

New FOIA Policy

4. **July Fourth marks the 43rd anniversary of the enactment of the Freedom of Information Act ("FOIA"). I commend the President for issuing a memorandum to strengthen FOIA on his first full day in office, and I commend you for issuing a FOIA memorandum in March which restores the presumption of openness to our government. Your FOIA Memo requires, among other things, that this new policy "should be taken into account and applied if practicable" to pending FOIA cases. But there is some concern that the Department and other federal agencies are not actually applying this policy to their pending cases.**

    a. **Is the Department regularly reviewing its pending FOIA cases to determine the impact of your March 19 FOIA Memo on withholding decisions?**

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Response: In accordance with the Attorney General's Memorandum, the Department's Civil Division has implemented a policy of reviewing each pending FOIA case to determine whether it is practicable to re-examine documents in that case and whether "there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information." Attorney General's Memorandum at 2. In addition, the Department is in the process of contacting each U.S. Attorney's Office to ensure that it is in compliance with its obligations under the Memorandum.

b. Has your new policy resulted in the release of more information to the public?

Response: Yes. The Department has undertaken extensive outreach, education and training about the new guidelines across the government. We have made clear that agencies must take care to apply the new guidelines from the very earliest stages of a FOIA request. In addition, once cases reach litigation, Department attorneys query agency officials with respect to their application of guidelines, and encourage agencies to make discretionary releases. Thus, the new guidelines have resulted in the release of more information at all stages of the FOIA process. In addition, we have emphasized to agencies in trainings that they need not wait for a FOIA request to release information. In the words of the Attorney General's Memorandum, "agencies should readily and systematically post information online in advance of any public request." Doing so "reduces the need for individualized requests and may help reduce existing backlogs," thus speeding the flow of information in multiple ways.

c. Will you commit to work with me and the FOIA requester community to address concerns about the implementation of this policy?

Response: The Department looks forward to working with you and the FOIA requester community to address any concerns about the implementation of our FOIA policy. As you know, both the President and the Attorney General are committed to increasing transparency. The President's Memorandum and the Attorney General's FOIA Guidelines call on agencies to adopt a presumption of openness and to ensure that our fundamental commitment to open government is realized in practice. The Department's Office of Information Policy (OIP), which has been working with agencies to implement this policy, is also reaching out to the FOIA requester community. In fact, OIP is hosting a Requester Roundtable on August 5, 2009, to provide requesters an opportunity to share concerns and ideas directly with the Department.

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Material Support for Terrorism

5. Upon taking office, Secretary Napolitano announced a broad review of Department of Homeland Security immigration policies, including how to handle asylum cases held in limbo because of the overly-broad definition of material support for terrorism in our immigration laws. I welcome her review and hope that the Department of Justice is fully cooperating in this process.

a. What steps is the Department of Justice taking to revisit past agency interpretations of the material support inadmissibility grounds?

Response: The statute's inadmissibility grounds are coupled with the authority to grant exemptions to those inadmissibility bars. The National Security Council is leading an interagency process, including the Department of Justice, to make the process for granting appropriate exemptions to the terrorism-based inadmissibility grounds more efficient while ensuring the protection of our national security interests. The Department views exemptions under the statute as an appropriate form of relief in certain circumstances.

b. Does the Department of Justice agree that *de minimis* contributions and acts committed under duress should not be considered to be "material support"?

Response: The Department of Justice does not agree that *de minimis* contributions or those given under duress cannot under any circumstances constitute material support as defined by the statute, and the Department seeks to avoid inconsistencies with its interpretation of such terms in the criminal context. However, an exemption may be appropriate in a particular case under the totality of the circumstances, and the Secretaries of State and of Homeland Security, in consultation with the Attorney General, have the authority to grant such an exemption. *See* 8 U.S.C. § 1182(d)(3)(B).

Asylum Claims Based on Membership in a Particular Social Group

6. Asylum claims may be based on "membership in a particular social group," but that phrase is not defined by the statute. The standard for defining "membership in a particular social group" was articulated in a 1985 opinion from the Board of Immigration Appeals (BIA) entitled *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). The *Acosta* decision requires the asylum seeker to show that the members of the social group at issue share a common characteristic that is either immutable or so fundamental to their identity or conscience that they should not be required to change it. For more than twenty years, the BIA followed the *Acosta* standard under the well-established guidance of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the UNHCR Social Group Guidelines.

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In a 2006 decision titled *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006), the BIA introduced a new and troubling concept into its review of social group asylum cases. In *Matter of C-A-*, the BIA required that the social group at issue in the case also be visible in the society. In this ruling, the BIA cited to the UNHCR Social Group Guidelines as a source for its heightened "social visibility" standard, but in doing so, misstated the UNHCR position on the matter. Since that time, UNHCR has stated unequivocally that the BIA misconstrued its meaning. The UNHCR position is that there is no requirement that a particular social group be visible to society at large. Is the Department reviewing this matter and considering a modification to BIA precedent that is consistent with UNHCR Social Group Guidelines?

Response: A litigant in the Eighth Circuit has asked the Attorney General to take his case on certification and reconsider the social visibility requirement for a social group. The UNHCR has joined that request, which is pending. The Department currently is considering the request.

E-FOIA

7. **The Freedom of Information Act was amended in 1996 to cover electronic information. Since then, I and others have worked hard to make sure that our federal agencies are fully complying with that law. Given the explosion of the Internet and other new technologies, compliance with E-FOIA is essential to improving overall FOIA performance across the government.**

   Will the Department conduct a review of agency web sites to determine whether they are in compliance with the affirmative disclosure requirements of E-FOIA?

Response: The Department, through the Office of Information Policy (OIP), conducts reviews of agency websites on a periodic basis. As you know, the May 30, 2008, Attorney General's Report to the President on agency progress under Executive Order 13,392, "Improving Agency Disclosure of Information," asked agencies to review the FOIA Reading Rooms on their websites and certify that they were in compliance with the FOIA. Those certifications were made less than a year ago, on October 31, 2008.

FOIA Processing

8. **Delay in the FOIA process has been a persistent problem, and despite efforts under Executive Order 13392, many agencies have not been able to meaningfully reduce their FOIA backlogs.**

   a. **What do you see as the role of DOJ in helping and/or compelling agencies to reduce their backlogs?**

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Response: The Department is charged by the FOIA itself with the responsibility of encouraging agency compliance with the FOIA. As a result, we have long focused on the issue of backlogs and the need to improve the time taken to respond to requests. Indeed, the Attorney General's FOIA Guidelines stressed that agencies must make it a priority to respond to requests in a timely manner and not to view long delays as an inevitable and insurmountable consequence of high demand. The Attorney General has also required agencies to include data on their backlogs in their agency Annual FOIA Reports.

b. Many agencies still do not permit members of the public to submit FOIA requests by e-mail, although doing so would save time and money for both requesters and agencies. Will you issue additional guidance requiring all agencies to accept FOIA requests electronically?

Response: The Department recognizes the value of improving the efficiency of the process and is considering the issue of developing guidance on the electronic acceptance of electronic FOIA requests.

Privacy and MWCOG Multi-Jurisdictional Database

9. In 2002, the Metropolitan Washington Council of Governments ("MWCOG") received federal funding under the COPS program for the development of a Regional Pawn Sharing Database system. State and local law enforcement agencies use this database to aggregate records of consumer credit transactions by pawnbrokers and to deter the marketing of stolen property. The information contained in the Regional Pawn Sharing Database includes sensitive personal information about U.S. consumers who patronize pawnbroker establishments, including name, date of birth, race, address, an identification number from a state-issued identification document (e.g., driver's license) or Social Security Number, as well as occasionally, biometric identifiers such as fingerprints. Given the sensitive personal information routinely maintained in the Regional Pawn Sharing Database, there is growing concern that this database could be vulnerable to privacy and civil liberties violations.

What steps is the Department taking to ensure that state and local law enforcement agencies that receive federal funding to participate in Regional Pawn Sharing Database comply with the privacy and civil liberties requirements established under 28 C.F.R. Part 23?

Response: One of the grant conditions included in the COPS Office Grant Owners Manual for Technology grantees is that grantees using COPS funds to operate an interjurisdictional criminal intelligence system must comply with the operating principles of 28 C.F.R. Part 23. The grantee is required to acknowledge that it has completed, signed and submitted with its grant application the relevant Special Condition certifying its compliance with 28 C.F.R. Part 23.

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All recipients are required to agree to the Criminal Intelligence Systems/28 C.F.R. Part 23 Compliance Special Condition as part of their application proposal so the COPS Office can track which agencies intend to use their grant funds to operate interjurisdictional criminal intelligence systems. If an agency intends to use grant funds to operate an interjurisdictional criminal intelligence system, it should have indicated this in its application and certified the agency's agreement to comply with the operating principles found at 28 C.F.R. Part 23. An agency now must comply with 28 C.F.R. Part 23 in operating the interjurisdictional criminal intelligence system funded through its COPS grant.

Grant monitoring and evaluation are critical aspects of all COPS grant programs. The COPS Grant Monitoring Division was established in FY1998 to assess grantee progress in meeting the terms and conditions of COPS grants, assist grantees in their grant implementation, and document and disseminate law enforcement "best practices." In addition, routine monitoring activities assist in tracking the progress and success of COPS funding programs and the advancement of community policing.

In FY2007, the COPS Office began working with the newly-established Office of Audit, Assessment, and Management (OAAM), which was created through the Department of Justice Reauthorization Act of 2005 and subsequently housed within the Office of Justice Programs (OJP) in 2007. The COPS Office has collaborated closely with OAAM since its inception to improve operating efficiency and effectiveness and enhance programmatic oversight for all DOJ grant-making agencies. As its primary achievement to date, a grant assessment tool was developed by the OAAM inter-agency working group to provide a common, organized framework and methodology for systematically and objectively assessing risk associated with grants and/or grantees through a standard set of criteria. By using this tool, COPS and OJP can work to ensure that grantees most in need of assistance are aided through on-site and desk-based monitoring efforts, and that monitoring activities are prioritized based on potential vulnerabilities while simultaneously fostering consistency across all DOJ grant-making components.

The most common methods of monitoring by the COPS Office are:

- ***Site Visits*** – Based on risk assessment criteria as described above, certain grantees are selected for on-site monitoring visits. On-site monitoring is generally conducted through a one-day or two-day site visit, including an entrance interview with law enforcement and government executives, a thorough programmatic and financial review of the grants awarded, and community visits to businesses, neighborhood associations, and/or sub-stations where COPS staff can observe a department's community policing efforts firsthand. Agencies are notified in writing of the results and any actions necessary to remedy identified grant violations.

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- ***Office-Based Grant Reviews (OBGRs)*** – Also based on risk assessment criteria as described above, certain grantees are selected for reviews conducted at the COPS Office. Similar to an on-site grant review, an OBGR begins with an internal examination of grant documentation, followed by contact with the grantee to collect any additional and/or supporting documentation demonstrating compliance with grant conditions and requirements. Staff work with grantees to correct any identified problems or deficiencies through telephone contact or written correspondence.

- ***Complaints / Allegations*** – The COPS Office responds to complaints from citizens, labor associations, media, and other sources. Any written complaints or allegations of non-compliance are resolved via direct contact with the grantee in question, in a manner similar to that used for issues identified through either site visits or office-based grant reviews.

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QUESTIONS POSED BY SENATOR FEINGOLD

1. **As we discussed at the hearing, I requested in letters I sent to the President on April 29 and June 15 that the administration withdraw the January 2006 White Paper and other classified Office of Legal Counsel (OLC) memos providing legal justification for the NSA's warrantless wiretapping program. At the hearing, you stated that the OLC is reviewing those opinions to determine whether they can be made public.**

   a. **How soon can we expect that review to be completed?**

   b. **My understanding is that OLC attorneys also are reviewing those opinions to determine whether they should be withdrawn. Can you confirm that understanding? When do you expect that review to be completed?**

Response to subparts a and b: The review processes described in your question are still ongoing. The Department will work with you and your staff to provide a better sense of the timing of the completion of both reviews.

2. **President Obama, in his May 29 statement on cyber security, offered the following reassurance: "Let me also be clear about what we will not do. Our pursuit of cyber security will not – I repeat, will not include – monitoring private sector networks or Internet traffic. We will preserve and protect the personal privacy and civil liberties that we cherish as Americans." This is a clear statement of the importance of personal privacy as the administration moves forward on cyber security. But the Cyber Space Policy Review report released that day by the White House acknowledged a "complex patchwork" of applicable laws and the "paucity of judicial opinions in several areas."**

   a. **Is there a currently operative Justice Department legal opinion to guide the application of existing law or any new legislative framework that might be proposed? If so, when and by whom was the opinion developed?**

   b. **Is this topic part of the overall review that is underway of OLC memos?**

Response to subparts a and b: There are at least two currently operative OLC opinions that relate to cyber security, both of which were issued during the last administration. The White House recently completed its 60-day study of cyber security issues, and the Department has been working with other Executive Branch agencies to follow up on that study, particularly with regard to reviewing the scope of various surveillance laws and new technologies that might be used to curb intrusions in U.S. government networks.

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c. **Will you make public as much of the relevant legal analysis as possible, and will you provide any existing opinions, and any future opinions on this topic, to Congress, so that staff with appropriate clearances will have complete access to the legal analysis?**

Response: We understand that staff members of this Committee have had access to the opinions referenced above, and the Department will work with you to provide you additional information. The Department will consider publication of any unclassified opinions as part of its ordinary publications process.

3. **I was very pleased that you decided to vacate the order issued by Attorney General Mukasey in *Matter of Compean*, and that you have directed the Executive Office for Immigration Review to initiate a rulemaking procedure to evaluate the existing framework for making claims of ineffective assistance of counsel. What is the timetable for issuing a final rule in this matter?**

Response: Attorneys from the Executive Office for Immigration Review (EOIR), in consultation with other relevant Department components, began the review process promptly after the announcement of the Attorney General's order to initiate the rulemaking, evaluate the issues, make recommendations, and begin drafting appropriate language. The rulemaking process involves many separate steps, including publication of a proposed rule and a final rule, and review by the Office of Information and Regulatory Affairs under Executive Order 12866, and some rules may take up to a year or more for completion of the process. This particular matter calls for careful consideration of the important legal and practical concerns presented in these cases, and the Department will also be allowing an appropriate period for public comment. Though no specific target date has been set for issuance of a final rule, the Department will be monitoring the progress of the ongoing review in order to ensure a timely completion of the rulemaking process.

4. **The recent revelations of high-level officials involved in authorizing or ordering the use of torture, including the disclosure last month of the Office of Legal Counsel memos, the publication of the 2007 report of the International Committee of the Red Cross that concluded that our government committed torture, and the report released last month by the Senate Armed Services Committee on the use of torture by the Defense Department, all raise serious allegations of crimes being authorized and ordered at the very highest levels of government. What steps have you taken to ensure that there is an independent review of the evidence of possible criminal acts, and how would you respond to those who believe that only the appointment of an independent prosecutor will allow a credible investigation of wrongdoing to take place?**

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Response: The President has stated that such prosecutorial decisions are up to the Attorney General and that he does not want to pre-judge such decisions. In general, the Department does not comment on the existence or non-existence of investigations. We can tell you that with respect to the lawyers who authored the OLC opinions at issue, the Department's Office of Professional Responsibility is conducting a review to determine whether the memos were consistent with the professional standards that apply to Department attorneys. It would be premature at this time to comment on the outcome of that review or on other possible investigations.

5. **At your confirmation hearing in January, I asked if the Justice Department would prepare a detailed report about implementation of the federal death penalty from 2001 to 2008, similar to a report that was issued in 2000. You agreed that it would be appropriate to do an in-depth report and share the results publicly – a response that I greatly appreciated. What is the status of this effort, and when do you expect it to be completed?**

Response: In April 2009, the Attorney General asked the Deputy Attorney General to create and chair a working group to undertake a comprehensive review of federal sentencing and corrections policy. To carry out the review, the Deputy Attorney General created a three-tier structure comprised of: (1) the Sentencing Working Group, an intra-Departmental team representing relevant interests within the Department; (2) a Steering Committee of Department leaders on sentencing and corrections; and (3) Issue Teams responsible for compiling information and drafting papers on individual issues for the Working Group. The group is seeking the perspectives of parties outside the Department by convening meetings and listening sessions.

The Working Group has recently created a new Issue Team to review the Department's handling of capital cases. The Death Penalty Issue Team will take a fresh look at the Department's death penalty protocols and decision-making process, and develop recommendations for the Deputy Attorney General and Attorney General. We think that this structure will provide for a thoughtful analysis of the issue within the larger context of overall sentencing and corrections policy. Part of this group's initial effort will be to undertake a comprehensive review of existing research on racial, ethnic, and geographic disparities in federal capital cases, with an eye towards deciding whether additional studies are warranted and what the focus of any such studies should be.

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QUESTIONS POSED BY SENATOR SCHUMER

1. **As you know, I am the Chairman of the Rules Committee, which has jurisdiction over the administration of federal elections. On March 11, we held a hearing to look into the problems with our current voter registration system. We had found that as many as 7 million eligible voters either could not vote or did not vote due to registration issues. This is unacceptable. I know you would agree with me when I say that voter registration is the lifeblood of our republic. And there are several components to achieving successful voter registration under our current system. Two of these components are 1) that states comply with the requirements of the National Voter Registration Act (NVRA), and 2) that various Federal agencies be "designated" as voter registration agencies in order to decrease unnecessary obstacles to registration. I believe both are vital to an effective registration system under our current regime.**

   a. **What steps will you take to reverse the Department of Justice's past practices of non-enforcement of NVRA and the Help America Vote Act, particularly with respect to registering voters from the public assistance lists?**

Response: The Department is committed to enforcing all of the NVRA's provisions to the fullest extent possible. To that end we have commenced a program to evaluate current data, including that just released by the Election Assistance Commission in a report dated June 30, 2009, to determine which jurisdictions are failing to comply with the voter registration requirements under Section 7 of the NVRA. We have committed significant resources within the Department to investigate a number of states to determine whether they are complying with the law. If we believe that they are not, we intend to contact them and, in the event we cannot agree on the terms of an appropriate consent decree, to initiate lawsuits against them.

In the same vein, we are evaluating available information to determine whether states are complying with the NVRA's requirement that they designate additional agencies as voter registration agencies. In the past year, similar efforts led to voluntary actions by Iowa, Nebraska, and Mississippi to amend their laws to comply with the NVRA. We expect to continue these efforts and hope to achieve similar results.

   b. **Would the Department be willing to sue states out of compliance with NVRA?**

Response: Yes. We have recently sent a notice letter to a state informing it that we have received authorization to commence a lawsuit against it alleging claims arising out of violations of Section 7 of the NVRA. We currently are negotiating a possible resolution

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of these claims. We fully expect to send similar notice letters to other states determined to be out of compliance with the NVRA, and, where necessary, to commence lawsuits.

2. **There is another aspect of NVRA that deserves significant attention. In order to help improve voter registration and make it easier for some in our population – especially our veterans – to vote, various Federal agencies can be designated as "voter registration agencies." In fact, I wrote to President Obama requesting that this be done as soon as possible. Now, it does not need to be implemented for every Federal agency, but certainly the Department of Veterans' Affairs and HHS would be appropriate places to start.**

   Do you agree with me that such designations are both necessary and helpful, and do you know of any plans to move forward with these designations?

Response: The Department of Justice is according high priority to enforcing Section 7 of the NVRA, and the Department supports the concept of designating federal agencies as voter-registration agencies. We encourage States to designate appropriate federal agencies as voter-registration agencies, and we will work with those federal agencies to make sure they are aware of the benefits of providing voter-registration services. To reach all segments of the population, federal agencies that have heavy contact with members of the public can, and should, play an important role. The Department is currently exploring the legal and practical issues involved in designating particular federal offices as voter-registration agencies.

3. **Early this year, the U.S. Attorney for the District of Columbia declined to prosecute the former head of the Civil Rights Division, Bradley Schlozman, for statements that he made to me and other Senators that the Office of Inspector General found to be untrue. At your confirmation hearing, I asked if you would refer this case to the U.S. Attorney in Connecticut, who is conducting a review of politicization at the Department under the last administration, and to give me an update on this investigation.**

   a. **Can you provide me and the other members of the Committee with an update at this time?**

Response: At his confirmation hearing, the Attorney General indicated that he would review the prosecutive decision that had been made with respect to Mr. Schlozman, and that review is ongoing. Because the review is ongoing, it would be inappropriate to comment further regarding the status of the review. At the conclusion of the review, we will consider whether there are additional disclosures we can make to the Committee consistent with any disclosure restrictions such as those contained in Federal Rule of Criminal Procedure 6(e).

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4. **As Chairman of the Immigration Subcommittee, one of my primary concerns is the effective operation of our immigration court system. In recent years, many court officials have called for an increase in funding for the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) citing the complexities of immigration cases, unmanageable dockets and unrealistic case completion deadlines.**

   On average, Immigration Judges have less time than before to dispose of a case despite their burgeoning case loads. In 2007, they received more than 334,000 matters—including bonds, motions and removal proceedings—up from roughly 290,000 in 2002. Based on the total number of judges, this amounts to nearly 1,500 matters per Immigration Judge. In comparison, U.S. District Court judges average 483 matters completed per year.

   The Board of Immigration Appeals (BIA) also needs a sufficient number of judges to do its job fairly and efficiently. Reports indicate that there are more than 8,700 cases that took more than five years for the BIA to complete, and tens of thousands more that were pending before the courts for more than two years before they were resolved.

   a. **What steps have you taken, or do you plan on taking, to ensure that Immigration Judges and BIA members can manage their burgeoning case loads?**

Response: The Department of Justice and the Executive Office for Immigration Review (EOIR) continue to address the caseload challenges facing the immigration courts and the Board of Immigration Appeals (BIA). We are responding to these challenges by deploying new and existing resources to locations where the case priorities are highest and the need is greatest, by requesting budget increases for additional staff, and by using video technology to increase efficiency and flexibility. For example, EOIR has moved, and will continue to move, Immigration Judge resources from non-detained to detained locations to accommodate the increasing detained docket.

Overall, EOIR continues to transform its operations to improve and enhance the BIA and immigration courts. The final rule to increase the BIA from 11 to 15 members was published in the *Federal Register* on June 16, 2008. During Fiscal Year (FY) 2008, the Attorney General appointed five new BIA members and a new Chair. A new Vice Chair was appointed in January 2009. The vacancy announcement for the remaining BIA member position closed on April 9, 2009, and will be filled through a competitive selection process. In addition, Immigration Judges and senior EOIR attorneys may serve as temporary members, and have in the past.

Additionally, EOIR has increased the number of Immigration Judge positions and is in the process of filling them. The Administration worked with Congress to secure additional funding in FY 2009. As a result, EOIR received $5 million to help increase the number of Immigration Judges from 224 on board to 253, and fund additional staff.

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EOIR brought on board 10 new Immigration Judges on April 12, 2009, and the hiring process is ongoing for the remaining new Immigration Judges who will help EOIR reach its target of 253. Also, the President's 2010 budget request includes an increase for EOIR of 172 positions, including 28 Immigration Judges.

b. How many additional Immigration Judges, BIA members, and staff attorneys do you plan to hire in FY 2009 and 2010?

Response: As stated above, EOIR brought on 10 new Immigration Judges in April 2009, and the hiring process is ongoing for the remaining new Immigration Judges who will help EOIR reach its target of 253. The vacancy announcement for the remaining BIA member position closed on April 9, 2009, and will be filled through a competitive selection process. Additionally, the hiring process for 6 staff attorneys is ongoing. Finally, EOIR has requested 172 new positions, including 28 Immigration Judge positions and 16 staff attorneys, in the President's 2010 budget.

5. With regard to combating the smuggling of illegal aliens into the United States, a 2005 GAO report concluded that—in order to effectively combat alien smuggling—the Government needs civil forfeiture authority that would enable the Government to seize safe houses used in alien-smuggling. This authority has yet to be granted by Congress. I spoke with Secretary Napolitano last week about my intention to draft a bill giving the Government this authority and she was enthusiastically supportive.

a. Would you support my bill giving the Government this civil forfeiture authority to seize safe-houses used in alien-smuggling, and is that something you will work with me to enact?

Response: The Department would strongly support such a provision. The gap in civil forfeiture authority for facilitating property in alien smuggling cases continues to be a real problem for law enforcement. This lack of authority, particularly as it pertains to real property, gravely hampers our efforts to use forfeiture for its deterrent and punitive effects in these cases. We will give whatever assistance is necessary to include a provision authorizing civil forfeiture of facilitating property in proposed legislation and to support its enactment.

6. I recently toured the Federal Correctional Facility in Otisville, New York. What I saw there was deeply troubling. Otisville is operating at 42.7% over capacity and is 14% understaffed. Federal prisons in Manhattan, Brooklyn and Ray Brook, are all more than 50% overcrowded and are also severely understaffed. Nationally, federal prisons are operating around 37% over their rated capacity and are understaffed by an order of 13.4%. Inmates are being held in areas not originally designed as inmate sleeping areas and, at least on some occasions, non-correctional prison staff is being used for correctional duties. Fortunately, thanks to some very outstanding work by our corrections officers, all four New York facilities I mentioned have been

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exceptionally safe, and assault numbers were down in 2007. Nonetheless, I'm sure you will agree that we cannot treat prisons like an afterthought.

a. With this in mind, does the Department believe that more funding is necessary to ensure safety for prison staff and security for inmates?

Response: The Department believes it is important to ensure that the federal prison system is adequately funded and safely staffed. For FY 2010, the Administration is requesting an increase of $384 million over FY 2009 enacted for the Bureau of Prisons (BOP) Salaries and Expenses Budget. The FY 2010 budget request supports current services and also provides funding to begin hiring for the two new prisons, which will eventually add 737 new positions including 350 correctional officers.

b. If not, how is the Department planning to address these growing concerns?

Response: As noted above, the Administration is requesting increased funding to ensure adequate resources for BOP to support safe staffing levels. The Department believes that BOP plays a key role in the administration of the federal justice system. BOP provides safe, secure and humane care to federal inmates. BOP also provides programs and other self-improvement opportunities that facilitate successful reentry into society post-release. The Department is focused on finding ways to improve the staffing levels at BOP as well as the training, educational and treatment options available to inmates. The Attorney General recently formed a Sentencing and Corrections Workgroup to make recommendations for addressing the critical challenges facing the federal prison system among other issues.

7. A common refrain from people who are opposed to more restrictive gun laws is that we should "enforce the existing laws on the books." I will say that I think this is a fair statement, and it's one of the rare places on this issue on which we should all be able to agree. But I'm concerned that, at least with respect to the ATF, current staffing limitations may make it impossible to even enforce some of the gun laws we have now. And I say all of this with the important caveat that there are only a few bad apples out there – a handful of gun dealers are responsible for the overwhelming majority of illegally sold guns in the country. Our goal should be finding the bad apples – and the best way to do that will be through routine inspections. As you know, the ATF is now empowered to conduct an annual inspection of a federal firearms licensee's inventory and records. But according to recent news reports, most gun dealers are only inspected once every three to six years, because the pool of ATF auditors is stretched dangerously thin.

a. That estimate was accurate as of April of this year. Do you have any reason to believe that anything has changed with respect to that estimate?

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Response: Currently, the total number of Federal Firearms Licensees (FFL) is approximately 114,000. In addition to this number, there are approximately 11,000 Federal Explosive Licensees (FEL), which ATF also regulates. ATF is required, by law, to conduct inspections of FELs once every three years. ATF Industry Operations Investigators (IOI) also conduct approximately 5,000 inspections of new FFL applicants and 1,300 new FEL applicants each year as well as inspections to assist law enforcement and seminars to promote compliance. Given these figures, and the fact that ATF's IOI is currently 580 field IOIs, ATF estimates that FFLs are inspected once every three to six years.

While ATF may not have the resources to conduct annual inspections of every FFL, ATF has a number of inspection programs focusing on FFLs who may either be high-volume, be part of a specific type of the industry, or have previous compliance issues. These focused inspection programs allow ATF to focus its limited resources on those FFLs who are of greatest interest to ATF. ATF has found that increased inspections result in increased compliance. The increase in inspections affords additional opportunities for FFL education which results in improved accountability of firearms inventory, as well as improved record keeping, which will result in a higher percentage of successfully completed traces of firearms.

Likewise, as of 2007, ATF said publicly that conducting a single inspection of every federal firearms licensee in the country would take approximately seventeen years.

b. Do you have any reason to believe that anything has changed with respect to that estimate?

Response: In FY 2008, ATF conducted approximately 11,000 compliance inspections of FFLs. The current population of FFLs is 114,000. Assuming that ATF could continue that same level of inspections, it would take approximately 10 years to conduct a single inspection of every FFL.

c. In light of these numbers, are you concerned that the ATF may be understaffed?

Response: As previously stated, ATF's current IOI field population of 580 does not allow for inspection of FFLs on an annual basis, and limits inspections to a three to six year inspection cycle. The integrated efforts of our agents, IOIs, attorneys, scientists, financial auditors, and administrative professionals allow ATF to effectively identify, investigate, and recommend for prosecution violators of the Federal firearms and explosives laws. On an annual basis, we are able to evaluate the compliance level of 10% of our FFLs via in person inspections. Additionally, our request for fiscal year 2010 includes an additional 93 positions, including 35 new agents.

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8. I understand that the Department of Justice is investigating for accomplices to the murder of Dr. George Tiller, and for potential violations of the Freedom of Access to Clinics Entrances (or "FACE") Act – the law that prohibits threats of force or physical obstruction of reproductive-health providers and seekers. According to newspaper reports, criminal enforcement of this important law had declined by more than 75 percent over the last 8 years under the previous administration. Therefore, I appreciate that the Department has launched its investigation, and feel that we must work together to stop these unconscionable acts of violence.

a. How can we work with the Department of Justice to ensure that health-care professionals are protected from acts of violence?

Response: The Attorney General shares your concern for the safety of our nation's health-care providers, and you can be assured that the Department of Justice is doing everything in its power to ensure that they are protected from acts of violence. As you noted, there had been a decline of violent acts against reproductive health care providers in the past several years, but we recognize that recent events may result in renewed unlawful acts, and the Department is prepared for that possibility. Immediately after the murder of Dr. George Tiller, the Criminal Section of the Civil Rights Division coordinated with the United States Marshals Service (USMS), the Federal Bureau of Investigation (FBI), and the provider groups to focus on the immediate safety of other clinic workers around the country. The Attorney General also immediately directed USMS to provide protection to clinics and providers assessed to be at risk in the wake of Dr. Tiller's murder. For example, the USMS, FBI and Wichita Police Department (WPD) provided nearly unprecedented security at Dr. Tiller's funeral and to providers who attended the funeral. As part of this endeavor, the USMS dispatched more than 70 Deputy Marshals to Wichita, Kansas.

Additionally, working with the provider groups, the USMS prioritized a number of clinics and doctors for assessment and protection. USMS established a protocol for assessing threats at clinics and providing additional protection on an as-needed basis. USMS sent a directive to USMS personnel in each judicial district to provide them with criteria for assessing potential threats to the providers within their individual jurisdictions. Threats against clinics and providers are being treated with the same level of urgency as would be accorded threats against federal prosecutors and judges. USMS will continue to coordinate with providers to assess and meet their security needs.

Department officials have held two meetings of the National Task Force on Violence Against Health Care Providers to coordinate the law enforcement efforts with respect to the ongoing federal investigation of Dr. Tiller's murder and to ensure that appropriate security measures are undertaken at abortion clinics around the nation. The Attorney General also personally met with representatives from organizations that seek to protect reproductive rights to convey my commitment to ensuring the safety of reproductive health care providers and seekers, and to listen to their concerns. Additionally, USMS and the FBI are coordinating with the Security Directors for the

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provider groups, and Civil Rights Division attorneys have been in regular contact with representatives from the provider groups. The FBI has also directed its field offices to make contact with all clinics that provide abortion services to ensure that the lines of communication are open.

We appreciate your support and concern for the safety of our nation's health care providers. Your work and that of key sponsors who ensured passage of the FACE Act has given the Department a critical tool in our efforts to protect the public. As you know, enhancing civil rights enforcement is a top priority for the Department of Justice. As part of this effort, the President's Budget includes a significant increase in funding to revitalize the Civil Rights Division, which is at the forefront of enforcing the FACE Act.

9. Last week, the Department issued a brief arguing in favor of upholding the Defense of Marriage Act in federal court. Many members of the LGBT community were upset by this brief.

a. Can you please tell me what knowledge you had of this before it was written?

Response: The Attorney General was aware of the brief before it was filed.

b. Can you please elaborate on how this administration's position on the Defense of Marriage Act differs from that of the Bush Administration?

Response: The Administration believes that the Defense of Marriage Act should be repealed. At the same time, the Department of Justice has long followed the practice of defending statutes enacted by Congress when they are challenged in litigation, even when the Department disagrees with the statute as a policy matter, so long as reasonable arguments can be made in support of its constitutionality. This longstanding and bipartisan tradition accords respect to co-equal branches of government.

Pursuant to that longstanding practice, in the Department's first court filing defending the constitutionality of DOMA since President Obama took office, the Department argued that given the strength of competing convictions on this still-evolving issue, Congress could lawfully decide to continue providing federal benefits on the basis of a traditional, centuries-old definition of marriage recognized by all 50 states and the District of Columbia, while reserving judgment with respect to new definitions of marriage recognized by no states at the time DOMA was enacted and by a minority today. The Department did not defend certain rationales for the Act that had been presented in briefs submitted in the Bush Administration, including asserted government interests in encouraging "the development of relationships that are optimal for procreation" and "the creation of stable relationships that facilitate the rearing of children by both of their biological parents."

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QUESTIONS POSED BY SENATOR WHITEHOUSE

1. **The Department under your stewardship his continued and reinforced the Bush Administration's arguments regarding the "state secrets" defense. I understand that on a complex issue like this, one may not wish to revisit it on the schedule of an ongoing case, or in that particular context, and I recognize that Senate delays have slowed down the confirmation of your new management team.**

   Can we expect a policy review of this defense, and if so, on what schedule? Are there other areas in which you anticipate or are conducting such policy review?

Response: The Attorney General knows how important this issue is to the Committee and the American people. It is also important to the President. As you know, the President has recently committed to reform of the privilege and has set forth principles to guide that reform. They include: (1) a stricter legal test for deciding what material can be protected under the privilege; (2) a formal process of review within the Justice Department prior to approval of any assertion of the privilege in court; and (3) voluntary reporting to notify Congress of the cases in which the privilege has been invoked and the reasons for doing so.

The Attorney General is also committed to an in-depth review by the Department of the state secrets privilege in all cases in which it was asserted by the prior Administration. He has asked the Deputy Attorney General to set up a task force to carry out that review. The task force was instructed to: (1) assess the assertion of the privilege in each pending case and evaluate its appropriateness under existing law; (2) determine whether the privilege could be asserted in a narrower fashion that would allow the case, or at least key parts of the case, to continue; and (3) identify key policy issues regarding invocation of the privilege in these cases and generally.

The Administration is considering reform consistent with the President's commitments, and the work of the Department's task force. There is extensive interagency discussion and coordination going on now. We recognize that we need to ensure the public has confidence that the privilege is invoked only in the rare cases where appropriate.

We intend to release a public report of our findings and intend to share a copy of the report with Members of this Committee prior to publication.

In addition to reviewing the state secrets privilege, Justice Department personnel are participating in the task forces established pursuant to the Executive Orders the President signed on January 22, 2009, to review interrogation policy (Executive Order 13491); policy regarding detainees at the Guantanamo Bay Naval Base (Executive Order 13492); and detention policy options (Executive Order 13493).

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2. **A great deal of damage was done to the Department of Justice during the last administration. What procedures are now in place for capturing disclosures from career Department employees about that damage – be it professional or ethical misconduct, politicized decision-making, or something else? To what office do such disclosures go, so that they can be properly analyzed and, if necessary, acted upon?**

Response: Allegations that relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice are reported to the Office of Professional Responsibility. Allegations of criminal wrongdoing or administrative misconduct are reported to the Office of the Inspector General. DOJ employees may also consult a Designated Ethics Official, a Professional Responsibility Officer, the Office of General Counsel in the Executive Office for U.S. Attorneys, the Professional Responsibility Advisory Office, or, in some components, an Ombudsman. OPR and the OIG coordinate investigations in matters that overlap their respective jurisdictions.

3. **On June 15, 2009, the Department of Justice submitted a brief in support of the Defense of Marriage Act (DOMA), the law that protects the right of states not to recognize same-sex marriages or provide same-sex married couples with federal benefits. At the same time, the President has pledged to support repeal of DOMA (and I too would like to see it repealed). Was the litigation posture taken after a policy review by the Department, or a continuation of the litigation strategy of the previous administration? The distinction between a policy position and a litigation posture is important.**

Response: This Administration believes that the Defense of Marriage Act should be repealed. The Department of Justice, however, has long followed the practice of defending statutes enacted by Congress when they are challenged in litigation, even when the Department disagrees with the statute as a policy matter, so long as reasonable arguments can be made in support of its constitutionality. This longstanding and bipartisan tradition accords the respect appropriately due co-equal branches of government. Consistent with this tradition, the Department has defended DOMA in litigation, including in the *Smelt* case referenced in this question, over the past five years.

In the June 15, 2009 brief—the Department's first court filing on this issue since President Obama took office—the Department argued that given the strength of competing convictions on this still-evolving issue, Congress could lawfully decide to continue providing federal benefits on the basis of a traditional, centuries-old definition of marriage recognized by all 50 states and the District of Columbia, while reserving judgment with respect to new definitions of marriage recognized by no states at the time DOMA was enacted and by a minority today. The Department did not defend certain rationales for the Act that had been presented in briefs submitted in the Bush Administration, including asserted government interests in encouraging "the development of relationships that are optimal for procreation" and "the creation of stable relationships that facilitate the rearing of children by both of their biological parents."

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QUESTIONS POSED BY SENATOR WYDEN

1. **Article 4 of the Mexican Federal Penal Code allows for the prosecution of Mexican nationals who have committed a crime in the US and fled back to Mexico. In certain cases, extradition may not be achievable, and Article 4 provides the sole process for obtaining justice for US crime victims and imposing punishment upon the criminal. State and local law enforcement authorities in many states, including Oregon, have had success pursuing Article 4 prosecutions. However, complying with the requirements of Article 4 and working with Mexican law enforcement officials to complete the prosecution is quite an entailed process. Many jurisdictions lack the resources and expertise to pursue Article 4 cases.**

Response: Your statement is correct. Under Article 4 of its domestic penal code, Mexico has extraterritorial jurisdiction to prosecute any Mexican national who commits a crime in foreign territory. In these cases, evidence from a U.S. investigation is transferred to special Article 4 courts in Mexico and the defendant is tried in Mexico, with Mexican prosecutors largely relying on evidence developed in the U.S. investigation. This type of prosecution is not unique to Mexico and is used, if sporadically, in countries that do not extradite its nationals or, as in the case of Russia, where we do not have an extradition treaty relationship. However, Article 4 prosecutions in Mexico are more common and better known to our state prosecutors, because of our shared border and the potential volume of cases.

Article 4 prosecutions were most used widely in the past when Mexico did not extradite its nationals, and thus prosecution in Mexico was the only way to address crimes committed in the U.S. by Mexican nationals who fled across the border. However, that situation has changed dramatically in this decade. A Mexican Supreme Court ruling in 2001 made it clear that Mexican law did not prohibit extradition of citizens or restrict extradition of citizens to extraordinary cases. Since then, the number of extraditions from Mexico has increased steadily each year, with a record 95 fugitives extradited in 2008, the vast majority of whom were Mexican citizens. Some states continue to refer Article 4 cases to Mexico, when they believe that a prosecution in Mexico is a satisfactory way to see that justice is done in a particular case. However, with extradition now available in most cases, state and federal prosecutors increasingly look to extradition, rather than Article 4 prosecution, as the means for bringing defendants to justice. At this juncture, the Department of Justice has been concentrating its resources and expertise on assisting the increasing number of state and federal prosecutors seeking extradition of fugitives. Indeed, the greatest expertise in Article 4 prosecutions is with officials in states such as California and Texas – and this may be true of Oregon as well – officials who we have found to be very willing to share their expertise and insights with prosecutors from other jurisdictions. As to costs, it is not clear whether the costs for an Article 4 prosecution would necessarily be more or less than those for an extradition. We do know that the costs in international cases, under either approach, can sometimes present difficulties, particularly for smaller jurisdictions.

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2. **Given the increasing criminal problems arising from the cross-border activities of Mexican drug cartels, do you believe that Article 4 is an important tool for pursuing justice for crimes committed in the US by Mexican national suspects?**

Response: In the arsenal of tools available to address that problem, Article 4 prosecutions may be a useful alternative for some state and local jurisdictions in particular cases. However, for most cases, and certainly for most major drug cases, we believe extradition is a much better alternative. Among other things, our prosecutors and investigating agents have developed tremendous expertise in investigating and prosecuting sophisticated organized crime groups. Our investigations are structured to meet U.S. evidentiary requirements and utilize investigative tools and procedures that conform to U.S. legal requirements and U.S. practices. Transferring these sorts of complex investigations to another country for prosecution under a different system of laws and procedures could be very problematic, and therefore we do not believe Article 4 is a helpful alternative to extradition for these types of cases. Indeed, because of the importance of extradition in our overall strategy against the Mexican drug cartels, we are now in the process of establishing a dedicated Organized Crime Drug Enforcement Task Force (OCDETF) International Unit in the Office of International Affairs in the Department's Criminal Division, to focus on OCDETF cases involving the highest-level Mexico-based targets.

3. **Are you aware of any barriers that would prevent the Department of Justice's Office of International Affairs from providing assistance to state and local law enforcement officials and providing greater coordination and efficiency to the development of Article 4 cases?**

Response: As noted above, in recent years, the Office of International Affairs (OIA) has concentrated on improving our extradition record with Mexico, and on working with our Mexican counterparts to work through legal and procedural barriers that made extradition, and particularly extradition of Mexican nationals, so difficult in the past. This is one area where we have had great success nonetheless. We have gone from a dozen extraditions from Mexico in 2000 to nearly one hundred in 2008. We would be concerned about the OIA taking on new responsibilities in coordinating Article 4 prosecutions for the following reasons.

First, we believe that extradition is the best way to bring foreign fugitives to justice, and that thus extradition, rather than transferring prosecution to foreign courts, should be our priority. Second, since extraditions are part of the foreign relations responsibilities of the federal government, it is necessary that OIA be available to assist state and local prosecutors as well as our federal prosecutors in extradition cases. That is not true with Article 4 prosecutions, where state authorities may directly invoke the process. Third, involvement of OIA, which now handles thousands of international cases a year, could actually delay the Article 4 process and add another level of bureaucracy. Experience indicates that those states that have handled Article 4 prosecutions directly are the states that are the most efficient and obtain the best and most satisfactory results.

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Fourth, at this point the expertise with Article 4 prosecutions is at the state, not the federal level. The involvement of OIA is of course available when necessary, but for those states that have developed their own expertise, we do not believe that interjecting OIA into the process would be helpful.

In contrast, OIA recently has obtained record numbers of extraditions from Mexico for a wide variety of offenses. For example, the past three years (2008, 2007, and 2006) saw records numbers of fugitives returned by Mexico to the United States. In 2008, Mexico extradited a total of 95 fugitives, 78 of whom were Mexican nationals, and 23 of whom were extradited for drug charges, to the United States. In addition, Mexico deported approximately 172 fugitives to the United States in 2008. As recently as 2000, Mexico had extradited only 12 fugitives to the U.S. only one of whom was a Mexican national. Given the increasingly successful rate of extraditions from Mexico, Article 4 prosecutions are and should remain the rare exception.

In sum, we believe state governments wishing to continue to transfer prosecutions to Mexico under Article 4 should do so under their own authority and resources but that this is not an area where the federal government need assert responsibility or divert resources already strained by other critical work.

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QUESTIONS POSED BY SENATOR HATCH

1. **Some provisions of the PATRIOT Act will expire this December. Two sections pertaining to Roving Wiretaps and Business Record Access give the FBI some of its most powerful tools in investigating suspected terrorists operating in the United States. Roving Wiretaps are used in other criminal investigations, for example organized crime and drug trafficking investigations. An examination of business records can provide critical insight into possible pre-attack planning by terrorist suspects. Director Mueller appeared before this committee this spring and described how important these tools are in furthering the FBI's mission in investigating terrorism activity here in the United States. He also expressed his support for reauthorizing the provisions without modifications. The Director also provided the committee some useful statistics regarding the usage of these techniques. For example, between 2004 though 2007 the FBI used the business record examination tool 225 times. During that same time period, the FBI used roving wiretaps 147 times. What is your assessment of these tools and does the administration and the Department of Justice support their reauthorization without additional modifications?**

Response: As you may be aware, the Administration recently completed its review of the provisions of the PATRIOT Act that were set to expire on December 31 of this year. As part of the review, the Department consulted with the experts that deal with the provisions set to sunset as well as other stakeholders. We provided a comprehensive assessment of these tools in a letter to Judiciary Chairman Leahy on September 14, 2009. For your convenience, we have attached a copy of that letter.

2. **There are 15 High Security prisons under the control of the Department of Justice. The total rated capacity of these facilities is 13,448 inmates. The current population of inmates in these facilities is 20,001. Presently, there is only 1 dedicated Supermax prison in the BOP arsenal and as you know this is located in Florence, Colorado. As of June 4, 2009, the current population of the Florence Supermax was 468 inmates. This number means that this facility is currently at its maximum capacity. ADX Florence already houses 33 inmates incarcerated there with ties to international terrorism. Inmates at ADX Florence are locked down for 23 hours a day. There is no congregate dining or religious services in this facility. I bring this up because this is exactly the same conditions that the high security unit at Guantanamo offers. With the administration's self imposed deadline for closure looming on the horizon there is a lot of criticism that there has not been one hint of a plan for Guantanamo's closure. Some of my colleagues in the majority party have floated the idea that there is plenty of room to incarcerate these detainees in BOP facilities. However, the BOP has stated time and again that they do not have the room. BOP has provided population figures to both sides of the aisle that proves this. Can you give me your view on where the Department of Justice is going to house these detainees when Guantanamo is closed?**

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Response: We are currently examining a number of different options for housing Guantanamo detainees. We can assure you that we will not move any detainees into the United States unless and until we are convinced that the detainees will be held safely and securely in a facility that satisfies all of our security concerns.

3. **Recently, the Obama Administration has advocated that *Miranda* warnings should be given to combatants captured on the battlefield in Afghanistan. This practice has been implemented by agents of the FBI. In January, when you appeared before this committee for your confirmation you stated that in your belief this country is "at war." In January, the President's issued an Executive Order stating that the Army Filed Manual would be the "rule book" governing the treatment of prisoners. The Army Filed Manual does not mention providing Miranda warnings to prisoners. Is the Justice Department endorsing an approach of using criminal investigative techniques in battlefield interrogations? Can you explain this rationale behind reading a waiver to combatants and Al Qaida operatives that informs them of their U.S. Constitutional rights in a foreign nation?**

Response: The Obama Administration has not advocated that *Miranda* warnings should be given to combatants captured on the battlefield in Afghanistan. As the Attorney General explained in his letter of July 21, 2009, to the Chairman and Ranking Member of the House Committee on Armed Services, "[i]t has been the long-standing practice of the U.S. government, including administrations of both parties, to use Miranda warnings in a very small number of cases in which it is important to our national security to ensure that statements made by terrorists can be used in a criminal prosecution. The warnings are given in locations removed from the battle-field, and only after the military's intelligence gathering and force protection needs have been met."

4. **As you know the College Football Bowl Championship Series (BCS) has been a matter of significant controversy for many throughout the country, including President Obama. While some may dismiss the BCS as too trivial a matter for government attention, it involves hundreds of millions of dollars in revenue every year, most of which is reserved for participants most favored by the BCS. This system places nearly half the schools who field Division I football teams at a competitive and financial disadvantage. While most reasonable people agree that the BCS arrangement is unfair, I, along with others, have raised questions about the legality of the BCS in light of our nation's antitrust laws. In addition, I know that you have been contacted by Utah state officials regarding this matter. At this point, what is the disposition of the Justice Department, particularly the Antitrust Division, regarding the BCS? Are there any ongoing Justice Department efforts to examine the legality of the existing BCS system?**

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Response: The Department is committed to ensuring that the antitrust laws are enforced to maintain competition in every industry, including college sports, which is financially significant to the colleges involved and a vital part of our nation's sports and entertainment industry. The Department has reached no conclusion as to whether the BCS violates the antitrust laws. We note that the Department attended the recent hearing held on July 7, 2009, by the Antitrust Subcommittee of the Senate Judiciary Committee entitled "The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?"

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QUESTIONS POSED BY SENATOR GRASSLEY

Timeliness Responses to Congressional Inquiries

1. **I continue to await responses to a number of outstanding requests for documents and information from the Justice Department and its subordinate agencies. A number of these requests have gone unanswered. Further, there are outstanding Committee requests including a number of Questions for the Record (QFRs). Some of these questions are well over a year old (e.g. FBI Oversight Hearing QFRs 9/17/08 and 3/5/08). I am particularly concerned about these QFRs because they appear complete, yet exempt out specific questions from members—often time only questions from this member.**

   At the latest FBI Oversight hearing in March I asked FBI Director Mueller about these outstanding QFRs. Director Mueller informed the Committee they had been provided to the Department in June and December of 2008, but that the Department had them tied up in a clearance process. This is unacceptable and contrary to the repeated promises I've received from you and other nominees at the Department. Here is a list of outstanding correspondence that the Department has either not answered or answered in an incomplete manner:

Agency	Nature of Request	Date of Request	Date Due
DOJ	Agriculture Antitrust	5/26/2009	ASAP
DOJ	Title 21 Investigative Authority	4/21/09	ASAP
FBI	Cecilia Woods	3/27/06	4/10/06
DOJ	Anti-trust determination of Norvir and Kaletra	1/16/07	1/25/07
FBI	Whistleblower: Jane Turner	2/26/07	3/07/07
DOJ-OIG	Whistleblower: Bassem Youssef	3/16/07	ASAP
FBI	Use of National Security Letters by the Communication Analysis Unit	3/19/07	ASAP
FBI	Mismanagement of confidential case funds	1/10/08	1/25/08

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DOJ-OIG	Requested briefings on 7 ongoing inquiries	6/04/08	ASAP
FBI	Use of Exigent Letters	6/25/08	ASAP
FBI	Amerithrax	8/07/08	8/21/08
DOJ-OIG	Whistleblower: Elizabeth Morris	10/22/08	11/05/08
FBI-OPR	Whistleblower: Elizabeth Morris	10/22/08	11/05/08
DOJ-IG	7 Issues that were brought up in June 2008	4/22/2009	ASAP
DOJ and FBI	Heparin	5/20/2009	Update needed

These outstanding responses and unanswered questions are unacceptable and I expect the Department to get the Committee answers in a timely manner. If not, we'll have to examine ways to make the Department respond in a timely fashion, including holding nominations and looking at appropriations.

(a) When can I expect complete and thorough responses to all the outstanding requests?

(b) At your confirmation hearing, I asked you about the "clearance" review process at the Department. You responded that you needed time once you were confirmed to "check on the internal workings of the department to make sure that we're doing it as quickly as we can." You've been on the job for nearly 5 months now. Have you reviewed the internal workings of the Justice Department Clearance process? If so, what were the results of this review? If not, why not?

(c) Can you explain why the Department of Justice has had QFR responses from the FBI for over a year and has yet to produce those responses and documents to the Committee in a timely fashion?

(d) In your opinion, how long should the clearance process take at the Department once questions are received from a subordinate agency? Why does it take that long?

Response to subparts a through d: The Department considers timely and thorough communications with Congress to be a critical priority, and is committed to responding to all Congressional correspondence in a timely manner. To that end, the Office of

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Legislative Affairs has been working with your staff to identify with precision any current requests for which answers have not yet been provided and has provided to your staff an annotated notebook containing replies to a number of your earlier requests. As you may know, all but 4 of the letters listed above were referenced in an earlier list provided to the Department. The 4 new items set forth above also have already been answered by the Department. A complete list of this correspondence, including the date and manner of our response, is enclosed. We will continue to work with you and your staff to respond as fully as possible to all current requests.

With regard to the Committee's Questions for the Record (QFRs), the Department makes substantial efforts to respond to the Committee's QFRs following each hearing. These QFRs, which are submitted by the Committee pursuant to the requests of each Member, are often voluminous and include multiple subparts. Each QFR initially must be analyzed to determine which Department component would likely have responsive information. In some instances, a single QFR can require input from more than one component. The information provided by the components is then reviewed in order to assure that the Department has made its best efforts to develop answers that are responsive to the Committee's interests. The draft responses are then vetted with the other Department components that have an interest in the matters raised in the QFRs. Once the draft QFR responses have been fully vetted by both the substantive components and the Department's leadership offices, the draft QFR responses must be sent to OMB for clearance, which involves OMB's circulation of the QFR responses to other parts of the Executive Branch. These other Executive Branch components often submit comments and questions on the draft QFR Responses, which are passed back to the Department by OMB. This pass-back process often involves numerous exchanges, the timing of which are not subject to any one entity's control and often require input from attorneys and other professional staff with primary litigation, law enforcement, and intelligence responsibilities.

The Department recognizes the importance of managing this process in the most efficient and effective way possible in order to provide information responsive to the Committee's oversight interests. We are committed to improving the timeliness of our responses to the Committee and will work with Committee staff to accomplish this goal.

DOJ Role in the Termination of Inspector General Gerald Walpin:

2. **On June 10th the White House notified Inspector General Gerald Walpin, the Inspector General for the Corporation for National and Community Service (CNCS), that he had one hour to resign his position or he would be fired. Since that day, I've been asking a number of questions to the White House and CNCS regarding the motive for this ultimatum and the subsequent termination of Inspector General Walpin. In the course of reviewing this suspicious termination, I have learned that the acting United States Attorney for the Eastern District of California, Lawrence D. Brown, wrote on behalf of his office on April 29, 2009, to Kenneth Kaiser, the Chair of the Integrity Committee of the Council of the Inspectors General on Integrity and**

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Efficiency (CIGIE) raising concerns about the conduct of Mr. Walpin stating that "Mr. Walpin overstepped his authority" and "tarnished the reputation" of CNCS.

I am interested in learning more about the role Justice Department officials played in the events that led to the termination of Mr. Walpin. Accordingly, please answer the following questions.

(a) Mr. Brown's April 29, 2009 letter led the Integrity Committee of the CIGIE to open an inquiry into Mr. Walpin. It appears acting-U.S. Attorney Brown's purpose behind the letter was to initiate an inquiry into Inspector General Walpin. This type of referral is similar to an ethics referral or complaint against an attorney or judge that is involved in litigation matters with U.S. Attorneys. The U.S. Attorney's Manual, Section1-4.150 "Reporting Allegations of Misconduct Concerning Non-Department of Justice Attorneys or Judges" states that, "Allegations of misconduct by non-DOJ attorneys or judges shall be reported to OPR for a determination of whether to report the allegation to appropriate disciplinary officials."

- **Did acting-U.S. Attorney Brown consult with OPR prior to sending his April 29, 2009 letter? If so, who was aware of that referral and what was the response? (Please provide all relevant supporting documents and emails).**
- **If OPR was not consulted, why not?**
- **Are there any DOJ regulations or rules regarding the referral of allegations of misconduct by investigations, Inspectors Generals, or other non-DOJ investigators? If so, please provide a list. If not, why not?**

(b) With whom did Acting U.S. Attorney Lawrence D. Brown consult in determining whether or not to file a complaint against Corporation for National and Community Service (CNCS) Inspector General Gerald Walpin with Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE)?

(c) Did anyone at the White House communicate concerns or recommend that Brown file a complaint with CIGIE's Integrity Committee? If so, who and when? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(d) Did any CNCS employee or member of the Board of Directors communicate concerns or recommend that Brown file a complaint with CIGIE's Integrity Committee? If so, who and when? Please describe any such communications in detail and produce to the Senate

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Judiciary Committee any and all records related to such communications.

(e) Did any OIG staff member communicate concerns to Brown or recommend he file a complaint with CIGIE's Integrity committee? If so, who and when? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(f) Did any other person communicate concerns to Brown regarding Mr. Walpin's conduct as CNCS IG? If so, who and when? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(g) Did Brown consult Integrity Committee Chairman Kenneth W. Kaiser prior to filing his compliant? If so, when did he communicate with Mr. Kaiser? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(h) Please identify and produce any communications between Brown's office and the Integrity Committee regarding Mr. Walpin.

(i) Was Brown contacted by any member of the White House staff as part of its evaluation of Mr. Walpin's performance as IG? If so, who contacted Brown, and when did he have communication with White House staff? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(j) Did Brown recommend to the White House or to CNCS that Mr. Walpin should be removed from his post as IG? Please describe any such communications in details produce to the Senate Judiciary Committee any and all records related to such communications.

(k) Has Brown ever previously filed a complaint with CIGIE (or its predecessor organizations)? If such a complaint has been filed, please describe the circumstances of the complaint.

(l) Has a United States Attorney in the Eastern District of California ever previously filed a complaint with CIGIE or its predecessor organization? If such a complaint has been filed, please describe the circumstances of the complaint.

(m) Is there statutory or other authority upon which Brown bases his claim that Mr. Walpin's communication with the *Sacramento Bee* or other media outlets was inappropriate? If so, what?

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(n) In his complaint, Brown states that he "understand[s] . . . the Inspector General is not intended to act as an advocate for suspension or debarment." What is the basis for this understanding?

(o) In his complaint, Brown states that "we considered the IG referral somewhat unusual in that it was accompanied by a letter from Mr. Walpin explaining that he viewed the conduct in this case as egregious and warranted our pursuing the matter criminally and civilly." Why is Mr. Walpin's letter unusual?

(p) In what specific ways did Mr. Walpin's public comments interfere with the United States Attorney's investigation of the Respondents?

(q) In what specific ways did Mr. Walpin's referral cover letter interfere with the United States Attorney's investigation of the Respondents?

(r) Mr. Walpin was instructed by then United States Attorney McGregor Scott that he was not "to communicate with the media about a matter under investigation." Which of Mr. Walpin's subsequent communications with the media refer to material facts of a criminal investigation or civil monetary recovery or settlement (as opposed to describing the process of such recoveries)?

(s) Has Brown had any communications about the possibility of being nominated by the President to be the United States Attorney for the Eastern District of California (U.S. Attorney)? If so, when and with whom did he have such communications? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(t) Have you or anyone in your office had any communications about Brown's complaint to CIGIE's Integrity Committee? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(u) Have you or anyone in your office had any communications about the removal of Gerald Walpin? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

(v) Have you or anyone in your office had any communications about the resignation, retirement, removal, or transfer of any other Inspector General? Please describe any such communications in detail and produce to the Senate Judiciary Committee any and all records related to such communications.

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(w) When did the FBI begin its investigation of the destruction of Kevin Johnson's emails under subpoena by the Inspector General and other potential obstructions of the IG's investigation?

(x) The FBI, under your ultimate supervision, has a representative on CIGIE's Integrity Committee. Please describe in detail the nature and extent of the Integrity Committee's investigative activities related to Brown's complaint against IG Walpin. What investigative steps did the Committee have an opportunity to take before process was essentially mooted by the President's decision to remove Walpin? What is the current status of the investigation and will the Committee provide a non-partisan assessment of Brown's allegations for consideration by Congress and the American People?

Response: In August 2008, Mr. Gerald Walpin, the Inspector General for the Corporation for National and Community Service (CNCS), referred a case to the United States Attorney for the Eastern District of California regarding the alleged misuse of AmeriCorps grant funds by St. HOPE Academy and its then-Chief Executive Officer, Kevin Johnson. Mr. Johnson was a candidate for Mayor of Sacramento and subsequently was elected Mayor.

During the period when the United States Attorney's Office was reviewing evidence presented by the OIG to determine the appropriate and just course under the circumstances of this particular case, Mr. Walpin and his Public Information Officer made numerous public comments regarding the St. HOPE Academy matter at a time when no charges had been brought. The United States Attorney believed this conduct to be inconsistent with the established law enforcement policy that public comments should not be made while a criminal investigation is pending given the potential to greatly harm a target's reputation, even if a case ultimately is not filed, and to endanger the right to a fair trial if criminal charges are filed.

Mr. Walpin's actions caused personnel in the United States Attorney's Office to lose confidence in the objectivity of the OIG's investigation. For example, the OIG's referral to the United States Attorney contained the conclusion that "AmeriCorps members performed no tutoring." The United States Attorney's Office learned of a witness, a school principal, who stated that the AmeriCorps students had performed tutoring at his school. When asked, the OIG staff stated that they had been aware of this information but did not further investigate this exculpatory information or disclose the information to the United States Attorney.

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On April 29, 2009, then-Acting United States Attorney Lawrence G. Brown[1] wrote a letter to Kenneth Kaiser, the Chair of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency, expressing his concerns about Mr. Walpin's conduct. Mr. Brown had no outside contact regarding the letter before it was sent, and the only outside consultation the United States Attorney's Office had regarding the letter was with the general counsel's office of the CNCS and was for the limited purpose of determining where to send the letter. Following that consultation, Mr. Brown submitted the letter to the Integrity Committee and provided a copy to the CNCS Board of Directors. The only response from the Integrity Committee has been a letter from Mr. Kaiser to Mr. Brown, dated May 6, 2009, confirming receipt of the letter.

The Office of the Attorney General (OAG) had no involvement in the decision to remove Mr. Walpin, and was not informed of the decision beforehand. Nor has OAG had any communications about the resignation, retirement, removal, or transfer of any other Inspector General.

The Department will respond under separate cover to the document requests contained in this Question.

Title 21 Memorandum of Understanding:

3. **In May of this year, the Government Accountability Office (GAO) released a report that I requested analyzing cooperation between DEA and other law enforcement agencies. Chief among the findings was that the outdated Memorandums of Understanding (MOU) threatened to hinder the mission of DEA and other law enforcement agencies ability to investigation narcotics and money laundering. The MOU on narcotics investigative authority (known as Title 21) represented a particular problem for law enforcement. The GAO report confirmed that the longstanding turf battles over Title 21 cases between DEA and ICE has created an environment that is dangerous to our own agents. I find this unacceptable.**

   The GAO ultimately made three (3) major recommendations:
   - **That the Secretary of DHS and the Attorney General should jointly and expeditiously develop a new updated MOU for narcotics investigations.**

[1] Mr. Brown became First Assistant United States Attorney on March 24, 2003. On January 5, 2009, he became Acting United States Attorney following the resignation of Presidentially-appointed United States Attorney McGregor W. Scott. On August 3, 2009, upon expiration of the time period in the Vacancies Reform Act, Mr. Brown became United States Attorney by virtue of an interim appointment by the Attorney General. Mr. Brown submitted a letter to United States Senator Diane Feinstein in December 2008 expressing interest in being nominated to be the Presidentially-appointed United States Attorney. Subsequently, on February 12, 2009, he was interviewed for the position before a local five-person vetting committee appointed by the Senator. The February 12, 2009 interview constituted his last communication with the local committee regarding such an appointment. On August 6, 2009, the President nominated Benjamin Wagner to be United States Attorney for the Eastern District of California.

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- **That the Secretary of DHS and the Attorney General develop processes for periodically monitoring the implementation of the new MOU.**
- **That the Secretary of DHS direct ICE to participate in the OCDETF Fusion Center.**

Just last week, the Department of Justice and Department of Homeland Security announced that a new MOU had been agreed upon for Title 21 investigations. I am glad to see that the new MOU addressed the issues pointed out by GAO and appears to implement the recommendations. However, I am concerned that the agreement fails to address the issue of bulk cash smuggling and money laundering which is governed by another outdated MOU. In fact, this new MOU seems to go above and beyond to avoid dealing with the issue of bulk cash smuggling and money laundering investigative authority. It does this by creating a term that only a bureaucrat could love, "nondrug-related international illicit financial schemes." I feel that this new MOU may simply kick the can down the road for problems with asset forfeitures resulted from bulk cash smuggling and money laundering investigations.

(a) Please define what "nondrug-related international illicit financial schemes" are. Provide explicit examples of what would qualify under this definition.

Response: The phrase "nondrug-related international illicit financial schemes" refers to those offenses which fall within ICE's inherent jurisdiction. The language was suggested by ICE to make it clear that the parties to the Interagency Cooperation Agreement did not intend to alter the allocation of investigative responsibilities in the MOUs. DEA will continue to conduct money laundering investigations where the predicate offense is related to drug trafficking. ICE will continue to investigate money laundering unrelated to drug trafficking, within the parameters of its inherent jurisdiction. Examples of such schemes would include violations of 18 U.S.C. § 2332 (financial transactions relating to terrorism); 19 U.S.C. § 1590 (aviation smuggling); 31 U.S.C. §§ 5313-16 (currency/monetary transaction reporting requirements); and 31 U.S.C. § 5332 (bulk cash smuggling into or out of the United States).

(b) Do you anticipate updating the MOU related to money laundering investigations? If so, when can I expect to see that completed?

Response: DEA and ICE are currently implementing the June 18, 2009, Interagency Cooperation Agreement (ICA) which addresses the concerns stated in the GAO Report. In reaching the ICA, it was the intent of the agencies to leave the essential terms of the existing money laundering MOUs in place.

The basic premise of the MOU relating to money laundering investigations was that the Federal agency with historical jurisdiction over the "Specified Unlawful

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Activity" (SUA) that generated the proceeds of the money laundering offense would have jurisdiction over the money laundering violations involving those proceeds. This basic premise of the MOU remains in place today, even though the MOU has not been updated to reflect the creation of DHS and the transfer of certain law enforcement function to that agency.

While it may be advisable to update the MOU to reflect the changes that have taken place since the Money Laundering MOU was signed in 1990, there is no need to alter the underlying purpose and premise of the MOU, and there is no pressing need to renegotiate such a complex agreement merely to change the name of the parties involved when the Homeland Security Act's Saving Clause (section 1512, now codified at 6 U.S.C. § 552) clearly preserved DHS' interests in the agreement.

(c) Will any effort to update the money laundering MOU clarify the jurisdictional authority of investigative agencies for bulk cash smuggling? If not, why not?

Response: The agencies believe that there is no need at the present time to clarify further jurisdictional authority over bulk cash smuggling. ICE has investigative jurisdiction over 31 U.S.C. § 5332 (bulk cash smuggling into or out of the United States). DEA investigates the transport of currency and makes cash seizures only when the currency is related to drug trafficking offenses under Title 21; in the absence of a drug trafficking nexus, DEA does not have authority to investigate bulk cash smuggling. If, during a bulk cash smuggling investigation, ICE develops evidence of a drug nexus, the information sharing and deconfliction provisions of the ICA apply.

The Department believes that the same premise that underlies the Money Laundering MOU should apply to investigations for bulk cash smuggling, *i.e.*, that the Federal agency with historical jurisdiction over the SUA that generated the proceeds of the bulk cash smuggling offense would have jurisdiction over the bulk cash smuggling violations involving those proceeds. We must use the most aggressive efforts to stop drug dealers, terrorists, and tax evaders from moving bulk amounts of cash and cash equivalents out of the country. For that reason, it is, and should remain, within the jurisdiction of the broadest range of law enforcement agencies to provide the most comprehensive response to bulk cash smuggling.

(d) Do you believe this matter can be worked out administratively as the Title 21 MOU was, or do you believe legislation is necessary?

Response: Any update that is necessary to the MOUs is best made by agreement between the agencies. The Department does not believe legislation is warranted to address the issues of investigative jurisdiction in bulk cash smuggling investigations.

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False Claims Act:

4. **Attorney General Holder, no provision in the False Claims Act has generated more litigation than the so called "public disclosure bar" found in Section 3730(e)(4). Indeed, the Supreme Court has asked to review this provision a second time in as many years.**

Existing case law has grossly misinterpreted this provision I drafted in 1986, allowing countless defendants to have meritorious cases dismissed by misusing the provision in ways we did not contemplate. Moreover, the confusing legal patchwork has increasingly deterred whistleblowers from even filing suit, fearful that their courageous actions will be silenced at the hands of defendants wrongfully wielding the public disclosure bar.

Attorney General Holder, when we added this provision in 1986, we intended to bar only "parasitic" lawsuits, such as ones brought by individuals who did no more than copy a Government indictment. We expressly stated that we did not intend to bar suits solely because the Government already knew of the fraud or could have learned of the fraud from information in the public domain.

However, previous Justice Department administrations have advocated a reading of the Act that precludes qui tam suits that are "substantially similar to" public disclosures, even when the relator's knowledge was not derived from the public disclosure.

In last term's Department of Justice's Views Letter, in response to S. 2041, the Department argued that the public disclosure bar should apply when the Government is on the trail of a fraud, regardless of whether or not the relator is actually aware of the government investigation. This reading of the Act resurrects the so-called "government knowledge bar," which we explicitly replaced with the public disclosure bar in 1986.

(a) Do you agree that the False Claims Act public disclosure bar is fraught with circuit court splits, generating confusion and uncertainly in this area of the law?

(b) Do you agree that potentially meritorious qui tam suits are regularly silenced by defendants utilizing the False Claims Act public disclosure bar?

(c) Do I have your commitment that this Justice Department will now correctly read the Act to only bar parasitic relators who actually derive their knowledge of the fraud from a statutorily enumerated public disclosure? If not, why not?

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Response: We appreciate the Committee's concerns regarding the public disclosure bar found in Section 3730(e)(4) of the False Claims Act and the various interpretations of this provision by the courts. The Department has stated its views on many of these issues consistent with the intent of the 1986 amendments, namely, to "further the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F. 3d 645, 649, 651 (D.C. Cir. 1994). Thus, for example, the Department has filed as amicus curiae a brief urging the Supreme Court to grant certiorari in *Graham County Soil & Water Conservation District, et al. v. United States ex rel. Wilson*, No. 08-304, in order to resolve a split among the circuits on the issue of whether a public disclosure in a state issued audit bars jurisdiction under the statute. The Department took the position that because those audits are unlikely to alert the federal government to allegations of fraud, barring a qui tam suit based on those reports would frustrate Congress's intent to encourage private actions the government is not capable of pursuing on its own. The Court recently granted certiorari.

We are committed to enforcing the statute to further these goals. To that end, we are happy to work with the Committee and staff to discuss its concerns and any proposed changes to the statute.

Working Capital Fund:

5. **In 2002, Congress authorized the Attorney General to collect "up to 3 percent of all amounts collected pursuant to civil debt collection litigation activities of the Department of Justice." This authorization allows the Attorney General to retain 3% of all civil debt collections and place those funds in the Department's Working Capital Fund. These funds may be used to further civil debt collection activities in the future and are disbursed by the Civil Recoveries Administrative Board. As civil settlements by the Department of Justice continue to grow in size, especially under the False Claims Act, I'd like to know how much money is returned to the Working Capital Fund on a yearly basis. Further, I'd like a break down on how those funds are expended. Please provide responses to the following:**

   (a) **How much money has the 3% authorization (28 U.S.C. § 527 note) returned to the Working Capital Fund from FY 2004-2009? Please provide a comprehensive breakdown outlining all monies collected by the authorization and how those monies were expended from FY [sic].**

   (b) **The statutory authorization for the fund requires that the funds are available until expended and "shall be used first, for paying the costs of processing and tracking civil and criminal debt-collection litigation, and thereafter for financial systems and for debt-collection-related personnel, administrative, and litigation expenses." Please provide a breakdown of how much money was required, each year from 2004-2009, to pay the cost of processing and tracking civil and criminal**

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debt-collection litigation. Provide a full breakdown of how the money was used.

(c) Please provide a breakdown of all monies expended from the Working Capital Fund for "financial systems" in FY2004-2009.

(d) Provide a comprehensive breakdown of FTEs that were funded by this 3 percent authorization from the Working Capital Fund, including attorneys, investigators, and administrative personnel from FY2004-2009.

(e) Please provide a detailed breakdown of all unobligated financial balances for FY2004-2009.

Response: The below chart provides information on monies collected and monies expended over the FY 2004 through FY 2009 timeframe. The chart also shows unobligated balances. The monies collected as a result of the 3% authorization are labeled "DCM Collections." "DCM Operations" is the central office under the Justice Management Division responsible for processing and tracking civil and criminal debt collection litigation. Each year, the Department has also used the 3% monies to invest in debt collection personnel and litigation expenses, primarily for the U.S. Attorneys for Affirmative Civil Enforcement efforts and the Civil Division for Automated Litigation Support. None of the 3% funds have been used for financial systems; however, the monies have been used to invest in a new consolidated debt collection tracking system.

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ACCOUNT	AS OF JUNE 2009: COLLECTIONS	OBLIGATIONS	UNOBLIGATED BALANCE
DCM PRIOR YEAR CARRYOVER			$70,757,075
FY 2004:			
DCM COLLECTIONS	$93,541,106		
DCM OPERATIONS		$12,865,657	
US ATTORNEYS		27,565,307	
TAX DIVISION		1,114,760	
CIVIL DIVISION		34,565,888	
ENR DIVISION		4,383,103	
US MARSHALS SERVICE		328,000	
CRIMINAL DIVISION		3,300,000	
FY 2004 TOTALS	$93,541,106	$84,122,715	$80,175,466
FY 2005:			
DCM COLLECTIONS	$84,635,046		
DCM OPERATIONS		$10,964,831	
US ATTORNEYS		27,102,673	
TAX DIVISION		1,591,200	
CIVIL DIVISION		30,306,036	
ENR DIVISION		4,724,064	
CRIMINAL DIVISION		1,425,000	
FY 2005 TOTALS	$84,635,046	$76,113,804	$88,696,708
FY 2006:			
DCM COLLECTIONS	$107,426,424		
DCM OPERATIONS		$10,612,177	
US ATTORNEYS		27,399,924	
TAX DIVISION		1,557,000	
CIVIL DIVISION		8,754,658	
ENR DIVISION		5,222,293	
CRIMINAL DIVISION		1,100,000	
CONSOLIDATED DEBT COLLECTION SYSTEM		12,444,153	
FY 2006 TOTALS	$107,426,424	$67,090,205	$129,032,926

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ACCOUNT	AS OF JUNE 2009: COLLECTIONS	OBLIGATIONS	UNOBLIGATED BALANCE
FY 2007:			
DCM COLLECTIONS	$57,226,003		
DCM OPERATIONS		$10,769,471	
US ATTORNEYS		31,857,775	
TAX DIVISION		1,418,971	
CIVIL DIVISION		15,256,769	
ENR DIVISION		2,155,350	
CRIMINAL DIVISION		1,000,000	
FY 2007 TOTALS	$57,226,003	$62,458,336	$123,800,593
FY 2008:			
DCM COLLECTIONS	$80,100,624		
DCM OPERATIONS		10,093,722	
US ATTORNEYS		30,618,036	
TAX DIVISION		2,096,102	
CIVIL DIVISION		10,838,876	
ENR DIVISION		2,770,981	
CRIMINAL DIVISION		2,000,000	
CONSOLIDATED DEBT COLLECTION SYSTEM		5,021,740	
FY 2008 TOTALS	$80,100,624	$63,439,456	$140,461,760
FY 2009:			
DCM COLLECTIONS	$64,142,358		
DCM OPERATIONS		$8,696,631	
US ATTORNEYS		38,042,602	
TAX DIVISION		2,185,408	
CIVIL DIVISION		23,101,000	
ENR DIVISION		4,640,000	
CRIMINAL DIVISION		3,476,000	
CONSOLIDATED DEBT COLLECTION SYSTEM		6,552,912	
FY 2009 TOTALS	$64,142,358	$86,694,553	$117,909,565
GRAND TOTALS	$487,071,561	$439,919,071	$117,909,565

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The 3% collections pay for the salaries of over 225 Department employees. Since the collections can vary from year to year, the Department maintains carryover balances to ensure adequate funding is available to pay for salaries and other recurring operational expenses. The chart below provides information on FTE funded by the 3% authorization.

	ATTORNEYS	INVESTIGATORS	ADMIN PERS	TOTAL
FY 2004				
DCM Operations	0	0	27	27
US Attorneys	53	0	103	156
Civil Division	9	3	8	20
Total	62	3	138	203
FY 2005				
DCM Operations	0	0	27	27
US Attorneys	55	0	96	151
Civil Division	9	3	8	20
Total	64	3	131	198
FY 2006				
DCM Operations	0	0	27	27
US Attorneys	55	0	106	161
Civil Division	7	2	7	16
Total	62	2	140	204
FY 2007				
DCM Operations	0	0	27	27
US Attorneys	55	0	106	161
Civil Division	7	2	7	16
Total	62	2	140	204
FY 2008				
DCM Operations	0	0	27	27
US Attorneys	68	0	106	174
Civil Division	15	2	9	26
Total	83	2	142	227
FY 2009				
DCM Operations	0	0	27	27
US Attorneys	68	0	107	175
Civil Division	15	2	9	26
Total	83	2	143	228

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OLC Opinion on Privacy Act:

6. As part of your confirmation hearing, I asked you a question regarding a 2001 letter opinion issued by the Office of Legal Counsel (OLC) regarding the Congressional disclosure exception of the privacy act. That letter opinion titled, "Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members" concludes that the Privacy Act "prohibits the disclosure of Privacy Act-protected information to the ranking minority member" of a congressional committee of jurisdiction that requests information from a Federal agency. The Opinion reached this conclusion despite the fact that the Privacy Act allows disclosures, "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." Nowhere in the statute does it define "committee" to mean only the Chairman and not the Ranking Member.

I asked you about this opinion because I believe that courts have held a contrary view of the privacy act and wanted your opinion. For instance, the D.C. Circuit Courts of Appeal held that members of Congress have "constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information." *Murphy v. Dep't of the Army,* 613 F.2d 1151, 1157 (D.C. Cir. 1979). Further, the 2nd Circuit held that information sent to a congressman in his official capacity as a *member* of a subcommittee fell "squarely within the ambit of § 552a(b)(9)". *See Devine v. United States,* 202 F.3d 547, 551 (2nd Cir. 2000).

Unfortunately, you did not answer my question stating that you "have not had an opportunity to study this issue of interpretation with the care that it warrants." In follow-up questions you also added that, "Prior to confirmation, it would be inappropriate for me to provide a definitive view on the correctness of the opinion's interpretation of the statute in question." Now that you have been confirmed and in charge of the Department for nearly five months, I'd like to know your views on this letter opinion.

(a) Do you support the position taken by DOJ in this OLC Letter Opinion?

(b) Do you believe that, as a general matter, Ranking Minority members of a Committee should be prohibited from obtaining information from an agency absent the approval of the Chairman? If so, why?

(c) **In your opinion, couldn't the wording of the Privacy Act that allows disclosure "to either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof" be construed to allow disclosure to Ranking Members if the Administration was willing to do so? Please explain why or why not.**

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Response: Consistent with long-standing Executive Branch policy and practice, the Department's accommodation of congressional oversight requests can include the provision of information that is subject to the Privacy Act. *See* 5 U.S.C. § 552a(b)(9) (authorizing disclosures under the Privacy Act "to either House of Congress, or, to the extent of matters within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."). The Executive Branch generally discloses such information only when requested by a committee on matters within its jurisdiction. We recognize that congressional oversight is conducted by duly authorized committees, as directed by their chairpersons. Accordingly, the Executive Branch obligation to seek to accommodate committee oversight needs for information is generally triggered only by requests from committee chairpersons.

Danger Pay:

7. **Recent initiatives, including the National Southwest Border Counternarcotics Strategy and the Merida Initiative, have caused the reallocation of an extraordinary number of DOJ employees to be detailed to the Southwest Border and throughout Mexico. Unfortunately, the Government of Mexico's crackdown on the drug cartels has resulted in a shocking rise in violence across Mexico—including assassinations, kidnappings, and murders. According to analysis conducted by the University of San Diego Trans-Border Institute, over 9,700 people have been killed in drug related violence since war against the cartels began in January 2007. In the midst of this violence, our government employees are working shoulder to shoulder with their Mexican counterparts to stamp out the dangerous drug cartels once and for all.**

   Currently, despite the daily threat of harm, the Department of State does not consider Mexico a danger pay location. In fact, the request for danger pay allowance submitted by the Regional Security Officer in Mexico City was recently denied by the State Department. However, due to a statutory exemption, employees of the FBI and DEA are receiving danger pay. I understand that other DOJ employees from ATF and the U.S. Marshal detailed to post in Mexico may be receiving danger pay. I don't want any misunderstand on this issue. I believe every U.S. employee working in Mexico who is entitled to danger pay should get it. However, until the State Department changes its policy or Congress amends the law, only FBI and DEA can legally get it.

   (a) Are ATF and USMS employees stationed in Mexico currently receiving danger pay? If so, under what authorization or arrangement are they receiving this benefit?

Response: No, ATF and USMS employees currently stationed in Mexico do not receive danger pay.

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(b) Do you believe Mexico should be considered a danger pay location?

Response: According to the State Department's (State) Office of Allowances, entire countries are not designated as danger posts. When considering requests for establishment of danger posts, State's Office of Allowances makes determinations on specific duty stations. The Department supports designation of the following locations within Mexico as danger posts: Mexico City, Monterrey, Ciudad Juarez, Tijuana, Guadalajara, Hermosillo, Merida, and Matamoros.

(c) Has DOJ informally or formally discussed with the State Department the issue of danger pay in Mexico? If so, for what was the reason and what was the result?

Response: Yes. Chapter 650 of the Department of State (DOS) Standardized Regulations (DSSR) states that "the danger pay allowance is designed to provide additional compensation above basic compensation to all U.S. Government civilian employees, including Chiefs of Mission, for service at places in foreign areas where there exist conditions of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well-being of an employee."

Section 653.1 of Chapter 650 of the DSSR states that "A danger pay allowance is established by the Secretary of State when, and only when, civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well being of a majority of employees officially stationed or detailed at a post or country/area in a foreign area. To determine whether the situation meets the danger pay criteria, a post usually must submit the Danger Pay Factors Form (FS-578) along with pertinent supporting information to the Department of State's Office of Allowances for review. The Director of the Office of Allowances will chair a working group which will make a recommendation to the Assistant Secretary of State for Administration concerning a danger pay designation."

On March 19, 2009, the Department of Justice requested an informal review from the Department of State for approval of danger pay in various locations within Mexico, including Mexico City. DOS responded by saying that it does not conduct informal reviews of danger pay requests. On April 30, 2009, DOJ's Assistant Attorney General for Administration sent a letter to DOS requesting a formal review for danger pay on behalf of Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and U.S. Marshals Service (USMS) employees in Mexico City and several other locations within Mexico. DOS acknowledged receipt of the letter and responded that State's process for approving danger pay requires that a particular duty post forward supporting data (proposed Danger Pay Factors) to DOS on behalf of the agencies represented in that particular location.

In compliance with that process, the U.S. Embassy in Mexico forwarded a package to DOS requesting danger pay in Mexico City and other locations in Mexico.

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Both ATF and USMS endorsed the request and provided supporting justification. DOS reviewed and denied the request.

However, the Drug Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI) have been granted a unique authority which allows for danger pay compensation to be provided when stationed in overseas posts, regardless of whether or not a post has been designated by DOS as a danger pay location. Under Section 5928 of Title 5, U.S.C., "The Secretary of State may not deny a request by the Drug Enforcement Administration or Federal Bureau of Investigation to authorize a danger pay allowance for any employee of such agency (P.L. 101-246, Title I, Sec. 151, Feb. 16, 1990, 104 Stat. 42, as amended by P.L. 107-273, div. C, Title I, Sec. 11005, Nov. 2, 2002, 116 Stat. 1817)." This causes disparity between FBI or DEA employees and any other U.S. Government civilian employee, including the employees of other DOJ components such as ATF and USMS, serving in Mexico or in other posts overseas. DOS informed the Department of Justice that it does not have authority to broaden the DEA and FBI agency-specific authorizations to include ATF and USMS.

DOJ Cooperation with Government Accountability Office:

8. It's come to my attention that the Department of Justice has recently restricted GAO's access to certain information related to staffing vacancies within the FBI's counter-terrorism division, work that the GAO is doing at the request of this Committee. DOJ's position essentially is that the FBI's CT work is part of the intelligence community and therefore outside the purview of GAO review. As you know, the GAO is an important instrument for the independent, congressional oversight conducted by this and other Committees.

(a) What does this mean for the role of this Committee in conducting oversight at the FBI?

Response: The Department of Justice has worked closely with the GAO to provide the maximum amount of information possible for this GAO review, consistent with GAO's statutory jurisdiction. In sum, the FBI will provide the GAO with information regarding as many as 30,000 of the 35,013 current positions at the FBI. The GAO's review is now underway. Interviews are proceeding and documents have been and are being provided. The Department of Justice believes the GAO will be able to complete a meaningful review that will meet the GAO's objectives.

(b) What does this mean for the role of the GAO in conducting oversight at the FBI?

Response: The GAO has dozens of ongoing matters which involve oversight of the FBI, very few of which are impacted by the limits on GAO's statutory jurisdiction. The Department of Justice expects that the GAO will continue these reviews at the FBI.

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(c) Will you commit to facilitating GAO's ability to conduct this review?

Response: The Department of Justice has worked closely with the GAO to facilitate this review. Going forward, the Department of Justice will continue to facilitate the GAO's ability to conduct this review.

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QUESTIONS POSED BY SENATOR KYL

1. **On May 29th, I sent you a letter asking you to provide the factual justification for the President's statement in his May 21st speech at the National Archives when he said: "Our federal 'supermax' prisons...hold hundreds of convicted terrorists."**

   a. **As requested in the letter, please provide the names of the terrorists currently held in federal prisons and the details of their crimes.**

Response: Pursuant to governing policies and regulations (see 28 C.F.R. § 513.34(b)) the Department cannot provide you with a list of Bureau of Prisons inmates. However, the Department can provide you with briefings about terrorism suspects housed in Federal prisons generally and about the types of crimes committed by those prisoners.

   b. **Do you assess that their crimes are comparable to that of the high-value detainees at GTMO?**

Response: A number of individuals with a history of, or nexus to, international or domestic terrorism are currently being held in federal prisons, each of whom was tried and convicted in an Article III court. The Attorney General considers all crimes of terrorism to be serious.

2. **How would the Bureau of Prisons make space for the GTMO detainees?**

   a. **If using existing maximum security facilities (which are already overcrowded by almost 7,000 inmates) what would happen to the inmates that are there now?**

   b. **If opening a new facility or re-opening a closed facility, how would this facility be made ready in seven months or less in order to accommodate President Obama's Executive Order deadline of January 22, 2010?**

Response: We are currently examining a number of different options for housing Guantanamo detainees. We can assure you that we will not move any detainees into the United States unless and until we are convinced that the detainees will be held safely and securely in a facility that satisfies all of our security concerns.

3. **On what legal basis would you prevent a GTMO detainee from being released into the United States if found not guilty in a federal court? What if a case is thrown out for procedural reasons?**

Response: Where we have legal detention authority, as the President has stated, we will not release anyone into the United States if doing so would endanger our national security or the American people. There are a number of tools at the government's disposal to

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QUESTIONS POSED BY SENATOR COBURN

Emmett Till Unsolved Civil Rights Crimes:

1. **At last week's oversight hearing, we discussed how you committed to me at your confirmation hearing that you would "figure out ways to try to move money around" to fund the Emmett Till Unsolved Civil Rights Crime Act. You testified that you would get back to me once you had confirmed whether any money had been provided by the Department of Justice to fund that initiative.**

   a. **Now that you have had time to look into it, please describe what resources (if any) DOJ has devoted to the Emmett Till Unsolved Civil Rights Crime Act.**

Response: A fact sheet detailing all resources dedicated to the Emmett Till Unsolved Civil Rights Crime Act is attached.

I was pleased by your commitment to meet with members of the Emmett Till Campaign for Justice, especially its President, Mr. Alvin Sykes.

   b. **Has that meeting been scheduled? If so, when will it take place? (I would be happy to help facilitate, if needed.)**

Response: The Attorney General met with Mr. Alvin Sykes on July 27, 2009.

"Assault Weapons" Ban:

2. **At the oversight hearing, you testified that: "I don't think I have in fact said that we need a new assault weapons ban."**

   a. **Do you now acknowledge having called for a reinstatement of that ban at a February 25, 2009 press conference?**

Response: At a February 25, 2009, press conference regarding U.S efforts against Mexican drug cartels, the Attorney General was asked by a reporter whether he was reviewing "the enforcement of the assault weapons regulation in the U.S." He replied: "Well, as President Obama indicated during the campaign, there are just a few gun-related changes that we would like to make, and among them would be to reinstitute the ban on the sale of assault weapons." The Attorney General did not regard that response as "call[ing] for" a new assault weapons ban, but rather restating the previously expressed campaign position on this issue.

   b. **Is it still your intent to seek a reinstitution of the "assault weapons" ban?**

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Response: The Department is currently reviewing existing gun laws to determine how best to combat gun violence and keep guns out of the hands of criminals and others prohibited from possessing them.

Grant Management

3. **What specific steps have you taken to improve grant management at DOJ? In your confirmation hearing, you recognized that it must be treated as a "consistent priority" to prevent problems.**

   a. **Have you been in contact with the Inspector General about grant management? Now that you have had time to review the various DOJ grant programs, what problems have you seen, and how do you propose to address them?**

Response: The U.S. Department of Justice Office of Inspector General issued a report in February 2009 entitled "Improving the Grant Management Process." All three grant-making components have embraced the recommendations in the OIG report. Each of the Department's grant-making components has implemented the OIG's recommendations related to Grant Program Development, Grant Applications, and the Award Process. Each component has a plan in place to implement the OIG's recommendations relating to Monitoring, Performance and Training.

President Obama promised to conduct "an immediate and periodic public inventory of administrative offices and functions and require agency leaders to work together to root out redundancy." You said you would begin these efforts at DOJ "soon after you took office as Attorney General."

   b. **Have you begun these efforts? If so, what specific steps have you taken?**

Response: The Department is committed to identifying savings and efficiencies, including those that involve administrative consolidation to avoid redundancy of effort. Senior leadership of the Department is considering proposals for organizational change that will reduce costs and improve operational effectiveness. The results of this process will be announced once we have made final decisions about implementation of particular cost-saving measures.

Prolonged Detention

4. **Last week, the Senate Judiciary Subcommittee on the Constitution held a hearing on prolonged detention.**

   a. **Do you agree with the President that there are some detainees who cannot be prosecuted?**

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Response: Yes.

b. **Do you agree with the President that there are some detainee terrorists who "pose a clear danger" to the American people and who "remain at war with the United States"?**

Response: Yes.

c. **Is the United States under any international obligation to either "try or release" those detainees?**

Response: No.

Earmark Investigation

5. **On June 6, 2008, the SAFETEA-LU Technical Corrections Act of 2008 (Public Law 110-244) was signed into law. That bill included a provision which reads as follows:**

> **"SEC. 502. DEPARTMENT OF JUSTICE REVIEW. Consistent with applicable standards and procedures, the Department of Justice shall review allegations of impropriety regarding item 462 in section 1934(c) of Public Law 109-59 to ascertain if a violation of Federal criminal law has occurred."**

As you may recall, this provision referred to the $10 million "Coconut Road" earmark that was inserted into the transportation bill after it passed both the House and Senate. A $10 million earmark for "Widening and Improvements for I-75 in Collier and Lee County" was in the bill that passed both houses of Congress, but was not in the version of the bill signed by President Bush. That earmark was deleted and one appeared that was for a $10 million earmark for the "Coconut Rd. interchange I-75/Lee County[.]" An effort I undertook to have the House and Senate investigate this was modified by my colleague, Senator Boxer, to have DOJ investigate the matter instead.

a. **What is the status of this review?**

b. **Has the Department reached any conclusions?**

c. **If it has been determined that a violation of federal criminal law has occurred, what will be the next step for DOJ?**

Response to subparts a, b, and c: Consistent with Department policy, we can neither confirm nor deny the existence of an ongoing investigation.

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Attachment A

Sen. Hatch 1

Department of Justice Letter to Chairman Leahy

(dated September 14, 2009)

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2009

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

Dear Mr. Chairman:

Thank you for your letter requesting our recommendations on the three provisions of the Foreign Intelligence Surveillance Act ("FISA") currently scheduled to expire on December 31, 2009. We believe that the best legislation will emerge from a careful examination of these matters. In this letter, we provide our recommendations for each provision, along with a summary of the supporting facts and rationale. We have discussed these issues with the Office of the Director of National Intelligence, which concurs with the views expressed in this letter.

We also are aware that Members of Congress may propose modifications to provide additional protection for the privacy of law abiding Americans. As President Obama said in his speech at the National Archives on May 21, 2009, "We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability." Therefore, the Administration is willing to consider such ideas, provided that they do not undermine the effectiveness of these important authorities.

1. Roving Wiretaps, USA PATRIOT Act Section 206 (codified at 50 U.S.C. § 1805(c)(2))

We recommend reauthorizing section 206 of the USA PATRIOT Act, which provides for roving surveillance of targets who take measures to thwart FISA surveillance. It has proven an important intelligence-gathering tool in a small but significant subset of FISA electronic surveillance orders.

This provision states that where the Government sets forth in its application for a surveillance order "specific facts" indicating that the actions of the target of the order "may have the effect of thwarting" the identification, at the time of the application, of third parties necessary to accomplish the ordered surveillance, the order shall direct such third parties, when identified to furnish the Government with all assistance necessary to accomplish surveillance of the target identified in the order. In other words, the "roving" authority is only available when the Government is able to provide specific information that the target may engage in counter-surveillance activity (such as rapidly switching cell phone numbers. The language of the statute does not allow the Government to make a general, "boilerplate" allegation that the target may

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engage in such activities; rather, the Government must provide specific facts to support its allegation.

There are at least two scenarios in which the Government's ability to obtain a roving wiretap may be critical to effective surveillance of a target. The first is where the surveillance targets a traditional foreign intelligence officer. In these cases, the Government often has years of experience maintaining surveillance of officers of a particular foreign intelligence service who are posted to locations within the United States. The FBI will have extensive information documenting the tactics and tradecraft practiced by officers of the particular intelligence service, and may even have information about the training provided to those officers in their home country. Under these circumstances, the Government can represent that an individual who has been identified as an officer of that intelligence service is likely to engage in counter-surveillance activity.

The second scenario in which the ability to obtain a roving wiretap may be critical to effective surveillance is the case of an individual who actually has engaged in counter-surveillance activities or in preparations for such activities. In some cases, individuals already subject to FISA surveillance are found to be making preparations for counter-surveillance activities or instructing associates on how to communicate with them through more secure means. In other cases, non-FISA investigative techniques have revealed counter-surveillance preparations (such as buying "throwaway" cell phones or multiple calling cards). The Government then offers these specific facts to the FISA court as justification for a grant of roving authority.

Since the roving authority was added to FISA in 2001, the Government has sought to use it in a relatively small number of cases (on average, twenty-two applications a year). We would be pleased to brief Members or staff regarding actual numbers, along with specific case examples, in a classified setting. The FBI uses the granted authority only when the target actually begins to engage in counter-surveillance activity that thwarts the already authorized surveillance, and does so in a way that renders the use of roving authority feasible.

Roving authority is subject to the same court-approved minimization rules that govern other electronic surveillance under FISA and that protect against the unjustified acquisition or retention of non-pertinent information. The statute generally requires the Government to notify the FISA court within 10 days of the date upon which surveillance begins to be directed at any new facility. Over the past seven years, this process has functioned well and has provided effective oversight for this investigative technique.

We believe that the basic justification offered to Congress in 2001 for the roving authority remains valid today. Specifically, the ease with which individuals can rapidly shift between communications providers, and the proliferation of both those providers and the services they offer, almost certainly will increase as technology continues to develop. International terrorists, foreign intelligence officers, and espionage suspects — like ordinary

criminals — have learned to use these numerous and diverse communications options to their advantage. Any effective surveillance mechanism must incorporate the ability to rapidly address an unanticipated change in the target's communications behavior. The roving electronic surveillance provision has functioned as intended and has addressed an investigative requirement that will continue to be critical to national security operations. Accordingly, we recommend reauthorizing this feature of FISA.

2. "Business Records," USA PATRIOT Act Section 215 (codified at 50 U.S.C. § 1861-62)

We also recommend reauthorizing section 215 of the USA PATRIOT Act, which allows the FISA court to compel the production of "business records." The business records provision addresses a gap in intelligence collection authorities and has proven valuable in a number of contexts.

The USA PATRIOT Act made the FISA authority relating to business records roughly analogous to that available to FBI agents investigating criminal matters through the use of grand jury subpoenas. The original FISA language, added in 1998, limited the business records authority to four specific types of records, and required the Government to demonstrate "specific and articulable facts" supporting a reason to believe that the target was an agent of a foreign power. In the USA PATRIOT Act, the authority was changed to encompass the production of "any tangible things" and the legal standard was changed to one of simple relevance to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

The Government first used the USA PATRIOT Act business records authority in 2004 after extensive internal discussions over its proper implementation. The Department's inspector general evaluated the Department's implementation of this new authority at length, in reports that are now publicly available. Other parts of the USA PATRIOT Act, specifically those eliminating the "wall" separating intelligence operations and criminal investigations, also had an effect on the operational environment. The greater access that intelligence investigators now have to criminal tools (such as grand jury subpoenas) reduces but does not eliminate the need for intelligence tools such as the business records authority. The operational security requirements of most intelligence investigations still require the secrecy afforded by the FISA authority.

For the period 2004-2007, the FISA court has issued about 220 orders to produce business records. Of these, 173 orders were issued in 2004-06 in combination with FISA pen register orders to address an anomaly in the statutory language that prevented the acquisition of subscriber identification information ordinarily associated with pen register information. Congress corrected this deficiency in the pen register provision in 2006 with language in the USA PATRIOT Improvement and Reauthorization Act. Thus, this use of the business records authority became unnecessary.

The remaining business records orders issued between 2004 and 2007 were used to obtain transactional information that did not fall within the scope of any other national security investigative authority (such as a national security letter). Some of these orders were used to support important and highly sensitive intelligence collection operations, of which both Members of the Intelligence Committee and their staffs are aware. The Department can provide additional information to Members or their staff in a classified setting.

It is noteworthy that no recipient of a FISA business records order has ever challenged the validity of the order, despite the availability, since 2006, of a clear statutory mechanism to do so. At the time of the USA PATRIOT Act, there was concern that the FBI would exploit the broad scope of the business records authority to collect sensitive personal information on constitutionally protected activities, such as the use of public libraries. This simply has not occurred, even in the environment of heightened terrorist threat activity. The oversight provided by Congress since 2001 and the specific oversight provisions added to the statute in 2006 have helped to ensure that the authority is being used as intended.

Based upon this operational experience, we believe that the FISA business records authority should be reauthorized. There will continue to be instances in which FBI investigators need to obtain transactional information that does not fall within the scope of authorities relating to national security letters and are operating in an environment that precludes the use of less secure criminal authorities. Many of these instances will be mundane (as they have been in the past), such as the need to obtain driver's license information that is protected by State law. Others will be more complex, such as the need to track the activities of intelligence officers through their use of certain business services. In all these cases, the availability of a generic, court-supervised FISA business records authority is the best option for advancing national security investigations in a manner consistent with civil liberties. The absence of such an authority could force the FBI to sacrifice key intelligence opportunities.

3. "Lone Wolf," Intelligence Reform and Terrorism Prevention Act of 2004 Section 6001 (codified at 50 U.S.C. § 1801(b)(1)(C))

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 defines a "lone wolf" agent of a foreign power and allows a non-United States person who "engages in international terrorism activities" to be considered an agent of a foreign power under FISA even though the specific foreign power (*i.e.*, the international terrorist group) remains unidentified. We also recommend reauthorizing this provision.

Enacted in 2004, this provision arose from discussions inspired by the Zacarias Moussaoui case. The basic idea behind the authority was to cover situations in which information linking the target of an investigation to an international group was absent or insufficient, although the target's engagement in "international terrorism" was sufficiently established. The definition is quite narrow: it applies only to non-United States persons; the activities of the person must meet the FISA definition of "international terrorism;" and the

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information likely to be obtained must be foreign intelligence information. What this means, in practice, is that the Government must know a great deal about the target, including the target's purpose and plans for terrorist activity (in order to satisfy the definition of "international terrorism"), but still be unable to connect the individual to any group that meets the FISA definition of a foreign power.

To date, the Government has not encountered a case in which this definition was both necessary and available, *i.e.*, the target was a non-United States person. Thus, the definition has never been used in a FISA application. However, we do not believe that this means the authority is now unnecessary. Subsection 101(b) of FISA provides ten separate definitions for the term "agent of a foreign power" (five applicable only to non-United States persons, and five applicable to all persons). Some of these definitions cover the most common fact patterns; others describe narrow categories that may be encountered rarely. However, this latter group includes legitimate targets that could not be accommodated under the more generic definitions and would escape surveillance but for the more specific definitions.

We believe that the "lone wolf" provision falls squarely within this class. While we cannot predict the frequency with which it may be used, we can foresee situations in which it would be the only avenue to effective surveillance. For example, we could have a case in which a known international terrorist affirmatively severed his connection with his group, perhaps following some internal dispute. The target still would be an international terrorist, and an appropriate target for intelligence surveillance. However, the Government could no longer represent to the FISA court that he was currently a member of an international terrorist group or acting on its behalf. Lacking the "lone wolf" definition, the Government could have to postpone FISA surveillance until the target could be linked to another group. Another scenario is the prospect of a terrorist who "self-radicalizes" by means of information and training provided by a variety of international terrorist groups via the Internet. Although this target would have adopted the aims and means of international terrorism, the target would not actually have contacted a terrorist group. Without the lone wolf definition, the Government might be unable to establish FISA surveillance.

These scenarios are not remote hypotheticals: they are based on trends we observe in current intelligence reporting. We cannot determine how common these fact patterns will be in the future or whether any of the targets will so completely lack connections to groups that they cannot be accommodated under other definitions. However, the continued availability of the lone wolf definition eliminates any gap. The statutory language of the existing provision ensures its narrow application, so the availability of this potentially useful tool carries little risk of overuse. We believe that it is essential to have the tool available for the rare situation in which it is necessary rather than to delay surveillance of a terrorist in the hopes that the necessary links are established.

Thank you for the opportunity to present our views. We would be happy to meet with your staff to discuss them. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Minority Member

Attachment B
Sen. Grassley 1 Department of Justice and Sen. Grassley Correspondence Re: Oversight Matters

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Senator Charles E. Grassley Correspondence Re: Oversight Matters

Grassley Correspondence Addressed to the Department

Date	Addressed to:
January 16, 2007 (Answered 2/21/07)	The Honorable Alberto Gonzales Attorney General, U.S. Department of Justice (Subject: Antitrust Inquiry on Abbott Labs)
August 7, 2008 (Answered 3/5/09)	The Honorable Michael B. Mukasey Attorney General, U.S. Department of Justice (Subject: Amerithrax Investigation)
April 21, 2009 (Answered 7/27/09)	The Honorable Eric H. Holder Attorney General, U.S. Department of Justice The Honorable Janet Napolitano Secretary, U.S. Department of Homeland Security (Subject: Title 21 Investigative Authority)
May 20, 2009 (Answered 6/18/09)	The Honorable Eric H. Holder Attorney General, U.S. Department of Justice The Honorable Robert S. Mueller, III Director, Federal Bureau of Investigation (Subject: Heparin)
May 26, 2009 (Answered 6/29/09)	The Honorable Christine Varney Assistant Attorney General, Antitrust Division U.S. Department of Justice (Subject: Antitrust Enforcement in the Agricultural Sector)

Grassley Correspondence Addressed to the FBI

Date	Addressed to:
March 27, 2006 (FBI has no record of correspondence)	The Honorable Robert A. Mueller, III Director, Federal Bureau of Investigation (Subject: Cecilia Woods matter)
February 26, 2007 (Answered 3/15/07)	The Honorable Robert A. Mueller, III Director, Federal Bureau of Investigation (Subject: SA Jamie Turner matter/Discipline of Turners supervisors)
March 19, 2007 (Answered 3/26/07- cc: Sen. Grassley)	The Honorable Robert A. Mueller, III Director, Federal Bureau of Investigation (Subject: Use of Exigent letters)

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January 10, 2008 (Answered 2/26/08)	The Honorable Robert A. Mueller, III Director, Federal Bureau of Investigation (Subject: Misuse of confidential case funds. Briefing also provided.)
June 25, 2008 (Answered 8/29/08- cc: Sen. Grassley)	The Honorable Robert A. Mueller, III Director, Federal Bureau of Investigation (Subject: Exigent letters)
October 22, 2008 (Answered 3/13/09)	Candice M. Will Assistant Director, Federal Bureau of Investigation (Subject: SA Elizabeth Morris matter)

Grassley Correspondence Addressed to the IG

Date	Addressed to:
March 16, 2007 (OIG responded via conversations with staff member Jason Foster during Spring 2007–complaint forwarded to OPR for handling)	The Honorable Glenn A. Fine Inspector General,U.S. Department of Justice (Subject: Agent Bassem Youssef matter)
June 4, 2008 (OIG responded via conversations with staff member Jason Foster)	The Honorable Glenn A. Fine Inspector General,U.S. Department of Justice (Subject: 7 ongoing OIG reviews)
April 22, 2009 (follow-up to 6/4/08) (OIG responded via conversations with staff member Jason Foster; additionally, IG Fine met with staff on 5/26/09 to discuss the issues in these letters)	The Honorable Glenn A. Fine Inspector General,U.S. Department of Justice (Subject: 7 Issues regarding OIG investigations)
October 22, 2008 (OIG answered first Morris letter in writing on 8/22/08. OIG answered the 10/22/08 letter in writing on 4/14/09)	The Honorable Glenn A. Fine Inspector General, U.S. Department of Justice (Subject: SA Elizabeth Morris matter)

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Attachment C
Sen. Coburn 1
Fact Sheet: Emmett Till Unsolved Civil Rights Crime Act

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7/7/09

U.S. Department of Justice

EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007

Overview and Background

The Department of Justice fully supports the goals of the Emmett Till Unsolved Civil Rights Crime Act of 2007. For more than 50 years, the Department of Justice has been instrumental in bringing justice to some of the Nation's horrific civil rights era crimes. These crimes occurred during a terrible time in our nation's history when some people viewed their fellow Americans as inferior, and as threats, based only on the color of their skin. The Department of Justice believes that racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our history. As such, the Department stands ready to lend our assistance, expertise, and resources to assist in the investigation and possible prosecution of these matters.

In October 2008, the Emmett Till Unsolved Civil Rights Crime Act of 2007 was signed into law, directing the Department to designate a Deputy Chief in the Civil Rights Division (CRT) to coordinate the investigation and prosecution of civil rights era homicides. CRT officially designated the Deputy Chief on March 1, 2009. In addition, the Act required the designation of a Supervisory Special Agent in the FBI's Civil Rights Unit to manage and provide oversight of these investigations. FBI designated a Supervisory Special Agent on October 12, 2008. The Civil Rights Division and the FBI were also given the authority to coordinate their activities with state and local law enforcement officials.

For fiscal years 2008 through 2017, the Act authorized to be appropriated $10,000,000 per year to the Attorney General, to be allocated as appropriate to the Department's Civil Rights Division and the FBI for the purpose of investigating and prosecuting criminal civil rights violations; $2,000,000 per year for grants to State or local law enforcement agencies for expenses associated with the investigation and prosecution by them of civil rights era homicides; and $1,500,000 per year to the Community Relations Service of the Department to bring together law enforcement agencies and communities in conflict, resulting from the investigation of these cases. However, funds authorized by this Act have not been appropriated.

The Act requires the Attorney General to annually conduct a study and report to Congress not later than 6 months after the date of enactment of this Act, and each year thereafter. Among other issues, the study and report is required to discuss the number of open

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investigations within the Department for violations of criminal civil rights statutes that occurred not later than December 31, 1969, and resulted in a death. The Act also requires the report to discuss any applications submitted for grants under section 5, the award of any grants, and the purposes for which any grant amount was expended. Additionally, the Act requires the Attorney General to designate a Deputy Chief in the Criminal Section of the Civil Rights Division to coordinate the investigation and prosecution of these criminal cases, and authorizes the Deputy Chief to coordinate investigative activities with State and local law enforcement officials. The Department completed and submitted the first report to Congress on May 13, 2009.

The Department's efforts to investigate and prosecute unsolved civil rights era homicide cases predate the Emmett Till Unsolved Civil Rights Crime Act. During the course of the Department's focus on these matters, we have opened 107 matters for review. Eleven of those matters have been opened within the past six months. Of the 107 matters opened as part of the Department's review of civil rights era homicides, the Department has thus far made a decision to close 14 matters without federal prosecution. However, we are awaiting contact information for identifiable next-of-kin to the victims for 12 of those matters so that we may notify them of our decision. The following two matters were closed on April 3, 2009: *In re: Clarence Pershing Cloninger*; and *In re: William D. Owens*. In both matters, our review revealed no viable federal statutory basis for prosecution.

In addition, there are certain difficulties inherent in these cold cases: subjects die; witnesses die or can no longer be located; memories become clouded; evidence is destroyed. Even with our best efforts, investigations into historic cases are exceptionally difficult, and justice in many of these cases will never be reached inside of a courtroom. Notwithstanding these legal and factual limitations, the Department believes that the federal government can still play an important role in these cases.

To further the Department's commitment to investigating and prosecuting civil rights era homicides, the FBI in 2006 began its Cold Case Initiative (the Initiative) to identify and investigate the murders committed during the civil rights era. Each of the 56 field offices was directed to identify cases within its jurisdiction that might warrant inclusion on a list of cold cases meriting additional investigation. In 2007, the FBI announced the next phase of this initiative, which includes a partnership with the National Association for the Advancement of Colored People (NAACP), the Southern Poverty Law Center (SPLC), and the National Urban League to identify possible additional cases for investigation and to solicit their assistance with already identified matters.

Since January, 2007, at least 40 federal prosecutors have worked on cases under review as part of the Department's Cold Case Initiative and the Emmett Till Unsolved Civil Rights Crime Act of 2007. Although no matters are currently under federal indictment, several cases have been identified as potentially viable prosecutions at either the state or federal level. The resources involved in a viable prosecution are enormous.

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New Investments

Civil Rights Division

The FY 2010 Budget requests **$1.6 million and 9 positions (6 attorneys)** to support the establishment of the Cold Case Unit in the Civil Rights Division, to comply with the recently enacted Emmett Till Unsolved Civil Rights Crime Act, passed by Congress in October 2008. This new unit will focus exclusively on the investigation and prosecution of civil rights era unsolved homicide cases. FY 2010 requested program increase will establish baseline funding for this initiative.

Emmett Till Act
Resource Summary
(Amount in $000)

DOJ Component	FY 2009 Pos	Agt/Atty	Amount	FY 2010 Pos	Agt/Atty	Amount
Civil Rights Division	14	3	600	9	6	1,645
United States Attorneys	Funded within base			Funded within base		
Federal Bureau of Investigation	20 field agents working on cold case era matters, funded within base			Funded within base		
Community Relations Service	Funded within base			Funded within base		
Office of Justice Programs-National Institute of Justice-DNA Initiative*	$14.5 million in grant requests were received for cold cases, but no requests for grant funding have been received to date associated with the Emmett Till Act					

* As part of the DNA Initiative, OJP/NIJ releases annual, competitive solicitations for grant applications to solve cold cases with DNA. Specifically, "... applications from States and units of local government for funding to identify, review, and investigate "violent crime cold cases" that have the potential to be solved using DNA analysis and to locate and analyze biological evidence associated with these cases." The period of award is a maximum of 18 months.

In FY2009, OJP/NIJ received requests for $14.5M in funding under this solicitation. OJP/NIJ will release another competitive solicitation in FY 2010.

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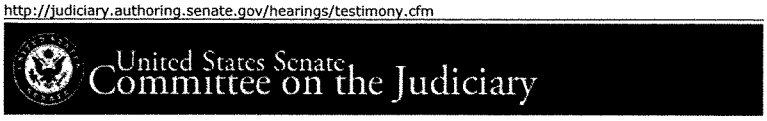

< Return To Hearing

Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
June 17, 2009

CARDIN CALLS ON AG HOLDER TO AGGRESSIVELY COMBAT PREDATORY LENDING PRACTICES

Senator also announces July hearing on GTMO detainees

Washington, DC – U.S. Senator Benjamin L. Cardin (D-MD), a member of the Senate Judiciary Committee, participated today in the first oversight hearing with Attorney General Eric Holder. During the hearing, Senator Cardin called upon the Department of Justice (DOJ) to investigate allegations of predatory lending across the country.

"Predatory lending has had a devastating effect on our national economy, but it seems to be no coincidence that it has had a disproportionate impact on minority communities like Baltimore and Prince George's County. I urge Attorney General Holder to be more aggressive in ensuring that our lending institutions are not violating the Fair Housing Act and unlawfully targeting minority and urban communities for high-interest rate loans. DOJ needs to reverse the inaction of the previous administration and do more to make certain that these destructive lending practices are no longer tolerated in our country," Senator Cardin said.

In his capacity as Chairman of the Judiciary Terrorism and Homeland Security Subcommittee, Senator Cardin also sought details from Attorney General Holder on the usage and benefits of provisions of the PATRIOT Act that are set to expire at the end of 2009. In addition, Senator Cardin announced that he would hold hearings in late July on the potential trials and transfers of detainees from the U.S. detention center at Guantánamo Bay.

"Specific provisions of the PATRIOT Act are set to expire this year. Before Congress takes any action to extend or let them expire, we need to know how useful they have been to law and intelligence officials and whether or not they are necessary and efficient. These questions have not yet been adequately answered," said Senator Cardin. "Congress' greatest responsibility is to ensure the safety and security of the American public. I have no doubt that the Obama Administration shares this belief and agrees that we must balance any such actions with respect for civil liberties and civil rights."

"Guantánamo Bay represents a failed system of justice and a mark against the United States' record of human rights. I agree with President Obama that it is far past time to close Guantánamo Bay and I commend him for taking actions to do so. Yet again, Congress has a responsibility to review the details of any plan to prosecute suspected terrorists before allocating any funds for that purpose. As Chairman of the Judiciary Terrorism and Homeland Security Subcommittee, I look forward to hearing specifics from the Obama Administration as they finalize the details of a lawful and efficient process to bring accused terrorists to justice in appropriate military or civilian courts."

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STATEMENT OF ERIC H. HOLDER JR.
ATTORNEY GENERAL OF THE UNITED STATES
BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

JUNE 17, 2009

Good morning Chairman Leahy, Ranking Member Sessions, and Members of the Committee. Thank you for the opportunity to appear before you today to highlight the work and priorities of the U.S. Department of Justice. I would also like to thank you for your support of the Department. I look forward to your continued support and appreciate your recognition of the Department's mission and the important work that we do.

I testified during my confirmation hearings earlier this year that under my leadership, the Department would pursue a very specific set of goals: ensuring public safety against threats both foreign and domestic; ensuring fair and impartial administration of justice for all Americans; assisting our state and local partners; and defending the interests of the United States according to the law. I believe we are on the right path to accomplish those goals.

First, we are working to strengthen the activities of the federal government that protect the American people from terrorism and are doing so within the letter and spirit of the Constitution. Let me be clear: we need not sacrifice our core values in order to ensure our security. Adherence to the rule of law strengthens security by depriving terrorist organizations of their prime recruiting tools. America must be a beacon to the world. We can lead and are leading by strength, by wisdom, and by example.

Second, we are working to ensure that the Department of Justice will always serve the cause of justice, not the fleeting interests of politics. For example, law enforcement decisions and personnel actions must be untainted by partisanship.

Third, we are working to reinvigorate the traditional missions of the Department. Without ever relaxing our guard in the fight against global terrorism, the Department is also embracing its historic role in fighting crime, protecting civil rights, preserving the environment, and ensuring fairness in the market place.

Counter-Terrorism Efforts

The highest priority of the Department is to protect America against acts of terrorism. The Department has improved significantly its ability to identify, penetrate, and dismantle terrorist plots as a result of a series of structural reforms, the development

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of new intelligence and law enforcement tools, and a new mindset that values information sharing, communication and prevention.

I am committed to continuing to build our capacity to deter, detect and disrupt terrorist plots and to identify terrorist cells that would seek to do us harm. And I am committed to doing so consistent with the rule of law and American values. We will continue to develop intelligence, identify new and emerging threats and use the full range of tools and capabilities the Department possesses in its intelligence and law enforcement components.

The threats that confront us know no boundaries. So while the focus is on protecting the security of Americans here at home, now more than ever, there is a critical link between our national security and the creation of sustainable institutions in emerging, failing, or failed states and in post conflict environments. Our counter-terrorism efforts are aided by fostering international cooperation, maximizing U.S. influence regarding the development of foreign legal policies and procedures, and establishing direct ties and personal relationships with our counterparts across the globe.

Working with our federal, state, and local partners, as well as international counterparts, the Department has worked tirelessly to safeguard America and will continue to do so.

Over the past several years, the FBI has transformed its operations to better detect and dismantle terrorist enterprises – part of the FBI's larger emphasis on threat-driven intelligence. As part of this strategic shift, the FBI has overhauled its counterterrorism operations, expanded intelligence capabilities, modernized business practices and technology, and improved coordination with its partners. From the Joint Terrorism Task Forces, where agents work side by side with their state and local counterparts to make sure no terrorism threat goes unaddressed, to growing a professional analytic cadre to identify emerging threats, I am committed to ensuring that the FBI continues to build its capabilities as a national security organization.

The Department's National Security Division ensures that the prosecutorial and the intelligence elements within Main Justice are centrally managed. Since January 20, the Department's National Security Division has marked several key achievements in prosecuting terrorism and terror-related cases, including:

- In the first use of U.S. criminal courts to prosecute an individual for terror offenses against Americans in Iraq, Wesam al-Delaema pleaded guilty to planting roadside bombs targeting Americans in Fallujah, Iraq.

- Four defendants pleaded guilty in connection with their efforts to acquire surface-to-air missiles and other weapons for the Liberation Tigers of Tamil Eelam, a terrorist organization in Sri Lanka.

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- An associate of international arms dealer Monzer al-Kassar was found guilty of terror violations in connection with his efforts to sell surface-to-air missiles and other weapons to terrorists in Colombia.

- An Ohio man and al-Qaeda member was sentenced to 20 years in prison for conspiring to bomb targets in Europe and the United States.

- Five defendants in the Fort Dix trial were sentenced, ranging from 33 years to life in prison, for plotting to kill American soldiers in 2007 at the Fort Dix military base.

Implementing the President's Executive Orders to Close Guantanamo

Consistent with our commitment to national security as the Department's number one priority, the Justice Department is leading the work set out by the President to close Guantanamo and to ensure that policies going forward for detention, interrogation, and transfer live up to our nation's values. As the President said in his speech at the National Archives, instead of serving as a tool to counter-terrorism, Guantanamo became a symbol that helped al-Qaeda recruit terrorists to its cause.

On January 22nd, President Obama issued three Executive Orders and a Presidential Memorandum that gave significant responsibility to the Department. The Department is coordinating an interagency effort to conduct the hard work of implementing these important Presidential initiatives. The Principals listed in the Executive Orders and Presidential Memorandum have been called upon to:

- Review and help effect the appropriate disposition of individuals currently detained at the Guantanamo Bay Naval Base;

- Develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations;

- Study and evaluate current interrogation practices and techniques and, if warranted, recommend additional or different guidance; and

- Review the detention of Ali Saleh Kahlah al-Marri.

The Department, together with the Departments of Defense, State, Homeland Security, and Office of the Director of National Intelligence, the Central Intelligence Agency, the Joint Chiefs of Staff and others, is implementing these Orders; and with the indictment and guilty plea of Mr. al-Marri in late April, we have brought about a just resolution of that case.

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With regard to the President's Executive Orders, I have appointed an Executive Director to lead the Guantanamo Detainee Task Force. I have also named two officials to coordinate the Task Force Reviews on Interrogation and Detention Policy.

The Guantanamo Detainee Review Task Force is responsible for assembling and examining relevant information and making recommendations regarding the proper disposition of each individual currently detained at Guantanamo Bay. The Task Force is considering whether it is possible to transfer or release detained individuals consistent with the national security and foreign policy interests of the United States; evaluating whether the government should seek to prosecute detained individuals for crimes they may have committed; and, if none of these options is possible, recommending other lawful means for disposition of the detained individuals.

The Task Force on Interrogation and Transfer Policies is charged with conducting a review to determine whether the Army Field Manual interrogation practices and techniques, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the nation, and whether different or additional interrogation guidance is necessary. This task force is also responsible for examining the practices regarding transfer of individuals to other nations to ensure that such practices comply with all domestic and international legal obligations and policies of the United States, and are sufficient to ensure that such individuals do not face torture or inhumane treatment.

The Task Force on Detention Policy is charged with conducting a review of the lawful options available to the federal government for the apprehension, detention, trial, transfer, release or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

The Executive Orders and Presidential Memorandum require me to coordinate or co-chair each of these interagency activities. The leaders of other U.S. Government departments and agencies are participating in these task forces, including the Secretaries of Defense, State, Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, the Chairman of the Joint Chiefs of Staff and other officials.

While implementing these Orders, the Department will take necessary precautions to ensure decisions regarding Guantanamo detainees account for safety concerns of all Americans.

With respect to the task of reviewing the detention of Ali Saleh Kahlah al-Marri, I am pleased to report to you that on April 30, al-Marri pleaded guilty to conspiracy to provide material support to the al-Qaeda terrorist network. By entering into that agreement, al-Marri admitted that he worked for and provided material support to al-Qaeda with the intent to further its terrorism objectives and activities here in the United States. At the time that President Obama directed me to lead an interagency review of his case, al-Marri had been detained in a naval brig in South Carolina for more than five

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years without charges. The resolution of this matter in the criminal justice system is a result of the dedicated work of career prosecutors and investigators at the Justice Department and in other agencies. As a result, the Department has shown that our criminal justice system can and will hold terrorists accountable for their actions, protecting the American people in a manner consistent with our values and prosecuting alleged terrorists to the full extent of the law.

Trying accused terrorists in the federal criminal justice system has been a common and successful approach that the Department has taken since the 1990's. The Department has prosecuted and convicted individuals who planned such terrorist acts as the bombings of the World Trade Center in 1993, the American embassies in East Africa, and the U.S.S. Cole. An independent analysis found that federal prosecutors achieved a conviction rate of more than 90 percent on at least one charge among a group of 160 defendants whose cases were resolved. Since the beginning of this year, more than 30 individuals charged with terrorism violations have been successfully prosecuted and/or sentenced in federal courts nationwide.

It is also important to state that there are currently 216 inmates in Bureau of Prisons (BOP) custody who have a history of or nexus to international terrorism. Federal prisons are considered some of the most secure in the world. The "Supermax" facility in Florence, Colorado (ADX Florence), which is BOP's most secure facility, houses 33 international terrorists. There has never been an escape from ADX Florence, and BOP has housed some of these international terrorists since the early 1990's. In addition to the ADX Florence, the BOP houses such individuals in the Communications Management Units at Terre Haute, Ind., and Marion, Ill., as well as in other facilities among different institutions around the country.

Under the law, the Attorney General may direct the BOP to initiate Special Administrative Measures with respect to a particular inmate (including those being held pre-trial or during trial) when there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. Generally, these measures can be initiated to prevent acts of terrorism, acts of violence, or the disclosure of classified information.

The Mexican Cartels and Southwest Border Security

The Department has undertaken significant work recently to confront the threat posed by the Mexican drug cartels and to ensure the security of our southwest border. The effort is being led by Deputy Attorney General David Ogden. This strategy uses federal prosecutor-led task forces that bring together federal, state and local law enforcement agencies to identify, disrupt and dismantle the Mexican drug cartels through investigation, prosecution, and extradition of their key leaders and facilitators, and seizure and forfeiture of their assets. The Department also co-chaired an interagency effort with the Department of Homeland Security, on behalf of the Office of National Drug Control Policy, to develop the 2009 National Southwest Border Counternarcotics

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Strategy. That Strategy was recently released June 05, 2009, and identifies recommended actions to combat the illegal trafficking of drugs, outbound flow of illegal cash, and weapons across the border with Mexico. The Department is also increasing its focus on investigations and prosecutions of the southbound smuggling of guns and cash that fuel the violence and corruption, as well as attacking the cartels in Mexico itself, in partnership with the Mexican Attorney General's Office and the Secretariat of Public Security.

Confronting the Mexican cartels, together with our partners in the Mexican government, is a paramount priority for the United States and the Department. The southwest border in particular is a vulnerable area for illegal immigration, drug trafficking, and the smuggling of illegal firearms. Implementing a comprehensive strategy for confronting the cartels and security at the border involves collaboration and coordination at various levels of the government.

Addressing the Southwest Border threat has two basic elements: policing the actual border to interdict and deter the illegal crossing of undocumented persons or contraband goods, and confronting the large criminal organizations operating on both sides of the border. To that end, the Justice Department is targeting the Mexican cartels as it did La Cosa Nostra or any other large organized crime organization. The efforts of Justice Department law enforcement components – DEA, FBI, ATF, U.S. Marshals Service (USMS), the U.S. Attorneys, the Criminal Division and the Organized Crime Drug Enforcement Task Force (OCDETF) – along with the Department of Homeland Security and other federal agencies – have already yielded important results.

In February, I announced the arrest of more than 750 individuals on narcotics-related charges and the seizure of more than 23 tons of narcotics under Operation Xcellerator, a multi-agency, multi-national effort that targeted the Mexican drug trafficking organization known as the Sinaloa Cartel. The Sinaloa Cartel is also believed to be responsible for laundering millions of dollars in criminal proceeds from illegal drug trafficking activities. This Cartel is responsible for bringing tons of cocaine into the United States through an extensive network of distribution cells in the United States and Canada. Through Operation Xcellerator, federal law enforcement agencies—along with law enforcement officials from the governments of Mexico and Canada and state and local authorities in the United States—delivered a significant blow to the Sinaloa Cartel. In addition to the arrests, authorities seized over $59 million in U.S. Currency, more than 12.000 kilograms of cocaine, more than 1,200 pounds of methamphetamine, approximately 1.3 million Ecstasy pills, and other illegal drugs. Also significant was the seizure of 169 weapons, 3 aircraft, and 3 maritime vessels.

In March, the Department announced increased methods to be used in the fight against Mexican Drug Cartels. The Department and DHS are working closely in support of the Department of State on efforts against the cartels in Mexico through the Merida Initiative. The Department's coordination will include the FBI, DEA, ATF, USMS, OCDETF and the Criminal Division, who will work with law enforcement colleagues to

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investigate and prosecute cartel members for their illegal activities in the United States and to disrupt the illegal flow of weapons and bulk cash to Mexico.

Over the last nine months, the USMS has deployed an additional 94 Deputy U.S. Marshals to district offices and will be sending four additional deputies to assist the Mexico City Field Office in order to step-up efforts along the Southwest Border. In addition, within the last three months, four new Criminal Investigators have been placed in the asset forfeiture field units along the Southwest Border. These new positions will support U.S. Attorneys' Offices and law enforcement agencies in their efforts against the cartels, as well as contributing to other large-scale investigations.

Our strategy to address the Mexican cartels will allow the Department to commit 100 ATF personnel to the southwest border to supplement our ongoing Project Gunrunner. DEA will add 16 new positions on the border, as well as newly reconstituted Mobile Enforcement Teams, and the FBI is creating a new intelligence group that will focus on gang/drug criminal enterprises, public corruption, kidnapping, extortion and other investigative matters related to the Southwest Border. In addition, I have had a series of meetings with Secretary Napolitano to discuss increased coordination on various matters between the Department of Justice and DHS.

This April, I, along with Secretary Napolitano, attended the Mexico/United States Arms Trafficking Conference in Cuernavaca, Mexico. This was my first foreign trip as Attorney General. My attendance at this conference reflects my commitment to continuing this fight against the drug cartels. The United States shares the responsibility to find solutions to this problem and we will join our Mexican counterparts in every step of this fight.

Civil Rights

The Department is fully committed to defending the civil rights of every American. In the last eight years, vital federal laws designed to protect rights in the workplace, the housing market and the voting booth have languished. Moreover, improper political considerations tainted certain hiring decisions and undermined this important mission. This is now changing, and I have made restoring the proper functioning of the Civil Rights Division a priority as Attorney General. The Civil Rights Division already has increased its enforcement activities.

First, the Department is continuing its tradition of using amicus participation as an integral part of its enforcement program. Filing amicus briefs in cases brought by private parties allows the Division to advance its interpretation of the statutes and regulations it enforces before the courts in significant cases, assisting the courts and helping to ensure that the public receives the full measure of the protections provided. Since January 21, the Department has filed amicus briefs in nine civil rights cases and sought leave to file in two others. The issues involved in these cases include, among other issues, employment discrimination, disability rights, and sexual harassment in violation of the Fair Housing Act.

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The Civil Rights Division has also stepped up its fair housing enforcement efforts to address systemic housing discrimination. The Division has filed 16 cases under the Fair Housing Act, including 7 pattern or practice cases, and obtained 8 consent decrees providing comprehensive relief.

Another important element of strengthening civil rights is to ensure fairness in the administration of the criminal laws. The Department firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and free from unwarranted racial and ethnic disparities. 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. This Administration is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist. The Department's work in this respect has already started with a sentencing working group that is being led by the Deputy Attorney General. The right to counsel is also an essential element of an effective and fair criminal justice system. The Department is concerned about the quality and availability of defense counsel for indigents, especially in this difficult economic time, and has begun to study proposals for improvement.

Another civil rights issue that is a clear priority for the Department is enactment of effective hate crimes legislation. Hate crimes victimize not only individuals, but entire communities. Such bias-motivated violence simply cannot be tolerated, and we need the tools to address the worst cases at the federal level.

Federal and State Partnerships Targeting Financial and Mortgage Fraud

As many Americans face the adverse effects of a devastating economy and an unstable housing market, the Administration announced a new coordinated effort across federal and state government and the private sector to target mortgage loan modification fraud and foreclosure rescue scams. These fraudulent activities threaten to hurt American homeowners and prevent them from getting the help they need during these challenging times. The new effort aligns responses from federal law enforcement agencies, state investigators and prosecutors, civil enforcement authorities, and the private sector to protect homeowners seeking assistance under the Administration's Making Home Affordable Program from criminals looking to perpetrate predatory schemes.

The Department, in partnership with the U.S. Department of Treasury, the Department of Housing and Urban Development (HUD), the Federal Trade Commission (FTC) and the Attorney General of Illinois, will coordinate information and resources across agencies to maximize targeting and efficiency in fraud investigations, alert financial institutions to emerging schemes, and step up enforcement actions. As part of

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this multi-agency effort, the Department has outlined ways to crack down on mortgage fraud schemes. The FBI is investigating more than 2,500 mortgage fraud cases as of May 31, 2009. This number is up almost 400 percent from five years ago. The Bureau has more than doubled the number of agents investigating mortgage scams, created a National Mortgage Fraud Team at Headquarters, and is working hand-in-hand with other partnering agencies.

I appreciate the Committee's work with us in enacting legislation to enhance the Department's criminal and civil tools and resources to combat mortgage fraud, securities and commodities fraud, money laundering, and to protect taxpayer money that has been expended on recent economic stimulus and rescue packages. The Fraud Enforcement Recovery Act will reverse unfortunate court decisions that have hindered the ability to prosecute money laundering by allowing the Department to obtain all the proceeds of unlawful activity. The new law also authorizes new investigators and prosecutors to facilitate bringing financial fraud cases. These additional resources will provide a return on investment through additional fines, penalties, restitution, damages, and forfeitures. With the tools and resources that the bill provides, the Department and others will be better equipped to address the challenges that face this Nation in difficult economic times and to do their part to help the Nation respond to this challenge. Further, the new law amends the False Claims Act in several important respects to ensure that that legislation remains a potent and useful weapon against the misuse of taxpayer funds.

In addition to focusing on fraudulent scams, I am committed to ensuring that homeowners who may be having difficulty making their mortgage payments do not experience discrimination and can benefit in equal measure from legitimate loan modification programs and other federal programs to provide mortgage assistance and stabilize home prices. Discrimination in lending on the basis of race, national origin, or other prohibited factors is destructive, morally repugnant, and against the law. Lending discrimination prevents those who are discriminated against from enjoying the benefits of access to credit, including reasonable mortgage payments, so they can stay in their homes and provide much needed stability for their neighborhoods. We are using the full range of our enforcement authority to investigate and prosecute this type of unacceptable lending discrimination.

The Department has been investigating and prosecuting financial crimes aggressively and has had tremendous success in identifying, investigating, and prosecuting massive financial fraud schemes, including securities and commodities market manipulation and Ponzi schemes. The Department has sought to ensure that significant sentences are meted out for the perpetrators. For example:

- On March 12, Bernard L. Madoff pleaded guilty to 11 felony counts related to a massive Ponzi scheme. The Justice Department alleged that Madoff perpetrated a scheme to defraud the clients by soliciting billions of dollars of funds under false pretenses, failing to invest investors' funds as promised, and misappropriating and converting investors' funds to Madoff's own benefit and the benefit of others without the knowledge or

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authorization of the investors. Madoff faces a statutory maximum sentence of 150 years' incarceration. He is also subject to mandatory restitution and faces fines up to twice the gross gain or loss derived from the offenses. The Criminal Information also includes forfeiture allegations which would require Madoff to forfeit the proceeds of the charged crimes, as well as all property involved in the money laundering offenses and all property traceable to such property.

- On March 27, 2009, the Department secured 30-year and 25-year sentences, respectively, for two executives of National Century Financial Enterprises (NCFE) following their convictions on conspiracy, fraud and money-laundering charges related to a scheme to deceive investors about the financial health of the company, which may have cost investors as much as $ 2 billion.

- The Department secured a four-year sentence for Christian M. Milton, a former vice president of American International Group (AIG), for his role in a scheme to manipulate the company's financial statements.

Transparency

The Department is committed to an open, transparent, and accountable government. These values are central to our revitalization of the basic traditions of the Department, and are key features of our reform efforts. We issued new comprehensive Freedom of Information Act (FOIA) Guidelines that direct all executive branch departments and agencies to apply a presumption of openness when administering the FOIA. The new Guidelines, announced in a memo to heads of executive departments, build on principles of openness and rescind the guidelines issued by the previous administration.

In applying a presumption of openness and disclosure, the new Guidelines stress that agencies should not withhold records simply because they may do so legally; rather, agencies should consider whether any real harm may result from their disclosure. Furthermore, the Guidelines established a new standard for when the Department of Justice will defend an agency that denies a FOIA request. Under the new standard, the Department will defend the agency "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." The new Guidelines also emphasize that open government is everyone's responsibility. Agencies must work cooperatively with FOIA requesters and should reply in a timely manner.

In addition to issuing these new FOIA Guidelines, the Department released several previously undisclosed Office of Legal Counsel (OLC) memoranda and opinions. On April 16, for example, the Department released to the public four previously undisclosed OLC opinions from 2002 and 2005 that addressed the use of various interrogation techniques. When releasing these opinions, I explained that the "President

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has halted the use of the interrogation techniques described in these opinions, and this administration has made clear from day one that it will not condone torture. We are disclosing these memos consistent with our commitment to the rule of law." After reviewing these opinions, moreover, the Office of Legal Counsel withdrew them: they no longer represent the views of the Department. The release of these memos and opinions followed the release of seven other previously undisclosed opinions and two previously undisclosed OLC memoranda.

Consistent with the Department's commitment to transparency, I recently vacated Attorney General Mukasey's order in *Matter of Compean*, and directed the Executive Office of Immigration Review to begin a rulemaking process to evaluate the procedures for bringing claims of ineffective assistance of counsel in immigration proceedings. The previous *Compean* order had made significant changes to those procedures, which are critical to the integrity of immigration proceedings, without the benefit of adequate notice and comment. In the new rulemaking, the public will have a full and fair opportunity to participate in the formulation of those procedures. My order did not reverse the previous order on the merits, restores the status quo *ante*, and will not affect the Department's litigating positions.

Recovery Act

The American Recovery and Reinvestment Act of 2009 included $4 billion in Department of Justice grant funding to enhance state, local, and tribal law enforcement efforts, including the hiring of new police officers, to combat violence against women, and to fight internet crimes against children. This funding will not only help jumpstart our economy and create or save millions of jobs, but it will also help reinvigorate the Department of Justice's traditional law enforcement mission, a key element of which is its partnerships with state, local, and tribal law enforcement agencies. I am personally committed to rebuilding the Department's traditional partnership with our law enforcement partners through both operational synergies and greater resources. This funding is vital to keeping our communities strong. As governors, mayors, and local law enforcement professionals struggle with the current economic crisis, we cannot afford to decrease our commitment to fighting crime and keeping communities safe.

The Recovery Act provides $4 billion in grant funding that will be distributed by the Justice Department's three major grant-making offices: the Office of Justice Programs (OJP), the Office on Violence Against Women (OVW), and the Community Oriented Policing Services (COPS). The Recovery Act's grant funding is primarily apportioned among these offices as follows:

- OJP is overseeing the distribution of nearly $2.76 billion worth of grant money through the Bureau of Justice Assistance (BJA), the Office of Victims of Crimes (OVC) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Nearly $2 billion dollars of this funding is available through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, which allows state, local, and tribal

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governments to support a broad range of activities to prevent and control crime and improve the criminal justice system.

- OVW is responsible for granting $225 million to fund programs through its Services Training Officers Prosecutors (STOP) Formula Grant Program, its Transitional Housing Assistance, grants to Tribal governments, and to State and Tribal Sexual Assault and Domestic Violence Coalitions.

- The COPS office, through its COPS Hiring Recovery Program (CHRP) will be distributing $1 billion for large and small police departments and tribal law enforcement agencies to hire and rehire officers. The COPS CHRP program is estimated to create 5,000 positions in law enforcement around the country.

The program announcements soliciting applications under these Recovery Act grant programs have all been posted on the Department's Recovery Act website and the Grants.gov Fund Grant Opportunities webpage. Some deadlines have passed, and all applications for those programs are now being reviewed. To date, OJP has awarded nearly $1.54 billion in grants. Formula awards to states, localities, State task forces, and tribal governments have been provided on a rolling basis through 51 grants under the Byrne/JAG Program, as well as the Victims of Crime grants for Victim Assistance and Compensation, grants to State Coalitions on Internet Crimes Against Children, and STOP training grants and Sexual Assault and Domestic Violence Coalition grants from the Office on Violence Against Women. Competitive grant applications for other programs, including COPS, are being considered by staff and dozens of panels of peer reviewers. Nearly all of the grant funds should be awarded by the end of July 2009.

The Department also has worked to ensure that grants are being awarded within a framework of accountability and transparency and that the risk of waste, fraud, error, or abuse is mitigated. Representatives from the Department's grant making components, including OJP, OVW, and COPS, have attended specific grant fraud prevention and detection training. In addition, the grant making components have created new Recovery Act webpages that will allow the public to readily access Recovery Act information. These Recovery Act webpages include detailed information on each of the grant programs and links to applications, FAQs, and other relevant materials. In this way, the Department hopes to ease the application process for Recovery Act grants, so that this important funding can be distributed promptly and efficiently.

Health Care Fraud

As part of the administration's ongoing commitment to fiscal responsibility and accountability, the Department is working with the Department of Health and Human Services to combat the tens of billions of dollars that are lost every year to Medicare and Medicaid fraud. Those billions represent health care dollars that could be spent on services for Medicare and Medicaid beneficiaries, but instead are wasted on fraud and

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abuse. This is unacceptable. Our agencies have been partners for more than a decade in efforts to combat health care fraud. Since 1997, when Congress established the Health Care Fraud and Abuse Control program, our Departments have returned more than $14.3 billion to the federal government. Over $12 billion of that amount went back to the Medicare Trust Fund.

Our Civil Division, working with our United States Attorneys throughout the nation, has effectively used the False Claims Act to return these billions of dollars to the government. Last year alone, we recovered over $1.12 billion in health care fraud matters, as we noted last November (http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html), and in only the first months of this fiscal year we already have nearly matched that amount, with more recoveries in the pipeline.

Tough civil and criminal penalties and preventative strategies are strong deterrents top those who contemplate committing fraud against government health care programs. That is why last month, I joined with the Secretary of Health and Human Services, Kathleen Sebelius, to launch a new effort to combat fraud that will have increased tools and resources, and a sustained focus by senior leadership in both agencies. The Health Care Fraud Prevention & Enforcement Action Team (or HEAT) is a team of key leaders at the highest levels of DOJ and HHS that will maximize our effectiveness through enhanced coordination, intelligence sharing and training among our investigators, agents, prosecutors, civil fraud attorneys, and program administrators. As a top priority, this team will examine how we can better share real-time intelligence data on health care fraud patterns and practices. The team will also ensure that critical, up-to-date information about health care services, pharmaceuticals, and medical devices is readily exchanged between HHS and DOJ, increasing the efficiency and prompt resolution of complex health care fraud cases. It will also strive to implement improved technology and training that will provide our analysts and agents with the best tools to effectively prevent fraud and abuse.

DOJ-HHS coordination has already demonstrated success in the Medicare Fraud Strike Forces we have deployed in key cities and regions throughout the country. The two departments launched the first strike force in Southern Florida in 2007, and prosecutors there have filed 87 indictments charging 159 defendants with fraud offenses. Last year, the strike force expanded to Los Angeles, and now we have expanded the strike force to Houston, Detroit, and other areas of concentrated Medicare fraud. I believe a targeted civil and criminal enforcement strategy in those locations will have a substantial impact on deterring fraud and abuse, protecting patients and the elderly from scams, and ensuring that taxpayer funds are not stolen.

We recognize that health care fraud has a debilitating impact on our most vulnerable citizens – the elderly and those in long-term care facilities. Our Elder Justice and Nursing Home Initiative coordinates the activities of our attorneys and agents throughout the country to better understand and address the abuse, neglect and financial exploitation of these victims, and to bring to bear the full weight of my Department to ensure that these types of crimes are prevented and/or prosecuted. We also look forward

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to working with Congress to identify and pursue legislative and regulatory reforms that are needed to prevent, deter, and prosecute health care fraud, such as additional preventative authorities, appropriate payment policies, and increased sanctions and penalties.

Nominations

I appreciate that this committee has done a fine job in recommending the confirmation of many senior officials in the Department of Justice. There are other pending nominations for these positions, and I encourage you to confirm them as quickly as possible so that the Department can fully perform its mission on behalf of the American people.

And, of course, I am very pleased that President Obama has nominated Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit to be an Associate Justice of the Supreme Court of the United States. Judge Sotomayor has established a very impressive record as a judge over the past 17 years, and has more federal judicial experience than any Supreme Court nominee in at least a century. Her personal story – which took her from a public housing project in the Bronx to success in some of our nation's finest educational institutions and then to jobs as a prosecutor, attorney in private practice, and on the bench -- is truly inspirational. I express thanks to the Committee for scheduling hearing on her nomination in July, so that she can be confirmed by the full Senate before August and take her seat in time for the next session of the Court in October.

Additionally, the Department is continuing to work with the White House to identify high quality individuals for positions as federal judges, United States Attorneys, and United States Marshals.

Conclusion

Chairman Leahy, Ranking Member Sessions, and Members of the Committee, I want to thank you for this opportunity to address my priorities for the Department. I am pleased to answer any questions you might have.

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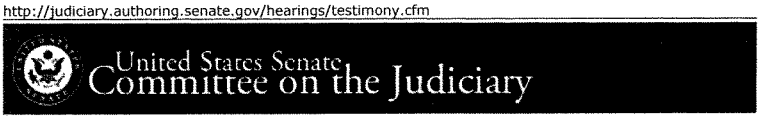

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
June 17, 2009

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee

Hearing on "Department of Justice Oversight"

June 17, 2009

I welcome Attorney General Holder back to the Senate Judiciary Committee, as we continue our oversight of the Justice Department. I commend the Attorney General and his team for their hard work and commitment to the difficult task of once again making the Department of Justice an agency worthy of its name.

In the last administration, political manipulation of the Department of Justice, and particularly its crucial law enforcement and civil rights functions, struck a devastating blow to the credibility of federal law enforcement, and undermined the public's trust in the integrity of our system of justice. Much of the job of restoring this trust has fallen to Attorney General Holder. He has made an impressive start, having made difficult decisions in high profile cases.

He has recommitted the Department to aggressive investigation and prosecution of mortgage and financial fraud. I have confidence he will implement the Fraud Enforcement and Recovery Act, which was signed into law earlier this year. The Attorney General also recognized the need to include Federal assistance to state and local law enforcement in the Economic Recovery Act and is now working hard to get needed resources out to our states, cities, and towns to help keep our communities safe and strengthen economic recovery.

It is my hope that the Justice Department will work with this Committee on such important issues as the state secrets privilege, shielding members of the press from being forced to reveal their sources, passing hate crimes legislation, and effectively cracking down on health care fraud. In addition, our subcommittees are hard at work on a wide range of important issues from comprehensive immigration reform to the PATRIOT Act.

I have been troubled to see the continuation of the Bush administration's practice of asserting the state secrets privilege to try to shut down lawsuits. I believe that accountability is important and that access to the courts for those alleging wrongdoing by the Government is crucial. I support making use of the many procedures available to the courts to protect national security, rather than completely shutting down important cases without true judicial review. I hope the Attorney General will work with me to reach a mutually acceptable solution to this unacceptable situation.

An issue on which I believe that Attorney General Holder has shown great courage in the face of political pressure is his commitment to the process of safely and effectively closing the detention facility at Guantanamo Bay. This step will end a disgraceful period in our history, and help to restore our commitment to the rule of law and our reputation in the world.

I believe strongly that we can ensure our safety and security, and bring our enemies to justice, in ways that are consistent with our laws and values. When we have strayed from that approach – when we have

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tortured people in our custody, sent people to other countries to be tortured, held people for years without even giving them the chance to go to court to argue that they were being held in error – we have hurt our national security immeasurably. Our allies have been less willing to help our counter-terrorism efforts, which has made our military men and women more vulnerable and our country less safe. Our enemies have been able to enlist new recruits. In addition, we had lost our ability to respond with moral authority if others should mistreat American soldiers or civilians.

Changing our interrogation policies to ban torture was an essential first step. By shutting the Guantanamo facility down and restoring tough but fair procedures we can restore our image around the world, which we must do if we hope to have a truly strong national security policy.

Recent debate has focused on keeping all Guantanamo detainees out of the United States. In this debate, political rhetoric has drowned out reason and reality. Our criminal justice system handles extremely dangerous criminals, and more than a few terrorists, and it does so safely and effectively. We try very dangerous people in our courts and hold very dangerous people in our jails and prisons in Vermont and throughout the country.

We have tried terrorists of all stripes in our Federal court system – from Oklahoma City bomber Timothy McVeigh to Sheikh Omar Abdel-Rahman and others who planned the 1993 World Trade Center bombing to Zacarias Moussaoui. Now Ahmed Ghailani faces trial in New York for the African embassy bombings. We have held these people in our Federal prisons. We have the best justice system and the best corrections system in the world. We handle the toughest people every day in ways that keep the American people safe and secure, and I have absolute confidence that we can do it for even the most dangerous terrorism suspects. As Senator Graham, an experienced military prosecutor himself, said recently: "The idea that we cannot find a place to securely house 250-plus detainees within the United States is not rational."

I credit the Attorney General for the major strides the Government has made recently. A first detainee was brought to the United States to stand trial, and more will follow. This is the right path. It will lead to justice and accountability of the kind we have not seen in recent years. It will be transparent and will show the world the power of our justice system. It will be handled with our national security in mind, and it will make us safer.

Key questions remain. "Prolonged detention" and military commissions, both of which are being discussed by the administration, carry with them the risk of abuse. I expect Attorney General Holder and President Obama to face these issues with the same commitment to our constitution, our laws, and our values, and the same dedication to our security that they have shown so far. I trust they will work with us to find the right solutions to these problems.

Another area where we must rapidly come together to act is the sadly resurgent problem of hate crimes. Last week's tragic events at the Holocaust Museum, together with other recent incidents, have made all too clear that violence motivated by bias and by hatred remains a serious problem with tragic real world consequences. Senator Kennedy and I, together with a strong bipartisan group of cosponsors across the political spectrum, have once again introduced a bill that will take substantial and important steps to strengthen our enforcement of hate-based violence. It was crafted with due regard for the First Amendment so that only those who engage in brutal acts of violence will be culpable. This important bill has been stalled for too long. With the strong support of the Attorney General and the President, the time to act is now.

The Department has also made important steps toward ensuring a more open and transparent Government, including implementing a much improved Freedom of Information Act policy. I hope this new direction will continue.

This hearing can be an important step toward the Attorney General and the Department working more closely with this Committee to put into place the kinds of laws and policies needed to make the Justice Department, and the country, stronger, safer, and more just.

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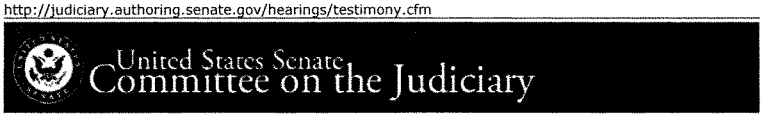

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Statement of

The Honorable Jeff Sessions

United States Senator
Alabama
June 17, 2009

"Attorney General Holder, I'm glad that you are here today to address the Committee as we fulfill our role of oversight of the Department of Justice. The Department of Justice plays a critical role in protecting the rule of law and preserving national security. And it must do so free from political pressures.

"Mr. Holder, I publicly supported your nomination to be Attorney General. In fact, I was in the minority of my own political party. But I did so because I believed that your previous experience within the Department would serve to elevate the Department and its mission above politics and bad policy, and on your promises during the confirmation process.

"So it is difficult for me to tell you this: I'm disappointed.

"During your confirmation hearings, you promised to adhere to the Constitution and to put the rule of law over political considerations. You said you had learned from the past and that you would not return to a pre-9/11 criminal mindset in protecting the American people from terrorist attack. You told Senator Lindsey Graham that you agreed with him that "every person who commits to going to war against America, or any other peaceful nation, should be held off the battlefield as long as they're dangerous." I do not believe your actions have matched your promises.

"Since your confirmation, you have done many of the things you pledged not to do during your hearing. Time and again I find myself reading about how political appointees – including you – have overruled career department attorneys to appease some far left group.

"One such instance came when you rejected the Office of Legal Counsel on its legal conclusion that Congress's recent legislation on D.C. voting was unconstitutional. During your confirmation hearing, you emphasized that your review of OLC opinions would not be a political process. So when OLC prepared an opinion for you that said that Congress's legislation was unconstitutional – I would expect you to listen to their reasoned, legal opinions. You did not. Instead, you ignored them and sought a second opinion from the Solicitor General's office – an office that is not tasked with giving that kind of legal advice.

"You again allowed left wing political pressure to override common sense when you allowed DOJ to release OLC legal opinions regarding interrogation, even though high-profile members of the intelligence community warned you it would be unwise to do so. Former Attorney General Michael Mukasey and CIA Director Michael Hayden wrote a joint Wall Street Journal op-ed stating the release of the memos would be "unnecessary as a legal matter" and "unsound as a matter of policy." They predicted that the effect of the memos' release "will be to invite the kind of institutional timidity and fear of recrimination that weakened intelligence gathering in the past, and that we came sorely to regret on Sept. 11, 2001." The lawful and wise thing to do would have been to keep our secrets secret. Yet you did not. Instead, you have now given a crucial piece of information to our enemies.

"Just in the last three weeks, I received word again that you had put politics above the rule of law. On May 29, The Washington Times reported that DOJ voluntarily dismissed a case against three Black Panther Party members for voter intimidation outside a polling place in Pennsylvania. In that case, three Black Panthers wore military-style uniforms, were armed with a nightstick, and used racial slurs to scare would-be voters at

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the polling location. Bartle Bull, a longtime civil rights activist, called the conduct "an outrageous affront to American democracy and the rights of voters to participate in an election without fear." DOJ had been working on the case for months and had already secured a default judgment on April 20, 2009.

"Inexplicably, according to the Washington Times, Justice Department political appointees overruled career attorneys and ended the civil complaint, dismissing two of the men from the lawsuit with no penalty and winning an order against the third man that simply prohibits him from bringing a weapon to a polling place in future elections – something that is already prohibited. Instead of supporting the career attorneys who fought to protect the civil rights of voters in Pennsylvania, DOJ political appointees wiped out their good work. This flies in the face of your statement at your confirmation hearing about career attorneys at DOJ that you would "listen to them, respect them, and make them proud of the vital goals we will pursue together." It also defies your statement during your confirmation hearing that "[t]he Justice Department must also defend the civil rights of every American

"Another concern that this Committee raised with you during your confirmation hearing was whether you would operate under pre-9/11, criminal law mindset when fighting terrorists. You assured the Committee that you learned from the past, and that you would do your best to aggressively continue the War on Terror. In fact, you listed as your first priority for Attorney General that you would "work to strengthen the activities of the federal government and protect the American people from terrorism."

"Yet, instead of taking the lead in protecting the American people, you have enacted poor policies and stayed silent on important issues.

"One primary example of this pre-9/11 mindset is a recent report that the Obama Administration is requiring that enemy combatants in Afghanistan be given Miranda warnings. Last week, Michigan Congressman Mike Rogers revealed the Obama administration has begun administering Miranda rights to enemy combatants detained in Afghanistan.

"Just this March, in a "60 Minutes" interview, the President mocked giving Miranda warnings to enemy combatants. He said, "[n]ow, do these folks deserve Miranda warnings? Do they deserve to be treated like a shoplifter down the block? Of course not." What has changed in three months?

"The administration's new Miranda approach to battlefield detainees will invariably hamper intelligence gathering in the War on Terror, even if the new approach is a well-intended safeguard to preserve the option of federal court criminal prosecution. Under the Obama "Global Justice Initiative" approach, even captured high-level al Qaeda operatives may be advised that they may remain silent and seek counsel. According to Congressman Rogers, this has already begun to have an adverse effect. The International Red Cross has begun advising detainees "Take the option. You want a lawyer." The Weekly Standard reported "in at least one instance, a high-level detainee has taken that advice and requested a lawyer."

"Likewise, the American people remain in limbo as they have waited for your word on whether detainees held at Guantanamo would be transferred into the United States. The solutions that you have suggested have been dangerous. In March, you said that some of the detainees could be released into the United States. A few days later, Director of National Intelligence Dennis Blair expanded on your statement to say that released detainees would receive "some sort of public assistance for them to start a new life." The American people deserve to know what your plan is – and to have that plan be consistent with our legitimate national security concerns.

"You have failed to weigh in on sensitive -- I would say dangerous – legislation such as State Secrets and Media Shield law. And you have also stood silent on bills that must be passed this year, such as the reauthorization of the Patriot Act. You must take the lead on this. Instead of damaging rhetoric – like calling America a "nation of cowards," or promising assistance in foreign investigations of Bush officials, you should work to promote legislation to protect our Nation against attack.

"So Mr. Holder, I am disappointed and I am worried. I am worried because these are all serious matters. When OLC attorneys told you something was unconstitutional, you overruled them. When security officials came to you and said that we should keep our interrogation methods confidential, you said "no." When the civil rights of Americans were trampled on by members of the Black Panthers, you let the offenders get away. And as the American people look to you to lead in the war against terrorism, you have remained largely silent. You've even granted the release of dangerous detainees, including Jose Padilla's alleged accomplice and another detainee who reportedly killed an American diplomat.

"There are several decisions that you've made that are to be commended.

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"Your department has defended our Nation's secrets at least three times in the federal courts by invoking the state secrets privilege. In standing up for our Nation's secrets, you have faced a lot of criticism from the left – including from your own party – so I commend your actions.

"Second, I am encouraged that you listened to members of Congress and members of the intelligence community to oppose the release of interrogation photos. The release of these photos is not necessary, and it will place American soldiers at greater risk.

"And even though I am disappointed by your long delay in answering my questions about the Uighurs, I am encouraged by your decision not to release Uighurs into the United States, despite earlier comments that you would do so.

"As I said at the time of your confirmation, I respect you, I support you, and I want you to succeed as Attorney General. And I want to do everything I can to help you do your job well. But many of your actions and decisions have left me baffled. You are the Nation's chief law enforcement officer, and you have a duty to protect us with every lawful authority.

"I hope to use this hearing to examine some of your decisions, to allow you a chance to defend and explain them, and to look forward and to gain some insight into your future plans for the Department of Justice."

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