

**COMMERCE, JUSTICE, SCIENCE, AND RE-  
LATED AGENCIES APPROPRIATIONS FOR  
FISCAL YEAR 2014**

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**THURSDAY, JUNE 6, 2013**

U.S. SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,  
*Washington, DC.*

The subcommittee met at 11:15 a.m., in room SD-138, Dirksen Senate Office Building, Hon. Barbara A. Mikulski (chairwoman) presiding.

Present: Senators Mikulski, Feinstein, Shelby, Collins, Murkowski, Graham, and Kirk.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

**STATEMENT OF HON. ERIC H. HOLDER, JR., ATTORNEY GENERAL**

OPENING STATEMENT OF SENATOR BARBARA A. MIKULSKI

Chairwoman MIKULSKI. The Commerce, Justice, Science subcommittee will now come to order.

Today, we take the testimony of the Attorney General of the United States. The subcommittee wishes to welcome the Attorney General, and we know he will be testifying on, the Department of Justice's (DOJ) budget, its priorities for fiscal year 2014, and also the impact of the sequester this year and next year in terms of the impact on the DOJ, its mission because of the impact on its employees.

Later, we will also be listening to the DOJ Inspector General, Michael Horowitz, testifying for the first time about oversight in terms of management issues. We are doing this at every one of our hearings listening to the Cabinet. We invited the Inspector General to come so that we have a better sense of how this committee not only spends money, but how we can be a more frugal, more efficient Government, and to get value for our dollar.

Today, we will discuss how the Justice Department's fiscal year 2014 budget strengthens national security and counterterrorism, protects the safety and security of the rights of citizens, and how the Department ensures it uses taxpayer's money wisely.

DOJ enforces and defends the interests of the United States, public safety against threats foreign and domestic, seeks punishment of the guilty while providing leadership in preventing and controlling crimes, and ensures fair and impartial administration of

the justice of all Americans. That is a lot, and we ask a lot of the Department of Justice, employing more than 115,000 people; 26,000 of them are Federal agents: the FBI, DEA, our U.S. Marshals, ATF. We have over roughly 20,000 prison guards and nearly 10,000 prosecutors, investigators, and legal experts. We get a lot, too, for what we have asked them to do.

The U.S. Marshals have arrested over 12,000 fugitive sex offenders; 12,000 sexual predators were taken off the streets because of the aggressive work of our marshals. The DEA put 3,000 drug trafficking organizations, not people, out of business. And the FBI dismantled 409 criminal enterprises. The U.S. Attorneys collected \$13 billion in criminal and civil penalties, going again, after the bad guys. They are the guardians of our justice system, and we want to make sure that we let them know we value them.

So Mr. Attorney General, when we get ready to turn to you, we want all those people who work at the Department of Justice administering justice, protecting America and its Constitution, we want to say thank you.

We ask a lot of the DOJ, and as we look at this year's budget, we know that the DOJ got a request from the President of \$27.6 billion. We also know that in fiscal year 2013, we enacted \$26.8 billion, but then you faced the sequester, which took the entire funding down by almost \$1.5 billion to \$25.3 billion. Those are numbers, but wow, they must have had just a tremendous impact, and we are going to look forward to hearing about that impact.

For us, we look for community security, national security, oversight, and accountability. We know that for your highlights, we know that there have been limited, but targeted entry increases in gun violence, requesting \$1.4 billion, \$379 million more than the fiscal year 2013 request, to keep our home, schools, and communities safe.

I like the fact that we want to help States improve the quality of criminal records and also mental health records, to allow schools to hire school safety personnel, and train local police on how to respond to these threatening incidents.

While we are looking out, though, the threat that I consider the new enduring war is the threat to cybersecurity. In the last month, DOJ has charged cyber criminals in a \$45 million ATM heist. Why rob a bank, when you can do an ATM heist?

There is a growing nexus between organized crime and nation-states. Our Nation is facing, what Leon Panetta called, a digital Pearl Harbor. We know that the Justice Department is requesting \$668 million for FBI agents, computer scientists, Federal prosecutors on the issue of cybersecurity, and we look forward to working with you on that.

There are many issues facing the budget. One of the biggest stresses on the budget is Federal prisons. The Bureau of Prisons' request is close to \$7 billion. We have added 3,200 new inmates for a total of 224,000 people in our Federal prisons. That is a stunning number and it requires a lot of protection. We are concerned about keeping the bad guys off the street. We need to deal with the prison situation and also look out for the safety of our prison guards.

We want to strengthen national security and we will be talking about that as we move along. But we also know that for State and

local law enforcement, this is an area of great concern because we know the way that the Department of Justice, the FBI through joint task forces, and our U.S. attorneys work: it is through State and local. There is a request of \$2.3 billion for grants to be able to support the investments in that effort. We look forward to hearing more about that.

We also look forward to hearing from you in terms of how we can achieve those savings and be a more, as I said, we want to have a safer country. We need to have a smarter Government in terms of how we use our resources. And yet, at the same time, we want to protect all American people.

I would like to turn now to Senator Shelby.

STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. Thank you, Madam Chairman.

Welcome, Mr. Attorney General.

Today, we will hear from the Attorney General of the United States, Attorney General Holder, about the Department of Justice and his fiscal year 2014 budget request. We will also hear from the Inspector General, Michael Horowitz, who has taken a very active oversight role within the Department, as he should.

First, I want to take a moment to recognize the men and women, Mr. Attorney General, of the DOJ who protect this country from crime and terrorism. They work hard to keep us safe in this country, and for that, I think we all owe them a debt of gratitude.

The fiscal year 2014 budget request for the Department of Justice totals \$28 billion, a 3.9-percent increase over the fiscal year 2013 enacted level. That increase, however, comes largely in the form of funding for new gun control measures while the majority of law enforcement accounts basically remain flat.

The budget also proposes a number of gimmicks to find additional so-called savings within the Department. I believe this approach is misguided, Mr. Attorney General, and look forward to working with Chairwoman Mikulski to put the Department's budget on the right track in the fiscal year 2014 process.

The budget also proposes to remove language that prohibits the transfer of GTMO detainees to U.S. soil. This provision received broad bipartisan support last year and I am troubled by the administration's recommendation that it be removed. Their proposal is particularly disconcerting in light of the President's renewed declaration on May 23 to close Guantanamo Bay.

Aside from his broad declarations regarding the closure of GTMO, the President has made no specific proposal for dealing with the current detainees. The President has not even attempted to remove those detainees, his own administration has determined, who can be returned to their home country.

The budget proposal, however, leads me to believe that the President is planning to move the GTMO detainees here to the United States. Why else would the budget delete the transfer language? Either this is a real proposal or it is a political posturing. In my view, political posturing is unnecessary and, frankly, detrimental to any real discussion about terrorist detainees.

I am also adamantly opposed to moving any terrorist detainees to the United States, and I believe many of my colleagues would

agree with me. Such a move would necessarily place Americans in harm's way. These are dangerous individuals and they need to be isolated. GTMO, as we all know, provides that isolation.

Madam Chairwoman, I would be remiss if I did not mention the controversy that has engulfed the Department and the Attorney General in recent weeks. These issues have overwhelmed the Department and cast a shadow of doubt upon the Attorney General.

The Attorney General, as we all know, is the chief law enforcement officer of the Federal Government, and as the head of the Department of Justice, it is his responsibility to ensure that the laws are enforced and the interests of the United States are defended.

The controversy that has embroiled the Department has called into question its ability, I believe, to fairly administer law and justice. Further, the questionable actions of the Attorney General, I believe, have tarnished the integrity, impartiality, and efficacy of the position of attorney general.

I believe it is the responsibility of this committee, Madam Chairman, to provide the resources necessary to ensure that the DOJ can efficiently and effectively enforce the laws, protect our citizens, and administer justice.

Similarly, it is the responsibility of the Department of Justice, headed by the attorney general, to ensure that it carries out its duties. That it is responsible and responsive to the citizens of the United States, and that it operates with, and it tolerates, no less than the highest degree of honesty and integrity.

Unfortunately, I believe that until these issues are resolved, and the controversy surrounding the Justice Department and the Attorney General's Office is laid to rest, a hue of distrust will hover over the DOJ.

#### PREPARED STATEMENT

Mr. Attorney General, it is my hope that you will move swiftly to address these issues that have been raised, not just by me but by others, to put this controversy to rest in a full and open manner so that the Department, which is so important, can get back to focusing on the issues central to its mission.

[The statement follows:]

#### PREPARED STATEMENT OF SENATOR RICHARD C. SHELBY

Thank you Madam Chair.

Today we will hear from Attorney General Holder about the Department of Justice and its fiscal year 2014 budget request. We will also hear from the Inspector General, Michael Horowitz, who has taken a very active oversight role within the Department.

First, I want to take a moment to recognize the men and women of the Department of Justice who protect this country from crime and terrorism. They work hard to keep us safe and for that we owe them a debt of gratitude.

The 2014 budget request for the Department of Justice totals \$28.1 billion; a 3.9 percent increase over the fiscal year 2013 enacted level. That increase however, comes largely in the form of funding for new gun control measures while the majority of law enforcement accounts remain flat.

The budget also proposes a number of gimmicks to find additional, so called savings, within the Department. I believe this approach is misguided and look forward to working with the Chair to put the Department's budget on the right track in 2014.

The budget also proposes to remove language that prohibits the transfer of GITMO detainees to U.S. soil. This provision received broad bipartisan support last year and I am troubled by the administration's recommendation that it be removed.

The proposal is particularly disconcerting in light of the President's renewed declaration on May 23 to close GITMO.

Aside from his broad declarations regarding the closure of GITMO, the President has made no specific proposal for dealing with the current detainees. The President has not even attempted to remove those detainees his own administration has determined can be returned to their home country.

The budget proposal however, leads me to believe that the President is planning to move GITMO detainees here, to the United States. Why else would the budget delete the transfer language?

Either this is a real proposal or it is political posturing. In my view, political posturing is unnecessary and frankly, detrimental to any real discussion about terrorist detainees.

I am adamantly opposed to moving any terrorist detainees to the United States and I believe many of my colleagues agree with me. Such a move would unnecessarily place Americans in harm's way. These are dangerous individuals and they need to be isolated. GITMO provides that isolation.

Madam Chair, I would be remiss if I did not mention the controversy that has engulfed the Department and the Attorney General in recent weeks. These issues have overwhelmed the Department and cast a shadow of doubt upon the Attorney General.

The Attorney General is the chief law enforcement officer of the Federal Government and as the head of the Department of Justice, it is his responsibility to ensure that laws are enforced and the interests of the United States are defended. The controversy that has embroiled the Department has called into question its ability to fairly administer the law and justice. Further, the questionable actions of this Attorney General have tarnished the integrity, impartiality and efficacy of the position.

It is the responsibility of this Committee to provide the resources necessary to ensure that the Department of Justice can efficiently and effectively enforce the laws, protect our citizens, and administer justice. Similarly, it is the responsibility of the Department to ensure that it carries out its duties; that it is responsible and responsive to the citizens of the United States; and that it operates with and tolerates no less than the highest degree of honesty and integrity. Unfortunately, I believe that until these issues are resolved and the controversy laid to rest, a hue of distrust will hover over the Department of Justice.

Mr. Attorney General, it is my hope that you will move swiftly to address these issues—to put this controversy to rest in a full and open manner so that the Department can get back to focusing on the issues central to its mission.

Madam Chair, thank you for the time and I look forward to hearing more from the Attorney General and from the Inspector General.

Senator SHELBY. Thank you, Madam Chair.  
Chairwoman MIKULSKI. Mr. Attorney General.

#### SUMMARY STATEMENT OF HON. ERIC H. HOLDER, JR.

Attorney General HOLDER. Good morning Chairwoman Mikulski, Ranking Member Shelby, other distinguished members of the subcommittee.

I appreciate this opportunity to appear before you today to discuss the President's fiscal year 2014 budget for the Department of Justice, and to provide an overview of the Department's recent achievements and important ongoing work.

Thanks to my dedicated colleagues, the nearly 116,000 employees serving in offices around the world, in recent years, the Department has made really tremendous progress in protecting the safety and the sacred rights of the American people, and nowhere is this clearer than in our work with regard to ensuring America's national security.

Since 2009, we have brought cases, secured convictions, and obtained appropriately robust sentences against scores of dangerous people on terrorism-related offenses by relying on our tried and tested Federal Article III civilian court system. We have identified, investigated, and disrupted numerous potential plots by foreign

terrorist organizations, as well as by homegrown terrorists. Moving forward, we will continue to remain vigilant, to adapt to emerging threats, and to take these comprehensive efforts to a new level.

To this end, the President's budget requests over \$4 billion for vital national security programs and to respond to events like the horrific terrorist attacks on the Boston Marathon. As we continue to investigate this matter, I want to assure you, and the American people, that my colleagues and I are determined to hold accountable, to the fullest extent of the law, those who bore responsibility for this heinous act, and all who threaten our people or who attempt to terrorize our cities.

While the DOJ must not waver in its determination to protect our national security, we must be just as vigilant in our defense of the sacred rights and freedoms that we are equally obligated to protect, including the freedom of the press.

In order to ensure the appropriate balance in these efforts, and at the President's direction, I have launched a review of existing Justice Department guidelines governing investigations that involve reporters. Last week, I convened the first in a series of meetings with representatives of news organizations, Government agencies, and other groups to discuss the need to strike this important balance to ensure robust First Amendment protections and to foster a constructive dialogue.

Now, I appreciate the opportunity to engage members of the media and national security professionals in this effort to improve our guidelines, policies, and processes and to renew the important conversation that really is as old as the Republic itself about how to balance our security with our dearest civil liberties.

As part of that conversation, let me make at least two things clear. First, the Department's goal in investigating leaked cases is to identify and to prosecute Government officials who jeopardize national security by violating their oaths, not to target members of the press or to discourage them from carrying out their vital work.

Second, the Department has not prosecuted, and as long as I have the privilege of serving as Attorney General of the United States, will not prosecute any reporter for doing his or her job.

With these guiding principles in mind, we are updating our internal guidelines to ensure that in every case, the Department's actions are clear and consistent with our most sacred values. To the extent that there is a problem, and I just want to make clear that I think that it is with our guidelines and with our regulations—and not with the people of the Justice Department who have been involved in these matters.

Now, this conversation is not static and it seldom results in easy consensus. It is often difficult, and it is often emotionally charged. It requires all parties to approach these delicate issues in good faith so that today's Government leaders, journalists, and concerned citizens from all walks of life can come together as our predecessors have done to secure our freedoms, to ensure the safety of our citizens, and to update and refine key protections in a way that is commensurate with the challenges and the technologies of a new century, and consistent with our most treasured values.

In addition to this critical work, my colleagues and I remain committed to working with Members of Congress to secure the passage

of common sense measures for preventing and reducing gun violence. The President's budget request provides \$395 million to support these efforts and to allow us to keep our promise to the families and communities of those senselessly murdered at Sandy Hook Elementary School and in countless other acts of gun violence throughout the Nation.

We will also continue to advocate for comprehensive immigration reform and strive to improve our broken immigration system in a way that is fair and guarantees that all are playing by the same rules. It requires responsibility from everyone, including those who are here in an undocumented status and employers who would attempt to hire or exploit them. I am encouraged that these basic principles are reflected in proposals that are currently under consideration by the Senate, and I look forward to working with leaders of both chambers of the Congress to strengthen, pass, and implement responsible reform legislation.

In the meantime, the Justice Department will continue to move aggressively and appropriately to enforce existing immigration laws to safeguard the most vulnerable members of our society, to ensure the fairness and integrity of our financial markets, to protect the environment, and to invest in strategies for becoming both smarter and tougher on crime.

I think that we can be proud of the progress that the Department has made in each of these areas in recent years, and I am encouraged to note that the President's budget request includes the resources that we will need to continue this important work, including an additional \$25 million for the Executive Office for Immigration Review to augment staffing and to improve the efficiency of our immigration courts; \$2.3 billion for State, local, and tribal assistance programs with a focus on funding evidenced-based programs; increase of \$55 million to combat financial and mortgage fraud; an additional \$93 million to address cybersecurity needs; and an increase of \$7 million to expand on the historic achievements of the Civil Rights Division in addressing bias, intimidation, and discrimination.

I must note that our ability to continue this progress has been negatively impacted by sequestration, which cut more than \$1.6 billion from the Department's budget for the current fiscal year. Earlier this year, with the help of this subcommittee, I provided \$150 million to the Bureau of Prisons to mitigate the effects of these untenable reductions and to avoid furloughing more than 3,500 correctional staff each day from Federal prisons around the country.

In April, again with your support, and using similar authority, I provided necessary funding to the FBI, the U.S. Marshal Service, the ATF, and to U.S. Attorneys and other components to prevent furloughs and to maintain adequate operations. I really want to thank the subcommittee for your full and immediate support of these actions. It could not have occurred without your assistance.

But I must stress that these and similar solutions will no longer be available to alleviate fiscal year 2014 shortfalls due to joint committee reductions should they be allowed to persist. I am eager to work with this subcommittee and with the entire Congress to prevent this from occurring, and to secure the timely passage of the

President's budget request, which provides a total of \$27.6 billion for the Justice Department. That level of support will be essential in ensuring that my colleagues and I have the resources that we need to fulfill our critical missions.

PREPARED STATEMENT

So I want to thank you again for the chance to discuss this work with you today. And I would be more than glad to answer any questions that you might have. Thank you.

[The statement follows:]

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

Good morning, Chairwoman Mikulski, Ranking Member Shelby, and members of the subcommittee. Thank you for the opportunity to appear before you today to highlight the President's fiscal year 2014 budget for the U.S. Department of Justice (DOJ)—and to discuss the Department's recent achievements and future priorities. I would also like to thank you for your support of the fiscal year 2013 supplemental Disaster Relief Act and the fiscal year 2013 Consolidation and Continuation Appropriations Act, which provide important resources for our law enforcement, correctional, and litigation operations.

As you are aware, automatic spending reductions—known as sequestration—recently cut more than \$1.6 billion from the Department's budget, leaving very little flexibility in how the cuts are applied. Sequestration is having a significant impact on the Department's operations—affecting not only employees, but our ability to ensure the administration of justice in communities across the Nation. As a result, we have carefully and thoughtfully reviewed our spending levels and redoubled ongoing efforts to reduce expenses throughout the Department. Spending restrictions have been identified and established in the areas of hiring, contracts, travel, training, conferences, non-law enforcement employee overtime, and monetary awards.

While I recognize the need to take action to absorb these deep cuts, our actions must not threaten the critical operations of the Department that are necessary to protect life and safety. In March, using my limited authorities to transfer and allocate existing funds from within the Department, I provided \$150 million to the Bureau of Prisons (BOP) to avoid furloughing correctional workers at our prison institutions. Without this intervention, we would have been forced to furlough 3,570 staff each day from the Federal prisons around the country. The loss of these correctional officers and other staff who supervise the 175,000 prisoners at 119 institutions would have created serious threats to the safety and security of our staff, inmates, and the public. In April, using similar authorities, I provided necessary funding to the Federal Bureau of Investigation (FBI), United States Marshals Service (USMS), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), United States Attorneys (USA), and other DOJ components to mitigate furloughs and maintain adequate staffing resources in order to fulfill the Department's missions. Chairwoman Mikulski, Ranking Member Shelby, and members of the subcommittee, thank you for your full and immediate support of our actions to provide relief to the Department.

However, I must note that I remain concerned about our ability to keep DOJ employees on the job to respond to emergencies and safeguard the American people in the days ahead. The solutions that we used to alleviate sequestration cuts in fiscal year 2013 will no longer be available to mitigate fiscal year 2014 funding shortfalls.

This could threaten programs that affect the safety of Americans across the country, and undermine the remarkable work that the Department's nearly 116,000 dedicated employees have made possible over the last 4 years. Today, I affirm the Department's commitment to continue building on this work—to protect the Nation from terrorism and other national security threats, combat violent crime, eradicate financial fraud, and safeguard the most vulnerable members of society. While fulfilling this commitment, I will continue to explore innovative techniques to carry out our missions more efficiently—and to make targeted investments to protect the safety and security of the American people, our critical national infrastructure, and global financial markets.

The President's fiscal year 2014 budget request for the Department is \$27.6 billion. The request represents a 3 percent increase more than the fiscal year 2012 enacted level. More specifically, the President's fiscal year 2014 budget request:

- Provides increased funding for adjustments to existing Federal programs.*—The request provides \$566.7 million more than the fiscal year 2012 enactment to fund adjustments in key areas where there is little short-term flexibility, such as rent costs, foreign expenses, prison operations, and restoring cancellation of balances. The request also funds employee pay adjustments.
- Enhances critical counterterrorism and counterespionage programs intelligence gathering and surveillance capabilities.*—The request includes \$14 million in program increases for technological and human capital resources to detect, disrupt, and deter threats to our national security.
- Supports the administration's plans to reduce gun violence.*—The request invests \$395 million in Federal programs to help reduce gun violence. This includes \$100 million to double the existing capacity of the FBI's National Instant Criminal Background Check System (NICS), and \$73 million for additional Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigative and regulatory capabilities. It also includes improvements in ATF's tracing and ballistics systems. In addition, the request provides \$222 million for grant programs to assist States in making more records available in the NICS system, to improve school safety, to support officer safety programs—including a joint Office of Justice Programs (OJP)/FBI training for active shooter situations, to provide incentives for State and local governments to update NICS data with criminal history and mental health information, and to encourage the development of innovative gun safety technology.
- Enhances efforts to combat and keep pace with increasingly sophisticated and rapidly evolving cyber threats.*—The request provides \$92.6 million in program increases to improve the ability to share information in a timely and accurate manner, to develop forensic capabilities for a cloud architecture, to increase cyber collection and data analysis, to provide prompt victim notification and response, and to enhance the Department's cyber policy scope.
- Invests in law enforcement efforts targeting financial fraud.*—The request includes \$55 million more to improve the Department's capacity to investigate and prosecute a broad range financial fraud, including securities and commodities fraud, investment scams, and mortgage foreclosure schemes.
- Strengthens enforcement of immigration laws.*—The request invests \$25 million in additional personnel to process the increasing workload and improve the efficiency of our overall immigration enforcement efforts.
- Invests in Federal civil rights enforcement.*—The request provides \$9 million, of which \$1.5 million is included as part of the Department's financial fraud investments, to enhance the Department's enforcement of Federal civil rights laws, including human trafficking, hate crimes, police misconduct, fair housing, fair lending, disability rights, and voting rights.
- Supports Federal prisons and detention operations.*—The request invests \$236.2 million to continue to maintain secure, controlled Federal criminal detention and prison facilities and additional programming to reduce recidivism.
- Enhances State, local, and tribal law enforcement programs.*—The request invests \$2.3 billion, which is a net increase of \$201.3 million over the fiscal year 2012 level. The budget includes critical resources for police hiring, programs targeting violence against women, school safety, and general purpose criminal justice programs. The budget expands programs that have demonstrated success, including new programs that are structured on evidence-based principles, and programs to reduce gun violence.

As I testified during my first appropriations hearing 4 years ago, I will continue to pursue a very specific set of goals:

*First*, my colleagues and I will continue to bolster the activities of the Federal Government that protect the American people from terrorism and other threats to our way of life. We will use every lawful instrument to hold terrorists accountable for their actions and bring them to justice.

*Second*, we will continue to enhance the credibility of the Department while promoting equality, opportunity, and justice for all.

*Third*, we will continue to strengthen the traditional missions of the Department. In partnership with government, law enforcement, and industry leaders, we will enforce the law and defend the interests of both consumers and the United States.

In addressing these priorities, I am profoundly grateful for the contributions of Justice Department employees here in Washington and around the world—and I look forward to the continued support of this subcommittee and Congress, as a whole.

PROTECTING THE AMERICAN PEOPLE FROM TERRORISM AND OTHER NATIONAL SECURITY  
THREATS

The fiscal year 2014 budget includes a total of \$4.4 billion to maintain critical national security programs within the Department. National security threats are constantly evolving and adapting, often requiring additional resources to address new critical areas. Increasing global access to technological advancements can result in new vulnerabilities that the Department must be prepared to address. This request includes \$14 million in program increases that provide the technology and personnel needed to effectively identify, obstruct, and avert threats to our national security.

Preventing, disrupting, and defeating terrorist acts before they occur remains the Justice Department's highest priority. Since 2009, the Department has thwarted multiple terrorist plots against the United States. In 2012, the Department obtained a conviction against Naser Jason Abdo for his role in a plot to use explosives to attack soldiers from Fort Hood. He was sentenced to life in prison. We also secured a conviction—and a life sentence—in the case of Adis Medunjanin, for his role in a plan to carry out a suicide terrorist attack in New York City.

In addition, the Department has successfully executed ground-breaking counter-intelligence operations to safeguard sensitive U.S. military and strategic technologies and keep them from falling into the wrong hands. In 2012, Bryan Underwood, a former guard at a U.S. Consulate under construction in China, pleaded guilty in connection with his efforts to sell classified photographs and information about the U.S. Consulate to China. Working closely with our U.S. and international partners, we disrupted an international network conspiring to illegally export United States-origin materials to Iran for the construction of gas centrifuges used to enrich uranium. We also disrupted a Russian procurement network in the United States that was illegally exporting United States microelectronics to Russian military and intelligence agencies.

From terrorists seeking to sabotage critical infrastructure; to organized crime syndicates and cyber criminals attempting to defraud banks, corporations, and individuals; and other criminals searching for new ways to steal defense and intelligence secrets and intellectual property—our Nation's economy and security are under constant threat from domestic and foreign sources. In the past year, Michael Patrick Sallert pled guilty in connection with his role in an international cybercrime ring believed to have caused more than \$72 million in total losses to more than one million computer users through the sale of fraudulent computer security software known as "scareware." And we obtained a conviction against Shanshan Du and Yu Qin for conspiring to steal General Motors trade secrets with the intent to use them in a joint venture with an automotive competitor in China.

The Department continues to maintain and strengthen its own cybersecurity environment to counter cyber threats, including insider threats, and to ensure its personnel have unimpeded access to the IT systems, networks, and data necessary to fulfill their missions. In 2012, the FBI established Cyber Watch as its 24/7 operations center for cyber intrusion prevention and response operations.

COMBATING VIOLENCE AND OTHER CRIMES AGAINST THE AMERICAN PEOPLE

Gun violence has touched every State, county, city, and town in America. Especially in the wake of December's horrific events in Newtown, Connecticut, the need to address this problem has come into sharp focus. Since then, the Department has been working with the White House—and our colleagues across the administration—to develop and implement concrete, common-sense steps to combat the gun violence that devastates too many lives and communities every day.

The fiscal year 2014 budget provides funding and programs to reduce gun violence and prevent future tragedies. The Department of Justice seeks to invest \$395 million to strengthen the national background check system; enhance our investigative and regulatory resources; improve our tracing and ballistics systems; and assist law enforcement personnel in the dangerous work of protecting the American people from violence. The Department recognizes that gun violence is not just a Federal problem, and our partners at the State, local, and tribal levels stand on the front lines of the critical work to keep our people safe—and our cities, neighborhoods, and schools more secure.

In the past year, the Department has spearheaded a number of collaborative efforts between Federal law enforcement agencies and local police departments to combat violent crime in some of the most seriously afflicted neighborhoods across the country. As part of this initiative, the Department has enhanced its ability to re-target Federal resources to areas experiencing the highest levels of violence. For example, last summer in Philadelphia, the U.S. Attorney's Office for the Eastern District of Pennsylvania charged 92 defendants in 77 indictments; ATF made 84

Federal and 17 State arrests; USMS arrested more than 300 fugitives charged with violent crimes and crimes closely associated with violence; DEA made 258 arrests for drug related offenses; and the FBI made more than 140 arrests. As we've repeatedly seen, effectively combating violent crime demands that—with the help and leadership of our U.S. Attorneys' Offices, as well as the FBI, ATF, DEA, and USMS—we will continue to use every tool, resource, and authority to crack down on the gang-, gun-, and drug-fueled violence that menaces our streets and threatens our communities. Through intelligence-driven, threat-based prosecutions—we will focus on dismantling criminal organizations and putting them out of business for good. We will continue to measure the effectiveness of our endeavors in these crime-ridden areas to ensure that our efforts result in significant and lasting positive outcomes.

In addition to protecting our communities, the Department is working to safeguard our environment—and to hold accountable those responsible for the *Deepwater Horizon* disaster. In November 2012, BP Exploration and Production Inc. pleaded guilty to 11 counts of felony manslaughter, 1 count of felony obstruction of Congress, and violations of the Clean Water and Migratory Bird Treaty Acts for its conduct relating to the 2010 *Deepwater Horizon* disaster that killed 11 people and caused the largest environmental disaster in U.S. history. As part of its plea, BP agreed to pay a record \$4 billion in criminal fines and penalties. In addition, the two highest-ranking BP supervisors on the *Deepwater Horizon* oil rig were charged with 11 counts of manslaughter, and a former senior BP executive was charged with obstruction of Congress. In January 2013, Transocean Deepwater, which operated *Deepwater Horizon* oil rig, agreed to plead guilty to violating the Clean Water Act and to pay a total of \$1.4 billion in civil and criminal fines and penalties for its conduct in relation to this tragedy. Nearly 80 percent of these penalties will be distributed directly to the Gulf States as dictated by Congress under the RESTORE Act.

As we continue to investigate the explosion that led to the *Deepwater Horizon* oil spill, my colleagues and I are determined to hold accountable those who violated the law, pursue appropriate action to recover civil penalties under the Clean Water Act, and hold all parties liable for natural resource damages under the Oil Pollution Act.

#### ERADICATING FINANCIAL FRAUD

Beyond this work, the administration and the Department remain committed to combating financial and mortgage fraud that harms the financial security of the American people and threatens national economic stability. The President's budget request provides program increases totaling \$55 million to improve the Department's capacity to investigate and prosecute allegations of such conduct.

In the past year, the Department has launched numerous investigations into those engaged in financial fraud—and these efforts are yielding significant results. For instance, we secured a \$160 million penalty from Barclays Bank, PLC, to resolve allegations related to the role Barclays played in attempting to manipulate its submissions for the London Interbank Offered Rate (LIBOR), which is used as a benchmark interest rate in financial markets around the world. We also obtained convictions against three former UBS AG executives—Peter Ghavami, Gary Heinz and Michael Welty—for their participation in frauds related to bidding for contracts for the investment of municipal bond proceeds and other municipal finance contracts.

In connection with its ongoing investigations into the manipulation of LIBOR and other global benchmark interest rates, the Department obtained admissions establishing criminal liability from three major financial institutions in 2012 and 2013—including corporate guilty pleas from the responsible subsidiaries of two banks. We received more than \$800 million in related penalties, which was part of a total \$2.5 billion in settlements paid by the banks to resolve their liability with U.S. and foreign regulators. And the Department charged two derivatives traders individually for their role in this scheme.

Fortunately, this is only the beginning. The Department also continues to make progress toward achieving justice for victims of mortgage fraud. In 2012, the Department played a major role in obtaining the largest joint Federal-State settlement on record—against the Nation's five largest mortgage services—resulting in \$25 billion in financial penalties and extensive consumer relief. We secured a \$175 million fair lending settlement against Wells Fargo Bank to resolve allegations involving a pattern or practice of discrimination against qualified African-American and Hispanic borrowers in its mortgage lending from 2004 through 2009.

In February 2013, the Department filed a civil lawsuit against Standard & Poor's Financial Services—as well as its parent company, McGraw-Hill—alleging that the credit rating agency S&P engaged in a scheme to defraud investors in financial

products known as Residential Mortgage-Backed Securities, or RMBS, and Collateralized Debt Obligations, or CDOs. We alleged that, by knowingly issuing inflated credit ratings for CDOs—which misrepresented their creditworthiness and understated their risks—S&P misled investors, including many federally insured financial institutions, causing them to lose billions of dollars. In addition, we alleged that S&P falsely claimed that its ratings were independent, objective, and not influenced by the company’s relationship with the issuers who hired S&P to rate the securities in question—when, in reality, the ratings were affected by significant conflicts of interest, and S&P was driven by its desire to increase its profits and market share to favor the interests of issuers over investors.

#### SAFEGUARDING THE MOST VULNERABLE MEMBERS OF SOCIETY

My colleagues and I are determined to uphold the civil and constitutional rights of all Americans, particularly the most vulnerable members of our society. The fiscal year 2014 budget includes \$258.6 million to support the Department’s vigorous enforcement of Federal civil rights laws, including laws that address human trafficking, fair housing, fair lending, disability rights, and voting. This request includes an additional \$9 million for the Civil Rights Division and Community Relations Service, of which \$1.5 million is included as part of the Department’s financial fraud investments.

In 2012, the Department charged a record number of human trafficking cases. Through expanded partnerships with State and local law enforcement agencies, foreign governments, and nongovernmental organizations, we prosecuted 73 human trafficking cases. We obtained a conviction—and a life sentence—against Weylin Rodriguez, for his role in sex trafficking and his violent use of firearms in recruiting three minor females and two young adults to work as prostitutes. We prosecuted Kala Bray, who was later sentenced to 14 years in prison, for her role in a conspiracy to engage in child sex trafficking by force, fraud, and coercion.

In addition to these high-profile cases, we secured the longest sentence ever recorded in a forced labor case, in which a defendant received a sentence of life plus 20 years for his role in a transnational organized criminal network that exploited Ukrainian men and women for labor on commercial cleaning crews in the Philadelphia area—by using threats, violence, and sexual assaults to intimidate and control the victims. We also convicted and secured life sentences against one sex trafficker who exploited young, vulnerable Micronesian women in brothels in Guam—and another who targeted Eastern European women and used brutal beatings, rapes, and threats to control every aspect of their lives—branding them with tattoos and compelling them into forced labor and prostitution.

Last, the Department remains focused on reinvigorating its fair housing and fair lending enforcement—and working to ensure that local governments and private housing providers offer safe and affordable housing on a non-discriminatory basis. In the past year, we secured a record monetary settlement in a fair housing accessibility case, including the largest civil penalty in any Fair Housing Act case.

#### CONCLUSION

Chairwoman Mikulski, Ranking Member Shelby, and members of the subcommittee, I want to thank you for this opportunity to discuss my concerns about the adverse impact of sequestration on the Department, to highlight the Department’s ongoing priorities, and to share our plans to strengthen our efforts in fiscal year 2014.

As we speak, the Department is confronting significant funding and operational challenges across every component. Our ability to rise to these challenges will have serious consequences for the administration of justice. I am deeply troubled by the impact that sequestration will have on the Department’s capacity to prevent terrorism, combat violent crime, and protect the most vulnerable among us. Despite the obstacles ahead—and the significant challenges we face every day—the Department remains committed to fulfilling our responsibilities to protect the American people, even as we navigate this period of fiscal uncertainty.

As we do so, we will continue to identify additional efficiencies and cost-saving measures—while making our programs and activities as efficient and effective as possible. I look forward to working with this subcommittee and with the entire Congress to build on the record of achievement we’ve established over the past 4 years. And I am happy to answer any questions you may have.

Chairwoman MIKULSKI. Thank you, Mr. Attorney General.

We are going to go to the 5 minute rule, and I am going to stick to it as well, and we will let Senator Shelby go next, and then the order of arrival of everybody.

There are many questions to be asked because the Department of Justice has such, such scope and incredible mission. I want to ask my first question, though, related to what I consider an explosive situation, and that is the Federal prisons.

#### FEDERAL PRISON POPULATION

I am very concerned about the fact of prison overcrowding. The fact that right now, the Federal prison budget is making up 25 percent of the entire Department of Justice budget, and it keeps increasing year after year. As we better our Federal law enforcement, the competency of the U.S. Attorney's offices, we are getting more convictions of bad people. That is the good part.

The other part, though, is that we have 224,000 people in prison. I worry about the safety of the guards and I know you do too, Mr. Attorney General, but we are on, in some ways, a fiscally unsustainable path here.

I want to ask, first of all, do you feel that your request of \$6.9 billion—which is, again, 25 percent of your budget request—adequate to meet the ethical standards in the care of prisons, prisoners, and at the same time protecting our guards? And then, do you have thoughts on how we can reduce the prison population without increasing risk to our American people?

We worry a lot about GTMO and I know it is a big issue, but I sure worry about what is going on in our Federal prisons here. I have a topnotch one in Cumberland, Maryland, as you know, which I visited.

Can we hear your thoughts, sir?

Attorney General HOLDER. Chairwoman Mikulski, I share your concerns.

The \$6.9 billion that we have requested, will support and allow us to run the system in an appropriate way. It includes funding to handle the growth in our inmate population by finalizing the activation of two new facilities, one in Berlin, New Hampshire and one in Aliceville, Alabama. It also anticipates the beginning of activation for three other institutions, which will increase our capacity. It also adds 2,087 new positions, including 956 correctional officers.

And there, I think, we have a life and death issue. We have to have sufficient numbers of correctional officers to ensure that we have adequate numbers of people who can be deployed, not only to maintain order, but to protect their fellow officers. But I am confident that at this level, \$6.9 billion, we have sufficient amounts of money to bring on that additional capacity and the additional officers.

Chairwoman MIKULSKI. Well, that is heartening to hear because, again, we have legal and ethical standards in the care of prisoners, but also of our guards.

Of the population of 224,000 prisoners, how many of those are repeat offenders and the recidivism rate?

Attorney General HOLDER. The recidivism rate runs at about, I am not totally sure, but I think between 25 and 40 percent; I think

it is slightly lower in the Federal system than it is in our State system.

But one of the things I think that we need to do is to focus resources on reentry programs and rehabilitation programs while we have people in prison so that we make more effective our efforts at reducing that recidivism rate.

Chairwoman MIKULSKI. Mr. Attorney General, you have a lot on your plate and now we are going to have the immigration bill, hopefully will pass, and we will have to implement. But I want to come back to this because I really want to keep America's streets safe. At the same time, the administration of justice is now going to be ever increasing. We cannot build our way out of prisons. And again, I am for tough, vigorous law enforcement and tough prosecution.

What I am asking you is: do you have established within your Justice Department, number one, the management mechanisms to look at how we can reduce recidivism? What are the other tools and techniques where we can begin looking at stabilizing or reducing the population without increasing risk to our American people on the streets? Because it could go 25 percent, it can go 30 percent, we have other things to do with the Justice Department.

Attorney General HOLDER. Yes. I think the point you make is a good one. We not only have to focus on how we manage the existing system that we have and those who are incarcerated, but we also need to focus on prevention activities so that we reduce the number of people who are coming into the system.

And in that regard, our Office of Juvenile Justice and Delinquency Prevention, our Office of Justice Programs, we have a variety of things that we do.

Chairwoman MIKULSKI. Yes, but what I want from you is a plan, and here is what the plan is. So let's look at the prisoner as a prisoner, that they have done bad things, and so bad that they are in Federal prison. So then I look at this continuum, which is really, actually, a vicious circle.

What, then, do we need to be funding for the prevention programs? And then, what happens when they are in our care and custody that begins to change them there for when they hit the streets again? So they are not hitting up our people again and back in the same prison.

So then, what are those programs so when we do our funding, we are not only funding the prison, but we are funding a continuum of services to prevent people from becoming at this dead end? And then, what are some of the other programs we need to do?

We need to look at this, the scope of the committee is such that we need your advice on what it should be, what those levels should be, so we begin to tackle this. It is both a humanitarian concern. It is a public safety concern on our streets.

A mutual dear friend of ours, Marian Wright Edelman, has spoken of not the cradle to grave, but the cradle to prison cycle. This committee wants to be a partner with you on a bipartisan basis to begin to break that. And you know, you are in those neighborhoods like me. We are now spending more to keep a person in prison than we are sending them to school or to higher education.

Let's really look at that continuum and let's work together on it. Attorney General HOLDER. I want to work with you on that, and I think the way in which you have stated it is exactly right. We want to work on prevention activities. We want to work on rehabilitation while people are in prison, and we also want to deal with reentry.

But, I think we also need to ask ourselves some tough questions about the enforcement priorities that we have in the Department and the way in which we have enforced our laws, and the collateral consequences of some of those enforcement activities. I am going to be making some proposals later in the year about rethinking the ways in which we are conducting our criminal justice system prosecutorial efforts.

Senator SHELBY. Thank you, Madam Chairman.

#### CONTROVERSIES AT DOJ

Mr. Attorney General, the Department, as we all know, has been mired in a controversy of late. It began with the reports of an overbroad collection of telephone records of 20 AP reporters and editors; was followed by revelations of a Departmental-led espionage investigation of Fox News reporter James Rosen; and culminated in questions about the veracity of your testimony before the House Judiciary Committee.

These issues have led some Members of Congress, and the public, to question the Department's adherence to the rule of law and your ability as the Attorney General to lead. These controversies have become, I believe, a significant distraction for this Department, and have led to calls for an investigation into your actions and the actions of your Department. Others have even called for your resignation.

Mr. Attorney General, I think that, hope you would agree, that leading the Department of Justice is a full time job. I think you would also agree that these controversies have become a distraction for the Department and for you as its leader. I hope you would agree that the American people deserve an attorney general who is completely focused on the fair and impartial administration of justice and not distracted by controversies of his own making.

I have observed over the years that effective leaders from time to time subject themselves to a self-evaluation process in hopes of improving their performance.

How would you, Mr. Attorney General, evaluate your performance to date, if you could, and is there any room for improvement? And have you, or will you, take actions to move the Department beyond this controversy and how to ensure that similar missteps—and the cloud—will not continue there?

Attorney General HOLDER. Well, I first want to assure you, and the American people, that in spite of the recent controversies that you mentioned, the Department is fully engaged in the work of protecting the American people in all the ways that are unique to the Department. I also want to assure the American people, and you as well, that I am fully engaged in that regard.

And sure, I go through a self-evaluation process almost on a daily basis. I have not done a perfect job. I think I have done a good job, but I am always trying to do better.

Some of the criticism that has been labeled or thrown at me and at the Department has caused us to rethink, for instance, the way in which we are going to deal with these media inquiries, and we will make changes. That is one of the reasons why we are engaged in a process now of meeting with media groups so that we can formulate new policies, new regulations, and hopefully get that behind us.

Senator SHELBY. I believe, Mr. Attorney General, and I hope you would agree with me, that the American people need to know that the administration of justice headed by the attorney general is in the hands of a dispassionate and capable leader. And whether you will continue to be the chief law enforcement officer of the Federal Government, the Attorney General, is either a decision for you or the President to make. I understand that.

I am interested to know what criteria you will use to determine whether you can continue to lead the Department? In other words, what is the tipping point here? Are you going to clear up this controversy or is it going to hover over us and the Justice Department, which is very important to the American people?

Attorney General HOLDER. The tipping point might be fatigue. You get to a point where you just get tired.

Senator SHELBY. Sure.

Attorney General HOLDER. But beyond that, there are certain goals that I set for myself and for this Department when I started back in 2009. When I get to a point where I think that I have accomplished all the goals that I set, I will sit down with the President, and we will talk about a transition to a new attorney general.

I think that change is frequently a good thing for an organization, a new perspective. This has been the honor of my professional life to serve as Attorney General. But I also have such respect for the Department of Justice that I want to make sure that it operates at peak efficiency, and that new ideas are constantly being explored.

I am proud of the work that I have done. I am proud of the work that the men and women of this Department have done under my leadership. And when the time comes for me to step aside for my successor, I will do so.

Senator SHELBY. With the belief in the integrity of the Attorney General and the Justice Department is central to the wellbeing of this country, is it not?

Attorney General HOLDER. It certainly is.

Senator SHELBY. Thank you.

Thank you Madam Chair.

Chairwoman MIKULSKI. Senator Feinstein.

#### STATEMENT OF SENATOR DIANNE FEINSTEIN

Senator FEINSTEIN. Thank you very much, Madam Chairman.

I would just like to respond to that last comment and simply say that I believe in your integrity. I believe that you are a good attorney general. I think you have had undue problems that are hard to anticipate. I think you have responded the best you possibly could, and I just want to say that because, candidly, I do not like to see this hearing used to berate you.

## MONEY LAUNDERING

Let me ask you this question. I chair the Senate Caucus on International Narcotics Control, and we issue a series of reports, and we have just issued one on money laundering. What has come to my attention is that there is substantial failure of some United States banks to comply with anti-money laundering laws, which fuel drug-related violence in Mexico.

For example, HSBC allowed more than \$670 million in wire transfers, and more than \$9.4 billion in physical money to enter the United States from Mexico unmonitored. Of that money, we know that at least \$881 million in Mexican drug proceeds entered the United States illegally.

On December 11, 2012, HSBC entered into a deferred prosecution agreement with the Department of Justice, and paid \$1.92 billion in fines. Similarly in 2010, Wachovia agreed to pay \$160 million to settle charges that its weak anti-money laundering compliance program enabled at least \$110 million in Mexican drug money to enter the United States.

Now, \$1.9 billion in fines is a huge fine. The question I have of you is: do you believe that these fines are going to change what has been current practice? And I suspect that there are other banks doing this same thing, and this is an enormous gap in our infrastructure with respect to allowing drug proceeds to be monitored right in our own country.

Could you comment on that?

Attorney General HOLDER. Sure. I think the concern that you raise is a very good one.

I think that we are being appropriately aggressive in our enforcement efforts. I think we have come up with robust, but proportional, financial penalties. We can never get to a situation where this is simply seen as the cost of doing business, where a bank can simply pay, even a huge amount of money, and think that that is the way in which it can absolve itself from wrongdoing.

So we have also put in place, as part of these agreements, compliance measures ensuring remediation, effecting reform, and imposing independent monitoring, to make sure that these kinds of things do not happen again.

These sanctions that we put in place go well beyond what a judge would be able to do if this were decided in a courtroom in a more traditional setting; this is not to say that we should not hold corporations criminally liable, and I think wherever we possibly can, we hold individuals liable for this kind of activity.

Senator FEINSTEIN. Well, this is a recommendation of our Drug Caucus that individuals begin to be held responsible for money laundering when it is overt and due diligence is not done. So I thank you for that response.

## ATF GUN DEALER INSPECTIONS

There was an OIG report on ATF's gun dealer inspection program that, I believe, Mr. Horowitz, who is going to testify, carried out. And as I understand it, that report found that 58 percent of Federal firearms dealers had not been inspected within the last 5 years.

You cited three reasons for this: under-staffing, the large geographic areas some field divisions cover, and a 16 percent increase in gun dealers between 2004 and 2011. It is my understanding that the President has \$51.1 million to enhance ATF's enforcement efforts and strengthen inspections. We very much hope now to get a director of that unit. The Judiciary Committee, on which I serve, has him coming before us this next week.

They project that this allocation, as I understand it, would fund 60 additional inspector positions. Your report concluded that you would need an additional 199,000 hours to inspect all dealers within a 5-year period, and that field divisions told ATF headquarters in 2012 that they needed 504 more investigators.

The Federal firearms dealer, in my view, is what makes any legal gun sales possible in the United States because they require certain material. That 58 percent figure is really a distressing figure.

What do you believe these additional inspectors could do to increase that 58 percent? And, do you have any idea to what level we could be confident that with these there would be inspections of Federal firearms dealers within the 5 year period?

Attorney General HOLDER. Yes, I do think that we would be able to do that. The ATF is an organization that, I think, has been resource-starved over the recent past. Actually, for a great number of years. Without Senate-confirmed leadership, I think it has also suffered.

And I think the concern that you raise about having the ability to do inventories at the prescribed level, will give us all greater comfort, and have an impact on our ability, ATF's ability, to monitor the gun trade so that we make sure that only the appropriate people have access to weapons. And that is fully respecting people's Second Amendment rights. We are talking about keeping guns out of the hands of people who should not have them. Without these inventory controls, there is no way to tell when thefts have occurred from federally licensed firearms dealers, or to put up warning signs that we need to be on the lookout for weapons that have been missing from a particular location.

But I am confident that if we get the money that we have asked for, and if Todd Jones is confirmed as the leader of ATF, that we can change that situation and make the American people safer.

Senator FEINSTEIN. Good. I just want to say this is important to me and I would certainly appreciate it if an emphasis can be placed in that area. So thank you very much. My time is up.

Chairwoman MIKULSKI. Senator Collins.

#### STATEMENT OF SENATOR SUSAN M. COLLINS

#### USE OF LETHAL FORCE AGAINST AMERICAN CITIZENS

Senator COLLINS. Thank you, Madam Chairman.

Mr. Attorney General, it troubles me that the President has virtually unreviewable, unfettered authority to order the killing of any American citizen overseas who is suspected of terrorist activity without any kind of charge, or trial, or judicial review.

We have all read this morning of the controversy over the NSA having access to phone records of American citizens. It seems to me

that an American currently receives a greater degree of due process protections from the judicial branch if the Government is seeking to listen in on his phone conversations or get information about his phone conversations than if the President is seeking to take his life. That just does not make sense to me.

Why hasn't the administration proposed to the Congress a process that would provide some degree of independent judicial review for a targeted, lethal strike against a U.S. person overseas? Something, either an expansion of the FISA Court or a different kind of classified proceeding before a court to ensure that there is some kind of judicial review, rather than vesting that authority to take a life, an American life I am talking about, overseas, only in the President?

Attorney General HOLDER. Yes. Well, with all due respect, I would say that it is incorrect to say that the President has unlimited authority in this regard, with regard to the use of drones, and we are talking about being more transparent.

I sent a letter to Chairman Leahy; the President gave a speech to make more transparent our efforts in this regard. But we operate under the statute that the Congress passed, the Authorization for the Use of Military Force. And we also, when we are dealing with these matters, try to focus on capture where possible. We focus on whether or not the threat is imminent. We also operate under the rules of law.

And as the President said in his speech: people cannot plot against the United States. People cannot kill American citizens and then use as a shield their American citizenship. These are steps that we take with great care. They are the most difficult of decisions that we have to make. They are the things that keep me up at night as I think about my role as part of the national security team in discussing these matters.

The concerns you raise, I understand. They are legitimate ones, but we are working within the administration to make sure that when we take these ultimate measures, they are done in appropriate ways, that they are done in legal ways, and that they are also done in a way that is consistent with our values.

Senator COLLINS. Well, I would say to you that these drone strikes have occurred outside of the hot battlefield. We are not talking about countries where we are engaged in hostilities like Iraq or Afghanistan.

I just do not understand why you would not want the protection of some sort of judicial review of the target. I am not saying that the President is wrong to try to kill American terrorists overseas who are plotting to execute our citizens. But I am uncomfortable giving the President that authority without any kind of judicial check. And I am not comforted by the Office of Legal Counsel opinions, which I have read now for the legal basis.

Let me turn to a second point that you just made about a preference for capture. I have not seen a preference for capture. If you compare the number of terror suspects who are captured in the previous administration versus this administration, there is a huge difference, as there is in the number of lethal strikes with drones that were undertaken.

Is the reason for the exceedingly low number of captures due to the change in the Obama administration's position on detention and the fact that the administration does not want to send captives to Guantanamo? Isn't that really the reason?

I mean, here we have a case of the terrorist Warsame, who ultimately was convicted, but who was driven around on a Navy ship for 2 months because there really was no place to put him.

Attorney General HOLDER. No, it is not a function of not trying to take people to Guantánamo. As you indicated, Warsame was captured. Abu Ghaith was captured and brought to face justice in an Article III court.

The desire to capture is something that we take seriously because we gain intelligence.

Senator COLLINS. Right.

Attorney General HOLDER. Warsame, I am not sure how long he was on that boat. It was not a joyride for him. We were in the process of gathering important intelligence from him from the intelligence community, and then later on after he was read his rights, and waived them, from people in law enforcement. So that was time well spent and, I think, ultimately led to his plea in that case or his conviction in that case.

So it is not a function of us not trying to take prisoners to particular places. We try to capture people. We try to interrogate them. We try to gain intelligence, and then we try to bring them to justice.

Senator COLLINS. My time has expired. Thank you.

Chairwoman MIKULSKI. That was an excellent line of questioning, Senator.

Senator Kirk.

Senator KIRK. Thank you.

Chairwoman MIKULSKI. And then Senator Graham.

#### MONITORING OF PHONES

Senator KIRK. Mr. Attorney General, I want to take you to the Verizon scandal which, I understand, takes us to possibly monitoring up to 120 million calls. You know, when Government bureaucrats are sloppy, they usually are really sloppy.

I want to just ask, could you assure us that no phones inside the Capitol were monitored of Members of Congress that would give a future executive branch—if they started pulling this kind of thing up—would give them unique leverage over the legislature?

Attorney General HOLDER. With all due respect, Senator, I do not think this is an appropriate setting for me to discuss that issue. I would be more than glad to come back in an appropriate setting to discuss the issues that you have raised. But in this open forum, I don't think I could do that.

Senator KIRK. I would interrupt you and say the correct answer would be to say, "No, we stayed within our lane, and I am assuring you, we did not spy on Members of Congress."

Chairwoman MIKULSKI. You know, I would like to suggest something here. When I read The New York Times this morning, it was like, "Oh, God. Not one more thing," and not one more thing where we are trying to protect America, and then it looks like we are spying on America.

I think the full Senate needs to get a brief on this, and I think we need the Attorney General, I think we need the National Security Agency, and other appropriate people.

This is in no way to minimize, actually, Senator Kirk, your very excellent question, but there are also, I think, certain answers that might have to be given in a classified, more classified environment also. So I am not going to determine who answers what questions or censor.

Senator SHELBY. Madam Chairman.

Chairwoman MIKULSKI. Senator Shelby, do you have anything to say?

Senator SHELBY. If I could, I would hope that you as the chairman, you are a member of the Intelligence Committee too, I think would create the appropriate forum, that is, a classified hearing to get into this where the Attorney General could be open with us.

I think that what Senator Kirk is raising is a very important question and it should be dealt with—

Attorney General HOLDER. Yeah, and you know—

Chairwoman MIKULSKI. And I agree. I agree that Kirk question is, quite frankly—

Senator SHELBY [continuing]. And the sooner the better, and I am sure you will.

Chairwoman MIKULSKI [continuing]. The kind of question I would like to ask myself. What I would like to suggest is that I will send a note to Senator Reid and McConnell because I think this cuts across committees. I think it goes to Judiciary. I think it goes to Armed Services. I think it goes to Intelligence, and not only including in the scope of an appropriations committee.

Senator SHELBY. But it has oversight of the Justice Department, does it not?

Chairwoman MIKULSKI. Yes.

Senator KIRK. Madam Chair, I would just suggest that for separation of powers that whoever was so sloppy running this before you and probably did not segregate out the Supreme Court to make sure that when you are jumping out of your executive branch lane, you want to make sure you are not gaining new intel and leverage over a separated powers under our Constitution.

I would hope that we would get absolute assurance, sir, that not a single Supreme Court Justice was at all involved in this Verizon thing that we—

Chairwoman MIKULSKI. Well, Senator Shelby raises a great light. Senator Shelby, why don't you and I talk about how you would like to proceed, where we do our due diligence as a committee, but also, this does involve others in addition to the Justice Department.

Senator SHELBY. I would like to do that. I believe it is a relevant thing for this committee to look into, and we would probably need a classified setting for this.

Attorney General HOLDER. And I would be more than glad, as I said, in an appropriate setting to deal with questions.

Senator Kirk, please do not take my response as being anything but respectful of the concerns that you have raised. There has been no intention to do anything of that nature; that is, to spy on Members of Congress, to spy on members of the Supreme Court.

And without getting into anything specific, I will say that Members of Congress have been fully briefed as these issues, matters have been underway. I am not really comfortable in saying an awful lot more about that.

Chairwoman MIKULSKI. Well, we are going to stop here because this fully briefed is something that drives us up the wall, because often “fully briefed” means a group of eight leadership; it does not necessarily mean relevant committees.

And sitting right here now, there is Senator Shelby and I, a former chair of the Intelligence Committee and I am on it. Senator Collins chaired the Homeland Security Committee and led us, actually, to a new framework to coordinate intelligence and is viewed as a national leader on the topic. Senator Graham’s experience and Senator Kirk, himself, was an intelligence officer in the United States Navy.

Senator KIRK. The Navy, yes.

Chairwoman MIKULSKI. So we are kind of like an A Team here, but we also do not necessarily, I mean, we have been in that fully briefed circle. So “fully briefed” does not mean we know what is going on.

Senator SHELBY. Madam Chairman.

Senator MIKULSKI. Senator Shelby says we have got to know what is going on and there are appropriate questions to ask.

Senator SHELBY. Madam Chairman, if I could.

Senator MIKULSKI. Yes, sir.

Senator SHELBY. I think this falls within the jurisdiction of this committee, the Appropriations Committee that you chair and the subcommittee that you chair, and I am ranking on both, to get into this.

We fund the Justice Department. We fund the FBI. We fund all these operations and if we don’t know, if we are not properly briefed as to what is going on, we are not doing our oversight. I know you are going to do our oversight.

Chairwoman MIKULSKI. I got it. So what you are suggesting is that—

Senator SHELBY. A classified hearing.

Chairwoman MIKULSKI [continuing]. A classified hearing for the full Appropriations Committee.

Senator SHELBY. Absolutely.

Chairwoman MIKULSKI. Well, sir, if that is what you want.

Attorney General HOLDER. That’s fine.

Chairwoman MIKULSKI. We will proceed in that direction, and we look forward to working with you in a collaborative way. And actually, we have Senator Feinstein, who chairs the Intelligence Committee, tapping the full expertise of the full committee.

Senator Kirk, did you have additional questions?

Senator KIRK. I would just say—

Chairwoman MIKULSKI. Your work on the gang violence is really excellent. I did not know if you had a question on that.

Senator KIRK. I want to announce to the group, I am going to be offering an amendment to the next markup of this bill for \$30 million to identify gangs of national significance, which I would hope would be the Gangster Disciples in Illinois. I have talked about the possible need to arrest upwards of 18,000 people who are members

of that gang, and to do this especially because of my overwhelming concern for the Baltimore gang situation.

Chairwoman MIKULSKI. Anything else, Senator Kirk?

Senator KIRK. That's it.

Chairwoman MIKULSKI. All right, Senator—

Senator KIRK. I raise this issue because someone, whoever was running this program, knows they have really screwed up. I would just ask that you kind of seize the records and not allow the destruction of evidence that they have accidentally monitored other branches of the Government.

Attorney General HOLDER. All right. Well, as I said, I would be more than glad to discuss this in an appropriate setting.

Chairwoman MIKULSKI. We will, and I give my word to the committee members.

Senator Graham.

#### STATEMENT OF SENATOR LINDSEY GRAHAM

##### ROLE OF THE EXECUTIVE VERSUS LEGISLATIVE BRANCH

Senator GRAHAM. Well, thank you. I am very glad I came. This has been an interesting hearing. I am going to ask you a question, now pay close attention.

Attorney General HOLDER. I always do—

Senator GRAHAM. I know you do.

Attorney General HOLDER [continuing]. When you have a question.

Senator GRAHAM. The purpose of the PATRIOT Act, and the FISA Court, and the National Security Administration is to make sure that we are aware of terrorist activity and disrupting plots against our interests abroad and at home.

Is that true?

Attorney General HOLDER. I would agree with that.

Senator GRAHAM. The purpose of the PATRIOT Act is not to allow the executive branch to gather political intelligence on the judicial branch or the legislative branch.

Do you agree with that?

Attorney General HOLDER. I would agree with that.

Senator GRAHAM. So this is like killing innocent people in a cafe. I know exactly what you were trying to say. There is no lawful authority in the law of war or in any other statute to drone somebody who has done nothing wrong anywhere.

Do you agree with that?

Attorney General HOLDER. Yes, I would agree with that.

Senator GRAHAM. We are trying to capture and kill people who we believe present a national security threat to our Nation. Right?

Attorney General HOLDER. Also true.

Senator GRAHAM. And one thing we are trying to do in this PATRIOT Act is to find out about terrorist organizations and individual terrorists, who they may be talking to.

Attorney General HOLDER. Again, I would say that is an over-all—

Senator GRAHAM. I hope the American people appreciate that we are at war, because I sure as hell do. I hope the American people

appreciate that the way you protect the homeland is you try to find out what the enemy is up to.

I am a Verizon customer. It does not bother me one bit for the National Security Administration to have my phone number because what they are trying to do is find out what terrorist groups we know about, and individuals, and who the hell are they calling. And if my number pops up on some terrorist's phone, I am confident that the FISA Court is not going to allow my phone calls to be monitored by my Government unless you and others can prove to them that I am up to terrorist activity through a probable cause standard. So I may come out differently than my colleagues on this.

This was created by the Congress and if we have made mistakes, and we have gotten outside the lane, we are going to get back inside the lane. But the consequence of taking these tools away from the American people through their Government would be catastrophic.

So you keep up what you are doing, and if you have gone outside the lane, you fix it. President Bush started it. President Obama is continuing it. We need it from my point of view.

Now, under the law of war, there are three branches of Government. What branch of Government is in charge of actually implementing and executing the war?

Attorney General HOLDER. The executive branch.

Senator GRAHAM. So we don't have 535 Commanders-in-Chief. We have one, right?

Attorney General HOLDER. That is true.

Senator GRAHAM. Okay. Can you tell me any other time in any other war where our judiciary took over the decision of who to target, who the enemy was, and whether or not to use legal force from the executive branch?

Attorney General HOLDER. I am not aware of that. We obviously operate within legal parameters, but within those legal parameters, it is generally——

Senator GRAHAM. I will be astonished for America during this war to turn over from the Commander-in-Chief the ability to use lethal force to a bunch of unelected judges who have absolutely no expertise and no background as to who the enemy is and whether or not we should use lethal force.

I think the worst possible thing we could do is to take away from this Commander-in-Chief and any other Commander-in-Chief the power to determine who the enemy is in a time of war, and what kind of force to use, and give it to a bunch of judges. That would be the ultimate criminalization of the war.

I support you for having transparency and for making the hard call. But you have, from my point of view, been more than reasonable when it comes to the drone program. And to an American citizen, if you side with the enemy and we go through a laborious process to determine if you have, we will kill you or capture you. The best way to avoid that is not to help Al Qaeda.

Anwar al-Awlaki was an American citizen in Yemen. Any doubt in your mind he was helping Al Qaeda?

Attorney General HOLDER. None, and if you look at that letter that I sent, we laid out exactly why he was a target, that he was an appropriate target.

Senator GRAHAM. And there are other American citizens we know who are associated with Al Qaeda, one of them is a spokesman.

Is that correct?

Attorney General HOLDER. That is correct.

Senator GRAHAM. If we find him, kill him, or capture him, don't go to the court, and you don't need my permission to do it because it is your job. It is the executive branch job.

#### GUANTÁNAMO BAY

Finally, she asked a very good question. Would this administration use Guantánamo Bay in the future to house a law of war capture?

Attorney General HOLDER. I think the President has been pretty clear. It is not our intention to add any additional prisoners to Guantánamo.

Senator GRAHAM. Okay. So it goes back to her question. A jail cannot be a ship. Under the Geneva Convention, that is not a viable option. So we are a Nation without a jail and the reason we put the guy on the ship, we have got no place to put him, and this is going to catch up with us, Mr. Attorney General.

This Nation has lost the ability to gather intelligence because we don't have a prison to put people. And if we don't correct that, we are going to lose valuable intelligence.

And this last question, do you agree with me that the people we have had at GTMO for years, that the intelligence we have gathered humanely through the law of war interrogation has made this country safer and was one of the big reasons we got bin Laden?

Attorney General HOLDER. Well, I think one of the many reasons we got Osama bin Laden was the intelligence we gathered.

Senator GRAHAM. Would you agree with me that one of the treasure troves of the intelligence regarding the war on terror has come from people at GTMO?

Attorney General HOLDER. Well, at this point, you have some people who have been there for 10 and 11 years, and their intelligence value is close to zero at this point.

Senator GRAHAM. Well, some people may be, but the war is changing. What I am trying to say is there is no doubt in my mind that we did not torture our way to getting bin Laden. We put the puzzle together, and the big pieces of the puzzle were people we had at GTMO.

#### SEQUESTRATION

Last question: sequestration. What is it doing to your ability to protect us as a Nation?

Attorney General HOLDER. We are struggling, really, to keep our resources at the level where we can do our job.

Since January 2011, I have put a hiring freeze in place. We lost 2,400 people. We have lost about 600 prosecutors. Through the help of this subcommittee—

Chairwoman MIKULSKI. When you say "lost," what does that mean? Did they quit? I do not mean to interrupt you, sir, but could you be clear on what you mean?

Attorney General HOLDER. These are people who have left the Department of Justice and who have not been replaced. So we are a smaller DOJ than we were before I instituted the hiring freeze.

If we do not get assistance in fiscal year 2014, the furloughs that we were able to avoid because of your assistance, your assistance Ranking Member Shelby, those are furloughs that we would have to institute. And you will have FBI agents who are not out on the streets and prosecutors who are not in the courts.

My guess would be that whoever the Attorney General is a year or 2 years from now, you are going to see reduced numbers with regard to prosecutions, and I think that will be a function of this sequestration that we are trying to deal with. And we have tried to deal with, again, with your help.

Chairwoman MIKULSKI. I have such a great committee. I really do, no and really, the members. The reason I asked, and I did not mean to in any way intervene in your time, it is really talent on both sides of the aisle to really get to protecting our citizens.

If I could just clarify before I turn to Senator Murkowski. The people when you say, "they were lost," were they voluntary departures or involuntary departures?

Attorney General HOLDER. I think largely voluntary departures. People, you know, through normal attrition.

Chairwoman MIKULSKI. Which you did not replace. In other words, they left, and then you did not replace.

Attorney General HOLDER. We did not. I saw along with our officials from Justice Management Division that the economic clouds were forming and that we needed to get ahead of this.

And it was as a result of that hiring freeze and other great work done by JMD, that we were able, with your cooperation, to avoid furloughs in this year by having a hiring freeze, which kept our costs low, but at a price. We are paying a price for that lack of capacity.

Chairwoman MIKULSKI. I understand.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Madam Chairman.

I wish that I had been here for more of the discussion earlier. It sounds like it was quite animated.

#### TED STEVENS PROSECUTION

I am going to dial it back a little bit perhaps, but certainly for Alaskans, it is not dialing it back. And this goes back to the misconduct that was found in the Ted Stevens' prosecution some years ago; clearly admitted procedural defects. And then after that, the Department has a disciplinary process. Effectively, the judge threw out the discipline that the Department had imposed against the two assistant U.S. attorneys there. That was extraordinarily troubling to many of us.

Senator Cornyn and I wrote you a letter to suggest that the Department should appeal this decision, as well as relook at these disciplinary procedures in light of the board's decision.

So the question to you, Mr. Attorney General, is: Do you think that the decision to throw out the discipline that had been imposed on these two prosecutors was fair? Are you going to be appealing that? Where are we with this? Because Alaskans are still kind of

left dangling out there wondering is there any justice out there? And they think not.

Attorney General HOLDER. Well, I have respect for the people at the board who made that decision. I disagree with it, and my expectation is that we will be appealing that decision.

Senator MURKOWSKI. And in light of that, do you envision any changes in the prosecutorial discipline system as a consequence of what we have seen with this case?

Attorney General HOLDER. Well, I think we have a system in place, a disciplinary system that is adequate. I do not agree with the way the board looked at the way in which we conducted that disciplinary system. I think we followed the rules. We came up with a disciplinary sanction that was appropriate given the misconduct that was found. And we will, as I said, be appealing that. We will be appealing the board's determination.

Senator MURKOWSKI. Well, I would encourage that because it, unfortunately, leaves the appearance that some of the folks that were not perhaps at the highest level of the decisionmaking process were held accountable while others were given a pass, and that just does not sit well.

So I would, again, encourage that appeal and encourage you to look at how we might address, clearly, what some think the gaps and discrepancies are.

#### VAWA REAUTHORIZATION ACT

Second question for you, and again, this is very parochial. But we just passed the VAWA Reauthorization Act, and contained in that act, in section 909, we direct the Justice Department to consult with the State of Alaska, consult with our tribes, and present some recommendations to us in the Congress about restarting the Alaska Rural Justice Law Enforcement Commission. Those recommendations are due out in 2014.

This is a Commission that was established some time ago. It provides, basically, a venue for various officials to come together and improve law enforcement, judicial responses to crime, domestic violence, the whole gamut there. The Commission is no longer active because the earmarked funding was run out. So we do not have any forum, really, to move forward on the Commission's initial work.

So I would just ask that you have your folks look into whether or not we have started the work on implementation of section 909 to see if we can make some progress.

As you know, we have got some considerable challenges that face, particularly, our Native villages when it comes to public safety, to domestic violence. We need to turn this around, and we need your help.

Attorney General HOLDER. I agree with you, Senator. That is not a parochial concern. The one which you have expressed, maybe that mechanism is, but the concerns that you have raised go outside of your State and, I think, are worthy of your attention, my attention, and I look forward to working with you to come up with ways in which we can make effective that provision of the VAWA Reauthorization.

It is something that we have tried to make a priority, generally in the Justice Department, but the concerns that you have raised about what is going on in your State are very legitimate concerns. They are not parochial. These are national issues that require national responses and national attention.

Senator MURKOWSKI. I appreciate that.  
Thank you, Madam Chair.

Chairwoman MIKULSKI. Thank you, Mr. Attorney General. If there are no other questions from the committee, I would like to thank you until we meet again in the matter that we have discussed. There are many questions that we want to talk about and work with your staff, but we would like to hear from the Inspector General. We know that Senators have other duties.

Mr. Attorney General, I want to thank you for your flexibility on the schedule. We were originally scheduled earlier today because of the votes. Thank you for your cooperation in participating at the time that we requested, and we look forward to working with you and your staff, and we just have a lot to do here, and thank you.

Attorney General HOLDER. Good. Thank you very much.

**STATEMENT OF HON. MICHAEL E. HOROWITZ, INSPECTOR GENERAL,  
OFFICE OF INSPECTOR GENERAL**

Chairwoman MIKULSKI. I would like to now call the Inspector General for the Department of Justice, Mr. Michael Horowitz. Mr. Horowitz will keep his opening statements to a minimum. Could we shake hands and keep it all going here?

Thank you very much, Mr. Horowitz. I am not going to have an opening statement either. I know Senator Shelby and I want to get right to it, but they do have close to \$27 billion to spend.

There are many issues facing the Justice Department from the administration of grants, a topic I know that Senator Collins is so very keenly interested in. I worry about cybersecurity. Are we heading to a more secure Nation? Not only the excellent issues that were raised by colleagues, but are we heading to a techno boondoggle? Senator Shelby, Senator Murkowski, we all have great questions.

So why don't you, Mr. Horowitz, proceed in your comments to us? And then we can get right into a robust Q&A, and we know Senators have responsibilities.

**SUMMARY STATEMENT OF HON. MICHAEL E. HOROWITZ**

Mr. HOROWITZ. Thank you, Chairwoman Mikulski, Ranking Member Shelby, and members of the committee.

Thank you for inviting me to testify today about the work of the Inspector General's Office. It is just over 1 year now since I was sworn in as the Inspector General, and it has been an extraordinarily busy time for me and the Office.

We have issued numerous reports of great importance during the past year, including on ATF's Operations Fast and Furious and Wide Receiver. The Justice Management Division's improper hiring practices. The Department's handling of the Clarence Aaron's clemency request, and the Department's handling of known or suspected terrorists in the Federal Witness Security program.

We also completed many reports that did not make headlines that will help to make the Department's operations more effective and efficient. We issued more than 70 audits in the past year including annual financial audit statements, information security audits, and audits of grant recipients. We issued reports on the FBI's handling of suspension and debarment, the FBI's implementation of the Sentinel project, the U.S. Marshal Service management of its procurement activities, and the Executive Office of Immigration Reviews' management of immigration cases.

During the same time, our agents made dozens of arrests for corruption and fraud offenses, and conducted misconduct investigations that resulted in well more than 100 administrative actions against Department employees.

And I am particularly proud of having appointed the first-ever DOJ OIG whistleblower ombudsperson. We must ensure that whistleblowers can step forward and report waste, fraud, and abuse without fear of retaliation.

I have learned that our work this past year is typical of the extraordinary work that the OIG has regularly produced. Over the past 10 fiscal years, the OIG has identified nearly \$1 billion in questioned costs, far more than the OIG's budget during that same period. In addition, we have identified over \$250 million in taxpayer funds that could have been put to better use by the Department.

As with other Inspector Generals, however, sequestration has significantly impacted our Office. We received a 5-percent reduction to base this fiscal year, and are scheduled to receive a 2.3-percent additional reduction next fiscal year. Because approximately 79 percent of our expenditures are personnel-related, these budget reductions equate to a permanent reduction of nearly 8 percent of our workforce.

We are already well below the staffing levels we were at when I became Inspector General last year, and we continue to substantially reduce our—restrict our spending. These reduced staffing levels are negatively impacting our work in a number of ways, including requiring us to reevaluate the number and types of audits and investigations we will be able to conduct going forward.

Regarding our plans for future work, this past November, we released our list of the Department's top 10 management challenges. I would like to briefly mention three of them.

First, safeguarding national security remains one of the highest priorities as tragically demonstrated by the Boston Marathon bombings. The OIG is conducting numerous reviews including: National security issues, including intelligence information sharing among Federal agencies prior to the Boston bombing; the Department's coordination of its efforts to disrupt terrorist financing; and the use of the FBI's Foreign Terrorist Tracking Task Force.

Our report last month on the Federal Witness Security program revealed the potential risks involved in failing to properly share intelligence information.

The Department also must ensure it is appropriately using the investigative tools that it has been given, and we continue our substantial work in this area as well including our latest reviews of the FBI's use of national security letters and section 215 orders.

Second, cybersecurity must be one of the Department's highest priorities. Computer systems in the public and the private sector that are integral to the infrastructure, economy, and defense of the United States face a rapidly growing threat of cyber intrusion and attack.

The OIG previously examined the operations of the Justice Security Operation Center and the National Cyber Investigative Joint Task Force, as well as the capabilities of FBI field offices to investigate cyber intrusion. We made important recommendations in these reports, and we are currently evaluating additional reviews in this area.

Third, let me turn to the significant budget challenges the Department is facing, particularly in relation to the Federal prison system, which you mentioned earlier. Even as the Department's overall budget is shrinking, the Bureau of Prisons continues to consume an ever-increasing share of that budget due to the growth of the prison population and the aging of the prison population.

Fifteen years ago, the BOP's budget represented 14 percent of the Department's budget. Today it represents, as you indicated, 25 percent. And I would note if the Department, if the projected growth in the budget over the next several years continues, and the Department's budget stays flat, that number grows to 30 percent in the next several years. The BOP accounts for nearly one-third of all Department employees today, more than the FBI or any other Department component.

Despite the BOP budget growth, Federal prisons are now 37 percent over rated capacity, and the BOP projects that number to increase to 44 percent in the years ahead, even with the additional funding. The present path is unsustainable and the Department must address this issue before it necessitates cuts to the budgets of other DOJ components.

#### PREPARED STATEMENT

As the Department faces these and many other important challenges in the years ahead, the OIG will continue to conduct vigorous and independent oversight. The Department of Justice is more than just another Federal agency. It is the guardian of our system of justice and is responsible for enforcing our laws fairly, without bias and, above all, with utmost integrity. The OIG plays a critical role in ensuring the fulfillment of that mission.

I look forward to working with this subcommittee, and I look forward to the questions from you today.

[The statement follows:]

#### PREPARED STATEMENT OF HON. MICHAEL E. HOROWITZ

Chairwoman Mikulski, Senator Shelby, and members of the subcommittee: Thank you for inviting me to testify about the activities and oversight work of the Office of the Inspector General (OIG) for the Department of Justice (DOJ). It has been just more than 1 year since I was sworn in as the Department's Inspector General, and it has been an extraordinarily busy time for me and the Office.

#### THE OFFICE OF THE INSPECTOR GENERAL'S WORK OVER THE PAST YEAR

Our office has issued numerous important reports during the past year. For example, our report on the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Operation Fast and Furious and Operation Wide Receiver detailed a pattern of serious failures in both ATF's and the U.S. Attorney's Office's handling of the investiga-

tions, as well as the Department's response to congressional inquiries about those flawed operations. Our report on improper hiring practices in the Justice Management Division (JMD) found problems with nepotism in multiple offices in JMD. Our report on the Department's handling of the Clarence Aaron clemency request found that the Department's Pardon Attorney did not accurately represent material information to the White House in recommending that the President deny Aaron's clemency petition. And just 3 weeks ago, we issued an interim report on the Department's handling of known or suspected terrorists in the Federal Witness Security (WITSEC) Program that detailed significant information sharing failures which allowed WITSEC Program participants who were on the Transportation Security Administration's No Fly List to fly on commercial airplanes using their new Government-issued identities.

We also issued reports on such diverse topics as the Department's coordination of its efforts to disrupt terrorist financing; the Federal Bureau of Investigation's (FBI) Foreign Terrorist Tracking Task Force's sharing of information; the FBI's activities under section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act; ATF's efforts to conduct periodic inspections of explosives and firearms licensees; and the Federal Bureau of Prisons' (BOP) compassionate release program. That latter review was particularly troubling, as we found that the compassionate release program has been poorly managed and implemented inconsistently, resulting in ad hoc decisionmaking that has likely resulted in eligible inmates not being considered for release and terminally ill inmates dying before their requests were decided.

In addition, we completed many reports that did not necessarily make headlines but that will help make the Department's operations more effective and efficient, and result in important savings of taxpayer dollars. In the past year, we issued more than 70 audits, which included annual financial statement audits, information security audits, audits of grant recipients, and audits of State and local participants in the FBI's Combined DNA Index System. Further, we issued reports on the Department's handling of suspension and debarment, the FBI's implementation of the Sentinel Project, the FBI's handling of its forensic DNA case backlog, the U.S. Marshals Service's (USMS) management of its procurement activities, and the Executive Office for Immigration Review's management of immigration cases. Additionally, during this time, our Investigations Division received approximately 10,000 complaints, had dozens of arrests and convictions involving corruption or fraud offenses, and investigated allegations that resulted in well more than 100 administrative actions against Department employees.

I am particularly proud of having appointed the DOJ OIG's first-ever whistleblower ombudsperson, and I am committed to ensuring that whistleblowers in the Department can step forward and report fraud, waste, and abuse without fear of retaliation. During my tenure, I have seen first-hand the important role that whistleblowers play in advancing the OIG's mission to address wasteful spending and improve the Department's operations. We will continue to do all we can to ensure that we are responsive to complaints that we receive, and to ensure that allegations of retaliation are thoroughly and promptly reviewed.

#### PAST WORK OF THE OFFICE OF THE INSPECTOR GENERAL AND THE IMPACT OF SEQUESTRATION

While the past year has been a remarkably busy time, I have learned that it is typical of the extraordinary work that the DOJ OIG regularly produces, and indicative of the return on investment that the taxpayers receive from our office. Over the past 10 fiscal years, the OIG has identified nearly \$1 billion in questioned costs—far more than the OIG's budget during the same period. In addition, we have identified more than \$250 million in taxpayer funds that could be put to better use by the Department, and our criminal and administrative investigations have resulted in the imposition or identification of more than \$100 million in civil, criminal, and nonjudicial fines, assessments, restitution, and other recoveries over that period.

Moreover, when we issue our audits and reviews, we regularly make recommendations to the Department on how it can reduce costs and improve ineffective or inefficient programs. The Department must redouble its efforts to adopt and implement these OIG recommendations. Hundreds of OIG recommendations to the Department remain open, and our fiscal year 2012 audits and related single audits identified approximately \$25 million in questioned costs that the Department should make every effort to resolve and, if necessary, recover. I intend to make this issue a priority for my office.

Like other Inspectors General offices, our office has been impacted significantly by sequestration. We received as a result of sequestration a 5-percent reduction to our fiscal year 2012 base this fiscal year, and are scheduled to receive an additional 2.3-percent reduction in fiscal year 2014. Because approximately 79 percent of our expenditures are related to personnel and another 13 percent represents fixed rent, security, utilities, and other mandatory costs, a budget reduction of more than 7 percent equates to a permanent reduction of approximately 35 FTEs, or nearly 8 percent of our workforce.

As you would expect from careful stewards of taxpayer money, we planned for the possibility of sequestration months before it went into effect. As a result, we already are approximately 25 FTEs below our FTE hiring level when I became Inspector General in April 2012, and we expect to further restrict our spending for the remainder of the fiscal year in order to meet the budget reduction. It also is requiring us to reevaluate the number of audits and investigations we will be able to conduct in the future given our substantially reduced staffing levels, and to consider travel costs in considering whether to undertake certain audits and investigations. Nevertheless, I am confident that the dedicated professionals in the DOJ OIG will continue to provide extraordinary service to the American public.

#### FUTURE WORK AND TOP CHALLENGES FACING THE DEPARTMENT OF JUSTICE

Now that I have outlined for you some of our prior work, let me look forward to our future work.

Each year since 1998, the OIG has compiled a list of top management and performance challenges for the Department of Justice for use by the Attorney General and top DOJ officials. We identified the major challenges for the Department in 2013 as Safeguarding National Security, Enhancing Cyber Security, Managing the Federal Prison System, Leading the Department in an Era of Budget Constraints, Protecting Civil Rights and Civil Liberties, Restoring Confidence, Coordinating Among Law Enforcement Agencies, Enforcing Against Fraud and Financial Offenses, Administering Grants and Contracts, and Ensuring Effective International Law Enforcement. In my testimony today, I will highlight the first three of the challenges on our list. The full list, along with a detailed discussion of our assessment of each, is available on our Web site at <http://www.justice.gov/oig/challenges/2012.htm>.

Overall, I believe that the Department has made progress in addressing many of its top challenges, but significant and immediate improvement is still needed in some crucial areas.

#### NATIONAL SECURITY REMAINS A TOP CHALLENGE

April's bombing of the Boston Marathon tragically demonstrated why safeguarding national security has appropriately remained the Department's highest priority and the focus of substantial resources. The Department's efforts in this regard have consequently been a priority of the OIG's oversight work, which has consistently shown that the Department faces many persistent challenges in its efforts to protect the Nation from attack.

One such challenge is ensuring that national security information is appropriately shared among Department components and the intelligence community so that responsible officials have the information they need to act in a timely and effective manner. Our interim report on the Federal WITSEC Program last month demonstrated the stakes of this challenge. That review found that because the Department did not authorize the disclosure to the Terrorist Screening Center of the new identities provided to known or suspected terrorists and their dependents in the WITSEC Program, it was possible for known or suspected terrorists, using their new Government-issued identities, to fly on commercial airplanes and evade one of the Government's primary means of identifying and tracking terrorists' movements and actions.

The OIG is currently conducting numerous other reviews related to the sharing of national security information. For example, we are working with the Inspectors General of the Intelligence Community, the Central Intelligence Agency, and the Department of Homeland Security to conduct a coordinated and independent review into the U.S. Government's handling of intelligence information leading up to the Boston Marathon bombing. We also are examining the Department's management of the consolidated terrorist watchlist, and we recently issued a report assessing the Department's efforts to investigate terrorist financing. Each of these critical functions requires careful coordination between Department components and other agencies to ensure that the Department has every opportunity to prevent terrorist attacks before they occur.

In addition to the challenges of information sharing, the Department faces the challenge of ensuring the appropriate use of tools used to monitor and detect national security risks and threats. The importance of this challenge was demonstrated by our prior OIG reviews assessing the FBI's use of national security letters (NSLs), which allow the Government to obtain information such as telephone and financial records from third parties without a court order. These reviews found that the FBI had misused this authority by failing to comply with important legal requirements designed to protect civil liberties and privacy interests, and we therefore made recommendations to help remedy these failures.

The FBI has implemented many of these recommendations and continues to make progress in implementing others. However, some recommendations remain outstanding, and we are now conducting our third review of NSLs to assess the FBI's progress in responding to those recommendations and to evaluate the FBI's automated system for tracking NSL-related activities and ensuring compliance with applicable laws. This review also includes the OIG's first review of the Department's use of pen register and trap-and-trace devices under FISA.

On a related note, the OIG also completed its review of the Department's use of section 702 of the FISA Amendments Act (FAA), which culminated in a classified report released to the Department and to Congress. Especially in light of the fact that Congress reauthorized the FAA for another 5 years last session, we believe the findings and recommendations in our report will be of continuing benefit to the Department as it seeks to ensure the responsible use of this foreign intelligence tool.

#### CYBERSECURITY IS OF INCREASING IMPORTANCE

The Department and the administration have increasingly turned their attention to the problem of cybersecurity, which has quickly become one of the most serious threats to national security. Computer systems that are integral to the infrastructure, economy, and defense of the United States face the constant and rapidly growing threat of cyber intrusion and attack, including the threat of cyber terrorism. The Department also faces cyber threats to its own systems.

While the number of cybersecurity incidents directly affecting the Department remains classified, a recent study by the Government Accountability Office (GAO) found that the number of such incidents reported by Federal agencies increased by nearly 680 percent from 2006 to 2011. The Department will continue to face challenges as it seeks to prevent, deter, and respond to cybersecurity incidents—both those targeting its own networks and those that endanger the many private networks upon which the Nation depends.

In recognition of this trend, the Department has identified the investigation of cyber crime and the protection of the Nation's network infrastructure as one of its top priorities. The Department has sought to strengthen cybersecurity by responding to recommendations made in OIG reports relating to cybersecurity, including our September 2011 report examining the operations of the Justice Security Operations Center, and our April 2011 audit report assessing the National Cyber Investigative Joint Task Force and the capabilities of FBI field offices to investigate national security cyber intrusion cases. The Department has also substantially increased its requested budget for programs designed to combat cyber crime and defend its information networks: its fiscal year 2014 request of \$668 million in cyber resources represents an increase of \$92.6 million over its fiscal year 2013 cyber budget and includes an increase of \$86.6 million to support the FBI's Next Generation Cyber Initiative, which is focused on preventing intrusions into government and industry computer networks.

The challenges posed by cyber crime multiply as cyber threats grow in number and complexity. Of central importance to any cybersecurity strategy is working effectively with the private sector. The Department not only has an interest in the private sector investing in the security of its own networks, but also in conducting outreach to the private sector to assure potential victims of cyber crime that proprietary network information disclosed to law enforcement will be protected. Even a modest increase in the rate at which cyber crimes are reported would afford the Department invaluable opportunities to learn the newest tactics used by an unusually dynamic population of criminals and other adversaries, and to arrest and prosecute more perpetrators.

Cyber intrusion and attack also pose risks to the security of the Department's information, the continuity of its operations, and the effectiveness of its law enforcement and national security efforts. The OIG annually conducts Federal Information Security Management Act audits, which include testing the effectiveness of information security policies, procedures, and practices of a representative subset of the Department's systems. The OIG recently reviewed the security programs and a selec-

tion of individual systems for six components: the FBI, JMD, BOP, USMS, Criminal Division, and Tax Division. These audits identified deficiencies that included inadequate configuration management settings that exposed workstations to cybersecurity threats; inadequate identification and authentication controls that increased the risk of inappropriate or unauthorized access to information systems; audit and accountability controls that decreased the timely identification of operational problems and unauthorized activity; and inadequate contingency planning that increased the risk that information systems would not continue to operate during an emergency. In addition, the Civil Division has yet to complete corrective actions in response to a 2009 OIG audit report finding significant vulnerabilities in its laptop computer encryption policies and practices. The Department must strive to correct these deficiencies.

THE DEPARTMENT MUST ADDRESS ITS GROWING COST STRUCTURE, PARTICULARLY THE FEDERAL PRISON SYSTEM

While the Department's mission has remained substantially unchanged since the attacks of September 11, 2001, the budgetary environment is changing dramatically, presenting critical challenges for the Department. From fiscal year 2001 through fiscal year 2011, the Department's discretionary budget grew by more than 41 percent in real dollars, to \$28.9 billion. In fiscal year 2012, however, the Department's discretionary budget decreased by more than 7 percent (to \$26.9 billion), and in fiscal year 2013, the Department's discretionary budget decreased again, this time by 5.9 percent (to \$25.3 billion). Under these circumstances, the Department needs to redouble its efforts to evaluate spending in every program area to ensure that duplicative functions are streamlined, inefficient programs are remedied, and wasteful spending is eliminated.

One area where the Department needs to carefully evaluate both its short-term and long-term plans is the Federal prison system. Even as the Department's overall budget is now shrinking, the BOP continues to consume an ever-increasing share of that budget. The statistics present a clear picture of the unsustainable path that the Department is facing. Fifteen years ago, the BOP's budget was \$3.1 billion, which represented approximately 14 percent of the Department's budget. By fiscal year 2013, the BOP's budget has grown to \$6.8 billion, which represents nearly 25 percent of the Department's budget. Moreover, the President's fiscal year 2014 budget projects the budget for Federal correctional activities to rise to \$7.6 billion by fiscal year 2018, which, if the Department's budget were to remain flat, would represent fully 30 percent of the Department's budget. Today, the BOP already accounts for roughly one-third of all Department employees, more than the FBI or any other DOJ component.

The reason for the growth in the BOP's budget is obvious: according to statistics published by the Executive Office for United States Attorneys, the number of criminal cases filed in U.S. District Court increased by more than 60 percent from fiscal year 1997 through 2012. And with a conviction rate of greater than 90 percent, more prosecutions have translated into more prisoners and the need for more bed space. Indeed, the number of Federal defendants sentenced rose from approximately 60,000 in fiscal year 2001 to more than 84,000 in fiscal year 2012, according to the U.S. Sentencing Commission. During that same period, the number of Federal prison inmates has increased from approximately 157,000 to more than 218,000.

Unfortunately, despite the substantially increased spending on the Federal prison system, the BOP's prisons remain well over rated capacity. Since fiscal year 2006, Federal prisons have moved from approximately 36 percent over rated capacity to approximately 37 percent over rated capacity as of March 2013, with medium security facilities operating at approximately 44 percent over rated capacity and high security facilities operating at approximately 54 percent over rated capacity. Moreover, the Department's own outlook for the Federal prison system remains bleak: the BOP projects system-wide crowding to go up to 44 percent over rated capacity by 2018. In addition, since fiscal year 2000, the BOP's inmate-to-staff ratio has increased from about four-to-one to a projected five-to-one in fiscal year 2013.

The Department, during both the prior administration and the current administration, has itself recognized the budgetary and capacity problems associated with a rapidly expanding prison population. The Department first identified prison overcrowding as a programmatic material weakness in its fiscal year 2006 Performance and Accountability Report, and it has been similarly identified in every such report since, including last year's fiscal year 2012 report. In fact, prison overcrowding was the Department's only identified material performance weakness last year. Yet, despite the recognition of this significant problem for the past 7 years, the conditions

in the Federal prison system have continued to decline even as the BOP's budgetary needs have continued to increase.

Given the current budget environment, the Department will likely need to carefully assess all aspects of its enforcement and incarceration policies in order to address this issue, including which criminal cases should be brought in Federal court, whether performance metrics are aligned with the Department's enforcement priorities and measure the quality of cases brought rather than just the number of cases filed, and whether existing incarceration programs are being used effectively.

The OIG and the GAO have both recently issued reports concerning existing detention programs and found that the Department has not used them as effectively as they could. For example, in December 2011, the OIG reviewed the Department's International Prisoner Treaty Transfer Program, which permits certain foreign national inmates from treaty nations to transfer from the United States to their home countries to serve the remainder of their prison sentences. With approximately 26 percent of BOP inmates being non-U.S. nationals, and with approximately 46 percent of Federal defendants sentenced in fiscal year 2012 being non-U.S. nationals, the potential impact of the appropriate use of this program is readily apparent. However, the OIG's review found that, from fiscal year 2005 to fiscal year 2010, the BOP and the Criminal Division's International Prisoner Transfer Unit rejected 97 percent of inmates' transfer requests, and, in fiscal year 2010, approved requests for transfer from only 299 inmates, or slightly less than 1 percent of the 40,651 foreign national inmates in the BOP's custody. While some factors that reduce the number of inmates eligible for transfer are beyond the Department's control, the OIG found that if only 5 percent of eligible inmates who had never previously applied were transferred to their home countries, the BOP would remove 1,974 inmates from its prisons and save up to \$50.6 million in annual incarceration costs. The Department is now implementing the OIG's 14 recommendations to manage the program more effectively.

The BOP also should continue its efforts to address the OIG's recent recommendations to improve its poorly run Compassionate Release Program, as well as to use and improve the programs identified in a February 2012 GAO report assessing BOP detention programs, which include the Residential Drug Abuse Treatment Program, residential reentry centers, home detention, and the BOP's statutory authorities to request a court to release certain elderly prisoners who no longer pose a threat to the community. Regardless of how large the cost and capacity savings may be, given the serious budget and capacity issues facing the BOP, we believe the Department must effectively use every program that the Congress has authorized it to use.

The OIG is in the process of conducting multiple reviews that could identify other opportunities to reduce overcrowding and save costs, including an audit of the Department's Pre-Trial Diversion and Drug Court Programs with the Federal judiciary, which provide alternatives to traditional sentencing and incarceration of offenders. Both programs have received congressional support. The OIG also is conducting an audit of the BOP's efforts to improve its acquisition processes through the use of strategic sourcing.

In an era when the Department's overall budget is likely to remain flat or decline, at least in the short-term, it is clear that significant steps must be taken to address these BOP cost and capacity issues. Continuing to spend more money each year to operate more Federal prisons will require the Department to make cuts to other important areas of its operations. The Department must therefore articulate a clear strategy for addressing the underlying cost structure of the Federal prison system and ensuring that the Department can continue to run our prisons safely and securely without compromising the scope or quality of its many other critical law enforcement missions.

#### CONCLUSION

In sum, the Department has made progress in addressing many of the top management challenges the OIG has identified and documented through its work, but improvements are needed in important areas. These issues are not easily resolved and will require constant attention and strong leadership by the Department. To aid in this effort, the OIG will continue to conduct vigorous oversight of Department programs and provide recommendations for improvement.

This concludes my prepared statement, and I would be pleased to answer any questions that you may have.

Chairwoman MIKULSKI. Well, that was an excellent testimony and really raises some—

There are many things I worry about with the Department of Justice. One is, of course, cost escalating in the prison program, where we have to be so careful because we do not want to increase risking our community. And then the other is cybersecurity. Let me go to the cybersecurity question.

Mr. Horowitz, you identify this as a great concern of yours and it is a great concern of mine. It is so great of a concern that I am going to have a hearing across subcommittee lines on cyber. The administration has asked for, in every agency, \$13 billion. By and large, because this committee works through the subcommittees, we can have a stove-type approach, and all we get is smoke, but I do not know if we get fire.

The other thing that I worry about, so we want to make sure that whatever we do to protect the Nation, we are maximizing resources, getting value for the dollar, and we have our committees working in a coordinated way.

I also worry about techno boondoggles where everybody likes to buy a gadget and a widget, but we end up with incompatibility, inoperability, and dysfunction.

So here is my question: What would you say were the top three issues in the field of cybersecurity? And how can we insist, if there are deficiencies or dysfunctions, what we as a committee should either be insisting upon or at the same time investing in corrective action, or a combination of?

Mr. HOROWITZ. Let me mention what I think are three of the most important issues here.

Chairwoman MIKULSKI. Are my fears justified?

Mr. HOROWITZ. I think they are very justified, the concerns, and we have done reports in this area about some of the technology efforts to implement. Some ultimately, it appears, work like Sentinel, but this is our tenth report, for example, on the Sentinel system that we are preparing to do.

But I think in terms of the significant issues, I think first and foremost, is the public-private relationship. It is very important for the Government to reach out to the private sector and for the private sector to be willing to come in and report criminal activity to the Department of Justice, to local officials in this area. That is something that has to be worked on.

Second is information sharing and computer sharing, the issue you just raised. It is making sure that it is not one component's system and then another component's system and they are not speaking to one another. That is one of the issues that, I think, we will end up looking at probably in the Boston Marathon bombing review that we are doing, because we have four Inspector Generals working together. So we have the benefit of being able to look at—

Chairwoman MIKULSKI. So the so-called watch list issue.

Mr. HOROWITZ. Correct. And—

Chairwoman MIKULSKI. Which you are an expert on, Senator Collins. You have put a lot of time into the famous watch list issue. Go ahead.

Mr. HOROWITZ [continuing]. And we are doing a review on that watch list to follow up to the Christmas bombing incident and whether the changes have been made there that needed to be done.

And then, we identified in our prior reports, the need to make sure that the FBI agents, who are the frontline people in this effort, have the right training, the right tools on the ground, that is where the action is happening. Headquarters—I was a prosecutor in the U.S. Attorney's Office—that is where you need to make sure people are well trained. They are the ones who are going to have the relationships on the ground with the local businesses, with the local community. Those are the folks that need to know and understand how to take these actions, how to address these issues.

Chairwoman MIKULSKI. Let me ask another question. I really invite you to work with our staffs on a bipartisan basis about really what would be a must-do list that we can actually implement through the appropriations process on this compatibility interoperability, particularly intradepartmental and then interdepartmental.

The second question goes to the Federal prison population. I think you have raised in your reports the Compassionate Release Program and the aging population. That is a very intriguing thing. That one, you do not think it is well managed. But second, that you think that these are possibilities where, if done properly, we could reduce the number and not increase the risk, which is an obsession of the committee.

Could you share with us what you think the reform should be?

Mr. HOROWITZ. Yes. I think as we indicated in our Compassionate Release work, as the GAO indicated in some of the reviews they have done on residential reentry and elderly populations, we indicated on our International Prisoner Transfer Treaty report, there are ways to manage the prison population that allows individuals who have very low recidivism rates—you are never going to reduce it to zero, but as we found in Compassionate Release, the recidivism rate was about 3 percent. Those are very low risk individuals.

They are elderly or the prisoners who are released have, if you carefully select who is eligible, you can find, I believe, ways to address the issue with a very low potential for recidivism. There are several programs dealing with current inmates that can be done.

The International Prisoner Transfer issue, for example, that is a program that there are tens of thousands of inmates who, in theory, are eligible for. We found the Department had used it with regard to 299 inmates for one of the years. If that number was, instead of less than 1 percent of the eligible inmates—

Chairwoman MIKULSKI. Yes, we are not talking about the terrorists here—

Mr. HOROWITZ. Correct. We are talking about individuals—

Chairwoman MIKULSKI [continuing]. Like the GTMO problem.

Mr. HOROWITZ. Right. We are talking about low level offenders who are non-U.S. nationals who now, by the way—

Chairwoman MIKULSKI. Who are sitting in our prisons.

Mr. HOROWITZ [continuing]. 27 percent of our prisoners are non-U.S. nationals.

Chairwoman MIKULSKI. 27 percent?

Mr. HOROWITZ. 27 percent, approximately; 46 percent last year of defendants were non-U.S. nationals. So this is a number that is likely to go up.

Chairwoman MIKULSKI. Could you repeat those numbers again?

Mr. HOROWITZ. 27 percent, approximately, of current Federal inmates are non-U.S. nationals and last year's—

Chairwoman MIKULSKI. And 33 in the top.

Mr. HOROWITZ. Right. And last year's, of 84,000 defendants prosecuted by the Justice Department, approximately 46 percent were non-U.S. nationals. That number is obviously very significant. Those individuals, we have treaties with countries around the world.

Our report found, again, a 3 percent, approximately, recidivism rate; people coming back to this country and threatening individuals here because, again, this is not a mandatory program. If you carefully manage a program like this, you look at nonviolent offenders, first time offenders, individuals who have acted appropriately in prison, who have tried to, who have stable potential home lives. There are a variety of factors you would want to look at before making that decision.

So we are not looking at sending tens of thousands of people overseas, but as we found in our report, if you just did 3 percent of the eligible inmates, for example, that would save about \$50 million.

Chairwoman MIKULSKI. About \$50 million.

Mr. HOROWITZ. So there are possibilities out there that, I think, need to be addressed. There is a wide ranging issue. Obviously, it affects who is coming in the door.

What happens in residential reentry centers, a very important issue that we have done a lot of reviews on and found a lot of issues with how our RRC's, Residential Reentry Centers—halfway houses—are managed. They have to be managed better because they are an important transit point for inmates to leave the prison and get back to the community, and have that transition period in the Residential Reentry Center.

Chairwoman MIKULSKI. Well, thank you very much. I want to turn to Senator Shelby. I think that was a very meaty exchange.

Senator SHELBY. Very.

Chairwoman MIKULSKI. And, quite frankly, an eye opener, and I will follow up on what I would like from you.

Senator Shelby.

Senator SHELBY. Mr. Inspector General, I would like to follow up on Senator Mikulski's question a little. Of the 47 percent you used that are currently pending, is that right?

Mr. HOROWITZ. Right. Approximately 46 percent.

Senator SHELBY. More or less. What percentage of that is violent crime? Is it all kinds of crime? How do you break that down? Can you do a generic thing here?

Mr. HOROWITZ. Yes. I do not have the numbers offhand.

Senator SHELBY. I know.

Mr. HOROWITZ. But I certainly can get back to you and let you know that. But what you do find, and I think it is interesting as you see these numbers evolve what used to be the crime that had the largest share of defendants was drug prosecution.

Senator SHELBY. Okay.

Mr. HOROWITZ. It is now immigration prosecution.

Senator SHELBY. Immigration.

Mr. HOROWITZ. Drugs are now second, and then you get to fraud offenses and firearms offenses.

Senator SHELBY. If you excluded, just for the conversation—

Mr. HOROWITZ. Right.

Senator SHELBY [continuing]. Immigration and drugs, what about violent crime? Is it connected to drugs or is it all across the board?

Mr. HOROWITZ. I think it cuts across the board. And I think one of the issues—I know the Congress has tried to address when I was on the Sentencing Commission—we tried to address was to figure out which first time offenders in the drug area might be eligible, for example, for reentry court—

Senator SHELBY. Sure.

Mr. HOROWITZ [continuing]. Or other positions because they do not have a connection to violence, and I think that is an important issue.

Senator SHELBY. Thank you. I want to get back to an area that I was into questioning with the Attorney General.

Public trust and confidence, I think most of us would agree, is key to a successful Federal law enforcement effort across the board. If DOJ is facing significant issues, as we all know it has in recent years, and particularly in recent weeks that jeopardize so much of that confidence, what can be done to restore that public trust by the American people, in your judgment?

Will it take new personnel? Will it take a different attitude? What will it take? Because I think that this is very much under attack, the confidence of the American people in the Justice Department right now, because of a lot of things, prosecutors' misconduct that the Senator from Alaska raised, a lot of things, as you well know in your role.

Mr. HOROWITZ. Yes, I think there are of utmost importance to the Justice Department, to all the prosecutors and the agents, and all the people who work there is being able to make arrests, bring cases, try cases, and have the confidence in the jurors sitting in the jury box with what they are hearing and who they are hearing from.

And there have been a series of incidents over the last several years, certainly the Justice Department, that have raised concerns in that regard.

We did a report on Fast and Furious that involved what we thought were highly problematic events involving both the agents and the prosecutors. You have seen the Stevens prosecution that Senator Murkowski mentioned, other prosecutions that have been brought and dismissed that have raised concerns about that.

And I think the Department has to keep in mind the importance of maintaining that integrity. It has been on our top 10 list of challenges for the last several years, in part, because of that issue.

Senator SHELBY. The confidence of the American people, would it not, be based on the trust, truthfulness, veracity, evenhandedness, honesty of the Department of Justice?

Mr. HOROWITZ. Yes.

Senator SHELBY. Do you agree with that?

Mr. HOROWITZ. The critical point is there has to be that confidence.

Senator SHELBY. And if that is questioned, it undermines law enforcement, does it not?

Mr. HOROWITZ. Certainly, if there is a basis and then that takes hold, law enforcement, prosecutors, and then agents—

Senator SHELBY. I have just a few more seconds, I guess.

But in the area that Senator Mikulski got into, cyber crimes, which is so important. We have always had—I guess from the times of the Persians or the Greeks, and the Romans, and you name it—industrial espionage. You know, people trying to find out what this product, and how they made it and so forth, for the edge. We understand that, and that is big.

But it seems now with the computer age, that it has gotten easier. And there are other countries, including some of our friends, so-called friends, are very interested in the processes of tomorrow's products be they pharmaceutical, be they weapons, be they anything, energy, chemicals, you name it.

Cyber is so important, but the defense against that because I think in the cyber war, we better not forget that people are looking for the edge and you have got competitors in the world are getting into our so-called industrial secrets and so forth, things that have been built up over years, by billions of dollars' worth of research.

So I agree with Senator Mikulski, that is a real challenge for this country from the economic standpoint and, of course, always for national security.

Do you disagree with me?

Mr. HOROWITZ. No, I agree completely. And I think one of the things that is important that we do is understand whether the private sector is willing to bring that evidence in.

Senator SHELBY. What do you need? What does the Justice Department need? They need resources always and this is the Appropriations Committee. But they need the tools, and it is changing every day, is it not?

Mr. HOROWITZ. Yes, it is constantly evolving and changing.

Senator SHELBY. And it is not going away.

Mr. HOROWITZ. I would doubt that.

Senator SHELBY. Is this one of our biggest challenges as a Nation right now?

Mr. HOROWITZ. Yes, I think it is clearly one of the most significant challenges we are facing.

Senator SHELBY. Thank you.

Chairwoman MIKULSKI. Great questions.

Senator COLLINS.

Senator COLLINS. Thank you, Madam Chairman.

First, I want to commend the Inspector General for, what I think, has been truly extraordinary work and a very productive time during his leadership of the Office.

Last month, your Office released a public summary of an interim report on the Department's handling of known or suspected terrorists who had been admitted into the Federal Witness Protection Program. I must say, it came as a shock to me that we had known or suspected terrorists who were part of the Witness Protection Program, but that is a whole other issue.

What was troubling in this report to me is that it illustrated yet another failure of Government to share absolutely vital informa-

tion. In this case, according to your report, the Federal Witness Protection Program was not sharing information about these suspected, or even known, terrorists who had been admitted to the program with the Terrorist Screening Center. Now, the reason this is important is the Terrorist Screening Center's watch list is used by TSA for its no-fly and selectee lists.

So here we have a situation where one agency has admitted known or suspected terrorists into its program, may have changed their identities, given them new names likely has, and is not sharing that information to allow TSA to put these individuals on its no-fly list or, at least, the list where there is extra screening.

I would like to ask whether you found out whether or not some of these individuals actually did fly on commercial flights because their names were not on the no-fly list.

Mr. HOROWITZ. We did find that individuals flew and that they flew with the knowledge and permission of the Marshal Service.

What we did not go further to find out is whether on their own accord, they flew, but they certainly had that ability to do so using their new identities, even though under their real names, they had been put on a no-fly list by the TSA. And that was because, as you indicated, the criminal division of the Marshal Service did not share with the TSC, the Terrorist Screening Center, the new identity that that individual got.

Senator COLLINS. So think how extraordinary this is. The terrorist's real name is known and is on the no-fly list, but the new identity created by our Government under the Witness Protection Program is not shared with TSA or the Terrorism Screening Center. And thus, that identity, which is the identity they are using, allows them to escape being on this list.

We know that there is some official travel that may be necessary that you are referring to, but the fact is we have no idea whether these individuals traveled on their own. Is that correct?

Mr. HOROWITZ. That is correct.

Senator COLLINS. My second, and related, question to this is: were these individuals accompanied on the airplanes when they were traveling at the official behest of the Government?

Mr. HOROWITZ. Our understanding is that two marshals brought them to the plane, but once they got on the plane, they were not escorted further until they landed and got off the plane on the other side where two marshals met them. But for the travel itself, no one was accompanying them.

Senator COLLINS. So think about this, Madam Chairman. This is just so extraordinary. These individuals are dangerous enough that two marshals accompany them to the gate to get them on the plane, and yet, they fly without any marshals accompanying them or any law enforcement assigned to them, and they are so dangerous, that they are met at the other end. This is just mindboggling to me.

Now, is there any information that suggests to us that the air marshals who are on planes were informed of the presence of these known or suspected terrorists?

Mr. HOROWITZ. We are not aware of the air marshals, if they were on those planes, were notified. It appears that the effort to

compartmentalize this and keep the information close hold limited the sharing that should have otherwise occurred.

Senator COLLINS. So it is not as if the air marshal took over while they were on the plane. So I just find this mindboggling, and so unacceptable, and so dangerous.

I just want to thank you publicly for doing this work and revealing this incredible gap. Due to your work, I know that the Department of Justice is looking at changing its procedures, but it is just extraordinary that it happened in the first place.

Thank you for your good work. I know my time has expired.

Mr. HOROWITZ. Thank you, Senator.

Chairwoman MIKULSKI. And Senator Collins, I invite you, first of all, your expertise from having chaired Homeland Security and particularly during those early troubled times, you really are an expert on the watch list. But even when we have watch lists, you have to get on the watch list. So I have people, prominent Maryland citizens who cannot get off the watch list. But if you are a known terrorist, you do not get on the watch list.

So I would really like to I would invite you and your staff to work with the Inspector General for any reforms you would like to include in the bill.

Senator COLLINS. Thank you.

Chairwoman MIKULSKI. Senator Murkowski.

Senator MURKOWSKI. Thank you, Madam Chairman. And I would agree, this has been a fascinating hearing, in part, due to the expertise of some of our colleagues.

I am just thinking, Senator Collins, about all that you have detailed. You just have to kind of shake your head at what goes on. It was just announced yesterday that TSA has decided that they are going to not enforce that rule about allowing small knives on airplanes. As insignificant as that was, it is just one more example of how we are able to confuse and confound the public when it comes to safety as we travel. So I, too, thank you Mr. Horowitz, for your work here.

I would like to focus just a moment on what Senator Shelby raised, which is the public trust, and the issue of how we regain the public's confidence because I think the public's confidence is clearly shaken in many areas.

You and I had an opportunity to visit, and in that meeting you indicated to me that the Inspector General is really confined. You are bound by section 8E of the Inspector General Act that precludes the examination of the work of the Department of Justice attorneys.

So the Inspector General can look at everybody else to do an independent review and investigation, but when it comes to the Department of Justice attorneys, they are exempted. When you look at the law, you are shaking your head and saying, "Well, why is this?"

I, for one, would really like to have seen a truly independent inquiry into whether the Justice Department's litigators made the right decisions in a couple of different matters. I mentioned the terrible situation with Senator Stevens. And yet, we are told through your Office and the predecessor's to your Office, that it is not pos-

sible to review the matter because of this provision within the Inspector General Act.

Can you tell me if there is any legitimate reason in your mind why this section 8E should not be modified to allow your Office to conduct these independent inquiries into the Department's litigation units?

Mr. HOROWITZ. My Office has long taken the view that there is no reason for that provision to prohibit us from looking at attorney decisions when we, as you indicated, Senator, review actions of agents and every other employee in the Department.

Senator MURKOWSKI. Do you think that if you were able to conduct these independent investigations of the Department of Justice attorneys it would help us in reclaiming that public trust, if you will, or the confidence that I think we are lacking right now when it comes to certain aspects of the DOJ?

Mr. HOROWITZ. Well, let me mention two reports that we have done in the last year, some are well-familiar with them, Fast and Furious, where we addressed what looked initially to be agent conduct, but as we found it, also involved attorney conduct and decisionmaking. So that was one of those areas where we did speak to what attorneys did, but it was largely because it was originally investigator-driven and the questions were about ATF, but it also involved the U.S. Attorney's Office.

We just issued a few weeks ago a report on a leak that occurred out of that case that we found involved the U.S. Attorney himself. Our reports in both instances were made public. They were judged by the public, by Members of Congress. I was called up to testify at least as to the first, the Fast and Furious report, and from our standpoint, we are subject to rigorous oversight in that regard, and we make our reports public.

I think from our standpoint, it is important to be transparent, to be open so that when issues arise, if there is misconduct, and where there are allegations of the misconduct that are not proven, people know it is dealt with appropriately. Frankly, lots of AUSA's get allegations made against them that are disproven. That is, frankly, just as important to have out there. Their records, their names should be cleared if that has occurred.

So I think in both instances that is important.

Senator MURKOWSKI. Well, Madam Chairman, I would love to discuss this further with you. I think it is an issue and an area that we need to look at, to address.

I cannot think of any good reason why the Justice Department attorneys would be exempted, would be completely carved out. I do think that it would go towards really restoring a level of confidence, if you know that you can have a truly independent investigation and assessment. Right now, we are prohibited, the Inspector General is prohibited by law, from doing just that.

Mr. HOROWITZ. Right, by congressional statute.

Senator MURKOWSKI. There is no transparency here when there needs to be within the Department, and I think this is something that we should be looking at.

Mr. HOROWITZ. Thank you.

Senator MURKOWSKI. Thank you for your work, and thank you, Madam Chairman.

Chairwoman MIKULSKI. Mr. Horowitz, thank you for really adding, I think, very much to our knowledge, to our insights, and to, I think, really rounded out the subcommittee hearing.

We would like to work on these reforms that the Senators have indicated. And for me, I am going to come back to two areas, one a kind of a must-do list on that cybersecurity. Knowing that we are not the authorizers, but through financial work and through our report language, we think we can give guidance, and direction, and resources.

The other goes to the prisoner issue and particularly in those areas where we could look, at least for this year, the beginning step. Not an overhaul. Again, we are not authorizers. We are not the executive branch. But we know that we have reasonable outcomes of reducing population, but we know the people will be safe and we won't be sorry we did it.

I would look, then, at the aging population, what your suggestions would be in the areas of aging and compassionate release; again, carefully selected. And then the fact that 27 percent of those in our Federal prisons could be in prisons in other countries and that these are not terrorism. So we are not into releasing them into the street or releasing them in the streets of Paris, or Yemen, or something like that. But really, again, how we could encourage the Department of Justice to get more on the ball in this area because it sounds like they have not been on the ball in this area? What we can do to do that. Okay?

Mr. HOROWITZ. Yes. Absolutely.

Chairwoman MIKULSKI. But, again, we want to thank you. And you were an Assistant U.S. Attorney, is that correct?

Mr. HOROWITZ. I was for 7½ years up in Manhattan in New York City before I came down to Washington in 2009 and worked in the criminal division for 3½ years. So I have seen a variety of cases and public corruption as well.

Chairwoman MIKULSKI. Well, the U.S. Attorney's Office in Manhattan sees every kind of case in the world, actually, because you see the world in New York.

Mr. HOROWITZ. Right.

#### ADDITIONAL COMMITTEE QUESTIONS

Chairwoman MIKULSKI. Well, having said that, this was an excellent hearing. Our witnesses were very forthcoming and insightful. And our subcommittee, our subcommittee was excellent. If there are no further questions this morning, this subcommittee—

Senators may submit additional questions for this subcommittee in our official record. We request the DOJ's response within 30 days.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED TO HON. ERIC H. HOLDER, JR.

QUESTIONS SUBMITTED BY SENATOR PATRICK J. LEAHY

PRISON COSTS

*Question.* As more and more people are incarcerated for longer and longer, the resulting costs have placed an enormous strain on Federal, State and local budgets and have at the same time severely limited our ability to enact policies that prevent crimes effectively and efficiently. At the Federal level, the Bureau of Prison's (BOP) budget now consumes a full quarter of the total budget for the Department of Justice (DOJ).

What budget problems has the expanding prison population posed for the Department of Justice? Which other areas of the DOJ budget are suffering losses or cuts because funds must be diverted to maintain the BOP? What is the impact of such cuts to law enforcement?

*Answer.* The rising costs of supporting a growing prison population are unsustainable. With tight budgets, the mandatory costs of housing and securing the prison population could crowd out funding for all other Department of Justice functions: investigations, prosecutions, treatment and prevention activities, State and local grant programs, and other programs that help support public safety. This includes programs that facilitate the transition of inmates to contributing, law-abiding members of their communities.

The Department is continuing its efforts to address the growing inmate population. The Department supports sentencing and corrections policies that protect the public, are fair to both victims and defendants, reduce recidivism, and control the prison population.

On August 12, 2013, the Attorney General announced his "Smart on Crime" initiative which prioritizes prosecutions on the most serious cases, reforms sentencing to eliminate unfair disparities, pursues alternative to incarceration for low-level, non-violent crimes, and improves reentry to curb repeat offenses and re-victimization.

*Question.* How do you anticipate that continued growth of the BOP will divert funding from other DOJ programs and hiring in the future?

*Answer.* The mandatory costs of housing and securing the Federal prison population are expected to continue to grow and could crowd out opportunities for other Department programs. BOP costs have grown from 16 percent of the Department's Budget in 1980, to nearly 25 percent as of the end of fiscal year 2012, as the prison population has grown from approximately 25,000 to roughly 219,000 over the same period of time. The Department has proposed as part of the fiscal year 2014 President's budget two sentencing reform proposals to revise Federal statutes governing the time Federal inmates serve on their sentences. These proposals would encourage good conduct and participation in recidivism-reducing programming and would help reduce crowding and costs in the Federal prison system.

On August 12, 2013, the Attorney General announced his "Smart on Crime" initiative which prioritizes prosecutions on the most serious cases, reforms sentencing to eliminate unfair disparities, pursues alternative to incarceration for low-level, non-violent crimes, and improves reentry to curb repeat offenses and re-victimization.

*Question.* Since 2006, the Department has frequently testified that the Federal Bureau of Prisons is overcrowded and has suggested that more funding for more prisons is needed. In light of budget difficulties and the sequester, that is not a plausible solution for the foreseeable future.

What policy changes and sentencing reforms would the Department support to reduce the size and budgetary burden of the prison system?

*Answer.* Legislative changes that are supported by the administration that could help reduce prison costs and recidivism are as follows:

INMATE GOOD CONDUCT TIME

Title 18 U.S.C. 3624(b) (the statute that governs good time for Federal inmates with an offense date on or after November 1, 1987) states that, subject to conditions related to behavior in prison and participation in the General Educational Development (GED) program, a prisoner who is serving a term of imprisonment of more than 1 year (other than a term of life imprisonment) may receive credit toward the service of the prisoner's sentence of up to 54 days at the end of each year served of the prisoner's term of imprisonment (beginning at the end of the first year of the term). In *Barber et al. v. Thomas*, (S.Ct. No. 09-5201), the Supreme Court upheld the Bureau's interpretation of Section 3624(b).

Title 18 U.S.C. 3624(b) could be modified to allow a prisoner who is serving a term of imprisonment of more than 1 year (other than a term of life imprisonment) to receive credit toward the service of the prisoner's sentence of up to 54 days for each year of the sentence imposed. This change could be made retroactive, granting the additional credit for all Federal inmates in custody who have an offense date on or after Nov. 1, 1987 (all but "old law" offenders). This would effectively increase potential Good Time awards for every inmate by 7 days for each year of the sentence imposed.

This change to good conduct time would result in greater incentive for inmates to maintain good conduct and an immediate reduction in the expected population growth (approximately 4,000 fewer inmates 1 year after enactment), and lower growth figures than otherwise would have been expected.

#### EXPANDED EARLY RELEASE FOR PROGRAM COMPLETION

Among the Bureau's inmate programs that have been shown empirically to reduce recidivism, only the Residential Drug Abuse Program (RDAP) offers inmates the opportunity to earn a sentence reduction for successful completion of the program. Specifically, title 18 U.S.C. 3621(e)(2)(B) states that the Bureau may reduce the period an inmate convicted of a nonviolent offense remains in custody after successfully completing RDAP. The authority to provide an early release to inmates who complete RDAP has been used since 1995, with nearly 40,000 inmates getting sentence reductions. Inmates who have not been diagnosed with a "drug disorder" are ineligible for participation in RDAP; therefore, sentence reduction through RDAP is not available to them. Effectively, these inmates are disadvantaged in terms of sentence reduction, even if they complete programs that address their reentry needs and make them less likely to reoffend.

Legislation could be enacted to allow inmates to earn up to 60 days per year of credit toward their sentence for each year in which the inmate is in the custody of the Bureau and successfully participates (for a minimum of 180 days) in specific programs that have been demonstrated to reduce recidivism such as Federal Prison Industries (FPI), vocational training, and education programming. Credits earned toward service of a sentence pursuant to this proposal would not, in combination with RDAP credit earned under 18 U.S.C. 3621(e) and Good Conduct Time credits earned pursuant to 18 U.S.C. 3624(b), be allowed to exceed 33 percent of the sentence imposed.

Such a legislative proposal is not without historical precedence. Prior to enactment of the Sentencing Reform Act of 1984, the good time statutes allowed offenders to earn time off of their sentence for participating in educational and vocational programs. Additionally, the Parole Commission frequently looked to an inmate's institutional adjustment including program completion to determine whether to grant parole and release an inmate from custody.

In addition, on August 12, 2013, the Attorney General announced his "Smart on Crime" initiative which prioritizes prosecutions on the most serious cases, reforms sentencing to eliminate unfair disparities, pursues alternative to incarceration for low-level, non-violent crimes, and improves reentry to curb repeat offenses and revictimization.

*Question.* Specifically, what front-end sentencing reforms does the Department believe would be most effective in reducing the size and costs of the Federal prison population? Do you agree that sentencing reform should include lowering some mandatory minimum penalties and expanding the number of defendants eligible for relief from such penalties?

*Answer.* Please refer to the previous response.

In addition, on August 12, 2013, the Department of Justice announced a change in charging policies so that certain people who have committed low-level, nonviolent drug offenses, who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that carry mandatory minimum sentences.

#### COMPASSIONATE RELEASE

*Question.* The Inspector General recently released a report about the Bureau of Prison's mismanagement of the "compassionate release" program. Typically, the BOP seeks compassionate release only for prisoners who are within 1 year of death due to serious illness. Both in and out of prison, the medical costs of the last 12 months of life can be very high.

How many Federal prisoners are currently incarcerated who might be eligible for compassionate release? How much money could the BOP save if it released them all?

Answer. Since reduction-in-sentence (RIS) requests can be made for both medical and non-medical reasons, the number of inmates eligible cannot be determined. In April 2013, the BOP expanded the medical criteria that will be considered for inmates seeking compassionate release. In addition, in August 2013, the Attorney General announced revised criteria for other categories of inmates seeking reduced sentences, including elderly inmates and certain inmates who are the only possible caregiver for their dependents. For all RIS requests, the ultimate authority to reduce a sentence rests with the United States District Court Judge who rules on the motion submitted by the U.S. Attorney's Office on behalf of the BOP. This legal authority permits a release from prison based on a finding that extraordinary and compelling reasons exist that warrant an inmate's release. See 18 U.S.C. Sec. 3582(c)(1)(A)(i).

*Question.* The report found that the process of requesting a compassionate release is unnecessarily complicated and takes so long that some people die before it is complete. What are the Department and BOP doing or planning to do to improve this process? How soon can we expect those reforms?

Answer. The BOP's compassionate release program has been updated as part of the Attorney General's "Smart on Crime" initiative. The policy was updated on August 12, 2013, and clarifies the medical and non-medical criteria for reduction-in-sentence (RIS) consideration.

Under a recent change to regulations, the Warden of an institution will send approved requests directly to the BOP's Central Office for review and final disposition. The regulation change removed the level of Regional Director review to provide for more expedited review of these requests. At the BOP's Central Office, requests are reviewed by the General Counsel and the Director. The amended regulation can be found at 78 FR 13478 (Feb. 28, 2013) and was effective on April 1, 2013.

The BOP's medical criteria for a compassionate release include the following:

Inmates who have been diagnosed with a terminal, incurable disease whose life expectancy is 18 months or less. Previously, consideration was generally given to inmates whose life expectancy was 12 months or less. Inmates who have an incurable, progressive illness or who have suffered a debilitating injury from which they will not recover. For inmates in this category, the BOP will consider a compassionate release if the inmate is either completely disabled, meaning he or she cannot carry on any self-care and is totally confined to bed or chair, or is capable of only limited self-care and is confined to a bed or chair more than 50 percent of waking hours. Previously, consideration was generally given to inmates so debilitated that they could only provide very little or no self-care.

The BOP policy also sets forth non-medical RIS criteria including the following: Elderly inmates meeting certain criteria regarding age, and length of time served, and in some cases, medical impairments relating to age; circumstances in which there has been the death or incapacitation of the family member caregiver of an inmate's child; and circumstances in which the spouse or registered partner of an inmate has become incapacitated.

Included in the BOP's review process is an analysis of the inmate's ability or likelihood to re-offend, public safety concerns, the benefit, if any, of remaining in prison, and the availability of an appropriate release plan.

If applicable, the BOP notifies and solicits comments from victims and witnesses regarding an inmate's possible release and considers this information in determining whether to recommend a compassionate release to a sentencing judge. The BOP also consults with the U.S. Attorney's Office responsible for the criminal prosecution regarding an inmate's possible release and considers this information in determining whether to recommend a compassionate release to a sentencing judge.

A revised statement about RIS is included in the new Inmate A&O Handbook dated August 2, 2013, and states that the BOP may consider both medical and non-medical circumstances, and inmates may appeal denials through the Administrative Remedy Procedure. Additionally, the revised policy and a notice to inmates was placed on the inmate electronic bulletin board on August 13, 2013.

Beginning in late August 2013, the BOP began utilizing an electronic tracking system for all RIS requests. Various data regarding RIS requests is captured at the institution and Central Office levels of review.

Furthermore, various staff that work on RIS matters have been provided training on at least five occasions between June and September 2013.

## QUESTIONS SUBMITTED BY SENATOR DIANNE FEINSTEIN

## PROSECUTING GTMO DETAINEES IN FEDERAL COURT

*Question.* I was pleased to see the President recommit to closing Guantanamo in his recent national security speech. I would like to focus on the part of that speech where the President said he asked the Department of Defense to establish a site inside the United States to hold Military Commission trials.

If Guantanamo detainees could one day be brought to the United States for prosecution in a Military Commission, would the Department of Justice (DOJ) be ready to file charges against others in Federal criminal court in the United States?

*Answer.* In 2009, the Guantanamo Review Task Force concluded that a number of detainees at Guantanamo should be considered for prosecution, whether in an Article III court or in a military commission, and those cases were under review at the Departments of Justice and Defense. The process for considering whether Guantanamo detainees could be prosecuted in Article III courts effectively ended when Congress passed laws prohibiting the transfer of Guantanamo detainees to the United States, including for the purposes of trial. In the event that Congress were to lift those restrictions, and the administration were to determine that the option of prosecution of Guantanamo detainees in Federal court should again be considered, that process could be restarted, but it is not clear at this time how many detainees at Guantanamo Bay could be prosecuted in Federal court.

*Question.* Would it not be better to prosecute some GTMO detainees in a Federal criminal court because the charges of “Conspiracy” and “Material Support to Terrorism” are not available in Military Commissions at this time unless the Al-Bahlul decision is overturned?

*Answer.* As indicated by your question, the issue whether the Military Commissions Act (MCA) of 2006 authorizes prosecution of conspiracy and material support for terrorism offenses for conduct committed before its enactment is currently pending before the United States Court of Appeals for the District of Columbia Circuit. Both the 2006 and 2009 versions of the MCA include conspiracy and material support among the offenses that can be prosecuted by military commission. But in *Hamdan v. United States*, a panel of the D.C. Circuit held that the 2006 MCA does not authorize prosecution of pre-enactment conduct except for offenses previously codified or recognized as war crimes under customary international law. (The petitioner in that case had long since completed his sentence and been transferred to Yemen in 2008.) Thereafter, a second panel of the D.C. Circuit applied the holding in the *Hamdan* decision to reverse the military commission convictions of Ali al-Bahlul (who is currently serving a life sentence at Guantanamo Bay) on charges of material support, conspiracy, and solicitation. In March, the Department of Justice sought review of the panel’s holding in *al-Bahlul*, and in April the D.C. Circuit granted en banc review. The D.C. Circuit held oral argument on September 30, 2013. Because the terrorist activities of the detainees at Guantanamo Bay generally predate both the 2006 MCA and 2009 MCA, the outcome of the *al-Bahlul* case is likely to have a significant impact on whether military commissions will be authorized to prosecute Guantanamo Bay detainees on material support and conspiracy charges.

Criminal prosecutions in Article III courts could include charges of material support for terrorism and conspiracy if there is an evidentiary basis to support such charges.

*Question.* I understand that there may be some cases on appeal regarding the ability to charge detainees with Conspiracy and Material Support. Is DOJ currently preparing criminal complaints against any GTMO detainees, especially where charges of Conspiracy and Material Support are possible?

*Answer.* As indicated above, the Department’s review process for considering whether, and under what theories, Guantanamo detainees could be prosecuted in Article III courts effectively ended when Congress passed laws prohibiting the transfer of Guantanamo detainees to the United States. In the event that Congress were to lift those restrictions, the administration would again consider whether it is appropriate to prosecute Guantanamo detainees in Federal court, but it is not clear at this time how many detainees at Guantanamo Bay could be prosecuted in Federal court.

*Question.* Of the 80 GTMO detainees who have not been cleared for transfer, do you know how many can only be prosecuted for Conspiracy or Material Support?

*Answer.* It would not be appropriate for the Department to speculate on such issues.

## OFFICE OF LEGAL COUNSEL (OLC) LEGAL OPINIONS REGARDING TARGETED KILLING OPERATIONS

*Question.* I'd like to thank the administration for earlier this year providing the Intelligence Committee and the Judiciary Committee access to all of the OLC opinions related to the targeted killing of Americans outside the United States and outside areas of active hostilities, such as Afghanistan. However, I want to continue to work with you and the administration to get the other opinions we have not seen.

As you are aware, since 2010 the Senate Intelligence Committee has sent bipartisan letters to the executive branch requesting copies of all the OLC legal opinions concerning the U.S. Government's targeted use of force by unmanned aerial vehicles so that we can understand and evaluate the executive branch's legal reasoning, pursuant to our oversight obligations. In fact, you were copied on one of our original letters on this topic, dated September 21, 2010, requesting these OLC documents.

In his recent national security speech, the President said, "I have asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress." He went on to say that he looks forward to "actively engaging Congress to explore these—and other—options for increased oversight." As part of this commitment to increased oversight, can I have your commitment that you will work to provide the Congress with all of the OLC opinions that have been requested?

*Answer.* Where Congress or congressional committees have questions regarding the legal basis for the Government's conduct, including its counterterrorism and intelligence activities, the Department is committed to working with the departments and agencies of the executive branch who engage in that conduct to provide Congress with an explanation of the legal basis for those activities, while doing so in a manner that does not compromise the ability of executive branch officials to receive candid and confidential legal advice to inform their deliberations and decision-making.

It is undeniable that any decision to use lethal force against a U.S. citizen, even one in a foreign land who has become an operational leader of a terrorist organization intent on harming other Americans, would be a grave decision, and it is important that the public and Congress be aware of the legal framework that would apply in such circumstances. This is why the President, the Attorney General, and other senior administration officials have made public remarks addressing this important subject. The administration has also provided the Intelligence Committees with classified briefings regarding that legal framework, as well as an extensive classified white paper that contains a detailed discussion of applicable constitutional and statutory standards. The President's recent decision to provide members of the Senate Select Committee on Intelligence, as well as the House Permanent Select Committee on Intelligence and the Senate and House Judiciary Committees, with access to classified Office of Legal Counsel (OLC) advice related to the use of lethal force against U.S. citizens was an additional and extraordinary accommodation in the context of ongoing, extremely sensitive operational activities by the executive branch.

To the extent that Congress is interested in obtaining additional information to better understand and evaluate the executive branch's legal reasoning regarding potential counterterrorism or intelligence activities, including activities that might involve the use of lethal force, the department or agency that would engage in such activities would be in the best position to explain their legal basis. This longstanding approach allows Congress to conduct effective oversight of such activities and appropriately permits Congress to test, examine, and understand fully the lawfulness of the Government's action without the need for disclosure of confidential and pre-decisional legal advice.

As a general matter, the department or agency that engages (or would engage) in a particular activity is in the best position to explain the legal basis for that activity. There is, however, a fundamental difference between explaining the legal basis for executive branch conduct and disclosing the confidential advice and deliberations that precede executive branch decisions. Department of Justice legal advice and OLC opinions often address sensitive and controversial matters and reflect candid legal advice provided to executive branch decision makers in advance of decisions regarding potential Government actions. Routine disclosure of this sort of pre-decisional, internal executive branch legal advice could deter client agencies from coming to the Department for legal advice in the future and could affect the Department's presentation of that advice to its executive branch clients. Effective and informed decisionmaking by executive branch officials depends upon a robust deliberative process that includes the provision of confidential legal advice by agency general counsel and, in certain circumstances, by the Department and OLC.

While the Department's legal advice may at times relate to classified counterterrorism and intelligence activities, the Department's concern with protecting the confidentiality of such legal advice does not stem from a concern that classified information or intelligence sources and methods may be compromised if the advice were disclosed to the Congress the Department expects that the relevant congressional committees would usually be cleared to receive classified information and likely would already be aware of any intelligence sources and methods discussed in the Department's legal advice. Rather, it is to safeguard the ability of the executive branch to receive confidential legal advice and to have robust and confidential deliberations before making decisions.

*Question.* Were any intelligence sources or methods compromised when the most recent OLC opinions were shared with Congress? If not, then why not share the remaining OLC opinions with us as we have requested?

*Answer.* The response to the previous question is a comprehensive response that addresses this question and the next question.

*Question.* As you may recall, some of the OLC opinions during the Bush administration were withdrawn or superseded by the Department of Justice, often years after their issuance. If you do not provide all of the OLC opinions we have asked for, how can we ensure that today's executive branch is not repeating the mistakes of the past?

*Answer.* Please see the response to the previous question.

#### CONFIRMATION OF ATF DIRECTOR

*Question.* I applaud President Obama for nominating ATF's Acting Director to serve as the Bureau's permanent Director. ATF has a critical mission to keep guns out of the hands of criminals and other people who shouldn't have them. Yet, ATF has never had a Senate-confirmed Director.

I very much hope we can confirm the President's nominee as soon as possible. I am pleased that my colleague on this committee—who also serves as the Chairman of the Judiciary Committee—has scheduled a hearing on the nomination for Tuesday. I find it ironic—and a little hypocritical—that some Senators have, on the one hand, called on ATF and DOJ to prosecute more gun cases while, on the other hand, they have consistently blocked the President's nominee to lead this very same agency.

Do you believe the absence of a Senate-confirmed Director has affected ATF's ability to carry out its mission to enforce the Nation's laws regarding guns and explosives?

*Answer.* I am pleased that the Senate confirmed B. Todd Jones as the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives on July 31, 2013. The lack of permanent leadership at the ATF had an adverse effect on morale within the agency. The men and women that work at ATF are dedicated to executing ATF's mission of fighting violent crime and preserving public safety. They now do so with the benefit of a Senate confirmed Director.

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#### QUESTIONS SUBMITTED BY SENATOR MARY L. LANDRIEU

##### CONSENT DECREES IN NEW ORLEANS

*Question.* The city of New Orleans is not a signatory to the Orleans Parish Prison (OPP) Consent Decree, but the agreement includes provisions that will obligate the city to fund all or part of the OPP consent decree. The city has calculated that the total cost of the New Orleans Police Department (NOPD) Consent Decree is approximately \$55 million. Sheriff Marlin Gusman initially requested \$22.5 million to fund the OPP Consent Decree. These requested dollars would be in addition to the approximately \$22.5 million the city already provides to the Sheriff to operate OPP.

Prior to signing the Orleans Parish Prisons Consent Decree, did the Department of Justice conduct an analysis of the cost of the Orleans Parish Prisons Consent Decree? Why or why not?

*Answer.* In the civil case involving the Orleans Parish Prison (OPP), the role of the United States is to ensure that OPP is operated in a manner that complies with the Constitution and laws of the United States. The constitutional violations identified by the United States' investigation of OPP are well documented and egregious. The city has had the opportunity to put forth evidence that the conditions at OPP meet constitutional muster or that the proposed consent judgment extends farther than constitutionally necessary. The city has not presented any evidence, including expert testimony, showing that conditions at OPP do not violate the Constitution

or title VI. The city also has not offered evidence with respect to an alternative, less costly or less intrusive, approach to remedying conditions at OPP.

On June 6, 2013, Judge Lance Africk, who is overseeing the process for correcting the constitutional violations in OPP, including the process for determining the cost of compliance issued a 104 page “Order Approving the Consent Judgment and Certifying Settlement Class,” (attached), which set forth a process to determine how ensuring constitutional conditions in Orleans Parish Prison would be funded. (See Attachment #1)

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ATTACHMENT #1

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES ET AL.

CIVIL ACTION

VERSUS

No. 12–859  
c/w 12–138  
REF: BOTH CASES

MARLIN GUSMAN ET AL.

SECTION I

ORDER APPROVING CONSENT JUDGMENT AND  
CERTIFYING SETTLEMENT CLASS

Before the Court is the joint motion<sup>1</sup> for approval of the proposed consent judgment<sup>2</sup> filed by plaintiffs, LaShawn Jones et al. (“Class Plaintiffs”), intervenor plaintiff, the United States of America (“United States”) (collectively, “Plaintiffs”), and defendant, the Orleans Parish Sheriff (“Sheriff”). Also before the Court is the motion<sup>3</sup> for certification of a settlement class filed by Class Plaintiffs, which the United States and the Sheriff do not oppose. Third-party defendant, the City of New Orleans (“City”), opposes approval of the proposed consent judgment and certification of a settlement class.<sup>4</sup> For the following reasons, the motions are GRANTED.

FACTUAL BACKGROUND

This lawsuit arises from the alleged unlawful conditions of confinement at Orleans Parish Prison (“OPP”). Among other things, the lawsuit seeks to address deficiencies in safety and security, medical and mental healthcare, environmental conditions, fire safety, and Spanish language services at OPP. Inmates are currently housed in seven physical facilities that collectively comprise OPP, namely, (1) the original OPP,<sup>5</sup> (2) Conchetta, (3) Templeman Phase V, (4) the Temporary Detention Center, (5) the Tents, (6) the Warren McDaniels Transitional Work Center, and (7) the Intake Processing Center.<sup>6</sup> The 600–800 inmates housed in the original OPP include youth inmates, maximum security inmates, and inmates with medical issues.<sup>7</sup> Conchetta houses 300–400 inmates, including both youth and adult inmates, in six housing units.<sup>8</sup> Templeman Phase V (“Templeman V”) houses approximately 240 female inmates and inmates with mental health issues in nine different units.<sup>9</sup> The Temporary Detention Center houses approximately 400–500 inmates in four units, each of which contains two dormitories.<sup>10</sup> The Tents consist of eight windowless canvas tents, supplied by the Federal Emergency Management Agency (“FEMA”) after Hurricane Katrina,<sup>11</sup> which collectively house approximately 500–600 inmates in a

<sup>1</sup> R. Doc. No. 101. Record citations are to Civil Action No. 12–859 unless otherwise noted.

<sup>2</sup> Consent Judgment. Record citations to “Consent Judgment” are to the document filed on this date, which incorporates the March 18, 2013 amendments discussed herein and grammatical and typographical corrections listed in a separate filing.

<sup>3</sup> R. Doc. No. 145.

<sup>4</sup> *E.g.*, R. Doc. No. 159.

<sup>5</sup> This facility is also referred to as “Old Parish Prison.” *E.g.*, Pl. Ex. 374, at 10; R. Doc. No. 405, at 26. The Court refers to this facility as the “original OPP” and to the seven facilities generally as “OPP.”

<sup>6</sup> Pl. Ex. 3; Pl. Ex. 374, at 7; Pl. Ex. 380.

<sup>7</sup> Pl. Ex. 85; Pl. Ex. 370; Pl. Ex. 374, at 32; Pl. Ex. 380.

<sup>8</sup> Pl. Ex. 88; Pl. Ex. 368; Pl. Ex. 374, at 13; Pl. Ex. 380.

<sup>9</sup> Pl. Ex. 374, at 15; Pl. Ex. 380.

<sup>10</sup> Pl. Ex. 374, at 16; Pl. Ex. 380.

<sup>11</sup> R. Doc. No. 374, at 7.

dormitory setting.<sup>12</sup> Approximately 150 inmates may be present at the Intake Processing Center on a given day.<sup>13</sup> Approximately 115 inmates may be present at the Warren McDaniels Transitional Work Center, also referred to as the Broad Street work-release facility, on a given day.<sup>14</sup>

#### PROCEDURAL HISTORY

Although the conditions at OPP have long been the subject of litigation, this particular lawsuit is the product of investigations and complaints arising in the past 5 years.<sup>15</sup> In early 2008, the Sheriff requested technical assistance from the National Institute of Corrections, a Federal agency, expressing particular concern as to OPP facilities' staffing and emergency preparedness.<sup>16</sup> After two outside consultants conducted a six-day site visit, they drafted a report examining operations at OPP facilities, and focusing on staffing and emergency preparedness.<sup>17</sup> They noted OPP's "pervasive and long standing problems," which date back many years.<sup>18</sup> The October 2008 report discussed some of the deficiencies alleged in this case and proposed general solutions.<sup>19</sup>

In September 2009, the United States, through the Department of Justice ("DOJ"), conducted a site visit at OPP and issued a letter to the Sheriff, describing findings of unlawful conditions related to inmate violence, staff use of force, mental healthcare, and environmental conditions.<sup>20</sup> In April 2012, DOJ issued a findings update letter to the Sheriff, reporting that unlawful conditions persisted, notifying the Sheriff of discriminatory conditions not addressed in the previous letter, and requesting that the Sheriff take immediate action.<sup>21</sup>

On January 18, 2012, three youth inmates, through their next friends, filed a sealed complaint for injunctive and declaratory relief, alleging that unconstitutional conditions at OPP facilities subjected them to substantial risks of bodily harm or death.<sup>22</sup>

On April 2, 2013, ten named OPP inmates ("Class Representatives"), seeking solely injunctive relief, filed a complaint alleging that the Sheriff, the wardens of several OPP facilities, OPP's medical director, and its psychiatric director were violating OPP inmates' Eighth and Fourteenth Amendment rights. Class Representatives specifically alleged that defendants fail to provide constitutionally adequate medical care and mental healthcare.<sup>23</sup> Class Representatives further alleged that violent conditions of confinement subjected them to a substantial risk of serious physical injury, to which defendants were deliberately indifferent.<sup>24</sup> On the same day they filed their complaint, Class Representatives filed a motion for certification of a class of plaintiffs consisting of all current and future OPP inmates.<sup>25</sup> The April

<sup>12</sup> Pl. Ex. 374, at 13–14; Pl. Ex. 380.

<sup>13</sup> Pl. Ex. 380.

<sup>14</sup> Pl. Ex. 380.

<sup>15</sup> The litigation before the Court is separate from that in *Hamilton v. Morial*, which was ongoing for approximately 40 years before that case was closed in 2008. See *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 368 (5th Cir. 1998) ("In 1969 a class action, *Hamilton v. Schiro*, was filed in the Eastern District of Louisiana challenging conditions in the New Orleans Parish Prison. In April 1970, the trial court found that the prison conditions were unconstitutional and issued a remedial decree, including a prisoner population cap."); see also Civil Action No. 69–2443, R. Doc. No. 2007 (August 23, 2007) (dismissing plaintiffs' claims without prejudice), adopted by Civil Action No. 69–2443, R. Doc. No. 2041 (June 20, 2008) ("Magistrate Judge Chase has done an outstanding job through the years and all parties to this litigation were fortunate to have her preside over this case. But this litigation has now run its natural course and the time has come to end it.").

<sup>16</sup> Pl. Ex. 3, at 3.

<sup>17</sup> Pl. Ex. 3, at 6.

<sup>18</sup> Pl. Ex. 3, at 6.

<sup>19</sup> E.g., Pl. Ex. 3, at 60–61 ("Current classification practices are inadequate and require substantial improvements. . . . The Sheriff should request assistance from the National Institute of Corrections to develop a comprehensive new approach to inmate behavior management, including the development of a valid and effective system of inmate classification.").

<sup>20</sup> Pl. Ex. 1. DOJ issued a copy of the letter to Mayor Ray Nagin; T. Allen Ustry, counsel for the Sheriff; Penya Moses-Fields, City Attorney; and Jim Letten, United States Attorney for the Eastern District of Louisiana.

<sup>21</sup> Pl. Ex. 2. DOJ issued a copy of the letter to Mayor Mitch Landrieu; T. Allen Ustry, counsel for the Sheriff; Richard Cortizas, Acting City Attorney; and Jim Letten, United States Attorney for the Eastern District of Louisiana.

<sup>22</sup> Civil Action No. 12–138, R. Doc. No. 2.

<sup>23</sup> R. Doc. No. 1, at 36–37.

<sup>24</sup> R. Doc. No. 1, at 37.

<sup>25</sup> R. Doc. No. 2.

2 complaint was consolidated with the January 18 complaint.<sup>26</sup> The Court refers to the class, including Class Representatives, as “Class Plaintiffs.” Class Plaintiffs are represented by the Southern Poverty Law Center (“SPLC”).

Class Plaintiffs moved for a preliminary injunction, but discovery disputes delayed the consideration of this motion.<sup>27</sup> By September 21, 2012, however, the Court was advised that the Sheriff intended to file a third-party complaint against the City, after which Class Plaintiffs would file a motion for entry of a proposed consent judgment.<sup>28</sup>

On September 24, 2012, the United States moved to intervene in the April 2 lawsuit, stating that such intervention would provide the most efficient resolution of Class Plaintiffs’ and the United States’ overlapping concerns.<sup>29</sup> The Court granted the United States’ unopposed motion.<sup>30</sup> In its complaint in intervention, the United States alleged that the Sheriff violates inmates’ Eighth and Fourteenth Amendment rights by failing to protect inmates from harm, providing insufficient mental health and medical care, and subjecting inmates to unconstitutional environmental conditions.<sup>31</sup> The United States also alleged that the Sheriff violates Title VI by unlawfully discriminating against Latino inmates with limited English proficiency.<sup>32</sup>

On October 1, 2012, with leave of Court, the Sheriff filed two, substantively similar, third-party complaints against the City, one based on Class Plaintiffs’ claims and one based on the United States’ claims.<sup>33</sup> In each complaint, the Sheriff asserted that, “should judgment be rendered granting any prospective relief against third-party plaintiff,” the Court should order the City of New Orleans to pay the Sheriff “the full cost, as determined by the Court, of providing any prospective relief ordered by this Court pursuant to 18 U.S.C. § 3626.”<sup>34</sup>

#### THE PROPOSED CONSENT JUDGMENT

On December 11, 2012, Class Plaintiffs, the United States, and the Sheriff moved for the Court to approve a proposed consent judgment, notwithstanding the City’s decision to remain a nonparty to the agreement.<sup>35</sup>

The consent judgment is a 49-page agreement<sup>36</sup> entered into by Class Plaintiffs, including the named plaintiffs from each of the two consolidated cases, the United States, acting through DOJ, and the Sheriff, in his official capacity.<sup>37</sup> The consent judgment also functions as a settlement of class members’ claims. According to the consent judgment:

The purpose of this Agreement is to address the constitutional violations alleged in this matter, as well as the violations alleged in the findings letter issued by the United States on September 11, 2009. [OPP] is an integral part of the public safety system in New Orleans, Louisiana. Through the provisions of this Agreement, the Parties seek to ensure that the conditions in OPP protect the constitutional rights of prisoners confined there. By ensuring that the conditions in OPP are constitutional, the Sheriff will also provide for the safety of staff and promote public safety in the community.<sup>38</sup>

The substantive provisions of the consent judgment are organized by subject matter: protection from harm, mental healthcare, medical care, sanitation and environmental conditions, fire safety, language assistance, and youthful prisoners. Each subject is divided into several components, which address certain policies and practices. For example, mental healthcare is divided into the following components: screening and assessment, treatment, counseling, suicide prevention training pro-

<sup>26</sup> R. Doc. No. 13. Subsequent litigation has focused on the April 2 complaint. The named plaintiffs in Civil Action No. 12–138, however, are parties to this settlement pursuant to its express terms and implicitly as class members. *See* Consent Judgment, at 1.

<sup>27</sup> *E.g.*, R. Doc. No. 56.

<sup>28</sup> R. Doc. No. 71.

<sup>29</sup> R. Doc. No. 68, at 3.

<sup>30</sup> R. Doc. No. 69.

<sup>31</sup> R. Doc. No. 70.

<sup>32</sup> R. Doc. No. 70.

<sup>33</sup> R. Doc. Nos. 75, 76.

<sup>34</sup> R. Doc. Nos. 75, 76.

<sup>35</sup> R. Doc. No. 101.

<sup>36</sup> This number does not include the cover page and table of contents, which constitute an additional 4 pages and are numbered separately.

<sup>37</sup> Consent Judgment, at 1.

<sup>38</sup> Consent Judgment, at 1.

gram, suicide precautions, use of restraints, detoxification and training, medical and mental health staffing, and risk management.<sup>39</sup>

Within each subject and component, the substantive provisions are a mix of broad guidelines and specific benchmarks. For example, under “screening and assessment” for mental health issues, the consent judgment requires that the Orleans Parish Sheriff’s Office (“OPSO”) “[d]evelop and implement an appropriate screening instrument that identifies mental health needs, and ensures timely access to a mental health professional when presenting symptoms requiring such care.”<sup>40</sup> In particular, the consent judgment requires that inmates “with urgent mental health needs” receive an assessment by a qualified mental health professional within 48 hours.<sup>41</sup>

With respect to oversight, the consent judgment provides that the parties to the agreement “will jointly select a Monitor to oversee implementation of the Agreement,” with the Court resolving selection disputes.<sup>42</sup> Among other duties, the Monitor is responsible for providing the parties to the agreement, the City, and the Court with periodic reports on the Sheriff’s compliance with the consent judgment.<sup>43</sup> The consent judgment provides that the Monitor will receive “full and complete” access to OPP facilities, records, staff, and inmates.<sup>44</sup>

Separate from the appointment of a Monitor, the consent judgment obligates OPSO to “hire and retain, or reassign a current OPSO employee for the duration of this Agreement, to serve as a full-time OPSO Compliance Coordinator.”<sup>45</sup> According to the consent judgment:

At a minimum, the Compliance Coordinator will: coordinate OPSO’s compliance and implementation activities; facilitate the provision of data, documents, materials, and access to OPSO’s personnel to the Monitor, SPLC, DOJ, and the public, as needed; ensure that all documents and records are maintained as provided in this Agreement; and assist in assigning compliance tasks to OPSO personnel, as directed by the Sheriff or his or her designee.<sup>46</sup>

In addition, the Compliance Coordinator is responsible for collecting the information the Monitor requires from OPSO.<sup>47</sup>

As to funding, the consent judgment sets forth a process by which the Court will “determine the initial funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this Agreement, and the source(s) responsible for providing that funding at an evidentiary hearing (‘funding trial’)” at which the parties to the agreement, as well as the City, shall have the right to participate.<sup>48</sup> After this time, the funding amount “may be adjusted” through a process by which the Monitor attempts to resolve disagreements between the Sheriff and the City.<sup>49</sup> If the Monitor is unable to do so within 45 days, the dispute is submitted to the Court.<sup>50</sup>

The Consent Judgment provides specific procedures with respect to enforcement. For example, “if the Monitor, SPLC, or DOJ determines that Defendant has not made material progress toward Substantial Compliance with a significant obligation under the Agreement, and such failure constitutes a violation of prisoners’ constitutional rights, SPLC or DOJ may initiate contempt or enforcement proceedings against Defendant . . . .”<sup>51</sup> Before taking such action, however, “SPLC or DOJ shall give Defendant written notice of its intent to initiate such proceedings,” the parties shall work in good faith to resolve the dispute, and “Defendant shall have 30 days from the date of such notice to cure the failure . . . .”<sup>52</sup> In the event of an emergency that poses “an immediate threat to the health or safety of any pris-

<sup>39</sup> Consent Judgment, at ii-iii.

<sup>40</sup> Consent Judgment, at 20.

<sup>41</sup> Consent Judgment, at 20–21.

<sup>42</sup> Consent Judgment, at 40–41. Monitor is defined to include “an individual and his or her team of professionals.” Consent Judgment, at 3.

<sup>43</sup> Consent Judgment, at 42. The consent judgment also requires the Sheriff to provide periodic compliance reports to the Monitor, although the Monitor is “responsible for independently verifying representations from [the Sheriff] regarding progress toward compliance, and examining supporting documentation.” Consent Judgment, at 42.

<sup>44</sup> Consent Judgment, at 41.

<sup>45</sup> Consent Judgment, at 39.

<sup>46</sup> Consent Judgment, at 39.

<sup>47</sup> Consent Judgment, at 39.

<sup>48</sup> Consent Judgment, at 38.

<sup>49</sup> Consent Judgment, at 38.

<sup>50</sup> Consent Judgment, at 38.

<sup>51</sup> Consent Judgment, at 43.

<sup>52</sup> Consent Judgment, at 43.

oner or staff member at OPP, however, DOJ or SPLC may omit the notice and cure requirements” and immediately pursue an enforcement proceeding.<sup>53</sup>

With respect to termination, the consent judgment provides that it “shall terminate when Defendant has achieved Substantial Compliance with each provision of the Agreement and has maintained Substantial Compliance with the Agreement for a period of 2 years.”<sup>54</sup> As for severability, if any consent judgment provision “is declared invalid for any reason by a court of competent jurisdiction, said finding shall not affect the remaining provisions of the Agreement.”<sup>55</sup>

After Class Plaintiffs, the United States, and the Sheriff filed their motion for approval of the consent judgment, briefing and conferences addressed the need for a fairness hearing.<sup>56</sup> Ultimately, it became clear that the City of New Orleans must also be given the opportunity to litigate the issue of whether the proposed consent judgment exceeds minimum constitutional standards, arguably absolving the City of its funding obligation pursuant to state law and violating the Prison Litigation Reform Act’s narrow tailoring requirement.<sup>57</sup> Accordingly, the City was given the opportunity to participate in the fairness hearing not just as an affected third party, but also as a party pursuant to its status as a third-party defendant.<sup>58</sup> In the interim, Class Plaintiffs filed an unopposed motion to certify a settlement class, which superseded the original, presumably opposed, motion for class certification.<sup>59</sup>

#### THE FAIRNESS HEARING

At a fairness hearing commencing on April 1, 2013, the Court considered whether the proposed consent judgment was consistent with constitutional and statutory law and jurisprudence such that it should be approved as between Class Plaintiffs, the United States, and the Sheriff.<sup>60</sup> The fairness hearing lasted four full days, and the parties introduced nearly 400 exhibits into evidence.<sup>61</sup> Plaintiffs called four current and former OPP inmates, E.S., D.W., D.R., and A.S.<sup>62</sup> Plaintiffs called four experts: Jeffrey Schwartz, an expert in “security and operations” of jails and prisons;<sup>63</sup> Manuel Romero, an expert in “jail administration, with a particular emphasis on security, staffing, environmental conditions, food service and sanitation, fire conditions, and Limited English Proficiency (“LEP”) services”;<sup>64</sup> Dr. Bruce Gage, an expert in “correctional mental healthcare”;<sup>65</sup> and Dr. Daphne Glindmeyer, an expert in “mental health and psychiatry, as well as juvenile mental health in corrections.”<sup>66</sup> Plaintiffs also called the twin sister of an inmate who committed suicide at OPP while at the Intake Processing Center.<sup>67</sup> The City called Andrew Kopplin, the City’s First Deputy Mayor and Chief Administrative Officer.<sup>68</sup> The Sheriff’s only witness was Sheriff Marlin Gusman.<sup>69</sup>

The parties provided extensive briefing on the legal issues implicated by the pending motions prior to the hearing.<sup>70</sup> They also provided supplemental briefing after the hearing.<sup>71</sup> In addition to the evidence presented at the hearing, the Court considered approximately 150 public comments submitted by both class members and

<sup>53</sup> Consent Judgment, at 43.

<sup>54</sup> Consent Judgment, at 43.

<sup>55</sup> Consent Judgment, at 44.

<sup>56</sup> *E.g.*, R. Doc. Nos. 113, 126.

<sup>57</sup> *E.g.*, R. Doc. Nos. 107, 113.

<sup>58</sup> *E.g.*, R. Doc. No. 126.

<sup>59</sup> R. Doc. No. 145; *see also* R. Doc. No. 2.

<sup>60</sup> R. Doc. Nos. 384, 386, 389, 390.

<sup>61</sup> The Court has provided record citations for its findings, but these citations are not exhaustive lists of the evidence considered for a particular point. For example, the staggering level of violence at OPP is evidenced by the testimony of the experts and inmates, the number of investigated assaults, the high threshold required for such investigations, the records of hospital transports, and inmate grievances.

<sup>62</sup> These witnesses testified under their full names. As Katharine Schwartzmann, lead counsel for Class Plaintiffs, summarized: “It has taken enormous bravery for the plaintiffs to come forward and to tell the Court about their experiences. They have opened themselves up, their lives, their criminal histories up to review, to scrutiny, to cross-examination, and . . . none of them stand to make a dollar out of this case.” R. Doc. No. 412, at 34.

<sup>63</sup> R. Doc. No. 405, at 66.

<sup>64</sup> R. Doc. No. 407, at 25.

<sup>65</sup> R. Doc. No. 408, at 82.

<sup>66</sup> R. Doc. No. 409, at 174–75.

<sup>67</sup> R. Doc. No. 410, at 57–58.

<sup>68</sup> R. Doc. No. 409, at 7.

<sup>69</sup> R. Doc. No. 411, at 6.

<sup>70</sup> *E.g.*, R. Doc. Nos. 399, 416, 427.

<sup>71</sup> *E.g.*, R. Doc. Nos. 149, 197, 226–374, 387.

non-class members.<sup>72</sup> The Court addresses the motion for approval of the consent judgment and the motion for certification of a settlement class in turn.

#### CONSENT JUDGMENT ANALYSIS

##### I. Standard of Law

Generally, before entering a consent judgment, also called a consent decree, courts must decide whether it “represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation.” *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984) (quoting *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981)). Courts must also ascertain that the settlement is fair and that it does not violate the Constitution, statutes, or jurisprudence. *Id.* (citing *City of Miami*, 664 F.2d at 441). “In assessing the propriety of giving judicial imprimatur to the consent decree, the court must also consider the nature of the litigation and the purposes to be served by the decree.” *City of Miami*, 664 F.2d at 441.

If a consent judgment potentially affects third parties, courts must carefully scrutinize it to ensure that the effect “is neither unreasonable nor proscribed.” *Williams*, 729 F.2d at 1560 (quoting *City of Miami*, 664 F.2d at 441). Courts must “safeguard the interests of those individuals who [are] affected by the decree but were not represented in the negotiations.” *Id.*

Because the proposed consent judgment involves prospective relief with respect to prison conditions, an additional level of review applies. The Prison Litigation Reform Act (“PLRA”) provides:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>73</sup>

Through the PLRA, “Congress sought to curtail Federal courts’ long-term involvement in prison reform and halt Federal courts from providing more than the constitutional minimum necessary to remedy Federal rights violations.” *Frazar v. Ladd*, 457 F.3d 432, 438 n. 19 (5th Cir. 2006) (citing 18 U.S.C. §§ 3626(a)(1)(A), (b)(3), (c)(1)). Compliance with the PLRA generally presents a higher bar to approval of a consent judgment than that imposed by caselaw.<sup>74</sup> The parties to the consent judgment have stipulated that it complies with the PLRA,<sup>75</sup> but the Court conducts an independent inquiry.<sup>76</sup>

The U.S. Supreme Court addressed the PLRA’s narrow tailoring requirement in *Brown v. Plata*, 131 S. Ct. 1910 (2011), a prisoner release order case. In that case, the Court explained: “Narrow tailoring requires a fit between the remedy’s ends and the means chosen to accomplish those ends. The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation.” *Plata*, 131 S. Ct. at 1939–40 (internal quotations and modification omitted) (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)). Narrow tailoring does not require perfection. *See Fox*, 492 U.S. at 480 (Narrow tailoring requires “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”) (internal quotations omitted). The Court must ensure that the relief provided in the proposed consent judgment is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means of doing so.

The Court must also “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief,” although

<sup>72</sup> *E.g.*, R. Doc. Nos. 138–40, 153–55, 159, 173, 177, 179, 219–23, 367.

<sup>73</sup> 18 U.S.C. § 3626(a)(1)(A).

<sup>74</sup> The Court remains mindful of the different standards, but concurrently addresses the constitutional and statutory claims pursuant to both the jurisprudential standard and that set forth in the PLRA.

<sup>75</sup> Consent Judgment, at 44.

<sup>76</sup> The parties have not suggested the Court do otherwise. *See* R. Doc. No. 151, at 16 (arguing that such a stipulation is insufficient); R. Doc. No. 156–2, at 2 (noting that “Plaintiffs will provide a robust evidentiary record from which the Court can make the requisite findings under the [PLRA]. The Court need not rely on the PLRA stipulation . . . .”).

the PLRA “does not require the court to certify that its order has no possible adverse impact on the public.” § 3626(a)(1)(A); *Plata*, 131 S. Ct. at 1941. “Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety in some sectors.” *Plata*, 131 S. Ct. at 1941. Accordingly, “[a] court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.” *Id.* at 1942.

## II. Analysis

In asserting that conditions at OPP are unconstitutional, Plaintiffs face a high bar. To demonstrate a violation of inmates’ constitutional rights, Plaintiffs must show a substantial risk of serious harm to which prison officials were deliberately indifferent. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Demonstrating deliberate indifference requires that prison officials must “both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must also draw the inference.” *Id.* at 837. “[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004); see also *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) (“Plaintiffs’ allegations that the County received many reports of the conditions but took no remedial measures is sufficient to allege deliberate indifference to the substantial risk of serious harm faced by inmates in the Jail.”).

Pretrial detainees and convicted prisoners “look to different constitutional provisions for their respective rights to basic needs such as medical care and safety.” *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996) (en banc), *rev’d on other grounds*, 135 F.3d 320, 324 (5th Cir. 1998). However, “no constitutionally relevant difference exists between the rights of pretrial detainees and convicted prisoners to be secure in their basic human needs.” *Id.* at 647. Plaintiffs rely on the Eighth Amendment standard for conditions of confinement.<sup>77</sup> Because “a pretrial detainee’s due process rights are said to be ‘at least as great as the Eighth Amendment protections available to a convicted prisoner,’” this standard sets the minimal constitutional protections afforded to all OPP inmates. *Id.* at 639 (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); see also *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (“Where dealing with the constitutionally rooted duty of jailers to provide their prisoners reasonable protection from injury at the hands of fellow inmates, we need not dwell on the differences in rights enjoyed by pre-trial detainees and convicted persons or the maturation of prisoners’ rights in general.”) (quotation omitted).

The underlying constitutional violations alleged in this matter are systemic. As in *Plata*, “[P]laintiffs do not base their case on deficiencies” that occurred “on any one occasion,” and the Court “has no occasion to consider” whether any individual deficiency would “violate the Constitution . . . if considered in isolation.” 131 S. Ct. at 1925 n. 3. Rather, “Plaintiffs rely on systemwide deficiencies” that allegedly subject inmates to a “substantial risk of serious harm” and cause conditions in OPP “to fall below the evolving standard of decency that would mark the progress of a maturing society.” *Id.*; see also *Gates v. Cook*, 376 F.3d at 333 (It is “important to note that the inmate need not show that death or serious illness has occurred.”).

Specific examples of dysfunction at OPP are representative of systemic deficiencies. The Court’s inquiry is not focused on whether any one of these examples demonstrates the violation of a constitutional right. See *Plata*, 131 S. Ct. at 1925 n. 3; see also *Alberti*, 790 F.2d at 1225 (“We need not determine whether any of these incidents individually constituted an Eighth Amendment violation, for the evidence established that the totality of the circumstances in the jails were condemnable.”). The Court must determine, however, whether the proposed consent judgment is consistent with the PLRA.

“The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones.” *Gates v. Cook*, 376 F.3d at 332. The Constitution requires that inmates receive adequate food, clothing, shelter, medical care, and mental healthcare, and that detention facilities “take reasonable measures to ensure the safety of the inmates.” *Id.* (citing *Farmer*, 511 U.S. at 832). The Fifth Circuit has held that, with respect to conditions of confinement, even where “[e]ach factor separately, i.e., overcrowding dormitory barracks, lack of classification according to severity of offense, [ ] inmates with weapons, lack of supervision by [ ] guards, absence of a procedure for confiscation of weapons, may not rise to constitutional dimensions [ ], the effect of the totality of these circumstances [may be] the infliction of punish-

<sup>77</sup> *E.g.*, R. Doc. No. 140, at 105.

ment on inmates violative of the Eighth Amendment . . . .” *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974). “Conditions of confinement may establish an Eighth Amendment violation ‘in combination . . . only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.” *Gates v. Cook*, 376 F.3d at 333 (quotation omitted). Remedying unconstitutional conditions of confinement is a “necessarily aggregate endeavor, composed of multiple elements that work together to redress violations of the law.” *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010).

These principles indicate that it is appropriate to consider the proposed consent judgment’s provisions grouped according to subject matter. This approach recognizes the multiple circumstances that have a “mutually enforcing effect” with respect to deficient conditions at OPP. Additionally, it permits the Court to consider in the aggregate the proposed remedies relevant to each underlying Federal right. Accordingly, the Court will analyze the proposed consent judgment’s provisions with respect to the following alleged deficiencies at OPP: (1) safety and security, (2) medical care and mental healthcare, (3) environmental conditions, and (4) fire safety.<sup>78</sup>

#### A. Safety and Security

Manuel Romero, an expert in jail administration, with a particular emphasis on security, staffing, and use of force,<sup>79</sup> concluded that OPP is “totally dysfunctional in terms of overall security,” and that it is an “unsafe facility for both staff and inmates.”<sup>80</sup>

Jeffrey Schwartz, an expert in security and operations of jails and prisons, has worked with more than 40 of the 50 state departments of corrections and toured hundreds of prisons and jails.<sup>81</sup> He concluded that, in over 35 years of working with and reviewing jails and prisons, “OPP is the worst jail I’ve ever seen,” and “it is likely the worst large city jail in the United States.”<sup>82</sup> Schwartz described an “extraordinary and horrific situation,”<sup>83</sup> in which OPP is “plagued” by “suicides and other in-custody deaths, rapes and other sexual assaults, stabbings, and severe beatings.”<sup>84</sup>

In 2012, OPP had over 600 transports to local emergency rooms for physical injuries, of which far more than half were related to violence.<sup>85</sup> A similarly sized jail in the Memphis, Tennessee area had 7 emergency room transports related to violence in a comparable period of time.<sup>86</sup> OPP’s alarming levels of violence are directly attributable to numerous policies and practices that are gravely deficient,<sup>87</sup> including policies and practices associated with staffing and supervision, contraband, classification, sexual assault, and training and accountability.

##### 1. Staffing and Supervision

Inadequate staffing is one of the most significant causes of the runaway violence at OPP.<sup>88</sup> Schwartz concluded that OPP facilities “are the most poorly staffed correctional facilities I have ever encountered.”<sup>89</sup> Schwartz testified that while most correctional agencies might use the term “understaffed” to indicate that perhaps 10 percent more staff are needed, OPP’s “realistic need” may be at least 75 percent or 100 percent more staff.<sup>90</sup> The Court questioned Schwartz as to how he reached these estimates, and he replied that, after looking at a master roster and schedules, he tried to determine “just roughly how many staff would it take just, not to fill all positions, but just to put a deputy every shift in every tier. And that was my very

<sup>78</sup>In many cases, there is considerable overlap in the evidence relevant to different categories. For example, OPP’s deficiencies in medication administration are relevant to inmate medical care, inmate suicide, contraband practices, and inmate-on-inmate violence.

<sup>79</sup>R. Doc. No. 407, at 25. Romero has evaluated and assessed “well over a hundred prisons and jails in the United States.” R. Doc. No. 407, at 22.

<sup>80</sup>R. Doc. No. 407, at 44.

<sup>81</sup>Schwartz founded a non-profit criminal justice training and consulting organization in 1972. Since that time, he has worked with law enforcement and correctional agencies in the United States and Canada. Pl. Ex. 372, at 1. Schwartz has evaluated and assessed approximately 300 prisons and jails. R. Doc. No. 405, at 61–62.

<sup>82</sup>R. Doc. No. 405, at 67–69; *see also* Pl. Ex. 372, at 5.

<sup>83</sup>Pl. Ex. 372, at 69.

<sup>84</sup>Pl. Ex. 372, at 11.

<sup>85</sup>R. Doc. No. 405, at 77.

<sup>86</sup>R. Doc. No. 405, at 78–77.

<sup>87</sup>Pl. Ex. 374, at 16–17.

<sup>88</sup>R. Doc. No. 412, at 38.

<sup>89</sup>Pl. Ex. 372, at 8.

<sup>90</sup>Pl. Ex. 372, at 8.

rough estimate.”<sup>91</sup> The original OPP, for example, often operates with between 25–50 percent of its direct security posts unfilled.<sup>92</sup> A single officer is sometimes left responsible for supervising multiple floors of inmates.<sup>93</sup> Shift after shift, across facilities, security posts are left unstaffed.<sup>94</sup>

Even with an exceptionally low level of staffing, administrators prioritize staffing nonsecurity posts before security posts, a practice opposite that used in most prisons and jails.<sup>95</sup> Certain nonsecurity assignments may be staffed and operating in a relatively normal fashion, while staff are not present to patrol living units and common areas or to perform escort or transport services.<sup>96</sup>

OPP does not maintain any policy or procedure with respect to minimum staffing levels where, for example, staff may be required to work overtime to ensure that inmates are at least minimally supervised.<sup>97</sup> Watch commanders may be forced to schedule a shift with insufficient officers, and merely “hope that nothing terrible happens.”<sup>98</sup>

The absence of staff at security posts means that staff members may not physically enter housing units when doing routine security checks because OPP policy prohibits them from entering housing units alone.<sup>99</sup> It is a “rare occasion” for staff members conducting a security round to “actually go in . . . and view all the inmates and view the cells and into the showers and the activity areas.”<sup>100</sup> The evidence indicates that security rounds are neither frequent enough nor thorough enough to even minimally deter or detect inmate violence.<sup>101</sup> Inmates “kick on the cell” or “take something and ram it across the bars” with the hope that staff members will respond when assistance is needed.<sup>102</sup> As one inmate testified, this can take “30 minutes, maybe an hour, 40 minutes, whenever they get ready to come upstairs and see what’s going on.”<sup>103</sup> The record is replete with examples of inmate-on-inmate violence that demonstrate the manner in which a lack of supervision permits such violence to flourish.

For instance, OPP records show that, on one particular evening, a deputy heard what he believed to be inmates fighting on a tier, as well as statements like “stick your finger in his butt and piss on him.”<sup>104</sup> The deputy could not see what was going on, but he reported that he did not investigate because OPP policy prohibits staff members from venturing onto the tiers alone.<sup>105</sup> A sergeant arrived “later in the night,” but there is no indication in the record that any OPP staff member attempted to intervene at the time of the “altercation.”<sup>106</sup>

## 2. Contraband

Although the Court recognizes that possession of contraband in a correctional facility is not necessarily unusual, OPP is plagued to a marked degree with contraband, including phones, weapons, and drugs.<sup>107</sup> Weapons, in particular, are “widespread and readily available to inmates.”<sup>108</sup> Shanks are “rampant,” and the number of stabbings is “extremely high” and “very disturbing” for a facility the size of OPP.<sup>109</sup> Inmates report having access to street drugs and contraband prescription drugs.<sup>110</sup> Despite repetitive problems with assaults and weapons, OPSO does not conduct regular shakedowns in a manner that would minimize the presence of contraband.<sup>111</sup> *Compare Gates v. Collier*, 501 F.2d at 1308 (“Although many inmates

<sup>91</sup> R. Doc. No. 405, at 78–79.

<sup>92</sup> Pl. Ex. 85; Pl. Ex. 370.

<sup>93</sup> Pl. Ex. 85; Pl. Ex. 370; Pl. Ex. 372, at 15; Pl. Ex. 374, at 11.

<sup>94</sup> Pl. Ex. 372, at 16.

<sup>95</sup> Pl. Ex. 372, at 9.

<sup>96</sup> Pl. Ex. 372, at 9.

<sup>97</sup> Pl. Ex. 372, at 15–16.

<sup>98</sup> Pl. Ex. 372, at 15.

<sup>99</sup> R. Doc. No. 407, at 71–73, 83; Pl. Ex. 374, at 11.

<sup>100</sup> R. Doc. No. 407, at 71; Pl. Ex. 374, at 11–13.

<sup>101</sup> Pl. Ex. 372, at 16–19; Pl. Ex. 374, at 10.

<sup>102</sup> R. Doc. No. 406, at 113.

<sup>103</sup> R. Doc. No. 406, at 113.

<sup>104</sup> Pl. Ex. 11; Pl. Ex. 374, at 11–12.

<sup>105</sup> Pl. Ex. 11; Pl. Ex. 374, at 11–12; *see also* R. Doc. No. 407, at 71–72.

<sup>106</sup> Pl. Ex. 11.

<sup>107</sup> *See* Pl. Ex. 374, at 20, 23–24; City Ex. 13; R. Doc. No. 406, at 63; *see also* R. Doc. No. 411, at 82.

<sup>108</sup> R. Doc. No. 405, at 86; *see also* R. Doc. No. 406, at 63, 161. The evidence shows that items like mops, brooms, buckets, and coolers are frequently used in assaults. There is no effective system for preventing inmates from using such items as weapons. *See* Pl. Ex. 372, at 21, 60.

<sup>109</sup> Pl. Ex. 374, at 23–24, 24 n.6.

<sup>110</sup> R. Doc. No. 406, at 63, 132–33.

<sup>111</sup> Pl. Ex. 374, at 37.

possess weapons, there is no established procedure for discovering and confiscating weapons, nor is possession of weapons reported or punished.”).

Three videos, apparently filmed by inmates around the calendar year 2009<sup>112</sup> and unearthed the weekend before the fairness hearing, show inmates brandishing a loaded gun, using intravenous drugs, gambling with handfuls of cash, displaying cell phones, drinking cans of beer, and cavorting on Bourbon Street, having escaped OPP for an evening of leisure.<sup>113</sup> These videos appear to have been filmed at the now-closed House of Detention (“HOD”), in part to highlight the absence of supervision and the poor environmental conditions.<sup>114</sup> Whatever the history behind the videos, inmates were able to blatantly engage in criminal conduct, which they literally announced was occurring,<sup>115</sup> without showing any concern for staff intervention. There was no suggestion that the staff members responsible for supervising these inmates were ever identified, much less disciplined.<sup>116</sup> The conduct in the video may have occurred several years ago, but the policies, practices, and culture that enabled the outrageous conduct remain relevant.<sup>117</sup>

### 3. Classification

The failure to classify a substantial number of inmates risks “intermingling of inmates convicted of aggravated violent crimes with those who are first offenders or convicted of nonviolent crimes.” *Gates v. Collier*, 501 F.2d at 1308; see *Stokes v. Delcambre*, 710 F.2d 1120, 1124 (5th Cir. 1983) (“[F]ailure to control or separate prisoners who endanger the physical safety of other prisoners can constitute cruel and unusual punishment.”). A functioning classification system ensures that inmates are housed in a manner that increases the safety of inmates and staff by, for example, identifying and separating inmates likely to be predators from inmates likely to be victims.<sup>118</sup> In conjunction with a lack of direct supervision, OPP’s utterly ineffective classification system is a significant cause of the unprecedented levels of violence at OPP.<sup>119</sup>

On a sample date in December 2012, of the inmates who had proceeded past intake, approximately 35 percent had not been classified in any manner.<sup>120</sup> The unclassified inmates were “scattered across all of the facilities and in just about all of the tiers.”<sup>121</sup> Of the approximately 2,400 inmates at OPP on that date, only one inmate was classified as a known victim and only four inmates were classified as known predators, notwithstanding the staggering frequency of violence at OPP.<sup>122</sup> Of the inmates who were classified, potential predators were mixed with potential victims, and high, medium, and low security inmates were housed together, undermining the purpose of the classification system.<sup>123</sup> A sample four-person cell on the same date held a high security potential predator, a high security nonpredator, a medium security nonpredator, and a low security nonpredator.<sup>124</sup> Schwartz testified that such housing should “not ever happen” because “it could be explosive” given the “obvious potential” that “the two high security inmates, especially the one that’s a potential predator, could be preying on the one that’s the lower security, or perhaps even on the medium security.”<sup>125</sup> See also *Marsh*, 268 F.3d at 1025 (“[P]retrial detainees were housed with convicted inmates, nonviolent offenders with violent of-

<sup>112</sup> R. Doc. No. 407, at 5.

<sup>113</sup> City Ex. 13.

<sup>114</sup> City Ex. 13 (“CNN, y’all gonna get first bid on this tape . . . Orleans Parish Prison exposed.”).

<sup>115</sup> City Ex. 13 (“Pop me one of them beers open . . . Snort all that dope . . .”).

<sup>116</sup> Romero testified that he would expect some staff involvement given the level of dysfunction. R. Doc. No. 407, at 39–40. Such involvement would not be without precedent. In one documented instance, a female staff member, who was engaged in a “romantic relationship” with an inmate, warned the inmate to conceal a cell phone because of an upcoming shakedown. The staff member also sent text messages to the same inmate on his cell phone both while she was on and off duty. The staff member subsequently resigned. Pl. Ex. 58.

<sup>117</sup> R. Doc. No. 407, at 35–36.

<sup>118</sup> Pl. Ex. 372, at 12–14; Pl. Ex. 374, at 30–33; R. Doc. No. 407, at 46–47.

<sup>119</sup> Pl. Ex. 372, at 14; R. Doc. No. 407, at 46–50, 53, 57–62.

<sup>120</sup> Pl. Ex. 380; R. Doc. No. 406, at 82–85.

<sup>121</sup> Pl. Ex. 380; R. Doc. No. 406, at 82–85.

<sup>122</sup> Pl. Ex. 380; R. Doc. No. 405, at 83.

<sup>123</sup> *E.g.*, Pl. Ex. 380; R. Doc. No. 407, at 46–50, 53, 57–62. Staff members acknowledged to Romero that correct placement of inmates was complicated by limitations associated with the number of beds available for certain types of inmates. Accordingly, inmates may be placed where there is space available, even if this placement is inconsistent with their classification. *E.g.*, R. Doc. No. 407, at 53–54; see also Pl. Ex. 372, at 33 (noting that a juvenile requested a transfer because his roommate “gets aggressive,” but deputies responded that “there is nowhere for him to go”).

<sup>124</sup> R. Doc. No. 407, at 56–57.

<sup>125</sup> R. Doc. No. 407, at 56–58.

fenders, juveniles with adults, and mentally ill persons with those in good mental health.”). OPP also does not effectively separate youth and adult inmates.<sup>126</sup>

Because OPP does not have an effective system for reclassification, inmates who have violently assaulted other inmates may remain classified as “nonpredators.”<sup>127</sup> The risk related to such inaccurate information is compounded by the fact that an inmate’s disciplinary record does not become part of his permanent record.<sup>128</sup> Rather, an inmate receives a new disciplinary folder for each OPP facility he stays in, and these folders do not follow the inmates during transfers.<sup>129</sup> Facilities do not always maintain an inmate’s disciplinary record once he leaves, and determining whether the record was maintained requires a “time consuming search.”<sup>130</sup> These practices indicate that staff cannot rely on either an inmate’s classification or his disciplinary record when evaluating the inmate’s risk of violence.<sup>131</sup> The absence of such information plainly increases the risk of harm to staff and to other inmates. Moreover, as discussed below, the classification process does not identify or consider an inmate’s English proficiency.<sup>132</sup>

The importance of classification was illustrated by the following arc of one inmate’s violent actions, which ultimately caused another inmate to suffer severe and permanent brain damage:

- In August 2011, E.L., a 20-year-old male inmate, was observed repeatedly striking a 50-year-old inmate in the face and back of the head in one of the Tents. The victim stated that E.L. “needed his medication.” E.L. was too “hostile and combative” to be interviewed about the event, and he threw a large trash can at one deputy and spit on another deputy’s face. In a separate incident, he threw a wet towel at a third deputy’s back, angry that she was moving his belongings to another Tent in response to the assault.<sup>133</sup>
- In September 2011, at HOD, E.L. began punching a 24-year-old inmate in the face because the other inmate was using a toilet that E.L. wanted to use. He threw the inmate into the bars of the cell hard enough to cause a head injury that required hospital treatment.<sup>134</sup>
- In October 2011, another inmate requested to be moved to a different HOD tier because E.L. was antagonizing him by throwing ice and water on him and attempting to fight him. The grievance was denied because the inmate “had enemies” on the other side of the same tier, and the record does not suggest the inmate was offered any relief.<sup>135</sup>
- In December 2011, E.L. had been antagonizing a certain deputy at HOD. At some point, E.L. was able to defeat the locking mechanism on his cell door, arm himself with a broken broomstick, and attack the deputy, hitting him in the face with the broomstick and fracturing his jaw. He also struck another deputy with the broomstick, possibly fracturing the deputy’s hand.<sup>136</sup>
- On June 18, 2012, K.M., a Templeman V inmate, reported via a sick call request that he had his “two teeth knocked out in a physical altercation on my tier.”<sup>137</sup> On June 26, K.M. reported the attack to the Special Operations Division (“SOD”) and identified E.L. as his attacker.<sup>138</sup> He stated that he had not come forward sooner because E.L. “bullies all the older inmates,” and K.M. was scared for his life.<sup>139</sup>

<sup>126</sup> Pl. Ex. 372, at 10; Pl. Ex. 378, at 41; see R. Doc. No. 1, at 35.

<sup>127</sup> R. Doc. No. 405, at 83.

<sup>128</sup> Pl. Ex. 372, at 49.

<sup>129</sup> Pl. Ex. 372, at 49.

<sup>130</sup> Pl. Ex. 372, at 49.

<sup>131</sup> See R. Doc. No. 405, at 108 (“The same inmates who are a danger to other inmates are typically the most dangerous inmates for staff.”); R. Doc. Nos. 228–29 (describing E.L.’s attacks on staff members). The Court is not familiar with E.L.’s classification status, as he was apparently not present at OPP on the date for which the classification census was sampled. See Pl. Ex. 380.

<sup>132</sup> See R. Doc. No. 407, at 109, 112.

<sup>133</sup> Pl. Ex. 223; Pl. Ex. 225; Pl. Ex. 227.

<sup>134</sup> Pl. Ex. 226.

<sup>135</sup> Pl. Ex. 224.

<sup>136</sup> Pl. Ex. 229.

<sup>137</sup> Pl. Ex. 246.

<sup>138</sup> Pl. Ex. 230.

<sup>139</sup> Pl. Ex. 230. The Court notes that there is no suggestion in the record that anyone investigated the identity of K.M.’s assailant despite the fact that his sick call request expressly cited an altercation as the source of his injuries. OPP does not utilize the data recorded by medical services to identify acts of violence, and medical staff are not subject to any policy that would encourage them to report injuries resulting from violence. Pl. Ex. 259, at 57–62; Pl. Ex. 372, at 56.

—On June 23, 2012, at Templeman V’s A–3 tier, a “step down psychiatric tier,”<sup>140</sup> E.L. punched T.S., a 65-year-old man, several times in the face hard enough to knock him backwards. T.S. struck his head on a metal bench as he fell. A detective conducting a routine security check discovered T.S. lying on the ground with a pool of blood around his head. The punches and the strike to the back of the head caused T.S.’s brain to hemorrhage, resulting in a permanent, nearly “brain dead” state.<sup>141</sup>

E.L., an aggressive and predatory inmate with a penchant for administering blows to the head and face and for preying upon older inmates, ultimately caused T.S.’s severe and permanent brain damage.

E.L.’s attacks, which occurred across a variety of prison facilities, illustrate that, in the absence of adequate staffing and supervision, “even a low security housing unit with an unsophisticated inmate population will sink toward the lowest common denominator.”<sup>142</sup> A lack of staff supervision and a lack of effective inmate classification result in OPP’s most vulnerable inmates, including the mentally ill and elderly, falling prey to OPP’s most dangerous inmates.<sup>143</sup>

#### 4. Sexual Assault

OPP has an extraordinarily high level of rapes and sexual assaults, unprecedented in the many facilities toured by Romero.<sup>144</sup> However, the number of investigations into such conduct is “minuscule.”<sup>145</sup> A DOJ Review Panel (“Panel”) on prison rape selected OPP as a representative high-incidence facility for discussion at a public hearing.<sup>146</sup> The Panel was “deeply disturbed by the apparent culture of violence at OPP.”<sup>147</sup>

Calculating the incidence rate of sexual assault at OPP is difficult.<sup>148</sup> The grievance logs for July 20, 2012, through December 19, 2012, were missing entries.<sup>149</sup> In October, the only full month for which data is available, there were 30 grievances reporting sexual assault and no investigations.<sup>150</sup> The most investigations occurred in November, when there were two investigations and 26 grievances reporting sexual assault, not including missing entries.<sup>151</sup> OPP staff members have a pattern of tolerating sexual misconduct, as demonstrated by the lack of repercussions for inmates who engage in such misconduct in plain view of deputies.<sup>152</sup>

There is no consistent practice by which staff respond to inmate reports of sexual assault.<sup>153</sup> While in some cases inmates are quickly assessed and treated, Schwartz testified that, in “far too many cases, none of the right things happen.”<sup>154</sup> Most often, nothing happens.<sup>155</sup> “The standard used by OPP investigators seems to be

<sup>140</sup> Pl. Ex. 371.

<sup>141</sup> Pl. Ex. 222. E.L. subsequently trapped a deputy at Templeman V by grabbing his hand through a cell door food slot, and punching him in the face. The deputy was routed to the hospital. Pl. Ex. 228.

<sup>142</sup> Pl. Ex. 372, at 15. Staffing records for Templeman V were provided with respect to a period ranging from May 2012 to December 2012. These records reflect that, more often than not, there was no deputy even assigned to A–3, the tier on which T.S. was attacked. Pl. Ex. 371.

<sup>143</sup> See also R. Doc. No. 405, at 82–83 (describing mentally ill and developmentally disabled inmates as vulnerable); R. Doc. No. 406, at 153 (describing mentally ill or developmentally disabled inmate forced to do “sexual dances”). “A substantial number of inmates on suicide watch” claim suicidality to avoid disciplinary segregation. Pl. Ex. 372, at 50. “That produces a toxic stew of acute psychiatric inmates, acute suicidal inmates and disciplinary segregation inmates. It is an accident waiting to occur.” Pl. Ex. 372, at 50; see also Pl. Ex. 260, at 106–07 (OPP’s medical director estimates that at least 90 percent of inmates who report being suicidal are not, in fact, suicidal).

<sup>144</sup> Pl. Ex. 374, at 38.

<sup>145</sup> R. Doc. No. 405, at 121.

<sup>146</sup> Pl. Ex. 4, at 4. Although the Panel began with a focus on the now-closed South White Street Jail, it shifted its focus to OPP operations as a whole. Pl. Ex. 4, at 73. The Panel acknowledged that the shift in focus was, in part, related to the United States’ allegations underlying this lawsuit. Pl. Ex. 4, at 73. The Court is mindful of the relationship between the Panel’s report, follow-up measures, and the United States’ complaint in intervention, and it has weighed the evidence accordingly.

<sup>147</sup> Pl. Ex. 4, at 82.

<sup>148</sup> The Court does not rely on the sexual assault rate suggested by Plaintiffs, as its applicability to current OPP facilities has not been established. See R. Doc. No. 416, at 42. In any case, however, sexual assault at OPP is all too common, and in part directly attributable to the absence of inmate supervision.

<sup>149</sup> Pl. Ex. 353.

<sup>150</sup> Pl. Ex. 353.

<sup>151</sup> Pl. Ex. 353.

<sup>152</sup> Pl. Ex. 374, at 38–41.

<sup>153</sup> R. Doc. No. 405, at 112–13.

<sup>154</sup> R. Doc. No. 405, at 113; see also Pl. Ex. 60.

<sup>155</sup> Pl. Ex. 372, at 38.

that, short of having forensic evidence in the form of DNA or documented injury to a body orifice, there was no sexual misconduct.”<sup>156</sup> Staff sometimes publicly make derisive comments when an inmate reports a sexual assault, resulting in an announcement of the victim’s status and a strong display of tolerance for sexual assault.<sup>157</sup>

A video admitted into evidence portrays an interview with an inmate who reported a sexual assault.<sup>158</sup> The inmate is “Mirandized,”<sup>159</sup> repeatedly told that nothing happened,<sup>160</sup> and further informed that the absence of detectable physical injury one week after the alleged assault proved it did not occur.<sup>161</sup> Identifying false reports is a valid objective, but the testimony and other evidence presented at the hearing suggest that the practices used to investigate sexual assaults have the effect of discouraging bona fide reports, embarrassing inmates who come forward, and instilling in staff and inmates the impression that such reports can be quickly discounted.<sup>162</sup>

E.S., a former OPP inmate, testified that, on a daily basis at the original OPP, he saw violence, including “[f]ights, stabbings, people being sexually assaulted, just, you know, your average violence on the streets taken to the jailhouse.”<sup>163</sup>

One night, after the lights were turned out at 10:30 p.m., E.S. was attacked by a group of 10–14 inmates.<sup>164</sup> They ripped off his clothes and attempted to tie him up with pieces of string, but he was able to break free.<sup>165</sup> They then used a razor to cut strips of fabric from an inmate uniform.<sup>166</sup> After they hog-tied E.S. with the fabric, they sexually assaulted him.<sup>167</sup> E.S. testified that one inmate “stuck his finger into my anal area,” another inmate “stuck a toothbrush into my anal area,” and another inmate “actually stuck his tongue in my anal area.”<sup>168</sup> The attackers “took toothpaste and put it between my buttocks area.”<sup>169</sup> Next, they tied a blanket around E.S.’s face and continued beating him.<sup>170</sup> E.S.’s gasps for air were worrisome enough that one inmate retrieved an “asthma puffer” for him, although E.S. did not have asthma, but the beating continued.<sup>171</sup> The inmates kicked E.S. in the stomach and ribs and struck the back of his head with a mop and bucket.<sup>172</sup>

At some point, the assailants picked up E.S. and carried him to a new location at the back of the dormitory, where they released him from the hog-tied position and tied him to a post, with his back to the post.<sup>173</sup> At this point, four to six inmates began punching him repeatedly.<sup>174</sup> He was subsequently untied and repositioned to face the post.<sup>175</sup> The attackers threw hot water and possibly urine on E.S., and beat him so severely with a mop stick that the skin was ripped from his back and buttocks.<sup>176</sup> E.S. was still naked.<sup>177</sup> At some point during this phase of the attack, a guard performed a routine check, but he did not walk far enough down the

<sup>156</sup> Pl. Ex. 374, at 38.

<sup>157</sup> R. Doc. No. 405, at 112–13.

<sup>158</sup> Pl. Ex. 5 (video and transcript).

<sup>159</sup> See Pl. Ex. 5, at 54. According to Schwartz, it is common for OPP inmates who report sexual assaults to be Mirandized. R. Doc. No. 405, at 115 (“Before hello or anything else, the first thing that the investigator does is to Mirandize the victim.”).

<sup>160</sup> Pl. Ex. 5, at 41–42, 51.

<sup>161</sup> Pl. Ex. 5, at 41–42, 51.

<sup>162</sup> See R. Doc. No. 406, at 89. Schwartz asked staff members about inmates who report sexual assaults. According to Schwartz, “nobody said every inmate is lying,” but staff suggested “most of these inmates are fabricating,” to some extent. Schwartz also noted that “SOD staff continually violate the most crucial principle of medical care and mental healthcare in jails[:] custody and security staff may not act as gatekeepers for health or mental health services.” When SOD members determine a sexual assault report is unfounded, they refuse to provide the inmate with even a “ cursory medical assessment.” Pl. Ex. 372, at 39.

<sup>163</sup> R. Doc. No. 405, at 26–27.

<sup>164</sup> R. Doc. No. 405, at 30.

<sup>165</sup> R. Doc. No. 405, at 31.

<sup>166</sup> R. Doc. No. 405, at 31.

<sup>167</sup> R. Doc. No. 405, at 31–32.

<sup>168</sup> R. Doc. No. 405, at 32.

<sup>169</sup> R. Doc. No. 405, at 32.

<sup>170</sup> R. Doc. No. 405, at 32.

<sup>171</sup> R. Doc. No. 405, at 32–33.

<sup>172</sup> R. Doc. No. 405, at 31, 33.

<sup>173</sup> R. Doc. No. 405, at 33–34.

<sup>174</sup> R. Doc. No. 405, at 34.

<sup>175</sup> R. Doc. No. 405, at 34.

<sup>176</sup> R. Doc. No. 405, at 34–35.

<sup>177</sup> R. Doc. No. 405, at 35.

hall to notice E.S., naked, bound, and beaten.<sup>178</sup> E.S. reported that he did not cry out because he was certain that he would be killed if he did so.<sup>179</sup>

In the final phase of the attack, the inmates fashioned “some type of thong, like a woman’s thong” from strips of uniform fabric.<sup>180</sup> They forced E.S. to put it on and, E.S. testified, in an attempt to be “comical” or to “embarrass me or something in front of the dormitory . . . they made me dance. I don’t even know how to dance. So I just basically was just moving my hands . . . If I would do anything crazy I knew they were going to kill me for sure. There’s no doubt in my mind.”<sup>181</sup> E.S. reported that “90 percent of the crowd had knives in their hands visible.”<sup>182</sup>

After the episode in which the attackers made E.S. dance, they made him shower.<sup>183</sup> They forced him to sit in a mop bucket and “pushed it to the front of the shower, everybody laughing, ha, ha, ha . . . .”<sup>184</sup> E.S. indicated the assault lasted hours.<sup>185</sup> While E.S.’s assault resulted in an investigation, where OPP staff “brought the whole dorm down,” E.S. did not receive medical treatment for nearly a year.<sup>186</sup>

E.S.’s testimony parallels a report by another inmate, A.A.,<sup>187</sup> in which a group of inmates tied A.A. to a bunk using strips of inmate clothing and then sexually assaulted him.<sup>188</sup> After A.A. reported the assault on January 4, 2012, SOD’s investigation included photographing A.A.’s wrist abrasions, which a nurse confirmed were “consistent with [ ] having been tied up.”<sup>189</sup> Another inmate, whom A.A. identified as a witness, confirmed that he knew something was happening because inmates were going in and out of the area where A.A. was restrained.<sup>190</sup> A.A. identified five attackers using photographs of other inmates in the tier.<sup>191</sup> A.A. was transferred to a mental health hospital in Baton Rouge one week later, and the SOD investigation was closed.<sup>192</sup>

While the incident was referred to the office of the Orleans Parish District Attorney, that office determined that “based on the circumstances and statements given, we would not likely prosecute this case if an arrest was made.”<sup>193</sup> Aside from this referral, there is no evidence that action was taken to protect other inmates on the tier from the individuals who had forcibly bound and sexually assaulted A.A.<sup>194</sup> OPP’s practice of terminating a sexual assault investigation when a victim leaves a facility permits sexual predators to continue to prey on other inmates.<sup>195</sup>

The Court reiterates that the details of the described assaults are not discussed because they are brutal, although they are that, but because they are emblematic of systemic deficiencies in inmate safety and security. *See Alberti*, 790 F.2d at 1225 (“We recite the incidents of violence and sexual assault which follow not to exhaustively catalog conditions in the jails but to provide examples of the nature of evidence presented at the hearings.”). As far as the Court is aware, no staff members were identified, confronted, or otherwise held accountable for their absence during the nights in which E.S. and A.A. were assaulted.

<sup>178</sup> R. Doc. No. 405, at 38–39. E.S. testified that he would have been “shocked” if the guard actually walked down the tier but, had the guard done so, “[i]t would have probably saved me.” R. Doc. No. 405, at 41.

<sup>179</sup> R. Doc. No. 405, at 39.

<sup>180</sup> R. Doc. No. 405, at 36.

<sup>181</sup> R. Doc. No. 405, at 36.

<sup>182</sup> R. Doc. No. 405, at 36.

<sup>183</sup> R. Doc. No. 405, at 36–37.

<sup>184</sup> R. Doc. No. 405, at 37.

<sup>185</sup> R. Doc. No. 405, at 37–38.

<sup>186</sup> Additional details from E.S.’s testimony reveal other troubling circumstances surrounding his assault, including that it may have been foreseeable and preventable as an act of retaliation against E.S., organized by someone against whom E.S. was a witness in a criminal trial. R. Doc. No. 405, at 47–48.

<sup>187</sup> These initials are used for convenience. The inmate’s name has been obscured in the record, although other identifying information is available.

<sup>188</sup> The record suggests that this was one of two sexual assaults A.A. experienced at OPP. Pl. Ex. 324.

<sup>189</sup> The abrasions were still visible on January 11, 2013. Pl. Ex. 324.

<sup>190</sup> Pl. Ex. 324. Schwartz’s testimony suggested this witness was a deputy. R. Doc. No. 405, at 11718. The Court discounts this suggestion as a likely misstatement because it is inconsistent with the underlying evidence.

<sup>191</sup> Pl. Ex. 324.

<sup>192</sup> Pl. Ex. 324.

<sup>193</sup> Pl. Ex. 324.

<sup>194</sup> R. Doc. No. 405, at 118–19.

<sup>195</sup> *E.g.*, Pl. Ex. 67; R. Doc. No. 405, at 119. According to A.A., he was “not the only one being tied up” and subjected to such attacks. Pl. Ex. 324.

### 5. Training and Accountability

Accountability systems are fundamental to prisoner and staff safety.<sup>196</sup> Such systems include use of force policies, investigations, incident reporting, and grievance procedures.<sup>197</sup> Many, and perhaps even most, of OPP's accountability systems are ignored or directly contravened on a "wholesale basis."<sup>198</sup> The Court addresses in turn OPP's grievance system, use of force policy and investigations, and reliance on tier reps.

#### a. Grievance System

A grievance system permits inmates to make a written report to address anything from minor complaints to sexual assaults.<sup>199</sup> Grievances alert administrators to individual problems as well as to potential patterns of problems.<sup>200</sup>

Grievances at OPP are sometimes effectively ignored because they are not addressed until an inmate leaves, at which time they are closed.<sup>201</sup> For example, in a February 17, 2011 grievance, an inmate reported that he had been beaten and stabbed and that his fingers had been broken.<sup>202</sup> The inmate requested a transfer, stating that he feared for his life.<sup>203</sup> The grievance was closed on March 1, when the inmate was discharged, but his transfer request and reports of assaults were never addressed.<sup>204</sup> In another instance, an inmate reported being beaten by deputies on October 25, 2011.<sup>205</sup> He described knots on his head related to the beating and a sick call request that was ignored.<sup>206</sup> The grievance sought medical attention, and the inmate specifically requested x-rays of his head.<sup>207</sup> Approximately 3 months later, the grievance was closed because the inmate left OPP.<sup>208</sup> His sick call request—and allegations of staff misconduct—were apparently never addressed.<sup>209</sup> OPP staff suggested that, with respect to inmate-on-inmate violence, there is only an investigation when an inmate requires stitches.<sup>210</sup>

The failure of OPP to address even emergency grievances in a timely manner is inexplicable.<sup>211</sup> Grievance procedures have improved in the last year but they still fall far short, and the Court requires assurance that these improvements will continue.<sup>212</sup>

#### b. Use of Force & Investigations

OPP has deeply ingrained problems with respect to staff members' uncontrolled use of force on inmates.<sup>213</sup> OPP's investigative process for staff and prisoner misconduct fails to address, and is itself part of, the many operational breakdowns in OPP's accountability systems.<sup>214</sup> As with any jail or prison, use of force is a legitimate and "necessary component" of maintaining order at OPP.<sup>215</sup> A use of force policy ensures that staff are aware of the level of force that is appropriate in a given situation and provides guidance with respect to the use of force needed to avoid unnecessary injuries.<sup>216</sup>

While OPP staff members report efforts to implement change, these efforts are in their infancy.<sup>217</sup> OPP's use of force policy was rewritten somewhat recently, but it remains ineffective because staff members are not familiar with it and supervisors do not hold staff members accountable to the policy.<sup>218</sup> In short, the policy is routinely ignored altogether.<sup>219</sup> For example, while the Internal Affairs Division

<sup>196</sup> Pl. Ex. 374, at 33.

<sup>197</sup> Pl. Ex. 374, at 33.

<sup>198</sup> Pl. Ex. 372, at 11.

<sup>199</sup> R. Doc. No. 405, at 122–23.

<sup>200</sup> R. Doc. No. 405, at 123.

<sup>201</sup> R. Doc. No. 405, at 125–26.

<sup>202</sup> Pl. Ex. 302; R. Doc. No. 405, at 123.

<sup>203</sup> Pl. Ex. 302; R. Doc. No. 405, at 123.

<sup>204</sup> Pl. Ex. 302; R. Doc. No. 405, at 123–24.

<sup>205</sup> Pl. Ex. 305.

<sup>206</sup> Pl. Ex. 305.

<sup>207</sup> Pl. Ex. 305.

<sup>208</sup> Pl. Ex. 305.

<sup>209</sup> Pl. Ex. 305; R. Doc. No. 405, at 124.

<sup>210</sup> Pl. Ex. 374, at 37.

<sup>211</sup> R. Doc. No. 405, at 125–26.

<sup>212</sup> Pl. Ex. 372, at 47.

<sup>213</sup> Pl. Ex. 372, at 11, 40; Pl. Ex. 374, at 34.

<sup>214</sup> Pl. Ex. 374, at 37.

<sup>215</sup> Pl. Ex. 374, at 33.

<sup>216</sup> R. Doc. No. 405, at 88.

<sup>217</sup> Pl. Ex. 372, at 40; Pl. Ex. 374, at 34.

<sup>218</sup> R. Doc. No. 405, at 87.

<sup>219</sup> Pl. Ex. 372, at 28.

(“IAD”) is charged with use of force investigations pursuant to the new policy, SOD continues to handle such investigations.<sup>220</sup> Similarly, while the new policy calls for a use of force “review board,” there is no such board, despite the fact that the policy is more than a year old.<sup>221</sup>

One of the most egregious allegations of use of force suggested that an officer ordered “hits” on particular inmates, either by instructing a tier rep to arrange a hit or by placing the inmate in an area where known enemies made violence likely.<sup>222</sup> The same officer was later arrested after punching an inmate, who additionally reported that the officer had threatened to have the inmate assaulted.<sup>223</sup> See *Cantu v. Jones*, 293 F.3d 839, 845 (5th Cir. 2002) (“The jury found that the appellants essentially orchestrated the attack. This is in no way reasonable behavior for a prison official.”). The same officer had previously been accused of punching a restrained inmate, but the investigator did not question any of the witnesses, including the officer, about whether it occurred.<sup>224</sup> Not surprisingly, given the absence of elicited evidence, the prior allegation had not been sustained.<sup>225</sup>

As noted above, SOD investigates use of force reports, including reports of force by SOD members.<sup>226</sup> In at least one documented instance, the same officer who used force on an inmate authored the report that determined such level of force was appropriate.<sup>227</sup> Training records suggest that SOD members do not receive any in depth or specialized training relative to investigations.<sup>228</sup> The training that OPSO staff members generally receive includes materials focused on police investigations and car stops, but there is no indication of regular or in-service training relative to the conduct of investigations in a jail or prison environment.<sup>229</sup> OPP does not effectively track use of force or reports of staff misconduct.<sup>230</sup>

### c. Tier Reps

Tier representatives (“tier reps”) are inmates in charge of maintaining order on their tiers.<sup>231</sup> OPP staff members report that tier reps help with communication and represent their living units when inmates are given a say in decisionmaking.<sup>232</sup> OPP inmates report that tier reps control phone time, make decisions about inmate housing, and occasionally administer beatings to other inmates at the behest of staff.<sup>233</sup> Tier reps have the power to distribute food, including determining how much food to distribute per serving and whether to dole out “seconds.”<sup>234</sup> As Schwartz stated, “food is one of the small number of ‘hot button’ items for almost all inmates,” so this kind of power can be “used to extort other inmates and also be a source of confrontation or violence.”<sup>235</sup>

Given the fundamental flaws in OPP’s classification system, predatory or aggressive inmates may become tier reps.<sup>236</sup> Testimony from D.R., an inmate sexually harassed and assaulted by a tier rep, illustrates that tier reps have the opportunity to assault other inmates and to discourage reporting of such assaults.<sup>237</sup> D.R. testified that his tier rep, C.C., would “sometimes, early in the morning, take the television from Cell 1 and turn it towards the shower and put the aerobics channel on so he could go into the shower and masturbate.”<sup>238</sup> One morning, C.C. ordered D.R. to

<sup>220</sup> R. Doc. No. 405, at 92.

<sup>221</sup> R. Doc. No. 406, at 87.

<sup>222</sup> R. Doc. No. 405, at 101–02; Pl. Ex. 56.

<sup>223</sup> R. Doc. No. 405, at 101–02; Pl. Ex. 56.

<sup>224</sup> R. Doc. No. 405, at 102.

<sup>225</sup> R. Doc. No. 405, at 102.

<sup>226</sup> Pl. Ex. 372, at 40. Schwartz describes SOD as a tightly knit unit, which staff members perceive as elite. Pl. Ex. 372, at 40.

<sup>227</sup> R. Doc. No. 405, at 90–91; Pl. Ex. 275.

<sup>228</sup> Pl. Ex. 372, at 40.

<sup>229</sup> Pl. Ex. 372, at 40.

<sup>230</sup> Pl. Ex. 372, at 40.

<sup>231</sup> Pl. Ex. 372, at 43; Pl. Ex. 374, at 17; R. Doc. No. 406, at 136–37. Although discussed in this subsection, the use of tier reps is relevant to several aspects of inmate safety and security.

<sup>232</sup> Pl. Ex. 372, at 43.

<sup>233</sup> Pl. Ex. 372, at 43–44; Pl. Ex. 374, at 17. Public comments from inmates endorsing the proposed consent judgment also discuss such “hits.” See, e.g., R. Doc. No. 240.

<sup>234</sup> Pl. Ex. 372, at 43.

<sup>235</sup> Pl. Ex. 372, at 43–44; Pl. Ex. 374, at 17; see also Pl. Exs. 43, 47, 55 (describing stabbings related to food distribution); R. Doc. No. 406, at 138 (noting fights resulted from tier rep’s manipulation of food distribution); R. Doc. No. 407, at 43.

<sup>236</sup> See, e.g., Pl. Ex. 32; see also Pl. Ex. 372, at 44. This statement assumes that OPP would not knowingly choose such inmates to be tier reps. But see Pl. Ex. 372, at 44 (“A male inmate casually referred to the fact that the staff usually picked the person they perceived to be the toughest inmate on the unit as the tier rep.”).

<sup>237</sup> R. Doc. No. 406, at 136–42.

<sup>238</sup> R. Doc. No. 406, at 138.

get in the shower.<sup>239</sup> C.C. followed him, carrying a shank,<sup>240</sup> and proceeded to sexually assault D.R.<sup>241</sup> D.R. waited for approximately one week to report the assault, because “I had to think of a way to get around the immediate sergeants or officers that were in the building” so that the report would not reach C.C. before D.R. could be transferred.<sup>242</sup> Ultimately, after reporting the assault, D.R. was successful in his request to be transferred to another tier, although while on the “at risk” tier at Conchetta he suffered an additional physical assault.<sup>243</sup>

At Conchetta, D.R. attempted to break up a fight because of a concern that another inmate “was about to get really beat up.”<sup>244</sup> Before he could reach the fight, “I felt someone strike me in the back of the head . . . I balled up on the ground and I felt blows to my forehead, to my back, and to my legs.”<sup>245</sup> After he reported the assault, D.R. cooperated by describing his attacker’s physical appearance.<sup>246</sup> SOD staff initially brought an individual to D.R. in order to determine if D.R. could identify that individual as his attacker.<sup>247</sup> D.R. testified that he believed that individual had been physically assaulted by SOD in retaliation for the attack on D.R.<sup>248</sup> The individual had blood around his teeth and blood was also trickling from his mouth.<sup>249</sup> D.R. informed SOD that the individual was not his attacker, and D.R. was returned to the tier, notwithstanding the fact that his true attacker remained on the tier.<sup>250</sup> D.R. learned his assailant’s name at roll call the next morning, and reported that discovery in a grievance.<sup>251</sup> Although D.R. and the attacker were both moved, they were “moved together at the same time” and left alone together in a holding cell.<sup>252</sup> D.R. reported “I was just sitting there kind of on pins and needles, hoping that he didn’t realize exactly what was going on.”<sup>253</sup>

According to Romero, OPP has established an informal culture in which tier reps “make up for deficient staffing realities to help supplement facility order, which is a dangerous and reckless practice.”<sup>254</sup> As Schwartz stated, the “use of tier reps is a corrupt practice,” in which it is “inevitable that some of the tier reps will abuse their positions.”<sup>255</sup> The risk of “arbitrary infliction” of “physical and economic injury” is present whenever an inmate has “unchecked authority” over other inmates. *Gates v. Collier*, 501 F.2d at 1307.

One especially troubling situation illustrates deficiencies associated with the use of tier reps, but also broader deficiencies related to staff accountability. OPP records show that a high-ranking male security officer regularly observed a female tier rep showering and escorted her to a private office after hours for “prolonged periods of time.”<sup>256</sup> His actions were reported and confirmed by two staff members.<sup>257</sup> Inmates also witnessed the shower viewings, as well as the private office visits.<sup>258</sup> Inmate witnesses reported that the tier rep would frequently engage in physical altercations with other inmates, but the tier rep was never included in the corresponding incident reports.<sup>259</sup> The inmate at issue reportedly said that the officer promised to transfer money into her account once she left OPP for a new facility.<sup>260</sup>

Despite the witnessed sexual misconduct, the officer was permitted to resign, and there was never an investigation because of “insufficient evidence, the lack of witnesses and the statements taken.”<sup>261</sup> The extent to which other staff members, in-

<sup>239</sup> R. Doc. No. 406, at 138.

<sup>240</sup> R. Doc. No. 406, at 138–39.

<sup>241</sup> R. Doc. No. 406, at 139.

<sup>242</sup> R. Doc. No. 406, at 141–42. In another instance, female inmates reported tier reps openly engaging in sexual activities with other inmates, which an investigation confirmed. Pl. Ex. 374, at 18.

<sup>243</sup> R. Doc. No. 406, at 142–43.

<sup>244</sup> R. Doc. No. 406, at 143.

<sup>245</sup> R. Doc. No. 406, at 143.

<sup>246</sup> R. Doc. No. 406, at 144.

<sup>247</sup> R. Doc. No. 406, at 145–46.

<sup>248</sup> R. Doc. No. 406, at 145.

<sup>249</sup> R. Doc. No. 406, at 145.

<sup>250</sup> R. Doc. No. 406, at 146.

<sup>251</sup> R. Doc. No. 406, at 146–47.

<sup>252</sup> R. Doc. No. 406, at 147.

<sup>253</sup> R. Doc. No. 406, at 147.

<sup>254</sup> Pl. Ex. 374, at 19.

<sup>255</sup> Pl. Ex. 372, at 44.

<sup>256</sup> Pl. Ex. 26.

<sup>257</sup> Pl. Ex. 26.

<sup>258</sup> Pl. Ex. 26.

<sup>259</sup> Pl. Ex. 26.

<sup>260</sup> Pl. Ex. 26.

<sup>261</sup> Pl. Ex. 26. The same staff member was involved in an altercation with an inmate in which the staff member admitted to using shackles to choke the inmate. Pl. Ex. 7.

cluding those tasked with supervising the female inmates, knew of the conduct is unclear because of the lack of an investigation.<sup>262</sup> This is not the only documented instance of a staff member engaging in sexual conduct with an inmate.<sup>263</sup> The Court notes that, while not addressed in the sexual assault section of this opinion, sexual or romantic “relationships” between staff members and inmates are never acceptable and are, at best, implicitly coercive.

#### 6. Conclusion

“It is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of their fellow inmates.” *Longoria v. Texas*, 473 F.3d 586, 592 (5th Cir. 2006) (citing *Farmer*, 511 U.S. at 832–33). The proposed consent judgment addresses the proven deficiencies relative to inmates’ safety and security. For example, it requires OPSO to ensure adequate staffing, regular security rounds, and direct supervision in units designed for this type of supervision.<sup>264</sup> It also requires the development of a classification system that takes into account factors including security needs, suicide risk, and risk of violence or self-harm.<sup>265</sup> The proposed consent judgment also requires that the classification system be updated to reflect an inmate’s history at OPP.<sup>266</sup> These provisions directly address OPP’s deficiencies with respect to inmate-on-inmate violence, including sexual assault.

With respect to training and accountability, the consent judgment provides that OPSO “shall develop, implement, and maintain comprehensive policies and procedures (in accordance with generally accepted correctional standards) relating to the use of force” and shall “develop and implement a single, uniform reporting system.”<sup>267</sup> An “Early Intervention System” will document and track staff members involved in use of force incidents.<sup>268</sup> The consent judgment requires “timely and thorough investigation of alleged staff misconduct, sexual assaults, and physical assaults of prisoners resulting in serious injury.”<sup>269</sup>

OPP inmates are subject to an epidemic of violence.<sup>270</sup> The operational and administrative dysfunction of OPP’s accountability systems put staff members and inmates at risk on a daily basis. *Compare Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) (“[C]onditions in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates.”). The Court concludes that with respect to safety and security, the proposed consent judgment “represents a reasonable factual and legal determination based on the facts of record.” *Williams*, 729 F.2d at 1559. Considering the evidence presented, the Court further concludes that the consent judgment is narrowly drawn to remedy the violation of Plaintiffs’ Federal rights, is the least intrusive means of doing so, and extends no further than necessary. *See Plata*, 131 S. Ct. at 1939–40 (discussing § 3626(a)(1)).

#### B. Medical and Mental Health Care

During the course of the fairness hearing, the evidence, including credible witness testimony, exposed stark, sometimes shocking, deficiencies in OPP’s medical and mental healthcare system. Inmates with mental health issues are housed in deplorable conditions.<sup>271</sup> Mental health units smell strongly of feces, urine, and rotting organic matter.<sup>272</sup> Several inmates had floors and walls smeared with feces when Dr. Gage visited, and many cells had “evidence of the detritus of several days’ food and utensils.”<sup>273</sup> *Compare Gates v. Cook*, 376 F.3d at 338 (Living in “extremely filthy” cells with “crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles on the walls . . . would present a substantial risk of serious harm to inmates.”). Such unsanitary conditions can cause or exacerbate illness.<sup>274</sup>

<sup>262</sup> Pl. Ex. 26.

<sup>263</sup> *See* Pl. Ex. 41; Pl. Ex. 61.

<sup>264</sup> Consent Judgment, at 12–13.

<sup>265</sup> Consent Judgment, at 17–18.

<sup>266</sup> Consent Judgment, at 18.

<sup>267</sup> Consent Judgment, at 5.

<sup>268</sup> Consent Judgment, at 10–11.

<sup>269</sup> Consent Judgment, at 16.

<sup>270</sup> Pl. Ex. 352, at 11.

<sup>271</sup> R. Doc. No. 408, at 156–57.

<sup>272</sup> Pl. Ex. 376, at 27.

<sup>273</sup> R. Doc. No. 408, at 156; *see* Pl. Ex. 378, at 38 (describing individual with “psychotic symptoms” “with approximately ten plates of molded rotten food lying on the unoccupied upper bunk,” in a “dirty, malodorous” environment).

<sup>274</sup> Pl. Ex. 376, at 28.

Moreover, “mental health units, including those designed for suicide monitoring, were patently not suicide proof.”<sup>275</sup>

The consent judgment aims to remedy broad areas of medical and mental healthcare, including intake services, access to care, medication, staffing, suicide prevention, and records. The Court addresses each in turn.

### 1. Intake

At intake, prisoners with clear histories of self-harm, mental illness, or potential withdrawal from prescribed or illicitly acquired substances are cleared for placement in the general population without any medical or mental health consultation.<sup>276</sup> Agitated inmates are shackled or chained to an ordinary chair, which may permit them to manipulate their shackles or chains to cause self-harm.<sup>277</sup>

Dr. Bruce Gage, a correctional mental healthcare expert,<sup>278</sup> has been the Chief of Psychiatry for the Washington State Department of Corrections since 2008.<sup>279</sup> He concluded that OPP’s mental health services are largely inadequate “in all regards,” “from screening through assessment, treatment, suicide policies and practices, restraint, medication, medical records, continuity of care, and access to care.”<sup>280</sup>

In his report, Dr. Gage stated that in several cases, including instances of inmate suicide, an initial referral to psychiatry could have changed the outcome of the cases.<sup>281</sup> For example, M.H. committed suicide while still in the Intake Processing Center, notwithstanding that he had previously reported ingesting crack cocaine and he had recently been hospitalized for suicidality.<sup>282</sup> At intake, he was wandering around, and “gravitated toward the exit doors,” but he was “herded back to the seats” by staff members.<sup>283</sup> Because he attempted to leave through an exit door, he was placed in an isolation cell.<sup>284</sup> In the isolation cell, he hung himself with his t-shirt.<sup>285</sup> Dr. Gage testified that M.H.’s death could have been prevented with proper mental health assessment and treatment.<sup>286</sup> When asked by the Court whether his testimony reflected a “medical certainty,” Dr. Gage responded affirmatively, testifying that an assessment would have, at a minimum, prevented the isolation that facilitated M.H.’s suicide.<sup>287</sup>

T.W. provides a representative example with respect to the lack of intake screening and follow-up psychiatric services.<sup>288</sup> T.W. set her house on fire.<sup>289</sup> After she was treated for burns at Baton Rouge General Hospital, she was sent to OPP on September 7, 2012.<sup>290</sup> At intake, she described depression that had occurred within the last year and three prior suicide attempts.<sup>291</sup> In addition, her hospital records indicated that she carried a diagnosis of bipolar disorder and that she was currently prescribed lithium and mirtazapine, an antidepressant.<sup>292</sup> At intake, T.W. was ordered pain medication and referred to psychiatry for “eval. for meds.”<sup>293</sup> Despite this referral, T.W. was apparently not given any access to psychiatric care until November 15, 2012.<sup>294</sup> The events of that date are unclear.<sup>295</sup>

On November 16, 2012, T.W. received a psychiatric chronic care treatment plan from an OPP psychiatrist.<sup>296</sup> While the plan notes T.W. felt suicidal because she

<sup>275</sup> Pl. Ex. 376, at 27.

<sup>276</sup> Pl. Ex. 376, at 35.

<sup>277</sup> Pl. Ex. 376, at 38; Pl. Ex. 378, at 31; R. Doc. No. 408, at 98–99.

<sup>278</sup> R. Doc. No. 408, at 82.

<sup>279</sup> Pl. Ex. 376. From 1993 to 2000, he was involved in a University of Washington/Department of Corrections collaboration project that established an inpatient residential mental health program at one of the prisons. R. Doc. No. 408, at 80. Between 1990 and 2008, Dr. Gage worked at Western State Hospital in Lakewood, Washington, setting up continuity of care between jails and the state hospital and consulting with jails on issues such as involuntary medication. R. Doc. No. 408, at 79; *see also* Pl. Ex. 376.

<sup>280</sup> R. Doc. No. 408, at 83.

<sup>281</sup> Pl. Ex. 376, at 35.

<sup>282</sup> R. Doc. No. 410, at 58–60; *see also* Pl. Ex. 80–2.

<sup>283</sup> Pl. Ex. 80–2.

<sup>284</sup> Pl. Ex. 80–2.

<sup>285</sup> Pl. Ex. 80–2.

<sup>286</sup> R. Doc. No. 408, at 110.

<sup>287</sup> R. Doc. No. 408, at 110.

<sup>288</sup> Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

<sup>289</sup> Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

<sup>290</sup> Pl. Ex. 376, at 20.

<sup>291</sup> Pl. Ex. 376, at 20.

<sup>292</sup> Pl. Ex. 376, at 20.

<sup>293</sup> Pl. Ex. 376, at 20.

<sup>294</sup> Pl. Ex. 376, at 20.

<sup>295</sup> Pl. Ex. 376, at 20; *see also* Pl. Ex. 74.

<sup>296</sup> Pl. Ex. 376, at 20.

missed her children, the plan shows little awareness of her three previous suicide attempts, her prior diagnosis, or her prior psychotropic medications.<sup>297</sup> With respect to OPP's psychiatry services, T.W. received no diagnosis and no medications.<sup>298</sup> When Dr. Gage visited in December 2012, T.W. reported auditory hallucinations of "people out to get me," to whom she sometimes talked back.<sup>299</sup> She also spoke about "people being sent to hurt her."<sup>300</sup> Other inmates said that T.W. paces a lot, cries a lot, and "sleeps all day."<sup>301</sup> The record is devoid of evidence that T.W. received the mental health treatment that was obviously needed while she was at OPP.

## 2. Access to Care & Treatment

After Dr. Gage reviewed the records provided, "[t]here was not one example of a thorough psychiatric assessment by the OPP psychiatrist in any of the records and most were not even minimally adequate."<sup>302</sup> None of the records included an assessment of suicide risk, rather, "this portion of the assessment consisted in simply noting whether the person expressed suicidal ideation or not. The same was true of homicidal ideation and consideration of danger to others in general."<sup>303</sup> This is consistent with the testimony of an inmate that the extent of psychiatric exams is often limited to: "Are you suicidal or homicidal?"<sup>304</sup>

OPP has one full-time psychiatrist who works 40 hours per week.<sup>305</sup> Inmates may wait weeks or months for psychiatric appointments.<sup>306</sup> With respect to emergency care during the day, the psychiatrist is contacted and inmates are transferred to the mental health unit for suicide monitoring.<sup>307</sup> Accordingly, suicide tiers are the primary site of emergency services during the day.<sup>308</sup> After hours, the psychiatrist may sometimes be reached by telephone, but there is no mental health provider actually on call or present at OPP facilities.<sup>309</sup> An inmate who needs mental healthcare after hours or on weekends will either be sent to the mental health unit for suicide watch or to the emergency room.<sup>310</sup> Inmates who harm themselves or who are suicidal are typically not seen until the next working day, while those with less serious, but still urgent, complaints—including suicidal ideation without a plan—are not seen for several days.<sup>311</sup>

The experiences of D.R. and R.S. illustrate compounding inadequacies in mental and medical healthcare. D.R. testified as to the abhorrent conditions experienced by H.T., an inmate whom D.R. testified "seemed partially handicapped and mentally handicapped also," based on the "things he would say," "the way he got around," and his inability to care for himself.<sup>312</sup> H.T. utilized a colostomy bag, and "[e]very morning his colostomy bag would come off and there would be feces all in his cell and all over his jumper."<sup>313</sup> H.T. would leave the soiled jumper on the ground, "[a]nd someone would have to go in [his cell] and get his jumper and bring it to the gate and set it down and help him clean himself and somehow reattach the bag."<sup>314</sup> Other inmates, not staff members, would assist H.T. by cleaning and reattaching his colostomy bag and carrying his soiled jumper to the gate, where staff members would retrieve it.<sup>315</sup> While this daily routine seems inconsistent with basic care, perhaps more disturbing is that H.T. had to rely on other inmates' compassion and willingness to provide untrained nursing care to ensure he had an unsoiled jumper and an attached colostomy bag.<sup>316</sup> According to D.R., who witnessed H.T.'s

<sup>297</sup> Pl. Ex. 376, at 20–21.

<sup>298</sup> Pl. Ex. 376, at 21.

<sup>299</sup> Pl. Ex. 376, at 21.

<sup>300</sup> Pl. Ex. 376, at 21.

<sup>301</sup> Pl. Ex. 376, at 21.

<sup>302</sup> Pl. Ex. 376, at 37.

<sup>303</sup> Pl. Ex. 376, at 37.

<sup>304</sup> Pl. Ex. 376, at 32; R. Doc. No. 408, at 169. T.W. also told Dr. Gage, without being asked, that the OPP psychiatrist sometimes asks her, "Are you suicidal or homicidal?" and that's it." Pl. Ex. 376, at 21.

<sup>305</sup> R. Doc. No. 408, at 122–23; *see also* Pl. Ex. 259, at 102–03.

<sup>306</sup> Pl. Ex. 312; Pl. Ex. 376, at 39–40; R. Doc. No. 405, at 124–25; R. Doc. No. 408, at 126–27.

<sup>307</sup> Pl. Ex. 376, at 38.

<sup>308</sup> Pl. Ex. 376, at 38.

<sup>309</sup> Pl. Ex. 376, at 38.

<sup>310</sup> Pl. Ex. 376, at 38; R. Doc. No. 408, at 114.

<sup>311</sup> Pl. Ex. 376, at 39.

<sup>312</sup> R. Doc. No. 405–06.

<sup>313</sup> R. Doc. No. 406, at 408.

<sup>314</sup> R. Doc. No. 406, at 148.

<sup>315</sup> R. Doc. No. 406, at 148–150.

<sup>316</sup> D.R. testified that he was not sure how other inmates reattached the bag. "I didn't have the stomach for it." R. Doc. No. 406, at 148. The Court notes that the inmates who took it upon themselves to care for H.T. were subject to the health risks potentially associated with direct

treatment for more than 2 months, staff members who took roll call would, on a daily basis, see fecal matter that had spilled from the colostomy bag into H.T.'s cell and sometimes see H.T., sitting in his bed nude or wrapped in a towel.<sup>317</sup> Yet this offensive routine continued, and some staff members even joked about it.<sup>318</sup>

Another inmate's slow suicidal decline similarly illustrates the deficiencies with respect to both medical and mental healthcare. R.S. came to OPP after a standoff with the police.<sup>319</sup> R.S. expressed "wanting the cops to kill him," and an emergency room note describes suicidal ideation.<sup>320</sup> OPP staff notes reflect that R.S. stated: "I don't want to kill myself. I just wish I would die."<sup>321</sup> While on suicide watch, R.S. refused treatment, food, and water.<sup>322</sup> He became profoundly dehydrated, for which he was taken to the emergency room several times.<sup>323</sup>

R.S.'s extreme depression caused a "failure to thrive," which Dr. Gage described as occurring when people with severe depression or terminal illnesses stop eating and drinking, resulting in dehydration complications, including urinary tract infections, and complications related to inactivity, including pneumonia.<sup>324</sup> Records document that medical staff observed R.S. refusing food, while "saturated in urine and feces stating he can't get up."<sup>325</sup> On another instance, staff described him as "unwilling or unable to get up off of floor."<sup>326</sup> Records also show that R.S. "experienced an episode of incontinence, requiring his cell mate to clean him up."<sup>327</sup> Despite his refusal of basic sustenance, documented suicidality, and repeated hospitalizations, the Court has been provided with no evidence that OPP authorities undertook efforts that would facilitate and permit them to involuntarily treat R.S.<sup>328</sup>

OPP staff observed and documented R.S.'s decline. He was seen daily by nurses and eight times by physicians.<sup>329</sup> Nonetheless, R.S. died of urosepsis and pneumonia while still on suicide watch.<sup>330</sup> It is egregious that R.S. died after *announcing* his passive suicidality<sup>331</sup> and after spending days refusing food and lying on the floor, with no effort to provide involuntary treatment or otherwise actively intervene in R.S.'s slow suicide.<sup>332</sup> However, the internal OPP mortality report concluded that the standard of care was met, emphasizing that R.S. refused treatment.<sup>333</sup>

Dr. Daphne Glindmeyer, an expert in mental health and psychiatry and juvenile mental health in corrections,<sup>334</sup> is the medical director for Assertive Community Treatment, a program that provides in-home care to individuals with "chronic persistent severe mental illness."<sup>335</sup>

Dr. Glindmeyer conducted a site visit at the unit housing youth inmates.<sup>336</sup> The population of youth inmates at the time was approximately 24, and these inmates ranged from approximately 14 years old to 18 years old.<sup>337</sup> Just over half of the youth inmates were housed in protective custody because of issues including prior

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exposure to fecal matter. "Frequent exposure to the waste of other persons can certainly present health hazards that constitute a serious risk of substantial harm." *Gates v. Cook*, 376 F.3d at 341.

<sup>317</sup> R. Doc. No. 406, at 150; *see also* Pl. Ex. 376, at 20 (describing instance in which a different inmate was "not given his antipsychotic medication on at least one occasion because he was in a towel rather than jail clothing").

<sup>318</sup> R. Doc. No. 406, at 150.

<sup>319</sup> R. Doc. No. 408, at 150; Pl. Ex. 76-1.

<sup>320</sup> Pl. Ex. 76-2.

<sup>321</sup> Pl. Ex. 76-1.

<sup>322</sup> Pl. Ex. 76-1.

<sup>323</sup> R. Doc. No. 408, at 150.

<sup>324</sup> R. Doc. No. 408, at 151.

<sup>325</sup> Pl. Ex. 76-1.

<sup>326</sup> Pl. Ex. 76-1.

<sup>327</sup> Pl. Ex. 76-2.

<sup>328</sup> R. Doc. No. 408, at 150-51.

<sup>329</sup> Pl. Ex. 76-2.

<sup>330</sup> R. Doc. No. 408, at 150-51.

<sup>331</sup> *See* Pl. Ex. 167 (defining, in OPP's suicide lecture materials, "passive suicidality" as "wanting to be dead").

<sup>332</sup> R. Doc. No. 408, at 151.

<sup>333</sup> Pl. Ex. 76-2.

<sup>334</sup> R. Doc. No. 409, at 174-75.

<sup>335</sup> R. Doc. No. 409, at 174. For approximately the last 9 years, she has also served as a consent judgment compliance monitor with respect to mental healthcare in Mississippi's juvenile correctional facilities. Pl. Ex. 379, at 4-5. She has previously served as the Director of Psychiatry for Louisiana State University Health Science Center's Juvenile Corrections Program. Pl. Ex. 379, at 5.

<sup>336</sup> R. Doc. No. 409, at 213.

<sup>337</sup> R. Doc. No. 409, at 213.

sexual assault.<sup>338</sup> Those in protective custody were confined for 23 hours per day.<sup>339</sup> Youth inmates and staff advised Dr. Glindmeyer to see a youth inmate who had symptoms including “bizarre behavior” and a history of suicidal ideation.<sup>340</sup> Although the inmate had been seen by a psychiatrist 10 months earlier, he received no diagnosis for his apparent mood disorder and he was not receiving any medication or treatment.<sup>341</sup> Dr. Glindmeyer persuasively opined that his treatment or lack thereof was worsening his condition,<sup>342</sup> and his isolation was increasing his risk of suicide.<sup>343</sup>

### 3. Medication

Even where records demonstrated that medications are provided by agencies such as hospitals, and even when that fact is documented through reputable sources of information in the record, psychotropic medications are frequently discontinued at OPP.<sup>344</sup>

At intake, psychotropic medications are stopped approximately 75–80 percent of the time, with some OPP treatment providers refusing to order them in any circumstance.<sup>345</sup> While there are legitimate concerns associated with the potential abuse of such medications, the wholesale discontinuation of all medications creates a risk that inmates will deteriorate psychiatrically, develop a discontinuation syndrome, or experience withdrawal, all of which can cause unnecessary pain and suffering.<sup>346</sup> Moreover, the abrupt discontinuation of psychotropic medication can increase the likelihood of suicide and assault and worsen inmates’ long-term prognosis.<sup>347</sup>

#### a. Detoxification and Withdrawal

OPP inmates who require a detoxification protocol are not consistently identified or effectively treated. For example, C.F.’s intake questionnaire indicates that she was taking 2 milligrams of a benzodiazepine, Xanax, four times daily, an amount and frequency which Dr. Glindmeyer characterized as “a lot,” pursuant to a prescription to treat her mental illness.<sup>348</sup> At intake, C.F. specifically identified the pharmacy that filled her prescriptions and the hospital where she received mental health treatment.<sup>349</sup> OPP discontinued the benzodiazepine.<sup>350</sup> C.F. was monitored for only five days, despite the fact that benzodiazepine withdrawal can occur up to ten days after cessation of use.<sup>351</sup> During those five days, her vital signs would occasionally meet the criteria for providing detoxification medication; sometimes such medication was provided, sometimes it was not.<sup>352</sup>

During Dr. Glindmeyer’s visit on December 20, 2012, she observed C.F. “screaming very loudly” that she “needed to go to a wedding and that she had a baby in her tubes and they needed to come cut it out right away.”<sup>353</sup> Staff and other inmates indicated C.F. had been in that state or a similar state for several days prior to Dr. Glindmeyer’s site visit.<sup>354</sup> Dr. Glindmeyer spoke with C.F., who was “extremely paranoid,” “screaming, cursing,” and “very agitated.”<sup>355</sup> Dr. Glindmeyer took C.F.’s pulse, and found it to be “over a hundred. And her skin was just wet. Clammy.”<sup>356</sup> C.F. was experiencing delirium tremens, which Dr. Glindmeyer testified, is “very, very dangerous with a relatively high risk of mortality.”<sup>357</sup> Given the severity of the situation, Dr. Glindmeyer reported her concerns directly to nursing

<sup>338</sup> R. Doc. No. 410, at 7; *see also* Pl. Ex. 378, at 41–42.

<sup>339</sup> Pl. Ex. 378, at 42, 45; R. Doc. No. 410, at 11–12.

<sup>340</sup> R. Doc. No. 410, at 13–14.

<sup>341</sup> R. Doc. No. 410, at 14.

<sup>342</sup> R. Doc. No. 410, at 15.

<sup>343</sup> R. Doc. No. 410, at 15.

<sup>344</sup> R. Doc. No. 408, at 102.

<sup>345</sup> R. Doc. No. 408, at 101, 114–16.

<sup>346</sup> R. Doc. No. 408, at 101–02.

<sup>347</sup> R. Doc. No. 408, at 101–02; R. Doc. No. 408, at 102–03. As Schwartz noted, cessation of medication may be “logical if there was a reliable system for reassessing those inmates at a predetermined time, and if inmates could reliably get to sick call.” Pl. Ex. 372, at 25–26. The evidence demonstrates that there are no such reliable systems in place.

<sup>348</sup> R. Doc. No. 409, at 185; *see also* Pl. Ex. 180.

<sup>349</sup> R. Doc. No. 409, at 185–86; *see also* Pl. Ex. 180.

<sup>350</sup> Pl. Ex. 378, at 36–37.

<sup>351</sup> R. Doc. No. 409, at 189–90.

<sup>352</sup> R. Doc. No. 409, at 190; *see also* Pl. Ex. 378, at 37; Pl. Ex. 180.

<sup>353</sup> Pl. Ex. 378, at 37; R. Doc. No. 409, at 191.

<sup>354</sup> Pl. Ex. 378, at 37; R. Doc. No. 409, at 191.

<sup>355</sup> R. Doc. No. 409, at 191.

<sup>356</sup> R. Doc. No. 409, at 191.

<sup>357</sup> R. Doc. No. 409, at 192.

staff, who then reportedly routed C.F. to the emergency room.<sup>358</sup> A subsequent review of C.F.'s records showed that her delirium or psychosis was never noted before Dr. Glindmeyer's visit.<sup>359</sup> She had received no medication, despite the fact that staff and inmates indicated she had been in this disturbing, "obviously acutely ill," state for days.<sup>360</sup> Dr. Glindmeyer persuasively attributed C.F.'s state to OPP's detoxification protocol.<sup>361</sup> *Gates v. Cook*, 376 F.3d at 343 (noting "testimony that prisoners seldom see medical staff and that monitoring of medication was sporadic, with prisoners potentially being prescribed the wrong medication or no medication for long periods of time, potentially leading to extremely dangerous physical side effects or psychotic breakdowns").<sup>362</sup>

#### b. Untreated Mental Illness

OPP does not provide appropriate treatment to mentally ill inmates, even when they pose a danger to themselves or others. For example, S.T.<sup>363</sup> entered OPP in November 2012, but he was subsequently routed to the emergency room several times in a seven-day period.<sup>364</sup> The behavior that led to these visits generally included "climbing on ceiling and pulling light fixtures, throwing tile, spreading feces on windows," and "swinging from light fixtures."<sup>365</sup> S.T. reported auditory hallucinations.<sup>366</sup> At one point, S.T. was found "naked in his cell, with abrasions and signs of trauma."<sup>367</sup> An emergency room physician noted that S.T. would be discharged and "can follow up with psychiatry in jail, as it certainly appears that he will require medication to decrease his disruptive behavior."<sup>368</sup> When Dr. Gage observed S.T. in December 2012, "[h]e was mute and hid himself under a blanket, refusing to speak to me."<sup>369</sup> Dr. Glindmeyer also observed S.T. on two occasions in December 2012.<sup>370</sup> "On the first observation, he declined to speak," and he was lying on a mattress on the floor, with a "flat affect, slow movements, and poor eye contact."<sup>371</sup> Staff members reported that he had a history of refusing to eat.<sup>372</sup> On the second observation, S.T. demonstrated psychomotor retardation, moving in slow motion.<sup>373</sup> He spoke softly and slowly, and his affect remained flat.<sup>374</sup> Despite S.T.'s persistently bizarre behavior, OPP records reflect that the only psychotropic medication OPP ever provided to S.T. was a single emergency dose of an antipsychotic medication.<sup>375</sup> In short, S.T. remained symptomatic and untreated.<sup>376</sup>

Another inmate, R.C., was transferred to the mental health unit on November 27, 2012, less than a week after arriving at OPP.<sup>377</sup> The record indicates this transfer may have been related to a prior history of schizophrenia and ongoing suicidal and homicidal ideation, which included statements such as "I feel people are trying to kill me . . . I'll hurt somebody [by] cutting their throat off."<sup>378</sup> An OPP medical doctor, who was not part of the mental healthcare team, documented R.C. as "being extremely belligerent and bizarre, thinking that [the doctor] will harm him" and "soiled in stool."<sup>379</sup> The doctor noted that R.C. had a history of psychiatric issues

<sup>358</sup> R. Doc. No. 409, at 192.

<sup>359</sup> Pl. Ex. 378, at 22.

<sup>360</sup> Pl. Ex. 378, at 22; R. Doc. No. 409, at 191.

<sup>361</sup> R. Doc. No. 409, at 192.

<sup>362</sup> Dr. Gage's report suggests that he witnessed C.F. being removed for evaluation, but his subsequent review of her records showed no evidence of any such evaluation or hospitalization. Pl. Ex. 376, at 48.

<sup>363</sup> The initials of this inmate are actually T.S., but they are not used here so as to avoid conflation with the other T.S., who was attacked by E.L.

<sup>364</sup> Pl. Ex. 73.

<sup>365</sup> Pl. Ex. 73.

<sup>366</sup> Pl. Ex. 73.

<sup>367</sup> Pl. Ex. 73.

<sup>368</sup> Pl. Ex. 73.

<sup>369</sup> Pl. Ex. 376, at 19.

<sup>370</sup> Pl. Ex. 378, at 15.

<sup>371</sup> Pl. Ex. 378, at 15.

<sup>372</sup> Pl. Ex. 378, at 15.

<sup>373</sup> Pl. Ex. 378, at 15.

<sup>374</sup> Pl. Ex. 378, at 15.

<sup>375</sup> Pl. Ex. 376, at 19; Pl. Ex. 378, at 16.

<sup>376</sup> Pl. Ex. 376, at 19; Pl. Ex. 378, at 15–16.

<sup>377</sup> Pl. Ex. 91.

<sup>378</sup> R. Doc. No. 376, at 16; R. Doc. No. 408, at 160–61; *see also* Pl. Ex. 91. R.C. submitted a sick call request on November 26, 2012, stating, "I would like to receive my medicine that helps to keep my mind calm. I was being housed at Allen Correctional Facility. I was taking Haldol and Benadryl. Thank you & God Bless." Pl. Ex. 91. The timing of this request suggests it may have been associated with his transfer.

<sup>379</sup> R. Doc. No. 408, at 160–61; *see also* Pl. Ex. 376, at 15; Pl. Ex. 91.

and “defer[red] to psych. for further management of psychosis, before dealing w/ medical issues.”<sup>380</sup> When Dr. Gage toured the facility in mid-December, R.C. was “overtly responding to internal stimuli (indicative of hallucinations),” talking to people who were not there, and otherwise acting “grossly psychotic.”<sup>381</sup> Dr. Gage later saw R.C. “lying under the bed, lying in his own excrement,” with “shards of tile . . . arrayed on the sill of the window in plain sight.”<sup>382</sup> R.C. later ingested the shards of tile.<sup>383</sup> According to Dr. Gage, R.C. was “simply allowed to languish in psychosis, untreated,” despite the fact that evidence of psychosis was documented in R.C.’s record by other physicians.<sup>384</sup>

#### 4. Staffing

As with security and safety, OPP’s severe deficiencies in mental health and medical care are largely attributable to dramatically insufficient staffing.<sup>385</sup> Dr. Glindmeyer concluded that OPP’s mental health staffing is “woefully inadequate.”<sup>386</sup> There is one psychiatrist and one social worker for approximately 2,500 inmates.<sup>387</sup> According to Dr. Gage, OPP needs at least one additional psychiatrist or psychiatric prescriber to meet minimum standards.<sup>388</sup> Nurses report that there is no time to provide any formal mental health treatment, and that they engage in minimal contact usually only in the context of mandatory evaluations.<sup>389</sup> Given the number of inmates and the number of nurses, it is impossible for the nurses to adequately evaluate and chart patients, administer medications, respond to emergencies, provide suicide monitoring, gather sick call information, and provide basic nursing services.<sup>390</sup>

The Court questioned Dr. Gage as to certain statements in his report characterizing the relationship between staff and inmates at OPP.

THE COURT: You have a statement in your report which states, “There’s a general pattern of reckless and callous disregard for the suffering and treatment needs of the mentally ill and chemically dependent in OPP.” That’s a very strong statement. Do you want to explain that at all?

THE WITNESS: Well, I would stand by that. I guess that would be the first thing that I would say. I mean, I’ve seen a number of jails and I have not seen conditions as deplorable as I have seen in this jail, and I have not seen such absence of mental health services in the context of just abysmal physical environments and the kind of failure to monitor people and so on that I was speaking about. It was just more dramatic than I have ever seen in any other institution.<sup>391</sup>

While the Sheriff and City have suggested that an inmate population reduction may occur in just a few months, the evidence suggests that OPP has inadequate staffing to treat even a reduced population.<sup>392</sup>

#### 5. Suicide Prevention

According to Dr. Gage, “[OPP] records and interviews with staff and inmates demonstrate a level of disregard and disrespect on the part of most staff towards the mentally and chemically dependent” that is made plain by the conditions on the residential mental health unit and “especially the approach to suicide monitoring.”<sup>393</sup> The evidence supports this characterization.

<sup>380</sup> Pl. Ex. 91.

<sup>381</sup> Pl. Ex. 376, at 15; R. Doc. No. 408, at 161.

<sup>382</sup> R. Doc. No. 408, at 161.

<sup>383</sup> R. Doc. No. 408, at 161.

<sup>384</sup> Pl. Ex. 376, at 43. Dr. Gage described R.C. as someone who “would have readily qualified for involuntary treatment with antipsychotics.” R. Doc. No. 408, at 161. In his report, Dr. Gage detailed numerous additional examples of inmates at OPP who were left untreated. *See* Pl. Ex. 376, at 9–27.

<sup>385</sup> Pl. Ex. 376, at 29.

<sup>386</sup> R. Doc. No. 409, at 196. Dr. Glindmeyer also testified that youth inmates seem to be controlled by another youth inmate, as opposed to by the deputies. This youth inmate was physically the largest inmate, and the other youth inmates appeared to wait for his acquiescence before responding to Dr. Glindmeyer’s questions. R. Doc. No. 410, at 8–9.

<sup>387</sup> Pl. Ex. 376, at 29.

<sup>388</sup> R. Doc. No. 408, at 132.

<sup>389</sup> Pl. Ex. 376, at 42.

<sup>390</sup> Pl. Ex. 376, at 29.

<sup>391</sup> R. Doc. No. 408, at 186–187.

<sup>392</sup> R. Doc. No. 408, at 187.

<sup>393</sup> Pl. Ex. 376, at 50.

Suicide assessments at OPP are cursory and repetitive. Psychiatric contact with inmates is extremely brief, generally lasting less than five minutes.<sup>394</sup> OPP policy requires that staff members monitor inmates on suicide watch at all times.<sup>395</sup> But the staffing deficiencies and physical structures of OPP facilities make it nearly impossible to conduct adequate assessments and to directly observe inmates on suicide watch.<sup>396</sup> Those written assessments that are actually completed are perfunctory, and some appear to have been filled out in advance.<sup>397</sup> OPP does not have any suicide proof cells, and records demonstrate that inmates on suicide watch have access to medications that can be used to overdose.<sup>398</sup> Staff and inmates on the suicide watch unit could not recall the last time cells were searched for contraband, and there was no log of any such searches.<sup>399</sup>

On the suicide watch tier, records demonstrate that significant self-harm events were not listed as “sentinel events” that would trigger staff review.<sup>400</sup> These events included “head banging severe enough to require sutures,” swallowing pills, chemicals, and pieces of tile, and “countless episodes of tying cloth around necks, sometimes anchored to objects.”<sup>401</sup> Inmates who commit suicide are sometimes not discovered for quite some time.<sup>402</sup> *Compare Plata*, 131 S. Ct. at 1934 (noting that “prison staff did not even learn of [an inmate’s death] for several hours”).

OPP staff members’ ignorance of cut-down tools is particularly alarming. A cut-down tool is a type of knife “made to cut through layers of something that has been fashioned as a rope,” such as the “thick material that uniforms are made of.”<sup>403</sup> Suicide is a leading cause of death in correctional settings,<sup>404</sup> and approximately 95 percent of suicides in jails and prisons are committed by hanging.<sup>405</sup> Cutting someone down without a cut-down tool may take more time, decreasing the chance of survival.<sup>406</sup> Virtually none of OPP’s staff, including the staff members responsible for suicide watch, could locate cut-down tools when the experts visited.<sup>407</sup>

## 6. Records

Dr. Gage testified, and the Court has observed firsthand in connection with its own review, that record keeping at OPP is very poor.<sup>408</sup> For example, while medical forms may be reasonably constructed, they are often left blank or incomplete or are simply not present in inmates’ medical records.<sup>409</sup> These are not mere clerical oversights. In numerous instances, inmates are sent to the emergency room, but there is no indication in the inmates’ medical records regarding the outcome of their visits.<sup>410</sup>

Notes are undated, misdated, unsigned, and otherwise deficient.<sup>411</sup> There is a consistent pattern of incompleteness.<sup>412</sup> The serious deficiencies in record keeping make it difficult to comprehensively assess the quality of care at OPP and to render emergency care to inmates.<sup>413</sup> Moreover, the absence of consistent medication administration records contributes to the risk of overprescription, overdose, contraband trade, and inmate-on-inmate violence.<sup>414</sup>

## 7. Conclusion

The Court has reviewed the voluminous evidence regarding medical and mental healthcare at OPP and the measures in the amended proposed consent judgment that the signatories agree are necessary to address deficiencies. The evidence pre-

<sup>394</sup> Pl. Ex. 376, at 45.

<sup>395</sup> R. Doc. No. 408, at 171.

<sup>396</sup> Pl. Ex. 376, at 45.

<sup>397</sup> Pl. Ex. 376, at 46.

<sup>398</sup> See also Pl. Ex. 378, at 23.

<sup>399</sup> Pl. Ex. 376, at 45–46.

<sup>400</sup> Pl. Ex. 376, at 47.

<sup>401</sup> Pl. Ex. 376, at 47.

<sup>402</sup> Pl. Ex. 376, at 30; see e.g., Pl. Ex. 78; Pl. Ex. 81.

<sup>403</sup> R. Doc. No. 406, at 85.

<sup>404</sup> E.g., R. Doc. No. 410, at 46.

<sup>405</sup> R. Doc. No. 406, at 85–86.

<sup>406</sup> R. Doc. No. 406, at 85–86.

<sup>407</sup> R. Doc. No. 406, at 86; R. Doc. No. 408, at 159.

<sup>408</sup> R. Doc. No. 408, at 89, 94.

<sup>409</sup> Pl. Ex. 376, at 30.

<sup>410</sup> Pl. Ex. 376, at 31.

<sup>411</sup> R. Doc. No. 409, at 100.

<sup>412</sup> R. Doc. No. 409, at 100.

<sup>413</sup> R. Doc. No. 408, at 179–80.

<sup>414</sup> R. Doc. No. 408, at 177–78; see Pl. Ex. 376, at 34–35; Pl. Ex. 378, at 23. An inmate on suicide watch showed Schwartz a large bag of pills and a cup full of pills, totaling approximately 75 pills, which he had been stockpiling. Pl. Ex. 372, at 24–25. Schwartz reported the situation to OPP’s medical director. Pl. Ex. 372, at 25.

sented was largely targeted towards deficiencies in mental healthcare, although the evidence also shows deficiencies in non-mental healthcare treatment, in particular sick call requests, medication administration, and emergency room visits, that relate to the risk of suicide, violence, and contraband trade.<sup>415</sup> The evidence presented shows that a lack of treatment altogether, rather than inadequate treatment, contributes to severe deficiencies in medical and mental healthcare at OPP.<sup>416</sup>

The consent judgment directly addresses OPP's deficiencies with respect to medical and mental healthcare. For example, it requires that an inmate's risk of suicide or other self-harm be evaluated within eight hours of arriving at OPP and it prohibits placing inmates in isolation who have not been screened.<sup>417</sup> It requires that an inmate receive a mental health assessment no later than the next working day following an "adverse triggering event," such as a suicide attempt or self-injury.<sup>418</sup> It also requires that "psychotropic medications are administered in a clinically appropriate manner as to prevent misuse, overdose, theft, or violence related to the medication."<sup>419</sup>

"Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives inmates of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Plata*, 131 S. Ct. at 1928. OPP's deficiencies with respect to medical and mental healthcare are widespread, and the deficiencies with respect to mental healthcare are particularly obvious and pervasive. Dr. Gage testified that OPP's absence of mental health services is "dramatic" when compared to any other institution he has seen.<sup>420</sup> Considering the allegations of system-wide constitutional violations and the evidence presented of "complex and intractable" deficiencies, the Court concludes that the "scope of the remedy" presented in the proposed consent judgment is "proportional to the scope of the violation." *Id.* at 1937, 1940. The consent judgment provisions on mental and medical healthcare are necessary to remedy the violation of Federal rights, and they are the least intrusive means of doing so. *See id.*

### C. Environmental Conditions

OPP facilities are in a state of disrepair.<sup>421</sup> Ventilation throughout OPP facilities is very poor, in part because inmates plug the vents.<sup>422</sup> Rusted and poorly secured fixtures can be used to create and conceal weapons.<sup>423</sup> Inmates, including inmates on suicide watch, have easy access to shards of broken tile, which may be ingested, thrown, or used as a weapon.<sup>424</sup> *Compare Marsh*, 268 F.3d at 1027 ("The structure of the Jail was so dilapidated that inmates could fashion weapons from pieces of the building."). Old locks in disrepair allow inmates to lock and unlock their cells at will.<sup>425</sup> *Compare id.* ("[L]ocks on the doors to cells did not work, preventing inmates from being locked down."). Many toilets, sinks, and showers are not functional.<sup>426</sup> Sewage seeps into cells, including cells where inmates eat.<sup>427</sup> *Compare Gates v. Cook*, 376 F.3d at 341 ("[E]xposure to human waste 'evokes both the health concerns emphasized in Farmer and the more general standards of dignity embodied in the Eighth Amendment.'" (quoting *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001))). The acute psychiatric unit's showers have large amounts of black mold on the ceilings and walls.<sup>428</sup> Clouds of gnats have resulted in an increased incidence of skin problems.<sup>429</sup> Cells housing mentally ill inmates have feces spread on the walls.<sup>430</sup> Inmates, including inmates on the acute psychiatric unit, sometimes sleep on the floor or on bare steel bunks because they are not given mattresses.<sup>431</sup>

<sup>415</sup> R. Doc. No. 410, at 52–53.

<sup>416</sup> Pl. Ex. 376, at 50.

<sup>417</sup> Consent Judgment, at 20.

<sup>418</sup> Consent Judgment, at 21.

<sup>419</sup> Consent Judgment, at 22, 30.

<sup>420</sup> R. Doc. No. 408, at 187.

<sup>421</sup> R. Doc. No. 407, at 98.

<sup>422</sup> R. Doc. No. 407, at 100.

<sup>423</sup> R. Doc. No. 407, at 98, 101; *see* Pl. Ex. 374, at 45.

<sup>424</sup> *E.g.*, Pl. Ex. 90; Pl. Ex. 374, at 46.

<sup>425</sup> Pl. Ex. 372, at 55.

<sup>426</sup> R. Doc. No. 407, at 98.

<sup>427</sup> Pl. Ex. 372, at 54; R. Doc. No. 412, at 26–27; City Ex. 13; *see also* R. Doc. No. 407, at 45 (unsanitary conditions portrayed in City Ex. 13 persist).

<sup>428</sup> Pl. Ex. 372, at 54.

<sup>429</sup> Pl. Ex. 372, at 56; Several inmate letters described showers with "leech like" or "slug like" creatures, which one inmate described as "gnats before they transform." *E.g.*, R. Doc. Nos. 274, 294.

<sup>430</sup> R. Doc. No. 409, at 103–04.

<sup>431</sup> Pl. Ex. 372, at 26–27.

OPP's environmental conditions pose a security risk, and this risk endangers the lives of staff members and inmates, while also endangering the community through potential escapes.<sup>432</sup> OPP's environmental conditions also create a health hazard for staff members and inmates. *See Alberti v. Sheriff of Harris Cnty.*, 937 F.2d 984, 1000–01 (5th Cir. 1991) (observing that “problems with the jails’ plumbing, ventilation, fire safety, supplies, food service, and medical care” could “weigh in favor” of a finding of deliberate indifference). The consent judgment addresses these risks by requiring, for example, that OPP adequately install and maintain fixtures and that OPP's food service staff, including inmates, receive training on food safety.<sup>433</sup> The Court has closely reviewed the measures in the proposed consent judgment, and finds them narrowly drawn and no more intrusive than necessary to remedy the violation of inmates’ constitutional rights.

#### D. Fire Safety

With respect to fire safety, Romero observed fire hazards, including electrical sockets that had been “burnt out, perhaps by inmates tampering with them . . . to ignite something.”<sup>434</sup> Romero reported that staff members were unable to locate emergency exit keys in a timely manner, if at all.<sup>435</sup> A key control program is “foundational to jail security,”<sup>436</sup> but there is no reliable key control program at OPP.<sup>437</sup> According to Romero, “[s]taff and prisoners reported that emergency doors are frequently locked with shackles because during power outages, these doors pop open.”<sup>438</sup> At the time of Romero's visit, the fire alarm system for the last 3 months at several facilities had consisted of a “fire watch,” in which a person walked through units looking for fire hazards or signs of fire.<sup>439</sup> In September 2012, the Louisiana State Fire Marshal's office and the New Orleans Fire Department conducted a joint surprise inspection.<sup>440</sup> The OPP staff member assigned to the fire watch had, by 10:30 a.m., filled out the fire watch check log for the entire day.<sup>441</sup>

The inability of staff to operate emergency exits is deeply worrisome and poses the type of problem that could result in a large-scale catastrophic fire event with many fatalities.<sup>442</sup> While the Sheriff's testimony suggested that improvements have been made in recent months, the proposed consent judgment will ensure that such improvements remain consistent.<sup>443</sup> For example, the consent judgment requires that fire equipment be maintained and inspected quarterly and that staff be trained in the use of emergency keys.<sup>444</sup> In conjunction with the presence of contraband, including lighters<sup>445</sup> and “stingers,”<sup>446</sup> the dysfunctional emergency exit system, and the inadequate supervision at OPP, fire related issues pose a risk to the security and safety of inmates and staff. The remedies in the proposed consent judgment with respect to fire safety are narrowly drawn to remedy the violation of the Federal rights addressed herein, and they are no more intrusive than necessary to do so.

<sup>432</sup> Pl. Ex. 372, at 56; Pl. Ex. 374, at 47.

<sup>433</sup> Consent Judgment at 31–32.

<sup>434</sup> R. Doc. No. 407, at 102–03.

<sup>435</sup> Romero requested that staff members locate an emergency key for one of the housing units. Staff members located a key within about ten minutes, but it was the wrong key. A key located after an hour worked for one door but not for another. Ultimately, Romero concluded that the keys were kept in the warden's office, but the warden is only there during the day and the keys are not otherwise available to staff. Romero suspected the locks had been sabotaged by inmates. R. Doc. No. 407, at 104–07.

<sup>436</sup> Pl. Ex. 374, at 21.

<sup>437</sup> Pl. Ex. 372, at 21, 45.

<sup>438</sup> Pl. Ex. 374, at 46.

<sup>439</sup> R. Doc. No. 407, at 103–04.

<sup>440</sup> Pl. Ex. 62.

<sup>441</sup> Pl. Ex. 62. The staff member was suspended for 5 days.

<sup>442</sup> *E.g.*, R. Doc. No. 405, at 137; *see also* Pl. Ex. 372, at 44–46.

<sup>443</sup> R. Doc. No. 441, at 87–88.

<sup>444</sup> Consent Judgment, at 34.

<sup>445</sup> R. Doc. No. 405, at 86.

<sup>446</sup> Stingers are constructed by cutting a live electrical wire with a shank and attaching a washer to the end of the wire. Inmates use stingers to heat up food. R. Doc. No. 406, at 101–02.

### III. Statutory Rights

The United States alleges that OPP discriminates against Limited English Proficiency (“LEP”)<sup>447</sup> inmates by failing to provide LEP inmates with meaningful access to OPP’s intake, processing, housing, medical, and other services.<sup>448</sup>

Section 601 of Title VI of the Civil Rights Act of 1964 provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” See also *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *United States v. Maricopa Cnty., Ariz.*, No. 12–00981, 2012 WL 6742314 (D. Ariz. Dec. 12, 2012). “[L]ongstanding case law, Federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.” *Maricopa Cnty.*, 2012 WL 6742314, at \*4.

A policy guidance document issued by DOJ states that an entity’s obligation with respect to a particular service can be evaluated through an “individualized assessment that balances the following four factors: (1) [t]he number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people’s lives; and (4) the resources available to the grantee/recipient and costs.” Dep’t of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 4145501, 41459 (June 18, 2002); see also *Maricopa Cnty.*, 2012 WL 6742314, at \*4 (“DOJ coordinates government-wide compliance with Title VI and its interpretation of Title VI is entitled to special deference.”) (citations omitted).

While OPP has LEP inmates,<sup>449</sup> OPP has virtually no services for LEP inmates.<sup>450</sup> This creates problems with respect to classification, medical treatment, and emergency situations.<sup>451</sup> See 67 Fed. Reg. at 41469–70. At intake, LEP inmates sign forms and other documents without knowing their contents.<sup>452</sup> Staff members informed Romero that they have a “catch phrase type book,” but they were unable to locate it after searching for 20 minutes.<sup>453</sup> The number of LEP inmates is unknown because OPP does not keep a record, whether through intake classification or through some other process, of inmates that do not speak English.<sup>454</sup>

OPP also does not keep a record or otherwise identify staff members who are bilingual.<sup>455</sup> Romero was informed that only one staff member at intake speaks Spanish.<sup>456</sup> Accordingly, when that officer is not on duty, there is no one to communicate with Spanish-speaking inmates.<sup>457</sup> While other inmates may provide translation services in some circumstances, in “many circumstances” such an arrangement fails to comply with Title VI and its implementing regulations because of issues relative to confidentiality and physical safety. See 67 Fed. Reg. 4145501 at 41462 (“[O]ther inmates . . . are not competent to provide quality and accurate interpretations.”).

The proposed consent judgment provides for language assistance policies and procedures that will ensure compliance with Title VI. It requires, for example, that OPP provide Spanish translations of vital documents, including sick call forms and

<sup>447</sup> Limited English Proficiency (“LEP”) characterizes individuals who cannot speak, write, or understand the English language such that their ability to communicate is limited. R. Doc. No. 407, at 108.

<sup>448</sup> R. Doc. No. 70, at 12. While conditions at OPP appear obviously inconsistent with the Prison Rape Elimination Act (“PREA”), PREA is not one of Plaintiffs’ underlying causes of action. See, e.g., *Ball v. Beckworth*, No. 11–37, 2011 WL 4375806, at \*4 (D. Mont. Aug. 31, 2011). Nonetheless, the parties appear to agree that the consent judgment should be tailored to remedy PREA violations. Compare R. Doc. No. 416, at 48 (filing by Plaintiffs, asserting: “The proposed Consent Judgment’s remedies regarding sexual abuse and sexual assault are the minimum necessary to correct OPP’s PREA-related deficiencies.”); R. Doc. No. 154, at 8 (suggesting that the consent judgment is not narrowly tailored to remedy PREA violations). The Court concludes that the consent judgment is narrowly drawn with respect to constitutional standards. To the extent PREA standards are relevant, the consent judgment is PLRA compliant with respect to those standards as well. In any case, the only statutory right before the Court arises under Title VI.

<sup>449</sup> R. Doc. No. 407, at 109.

<sup>450</sup> R. Doc. No. 407, at 112–13.

<sup>451</sup> R. Doc. No. 407, at 108–11.

<sup>452</sup> R. Doc. No. 407, at 110; see also R. Doc. No. 81–1, at 11 (English translation of declaration describing inability to obtain medical care because of language barrier).

<sup>453</sup> R. Doc. No. 407, at 111.

<sup>454</sup> R. Doc. No. 407, at 109, 112.

<sup>455</sup> R. Doc. No. 407, at 113.

<sup>456</sup> R. Doc. No. 407, at 113.

<sup>457</sup> R. Doc. No. 407, at 113.

inmate handbooks, and that an appropriate number of bilingual staff members be available for translation or interpretation.<sup>458</sup> There is little doubt that the proposed consent judgment's provisions addressing LEP inmates are narrowly drawn to remedy the violation of inmates' rights pursuant to Title VI, and the provisions are no more intrusive than necessary.<sup>459</sup>

#### IV. Objections to Approval

The City has raised several objections to the proposed consent judgment. "A party potentially prejudiced by a decree has a right to a judicial determination of the merits of its objection." *City of Miami*, 664 F.2d at 447. However, "[c]omplete accord on all issues [is] not indispensable to the entry of [a consent judgment]." *Id.* at 440. In "multiparty litigation, two parties may resolve all of the issues that do not affect a third party, ask the court to include only this settlement in a consent decree, and submit to the court for adjudication the remaining issues, disputed between them and the third party." *Id.*

Although its legal arguments have been elusive at times, the City's overarching objection is that the consent judgment has an unreasonable and proscribed effect on third parties as a result of the consent judgment's funding provision, its unknown costs, its indirect effect on public safety, and its allegedly collusive history. The City also contends that the consent judgment extends further than necessary, in violation of the PLRA and state law. Finally, the City challenges particular provisions that require the Sheriff to "continue to" take certain actions and, relatedly, contends that the consent judgment cannot be approved absent a plainly worded concession of liability on the part of the Sheriff.

##### A. Provision-by-Provision Approach

The City asserts that the Court must examine the proposed consent judgment "provision by provision," making particularized findings that a Federal right has been violated and injunctive relief is narrowly drawn and necessary with respect to each and every provision. In support of this argument, the City cites cases addressing the termination of consent judgments.<sup>460</sup> But the Fifth Circuit has rejected such reliance on "provision-by-provision" cases as "misplaced" because the statutory subsection addressing termination of a consent decree, § 3626(b)(3), "on its face requires such written findings. Conversely, [§ 3626(a)(1)], which applies to the approval of prospective relief, does not." *Gates v. Cook*, 376 F.3d at 336 n.8 (distinguishing *Castillo v. Cameron Cnty.*, 238 F.3d 339, 351 (5th Cir. 2001)). Because this case involves § 3626(a)(1), no such approach is required here.

Nonetheless, the Court has taken great care to compare the evidence in support of the alleged violations of Federal rights to the remedial provisions proposed in the consent judgment. Moreover, the City received the opportunity to challenge specific provisions of the consent judgment, ensuring they received even greater scrutiny.<sup>461</sup> Although not required to do so, the Court has carefully combed through the consent judgment and concludes that its provisions are narrowly drawn to remedy the violation of inmates' Federal rights in light of the evidence presented at the fairness hearing.

##### B. Effect on Third Parties

###### 1. Funding Provision

The City argues that the proposed consent judgment's funding provision, Section V, has an impermissible effect on third parties. The City initially contended that Section V "impermissibly infringes on the City's rights as a non-party," by permitting "the Sheriff, the Plaintiff Inmates, and the Civil Rights Division [to] decide what is the appropriate level for funding for the Sheriff's office without affording the City an opportunity to be heard or a means to even have an evidentiary hearing."<sup>462</sup> In response, the parties to the consent judgment amended it "to ensure (a) that the City can fully participate in all proceedings relating to the funding and cost of implementing the Proposed Consent Judgment, and (b) that the City will receive complete information regarding compliance and conditions at OPP."<sup>463</sup> The City now contends that the Sheriff and Plaintiffs "took it upon themselves to 'resolve the

<sup>458</sup> Consent Judgment, at 36–37.

<sup>459</sup> *E.g.*, Pl. Ex. 374, at 49–50.

<sup>460</sup> R. Doc. No. 427, at 11 (citing *Cason v. Seckinger*, 231 F.3d 777, 785 (11th Cir. 2000)).

<sup>461</sup> *E.g.*, R. Doc. No. 126, at 3.

<sup>462</sup> R. Doc. No. 153, at 7; see also R. Doc. No. 427, at 9–10.

<sup>463</sup> See R. Doc. No. 183, at 1–2.

concerns of . . . the City” through the amendments.<sup>464</sup> In doing so, the City argues, they inserted amendments which impermissibly “obligate the City to certain actions to which the City does not consent.”<sup>465</sup> The City additionally argues that the amendments interfere with the City’s preparation of a balanced budget.<sup>466</sup>

For the sake of clarity, all of the amendments to the proposed consent judgment are set forth below. Deletions are indicated through **bold** text and insertions are within BOLD BRACKETS and italic text.

#### V. FUNDING

**[A.]** The Court shall determine the **[initial]** funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this Agreement, and the source(s) responsible for providing that funding **[at an evidentiary hearing (“funding trial”). Defendant, third-party Defendant City of New Orleans (“City”), and Plaintiffs shall have the right to participate fully in the funding trial, including producing expert testimony and analysis regarding the cost of implementing this Agreement].**

**A.[B.]** Defendant shall be responsible for implementation of this Agreement upon a definitive judgment with regard to **such [initial] funding [for this Agreement].**

**B.[C.]** Once the funding is determined pursuant to Paragraph A, the funding amount thereafter may be adjusted on an annual basis to account for changes in the size of the prisoner population, inflation, or other operating costs. **If the Parties [Defendant and the City] are unable to agree upon such adjustments to the annual budget, the Monitor will intervene and resolve the dispute. If the Monitor cannot resolve the dispute within 45 days, the dispute will be submitted to the district judge for resolution. [Defendant, the City, and Plaintiffs] The Parties agree to work in good faith to determine available cost savings measures that may result from the ongoing implementation of this Agreement or otherwise.**

**C.[D.]** Defendant will provide an annual budget for the expenditure of the funds for operation of OPP and an annual audited financial statement to the Monitor **[, the City,] and the Parties [Plaintiffs].** The Monitor will assist in conducting oversight to ensure that funds for implementing this Agreement are allocated to achieve compliance with this Agreement.

#### IX. MONITORING

F. Monitor Distribution of OPSO Documents, Reports, and Assessments: Within seven days of receipt, the Monitor shall distribute all OPSO assessments and reports to SPLC**[,] and DOJ[, and the City]**. The Monitor also shall provide any OPSO compliance-related documents within seven days to DOJ**[,] and SPLC, [and the City]** upon request.<sup>467</sup>

The City specifically objects to the amendments because they “require the City to subject itself to the ‘assistance’ of the Monitor to set funding levels for the Sheriff’s office.”<sup>468</sup> But if the City does not want to participate in a process in which the Monitor resolves disputes, it need not do so. While the funding provision now expressly includes the City, the Sheriff, and the Plaintiffs in the funding decision-making process, this modification merely provides the City with “the right,” rather than the obligation, “to participate” in the Monitor’s dispute resolution. Ultimately, “[i]f the Monitor cannot resolve the dispute within 45 days, the dispute will be submitted to the district judge for resolution.”<sup>469</sup> Nothing in the cited provision permits the Sheriff and Plaintiffs to impose any obligation upon the City without a hearing.

The City also objects on the basis that it cannot be required to appear in Court to settle funding disputes. There is a pending third-party complaint against the City. This claim and the law defining the relationship between the City and the Sheriff, including any funding obligations, are the source of any such requirement.

<sup>464</sup> R. Doc. No. 219, at 1 (quoting R. Doc. No. 183).

<sup>465</sup> R. Doc. No. 219, at 2.

<sup>466</sup> R. Doc. No. 219, at 3–4.

<sup>467</sup> R. Doc. No. 183–2. Although the City did not object to the amendment of the monitoring provision, the Court includes it because it is relevant to the Court’s determination that additional notice to the class members was not required. The City has also not objected to the provision requiring that it “work in good faith to determine available cost saving measures.” See *City of Miami*, 664 F.2d at 442–44 (noting which provisions had been objected to by a third party); *id.* at 444 (The district court’s “approval of the decree, insofar as it affected [the parties] and, patently, insofar as it is not objected to by the [third party] must be affirmed.”).

<sup>468</sup> R. Doc. No. 219, at 3.

<sup>469</sup> R. Doc. No. 183–2, at 1.

## 2. Effect on Public Safety Funding

The City next contends that the proposed consent judgment requires a “diversion of funds” that will adversely affect public safety and the welfare of the citizens of New Orleans who are not inmates at OPP.<sup>470</sup>

First Deputy Mayor Andrew Kopplin testified relative to the effects that the proposed consent judgment could have on the City’s budget. Because the cost of implementing the proposed consent judgment and the party responsible for paying any additional costs have not yet been determined, the Court permitted the City to offer testimony regarding the effect that a price tag of \$22.5 million would have on the City’s budget, should the City be required to pay such costs in full. Kopplin stated that the \$22.5 million figure was based on a request from the Sheriff.<sup>471</sup>

It is important to emphasize that, at this stage of the proceedings, the Court does not know whether any additional revenue is needed to ensure that OPP inmates are afforded the full protections of the Constitution and Title VI. The Court has not yet heard argument on the City’s state law funding obligation or heard evidence relative to the funds available to the Sheriff and the Sheriff’s spending of any such funds. Determining whether the City has an additional funding obligation and the amount of any such obligation is impossible at this stage. Accordingly, the Court will assume, for the sake of argument, that the City could be obligated to spend an additional \$22.5 million on implementation of the consent judgment.

Kopplin testified that either significant layoffs and furloughs or a drastic reduction in the number of police officers and fire department employees available to respond to public emergencies would be necessary if the City was forced to spend an additional \$22.5 million to remedy the conditions at OPP.<sup>472</sup> Such measures, Kopplin concluded “would put all of the citizens of the City at risk.”<sup>473</sup>

The PLRA requires courts to “give substantial weight to any adverse impact on public safety” caused by the entry of a consent judgment. 18 U.S.C. § 3626(a)(1). Plaintiffs assert that legislative history and caselaw demonstrate that this requirement is oriented towards the more direct effects on public safety associated with prisoner release orders and population caps.<sup>474</sup> *See, e.g., Plata*, 131 S. Ct. at 1941–42. The Court has considered the “difficult and sensitive” question of the proposed consent judgment’s effect on public safety, especially insofar as it may indirectly lead to decreased services in other areas. *Id.* at 1942.

The Court is well aware of New Orleans’ high homicide rate<sup>475</sup> and budgetary constraints,<sup>476</sup> but the evidence shows that violent crime is endemic within OPP as well. *See id.* at 1942. OPP inmates, and particularly inmates with mental health issues, leave the facility more damaged, and perhaps more dangerous, than when they arrived.<sup>477</sup> *Compare id.* Experts opined that OPP poses “clear and present dangers” of “life and death proportions” with respect to suicide and inmate violence, and the risk of a tragic fire is unacceptable.<sup>478</sup> Inmate escapes are not uncommon, and the prospect of armed inmates, whether outside or inside prison walls, is alarming.<sup>479</sup> The evidence shows that OPP itself presents a public safety crisis, which endangers inmates, staff, and the community at large.<sup>480</sup>

The Court concludes that, even were it to give substantial weight to the public safety issues outside OPP, ignore the public safety issues inside OPP, and assume

<sup>470</sup> R. Doc. No. 153, at 4.

<sup>471</sup> R. Doc. No. 409, at 15.

<sup>472</sup> R. Doc. No. 409, at 17–19.

<sup>473</sup> R. Doc. No. 409, at 19.

<sup>474</sup> R. Doc. No. 179, at 6.

<sup>475</sup> R. Doc. No. 412, at 62.

<sup>476</sup> *E.g.*, R. Doc. No. 409, at 17–18.

<sup>477</sup> As counsel for the Sheriff articulated, “it’s meant to be a jail. It’s not a hospital, it’s not a mental health ward, but that’s what’s coming into the jail more and more because all the health services are being cut everywhere else. So they are dumping them at the Sheriff’s doorstep.” R. Doc. No. 412, at 45; *see also* 42 U.S.C.A. § 15601(3) (“America’s jails and prisons house more mentally ill individuals than all of the Nation’s psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness.”).

<sup>478</sup> R. Doc. No. 405, at 135–37.

<sup>479</sup> Schwartz testified that, while the videos portraying inmates armed with a loaded gun, gambling, using intravenous drugs, and freely exiting and entering OPP to wander Bourbon Street are several years old, “my concern is that some of that could reoccur or is reoccurring” such that inmates could be endangering the non-incarcerated residents of New Orleans. R. Doc. No. 412, at 32.

<sup>480</sup> R. Doc. No. 412, at 42; R. Doc. No. 407, at 44 (“The security failures of the jail extend to the community.”); Pl. Ex. 372, at 5 (OPP facilities are “significantly more dangerous for staff than most jails, and for no good reason.”).

that the consent judgment will cost the City an additional \$22.5 million, the proposed consent judgment complies with the PLRA.

Notwithstanding this conclusion, the Sheriff's funding claim will be subject to a rigorous examination through two hearings, and any future funding claims will be addressed through a process that includes the participation of the City and, potentially, the Court. The consent judgment, and the Court's approach to its approval, are structured in a manner designed to minimize any indirect adverse effects on public safety. See § 3626(a)(1).

### 3. Cost & Taxes

Related to its argument that the proposed consent judgment's implementation costs will draw resources from other areas of public safety, the City argues that it cannot afford the consent judgment. In particular, the City argues, "any increase in funding to the Sheriff[s] Office inevitably will require the City to increase taxes imposed against the citizens of the City of New Orleans."<sup>481</sup> Even assuming that the City will have to provide additional revenue in the future to implement the consent judgment, a finding that the Court does not make at this juncture, "[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement, nor will an allegedly contrary duty at state law." *Smith v. Sullivan*, 611 F.2d 1039, 1043–44 (5th Cir. 1980) (internal citations omitted). "That it may be inconvenient or more expensive for the [local government] to run its prison in a constitutional fashion is neither a defense to this action or a ground for modification of the judgment rendered in this case." *Gates v. Collier*, 501 F.2d at 1322.

The City has had the opportunity to put forth evidence that the conditions at OPP meet constitutional muster or that the proposed consent judgment extends farther than constitutionally necessary. The City has not presented any evidence, including expert testimony, showing that conditions at OPP do not violate the Constitution or Title VI. The City has also not offered evidence with respect to an alternative, less costly or less intrusive, approach to remedying conditions at OPP. See *Armstrong*, 622 F.3d at 1071.

The Court anticipates that staffing will be one of the greatest costs associated with the proposed consent judgment. When it comes to staffing levels, the consent judgment provides the City with continuing opportunities to put forth evidence regarding the staffing and salaries needed to run a facility that meets constitutional and statutory requirements, including the PLRA. The uncontroverted evidence, however, is that some increase in staffing is necessary to ensure that conditions at OPP meet constitutional minimum requirements.<sup>482</sup>

The City's proposed finding of law that "[t]he Court may not approve a proposed consent decree that results in the raising of taxes" is disingenuous.<sup>483</sup> The City cites 18 U.S.C. § 3626(a)(1)(C), but that statute provides: "Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes." The Court has no intention of ordering the City, the Sheriff, or any other political entity, for that matter, to raise taxes or to construct yet another facility. To the extent our elected political leaders intend to house inmates at OPP facilities, however, these facilities must meet constitutional and statutory minimum requirements.

### 4. Negotiating History

The City argues that the parties have colluded in drafting a consent judgment that fails to recognize the Sheriff's revenue streams and that treats the City as "an unlimited bank account for the benefit of the inmates and the Sheriff."<sup>484</sup> The City appears to suggest that the Sheriff and Plaintiffs colluded by leaving the City out of the process while drafting a consent judgment that is broader and more expensive than necessary to remedy the conditions at OPP.<sup>485</sup>

The City describes as "unorthodox" the legislative landscape in which the City must finance a jail which is run by the Sheriff.<sup>486</sup> The literature suggests that such arrangements are not uncommon. *E.g.*, Margo Schlanger, *Civil Rights Injunctions*

<sup>481</sup> R. Doc. No. 153, at 5.

<sup>482</sup> See, e.g., R. Doc. No. 412, at 38.

<sup>483</sup> R. Doc. No. 153, at 6; R. Doc. No. 427, at 11.

<sup>484</sup> R. Doc. No. 151, at 14–15.

<sup>485</sup> In *Williams*, the Fifth Circuit observed that "the district court had to bear the full responsibility in this case to safeguard the interests of those individuals who were affected by the decree but were not represented in the negotiations." 729 F.2d at 1560. The Court has not interpreted *Williams* to indicate that the City's participation in negotiations excuses the Court from its "full responsibility" to safeguard the City's interests as a third party.

<sup>486</sup> R. Doc. No. 159, at 2.

*Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 562–63 (2006). Whether or not common, however, this financial relationship could incentivize sheriffs to seek out broad, expensive consent judgments.<sup>487</sup> The Court has been vigilant about ensuring compliance with the PLRA, however, and the City has assisted through its vigorous adversarial participation in this process. Nonetheless, at this stage, the City has not identified ways in which the proposed consent judgment’s objectives—namely, compliance with the Constitution—could be obtained for a lesser cost, and the expert testimony was persuasive that the remedies included in the consent judgment are the minimum necessary to remedy conditions at OPP.

The City also objects to the Plaintiffs’ characterization of its role in negotiating the proposed consent judgment. Plaintiffs have asserted: “Since November 2011, the Sheriff and the City participated in negotiations to formulate a comprehensive remedy to [ ] unlawful conditions.”<sup>488</sup> The City responds that it “did not participate in negotiations to formulate what is termed a comprehensive remedy for alleged unlawful conditions.”<sup>489</sup> However, the record shows that attorneys for the City actively participated in the negotiations.

After the Sheriff filed his two third-party complaints, the Court was advised that all parties, including the City, were prepared to enter into an interim consent judgment, subject to a dispute over the cost and funding of the interim consent judgment’s reforms.<sup>490</sup> An October 12 filing by Plaintiffs shows that the parties, including the City, had been successful in reaching “agreement on all of the substantive provisions in the proposed Settlement Agreement,” with the exception of an interim funding amount to “be in effect until completion of a staffing analysis.”<sup>491</sup> The accuracy of this filing was confirmed at an October 15 status conference, in which the City Attorney at the time, Richard Cortizas, and the current City Attorney, Sharonda Williams, participated.<sup>492</sup> The Court was advised by counsel for all parties that:

[T]here is no dispute with respect to those portions of the proposed consent judgment detailing unconstitutional conditions at Orleans Parish prison facilities as well as efforts that need to be undertaken to ensure that prison facilities satisfy constitutional standards. There is also no dispute that the City of New Orleans is responsible for funding those efforts that must be undertaken, pursuant to the proposed consent judgment, to remedy existing conditions. The only remaining issue before the Court is the level of interim and permanent funding required to remedy the unconstitutional conditions.<sup>493</sup>

The Court specifically confirmed the substance of this paragraph with counsel at the status conference. The confirmation was obtained through querying counsel for each party and receiving individual verbal affirmation that the parties were ready to sign the agreement.

Counsel were ordered to appear in person at the next status conference, ostensibly to provide the Court with the signed consent judgment, which would permit future development of the interim funding amount, and to discuss the appointment of a special master.<sup>494</sup> At the conference, notwithstanding numerous express assertions to the contrary by the City’s counsel, the Mayor of the City of New Orleans announced that he was unwilling to sign any such agreement.<sup>495</sup> The Mayor advised the Court that when he signed the New Orleans Police Department (“NOPD”) consent decree, the City was unaware that it was facing additional, significant revenue requests in connection with the OPP litigation.<sup>496</sup> Despite the persistent and skilled

<sup>487</sup> See Schlanger, 81 N.Y.U. L. Rev. at 562–63, 623 (noting “not so very hard fought” litigation involving sheriffs).

<sup>488</sup> R. Doc. No. 140, at 2.

<sup>489</sup> R. Doc. No. 154, at 6.

<sup>490</sup> See R. Doc. Nos. 77, 81.

<sup>491</sup> R. Doc. No. 81; see also R. Doc. No. 156–6 (May 31, 2012 email from the City’s then-Chief of Litigation, Sharonda Williams, to counsel for the United States and the Sheriff (“I made some proposed edits to the last version that was circulated. Please see attached.”)); R. Doc. No. 156–7 (July 11, 2012 email from the City’s then-Chief of Litigation, Sharonda Williams, to counsel for the United States and Sheriff (“See [ ] my redline of the most recent draft.”)).

<sup>492</sup> R. Doc. No. 82 (listing participants).

<sup>493</sup> R. Doc. No. 82.

<sup>494</sup> R. Doc. No. 82.

<sup>495</sup> R. Doc. No. 86; see also R. Doc. No. 92.

<sup>496</sup> Another section of the Court has rejected this assertion. See *United States v. City of New Orleans*, No. 12–1924, 2013 WL 2351266, at \*10 (E.D. La. May 23, 2013) (Morgan, J.) (“The

efforts of retired Judge Terry Q. Alarcon, who put in countless hours free of charge to facilitate negotiations, the parties could not reach an agreement.<sup>497</sup>

To be clear, the City's negotiations with respect to the consent judgment carry no weight whatsoever in the Court's analysis of the proposed consent judgment outside of its collusion analysis. The City had the right to refuse to sign the proposed consent judgment at any point, notwithstanding its prior apparent willingness to agree to the proposed reforms subject to a future resolution of the cost and funding dispute. The point of recounting this litigation history is to identify the persuasive evidence, including the procedural history of the case, that contradicts the City's argument that it was left out of the negotiations process.

#### C. Louisiana Rev. Stat. Ann. § 15:738

The City argues that the proposed consent judgment is inconsistent with La. Rev. Stat. Ann. § 15:738, which provides:

No incarcerated state prisoner, whether before trial, during trial or on appeal, or after final conviction, who is housed in any jail, prison, correctional facility, juvenile institution, temporary holding center, or detention facility within the state shall have a standard of living above that required by the constitutions of the United States and the state of Louisiana, as ordered or interpreted by the appropriate courts of last resort, or by the standards set by the American Correctional Association. It is the intention of this legislature that, to the extent permitted by law, no inmate shall have a standard of living better than the state poverty level. Citizens should not be worse off economically and living in conditions that are below those granted to inmates whose living standards are being paid for and subsidized by the hard-working and law-abiding people of the state of Louisiana.

At the fairness hearing and in its briefing, the City makes much of the fact that the proposed consent judgment would provide inmates with medical and mental healthcare to an extent that exceeds that provided to certain non-incarcerated citizens.<sup>498</sup>

No one disputes that La. Rev. Stat. § 15:738 does not negate constitutional minimum standards. Moreover, the parties are well aware that governments carry a special responsibility for those in their custody. "To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death." *Plata*, 131 S. Ct. at 1928 (quotation omitted). The Court notes that the statute's reliance on American Correctional Association standards implicates a higher level of care in some situations than that required by the Constitution.<sup>499</sup>

The City argues, however, that in evaluating what the Constitution requires, the Court should take into account the unfortunate living conditions experienced by some impoverished non-incarcerated citizens of Louisiana.<sup>500</sup> While constitutional standards reflect "the evolving standards of decency that mark the progress of a maturing society," *Plata*, 131 S. Ct. at 1925 n. 3 (quoting *Farmer*, 511 U.S. at 834), the Court has never before heard it argued that constitutional standards vary depending on the poverty level existing in the state or community in which one lives. As counsel for Class Plaintiffs highlighted during closing statements, such an interpretation has the effect of affording lessened constitutional protections to citizens of Louisiana.<sup>501</sup> The law does not support this argument. A state's inability or unwillingness to provide certain services to its non-incarcerated citizens does not excuse it from the constitutional obligation to provide basic care to those in its custody.

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City's argument that it had no knowledge of the potential cost ramifications for the OPP Consent Decree at the time it signed the NOPD Consent Decree is patently false. At least as early as July 19, 2012, several days before the City signed the NOPD Consent Decree on July 24, 2012, the City was on notice that the Sheriff intended to request "\$22.5 million of 'new' estimated costs' that would 'bring the total budget for OPP to \$45 million' for 2013." (modifications omitted).

<sup>497</sup> See R. Doc. No. 86.

<sup>498</sup> E.g., R. Doc. No. 412, at 53–54; R. Doc. No. 427, at 16.

<sup>499</sup> R. Doc. No. 407, at 32 ("In terms of the American Correctional Association, it does take it up to a little bit higher level because they have other things in those standards that go beyond the minimal required to operate a safe jail.").

<sup>500</sup> R. Doc. No. 412, at 54.

<sup>501</sup> R. Doc. No. 412, at 39–40.

#### D. Specific Provisions

Because the nature of the City's objections to the proposed consent judgment remained amorphous even as the fairness hearing was imminent, the Court ordered the City to clarify its position: "*The City shall identify with particularity the provisions of the proposed consent decree that it is challenging.*"<sup>502</sup>

In response, the City identified the funding provisions and fourteen substantive provisions beginning with the phrase "continue to."<sup>503</sup> The City did not argue that these fourteen provisions extended further than constitutionally required, but rather argued that they were unnecessary because they "obligate the Sheriff merely to 'continue' to follow policies and procedures that he has already implemented according to the language of the proposed Consent Decree."<sup>504</sup> "It cannot be reasonably argued," the City contends, that these provisions are "'narrowly drawn,' if they simply order the Sheriff to *continue* to do what he already does."<sup>505</sup> Plaintiffs respond that the "continue to" language is "the product of extensive negotiations, during which the Sheriff represented, without verification, that improvements had been made in certain areas."<sup>506</sup>

The Court has carefully examined the "continue to" provisions to which the City objects. These provisions address direct supervision and rounds; detection of contraband; inmate classification; grievances; training for special populations, including inmates with mental health issues; and building maintenance. The evidence was compelling that OPP suffers from serious deficiencies in these areas such that the consent judgment's provisions are narrowly drawn, are necessary to remedy the violation of a Federal right, and are the least intrusive means of doing so.

Moreover, even if the Sheriff's good faith efforts have resulted in recent changes, the proposed consent judgment remains necessary. The Fifth Circuit observed in *Gates v. Cook*, with respect to a state correctional department: "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a Federal court of its power to determine the legality of the practice. . . . The fact that many of these conditions have persisted for years despite MDOC's purported efforts leads us to likewise conclude that MDOC has not met the heavy burden of showing that its voluntary conduct has mooted any of the issues presented here." 376 F.3d at 337; *see also Gates v. Collier*, 501 F.2d at 1321 ("Changes made by defendants after suit is filed do not remove the necessity for injunctive relief, for practices may be reinstated as swiftly as they were suspended."). A defendant's assurance that it is "already on the path towards compliance is insufficient to moot the issue." *Gates v. Cook*, 376 F.3d at 343–42. According to Schwartz, "almost all of [the] problems given to OPSO in writing" in the 2008 National Institute of Corrections report "remain unmitigated today."<sup>507</sup>

The Court permitted the parties to add record citations to their proposed findings of fact and conclusions of law after the hearing.<sup>508</sup> The City did so, but it also attempted to "revise" its proposed findings of fact and conclusions of law to introduce arguments that were not raised when the City responded to the Court's order to "*identify with particularity the provisions of the proposed consent decree that it is challenging.*"<sup>509</sup> In the same paragraph, the Court expressly stated that "[d]efenses related to the constitutionality of existing conditions or the overbreadth of the proposed consent decree that are not raised shall be deemed waived."<sup>510</sup> While not expressly invited, the Court welcomes the City's additional citations to legal authority.<sup>511</sup> The Court mentions only briefly those arguments that were not raised until weeks after the hearing and that are, accordingly, waived.

For example, in its proposed conclusions of law, the City challenges as overbroad the provision stating that the consent judgment shall "terminate when the [Sheriff] has achieved substantial compliance with each provision of the Agreement and [has]

<sup>502</sup> R. Doc. No. 126, at 3 (emphasis in original). In the same order, the Court ensured the City was on notice of its obligation to argue at the fairness hearing any state-law funding defenses related to the overbreadth of the proposed consent judgment or the constitutionality of the conditions at OPP. The purpose of this approach was to avoid having to call the same expert witnesses and hear the same testimony at the funding hearing.

<sup>503</sup> R. Doc. No. 153, at 8–11.

<sup>504</sup> R. Doc. No. 153, at 8.

<sup>505</sup> R. Doc. No. 159, at 19.

<sup>506</sup> R. Doc. No. 156–2, at 6.

<sup>507</sup> Pl. Ex. 372, at 20.

<sup>508</sup> R. Doc. No. 391.

<sup>509</sup> R. Doc. No. 126, at 3; R. Doc. No. 395.

<sup>510</sup> R. Doc. No. 126, at 3.

<sup>511</sup> *See, e.g.*, R. Doc. No. 427, at 14.

maintained Substantial Compliance with the Agreement for a period of 2 years.”<sup>512</sup> Because the City did not raise this argument until several weeks after the hearing, opposing counsel did not have an opportunity to address it. Nonetheless, in light of the evidence of longstanding deficiencies at OPP facilities arising from deep-rooted and systemic weaknesses, the Court finds the two-year provision narrowly drawn and otherwise compliant with the PLRA.

The City additionally raises a new challenge to the failure to define “substantial compliance” with objective, quantifiable targets.<sup>513</sup> The consent judgment defines substantial compliance as “compliance with most or all components of the relevant provision of the Agreement.”<sup>514</sup> In light of the components of the proposed consent judgment, which include both general guidelines and specific baseline requirements, and the evidence admitted at the hearing, the Court concludes that this objection is without merit. *See also M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 848 (5th Cir. 2012) (“Named Plaintiffs must make an effort to give content to what it would mean to provide adequate or appropriate levels of services, so that final injunctive relief may be crafted to describe in reasonable detail the acts required.”) (quotation and modification omitted).

#### E. Admission of Liability

The City contends that “[u]nless [the Sheriff] admits to operating an unconstitutional facility, [] the decree is overly broad.”<sup>515</sup> In particular, the City demands that the Sheriff provide a “plainly-worded and straightforward admission of ‘deliberate indifference.’”<sup>516</sup> Some inmates, including one of the Class Representatives, similarly contend that the proposed consent judgment is inadequate because it does not require an admission of liability from the Sheriff or a finding to that effect.<sup>517</sup>

While the Court is aware of the fact that the City and certain inmates may be dissatisfied with a ruling that does not require a plain admission of liability, this is an inherent part of a settlement, as opposed to a matter litigated through a full trial. By choosing to enter into a consent judgment, the parties may “avoid the collateral effects of adjudicated guilt. *United States v. City of Jackson*, 519 F.2d 1147, 1152 n. 9 (5th Cir. 1979) (quoted in *City of Miami*, 664 F.2d at 441–42).

In the consent judgment, Class Plaintiffs, the United States, and the Sheriff stipulate that the consent judgment “complies in all respects with the provisions of 18 U.S.C. § 3626(a)” and, specifically, “that the prospective relief in this Agreement is narrowly drawn, extends no further than necessary to correct the violations of the Federal rights as alleged by Plaintiffs in the Complaints, is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system. . . . Any admission made for purposes of this Agreement is not admissible if presented by Third Parties in another proceeding.”<sup>518</sup>

“The requirements for the entry of relief in 18 U.S.C. § 3626(a)(1) may appear in some tension with any attempt by defendants to continue to deny legal liability while agreeing to the entry of the relief sought by plaintiffs.” Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 Pace L. Rev. 1672, 1684 (2010). Neither the PLRA nor caselaw requires a plainly worded concession of liability, and the Sheriff’s stipulation with respect to the consent judgment parallels the language in the PLRA. The Court must focus on whether the proposed relief complies with the Constitution, statutory law, including the PLRA, and jurisprudence. Whether the Sheriff’s stipulation amounts to a “cryptic” concession is not the Court’s concern. *See Margo Schlanger, Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 Harv. C.R.-C.L. L. Rev. 165, 173–74 (2013); *see also* H.R. Rep. No. 104–21, at 24 n.2 (1995).

#### IV. Public Comments

The Court invited the general public, as well as OPP inmate class members, to comment on the proposed consent judgment. The Court received numerous public comments from individuals who are not incarcerated. Virtually every comment endorsed the proposed consent judgment.

The Court heard from a broad cross section of the community.<sup>519</sup> Community groups, law professors, and religious leaders similarly described the necessity and

<sup>512</sup> R. Doc. No. 427, at 14 (citing R. Doc. No. 101–3, at 43).

<sup>513</sup> R. Doc. No. 427, at 14–15.

<sup>514</sup> Consent Judgment, at 9.

<sup>515</sup> R. Doc. No. 405, at 21.

<sup>516</sup> R. Doc. No. 159, at 23.

<sup>517</sup> *E.g.*, R. Doc. No. 229, at 4–7; R. Doc. No. 237, at 2.

<sup>518</sup> Consent Judgment, at 44.

<sup>519</sup> R. Doc. Nos. 327, 329.

urgency of injunctive relief.<sup>520</sup> The public comments consistently expressed that conditions at OPP have been deficient, to say the least, for a very long time. The Chief District Defender for Orleans Parish and the Louisiana Public Defender Board wrote to express support for the proposed consent judgment and express their concern for the safety of OPP staff members and inmates.<sup>521</sup> Family members of incarcerated individuals, including individuals who died in OPP, implored the Court to enter an order approving the consent judgment,<sup>522</sup> describing as “shocking and offensive” the City’s characterization of Plaintiffs’ suit as seeking “steaks and cognac” for inmates.<sup>523</sup> The public comments also expressed the opinion that politicians, including the Sheriff of Orleans Parish and the Mayor of New Orleans, have failed and will continue to fail to take action absent court approval of the consent judgment.<sup>524</sup>

The consent judgment represents a reasonable factual and legal determination based on the extensive factual record. It is fair and consistent with the Constitution, statutes, including the PLRA, and jurisprudence. Its effect on third parties is not unreasonable or proscribed. Having concluded that the consent judgment is overwhelmingly supported by the evidence, including OPP records and persuasive trial testimony, the Court turns to the determination of whether the consent judgment is additionally a fair, adequate, and reasonable class settlement.

#### CLASS SETTLEMENT ANALYSIS

Class Plaintiffs have filed an unopposed motion<sup>525</sup> for certification of a settlement class consisting of all people who are currently or will be incarcerated at the Orleans Parish Prison.<sup>526</sup> The terms of the proposed settlement, which is the same document as the consent judgment, have already been discussed.

#### I. Standard of Law

When determining whether to certify a settlement class, courts must determine whether the requirements for certification are met and whether the settlement is fair, adequate, and reasonable, especially insofar as it affects inmates who are not named plaintiffs in the lawsuit.

Rule 23(a) of the Federal Rules of Civil Procedure permits certification of a plaintiff class only if four requirements are met: (1) the class is so numerous that joinder of all members is impracticable (“numerosity”); (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class (“typicality”); and (4) the representative plaintiffs will fairly and adequately protect the interests of the class (“representation”). Although courts need not consider the likely difficulties in managing a class action when considering a settlement class, courts must be cognizant when considering the other factors that there will not be a “later opportunity for class adjustments.” *In re OCA*, No. 05–265, 2008 WL 4681369, at \*6 (E.D. La. Oct. 17, 2008) (Vance, J.) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). “The existence of a settlement class may even ‘warrant more, not less, caution on the question of certification.’” *Id.* (quoting *Amchem*, 521 U.S. at 620).

Class certification is appropriate when a “rigorous analysis” confirms that the requirements of Rule 23(a) are met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Courts must “look beyond the pleadings to ‘understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of certification issues.’” *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003)). Certification also requires that a class meets the requirements of one of the subsections in Rule 23(b).

<sup>520</sup> R. Doc. Nos. 264, 320, 325.

<sup>521</sup> R. Doc. Nos. 256, 319, 322.

<sup>522</sup> *E.g.*, R. Doc. Nos. 238, 251–54, 373.

<sup>523</sup> *See* R. Doc. No. 159, at 14 (“While the City does not question that constitutional standards must be satisfied, the Federal Courts, like the Legislature, have recognized that serving steaks and cognac to inmates is not a constitutional entitlement.”); R. Doc. No. 250, at 2 (“We are not asking for ‘steaks and cognac.’ We are asking that the over 2,000 people who continue to be held in the Orleans Parish jail be held in a safe, secure, and humane environment, with appropriate medical and mental health services and conditions fit for human habitation.”).

<sup>524</sup> *E.g.*, R. Doc. No. 241; R. Doc. No. 250, at 2–3; R. Doc. No. 260; R. Doc. No. 331.

<sup>525</sup> R. Doc. No. 145.

<sup>526</sup> R. Doc. No. 145–1, at 6–7; *see also* R. Doc. No. 1, at 11; Consent Judgment, at 1. The City contends that the other parties have “marginalized” the City, such that “the City is not in a position to address” the certification issue. The City contends, however, that “it is inordinate, and tantamount to overkill, to certify a class in this case.” R. Doc. No. 159, at 8–9.

Plaintiffs seek certification pursuant to Rule 23(b)(2), which applies where a defendant has “acted or refused to act on grounds that apply generally to the class” such that injunctive or declaratory relief is appropriate. “Rule 23(b)(2) was created to facilitate civil rights class actions.” *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) (citation omitted). “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’” *Dukes*, 131 S. Ct. at 2557 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The claims at issue present a paradigmatic case for Rule 23(b)(2) relief. If an individual plaintiff successfully brought a lawsuit raising the systemic claims at issue here, the injunctive relief sought, “as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.” Fed. R. Civ. P. 23(b)(2).

If certification requirements are met, the Court must still determine whether to approve the settlement. As a threshold matter, the Court looks to whether notice was provided “in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e). With respect to the substance of the settlement, the Court inquires whether the settlement is fair, adequate, and reasonable pursuant to Rule 23(e). The Fifth Circuit has advised courts to consider six factors in making this assessment: “(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs’ success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members.” *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)).

## II. Certification Analysis

### A. Numerosity

“To satisfy the numerosity prong, ‘a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.’” *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (quoting *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). OPP has approximately 2,500 inmates,<sup>527</sup> and joinder of these inmates would be impracticable, weighing in favor of certification. Moreover, the population is constantly in flux. “[T]he fact that the class includes unknown, unnamed future members also weighs in favor of certification.” *Id.* at 868 n. 11.

### B. Commonality

The common questions of law or fact required by Rule 23(a)(2) must be able to “generate common answers apt to drive the resolution of the litigation.” *Dukes*, 131 S. Ct. at 2551 (quoting Nagareda, 84 N.Y.U. L. Rev. at 132. “Before and after *Wal-Mart*, courts have certified classes of incarcerated persons challenging specific, written, acknowledged, official policies.” *Mathis v. GEO Grp.*, No. 08–CT–21, 2012 WL 600865, at \*6 (E.D.N.C. Feb. 23, 2012) (citing cases). In *M.D. ex rel. Stukenberg*, the Fifth Circuit expressly disagreed with the proposition that a policy must injure each class member to provide the foundation for class wide relief. 675 F.3d at 847–48. “Rather, the class claims could conceivably be based on an allegation that the [defendant] engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency, such as insufficient staffing—with respect to the class,’ so long as the declaratory or injunctive relief ‘settling the legality of the [defendant’s] behavior with respect to the class as a whole is appropriate.’” *Id.* (quoting R. 23(b)(2)(1966 Amendments advisory committee note)). The Court considers each of the Plaintiff Class’s claims to determine whether the commonality requirement is met.<sup>528</sup>

The mere incantation of the words “systemic violation” does not justify class certification. *See id.* at 844. For example, in *M.D. ex rel. Stukenberg*, plaintiffs alleged systemic violations of substantive due process, which defendants contended were not capable of resolution because they required an individualized “shocks the conscience” inquiry. *Id.* at 843. Here, however, Class Plaintiffs present claims that are susceptible to common answers. *See Logory v. Cnty. of Susquehanna*, 277 F.R.D. 135, 143 (M.D. Pa. 2011) (“Unlike *Dukes*, where commonality was destroyed where

<sup>527</sup> Pl. Ex. 380.

<sup>528</sup> The Court need not address the Title VI claim brought by the United States because Class Plaintiffs alleged only constitutional claims.

there was no ‘common mode of exercising discretion that pervade[d] the entire company,’ here there is a solid [prison] policy that applied directly to all potential class members.”) (quoting *Dukes*, 131 S. Ct. at 2554).

The claims, defenses, relevant facts, and applicable substantive law demonstrate that certification is warranted with respect to Class Plaintiffs’ Eighth and Fourteenth Amendment protection from harm claims. Whether certain conditions at OPP either by themselves, or through a “mutually enforcing effect,” put inmates at a substantial risk of harm is amenable to a common answer. See *Gates v. Cook*, 376 F.3d at 333. Plaintiffs have identified practices with respect to staffing, contraband, supervision, and classification, for example, that uniformly create a substantial risk of harm for all class members.<sup>529</sup> See *M.D. ex rel. Stukenberg*, 675 F.3d at 848 & n. 7 (suggesting that staffing levels are the type of condition that is generally applicable to a class of plaintiffs); see also *Gates*, 376 F.3d at 333. Similarly, whether OPP officials have been deliberately indifferent to any such risk can be demonstrated in a manner that is applicable to all class members.

The facts and law also demonstrate that Class Plaintiffs’ Eighth and Fourteenth Amendment medical and mental healthcare claims warrant certification.<sup>530</sup> These claims do not allege “amorphous” systemic deficiencies. Compare *M.D. ex rel. Stukenberg*, 675 F.3d at 844. Class Plaintiffs have identified “discrete and particularized practices” including, for example, medication and suicide prevention practices, as well as staffing inadequacies, that are mutually enforcing causes of OPP’s deficient conditions.<sup>531</sup> Compare *id.* at 844. Accordingly, a class action is an appropriate vehicle for these claims.

#### C. Typicality

The typicality inquiry “focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.” *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). Typicality is established where “the class representative’s claims have the same essential characteristics of those of the putative class.” *Id.* Here, Class Representatives consist of both pre- and post-trial detainees, and they present legal and remedial theories common to the class members. Compare *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001). While class members’ experiences at OPP may differ, “the claims arise from a similar course of conduct and share the same legal theory” and, therefore, “factual differences will not defeat typicality” in this case. *Stirman*, 280 F.3d at 562 (quotation omitted).

#### D. Adequacy of Representation

“Rule 23(a)’s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two.” *Id.* at 563 (quotation omitted). Class Representatives and class counsel have demonstrated that they will fairly and adequately protect the interests of the class. The Court is satisfied with the “zeal and competence” of class counsel and “the willingness and ability of the representatives to take an active role in and control the litigation.”<sup>532</sup> *Id.* (quotation omitted).

### III. Settlement Analysis

#### A. Notice

Rule 23(e) requires that class members be notified of a settlement, but notice “need only satisfy the broad reasonableness standards imposed by due process.” *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) (internal quotations and citation omitted). Due process is satisfied if the notice provides class members with the “information reasonably necessary for them to make a decision whether to object to the settlement.” *Id.*

The Court approved a procedure in which a notice document and copy of the consent judgment were distributed to all inmates at OPP on a given date.<sup>533</sup> In addition, 50 copies of the notice were posted in common areas in the seven OPP facilities, indicating how inmates could obtain a full copy of the consent judgment.<sup>534</sup> An

<sup>529</sup>The Court notes that this case involves a single administrative entity responsible for multiple facilities. The evidence shows that the proposed consent judgment’s relief is appropriately applied to all seven facilities.

<sup>530</sup>As discussed above, the details relevant to Plaintiffs’ medical and mental healthcare claims, and the associated remedies, largely overlap. Accordingly, the Court considers the two claims together.

<sup>531</sup>R. Doc. No. 1, at 2–3.

<sup>532</sup>*E.g.*, R. Doc. Nos. 229, 235–37.

<sup>533</sup>See R. Doc. No. 129; 131.

<sup>534</sup>See R. Doc. No. 129.

abbreviated notice also ran in The *Times-Picayune* on two different days and it was also posted on the newspaper's website, NOLA.com.<sup>535</sup> The abbreviated notice was posted by the Court on its website, as well as on class counsel's website, DOJ's website, and the Sheriff's website.<sup>536</sup> The City was also invited to post a copy on its website. The Court finds these procedures easily satisfy Rule 23(e)'s requirements by providing class members with more than enough information to determine whether the settlement is objectionable.

The Court previously determined that the amendments to the proposed consent judgment did not require new notice. The Court ruled, "the amendments do not alter the original Proposed Consent Judgment's substance or effect in a manner that would require new briefing before the April 1, 2013 fairness hearing or a revised class notice."<sup>537</sup> After reviewing the parties' supplemental briefing,<sup>538</sup> the Court remains convinced that no additional notice was necessary. The minor modifications with respect to the City, described *supra*, did not impair class members' rights even indirectly, and the modifications certainly did not constitute a material change with respect to the class members. *See, e.g., In re Baby Products Antitrust Litig.*, 708 F.3d 163, 175 n. 10, 182 (3d Cir. 2013) (supplemental notice required only if settlement is "materially altered"); *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (no additional notice needed where amendment "merely expanded the rights of class members").

#### B. Fraud or Collusion

The consent judgment is the product of a protracted period of litigation between Class Plaintiffs, DOJ, the Sheriff, and the City.<sup>539</sup> The relief offered in the consent judgment demonstrates that SPLC has been unwavering in fulfilling its obligations to Class Plaintiffs. For these reasons, as well as those discussed above with respect to the City's participation in the process, the Court is satisfied that the consent judgment is not tainted by fraud or collusion.

#### C. Complexity, Expense, and Duration of Litigation

Class Plaintiffs observe that the expenses associated with this case are high because demonstrating deliberate indifference would require "significant statistical, anecdotal, and expert evidence."<sup>540</sup> While Class Plaintiffs further believe that they have obtained such evidence, they accurately acknowledge that a failure to settle the case would require a protracted motions practice and potential appeals that would delay the relief requested.<sup>541</sup> Such delays would prolong Class Plaintiffs' exposure to the safety risks at OPP, weighing in favor of settlement.

#### D. Stage of the Proceedings

With respect to the stage of the proceedings, including the depositions and expert reports completed, this case has progressed to a marked degree. Class counsel notes that four staff paralegal investigators, as well as multiple law clerks and interns, have spent "thousands of hours documenting conditions in the jail by interviewing people housed there."<sup>542</sup> "There has not been a single point, in the last year and a half of this litigation, that Plaintiffs stopped doing client intake, responding to calls from the jail, and gathering evidence."<sup>543</sup>

The City asserts that an absence of evidence at the fairness hearing supporting class certification and settlement prohibits the Court from certifying the settlement class and approving the settlement.<sup>544</sup> This argument is flawed because the Court never indicated that it required an evidentiary hearing for class certification and because the evidence presented at the fairness hearing was directly relevant to the certification and class settlement inquiry. Moreover, the evidence presented at the hearing was consistent with the evidence presented prior to the hearing, including the declarations submitted by class counsel.<sup>545</sup>

#### E. Plaintiffs' Probability of Success & Possible Recovery

The Court concludes that Class Plaintiffs' probability of success and the possible recovery associated with success supports approval of the consent judgment. As dis-

<sup>535</sup> See R. Doc. No. 129.

<sup>536</sup> See R. Doc. No. 129.

<sup>537</sup> R. Doc. No. 213.

<sup>538</sup> *E.g.*, R. Doc. Nos. 395, 399.

<sup>539</sup> See R. Doc. No. 138, at 8; R. Doc. No. 411, at 22–23.

<sup>540</sup> R. Doc. No. 138, at 9.

<sup>541</sup> R. Doc. No. 138, at 9.

<sup>542</sup> R. Doc. No. 138, at 11 (citing R. Doc. No. 138–1).

<sup>543</sup> R. Doc. No. 138, at 11 (citing R. Doc. No. 138–1).

<sup>544</sup> R. Doc. No. 427, at 8.

<sup>545</sup> *E.g.*, R. Doc. No. 137–4.

cussed with respect to the PLRA's narrow tailoring inquiry, the Court concludes that the remedies set forth in the consent judgment address the allegations in Class Plaintiffs' complaint. Moreover, class counsel notes that the injunctive relief addressed in areas relevant to the United States' complaint in intervention will provide an additional benefit to many class members.<sup>546</sup>

The City contends that the Court should consider "a defendant's financial condition when deciding whether to approve a class action settlement."<sup>547</sup> In light of the evidence presented at trial, neither the City's nor the Sheriff's financial condition defeats the class settlement. Moreover, the cases cited by the City are not persuasive in the context of a class action solely for injunctive relief.<sup>548</sup>

#### F. Opinions of Class Counsel, Class Representatives, and Absent Class Members

The opinions of class counsel strongly support entry of the proposed consent judgment.<sup>549</sup> The Court has received many comments from class members in support of the proposed consent judgment. Inmates' comments describe numerous deficiencies, including poor environmental conditions, inadequate staffing and absent staff members, classification and housing problems, illicit drug use, sexual assault and other violence, staff use of excessive force, and inadequate medical and mental healthcare, including inadequate suicide prevention.<sup>550</sup> Although many inmates wrote solely about the current conditions at OPP,<sup>551</sup> those inmates that commented on the proposed settlement were generally positive.<sup>552</sup> Some inmates objected to the lack of financial compensation,<sup>553</sup> but the proposed consent judgment does not limit the ability of inmates to bring claims for damages and the complaint never sought such damages.<sup>554</sup>

One recurrent objection is that the proposed consent judgment does not go far enough because the Sheriff's compliance will be in appearance only, while the deficient conditions at OPP will persist or worsen.<sup>555</sup> Some class members assert that the Sheriff will present a facade of compliance during visits by experts or the Court, but not engage in substantive change.<sup>556</sup> These objectors ask for the Monitor to be "in house" or "on hand at all times within the jail" to ensure compliance.<sup>557</sup> One of the Class Representatives objects on the basis that the proposed consent judgment "reads like a Standard Policy [ ] Book issued by the Fed. Bureau of Prisons, La. Dept. of Corrections, and American Correctional Association (ACA)," and fails to set forth "specific details" on correcting the underlying problems.<sup>558</sup>

The Fifth Circuit's "jurisprudence [ ] makes clear that a settlement can be approved despite opposition from class members, including named plaintiffs." *Ayers*, 358 F.3d at 373. The proposed consent judgment "gives OPP officials discretion in establishing the details of facility-specific policies designed to address constitutional infirmities," but it also creates "concrete, baseline requirements."<sup>559</sup> *Freeman v. Berge*, 68 F. App'x 738, 742–43 (7th Cir. 2003) ("[I]f defendants have not lived up to their end of the bargain, [ ] inmates' remedy is to enforce the agreement, not attack it."). The Court is aware that in other cases, whether because of inability or unwillingness to comply, prison administrators have failed to implement consent judgments. Should this happen, appropriate measures will be considered.<sup>560</sup> At this point, however, these objections do not preclude approval of the class settlement.

The Court finds that the proposed class satisfies the numerosity, typicality, commonality, and adequacy of representation requirements set forth in Rule 23(a) and additionally meets the requirements for certification pursuant to Rule 23(b)(2). Moreover, the proposed settlement fulfills the requirements associated with Rule 23(e). Accordingly, the Court certifies the class, defined as "all people who are cur-

<sup>546</sup> R. Doc. No. 138, at 11.

<sup>547</sup> R. Doc. No. 427, at 8.

<sup>548</sup> See *Cody v. Hillard*, 88 F. Supp. 2d 1049, 1059 (D.S.D. 2000) ("This factor is not particularly important in the present case because the action is not for monetary damages.").

<sup>549</sup> *E.g.*, R. Doc. No. 138.

<sup>550</sup> *E.g.*, R. Doc. Nos. 227, 229, 269, 270, 274, 275–76, 334, 353.

<sup>551</sup> *E.g.*, R. Doc. No. 235.

<sup>552</sup> *E.g.*, R. Doc. No. 227 (generally approving of proposed consent judgment, but noting concerns about noncompliance).

<sup>553</sup> *E.g.*, R. Doc. No. 228.

<sup>554</sup> R. Doc. No. 1, at 37.

<sup>555</sup> *E.g.*, R. Doc. Nos. 227, 229. While some inmates appear to no longer reside at OPP, the Court will address their contentions as objections without ruling on class standing.

<sup>556</sup> R. Doc. No. 229.

<sup>557</sup> *E.g.*, R. Doc. No. 227.

<sup>558</sup> R. Doc. No. 229, at 10.

<sup>559</sup> R. Doc. No. 140, at 123.

<sup>560</sup> See, *e.g.*, R. Doc. No. 392.

rently or will be incarcerated at the Orleans Parish Prison,” and approves the class settlement.

CONCLUSION

Whether “budget shortfalls, a lack of political will in favor of reform,” and/or other factors are responsible for OPP’s deficiencies, these deficiencies must be remedied. *Plata*, 131 S. Ct. at 1936. Such conditions “are rarely susceptible of simple or straightforward solutions,” but the consent judgment presents a narrowly drawn yet comprehensive means of ensuring the protection of inmates’ Federal rights. *Id.*

The Federal rights at issue here, particularly with respect to the Constitution, establish minimum standards rather than ideals to which a correctional institution may aspire. These minimum standards are nonnegotiable. The Constitution guarantees that inmates, including convicted inmates and pretrial detainees who are presumed innocent, receive certain minimum levels of medical care and mental healthcare. It also guarantees that inmates will not be subject to a substantial risk of physical injury, sexual assault, or death to which officials are deliberately indifferent. The Court finds that the proposed consent judgment is the only way to overcome the years of stagnation that have permitted OPP to remain an indelible stain on the community, and it will ensure that OPP inmates are treated in a manner that does not offend contemporary notions of human decency. After carefully considering the tremendous amount of evidence, the parties’ arguments, including the City’s objections, and the law, the Court concludes that the consent judgment should be approved.

IT IS ORDERED that the motions are GRANTED.  
New Orleans, Louisiana, June 6, 2013.

  
LANCE M. AFRICK  
UNITED STATES DISTRICT JUDGE

(End of Attachment #1)

Specifically, Judge Africk explained that the consent judgment sets forth a process by which the Court will “determine the initial funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this agreement, and the source(s) responsible for providing that funding at an evidentiary hearing (‘funding trial’)” at which the parties to the agreement, as well as the city, shall have the right to participate. After this time, the funding amount “may be adjusted” through a process by which the monitor attempts to resolve disagreements between the Sheriff and the city. If the monitor is unable to do so within 45 days, the dispute is submitted to the Court. Order at 9.

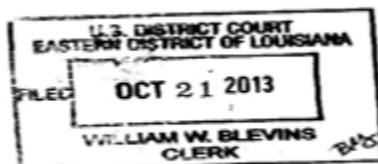
In addition, Judge Africk held:

“Whether budget shortfalls, a lack of political will in favor of reform,” and/or other factors are responsible for OPP’s deficiencies, these deficiencies must be remedied. *Plata*, 131 S. Ct. at 1936. Such conditions “are rarely susceptible of simple or straightforward solutions,” but the consent judgment presents a narrowly drawn yet comprehensive means of ensuring the protection of inmates’ Federal rights. *Id.* The Federal rights at issue here, particularly with respect to the Constitution, establish minimum standards rather than ideals to which a correctional institution may aspire. These minimum standards are nonnegotiable. The Constitution guarantees that inmates, including convicted inmates and pretrial detainees who are presumed innocent, receive certain minimum levels of medical care and mental healthcare. It also guarantees that inmates will not be subject to a substantial risk of physical injury, sexual assault, or death to which officials are deliberately indifferent. The Court finds that the proposed consent judgment is the only way to overcome the years of stagnation that have permitted OPP to remain an indelible stain on the community, and it will ensure that OPP inmates are treated in a manner that does not offend contemporary notions of human decency. Order at 103–104.

The United States will continue to work with all parties in the OPP case to design and implement a comprehensive, workable framework for sustainable reform to address the deplorable conditions at OPP.

On October 21, 2013, the court entered the attached order (attachment #2) after the city and the Sheriff settled for \$1.88 million for the fiscal year 2013 costs to begin implementing the consent decree. This order triggered the effective date of the June 6 consent decree, so the consent decree is also effective as of October 21. (see Attachment #2)

ATTACHMENT #2



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES, KENT  
ANDERSON, STEVEN DOMINICK,  
ANTHONY GIOUSTAVIA, JIMMIE  
JENKINS, GREG JOURNEE,  
RICHARD LANFORD, LEONARD  
LEWIS, EUELL SYLVESTER, and  
MARK WALKER, on behalf of  
themselves and all other similarly  
situated, et al.

CIVIL ACTION NO. 12-859  
JUDGE LANCE M. AFRICK  
MAGISTRATE JUDGE CHASEZ

VERSUS

MARLIN GUSMAN, Sheriff, Orleans  
Parish

JOINT MOTION FOR ENTRY OF SETTLEMENT AGREEMENT

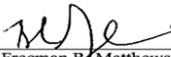
NOW INTO COURT, through undersigned counsel, comes Third-Party Plaintiff Marlin N. Gusman, Sheriff of Orleans Parish (the "Sheriff") and Third-Party Defendant the City of New Orleans (the "City"), who moves this Honorable Court to enter the release and settlement agreement reached by the Sheriff and the City regarding funding for the remainder of fiscal year 2013 into the record in this matter. During a settlement conference on October 16, 2013, the Sheriff and the City agreed in principle to a settlement of the Sheriff's Third-Party Demand against the City with respect to funding for the remainder of fiscal year 2013. The release and settlement agreement between the Sheriff and the City is attached is this motion as Exhibit "A."

The definition of the term "Effective Date" set forth in the Consent Judgment<sup>1</sup> states that the Consent Judgment shall be effective upon "a definitive judgment regarding the amount of funding needed" in order to comply with the terms of the Consent Judgment. Both the Sheriff and the City agree that the entry of an Order entering this settlement into the record satisfies this condition precedent in order for the Consent Judgment to be deemed "effective."

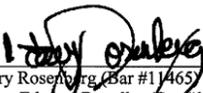
WHEREFORE, third-party plaintiff Marlin N. Gusman, Sheriff of Orleans Parish and Third-Party Defendant, the City of New Orleans, respectfully requests that this Honorable Court grant its Joint Motion to Approve Settlement.

<sup>1</sup>Rec. Doc. 466.

Respectfully submitted,

BY:   
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**ATTORNEYS FOR THIRD-PARTY  
PLAINTIFF, MARLIN N. GUSMAN,  
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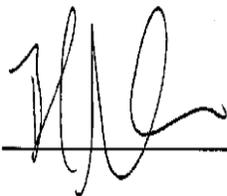
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**ATTORNEYS FOR THIRD-PARTY  
DEFENDANT, CITY OF NEW ORLEANS**

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was filed on this 21st day of October, 2013 with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all participating counsel of record.

  
\_\_\_\_\_

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (hereinafter, the "Agreement") is made on this 21st day of October, 2013, by and between Marlin N. Gusman, Sheriff of Orleans Parish (the "Sheriff"), on behalf of the Orleans Parish Sheriff's Office (the "OPSO") and the City of New Orleans (the "City") (the aforementioned parties being sometimes referred to as the "Parties"). The Parties hereby agree as follows:

WHEREAS, the Sheriff filed a third-party complaint naming the City as a third-party defendant as part of the litigation captioned *Lashawn Janes, et al. v. Marlin N. Gusman, et al.*, Case No. 12-859 (the "Third-Party Complaint"); and

WHEREAS, the Parties have agreed to resolve and compromise all differences and claims between them with respect to funding for fiscal year 2013 in the Third-Party Complaint ; and

NOW THEREFORE, in view of the foregoing, and in consideration of the payments and obligations set forth below, the Sheriff and the City give the following releases, and promise, represent, and acknowledge the following:

1. The following definitions shall apply to the Agreement:
  - a. The "Sheriff Released Parties" shall mean Marlin N. Gusman, the Sheriff of Orleans Parish, the Orleans Parish Sheriffs' Office, and all of their respective present, former, and future elected officials, officers, employees, agents, consultants, servants, representatives, attorneys, insurers, successors, and assigns.
  - b. The "City Released Parties" shall mean the City of New Orleans and all of its present, former, and future elected officials, officers, employees, agents, consultants, servants, representatives, attorneys, insurers, successors, and assigns.
  - c. The "Third-Party Complaint" shall mean the third-party litigation commenced by the Sheriff against the City, as part of the lawsuit captioned *Jones, et al. v. Gusman, et al.*, Case No. 12-859.
  - d. "Subject Matter" shall mean (1) all current and future claims by the Sheriff and/or the OPSO against the City, in their entirety, arising out of the claims alleged in the Third-Party Complaint related to the funding for the OPSO for fiscal year 2013, (2) all claims by the Sheriff and/or the OPSO against the City relating to the funding of the OPSO for fiscal year 2013, in their entirety, asserted or that could have been asserted in the Third-Party Complaint, and (3) all current and future claims by the City against the Sheriff and/or the OPSO, in their entirety, that could have been asserted by the City regarding funding for the OPSO for fiscal year 2013 and/or those that could have been asserted by the City in connection with the Third-Party Complaint.
2. The Sheriff, for himself and on behalf of the OPSO, agrees to dismiss all claims asserted against the City with respect to funding for fiscal year 2013 in the Third-Party Complaint with prejudice.
3. In consideration of the agreements, promises, and representations contained in this Agreement, the Parties agree as follows:
  - a. The City shall pay the sum of ONE MILLION EIGHT HUNDRED EIGHTY-EIGHT THOUSAND SIX HUNDRED FIFTY-TWO U.S. DOLLARS AND SEVEN CENTS (\$1,888,652.07) in interim funding for fiscal year 2013 to the OPSO.
  - b. It is expected that the funds provided by the City pursuant to this Agreement shall be expended by the Sheriff in accordance with the following allocation:
    - i. FIVE HUNDRED THOUSAND U.S. DOLLARS (\$500,000.00) for the hiring and of and contracting for additional medical staff;
    - ii. FOUR HUNDRED TWENTY-FIVE THOUSAND NINE HUNDRED SEVENTY-FOUR U.S. DOLLARS (\$425,974.00) for increasing the minimum salary for individuals employed by the OPSO at the ranks of Recruit, Deputy 1, and Deputy 2 that are performing jail security functions at the Conchetta, House of Detention, Old Parish Prison, Templeman V, Temporary Detention Center, the "Tents," and the Female facilities.
    - iii. THREE HUNDRED SEVENTY THOUSAND NINE HUNDRED THREE U.S. DOLLARS AND NINETY-EIGHT CENTS (\$370,903.98) for overtime directly related to jail personnel shortages at the jail facilities.
    - iv. TWO HUNDRED FIFTY THOUSAND EIGHT HUNDRED THIRTY-EIGHT U.S. DOLLARS AND TWENTY-SEVEN CENTS (\$250,838.27) for the hiring of forty-two (42) individuals to perform jail security functions.
    - v. ONE HUNDRED THIRTY-EIGHT THOUSAND U.S. DOLLARS (\$138,000.00) for the purchase of medical supplies.
    - vi. SEVENTY-FIVE THOUSAND U.S. DOLLARS (\$75,000.00) for the purchase of the "Watch Tour" software system.
    - vii. FORTY THOUSAND U.S. DOLLARS (\$40,000.00) for additional personnel issues at the discretion of the Sheriff.
    - viii. TWENTY-FOUR THOUSAND NINE HUNDRED SIXTY-NINE U.S. DOLLARS AND THIRTY-NINE CENTS (\$24, 969.39) for uniforms for new recruits.
    - ix. TWENTY-THOUSAND U.S. DOLLARS (\$20,000.00) for an increase of the minimum salary of fourteen (14) previously identified individuals cur-

rently taking part in the OPSO's training academy, or employed in the OPSO's transportation division and medical transportation division.

x. TWENTY THOUSAND U.S. DOLLARS (\$20,000.00) for the OPSO's recruiting budget.

xi. SEVENTEEN THOUSAND NINE HUNDRED SIXTY-SIX U.S. DOLLARS AND FORTY-THREE CENTS (\$17,966.43) in connection with the cost of OPSO's hiring of a qualified Jail Administrator as required by the Consent Decree.

xii. FIVE THOUSAND U.S. DOLLARS (\$5,000.00) for increasing the salary for five (5) individuals previously identified and employed by the OPSO at the rank of Lieutenant.

c. The Sheriff and the OPSO shall strictly adhere to this Allocation.

d. The Sheriff and the OPSO shall provide to the City an accounting within the last ten (10) days of the month for the remainder of 2013 detailing (i) all amounts expended by the Sheriff of the funds provided pursuant to this Agreement, (ii) the category from which the Sheriff drew such funds, and (iii) the remaining balance for each category. All supporting documentation for the Sheriff's expenditures of funds provided pursuant to this Agreement shall be made available to the City at its request.

e. In connection with the Sheriff's accounting for the month of December 2013, the Sheriff shall return to the City all of the funds provided under this Agreement that have not otherwise been spent for the above described expenses and/or needed to pay those obligations incurred during 2013.

4. The Sheriff and the City agree that nothing in this Agreement obligates the City to provide specific levels of funding for 2014 and beyond.

5. The Sheriff and the OPSO have agreed that they shall refrain from making any claim or demand or commencing or causing any action in law or equity regarding the funding of the OPSO by the City for fiscal year 2013 against any City Released Party.

6. The Parties agree that this Agreement does not constitute an admission of liability or the validity of any claim by the Sheriff but has been reached by the Parties to conserve resources, to amicably resolve differences, to avoid the risks and uncertainty inherent in litigation, and to allow for the process of needed reforms regarding the conditions of confinement at Orleans Parish Prison to begin as soon as possible.

7. No change or modification of this Agreement shall be valid unless it is made in writing and signed by the Parties.

8. The Parties agree to submit to the jurisdiction of the United States District Court for the Eastern District of Louisiana in the event of any dispute requiring the interpretation and/or enforcement of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Release and Settlement Agreement as of the first date written above.

**BLAKE ARCURI, on behalf of  
MARLIN N. GUSMAN, Sheriff of Orleans  
Parish**

  
\_\_\_\_\_

**CITY OF NEW ORLEANS**

  
\_\_\_\_\_  
**SHARONDA R. WILLIAMS**  
City Attorney on behalf of

The City of New Orleans and  
The Hon. Mitchell J. Landrieu  
Mayor of the City of New Orleans

[Signature Page to Release and Settlement Agreement]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES, KENT  
ANDERSON, STEVEN DOMINICK,  
ANTHONY GHOUSTAVIA, JIMMIE  
JENKINS, GREG JOURNEE,  
RICHARD LANFORD, LEONARD  
LEWIS, EUELL SYLVESTER, and  
MARK WALKER, on behalf of  
themselves and all other similarly  
situated, et al.

CIVIL ACTION NO. 12-859  
JUDGE LANCE M. AFRICK  
MAGISTRATE JUDGE CHASEZ

VERSUS

MARLIN GUSMAN, Sheriff, Orleans  
Parish

ORDER

Considering the foregoing Joint Motion for Entry of Settlement Agreement,  
IT IS ORDERED, that the motion is GRANTED, and  
IT IS FURTHER ORDERED that the Release and Settlement Agreement, at-  
tached to the Joint Motion for Approval of Settlement Agreement, is acknowledged  
and made a part of the record in this case;

IT IS FURTHER ORDERED that by the agreement of all the parties and as a  
result of the consensual resolution of these issues by the Sheriff and the City, this  
Order authorizing the entry of the Release and Settlement shall satisfy the condi-  
tion precedent set forth in the definition of "Effective Date" in the Consent Judg-  
ment.\*

New Orleans, Louisiana, this 21st day of October, 2013.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES ET AL.

CIVIL ACTION

VERSUS

No. 12-859  
c/w 12-138  
REF: 12-859

MARLIN GUSMAN ET AL.

SECTION I

ORDER AND REASONS

Before the Court is the joint motion for entry of settlement agreement filed by  
the Sheriff of Orleans Parish ("Sheriff") and the City of New Orleans ("City").

The complaint in this case was filed on April 2, 2012.<sup>1</sup> Subsequent legal pro-  
ceedings brought to light longstanding and grave deficiencies at Orleans Parish  
Prison. The Court entered a Consent Judgment on June 6, 2013, recognizing that  
"years of stagnation . . . have permitted OPP to remain an indelible stain on the  
community."<sup>2</sup> Since that date, the focus of the legal proceedings has been on the  
Sheriff's third-party claims against the City. In these claims, the Sheriff asserted  
that additional funding is required to ensure constitutional conditions at Orleans  
Parish Prison.

\* Rec. Doc. 466, p. 2.

<sup>1</sup> R. Doc. No. 1.

<sup>2</sup> R. Doc. No. 465, at 104.

After voluminous briefing, nearly 30 hours of testimony in open court, and the submission of many highly technical and detailed exhibits, the Court took these claims under advisement. While the Court weighed the evidence and drafted an opinion, the parties continued settlement efforts. The Court was gratified that the parties were able to agree on a lead monitor, Ms. Susan McCampbell, and that the Sheriff and the Mayor agreed to split the cost of the monitoring team through the end of the year. However, notwithstanding the tireless and diligent efforts of Judge Martin L.C. Feldman, who volunteered to act as a settlement coordinator over the last several months, the parties were unable to reach any type of broader settlement.

At the end of September, however, the Court was notified that the Sheriff and the Mayor believed that a settlement was still possible. The parties requested to meet with this Court in a final settlement effort.<sup>3</sup> On October 16, 2013, the parties informed the Court that they had reached substantive agreement as to funding for the remainder of the fiscal year and expected to be able to formally enter into an agreement today.

The Court commends the efforts of counsel for the United States of America and for the Plaintiff Class, which consists of all current and future Orleans Parish Prison inmates, for their diligent efforts to ensure that the settlement does not compromise the goals of the Consent Judgment. These efforts assured the Court that today's settlement adequately protects the rights of Orleans Parish Prison inmates.

Both the Sheriff and the Mayor had to make difficult decisions in this case that will influence the citizens of this community on a daily basis. These decisions, which required working together to reconcile sometimes-divergent interests, are the type of challenge that citizens entrust to their elected leaders. The government has an obligation to provide inmates with a safe and secure institution as well as adequate medical and mental healthcare. Of course, if the government fails to fulfill this obligation, the Court must act to remedy the resulting constitutional violations. The Court was prepared to act imminently in this case if a settlement was not reached, and it will be prepared to do so in the future if necessary. The Court commends the Sheriff and the Mayor, however, for rising to the challenge and reaching a compromise on this matter. Focusing on remedying conditions at Orleans Parish Prison, rather than on pointing fingers, is the only way to begin immediate implementation of the Consent Judgment.

While today marks an important milestone, the hard work is only now beginning. Entry of the settlement today triggers the Consent Judgment's effective date. The Consent Judgment's provisions are narrowly tailored to remedy violations of inmates' Federal rights, but they require a great deal of effort by the parties. Many of the changes address conditions at Orleans Parish Prison that have been present for generations. The Court is optimistic, however, that the parties and their attorneys are committed to working with the Monitor and the Court to make certain that the Consent Judgment effects meaningful change.

Accordingly,

IT IS ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that the release and settlement agreement, which is attached to the joint motion, is acknowledged and made a part of the record in this case.

IT IS FURTHER ORDERED that with the agreement of all of the parties and as a result of the consensual resolution of these issues by the Sheriff and the City, this Order authorizing the entry of the release and settlement agreement shall satisfy the condition precedent set forth in the definition of "Effective Date" in the Consent Judgment.

New Orleans, Louisiana, October 21, 2013.

  
 LANCE M. APRICK  
 UNITED STATES DISTRICT JUDGE

<sup>3</sup>See R. Doc. No. 569.

(End of Attachment #2)

Currently, the city is conducting budget hearings to formulate the fiscal year 14 budget, which will take effect on Jan. 1. If the Sheriff is not satisfied with the city's budget amount, the monitor will attempt to resolve the disagreement and if the monitor is unable to do so within 45 days, it will be submitted to the Court.

*Question.* Has the Department of Justice made any request or taken any steps to obligate Sheriff Gusman to prioritize his funds/spending? Why or why not? Why or why not?

*Answer.* As noted in question 1, the process for determining how to fund the reforms necessary to correct the constitutional violations at OPP is being led by Judge Africk. Please see response to question 1 above for a detailed outline of the process as set forth by Judge Africk. The United States will continue to comply with the Court's directives in this case.

*Question.* Did the Department of Justice take steps to evaluate the city of New Orleans' financial situation? Why or why not?

*Answer.* The Department of Justice is very mindful of the city of New Orleans' financial situation. As a result, the Department of Justice, as noted above in response to question 1, has provided tens of millions of dollars to the city of New Orleans to assist in reforming the criminal justice system. In addition, other Federal agencies have provided tens of millions of dollars in additional resources to reform the criminal justice system in New Orleans, including the construction of a new jail. The United States has also provided technical assistance on ways in which the city can reduce the costs of compliance with its legal obligations vis a vis New Orleans Police Department and the Orleans Parish Prison. At the same time, the United States has an obligation to ensure that the New Orleans Police Department and the Orleans Parish Prison are operated in a constitutional manner. The continuing costs of noncompliance, both in human terms and in financial terms (e.g. tort liability) are significant, and the Department continues to look forward to working with all parties to transform the criminal justice system in New Orleans into a national model.

## BOSSIER PARISH YOUNG MARINE PROGRAM

*Question.* Based on difficulties experienced by the Bossier Parish Young Marine Program in trying to secure grant funding; my constituents feel the Department of Justice, Office of Civil Rights, in Washington, D.C. is going to great lengths to prevent even the mere mention of God in any way to the youth in these programs.

Does voluntary prayer or a moment of silence during a youth program render the program ineligible for funding? Please describe the Department's process for determining what constitutes an inherently religious activity.

*Answer.* The Department's regulations on Equal Treatment for Faith-Based Organizations prescribe that "[o]rganizations that receive direct financial assistance from the Department of Justice may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department." 28 C.F.R. 38.2(b)(1). "If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance." *Id.*; see also Exec. Order No. 13279, 2(f), 67 Fed. Reg. 77,141 (Dec. 12, 2002), as amended by Exec. Order No. 13559, 1(b), 75 Fed. Reg. 71,319 (Nov. 22, 2010).

Voluntary prayer during a youth program, while an inherently religious activity for purposes of 28 C.F.R. 38.2(b)(1), does not render the program ineligible for funding, as long as the program is properly structured in compliance with Federal civil rights laws which require that these activities must be voluntary and conducted separately in time or location from Department of Justice (DOJ)-funded activities. A moment of silence could be subject to the same restrictions if in context it is apparent that the grantee's purpose in providing the moment of silence is to encourage prayer or religious reflection on the part of program participants, or if the grantee's policy has the primary effect of advancing religion.

In 2012, the Bossier Parish Sheriff's Office's Young Marines Program, described in its handbook as a youth education and service program for youth ages 8 through 18 years old, received a Juvenile Accountability Block Grant award through the Louisiana Commission on Law Enforcement (LCLE), the State Administering Agency for Louisiana. The curriculum for the program included a voluntary prayer at the beginning of each class session. The Office of Justice Programs' (OJP) Office for

Civil Rights at DOJ, which is responsible for ensuring that recipients of funding from the OJP comply with applicable civil rights statutes and regulations, informed the LCLE that it must ensure that the Sheriff's Office is conducting prayer in compliance with DOJ's Equal Treatment regulations.

*Question.* What steps are taken to ensure that communication between the Department and the State agencies truly reflect the Department's regulations and do not result in overly burdensome scrutiny?

*Answer.* The State Administering Agencies (SAA) administer Department of Justice (DOJ) funding and are responsible for ensuring that their DOJ-funded subrecipients comply with all applicable civil rights laws. The Office for Civil Rights (OCR), in the Office of Justice Programs (OJP), is responsible for ensuring SAAs are fulfilling this responsibility. The OCR provides the same level of monitoring and oversight to all SAAs and their subrecipients. The OCR provides technical assistance as needed to SAAs to assist them in ensuring that subrecipients are complying with their civil rights obligations. If there is a concern that a subrecipient is implementing or intends to implement DOJ funding in a manner that appears to violate civil rights laws, the OCR provides guidance to the SAA on the conditions under which the subrecipient may implement DOJ funding consistent with civil rights laws and regulations.

In the case of the Young Marines Program, once the Louisiana Commission on Law Enforcement (LCLE) notified the OCR that the program included voluntary prayer, the OCR informed the LCLE that the Sheriff's Office must ensure that prayer is conducted separately, in either time or location, from the class sessions (i.e., conducting prayer in a separate location from the DOJ-funded activities or ensuring that there is a break in time between prayer and the DOJ-funded activities). Funding for the Young Marines Program expired in December 2012 before the LCLE could confirm how the Sheriff's Office planned to conduct prayer separately in time or location from the DOJ-funded activities. However, OJP has been working closely with the LCLE to ensure that the Bossier Parish Sheriff's Office would meet the civil rights requirements that may come with any new OJP funding.

QUESTIONS SUBMITTED BY SENATOR RICHARD C. SHELBY

*Question.* The 2014 budget request includes \$100 million to double the existing capacity of the Federal Bureau of Investigation's (FBI) National Criminal Background Check System. In your testimony before the House Commerce, Justice, Science, and Related Agencies (CJS) Subcommittee, you stated that this funding was requested in anticipation of the adoption of a universal background check requirement; however your testimony today makes no mention of such a requirement.

Attorney General Holder, could you please provide the details relating to the \$100 million increase that has been requested? Is the funding necessary to simply support the existing system, which I understand is experiencing an uptick in background checks, or is the funding only necessary if a new, universal background check was adopted?

*Answer.* While the request was originally predicated upon the enactment of a universal background check requirement, the number of background checks has been increasing since 2002, as reflected in the chart below. Based on historical growth and anticipated need, the FBI requests a total of \$100 million and 524 positions to keep pace with anticipated workload requirements of the National Instant Criminal Background Check System (NICS). The chart below summarizes the yearly NICS workload from 1998 through March 2013.

Year	Total NICS Background Checks	Daily Average
1998	892,840	n/a
1999	9,138,123	25,105
2000	8,543,037	23,470
2001	8,910,191	24,479
2002	8,454,322	23,226
2003	8,481,588	23,301
2004	8,687,671	23,867
2005	8,952,945	24,596
2006	10,036,933	27,574
2007	11,177,335	30,707
2008	12,709,023	34,915
2009	14,033,824	38,554

Year	Total NICS Background Checks	Daily Average
2010 .....	14,409,616	39,587
2011 .....	16,454,951	45,206
2012 .....	19,592,303	53,825
1/1–3/31/2013 .....	7,014,240	77,936

*Question.* What specific activities or technology will be supported with the \$100 million?

*Answer.* The requested funding provides for an additional 524 positions, including NICS examiners, auditors, appeals and supervisory personnel; build out and rent costs for additional call center space; increased system capacity; and additional telecommunications equipment including routers, switches and Public Branch Exchange (PBX) equipment and associated installation and operations and maintenance costs.

*Question.* Attorney General Holder, in your testimony, you discuss the measures the Department undertook, working with Congress, to address some of the budget shortfalls resulting from sequestration in 2013. Additionally, you share your continued concern about your ability to “keep Department of Justice employees on the job to respond to emergencies and safeguard the American people in the days ahead.” This statement troubles me given the significant effort that went into working with the Department to ensure that there was adequate funding to support the overall mission and prevent furloughs.

Could you explain this statement and cite specific areas of concern for 2013 and help the subcommittee understand how and why they were not adequately covered by the reprogramming request or the spend plan?

*Answer.* The full statement from the testimony does not conclude with the quote above but continues with “the solutions that we used to alleviate sequestration cuts in fiscal year 2013 will no longer be available to mitigate fiscal year 2014 funding shortfalls.” While the reprogramming request and spend plan adequately mitigated the need for furloughs during fiscal year 2013, our concern remains that if Congress does not act to restore the Department’s funding for fiscal year 2014, we will face the continued loss of critical personnel, accelerated by furloughs we were able to avoid this fiscal year. The Department’s mission and its employees are inextricably linked: we cannot fulfill our mission without our employees. And as our employees address a multitude of important areas, from national security and cybersecurity to civil rights and safeguarding the most vulnerable members of society, our concerns about long-term impacts generated by inadequate funding extend to all areas of the Department’s work. The President’s fiscal year 2014 budget alleviates these concerns and provides the necessary funding to keep our employees on the job, and meet the Department’s mission.

*Question.* The budget requests \$150 million to support a comprehensive school safety proposal through the Community Oriented Policing Services (COPS) program. However, the request does not appear to settle on a specific approach and it is not accompanied by a plan that details the proposal. Additionally, in conversations with your staff at the Department as well as conversations with staff at the Office of Management and Budget (OMB), we have learned that there is in fact, a disparity between the Department’s concept for using these funds and OMB’s concept for using these funds. This troubles me.

Could you outline for us any guidance the Department has been given in terms of administering these funds and what requirements will be placed upon the recipients?

*Answer.* This Comprehensive School Safety Program would provide funding for holistic, integrated, and individually tailored school safety and security resources for primary and secondary schools. The program aims to bring the law enforcement, mental health, and education disciplines together to provide a comprehensive approach to school safety. Law enforcement and school districts, in consultation with school mental health professionals, should come together to apply for funding that fills the gaps in their own school safety and security efforts.

Under this program, funding would be available for the hiring of school safety personnel, as well as school safety assessments, technical assistance, and/or training. School safety personnel includes sworn school resource officers (SROs) and non-sworn school safety personnel, such as civilian public safety personnel; school counselors; school psychologists; other qualified psychologists; school social workers; and child and adolescent psychiatrists.

With assistance from the Department of Education (and flexible transfer authority), the program will support demand-driven grants, permitting the flexible use of

funds for safety assessments, personnel, and equipment. Applications will be driven by local needs and the quality of the comprehensive safety plans submitted with the applications that show how all of the funding requests and proposed activities are linked together. Funding may also be used to support training for any personnel hired to ensure that their presence in the schools does not lead to unnecessarily harsh discipline and arrests for youth misbehaving, and that they will support other school personnel in implementing evidence-based positive behavior strategies.

The COPS Office, in partnership with the Department of Education, is currently working to establish the program parameters and requirements. The COPS Office has a near 20-year history of program development and will work to ensure that, if Congress approves the \$150 million request, these scarce taxpayer resources are spent wisely and monitored fully. If appropriated, the program would open in the spring of 2014, and the full scope of the program would be outlined in the application materials. The COPS Office and Department of Justice staff welcome the opportunity to work with your staff throughout the program development phase to ensure your concerns are adequately addressed.

*Question.* Will the funds be available for technology enhancements, infrastructure investments or simply school resource officers? If the funds are available for more than just school resource officers, will schools be required to execute some sort of needs or vulnerability assessment prior to receiving funds in order to inform funding decisions?

*Answer.* Funding may also be used to purchase school safety equipment; develop and update public safety plans; conduct threat assessments; and train “crisis intervention teams” that span the law enforcement, education, and mental health communities to respond to and assist students in crisis.

The program will be “needs based,” which means that applicants would only apply for items based on their self-assessed need for those items to fill the existing gaps in their comprehensive school safety efforts. Applicants would be evaluated on the quality of their proposed programs and how closely they address all aspects of comprehensive school safety models, both in terms of their current activities and how grant funding would further enhance and complement these existing efforts.

The requirements of the proposed fiscal year 2014 program are still in development. However, in fiscal year 2013, the COPS Office will develop a model for, as well as a training curriculum on, the effective use of school resource officers in school safety programs for application to the proposed fiscal year 2014 Comprehensive School Safety Program. The training curriculum will incorporate best practices in the development and implementation of the school threat assessment process and threat assessment teams. While threat assessment can be funded under the proposed fiscal year 2014 Comprehensive School Safety Program, a decision has not yet been made as to whether threat assessments will be a requirement for grant recipients.

*Question.* Cybersecurity is a significant issue facing the Federal Government, the private sector and the global economy. Ensuring that we protect our critical infrastructure is of paramount importance. It is also imperative that we work collaboratively with the private sector to do so. The Department of Justice plays a critical role in the cybersecurity arena and the budget request includes additional resources to support further efforts.

The request discusses enhancing the Department’s cyber policy scope, improving the sharing of information and increasing cyber collection and data analysis. Could you provide a detailed description of what kinds of investments the Department will make with these increased resources?

*Answer.* The Department must continue to evolve and adapt to address complex cyber threats. We have already made significant changes at FBI and the Department of Justice (DOJ) just in the last year to refocus and adapt our strategies to make our efforts as effective as possible. To coordinate investigations, the Department participates in the National Cyber Investigative Joint Task Force (NCIJTF), a multi-agency, national focal point for which the FBI serves as executive agent that coordinates, integrates, and shares pertinent information relative to cyber threat investigations. The Department also just recently launched a new, nationwide program focused on combating cyber-based terrorism and state sponsored computer intrusions, the National Security Cyber Specialist (NSCS) network. The NSCS network, which consists of nearly 100 prosecutors from U.S. Attorney’s Offices nationwide and cyber experts from the National Security and Criminal Divisions, is a critical part of the Department’s efforts to better address cyber intrusions and attacks carried out by nation states or terrorist organizations. This network is modeled in part on the existing Computer Hacking and Intellectual Property (CHIP) coordinator network, which has brought together prosecutors across the country to address cybercrime and enforce intellectual property laws for over 15 years.

The Department's fiscal year 2014 Budget request provides a total of \$669 million to continue our Cyber efforts and \$92.6 million in program increases for FBI, National Security Division (NSD), and Criminal Division (CRM).

For FBI, \$86.6 million (152 positions, 60 agents) is provided to support the Next Generation Cyber Initiative to increase coordination with victims and increase investigative capacity (100 positions, 50 agents), improve cyber collection and analysis (36 positions, 10 agents), and extend centralized capabilities to the field (16 positions). These resources will help promote a whole of Government approach to cybersecurity, as well as address critical gaps in the FBI's current ability to investigate computer intrusions and identify, mitigate, and disrupt cyber threat actors. Requested resources will allow for the next phase of the Binary Analysis Characterization and Storage System (BACSS) malware analysis system, an FBI enterprise-wide malware triage tool that enhances the FBI's ability to exigently analyze and investigate malware infections.

For NSD, \$3.5 million (26 positions, 16 attorneys) is provided to recruit, hire and train additional cyber specialists to support the growing area of cyber threats to national security. Because cyber-based terrorism, cyber-based espionage, and other state-sponsored cyber intrusions threaten national security, NSD is involved in the full range of U.S. cyber and cybersecurity efforts, including cyber threat prevention, detection, investigation, and prosecutions, cybersecurity program development and oversight, cybersecurity vulnerability management, and cyber policy development. These resources will allow NSD to enhance current cyber capabilities in the areas of Counterespionage (3 positions, 2 attorneys), Foreign Investment Review (4 positions, 3 attorneys), Counterterrorism (3 positions, 2 attorneys), Office of Intelligence (12 positions, 8 attorneys), and Law and Policy (4 positions, 1 attorney).

For CRM, \$2.6 million (25 positions, 9 attorneys) is provided to enhance four vital areas that CRM provides efforts; investigations, prosecutions, and disruption efforts; support and advocacy for legal tools, international assistance and outreach; and forensic support. In addition to these operational support activities, these resources will increase the policy capacity of the Department of Justice as the Government continues to grow its interaction and interface with cybersecurity and cyberspace issues.

*Question.* Will these resources assist the Department in collaborating with other Federal agencies responsible for cybersecurity? If so, how?

Answer. Yes, these resources will assist the Department in collaborating with other Federal agencies responsible for cybersecurity. These resources will encompass and expand on the existing efforts to electronically and in real time connect the following entities: the seven security centers to enhance situational awareness; the Department of Homeland Security (DHS) deployed EINSTEIN Information Sharing and Analytics Government-wide system; and the FBI's Binary Analysis Characterization and Storage System (BACSS). These currently disparate efforts will be synchronized to develop a comprehensive coordinated cybersecurity information sharing system capable of leveraging ongoing activities and best practices of the Program Manager for the Information Sharing Environment (PM-ISE), including its work with fusion centers and privacy guidelines. The Information Security Architecture (ISA) will serve as the foundation for cybersecurity information sharing requirements across the Government. FBI will work with DHS and other impacted agencies, the PM-ISE and the National Institute of Standards and Technology (NIST) to develop machine readable interoperable technical standards that will allow for automated information sharing.

These resources will also support the Department's continued participation in the National Cyber Investigative Joint Task Force (NCIJTF) and its recently launched National Security Cyber Specialist (NSCS) network which is a nationwide program focused on combating cyber-based terrorism and state sponsored computer intrusions.

*Question.* Additionally, could you outline the efforts being undertaken by the Department to eliminate the stovepipes that exist across Government agencies with respect to the sharing of information and analysis?

Answer. The Department and the FBI are committed to working with interagency partners to eliminate the stovepipes that have historically limited capacity to most effectively counter cyber threats. Over the last year, the FBI and other key U.S. Government agencies have come together to define roles and responsibilities to maximize appropriate sharing of intelligence and analysis efforts. As a recent example, the FBI and DHS have refined and streamlined joint intelligence products to ensure they can be used effectively across public and private sectors.

At the FBI-led National Cyber Investigative Joint Task Force (NCIJTF), all 19 member agencies work in collaboration on operations. The NCIJTF is tasked with the responsibility for coordinating, integrating, and sharing pertinent cyber threat

investigations, and cases and targets are de-conflicted on a daily basis in this multi-agency environment. This is not limited to just U.S. Government participants; the NCIJTF has expanded its membership to include personnel from Australia and the United Kingdom, in addition to personnel from local law enforcement departments around the country. The FBI also has detailees embedded with the National Security Agency's (NSA) National Threat Operations Center (NTOC), the CIA's Information Operations Center (IOC), and DHS's National Cybersecurity Communications and Integration Center (NCCIC), who are responsible for coordinating and de-conflicting operations and initiatives with the interagency groups in real time.

In addition, the FBI actively participates in initiatives that bring together interagency resources to take action against advanced cyber adversaries. For example, the FBI initiated Operation Clean Slate, in which interagency and private sector partners conducted coordinated operations to successfully disrupt more than 1,000 botnets infected with malware known as Citadel. The botnets were part of a global crime operation estimated to be responsible for more than half a billion dollars in financial fraud. Efforts like this involve substantial coordination with interagency partners on a daily basis, and while this particular operation focuses on criminal actors, ultimately it will evolve to become a whole-of-government approach to target botnets controlled by national security actors.

*Question.* A significant impediment to future successes against cyber attacks is a lack of information from private companies about cyber attacks they have experienced. Obtaining such information would allow the Government to have a better understanding of the types of attacks that are occurring, what emerging threats look like and be better prepared to address them. Private companies however; are often weary of allowing the Federal Government to access their technology infrastructure.

Do you believe that there is a path forward that could provide a level of comfort to private companies such that the Government could have greater insight into these types of attacks?

*Answer.* The FBI has enhanced its information sharing practices to ensure that the private sector is getting information from the FBI that may be needed to protect systems and networks. In the past, private companies were hesitant to provide information or access because there was no reciprocity in information sharing. The FBI's enhanced approach to outreach and victim notification has drastically changed its relationship with private industry because the focus has changed to arming these companies with as much information as possible to enable them to repel malicious cyber intrusions.

When the FBI works with companies during intrusion investigations, it is often accompanied by relevant interagency members who play different, necessary roles during an incident. If necessary, the FBI will grant appropriate members of the private sector temporary security clearances to give them important incident information. This process has benefitted both the FBI and the private sector because the individual companies are appropriately informed.

The FBI has formalized its management of these important relationships through the establishment of its Outreach Section within the Cyber Division. This section is committed to developing relationships that will enhance the ability of the FBI and the U.S. Government to combat cyber threats. One component of this section is focused on developing, protecting, and supporting prioritized relationships, while another manages the national InfraGard program. The InfraGard program is a partnership started in the late 1990's between the FBI, other law enforcement agencies, and private sector entities where information regarding cyber threats is shared. As the FBI continues to develop the cyber outreach program, including the iGuardian portal which will allow private sector entities to quickly report cyber threats and incidents to the FBI, the information sharing relationship between the FBI and the private sector will become even more robust.

*Question.* What is the Department doing to allay the concerns that private companies have expressed?

*Answer.* Through numerous discussions with major U.S. companies, it has become evident that one impediment to information sharing is uncertainty regarding, among other things, certain statutory provisions regarding information sharing. To allay these concerns, the FBI participates in programs and initiatives aimed at educating the private sector about FBI structure, processes, and protocol. Beyond this, the FBI has a long history of protecting sensitive information, and it is committed to working with the private sector to address concerns and develop safeguards that protect cybersecurity information.

*Question.* In your testimony, you state that you will "pursue appropriate action to recover civil penalties under the Clean Water Act" for those responsible for the *Deepwater Horizon* oil spill. Much work and coordination by the Gulf States and Federal agencies has begun to standup the Gulf Coast Ecosystem Restoration Coun-

cil. The Gulf Coast needs a reliable stream of funding to allow communities damaged by the spill to recover from the economic and environmental impacts.

What actions can the Department take to expedite the assessment of civil penalties on those responsible?

Answer. The Department's civil action arising out of the *Deepwater Horizon* oil spill is being litigated in Federal district court in New Orleans. The Department and other Federal agencies (led by Coast Guard, EPA, and the Department of the Interior) have already entered into a settlement with the Transocean defendants that has secured \$1 billion in civil penalties that will provide funding for the Gulf Coast Ecosystem Restoration Council. The settlement proceeds will be paid in three installments over 2 years; the first payment has already been made. Consistent with the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (the RESTORE Act), 80 percent of that settlement will be deposited into the Gulf Coast Ecosystem Trust Fund.

In the ongoing litigation, the United States has pressed for trial schedules that will yield civil penalty judgments as quickly as practicable, consistent with the many, many claims also being pressed by individuals and businesses for private damages as well as claims by the Gulf States. For example, we have resisted large extensions of time in the trial schedules and have supported trial schedules that would resolve all the factors necessary for penalty assessment as soon as practicable. We have also prioritized case development and trial work on this matter, including deploying substantial litigation support funding and resources to this case, funds that are necessary for the massive case development and document productions called for in this high-stakes matter. (The United States has collected and produced over 90 million pages of documents, and well over 577 days of depositions have been completed so far, with more to come in the months ahead). The Phase One trial, which addressed liability and culpability questions (and which is relevant to ultimate penalty amount) is complete and was submitted to the court for decision on June 21, 2013, with the filing of necessary post-trial materials. The Phase Two trial, which will determine how many barrels of oil were discharged into the Gulf (another area in dispute that also is relevant to ultimate penalty amounts) concluded on October 18, 2013; opening post-trial briefs and other materials are due December 20, 2013, with responses due January 24, 2014. The Department's pending proposal to the court calls for a Phase Three trial to resolve all other issues necessary to assess civil penalties.

*Question.* Do you anticipate an extensive legal battle to resolve civil penalties that are due?

Answer. Yes. To date, the defendants against whom the United States filed a civil lawsuit who have not settled civil penalties claims (BP and Anadarko Petroleum Corporation) have vigorously litigated all aspects of this case, including those relevant to determine the amounts of civil penalties due.

*Question.* Are you determined to fight for the maximum amount allowed under the law?

Answer. Yes. As the Attorney General has said, the Department intends to hold the parties responsible for the *Deepwater Horizon* oil spill fully accountable for their violations of the law, and to ensure that the American taxpayers are not forced to bear the costs of restoring the Gulf region. To that end, we will seek the maximum amount of civil penalties allowed under the law.

The Joint Explanatory Statement to accompany Public Law 113-6 addresses the issue of prescription drug abuse which has become a pervasive problem in the United States. In particular the language urges you to collaborate with State and local organizations, including experienced nonprofits, as a means of sharing best practices for reducing prescription drug diversion and abuse, including establishment of prescription drug monitoring programs, proper drug disposal, and increased enforcement on pill mills and doctor shopping.

*Question.* Could you detail for the Committee the collaborations that are ongoing to specifically address this problem?

Answer. As you know, prescription drug abuse is the Nation's fastest-growing drug problem. The administration's Prescription Drug Abuse Prevention Plan expands upon the National Drug Control Strategy and includes action in four major areas to reduce prescription drug abuse: education, monitoring, proper disposal, and enforcement. The Department of Justice is fully engaged in all four action items and we routinely work with our State and local counterparts on these measures as appropriate. Department activities in the three specific areas about which you inquire are detailed below.

## PRESCRIPTION DRUG MONITORING PROGRAMS

One of the best ways to combat the rising tide of prescription drug abuse is the implementation and use of Prescription Drug Monitoring Programs (PDMPs). PDMPs help prevent and detect the diversion and abuse of pharmaceutical controlled substances, particularly at the retail level where no other automated information collection system exists.<sup>1</sup> However, most States do not require practitioners to use the PDMP, and use rates for some State PDMPs remain low.

While PDMPs are valuable tools for prescribers, pharmacists, and law enforcement agencies to identify, detect, and prevent prescription drug abuse and diversion, we know that diversion still exists, especially across State lines. Interconnectivity remains a challenge, as many drug traffickers and drug seekers willingly travel hundreds of miles to gain easy access to unscrupulous pain clinics and prescribers and to avoid detection by PDMPs. Also, improving interoperability between State systems and data sharing among States would increase the effectiveness of PDMPs. The Department supports efforts to enhance the benefits of State PDMPs by providing the means for prescribers and pharmacists to more easily identify drug abuse and misuse when patients cross State lines to obtain drugs.

## PROPER DRUG DISPOSAL

The Secure and Responsible Drug Disposal Act (Disposal Act), enacted in October 2010, amends the Controlled Substances Act (CSA) to authorize ultimate users to deliver pharmaceutical controlled substances to another authorized person for the purpose of disposal in accordance with regulations promulgated by the Drug Enforcement Administration (DEA), without violating the law. Prior to the passage of the Disposal Act, the CSA provided no legal means for patients to transfer possession of controlled substance medications to other individuals for disposal. DEA issued a Notice of Proposed Rulemaking to implement the Disposal Act on December 21, 2012. The public comment period closed on February 19, 2013. DEA is currently in the process of drafting the final rule.

Additionally, DEA-coordinates National Prescription Drug Take-Back Days to provide a safe, convenient, and responsible means of disposal, while also educating the public about the potential for abuse and diversion of these medications. Prescription Take-Back Days are convenient opportunities for the public to rid their medicine cabinets of unused, unwanted or expired medications. Since fiscal year 2011, DEA has conducted six National Take-Back Days. Each Take-Back Day provides the public with thousands of sites nationwide to turn in their unwanted or expired prescription drugs safely and securely. As a result of all six National Take-Back Initiatives, the DEA, in conjunction with its State, local and tribal law enforcement partners, has removed a total of approximately 2.8 million pounds (1,409 tons) of medication from circulation. Until the disposal regulations become permanent, DEA will continue to coordinate Take-Back Days.

## INCREASED ENFORCEMENT ON PILL MILLS AND DOCTOR SHOPPING

The DEA Diversion Control Program is using all criminal and regulatory tools available to identify, target, disrupt and dismantle individuals and organizations responsible for the illicit manufacture and distribution of pharmaceutical controlled substances in violation of the CSA.

*Question.* What types of enforcement measures are currently ongoing with respect to identifying and shutting down pill mills and unscrupulous doctors who support this problem?

*Answer.* Addressing this issue is a top priority for the DEA. As a result of the combined efforts to eliminate pharmaceutical diversion via the Internet, drug traffickers and drug seekers have turned to unscrupulous pain clinics, or “pill mills” for drugs. These “clinics” are often staffed by and sometimes owned by physicians, who dispense addictive opioids outside the course of professional practice and without a legitimate medical purpose. When pain clinics cannot dispense directly from the pain clinic, unscrupulous pharmacies, sometimes affiliated with the pain clinics, dispense these same substances in violation of the CSA.

To combat this problem, DEA substantially expanded its Tactical Diversion Squads (TDS) beginning in 2008. As of June 1, 2013, there are 58 operational TDS's throughout the United States and Puerto Rico. Eight more squads are expected to become operational before the end of this fiscal year. These TDS's incorporate the enforcement, investigative, and regulatory skill sets of DEA Special Agents, Diver-

<sup>1</sup>This statement applies to all schedules. However, while many prescription monitoring programs cover all schedules, some programs apply only to controlled substances in Schedule II.

sion Investigators, and other Federal law enforcement officers, and State and Local Task Force Officers. The expansion of the TDS groups has enabled the Diversion Groups to concentrate on the regulatory aspects of the Diversion Control Program, thus ensuring that DEA's nearly 1.4 million registrants meet their obligations under the CSA. For example, DEA increased the frequency of compliance inspections of specific registrant categories such as manufacturers, distributors, importers, exporters, narcotic treatment programs, DATA-waived practitioners, researchers, and chemical handlers.

*Question.* A recent press release from the Department applauds the United Parcel Service (UPS) for halting its distribution of controlled substances and prescription drugs from illegal online pharmacies. According to the press release, UPS entered into a Non-Prosecution Agreement in which the company agree to forfeit \$40 million in payments it received from illicit online pharmacies and to implement a compliance program designed to ensure that illegal online pharmacies will not be able to use UPS's services to distribute drugs in the future.

While I believe this is a step in the right direction I am interested in learning how UPS, or other shippers, know or can learn that they are in fact shipping illegal substances or that illegal pharmacies are using their services? Does the DEA or Food and Drug Administration (FDA), or someone with actual knowledge about these entities, provide a list to shippers so that they can assist in curbing the distribution?

*Answer.* DEA is committed to serving as a resource for shipping companies to use when considering questions of the legality of shipments from Internet pharmacies. To that end, law enforcement agencies including DEA have made themselves available in the past to discuss Internet pharmacy risks and curtailing illegal shipments of pharmaceuticals. For example, as was detailed in Attachment A of the Non-Prosecution Agreement between DOJ and UPS, "On five occasions in January 2004 through May 2006, UPS's Corporate Security Manager and a UPS Public Affairs Vice President met with DEA and other law enforcement agencies to discuss the parcel carrier industry's and UPS's role in assisting Federal authorities in curtailing illegal Internet pharmacies."

While package delivery companies have a history of cooperation in law enforcement efforts, providing a comprehensive list of all pharmacies that DEA believes may be operating illegally could raise significant legal issues. In addition, the Administrative Procedure Act requires DEA to provide notice and an opportunity to be heard before DEA may take administrative action against a pharmacy's registration.

Shippers have a variety of resources to avoid business with illegal Internet pharmacies. Final decisions revoking DEA registrations are published in the Federal Register and are available on DEA's website. The National Association of Boards of Pharmacies (NABP) provides accreditation of Internet pharmacies and a service for the public, including shipping companies such as UPS, to verify that an Internet pharmacy is accredited. The accreditation program is Verified Internet Pharmacy Practice Sites (VIPPS). In addition, NABP provides a list of criteria which are indicators of a rogue Internet drug outlet. In the course of entering into business with an Internet pharmacy, shipping companies could conduct research, identifying accreditation or possible risk indicators, to ensure that the pharmacy opening an account with a shipping company is in compliance with the shipping company's terms of service, i.e., that shipments do not violate Federal, State, or local laws. These NABP resources are listed for information purposes only and do not reflect a determination of the absence of culpability of a party availing themselves of those resources.

UPS and other shippers should conduct appropriate due diligence on all accounts employees know or should know are being used to ship pharmaceuticals ordered online to determine whether the businesses are operating legally. For additional details see the non-prosecution agreement, Attachment A, and Attachment B.

*Question.* The press release also states "[f]rom 2003 through 2010, UPS was on notice, through some of its employees, that Internet pharmacies were using its services to distribute controlled substances and prescription drugs without valid prescriptions in violation of the law. ... Despite being on notice that this activity was occurring, UPS did not implement procedures to close the shipping accounts of Internet pharmacies."

I am not clear what, if any "official" notification was provided to UPS. Were they notified by State or local law enforcement or Federal law enforcement authorities that specific "Internet pharmacies" were using their shipping services? After learning about the suspicions of some of their employees, did UPS reach out to law enforcement authorities for confirmation about these pharmacies? In other words, how did the process work?

Answer. Please see the attached statement of facts, in particular paragraphs 5, 22, 24, and 25. UPS was notified by its own employees and met with the DEA and other law enforcement agencies between January 2004 and June of 2006 regarding the issue. (see Attachment A)

*Question.* More importantly, I am interested in what work is being done to collaborate with and provide information to all shippers moving forward, so that they can be partners in this effort? Are there existing relationships with UPS, DHL, FedEx, the USPS, and others, to provide them this important information and provide guidance in establishing the procedures that the press release mentions was lacking for UPS?

Answer. The Department of Justice is actively engaged throughout the country in the prosecution of rogue Internet pharmacies that dispense and distribute controlled substances in violation of the Controlled Substances Act. The Department has long-standing relationships with private shipping companies and the U.S. Postal Service and we are pleased with the steps UPS has taken to stop the use of its shipping services by illegal on-line pharmacies. Please see attached UPS Online Pharmacy Compliance Program as an example of procedures implemented to combat illegal Internet pharmacies. (see Attachment B)

*Question.* Could you discuss the compliance program that UPS is implementing pursuant to the Non-Prosecution Agreement; is it being developed and implemented with the assistance of the U.S. Attorney's office and/or the DEA and is there any requirement for continued oversight or reporting?

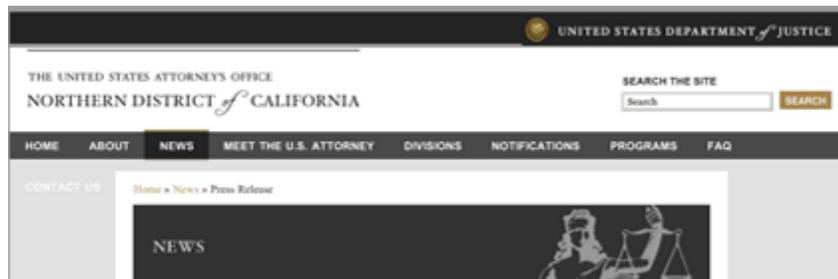
Does the Department intend to use the UPS compliance program as a model that other shippers will be encouraged to adopt?

Answer. The Department is hopeful that the leadership displayed by UPS through this compliance program will set the standard for the parcel delivery industry and will materially assist the Federal Government in its battle against illegal Internet pharmacies.

Please see the attached press release and the Non-Prosecution Agreement, the statement of facts and the UPS compliance program for additional information.

ATTACHMENTS—Press Release, Non-Prosecution Agreement, Agreed Statement of Facts, and UPS Online Pharmacy Compliance Program

THE UNITED STATES ATTORNEY'S OFFICE  
NORTHERN DISTRICT OF CALIFORNIA  
PRESS RELEASE



UPS Agrees To Forfeit \$40 Million In Payments From Illicit Online Pharmacies For Shipping Services

FOR IMMEDIATE RELEASE

March 29, 2013

SAN FRANCISCO.—United Parcel Service, Inc. (“UPS”) and the United States Attorney’s Office for the Northern District of California (“USAO–NDCA”) entered into a Non-Prosecution Agreement (“NPA”) today in which UPS agreed to forfeit \$40 million in payments it has received from illicit online pharmacies and to implement a compliance program designed to ensure that illegal online pharmacies will not be able to use UPS’s services to distribute drugs, U.S. Attorney Melinda Haag, Drug Enforcement Administration (DEA) Administrator Michele M. Leonhart, and Food

and Drug Administration (FDA) Director of the Office of Criminal Investigations John Roth announced.

UPS has cooperated fully with the investigation and has already taken steps to ensure that illegal Internet pharmacies can no longer use its services to ship drugs. These voluntary improvements will be strengthened by the compliance program UPS will implement as a condition of this NPA.

U.S. Attorney Melinda Haag commented: "We are pleased with the steps UPS has taken to stop the use of its shipping services by illegal on-line pharmacies. Good corporate citizens like UPS play an important role in halting the flow of illegal drugs that degrade our Nation's communities. We are hopeful that the leadership displayed by UPS through this compliance program will set the standard for the parcel delivery industry and will materially assist the Federal Government in its battle against illegal Internet pharmacies."

From 2003 through 2010, UPS was on notice, through some of its employees, that Internet pharmacies were using its services to distribute controlled substances and prescription drugs without valid prescriptions in violation of the law. Internet pharmacies operate illegally when they distribute controlled substances and prescription drugs that are not supported by valid prescriptions. A prescription based solely on a customer's completion of an on-line questionnaire is not valid. Despite being on notice that this activity was occurring, UPS did not implement procedures to close the shipping accounts of Internet pharmacies.

"DEA is aggressively targeting the diversion of controlled substances, as well as those who facilitate their unlawful distribution," said DEA Administrator Michele M. Leonhart. "This investigation is significant and DEA applauds UPS for working to strengthen and enhance its practices in order to prevent future drug diversion."

John Roth, Director of the FDA Office of Criminal Investigations added: "The results of this investigation will prompt a significant transformation of illicit Internet pharmacy shipping and distribution practices, limiting the chances of potentially unapproved, counterfeit or otherwise unsafe prescription medications from reaching U.S. consumers. The FDA is hopeful that the positive actions taken by UPS in this case will send a message to other shipping firms to put public health and safety above profits."

Kirstin M. Ault is the Assistant U.S. Attorney who is prosecuting the case with the assistance of Legal Technician Rawaty Yim. The prosecution is the result of an investigation by the Financial Investigative Team of the DEA, with the assistance of the FDA Office of Criminal Investigations. This investigation is part of USAO-NDCA's Health Care Fraud program and was initiated as an investigation with the Organized Crime and Drug Enforcement Task Force. Substantial assistance was provided by the North Carolina Board of Pharmacy.

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NON-PROSECUTION AGREEMENT



**U.S. Department of Justice**

*United States Attorney  
Northern District of California*

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*11th Floor, Federal Building (415) 436-7200  
450 Golden Gate Avenue, Box 36055  
San Francisco, California 94102-3495 FAX: (415) 436-7234*

March 29, 2013

Eugene Illovsky  
Morrison Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2842  
Eillovsky@mof.com

Re: *United Parcel Service*

Dear Mr. Illovsky:

This letter sets forth the Non-Prosecution Agreement ("Agreement") between the United States Department of Justice (the "Government") and United Parcel Service, Inc., a Delaware Corporation headquartered in Atlanta, Georgia, and any and all subsidiaries of United Parcel Service (collectively "UPS, Inc." or the "Company"). UPS, Inc., by its undersigned attorney, pursuant to the authority granted by UPS, Inc.'s Board of Directors, enters into this Agreement with the Government. As used in this Agreement, "UPS, Inc." shall be read to include UPS, Inc. and all of its subsidiaries, unless otherwise stated.

The Government has notified UPS, Inc. that, based upon an investigation by the Government and the Drug Enforcement Administration ("DEA"), in its view, UPS, Inc., engaged in the conduct described in Attachment A hereto. UPS, Inc. admits, acknowledges and accepts responsibility for the conduct set forth in Attachment A.

In exchange for a non-prosecution agreement, the parties have agreed to the following terms and conditions:

#### NON-PROSECUTION FOR CRIMINAL LIABILITY

1. In consideration of the Company's entering into this Agreement and its commitment to: (a) accept corporate responsibility for the conduct described in Attachment A; (b) forfeit \$40,000,000 to the United States; (c) enforce the Compliance Program set forth in Attachment B; and (d) otherwise comply with the terms of this Agreement, the Government agrees not to prosecute UPS, Inc. for (1) the conduct described in Attachment A; or (2) any other conduct relating to the transportation or distribution of controlled substances and prescription drugs for illegal Internet pharmacies from January 2002 through the date of this Agreement that was either the subject matter of the investigation that led to this Agreement or known to the Government as of the date of this Agreement, including but not limited to, conspiracy, 18 U.S.C. § 371, 21 U.S.C. § 846, 18 U.S.C. § 1956(h); distribution of controlled substances, 21 U.S.C. § 841(a)(1); money laundering, 18 U.S.C. §§ 1956 or 1957; and misbranding of pharmaceuticals, 21 U.S.C. §§ 331, *et seq.* This Paragraph does not provide any protection against prosecution for illegal activities, if any, committed in the future by UPS, Inc. or its subsidiaries, nor does it apply to any illegal conduct that may have occurred in the past which is not described in this Paragraph.

#### BREACH OF AGREEMENT

2. It is understood that if, in the 2 years following execution of this Agreement, the Government determines in the reasonable exercise of its sole discretion, that the Company or any of its employees, officers or directors: (a) has deliberately given false, incomplete, or misleading testimony or information in the investigation that led to this Agreement, (b) has committed any knowing and intentional criminal conduct relating to the distribution of controlled substances or prescription drugs by illegal Internet pharmacies after the date of this Agreement, or (c) has otherwise deliberately violated any provision of this Agreement, including that set forth in Attachment B, the Company shall, in the sole discretion of the Government, be subject to prosecution for any Federal criminal violation of which the Government has knowledge, including a prosecution based upon the conduct specified in Attachment A. Conduct by a UPS, Inc. employee who is not an officer or director will not constitute breach of this Agreement unless that employee acted in the course and scope of his or her employment, received the training concerning this agreement required by the Compliance Program contained in Attachment B, and intended to benefit the company.

3. The Company agrees that it is within the sole discretion of the Government to determine whether there has been a deliberate violation of this Agreement. The Company understands and agrees that the exercise of discretion by the Government under this Agreement is not reviewable by any court. In the event that the Government preliminarily determines that the Company has deliberately violated this Agreement, the Government shall provide written notice to the Company of that preliminary determination sufficient to notify the Company of the conduct that constitutes the breach and shall provide the Company with thirty calendar days from the date of that written notice in which to make a presentation to the Government to demonstrate that no deliberate breach has occurred, or to the extent applicable, that the breach has been cured, or that the Government should, in any event, neither revoke the Agreement nor prosecute the Company. The Government shall thereafter provide written notice to the Company of its final determination regarding whether a deliberate breach has occurred and has not been cured and whether the Government will revoke the Agreement.

4. UPS, Inc. further understands and agrees that any prosecution following such determination may be premised on any information provided by UPS, Inc. and its employees, officers and directors to the Government and any leads derived therefrom. UPS, Inc. agrees that, in any such proceeding, it will not seek to suppress the use of any such information, or any leads derived therefrom, under the United States Constitution, Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), or any other rule; that it will not contradict in any such proceeding the Agreed Statement of Facts in Attachment A; and that it will stipulate to the admissibility of the Agreed Statement of Facts in Attachment A. UPS, Inc. further agrees that it shall not contest the authenticity of documents and materials provided to the Government by UPS, Inc. and/or UPS, Inc.'s subsidiaries in the course of the Government's investigation, but UPS, Inc. otherwise may challenge the admissibility of any such materials in any prosecution of UPS, Inc. By signing this Agreement, UPS, Inc. waives all rights in the foregoing respects.

#### TOLLING OF THE STATUTE OF LIMITATIONS

5. UPS, Inc. agrees to toll and to exclude from any calculation of time the running of the statute of limitations for any criminal conduct relating to the distribution of controlled substances or prescription drugs by illegal Internet pharmacies for 2 years from the date of execution of this Agreement. By this Agreement, the Company expressly intends to and hereby does waive its rights to make a claim premised upon the statute of limitations, as well as any constitutional, statutory, or other claim concerning pre-indictment delay. Such waivers are knowing, voluntary, and in express reliance upon the advice of the Company's counsel.

#### ACCEPTANCE OF RESPONSIBILITY

6. UPS, Inc. accepts and acknowledges responsibility for the acts of its present and former employees, as set forth in the Agreed Statement of Facts in Attachment A. UPS, Inc. further agrees that the factual statements set forth in the Agreed Statement of Facts in Attachment A are accurate. UPS, Inc. condemns and does not condone the conduct set forth in the Agreed Statement of Facts in Attachment A, and has taken steps to prevent such conduct from occurring in the future, including the creation and implementation of the Corporate Compliance Agreement set forth in Attachment B.

#### COOPERATION

7. During the term of this Agreement, UPS, Inc. will continue to cooperate fully with the Government and the DEA in any ongoing investigation of individuals or entities who may have been involved in the distribution of controlled substances and prescription drugs by illegal Internet pharmacies, including the conduct described in Attachment A. UPS, Inc. agrees that its cooperation shall include, but is not limited to, the following:

a. timely provision to the Government and the DEA of all non-privileged documents and other materials, including documents and materials located outside the United States (and not otherwise prohibited from disclosure to the Government by foreign law), that the Government and the DEA may request; and

b. its best efforts upon sufficient notice to make available in a timely and voluntary manner to the Government and/or the DEA all present officers, directors and employees for sworn testimony before a Federal grand jury or in a Federal trial and interviews with Federal law enforcement authorities. Cooperation under this paragraph will include identification of witnesses not previously identified who, to the knowledge of UPS, Inc., may have material information regarding the matters under investigation.

8. UPS, Inc.'s obligation to cooperate pursuant to the preceding paragraph is not intended to apply if a prosecution by the Government is commenced against UPS, Inc. as a result of a breach of this Agreement.

9. Nothing in this Agreement is intended to request or require UPS, Inc. to waive its attorney-client privilege or work production protections and no such waiver shall be deemed effected by any provision herein.

10. With respect to any information, testimony, document, record, or tangible evidence provided to the Government pursuant to this Agreement, UPS, Inc. consents to any and all disclosures to other Government agencies, whether agencies of the United States or a foreign government, of such materials as the Government, in its sole discretion, shall deem appropriate.

## NOTICE OF COOPERATION

11. The Government agrees to bring to the attention of governmental authorities the facts and circumstances relating to the nature of the conduct underlying this Agreement, including the nature and quality of UPS, Inc.'s cooperation and remediation, upon request. By agreeing to provide this information to any such authorities, the Government is not agreeing to advocate on UPS, Inc.'s behalf, but rather is providing facts to be evaluated independently by those authorities.

## MONETARY PAYMENT

12. UPS, Inc. agrees to make the above-described \$40,000,000 payment to the Federal Government as a result of the conduct described in Attachment A. UPS, Inc. shall pay this sum by certified check or bank cashier's check made payable to the United States of America within five (5) business days of the date of execution of this Agreement by the parties. As a result of UPS, Inc.'s conduct, including the conduct set forth in Attachment A, the parties agree that the United States could institute a civil forfeiture action against certain funds held by UPS, Inc. and that such funds would be forfeitable pursuant to Title 21, United States Code, Section 881. UPS, Inc. hereby acknowledges that the forfeited amount was involved in the conduct described in Attachment A. UPS, Inc. hereby agrees that the funds paid by UPS, Inc. pursuant to this Agreement shall be considered substitute *res* for the purpose of administrative forfeiture to the United States pursuant to Title 21, United States Code, Section 881, and UPS, Inc. releases any and all claims it may have to such funds. The total amount paid is a final payment and shall not be refunded should the Government later determine that UPS, Inc. has breached this Agreement and commence a prosecution against UPS, Inc. Further, nothing in this Agreement shall be deemed an agreement by the Government that this amount is the maximum criminal fine or forfeiture that may be imposed in any such prosecution and the Government shall not be precluded in such a prosecution from arguing that the Court should impose a higher fine or forfeiture. The Government agrees, however, that in the event of a subsequent breach and prosecution, it will recommend to the Court that the amount paid pursuant to this Agreement be offset against whatever fine or forfeiture the Court shall impose as part of its judgment. UPS, Inc. understands that such a recommendation will not be binding on the Court. UPS, Inc. acknowledges that no tax deduction or insurance claim may be sought in connection with this payment.

## CORPORATE COMPLIANCE AGREEMENT

13. UPS, Inc. agrees to implement the Corporate Compliance Agreement set forth in Attachment B. UPS, Inc. will begin to implement the measures set forth in Attachment B within thirty (30) days of the date of execution of this Agreement by the parties. UPS, Inc. agrees that it will maintain these measures at least through the term of this Agreement.

## BASIS FOR AGREEMENT

14. The Government enters into this Agreement based upon the following facts and circumstances: (a) UPS, Inc.'s ongoing cooperation with the Government and the DEA since May of 2007; (b) UPS, Inc.'s willingness to accept responsibility for the conduct of its present and former officers and employees; (c) UPS, Inc. has undertaken, and has agreed to undertake, remedial measures to ensure that this conduct will not recur; and (d) UPS, Inc.'s demonstration of compliance with Federal drug and money laundering laws.

## STATEMENTS TO THE MEDIA AND PUBLIC

15. The Company and the Government agree that this Agreement will be disclosed to the public.

16. UPS, Inc. agrees that it will not make any public statement contradicting Attachment A. If the Government notifies the Company that it has preliminarily determined, in its sole discretion, that the Company has made any such contradictory statement, the Company may avoid a finding of breach of this Agreement by repudiating such statement, in a manner satisfactory to the Government, both to the recipients of such statement and to the Government within 48 hours after receipt of notice from the Government. The Company consents to the public release by the Government of any such repudiation. Consistent with the above, the Company may avail itself of any legal or factual arguments available to it in any litigation, investigation or proceeding (not involving the Government), as long as doing so does not otherwise violate any term of this Agreement. This paragraph is not intended to

apply to any statement made by any individual in the course of any actual or contemplated criminal, regulatory or administrative proceeding or civil case initiated by any governmental or private party against such individual.

TERM OF AGREEMENT

17. This Agreement shall be in effect for a period of 2 years from the date of its execution. UPS, Inc. may petition the Government to shorten the term of the Agreement after 1 year. The Government has sole discretion to determine whether a shorter term is warranted.

CORPORATE AUTHORITY

18. UPS, Inc. hereby warrants and represents that it is authorized to enter into this Agreement on behalf of itself and its subsidiaries, and that the person signing on behalf of UPS, Inc. has been granted authority by the UPS, Inc. Board of Directors to bind UPS, Inc. and its subsidiaries.

BINDING NATURE OF THE AGREEMENT

19. It is understood that this Agreement is binding on UPS, Inc. and the United States Attorney's Office for the Northern District of California, the United States Attorneys' Offices for each of the other ninety-three judicial districts of the United States and the United States Department of Justice, but that this Agreement does not bind any other Federal agencies, or any state or local enforcement or regulatory agencies. The Government will bring the cooperation of UPS, Inc. and its compliance with its obligations under this Agreement, its remedial actions and proactive measures to the attention of such agencies and authorities if requested to do so by UPS, Inc.

SUCCESSOR LIABILITY

20. UPS, Inc. agrees that in the event it sells, merges or transfers all or substantially all of its business operations as they exist during the term of this Agreement, whether such sale is structured as a stock or asset sale, merger, or transfer, it shall include in any contract for sale, merger or transfer provisions binding the purchaser or any successor-in-interest thereto to the obligations described in this Agreement. UPS, Inc. expressly understands that the protections provided under this Agreement shall not apply to any acquirer or successor entities unless and until such acquirer or successor formally adopts and accepts this Agreement.

NOTICE

21. Any notice to UPS, Inc. under this Agreement shall be given by personal delivery, overnight delivery by a recognized courier service, or registered or certified mail, addressed to the General Counsel of UPS, Inc., 55 Glenlake Parkway NE, Atlanta, GA 30328, with a copy to Eugene Illovsy, Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105.

REQUIRED SIGNATURES, AUTHORIZATION AND CORPORATE SEAL

22. By signing this Agreement, UPS, Inc.'s duly authorized representative and UPS, Inc.'s counsel acknowledge that the terms set forth above accurately reflect the parties' understanding of the Non-Prosecution Agreement between UPS, Inc. and the Government.

23. Two original copies of this Agreement shall be executed, one of which shall be delivered to the General Counsel of UPS, Inc., and one of which shall be delivered to Kirstin M. Ault, Assistant United States Attorney, Northern District of California.

COMPLETE AGREEMENT

24. This Agreement sets forth the terms of the Non-Prosecution Agreement between UPS, Inc. and the Government. No promises, agreements, or conditions have been entered into other than those set forth in this Agreement. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral.

25. No amendments or modifications to this Agreement shall be valid unless they are in writing and signed by the Government, the attorneys for UPS, Inc., and a duly authorized representative of UPS, Inc.

**FOR THE UNITED STATES :**

DATED: 3/29/13

MELINDA HAAG  
United States Attorney



KIRSTIN M. AULT  
Assistant United States Attorney

**FOR UNITED PARCEL SERVICE:**

DATED: 3/29/13



TERI PLUMMER MCCLURE  
Senior Vice President of Legal,  
Compliance and Public Affairs,  
General Counsel & Corporate Secretary

DATED: 3/29/13



EUGENE ILLOVSKY  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, California 94105  
(415) 268-7000

**ATTACHMENT A**

**AGREED STATEMENT OF FACTS**

1. United Parcel Service, Inc. ("UPS") is a corporation organized under the laws of Ohio and headquartered in Atlanta, Georgia. UPS operates as a common carrier.
2. The provision of UPS's services is governed by the UPS Tariff/Terms and Conditions of Service for Package Shipments in the United States which constitutes part of the shipping contract between UPS and shippers. In relevant part, the UPS Tariff/Terms and Conditions of Service currently states:
  - 3.14 Pharmaceuticals  
The shipper shall comply with and shall ensure that each shipment containing pharmaceutical products complies with all applicable Federal, State, provincial, and local laws and regulations governing the shipment or tender of shipment of pharmaceutical products.
  - 3.3 Prohibited by Law  
No service shall be rendered by UPS in the transportation of any shipment that is prohibited by applicable law or regulation of any Federal, State, provincial, or local government in the origin or destination country. It is the responsibility of the shipper to ensure that a shipment tendered to UPS, and any UPS Shipping System entry that the shipper prepares for that shipment, does not violate any Federal, State, provincial, or local laws or regulations applicable to the shipment.
3. Beginning in approximately 1999, companies began offering consumers controlled substances and prescription drugs based on the provision of information over

the Internet. These companies came to be known as Internet pharmacies. Some Internet pharmacies illegally distribute controlled substances and prescription drugs because customers are allowed to obtain these drugs without a valid prescription authorized by a licensed physician acting within the usual scope of professional medical practice who is providing the drugs for a valid medical purpose. UPS provided transportation and related services to some of those entities.

4. By approximately January 2004, UPS was on notice that many Internet pharmacies operated outside the law. Some of those illegally-operating Internet pharmacies were UPS customers.

5. On five occasions in January 2004 through May 2006, UPS's Corporate Security Manager and a UPS Public Affairs Vice President met with the DEA and other law enforcement agencies to discuss the parcel carrier industry's and UPS's role in assisting Federal authorities in curtailing illegal Internet pharmacies. In one such meeting on June 23, 2005, law enforcement discussed the problem of illicit pharmaceutical sales over the Internet and the traffickers' reliance on key business sectors, especially the express parcel carriers for delivery of packages to customers. The agents further discussed relevant laws controlling the legitimate sales of controlled substances in the United States and possible actions to prevent the illicit use of shipping services by Internet pharmacies.

6. On two occasions, UPS's Corporate Security Manager testified before Congress regarding the illegal sale of controlled substances over the Internet and UPS's efforts to ensure that UPS was not transporting illegally-sold controlled substances and prescription drugs. The first testimony occurred on July 22, 2004, before the Senate's Governmental Affairs Permanent Subcommittee on Investigations and the second on December 13, 2005, before the House of Representatives' Oversight and Investigations Committee on Energy and Commerce. During both sessions, the Corporate Security Manager testified: "It is the clear policy of UPS, as stated in our tariff, that illegal products of any type are prohibited from being transported through our system."

7. On December 13, 2005, the Corporate Security Manager testified before the House Subcommittee on Oversight and Investigations Committee on Energy and Commerce and stated, "We support legislation that would establish clear standards for Internet pharmacies. In particular, we support requiring Internet pharmacies to be licensed . . . . In addition, we support provisions that would prohibit Internet sales of pharmaceuticals to individuals without a prescription obtained from a practitioner with a qualifying medical relationship, which requires at least one in-person medical evaluation . . . . As a carrier, we can take actions such as those I have described in conjunction with law enforcement agencies, but we do not have the independent ability to judge the validity of a prescription or the legitimacy of a particular drug."

8. A group of five UPS marketing employees within the Southeast Region, one of eight UPS regions, began in approximately 2002 to research business opportunities within the healthcare industry. They identified five distinct sectors that included medical and hospital equipment, laboratories/research, healthcare providers, pharmaceuticals, and hospitals as opportunities for growth in the southeast part of the United States. In 2003, these marketing employees created a dedicated sales team of approximately twelve sales employees, and launched a Southeast Region healthcare marketing initiative to target and win this healthcare business. This team consisted of nine Account Executives and five National Account Executives (collectively "HCAEs"), as well as a marketing supervisor ("Marketing Supervisor"). This group identified Internet pharmacies as a sub-sector within the healthcare industry.

9. In a September 4, 2003 e-mail, a HCAE described opportunities in the Internet pharmaceutical sector, how Internet pharmacies operated, and the high shipping volume and revenue potential present with these accounts. The HCAE noted the importance of winning these accounts from the customer's current carrier.

10. In an email dated December 10, 2003, the Marketing Supervisor received from a Florida marketing and sales employee a copy of a December 4, 2003 Miami Herald news article describing the indictment of a South Florida owner of an Internet pharmacy that sold controlled substances "illegally by not requiring customers to be physically examined by doctors." The employee advised the Marketing Supervisor that if online pharmacies were in violation of state or Federal laws, UPS may want to discontinue pursuing the business.

11. On December 16, 2003, an Internet pharmacy owner informed a HCAE that its business was closing "due to the recent policies enacted by the Federal Government", and that "this industry has been flooded with companies that offer easy access to narcotics and other dangerous medications." In response to this email, a marketing manager in the Southeast Region ("Marketing Manager") wrote to the

Marketing Supervisor and a HCAE that “it appears that we are making the right decision to remove the on-line pharmacies from the Critical Customer targets.”

12. In a December 19, 2003 email, the Marketing Supervisor wrote to the Marketing Manager, “[t]his issue [about illegally operating Internet pharmacies] has also heated up in the press—I heard the end of a report on NPR this week—both UPS and FedEx were brought into question on this issue in the report.” The Marketing Supervisor further stated that the Southeast Region healthcare marketing initiative needed to make sure it was only targeting legitimate Internet pharmacies. The Marketing Supervisor also stated in the email that he had learned that the National Association of Boards of Pharmacies (“NABP”) had developed a Verified Internet Pharmacy Practice Sites (“VIPPS”) program, and that through this program, the NABP certified Internet pharmacies as legitimate, but that the process was new and only 14 Internet pharmacies had been certified. The Marketing Supervisor further stated that NABP also lists “rules of thumb” for identifying whether or not an Internet pharmacy is legitimate. The Marketing Supervisor wrote that they would probably want to do their own research on their current customers, and ones UPS planned to target, to determine whether they seemed to be doing anything illicit.

13. In January of 2004, marketing employees in the Southeast Region involved in the healthcare marketing initiative developed a Southeast Region Healthcare Reference Guide (the “Guide”) that provided an overview of the healthcare industry based on publicly available information. The Guide stated that illegitimate Internet pharmacies were being shut down by the Federal Government where no doctor visit was required and/or the drugs were imported illegally.

14. In January of 2004, marketing employees in the Southeast Region provided training about the Southeast Region Healthcare Initiative to Southeast Region Area Sales Managers who supervised HCAEs. This training identified suspiciously-operated Internet pharmacies as those for which there was no valid doctor patient relationship and required only an online or phone consultation with a doctor, the sole means of communication with the consumer was by e-mail, the site did not provide toll-free numbers, the consumer could not contact the pharmacist with questions, and noted that many pharmacies that sold a limited number of medications (particularly “lifestyle” drugs) were not legitimate. The talking points to the training materials stated that there must be a valid pre-existing doctor-patient relationship, that HCAEs should not target any Internet pharmacy that violated this rule, and that UPS did not want to be targeted as “an enabler of illegal activity.”

15. After the training, on January 9, 2004, the Marketing Supervisor forwarded a January 9, 2004 Wall Street Journal article to the HCAEs and their Area Sales Managers stating that, as discussed in the training, the Southeast Region Healthcare Initiative needed to make sure that it was not targeting any online pharmacies that did not require a prescription resulting from a valid doctor-patient examination. The email stated that online pharmacies that fulfilled prescriptions based on a questionnaire only, or a questionnaire and phone consultation with an online pharmacy supplied doctor were not considered legal. This email was forwarded to a UPS Vice President of Sales and several Southeast Region district sales directors.

16. In February of 2004, the Marketing Supervisor requested help in quantifying the sales opportunity from online pharmacies in the Southeast Region, “both legit and not legit,” to find out how much revenue UPS would be walking away from if the company decided not to target these businesses. Notes from a March 19, 2004 Southeast Region Healthcare Initiative conference call indicated that the HCAEs were told that they could continue to sell UPS services to Internet pharmacies as long as they did not actively target these businesses. According to the notes of the call, the Southeast Region Healthcare Initiative did not want the HCAEs to target Internet pharmacies in part because they were being shut down by law enforcement and it would be a waste of time and resources to win a customer that would soon go out of business.

17. On June 11, 2004, the Marketing Supervisor conducted background research on two Internet pharmacies for a HCAE in connection with attempting to win their business. The Marketing Supervisor identified one as prescribing drugs based on a phone consultation with a doctor provided by the Internet pharmacy and stated “Our stance has been that if the online pharmacy does not require you to have seen the prescribing doctor in person, we will not support any special [discount] pricing to get the business. If you can win it through regular district pricing or POS, [Point of Sale] that is fine. But, Marketing will not support any pricing appeals.”

18. On that same date, a UPS marketing analyst sent an internal memorandum to the South Florida district sales director, an Area Sales Manager and a Southeast Region Marketing Director discussing the Internet pharmacy industry in South Florida and how UPS’s revenue had been impacted by law enforcement and competi-

tive activity. According to the analyst, "Most accounts, if not all of the accounts we had have gone out of business due to illegal practice within the pharmaceutical industry." The memorandum listed four Internet pharmacies that were closed due to illegal dispensing of prescription medication and concluded that South Florida's business plan results for 2004 were impacted by these events. When a HCAE attempted to reestablish a shipping account for one of the illegal Internet pharmacies identified in this memorandum, a marketing specialist reminded the HCAE that he could attempt to win the business but could not provide discounted pricing.

19. In February 2005, marketing employees in the Southeast Region provided training to HCAEs. The training materials identified pharmacies that require face-to-face visits as a "best practice." Nevertheless, accounts were established for Internet pharmacies that did not meet this best practice. The training materials instructed the HCAEs that they could expect minimal region and corporate pricing support for Internet pharmacies that did not require face-to-face visits.

20. On May 18, 2005, a marketing analyst sent an email to a HCAE and a marketing employee listing questions for the HCAE to ask a potential Internet pharmacy customer. The email stated that a Florida-based Internet pharmacy was required to have an Internet Pharmacy Permit from the Florida Board of Pharmacy, and that Florida, Kentucky and Nevada had laws specifically regulating Internet pharmacies shipping or operating in their States. The email included a suggestion to call the Board of Pharmacy to verify a customer but that "this could however lead to us being a whistle blower on a customer."

21. Appropriate due diligence was not conducted on all accounts UPS employees knew or should have known were being used to ship pharmaceuticals ordered online to determine whether the businesses were operating legally. For example, on August 18, 2005, a UPS sales employee received a sales lead regarding United Care Pharmacy ("UCP"), a customer that had requested a meeting with a UPS representative. Subsequently, the sales employee secured UCP's business after meeting with the customer at the customer's location, and receiving information from the customer about UCP's business model. UCP was a fulfillment pharmacy that filled orders exclusively for Internet pharmacies. This account was established in late September 2005. Although the sales employee knew that UCP was shipping pharmaceuticals for Internet pharmacies, neither the sales employee nor others at UPS conducted research into UCP's business practices. Had UPS employees conducted due diligence on UCP, they would have learned that UCP was not VIPPS certified, was not registered in all States to which it shipped controlled substances and prescription drugs, and would be filling orders for Internet pharmacies based solely upon those pharmacies' customers' completion of an online questionnaire.

22. On September 30, 2005, the Kentucky Bureau of Investigations Drug Unit sent to a UPS district security manager and others a list of illegal pharmacies that shipped to their State. An affiliate of UCP was one of the illegal Internet pharmacies included on this list. UPS shipped packages from this entity into Kentucky after September 30, 2005.

23. In November of 2005, a UPS sales employee for UCP and his immediate supervisor traveled with the owner of UCP to Costa Rica. This trip was approved and paid for by UPS. While in Costa Rica, the sales employee and his immediate supervisor learned about the business model used by Internet pharmacies, including those for which UCP shipped pharmaceuticals. This business model was based on the fulfillment of prescriptions based upon either an online questionnaire or a telephone call where no valid doctor-patient relationship existed. The sales employee and his immediate supervisor established subaccounts under UCP's master account for Internet pharmacies that were located outside of the United States. At least one of the Internet pharmacies established as a subaccount under UCP shipped from three different locations in the State of Florida.

24. UCP was closed by State law enforcement in March 2006 for illegally distributing controlled substances for Internet pharmacies. UPS shipped packages for various offshore Internet pharmacies under UCP's master UPS shipping account after March 2006. UPS continued to ship packages under UCP's account until April 20, 2007, when a UPS District Controller for the North Carolina District advised the UPS sales employee and his immediate supervisor that UCP's leadership had been arrested and that the account needed to be suspended immediately.

25. On or about August 30, 2005, a UPS Southeast Region security manager received a fax from a group called the Southwest Drug Task Force in Big Stone Gap, Virginia. It stated in relevant part:

We the members of the Southwest Virginia Drug Task Force and other Wise County Virginia law enforcement officials feel a problem exist in our area and in other areas that your company has been made aware of the

problem. Our area has been overwhelmed in the past year with pharmaceutical drugs being ordered over the Internet or by phone. Companies such as yours and other companies are in the delivery service business are delivering these drugs into our area.

One problem, which concerns us, is delivery drivers are delivering packages to the same person who is using several different names. Delivery drivers are allowing these packages to be picked up in parking lots, and beside the highway and not making deliveries to the address listed on the package.

We are concerned as to the health and safety of the citizens in this area. We are concerned that these drugs many of which are mind altering pain medication and nerve medication are being misused, and abused by citizens. These citizens then may drive vehicles, and cause accidents.

They may become so addicted these medications they commit property crimes such as larceny, burglary, and robbery to obtain money to pay for these drugs, which are delivered COD by delivery companies.

For that reason we respectfully request steps be taken by your company to help correct this problem. We request your company suspend all shipments of drugs to subjects, or residences that are suspicious in nature. Your drivers and managers already know who these people and locations are. That drugs be shipped in separate and distinctive packaging. That your company requires proof of identity of any recipient of packages containing drugs. That packages containing drugs not be delivered to any location other than a residence or place of business.

Most of all we request officials of your company join local law enforcement in joint announcements in newspapers, radio and television making the public aware of the fact obtaining drugs over the Internet or by phone is not legal. That local law enforcement and your company are joining forces to make sure the public safety is watched after. And anyone who is caught obtaining these drugs will be arrested and prosecuted to the fullest extent of the law. We hope your company will join us in this effort and we can have your company beside us, talking with us as a partner and not being identified as part of the problem.

This fax was circulated to, among others, UPS's Corporate Security Manager and a Vice President of Public Affairs. UPS delivered packages in Virginia shipped by Internet pharmacies after receiving this request from the Southwest Virginia Drug Task Force.

26. UPS offered certain Internet pharmacies C.O.D. Enhancement Services. Through these services, C.O.D. ("Collect On Delivery") payments for thousands of packages shipped to individual Internet pharmacy customers were consolidated and deposited into a UPS bank account and then available funds were electronically transferred to the bank accounts of the Internet pharmacy shippers. In a June 8, 2005 email, the Marketing Supervisor wrote to a Vice President of Sales, a Marketing Manager, and a Business Development Manager at UPS Capital, in relevant part:

UPS Capital did in fact withdraw COD Automatic from three online pharmacy accounts in SFL. They were concerned about the financial risk of serving these pharmacies due to the history of these types of businesses getting shut down by the Government. When UPS Capital withdrew the COD Automatic, these accounts withdrew their small package business from UPS. These accounts were producing an average of \$3,500—\$5,000 per day before their accounts were closed in May.

[Name Redacted] does not feel that UPS Capital is exposing themselves to a high degree of risk by serving online pharmacy accounts, and he is in favor of continuing to do business with them.

27. UPS, through some of its employees, was on notice that Internet pharmacies violated the law when distributing controlled substances and prescription drugs without a valid prescription. Despite being on notice that such Internet pharmacies were using its services, UPS did not implement procedures to close the accounts of those pharmacies, permitting them to ship controlled substances and prescription drugs from 2003 to 2010.

## ATTACHMENT B

## UPS ONLINE PHARMACY COMPLIANCE PROGRAM

The following United Parcel Service, Inc. ("UPS") Online Pharmacy Compliance Program (hereinafter "Compliance Program") has been prepared pursuant to a Non-Prosecution Agreement dated this same date between UPS (the "Company") and the United States Attorney's Office for the Northern District of California ("United States" or "the Government"). Compliance with all the terms and standards of the Compliance Program is a condition of the Non-Prosecution Agreement.

## I. APPLICABILITY AND PURPOSE

A. The Compliance Program applies to the Company's small package transportation service for packages containing prescription drugs shipped by or on behalf of online pharmacies to customers. The purpose of the Compliance Program is to ensure (1) that the Company does not intentionally or knowingly pursue the business of online pharmacies that are violating state and Federal laws regarding the distribution of prescription pharmaceuticals and (2) that the Company has established processes for detecting, reporting to law enforcement, and closing the accounts of online pharmacies that it becomes aware are violating State and Federal laws regarding the distribution of prescription pharmaceuticals. The terms "online pharmacy" and "OLP" are herein defined as: a) an internet website that permits a consumer to obtain prescription drugs without any written prescription, or b) a pharmacy that provides prescription drugs to consumers where the prescription was issued solely through the completion of an on-line questionnaire, without an in-person medical evaluation. The term does not include those persons or entities excluded from the on-line pharmacy definition pursuant to 21 C.F.R. § 1300.04(h).

B. The Compliance Program is not intended to replace any other United States statute or regulation.

C. This Compliance Program shall be incorporated into the Non-Prosecution Agreement by reference, and compliance with the terms of the Compliance Program will be a condition of the Non-Prosecution Agreement. Deliberate, intentional or knowing failure to comply with any part of this Compliance Program may be a basis on which the Government may seek to revoke or modify the Non-Prosecution Agreement.

D. Any documents required by this Compliance Program shall be provided to the designated signatory for the Government upon request. The Government agrees that such documents will be treated as proprietary records that may contain privileged and confidential commercial or financial information.

E. Any proposed modifications to this Compliance Program must be made in writing and signed by the Company and the designated signatory for the Government.

F. The Government recognizes that the Company has a contract with the United States Postal Service ("USPS") under which the Company provides domestic air transportation for USPS express shipments and does not pick up from the shipper or deliver to the recipient. The Government acknowledges that the Company has no responsibility for packages tendered to the USPS for which the Company is only providing air transportation services.

## II. THE COMPLIANCE PROGRAM

As part of the Compliance Program, the Company shall implement the following requirements:

*A. Online Pharmacy (OLP) Compliance Officer*

1. Within 60 days of signing the Non-Prosecution Agreement, the Company shall designate an OLP Compliance Officer. The OLP Compliance Officer shall communicate directly and make reports directly to the Chief Executive Officer and the Audit Committee of the Board of Directors on matters relating to this Compliance Program. The OLP Compliance Officer shall be tasked with responsibility for the Compliance Program.

2. The OLP Compliance Officer shall be responsible for coordinating with the Program Auditor, as more fully described below; developing and implementing all of the processes described herein, including those recommended or developed in consultation with the Program Auditor; designing and implementing training programs; ensuring that reports of potentially unlawful activity by OLP shippers are investigated; ensuring that audits and surveys are carried out as required; ensuring that all Company documents and records are properly maintained; and ensuring that all Company reports required under this Compliance Program are made on a timely basis.

3. The OLP Compliance Officer will cause a procedure to be established that requires all officers, managers, and employees of the Company involved in the transportation of prescription pharmaceuticals to notify the OLP Compliance Officer of any violations of applicable requirements of this Compliance Program, and to cooperate fully with the Program Auditor and the United States in carrying out their auditing and oversight functions required by applicable law and this Non-Prosecution Agreement. The Company agrees to not retaliate against any officer, manager or employee solely for making any such report.

4. The OLP Compliance Officer position must be filled by an individual who possesses the authority to ensure full implementation of this Compliance Program, and who is thoroughly familiar with the requirements of this Compliance Program.

5. The OLP Compliance Officer shall be authorized to access all records, documents, and facilities throughout the Company's organization for the purpose of implementing this Compliance Program.

6. The OLP Compliance Officer shall take all reasonable steps to ensure the employee cooperation during all activities required by this Compliance Program. The Compliance Officer shall ensure that the Program Auditor and any other inspection, auditing or monitoring personnel involved in the auditing of the Company's operations under this Compliance Program has complete unrestricted access to all areas, documentation, personnel and material equipment necessary to perform its function under this Compliance Program. Private locations for one-on-one interviews between employees and various inspection, auditing or monitoring personnel shall be provided, as needed.

7. The OLP Compliance Officer may designate one or more individuals to assist in the execution of his/her responsibilities.

8. Any change in personnel designated as the OLP Compliance Officer must be reported within thirty (30) days to the designated signatory of the Government.

#### *B. OLP Compliance Officer Responsibilities*

The OLP Compliance Officer is required to cause the following to occur:

1. Develop and provide training regarding OLPs oriented for all employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages, and relevant sales, security, revenue operations, and any other groups identified by the Company;

2. Develop and provide training regarding OLPs to be included as part of new hire training given to all employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages and relevant sales, security, revenue operations, and any other groups identified by the Company;

3. Monitor and validate that the training is being given;

4. Develop and implement channels whereby employees can report instances of potentially unlawful activity by prescription pharmaceutical shippers;

5. Develop and implement a process for the investigation of reports of potentially unlawful activity by prescription pharmaceutical shippers, including anonymous reporting;

6. Review reports of investigation, and where warranted, ensure that appropriate action has been taken and that referrals have been made to law enforcement;

7. Oversee the implementation and operation of the Compliance Program;

8. Act as a principal point of contact for law enforcement and regulatory officials relating to OLP matters.

#### *C. OLP Compliance Officer Reporting Responsibilities*

1. The OLP Compliance Officer shall make quarterly reports to the Company's Chief Executive Officer concerning compliance with this Compliance Program. Annually, the OLP Compliance Officer shall provide a summary of these reports to the Audit Committee of the Company's Board of Directors. All issues of non-compliance will be communicated, along with any corrective action taken. Copies of these reports will be provided to the designated signatory of the Government. The Government agrees that such reports will be treated as proprietary records that may contain privileged and confidential commercial or financial information.

2. The OLP Compliance Officer shall ensure immediate notification to the designated signatory of the Government of any circumstances whereby the Company fails to provide resources necessary to support this Compliance Program.

#### *D. Program Auditor*

1. Within thirty (30) days following the signing of the Non-Prosecution Agreement, the Company shall nominate a Compliance Program Auditor ("Program Auditor") who meets the qualifications below to conduct the activities described in this Compliance Program. The nomination shall be made in writing to the signatories below. The Government will notify the Company in writing of its approval or dis-

approval within thirty (30) days, unless additional time for evaluation is requested in writing. The nominee shall be approved if the Government fails to provide notice within the period. The Government's approval shall not be unreasonably withheld.

2. Qualified candidates for the position must have expertise and competence in the regulatory programs under Federal and State laws relating to the distribution and shipment of prescription pharmaceuticals. The Program Auditor shall also have sufficient expertise and competence to assess whether the Company has adequate systems in place to assess Company compliance with the Compliance Program, correct non-compliance and prevent future non-compliance. The Company and the Government acknowledge that the functions of the Program Auditor may, by mutual agreement, be fulfilled by one or more individuals.

3. The Program Auditor must exercise independent judgment. The Company and the Program Auditor shall disclose to the Government any past, existing or planned future contractual relationships between the Program Auditor and the Company or the Company's parent company, subsidiaries, or affiliated business entities (other than the relationship contemplated by this Compliance Program).

4. If the Government determines that the proposed Program Auditor does not meet the qualifications set forth in the previous paragraphs, or that past, existing or planned future relationships with the Program Auditor would affect the Program Auditor's ability to exercise the independent judgment and discipline required to conduct the Compliance Program review and evaluation, such Program Auditor shall be disapproved and another Program Auditor shall be proposed by the Company within thirty (30) days of the Company's receipt of the disapproval.

5. Within one hundred and eighty (180) days of the signing of the Non-Prosecution Agreement, the Company shall implement all training and reporting processes and procedures discussed in Sections II.E–G, inclusive. One hundred eighty (180) days following the signing of the Non-Prosecution Agreement, the Company shall submit to the Government a written Compliance Program Implementation Certification that describes the steps the Company has undertaken to meet the requirements of this Compliance Agreement.

6. Upon submission of the Compliance Program Implementation Certification, the Program Auditor shall review the Company's implementation of the processes and procedures set forth in Sections II.E–G and the Company's attainment of the goals set forth in Paragraph I.A of this Compliance Program. No later than ninety (90) days following the commencement of such review, the Program Auditor shall generate a Compliance Confirmation Report ("Report") addressing the results of the review. The Report shall be submitted to the Company upon its completion. The Report shall be submitted to the Government fourteen (14) days after submission to the Company.

7. The Report shall present the following information:

- a. Review scope, including the time period covered by the review;
- b. The date(s) the on-site portion of the review was conducted;
- c. Identification of the review team members;
- d. Identification of the company representatives and regulatory personnel observing the review;
- e. The distribution list for the Report;
- f. A summary of the review process, including any obstacles encountered;
- g. Findings, including whether the Company has implemented the processes and procedures set forth in Sections II.E–G and attained the goals set forth in Section I.A of this Compliance Program;
- h. Recommendations, if any, for measures to improve the processes and procedures undertaken by the Company pursuant to Sections II.E–G and to assist the Company in achieving the goals set forth in Section I.A; and
- i. Certification by the Program Auditor that the review was conducted in accordance with this document.

8. The Government acknowledges that any processes and procedures recommended by the Program Auditor:

- a. Must be consistent with the Health Insurance Portability and Accountability Act of 1996 (Public Law 104–191) ("HIPAA");
- b. Should not place an unreasonable burden on the ability to ship validly obtained pharmaceuticals to consumers;
- c. Should not place an unreasonable burden on the ability to ship other goods to consumers; and
- d. Must be consistent with Federal laws applicable to carriers.

9. If recommendations are made in the Report pursuant to section II.D.7.h, the Company will implement such recommendations and notify the Government of implementation; provided, however, if the Company disagrees with a recommendation, it will notify the Government of its disagreement and non-implementation within

thirty (30) days of receipt of the Report. The Government will review the recommendation, in consultation with the Company and Program Auditor, and after such consultation, may relieve the Company from implementation. If the Government does not relieve the Company from implementation, the Company may file a miscellaneous case in the U.S. District Court from the Northern District of California, to seek a determination as to whether the Company must implement the recommendation. The parties consent to proceed before a United State Magistrate Judge in such case, and agree that the Magistrate Judge's decision shall be final and binding upon the parties.

#### *E. Training*

The Company will conduct OLP training for employees, as determined by the OLP Compliance Officer.

1. The training should be offered to employees and managers engaged in pick-up and delivery of prescription pharmaceutical packages and relevant sales, security, revenue operations, and other groups identified by the Company, through channels used to communicate significant matters related to policies, procedures and practices.

2. As part of new hire training, new employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages and relevant sales, security and revenue operations, and any other organizations identified by the Company, will be given OLP training.

3. Training will be targeted to reflect how different employees may encounter potentially unlawful OLPs.

4. All training shall include, at a minimum, the following elements:

- a. An overview of OLPs;
- b. A discussion of "red flags" appropriate to the audience being trained that may be indicative of potentially unlawful OLPs;
- c. Information on how to report a potentially unlawful OLP to the OLP Compliance Officer;
- d. A statement consistent with II.A.3 above, that there will be no retaliation solely for making a report of a potentially unlawful OLP.
- e. Information concerning the existence of the Non-Prosecution Agreement and the general terms of the Compliance Program.

5. Various training methods and materials may be used, such as group presentations; videos; online interactive training modules and internal website publications.

6. Records must be kept of all training, including the dates, locations, names and positions of the participants and attendees, and the substance of the training, including any training materials.

#### *F. Reports of Potentially Unlawful Activity by OLPs*

1. All reports of potentially unlawful activity by prescription pharmaceutical shippers reported to the OLP Compliance Officer shall be investigated by the Company. Investigations should typically be completed within 30 days of receipt.

2. In addition, any issues regarding prescription pharmaceutical shippers that are reported through existing Company reporting channels, such as the Company's Help Line, shall be forwarded to the OLP Compliance Officer for investigation.

3. Investigations may include one or more of the following elements:

- a. Internet or other research on the shipper;
- b. Review of the account's shipment history, volume, credit history, related accounts and other relevant Company information;
- c. Interviews with Company personnel familiar with the shipper and/or shipments;
- d. Consultation with Federal, state or local law enforcement;
- e. Site visits to the shipping location;
- f. Requests for licensure information from the shipper.

4. If, as a result of the Company's investigation, the Company concludes that the shipper is in violation of the UPS Tariff/Terms and Conditions of Service governing the shipment of pharmaceuticals, the Company will forward the information to local DEA and close the shipper's account.

5. At the conclusion of an investigation, the OLP Compliance Officer shall ensure that a Summary of Investigation has been prepared. The Summary of Investigation shall include:

- a. the identity of the person making the report (unless reported anonymously);
- b. the date the report was made;
- c. a synopsis of the investigation;

- d. action taken, and, if no action taken, the rationale;
- e. a statement of whether the matter was reported to law enforcement;
- f. remedial actions taken to minimize recurrence.

6. Any materials collected or created as part of the investigation shall be maintained with the summary.

*G. Reporting by the Company to Federal Authorities*

The Company will report to local DEA any shipper that the Company believes is delivering controlled substances in violation of the Controlled Substances Act, 21 U.S.C. § 801, et seq., or other laws governing the shipment of pharmaceuticals.

### III. NON-COMPLIANCE

This Compliance Program does not in any way release the Company from complying with any applicable state or Federal statutes and/or regulations, and does not limit imposition of any sanctions, penalties, or any other actions, available under those State or Federal statutes and regulations. The Compliance Program shall be part of the Non-Prosecution Agreement and adherence to it will be an enforceable condition. Deliberate, intentional or knowing failure to comply with any part of this Compliance Program (including but not limited to refusal to pay valid charges for the Program Auditor and failure to provide the Program Auditor access to facilities, personnel or documents as provided in this Compliance Program) may be a violation of the Non-Prosecution Agreement and may be grounds for the revocation or modification of the Non-Prosecution Agreement. Should the Government seek to revoke or modify the Non-Prosecution Agreement based on the Company's refusal to pay valid charges for the Program Auditor and/or its failure to provide the Program Auditor access to facilities, personnel, or documents, and/or as a result of any disagreement regarding any of the provisions of this Compliance Program, the Company shall have the right to contest the reasonableness of such revocation or modification.

### IV. DOCUMENTATION AVAILABLE FOR INSPECTION

The OLP Compliance Officer shall ensure that all documentation required by this Compliance Program is maintained and available for inspection by the Program Auditor and a designated representative of the Government.

### V. TERM

This Compliance Program shall be in effect for the term of the Non-Prosecution Agreement.

### VI. SELF-ENFORCEMENT

The Company further agrees that it will undertake and implement the necessary procedures to ensure that this Compliance Program is diligently complied with by all employees, managers, and other employees during the term of the Non-Prosecution Agreement.

### VII. REVISIONS/MODIFICATIONS

The requirements of this Compliance Program, including the dates and time periods mentioned herein, shall be strictly complied with. Should the Company be unable to comply with any of the deadlines, the Company shall immediately notify the designated representative of the Government in writing of the reasons for non-compliance.

### VIII. REPORTS

All reports, documents and correspondence required under this Compliance Program to be sent to the Government shall be sent to the following offices:

1. U.S. Attorney's Office  
Northern District of California  
ATTN: Kirstin Ault  
450 Golden Gate Avenue, 11th Floor  
San Francisco, CA 94102
2. Drug Enforcement Administration  
ATTN: Deputy Assistant Administrator Office of Diversion Control  
8701 Morrisette Drive  
Springfield, VA 22152

3. Food and Drug Administration—Office of Criminal Investigations  
Special Agent in Charge  
Investigative Operations Division Headquarters  
7500 Standish Place, Suite 250N  
Rockville, MD 20855  
(240) 276-9500

All reports, documents, notices and correspondence from the Government to the Company concerning this Compliance Program shall be sent to the following office:

Eugene Illovsky  
Morrison Foerster  
425 Market Street  
San Francisco, CA 94105

IX. CERTIFICATIONS

The Company has read this Compliance Program carefully and understands it thoroughly. The Company enters into this Compliance Program knowingly and voluntarily, and therefore agree to abide by its terms. By her signature below, the corporate representative agrees that she is duly authorized by the Company's Board of Directors to enter into and comply with all of the provisions of this Non-Prosecution Agreement.

DATED: 3/29/13

UNITED PARCEL SERVICE, INC.



TERI PLUMMER MCCLURE  
Senior Vice President of Legal,  
Compliance and Public Affairs  
General Counsel & Corporate Secretary

As counsel for UNITED PARCEL SERVICE, INC., I have discussed with my corporate client and its duly authorized representative the terms of this Compliance Program and have fully explained its requirements. I have no reason to doubt that my client is knowingly and voluntarily entering into this Compliance Program.

DATED: 3/29/13



EUGENE ILLOVSKY  
Counsel for United Parcel Service, Inc.

On behalf of the United States, the following agree to the terms of the Compliance Program:

MELINDA HAAG  
United States Attorney

DATED: 3/29/13

  
KIRSTIN M. AULT  
Assistant United States Attorney

## QUESTIONS SUBMITTED BY SENATOR LAMAR ALEXANDER

SEBELIUS

*Question.* The Department of Health and Human Services (HHS) has admitted to me in a letter dated June 3, 2013, that Secretary Sebelius has asked private entities, including at least three she regulates, to contribute funds or assistance to Enroll America, a nonprofit headed by a former White House aide, that is working to help her implement the Affordable Care Act.

Such private fundraising for an entity she is working closely with circumvents the constitutional requirement that only Congress may appropriate funds and raises serious ethical issues since she is also soliciting those who will be affected by her decisions.

In July 1987, President Reagan's Secretary of State, George Shultz, testified before Congress:

"You cannot spend funds the Congress doesn't either authorize you to obtain or appropriate. That is what the Constitution says, and we have to stick to it. Now, I will join everybody in saying that sometimes it gets doggone frustrating with what the Congress does or doesn't do, and I can be critical. However, that's the system, and we have to accept it, and then we have an argument about it and try to persuade you otherwise."

Do you agree with former Secretary Shultz?

Answer: Yes, the Department agrees that, under the Constitution, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," and that, under Government fiscal law, an agency may accept and spend funds from sources other than appropriations only when Congress has authorized it to do so. Congress has enacted such authorizations for a number of agencies.

*Question.* Has the Department, including the Office of Legal Counsel, issued an advisory opinion or consulted with HHS or the White House to make sure the Secretary's solicitation activities do not violate Federal laws?

Answer. As a general matter, the Department of Justice does not disclose whether it has provided confidential legal advice, in order to protect the confidentiality of attorney-client communications and internal executive branch deliberations.

In testimony on June 4th, 2013, before the House Education and Workforce Committee, Health and Human Services Secretary Sebelius discussed the lobbying restrictions on State and local grantees and subgrantees for HHS grants through the Prevention and Public Health Fund. The Secretary appeared to suggest at the hearing that the provisions in 18 U.S.C. section 1913 regarding limitations on lobbying with Federal funds would only apply if the individuals involved in lobbying violations were registered lobbyists at the State or local level.

*Question.* Given that your department enforces section 1913, what is the Department of Justice's position on lobbying with Federal funds by State or local grantees, subgrantees and their contractors? Can you please provide a copy of any interpretative materials, including letters to Congress or Office of Legal Counsel opinions, regarding the scope of this provision?

Answer. The Department's Office of Legal Counsel has published several opinions about the scope of section 1913: *Applicability of Antilobbying Statute (18 U.S.C. 1913) Federal Judges*, 2 Op. O.L.C. 30 (1978); *Antilobbying Laws (18 U.S.C. 1913, Public Law 95-465, 92 Stat. 1291) Department of the Interior*, 2 Op. O.L.C. 160 (1978); *Anti-Lobbying Restrictions Applicable to Community Services Administration Grantees*, 5 Op. O.L.C. 180 (1981); *Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty*, 12 Op. O.L.C. 30 (1988); *Constraints Imposed by 18 U.S.C. 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300 (1989); *Executive Branch Encouragement of Contributions to a Nicaraguan Opposition Party*, 14 Op. O.L.C. 7 (1990); *Application of 18 U.S.C. 1913 to "Grass Roots" Lobbying by Union Representatives*, 2005 WL 5913291. None of these opinions addresses, under the current version of section 1913, the issue you raise.

In addition, in response to a Question for the Record asked by Chairman Lamar Smith in connection with the June 7, 2012 House Judiciary Committee Hearing "Oversight of the United States Department of Justice," the Department described the general statutory framework that applies in this area as follows:

The Anti-Lobbying Act prohibits the use of appropriated funds, directly or indirectly, "to influence in any manner a Member of Congress, a jurisdiction, or an official of any government" with respect to "any legislation, law, ratification, policy or appropriation." The pre-2002 version of this statute also provided that "[w]hoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section," is subject to criminal fines and imprisonment. Citing this language, a Federal district

court concluded in 1982 that the Anti-Lobbying Act applied only to Federal officers and employees. *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 826 n.6 (D.C. Iowa 1982).

In 2002, Congress amended the Anti-Lobbying Act by replacing the criminal sanction with civil penalties and making a violation of the Act a violation of 31 U.S.C. 1352, the Byrd Amendment. The Byrd Amendment expressly prohibits “the recipient of a Federal contract, grant, loan, or cooperative agreement” from using appropriated funds to “influenc[e] or attempt[ ] to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress” in connection with specified “Federal action[s].” How these laws will apply in any given case depends on the particular facts, and the Department will appropriately pursue every serious allegation of illegal lobbying to the full extent of the law. Typically, such allegations would be investigated in the first instance by an agency’s Office of the Inspector General.

*Question.* Does section 1913 apply to state and local grantees and subgrantees and their contractors whether they are registered lobbyists or not?

*Answer.* The Department has not developed a view about the relevance, under section 1913, of whether a State or local grantee is a registered lobbyist or ought to register as a lobbyist, either as a dispositive fact under the statute or as an indication of the nature of the grantees’ activities. As noted above, how these laws will apply in any given case depends on the particular facts.

#### METHAMPHETAMINE IN TENNESSEE

*Question.* In 2010 Tennessee had the highest number of methamphetamine lab seizures in the Nation, and is on track to regain that infamous title this year.

The average cost to clean up a methamphetamine lab is \$2,300, and these costs put tremendous strain on State and local law enforcement. Without cleanup funds, there is a real incentive to avoid seizing these labs.

In Tennessee in early 2011, when Federal cleanup funding was about to run out, lab seizures dropped 75 percent—but not because the meth labs went away. When a new cleanup program started later that year, seizures rose by 73 percent.

Faced with less Federal support, Tennessee developed a “central storage container program” to find an affordable way to pay for cleanup. They were able to drop the average cost from \$2,300 to \$500 per lab. However, given the growing number of lab seizures they are facing they simply can’t keep up.

Tennessee is grateful for the assistance that the Department of Justice and the Drug Enforcement Agency has provided, and I support the Department’s request for \$12.5 million this year to help dispose of hazardous and explosive chemicals used in meth labs.

Given that this is one of, if not the most urgent drug problem facing our Nation, especially in rural communities with limited resources, why isn’t the Department requesting more funding to help address this problem?

*Answer.* The Department expects the \$12.5 million requested for COPS to reimburse the Drug Enforcement Administration (DEA) for State and local meth lab cleanup and training assistance to be sufficient to cover all State and cleanup requirements for Tennessee and other States in fiscal year 2014. In fiscal year 2013, DEA received a \$12.5 million transfer from COPS, which leaves \$11.87 million after the sequestration is applied to the transfer. DEA expects this amount to be sufficient to support the program. DEA has been able to reduce cleanup costs by working with its State and local partners to expand the use of the Container Program. As of June 2013, there are 10 States with operational container programs: Illinois, Alabama, Virginia, Indiana, Oklahoma, North Carolina, Kentucky, Arkansas, Tennessee, and Michigan. DEA has signed letters of agreement with an additional 6 States to implement the program: Mississippi, New York, Florida, Pennsylvania, Kansas, and Ohio. DEA is working with these States to identify container sites, procure equipment and supplies, and schedule training for law enforcement. This timeframe typically takes 9–12 months to go from a signed Letter of Agreement to fully operational. We expect three of the six States (Ohio, Florida, Mississippi) to become operational in fiscal year 2013 and the other three states (Kansas, Pennsylvania, New York) to become operational in fiscal year 2014.

#### JUSTICE DEPARTMENT ENFORCEMENT & WIND FARMS

*Question.* At the end of January, I sent you a letter in an effort to better understand the Department of Justice’s policy for prosecuting alleged violations of the Migratory Bird Treaty Act. More than 4 months later, I have yet to receive a response so I think it would be worth looking at this topic today.

My understanding is that the Department of Justice has held a number of oil and gas producers criminally liable for unintentional killing of migratory birds. Are you aware of any prosecutions of wind energy producers for migratory bird deaths?

There are a number of different estimates about the hundreds of thousands of birds killed by windmills each year, but in the U.S. Fish and Wildlife's fiscal year 2013 budget justification it estimated 440,000, and yes this would include protected birds such as gold and bald eagles. Despite that huge number of bird mortalities, there have been zero prosecutions by the administration for those deaths. At the same time, I am aware of a number of instances where the Department of Justice has prosecuted oil and gas producers.

Can you explain your prosecution strategy for these cases? Why has the Department of Justice given wind energy producers a pass at the same time you prosecute oil and gas companies?

Answer. On November 22, 2013 the Department responded to your earlier letter. The November 22 letter (attached here to for your convenience) addresses the questions you raise. (see Attachment #1)

*Question.* In a letter I sent to you on January 30, I asked 4 basic questions. First, how many criminal prosecutions has the Department of Justice undertaken against oil and gas producers who have allegedly violated the Migratory Bird Treaty Act? Second, how many criminal prosecutions has the Department of Justice undertaken against wind energy producers who have allegedly violated the Migratory Bird Treaty Act? Third, does the Department have guidelines for prosecutions under the MBTA and do those guidelines distinguish between oil and gas producers and wind producers? And, finally, do you believe it is inconsistent to prosecute producers of one type of energy for incidental killing of common species at the same time the administration considers a permit that would allow an energy product to kill between 8 and 15 bald eagles?

Please answer those questions.

Answer. On November 22, 2013 the Department responded to your earlier letter. The November 22 letter (attached here to for your convenience) addresses the questions you raise. (see Attachment #1)

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ATTACHMENT #1



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General    *Washington, D.C. 20530*

November 22, 2013

The Honorable David Vitter  
Ranking Member  
Committee on Environment and Public Works  
United States Senate  
Washington, D.C. 20510

The Honorable Lamar Alexander  
United States Senate  
Washington, D.C. 20510

Dear Senators Alexander and Vitter:

This responds to your letter to the Attorney General dated January 30, 2013, regarding the Department of Justice's (the Department) policy for prosecuting violations of the Migratory Bird Treaty Act (MBTA). We apologize for our delay in responding to your letter.

The Department shares your view that fair and consistent application of Federal enforcement authority is fundamental to equal justice under the law. Please be assured that the Department neither targets energy businesses for enforcement nor excuses them from enforcement because of the type of energy they produce. The Department has no enforcement guidelines or policy directives that distinguish between oil and gas producers and wind energy producers.

The MBTA provides that it is “unlawful at any time, by any means or in any manner,” to “take,” which includes wounding or killing, any migratory bird protected by the act, unless and except as permitted by regulations issued by the Department of the Interior (DOI). 16 U.S.C. § 703. The MBTA establishes a Class B misdemeanor penalty for any “person, association, partnership, or corporation” who violates this statutory prohibition.

In light of the statute’s broad, unqualified prohibition of take, it has long been the position of the Department and the Fish and Wildlife Service (FWS), that the unpermitted take of protected birds outside the hunting context—including take that is incidental to industrial or agricultural activities—can violate the MBTA. A contrary reading of the MBTA would be inconsistent not only with the plain language of the act but also with the act’s purpose of conserving and protecting migratory birds. The explicit application of the MBTA’s Class B misdemeanor provision to “any . . . corporation” that takes a migratory bird would be hard to reconcile with reading the statute to cover only hunting or similar activities. A substantial body of case law supports application of the MBTA where take is proximately caused by industrial or agricultural activities, although a few courts have disagreed with this interpretation of the act.<sup>1</sup>

The MBTA cases that we consider for prosecution are ordinarily referred to us by the FWS. Before referring cases, the FWS seeks to ensure that companies are aware of the risks posed by their facilities and of ways they can avoid or reduce the killing of migratory birds or mitigate unavoidable takes. The FWS works with companies to bring them into compliance with the law without need for prosecution. Violations of the MBTA are referred to the Department only when companies fail to make good-faith efforts to avoid, minimize, and mitigate avian take.

The FWS has worked with the oil and gas industry for a quarter century to develop practicable solutions to prevent migratory birds from dying in oil field reserve pits and evaporation ponds. These solutions are broadly known throughout the industry; indeed, the wide adoption of these measures is thought to have cut the industry’s take of migratory birds by 50–75 percent. More recently, and consistent with the best practices guidelines issued last year, the FWS has been working with the growing wind energy industry to develop guidance on how wind projects can minimize the harm done to migratory bird populations. In determining whether to prosecute a company for its violations of the MBTA, both the Department and the FWS consider whether the company has knowingly failed to adopt industry-specific practices to improve their compliance with the law.

The Department addresses each case based on the particular facts presented. When a case against a corporate entity is referred to the Department, prosecutors are guided by the Principles of Federal Prosecution of Business Organizations in deciding whether to bring charges and what charges to bring. U.S. Attorneys’ Manual 9–28.000. Under these principles, prosecutors may consider, among other things, the corporation’s history of similar conduct and its adoption of meaningful remedial measures in order to ensure that violations of the law do not recur. *Id.* at 9–28.600, 9–28.900. Consistent with these principles, prosecution for MBTA violations typically is reserved for cases in which companies are aware that their conduct will take migratory birds but nonetheless fail to implement reasonable and effective measures known to avoid, minimize, or mitigate the harms proximately caused by their activities.

The Department does not handle cases alleging violations by oil and gas producers differently from cases alleging violations by members of any other industry. The prosecutions referenced in your letter are consistent with the enforcement approach described above. The FWS notified the companies involved in those cases that their facilities were killing migratory birds in violation of the MBTA. Prosecutions were pursued only where the company at issue continued to violate the law and failed to adopt available remedial measures to fix known problems. Failure to prosecute companies that deliberately flout the law would undermine the deterrent effects of the law and could lead others to view compliance with the law as optional.

You have asked how many criminal prosecutions the Department has undertaken against oil and gas producers and wind energy producers for MBTA violations in the past 4 years. Although your letter asks about felony prosecutions of oil and gas

<sup>1</sup>Courts have upheld convictions under the MBTA for take that is incidental to industrial or agricultural activities in many jurisdictions. *See, e.g., United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *United States v. Moon Lake Electric Ass’n*, 45 F. Supp. 2d 1070 (D. Colo. 1999); *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Corbin Farm Servs.*, 444 F. Supp. 510 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978). *But see, e.g., United States v. Brigham Oil and Gas*, 840 F. Supp.2d 1202 (D.N.D. 2012).

or wind energy producers for violations of the MBTA, the MBTA's felony provisions apply only to the intended or actual commercialization of migratory birds or bird parts. These provisions are not implicated by the take of migratory birds through industrial activities, and so the only MBTA charges the Department has filed against energy companies are for misdemeanor violations.

Aside from the cases whose filing led to the district court decision cited in your letter,<sup>2</sup> we have completed prosecutions against six oil and gas companies and two electrical utilities during the relevant time period.<sup>3</sup> Over the relevant time period, we have declined to pursue charges against several oil and gas companies and electrical utilities; the Department also declined to pursue charges under the Bald and Golden Eagle Protection Act (BGEPA) that had been referred against one of those companies. The decision to decline or pursue criminal charges in any particular referred investigation is guided by the quantum of admissible evidence and by the Principles of Federal Prosecution of Business Organizations, as discussed above; based on these considerations, the Department may decline criminal prosecution in favor of civil or administrative remedies, as appropriate. The Department and the FWS fully recognize the risks that wind energy technology pose for migratory birds. We are currently evaluating referrals that we have received from the FWS against wind energy companies for violations of the MBTA and BGEPA and are pursuing further investigation and prosecution in the appropriate matters. We will follow the facts wherever they lead and decide whether enforcement action is appropriate based upon those facts, the law, and the Principles of Federal Prosecution. Today, in the District of Wyoming, Duke Energy Renewables, Inc., pleaded guilty to violations of the MBTA and was sentenced pursuant to an agreement stemming from its unauthorized takings of protected birds, including golden eagles, at two wind power projects.

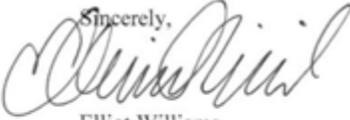
Finally, as referenced in your letter, in 2009, the FWS promulgated regulations under the BGEPA that allow applications for permits for the take of bald and golden eagles associated with (or incidental to) otherwise lawful activities, including long-term permits for take associated with ongoing activities. To obtain a permit, an applicant must work with FWS biologists to assess the potential for take, minimize the likelihood of take by adopting advanced conservation measures or mitigation actions, and monitor its operations on an ongoing basis. Permits may be available to companies in all types of industries. The preamble to the regulations explains that programmatic take permits "can be extended to industries, such as electric utilities or transportation industries, that currently take eagles in the course of otherwise lawful activities but who can work with the Service to develop and implement additional, exceptionally comprehensive measures to reduce take to the level where it is essentially unavoidable." 74 Fed. Reg. 46838. These permits authorize take only under the BGEPA and not the MBTA, although practices that minimize eagle take may well protect other migratory birds. As a result, consistent with FWS guidance, the Department regards adherence to the parameters of an eagle take permit and other applicable FWS guidance, such as the FWS Wind Energy Guidelines, as a reasonable and effective measure to reduce avian mortality of species protected solely under the MBTA and focuses our enforcement resources accordingly.

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

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<sup>2</sup>In addition to the three companies your letter mentions, similar charges were filed against four other defendants; three of those defendants pled guilty before charges against all seven companies were dismissed as a result of the district court decision.

<sup>3</sup>The case information we are providing is based on a review of cases identified in searches of the case management systems maintained by the Environment and Natural Resources Division and the Executive Office for United States Attorneys as MBTA or BGEPA cases against business entities that were referred, filed, or declined between January 1, 2009, and June 25, 2013 (the "relevant time period"). Please note that these case management systems are designed to manage case information for internal purposes. Because information is entered manually on a periodic basis, these systems may not have complete information and may contain occasional data entry errors or other flaws. We reviewed all cases that the systems identified to determine which involved conventional or wind energy companies.

Sincerely,  
  
 Elliot Williams  
 Deputy Assistant Attorney General

cc: The Honorable Barbara Boxer  
 Chairman

The Honorable Sally Jewell  
 Secretary  
 Department of the Interior

(End of Attachment #1)

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QUESTION SUBMITTED BY SENATOR SUSAN M. COLLINS

*Question.* Attorney General Holder, there is substantial evidence that prescription drug abuse is a major contributing factor in military and veteran suicides.

A January 2012 Army report found that 29 percent of suicides involved individuals with a known history of psychotropic medication use. In addition, the Center for a New American Security (CNAS) released a report in October 2011 which found that there is excess prescription medication in the military community. Both reports recommended that the Drug Enforcement Administration (DEA) should grant the Department of Defense (DOD) authority to accept and dispose of prescription medication from servicemembers.

Last July, I wrote you a letter requesting your support to address the epidemic of military suicides by allowing military treatment facilities to participate in drug take-back programs, as authorized by the Secure and Responsible Drug Disposal Act of 2010. This would satisfy the recommendation made in the Army and CNAS reports.

In March of this year, 8 months later, I finally received a response from your office. In that time period, nearly 200 additional servicemembers had lost their lives to suicide. According to the Veterans Benefits Administration (VA), based off data collected from 21 States, an estimated 22 veterans lose their lives to suicide each day as well.

In your response to my letter, you wrote that the DEA was in the rulemaking process to implement the Disposal Act and that the DEA was hopeful that the proposed regulations for the drug take back program will meet the needs of those in our Armed Forces.

Unfortunately, we know that the proposed regulations released in December 2012 will not meet the needs of our Armed Forces or our veterans because it does not allow pharmacies registered as hospitals or clinics at recognized military treatment facilities or VA hospitals to be collector points for DEA's drug take back programs.

The Pentagon and the Secretary of Veterans' Affairs Eric Shinseki agree with this assessment. The Pentagon's top healthcare civilian, Assistant Secretary of Defense for Health Affairs, Jonathan Woodson, wrote to the DEA Administrator on February 13, 2013 expressing his concern that the DEA's proposal would exclude more than two million DOD beneficiaries who receive care at military treatment facilities.

Last month, Secretary Shinseki testified before the Military Construction and Veterans' Affairs Appropriations subcommittee that the VA is in need of similar authorities for VA pharmacies to be considered authorized collectors of controlled substances.

Along with a number of my colleagues, including Senators Murkowski and Boozman, who both sit on this panel, I recently introduced bipartisan legislation which would require you to work with the Department of Defense and the VA to implement drug take-back programs. What is so frustrating to me, however, is that you can make this change today without any additional legislation.

I strongly urge you to ensure that the final regulations issued by DEA ensure that DOD and VA receive the necessary authority to ensure that our servicemembers and veterans are able to safely dispose of controlled substances at DOD and VA facilities.

Do you agree with Secretary Shinseki and Assistant Secretary Woodson that our veterans and servicemembers, especially our wounded warriors or those struggling with post traumatic stress disorder (PTSD), should be able to safely dispose of prescription medications at pharmacies located at military treatment facilities and VA facilities?

Answer. The Department is committed to ensuring that our military servicemembers and veterans, especially our wounded warriors or those struggling with PTSD, can dispose of unwanted, unneeded, or unnecessary pharmaceutical controlled substances safely and securely. To that end, DEA is diligently working on the final rule implementing the Secure and Responsible Drug Disposal Act of 2010, which authorizes additional ways for all Americans to dispose of their unwanted or expired controlled substance medications in a secure and responsible manner. The Notice of Proposed Rulemaking (NPRM) proposed the requirements to govern the secure disposal of controlled substances by both DEA registrants and ultimate users, and was published for comment between December 21, 2012 and February 19, 2013. DEA received approximately 200 comments and is working on a final rule that will address all of the issues raised by the commenters. DEA understands the importance of ensuring convenient and accessible disposal methods for military servicemembers, veterans and their dependents and is working hand-in-hand with DOD and VA to make certain that they can dispose of prescription medications through a variety of safe and secure methods. In the interim, DEA continues to administer National Drug Take-Back Days to provide consumers with a safe, convenient, and responsible means of disposing of prescription drugs. The most recent Drug Take-Back Day was October 26, 2013.

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#### QUESTIONS SUBMITTED BY SENATOR LINDSEY GRAHAM

*Question.* Currently, there is a ban on licensed firearm or ammunition manufacturers or importers selling “armor piercing ammunition,” except for government use. See 18 U.S.C. 922(a)(7). Broadly speaking, the term is defined to include projectiles that “may be used in a handgun” and that are made out of certain particularly hard metals, except for any projectile that “the Attorney General finds is primarily intended to be used for sporting purposes.” See 18 U.S.C. 921(a)(17).

Today, several ammunition industry members have requests pending with ATF to exempt various types of bullets—especially non-toxic hunting bullets—under this provision. How many exemption requests are now pending?

Answer. ATF currently has 17 requests from two ammunition manufacturers seeking exemption from the law to produce and sell to the general public armor piercing ammunition as defined under 18 U.S.C. 921(a)(17).

*Question.* Currently, there is a ban on licensed firearm or ammunition manufacturers or importers selling “armor piercing ammunition,” except for government use. See 18 U.S.C. 922(a)(7). Broadly speaking, the term is defined to include projectiles that “may be used in a handgun” and that are made out of certain particularly hard metals, except for any projectile that “the Attorney General finds is primarily intended to be used for sporting purposes.” See 18 U.S.C. 921(a)(17).

Today, several ammunition industry members have requests pending with ATF to exempt various types of bullets—especially non-toxic hunting bullets—under this provision. What is the status of ATF’s review of the “sporting purposes” exemption?

Answer. ATF continues to formulate and evaluate a process by which it can consistently and fairly apply an objective test to exempt ammunition projectiles (constructed of a metal or metal compound that is defined as armor piercing ammunition) that are primarily intended to be used for sporting purposes, while not obviating the purpose of the act designed to protect law enforcement officers from ammunition projectiles that may penetrate body armor. Once this process is complete, formal notification will proceed.

*Question.* Currently, there is a ban on licensed firearm or ammunition manufacturers or importers selling “armor piercing ammunition,” except for government use. See 18 U.S.C. 922(a)(7). Broadly speaking, the term is defined to include projectiles that “may be used in a handgun” and that are made out of certain particularly hard metals, except for any projectile that “the Attorney General finds is primarily intended to be used for sporting purposes.” See 18 U.S.C. 921(a)(17).

In November 2012, ATF held meetings with manufacturers, gun owners’ groups, and gun control groups to get their thoughts on how to apply the “sporting pur-

poses" exemption, but neither the gun owners' groups nor industry have heard anything further on the issue since. ATF has not responded to Freedom of Information Act (FOIA) requests on this process that were filed immediately after those meetings. When will pending FOIA requests on this matter be answered?

*Answer.* The ATF Office of Disclosure has received several FOIA requests for this meeting, including from the Sunlight Foundation and the National Rifle Association's (NRA) Institute for Legal Action. We are in the process of finalizing the records responding to these requests. Once this process is complete, all records will be sent to requesters.

*Question.* I know we're both proud of the partnership between the Department of Justice and the University of South Carolina in Columbia. Sequestration is impacting all departments, and many Federal activities and efforts may suffer and feel the pain of the current budget stalemate. I want to commend the Department for continuing to work with the University and hope that we will resolve the budget challenges and sequestration so that you can continue the fine work that the U.S. Attorneys do at the National Advocacy Center (NAC) in Columbia. Please outline the impacts of sequestration on the Palmetto Project, and how the department is adjusting?

*Answer.* Sequestration has both short- and long-term impacts on Project Palmetto. The short-term challenge we face is funding additional renovation, relocation, and equipment costs. The United States Attorney community received a \$139 million budget cut in fiscal year 2013 under sequestration. As part of a broader effort to avoid furloughs and more drastic measures, the Department reduced courses at the NAC by 37 percent in fiscal year 2013. Depending on appropriations levels in fiscal year 2014, similar reductions may be necessary in the future.

For the longer term, reductions in the Federal workforce could reduce space needs at the NAC. Further, a reduction in the Federal workforce could reduce the overall demand for training. Finally, budgetary pressure will reduce the time and money available for staff to travel to traditional classroom training at the NAC. Therefore, the focus of the NAC staff may shift from classroom training to distance learning, thereby freeing up a significant amount of classroom and office space.

EOUSA and University of South Carolina leadership are meeting to examine options for the future. The Department is committed to its strong partnership with the University.

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QUESTIONS SUBMITTED BY SENATOR MARK KIRK

*Question.* I am extremely concerned about the level of gang violence in the city of Chicago. Gang membership across the country is on the rise and close to 50 percent of violence crimes nationwide are due to gangs, with the level being much higher in some cities including Chicago.

Is there someone at the Department of Justice who is the Coordinator for your efforts to combat gang violence? How do the different agencies within the Department of Justice (DOJ) as well as other Government agencies coordinate strategies in fighting gangs?

*Answer.* The Department's Anti-Gang Coordination Committee (AGCC) plays a critical role in coordinating the Department's anti-gang efforts and minimizing that overlap between enforcement components and violent crime and gang task force efforts. AGCC membership includes not only Department components, but also other members of the U.S. law enforcement committee, such as the Immigration and Customs Enforcement (ICE). On an operational level, the National Gang Targeting, Enforcement and Coordination Center (GangTECC) within the Drug Enforcement Administration's (DEA) Special Operations Division (SOD) plays a significant role in deconfliction and organization. In fiscal year 2010, the Department of Justice, through DEA's SOD Gang Section, entered into a partnership with GangTECC to enhance the combined capabilities of the partner agencies (FBI, DEA, ATF, and United States Marshals Service (USMS)) as well as ICE. Prior to fiscal year 2010, GangTECC supported only 100 cases in the three preceding fiscal years combined. Since then, under the operational direction of SOD, GangTECC has successfully supported 2,175 cases that have resulted in more than 21,500 arrests. SOD also supports deconfliction and coordination on many cases, including gang cases. Moreover, DOJ also continues to focus on sharing intelligence at the field level with our State and local partners. Finally, as the chief prosecuting arm of the U.S. Government the U.S. Attorneys play a similar role at the local level, coordinating local strategies and working with all Federal partners.

*Question.* I understand from the people in Chicago that one problem in fighting the gangs has been the delays in prosecutions once a gang member is arrested. Your

fiscal year 2014 budget request for the U.S. Attorneys Office is lower than fiscal year 2012. Why? How will Washington be able to support the local needs with the lower resources that are coming?

Answer. Illinois and Chicago would be eligible to receive funding to address gang violence through several formula and competitive grant programs administered by the Office of Justice Programs. The fiscal year 2014 President's budget request includes funding for the following programs:

- Part B Formula Grants (\$70 million) and the Juvenile Accountability Block Grant (JABG) (\$30 million). The State of Illinois may allocate funding specifically to address gang violence under selected Title II and JABG program areas.
- Missing and Exploited Children's Program (\$67 million). This program provides funding for the Internet Crimes Against Children (ICAC) program. Previously, the Cook County State's Attorney's Office and the Illinois Attorney General's Office received funding from this competitive grant program to administer ICAC programs aimed at the detection, investigation, apprehension, and prosecution of technology-facilitated crimes against children. These activities include anti-trafficking investigations often linked with the proliferation of gang activity.
- Community Based Violence Prevention Initiative (\$25 million). This program helps localities and/or State programs that support a coordinated and multi-disciplinary approach to gang prevention, intervention, suppression, and reentry in targeted communities. This initiative aims to enhance and support evidence-based direct service programs that target both youth at risk of gang membership as well as gang-involved youth. Additionally, this initiative will support programs that reduce and prevent other forms of youth violence through a wide variety of activities such as street-level outreach, conflict mediation, and the changing of community norms to reduce violence, particularly shootings.
- The National Forum on Youth Violence Prevention (\$4 million). The Department of Justice has invited a small number of geographically diverse localities, including Chicago, to participate in the National Forum on Youth Violence Prevention. Participating localities, including Chicago, have agreed to form their own local network or use existing partnerships to address youth violence and gang activity in their communities. Chicago and the other participating localities have developed a multidisciplinary plan that emphasizes prevention and intervention as well as targeted enforcement activities. The Departments of Justice and Education, in collaboration with other Federal partners, will continue to provide technical assistance to support localities in the formation of their networks and the development and implementation of their anti-violence and anti-gang plans. The Federal agencies will also connect participating localities with one another, providing opportunities for localities to learn from each other, and will sponsor local and national events to showcase their efforts.
- The Children's Exposure to Violence (CEV) program (\$58 million). The CEV program will assist localities to address the trauma associated with community, school, and domestic violence. The program will support organizations to provide services including treatment and training and technical assistance for localities to prevent, respond, and mitigate the effects of violence.
- Youth Mentoring (\$58 million). Mentoring provides resources for programs aimed primarily at gang prevention along with some intervention activities. Organizations can apply for competitive discretionary grant funding through these programs.
- The National Gang Center (NGC) (\$2 million). With other entities, the NGC provides opportunities for resources, training, and technical assistance to address gang violence. Through the NGC, the Office of Juvenile Justice and Delinquency Prevention has expanded knowledge about youth gangs and effective responses to them by conducting the annual National Youth Gang Survey and by providing training materials, curriculums, and technical assistance on community gang problem assessment, multidisciplinary gang intervention, and comprehensive community responses to gangs. Communities may access and request training and technical assistance from NGC by completing a simple online form, available at <http://www.nationalgangcenter.gov/Training-and-Technical-Assistance/Request>.
- Project Safe Neighborhoods (PSN) (\$5 million). PSN provides funds to U.S. Attorneys for the purpose of developing partnerships among Federal, State and local governments as well as community and faith-based providers to help them create safer neighborhoods through a sustained reduction in crime associated with gang and gun violence. The U.S. Attorney in each judicial district leads a unified approach, with the cooperation of local, State, and Federal agencies, support prosecution efforts, intervention and prevention initiatives. This is a

competitive grant program for which the city of Chicago and the appropriate U.S. Attorney district are eligible to apply.

- The Intellectual Property Enforcement Program (IPEP) (\$2.5 million). IPEP supports the creation and maintenance of multi-jurisdictional task forces designed to support and enhance criminal investigations, prosecutions, and prevention and educational efforts as they relate to intellectual property theft and counterfeit goods enforcement. There is evidence that organized criminal networks are engaging in intellectual property (IP) theft to support their violent criminal enterprises and gang activities due to the low risk of prosecution and the extremely high profits involved.
- Byrne Criminal Justice Innovation (BCJI) (\$35 million). The goal of BCJI is to improve community safety by designing and implementing effective, comprehensive approaches to addressing crime within a targeted neighborhood as part of a broader strategy to advance neighborhood revitalization through cross-sector community-based partnerships. This is a competitive grant program for which the city of Chicago is eligible to apply.
- Victims of Trafficking (\$10.5 million). The goal of the human trafficking initiative is to support an enhanced anti-human trafficking law enforcement task force and victim service model designed to identify, rescue, and assist foreign and domestic, adult and minor, victims of human trafficking within the United States. Street gangs are a large part of the human trafficking problem. With State and national crackdowns on drug trafficking, gangs have turned to sex trafficking for financial gain. New technological advances give gang traffickers the ability to market the services of their victims discreetly. In several high-profile prosecutions of sex trafficking, street gangs used online advertisements to traffic women and girls as young as 13. The U.S. Government has prosecuted several hundred cases against street gangs, motorcycle gangs, and prison gangs in which commercial sex acts, prostitution, or human trafficking were mentioned. This is a competitive grant program for which the city of Chicago is eligible to apply.
- Preventing Violence Against Law Enforcement Officers and Ensuring Officer Resilience and Survivability (VALOR) (\$15 million). Many gang initiations consist of killing law enforcement officers, but not all gangs practice this behavior solely for initiation purposes. A gang called the “Satan Disciples” in Chicago has called for the formation of an assassination unit called “Guerrilla Mafia Cartel” whose sole mission is to kill law enforcement officers. VALOR is designed to prevent violence against law enforcement officers and ensure officer resilience and survivability following violent encounters during the course of their duties. VALOR responds to the precipitous increase in ambush-style assaults that have taken the lives of many law enforcement officers in recent months. With funding in fiscal year 2014, police officers in Chicago and surrounding jurisdictions would have access to this important training.

Specifically regarding USA funding, the fiscal year 2014 President’s budget request provides \$2.008 billion for the United States Attorneys (USA)—an increase of \$48 million over the enacted fiscal year 2012 level of \$1.960 billion.

*Question.* The FBI’s Safe Streets Task Force Program, a key program for fighting gangs, received a \$9 million increase in fiscal year 2013. Where will these increased funds go?

*Answer.* The FBI’s fiscal year 2013 enacted Appropriation included an across-the-board rescission of over \$150 million. This rescission, coupled with the over \$550 million reduction due to sequestration, eliminated any program increases included in the fiscal year 2013 Appropriation.

*Question.* A June 7, 2013 *Washington Post* story reported that a Federal judge in Virginia recently sentenced two gang members for running a sex trafficking ring. According to the story, the women were recruited through Backpage.com and other Internet sites. What is the Department of Justice doing to crackdown on the advertising for prostitution on the Internet and on sites like Backpage.com for their role in the facilitation of sex trafficking?

*Answer.* The Department shares your serious concerns about the use of such sites to illegally exploit vulnerable persons in this way. As a general matter, any prosecution of a website operator for such conduct would require the government (whether Federal or State) to prove beyond a reasonable doubt that the website operators actually knew or recklessly disregarded the fact that they were accepting an advertisement that offers sex with a child. Sufficient evidence of knowledge of a crime against a child is not indicated where an advertisement on its face is for a legal service offered by someone who appears to be an adult, and where there is no additional evidence establishing knowledge. We will continue to aggressively combat human trafficking, whether it takes place online or off. We are certainly cognizant

of the unique factors implicated by the type of online advertising that this question highlights, and the possible investigative and prosecutorial challenges (and opportunities) that exist as a result of this medium.

*Question.* In recent years there has been an effort by the U.S. Government to better report on sex trafficking to and within the U.S. How has DOJ been able to respond to the additional reporting? Have any trends emerged to inform efforts to combat sex trafficking both domestically and internationally?

*Answer.* The National Institute of Justice (NIJ) contributes to a report every 2 years on the prevalence of trafficking. Due to the difficulty in obtaining accurate statistics, the report focuses on advances in measuring trafficking. The report highlights practices of those communities that provide the best estimates so that other communities are better able to establish more reliable and accurate estimates. A list of trafficking research projects supported by NIJ, both ongoing and completed, and their scopes is available at <https://www.ncjrs.gov/pdffiles1/nij/223572/223572-e.pdf>. The scope of the projects varies from developing methods to better estimate the extent of trafficking to developing screening tools to assist the criminal justice system and service providers in identifying victims of trafficking. Anti-Human Trafficking Task Forces in the Bureau of Justice Assistance (BJA) are focused on all forms of human trafficking and not just specifically “sex trafficking.” Since 2007, BJA funded Anti-Human Trafficking Task Forces have been required to report data monthly into the Human Trafficking Reporting System (HTRS). This data includes information related to the number of investigations opened, the number of potential and actual victims identified, and the number of community awareness trainings the task forces have conducted. BJA holds monthly conference calls with the HTRS administrator for updates on the reporting process and which task forces are not up-to-date in reporting. When necessary, BJA reaches out to those task forces who are delinquent in reporting technical assistance. The task forces are also subject to random audits of the data to ensure accuracy.

Very few studies have been completed that analyze interventions and their effectiveness in combatting sex trafficking. A recently completed NIJ-funded study focused on sex trafficking demand reduction efforts. The study details typologies of different approaches to combat sex trafficking. Twelve distinct typologies were found including reverse sting operations, public education campaigns, rehabilitative efforts, and shaming tactics. The final research report, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>, provides descriptive information on current interventions and discusses what research has been done. A product of this study was Demandforum.net, an online resource developed under a grant from NIJ that provides assistance to practitioners and others in the form of information about the range of models and program structures implemented to deter sex trafficking. The site has information on more than 900 cities and counties in the U.S. that have launched initiatives in this area.

The Office for Victims of Crime (OVC) and BJA are working closely with Federal partners to identify trends in human trafficking in order to develop responses that will best serve the victims. For example, OVC and BJA, along with the Federal Bureau of Investigation and the Executive Office for United States Attorneys, are working with the Human Smuggling and Trafficking Center on an analysis of Federal data on human trafficking in the U.S. OVC and BJA also work closely with NIJ to learn from its ongoing studies of human trafficking in the US. In addition, OVC has improved its Trafficking Information Management System (TIMS), which collects systematic and comprehensive information from trafficking grantees on the demographics, immigration status and the service needs of victims. TIMS provides OVC with information on the needs of the trafficking victims, which has led to changes in grant solicitations and the provision of technical assistance and training. TIMS also provides data on the country of origin in the case of foreign labor trafficking victims. Over the last few years, the three top countries of origin were Mexico, the Philippines and Thailand. OVC used this information to develop a new national public awareness PSA (to be released in January 2014) in Spanish, Tagalog, and Thai, in addition to English. Finally, OVC is a key partner in the development of the Federal Strategic Action Plan on Victim Services in the United States, through which Federal agencies are embarking on new and strengthened coordination and collaboration to ensure all victims of human trafficking in the U.S. are identified and provided access to the services they need to recover and rebuild their lives.

*Question.* Given the recent ruling by an Egyptian court in the politically motivated trial against democracy workers, what is DOJ doing to ensure that any Egyptian Government efforts to issue arrest warrants through Interpol are blocked?

*Answer.* The Departments of Justice and State are monitoring the situation closely, including through contact with Egyptian Government and NGO officials. Interpol

Washington, the U.S. National Central Bureau (USNCB), a component of the Department of Justice, has also been in close contact with the International Criminal Police Organization (“INTERPOL”) to ensure that if Egypt elects to pursue INTERPOL notices or communications concerning the individuals involved, INTERPOL will reject any Egyptian efforts consistent with its previous decision on April 23, 2012, denying Egypt’s requests in the same case. INTERPOL’s April 2012 decision followed a brief in opposition to Egypt’s requests submitted on behalf of the United States by the USNCB with coordination and input from officials of the Criminal Division and State Department. The United States’ brief in opposition to the requests noted that the Egyptian prosecution was politically motivated and therefore contrary to Article 3 of INTERPOL’s Constitution which prohibits any activities by the organization of a “political, military, religious or racial character.” INTERPOL denied Egypt’s requests on this basis. Because the recent convictions *in absentia* are based on the same charges, any attempt by Egypt to pursue the defendants via INTERPOL would also be prohibited by Article 3 of the INTERPOL Constitution.

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QUESTIONS SUBMITTED BY SENATOR JOHN BOOZMAN

SETTLEMENT NEGOTIATIONS

*Question.* Mr. Holder, as you know many agencies enter into settlement negotiations that result in mandatory Federal actions. For example, the Environmental Protection Agency (EPA), the Fish and Wildlife Service, and other agencies, often settle lawsuits, resulting in legally-binding consent decrees. I am interested in the ability of affected citizens to be aware of these closed-door negotiations and to have a seat at the table—to intervene—when necessary and appropriate. Other agencies often point the finger at the Department of Justice (DOJ) when the door is kept shut.

Please explain the relationship between DOJ and other Federal agencies, when DOJ represents another agency in these situations. Is it accurate to think of the other agencies as DOJ’s client?

Answer. Because the question references the activities of the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service and refers to “mandatory Federal actions,” a term that is largely relevant to the Department of Justice’s work in defensive litigation, the responses to these questions will reference the specific authorities and experience of the Department of Justice in representing those agencies in defensive cases. Broadly speaking, the Department views its client as the United States. Therefore, in conducting litigation, we seek to act in the best interests of the United States. Where a particular agency is a named defendant in a lawsuit and the lawsuit challenges administrative action or inaction by that agency, we think of that agency as our primary client, while also considering the views of any other interested agencies.

*Question.* During such settlement negotiations, to what extent does DOJ allow the agency to participate in the process?

Answer. Agency participation in settlement negotiations may depend to some extent on the nature of the relief sought by the plaintiff in the lawsuit. Where the plaintiff seeks to compel the defendant agency either to undertake or to reconsider administrative action, it is common for lawyers from the defendant agency to participate in settlement negotiations. Even in those cases in which agency counsel might not be present during settlement negotiations with opposing counsel, the Department coordinates all settlement positions with the agency prior to (and, often times, during) any negotiations. The Department’s representation of EPA, for example, is governed by a June 1977 Memorandum of Understanding (MOU) between the Department and EPA. Under that MOU, attorneys employed by EPA may participate in the conduct of litigation in which the agency is party, including participation in settlement negotiations, subject to the supervision and control of the Attorney General. MOU 2, 4; *see also* 42 U.S.C. 7605(b) (participation by EPA attorneys in Clean Air Act litigation under the MOU).

*Question.* During such settlement negotiations, who determines whether affected parties that wish to intervene in the negotiation process are allowed a seat at the table—DOJ or EPA?

Answer. Under 28 U.S.C. 516 (and the June 1977 MOU with EPA), the conduct of all litigation is reserved to officers of the Department of Justice under the direction of the Attorney General. Thus, while the Department would typically consult with the client agency, any decision regarding what position the Government will take regarding intervention or participation in settlement negotiations ultimately

rests with the Justice Department. That said, the Department gives its client agencies' views considerable weight as to all significant litigation decisions.

DOJ'S RESPONSIBILITY TO ASSIST WITH THE FREEDOM OF INFORMATION ACT (FOIA)  
IMPLEMENTATION AT AGENCIES

*Question.* Mr. Holder, I would appreciate your thoughts regarding the importance of the Freedom of Information Act and your thoughts on the departments role regarding FOIA implementation and providing guidance to other agencies. Specifically: Would it be appropriate for an agency to automatically inform FOIA requestors that their requests are "overbroad" and will "probably cost more than the amount of money they agreed to pay"?

*Answer.* It would not be appropriate for an agency to "automatically" assume that a FOIA request was "overbroad" or that it would "cost more than the amount of money [the requester] agreed to pay." Each request must be evaluated individually, first to determine whether it meets the FOIA's requirement that it reasonably describe the records sought, and second, to determine whether there are any fees to be assessed in the first instance, and if so, whether those fees would be more than the requester has agreed to pay. There would be many requests for which there are no problems regarding the scope of the request or fees to be charged.

The Attorney General's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, issued on March 19, 2009, emphasized President Obama's call for agency FOIA professionals "to work 'in a spirit of cooperation' with FOIA requesters." In accordance with that directive, the Department has strongly encouraged agencies to actively communicate with requesters regarding their requests. Such communication can be particularly important in those situations when a request seeks a voluminous amount of material or when there is an issue regarding fees. In those cases dialogue between the parties can be beneficial to both agency and requester alike.

*Question.* Would you be concerned to learn of instances where Federal employees expressed an inability to respond to FOIA requests in a timely manner due to lack of proper training or insufficient support from their agency's Chief FOIA Officer?

*Answer.* Yes. The FOIA Memorandum referenced in response to the previous question emphasizes that "[i]mproving FOIA performance requires the active participation of agency Chief FOIA Officers" and that FOIA professionals "deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests." Furthermore, it provides that all Chief FOIA Officers must annually review their agency's FOIA administration and to report to the Department "on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies." In addition to a series of other questions, the Chief FOIA Officers have been required to report on their agency's efforts to conduct and attend FOIA training. Additionally, as part of the Department's ongoing effort to ensure that agencies understand both the FOIA's legal requirements and the policy directives in the President's FOIA Memorandum and the Attorney General's FOIA Memorandum, the Department has provided extensive, hands-on training to thousands of agency FOIA professionals across the Government each year. Moreover, the Department's FOIA experts at the Office of Information Policy (OIP) regularly provide specialized training to agencies and are always available to agencies that would like additional training.

*Question.* Since at least March, DOJ has been on notice that these and other serious FOIA implementation problems exist at the EPA. You were sent a bicameral letter on March 7, asking you to investigate these concerns and to help solve the problem. What, if anything, has DOJ done since March 7 to investigate these serious transparency problems?

*Answer.* The Department takes its leadership role in FOIA very seriously. Shortly after receiving the March 7 letter, the Director of OIP, which is the office within the Department charged with the responsibility for encouraging and overseeing agency FOIA compliance, met with EPA's Chief FOIA Officer to discuss its FOIA administration and the concerns that have been raised. Since that meeting, OIP's Director has continued to be engaged with EPA regarding these matters. On July 26, the Department provided a formal response to the letter you reference from Senators Vitter and Grassley and Congressman Issa.

*Question.* When should the Environment and Public Works (EPW) Committee, the Judiciary Committee, and the House Oversight Committee expect a response from you, to the March 7 letter?

*Answer.* A response to the March 7 letter was sent to Senators Vitter, Grassley and Chairman Issa on July 26.

## DOJ RESPONSIBILITY REGARDING THE EPA FEE WAIVER SCANDAL

*Question.* Mr. Holder, this spring, we learned that since January 2012, FOIA fee waiver requests from conservative/libertarian think tanks have been denied by the EPA 73 percent of the time. On the other hand, we learned that FOIA fee waiver requests from left-leaning organizations are granted by the EPA 92 percent of the time.

Do you agree that all Americans should be provided equal treatment by the Government, regardless of their religious, political, or ideological views?

*Answer.* Yes. A person's religious, political or ideological views have no impact on their FOIA request. Indeed, a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). However, there are certain areas of the FOIA where the identity of the requester and the reason he or she seeks records is a factor that must be considered. For example, the FOIA's fee provisions prescribe different types of fees for three distinct categories of requesters: (1) commercial use requesters; (2) educational institutions, noncommercial scientific institutions, and representatives of the news media; and (3) all other requesters. See 5 U.S.C. 552(a)(4)(A)(ii). Further, the statute provides for fees to be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester." 5 U.S.C. 552(a)(4)(A)(iii). In making decisions regarding the proper fee category and in deciding whether a fee waiver is appropriate, agencies necessarily look to the identity of the requester and their intended use of the material. That being said, the requester's "religious, political, or ideological views" would have no bearing on these determinations.

*Question.* If a Federal agency discriminates in the provision of Government services based on the political views of particular citizens, would the Department of Justice have a role in investigating that discrimination?

*Answer.* To the extent this question pertains to a Federal agency's FOIA administration, the Department does not have formal "investigatory" authority concerning FOIA administration. Nevertheless, the Department takes its leadership and oversight role in the FOIA very seriously, as the statute tasks us with the responsibility of encouraging agency compliance, and we exercise oversight authority through agencies' obligation to submit to the Department an Annual FOIA Report and Chief FOIA Officer Report. If the Department became aware of any issues regarding proper implementation of an agency's FOIA program, the Department would reach out to the agency's Chief FOIA Officer to provide guidance to the agency regarding proper application of the statute.

More broadly, the Department of Justice stands firmly against discrimination in the provision of Government services based on the political views of particular citizens. Depending on the specific facts at issue, the Department may have a role in investigating the alleged discrimination.

*Question.* You recently ordered a DOJ investigation of the IRS scandal, which involves disparate treatment and discrimination based on political views that occurred during the run up to the 2012 election. Would it be appropriate for the DOJ to similarly investigate political discrimination at the EPA?

What steps, if any, have you taken to determine whether such an investigation might be appropriate?

*Answer.* The Department of Justice does not comment on pending investigations or its plans regarding any potential investigations.

## CONCLUSION OF HEARINGS

Chairwoman MIKULSKI. This subcommittee stands in recess subject to the call of the Chair.

[Whereupon, at 12:15 p.m., the hearings were concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]