

**OVERSIGHT OF THE U.S. DEPARTMENT OF  
JUSTICE**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

APRIL 14, 2010

**Serial No. J-111-84**

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

63-323 PDF

WASHINGTON : 2011

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For sale by the Superintendent of Documents, U.S. Government Printing Office  
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# OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, APRIL 14, 2010

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

The Committee met, pursuant to notice, at 9:34 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl, presiding.

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

## OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Good morning. Before we begin today's hearing, we will pause for a moment of silence in solidarity with the people of Poland as they mourn the loss of their President, Lech Kaczynski, as well as so many others in Saturday's tragic plane crash.

[Pause.]

Senator KOHL. Thank you.

We welcome you all to today's oversight hearing. Regrettably, Chairman Leahy is not able to attend because he is at the funeral of a good friend back home in Vermont. We will proceed without him and, without objection, Senator Leahy's statement will be placed in the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator KOHL. Attorney General Holder, it has been well over a year since you were confirmed, and this will be your third oversight hearing before this Committee. We welcome you and thank you for making yourself accessible so that we can engage in one of our most important responsibilities: oversight of the Justice Department. It is a duty that we take seriously, regardless of the party in the White House. Oversight should not be conducted for the sake of political gain, but it should be a meaningful discussion about the challenges facing the Justice Department and should provide a check on its actions and the use of taxpayer dollars.

Over the past year, the Justice Department has done many good things that should be applauded. The Department has renewed its commitment to local law enforcement, which has put more officers on the beat and made our neighborhoods safer, helping local communities attract business and economic development. It has

stepped up enforcement on the southwest border to turn the tide on the Mexican drug cartels that continue to funnel drugs and crime to cities throughout our country.

The Criminal Division has increased efforts to root out fraud operations that cost the Federal Government and Americans billions of dollars—from financial and mortgage fraud to health care and Medicare fraud. And as our economy rebounds, the Antitrust Division's revitalized enforcement has fostered a competitive marketplace that encourages innovation and economic development while ensuring consumers have access to high-quality goods at the best prices.

The Justice Department's tireless fight against terrorism has yielded numerous interrupted plots and arrests, valuable intelligence information, and successful prosecutions. We were reminded of our constant struggle against those who wish to do us harm on Christmas Day when brave passengers stopped a would-be terrorist from taking down a full airplane with a homemade bomb, and when the FBI intercepted a sophisticated plan to attack the New York subway system.

Yet there have been legitimate concerns raised—by Democrats and Republicans alike—about this administration's approach to terrorist investigations, detention, and prosecution. Among the many issues you will need to address today include the long-overdue need to close the prison at Guantanamo Bay, where to hold trials for the five 9/11 plotters, and the process we use to detain and interrogate foreign terrorists, such as the Christmas Day bomber, who are captured in the United States. Reasonable minds can differ on these issues, but we can all agree that the decisions you make will have a long-lasting and far-reaching impact on our fight against terrorism and our ability to keep Americans safe.

The Justice Department is charged with important duties in many areas of the law. We thank you and the thousands of employees who dedicate themselves each and every day to the independent and impartial enforcement of the law. We look forward to a productive hearing, and we turn now to the distinguished Ranking Member, Senator Jeff Sessions, for his opening statement.

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

Senator SESSIONS. Thank you, Chairman Kohl. It is good to be with you, and I am sorry that Chairman Leahy could not be with us today.

Attorney General Holder, thank you for being here. It is an important oversight hearing, and it comes at an important time, and we have a number of issues to discuss with you.

After 9/11, our Nation fundamentally re-evaluated its approach to terrorism. We recognized that we are at war and that our normal criminal justice procedures were not designed for and not appropriate for the new threat. We then began to establish a military commission framework consistent with history for the detention, interrogation, and trial of captured al Qaeda terrorists. We passed bipartisan legislation to put this system in place, and we built a multi-million-dollar courthouse at Guantanamo Bay. Much effort, including the work of the 9/11 Commission, led to this decision. But

the President and you as Attorney General have worked to undo these policies and gains. It has imperiled, I think, a lot of hard work and progress over the years.

As you know, I supported your nomination, but your actions have shaken my confidence in your leadership at the Department of Justice. Immediately after taking office, President Obama's Executive order stopped these military commissions. Then on July 20th, less than 6 months after you took office, the Detention Policy Task Force, which you co-chaired, reached a stunning conclusion: Captured enemy combatants, including the 9/11 terrorists and others held at Guantanamo Bay, would not be tried by military commissions but would be given the presumption of civilian criminal trials. Since that time, not one military tribunal has been held. They have been stopped.

On November 13th, you announced that even Khalid Sheikh Mohammed, the alleged mastermind of 9/11, and the other 9/11 plotters would be taken from Gitmo and brought to New York City for trial. Five days later, you declared before this Committee that this was in the best interest of the American people in terms of safety. You cited as support for your views the New York mayor, yet since that time the mayor and the Governor have both opposed this decision. You asserted that, "We know that we can prosecute terrorists in our Federal courts safely and securely because there are more than 300 convicted international and domestic terrorists currently in the Bureau of Prisons." But that was surely an exaggeration. When on March 22nd you finally provided a list of those individuals, after much prodding, it was, I think, an inflated list of many hundreds of lesser offenses. Many of those cases were only prosecuted before the military commissions became operable.

In your November testimony, you claimed that civilian courts were just as effective at protecting classified material as military courts. Yet in those same March 22nd responses, your Department of Justice contradicted your statements and conceded that military commissions do provide better safeguards. In fact, the responses list seven ways military court procedures are superior. On December 25th, Farouk Abdulmutallab, the Christmas Day bomber, was captured, but he was questioned less than an hour before he was given Miranda warnings and offered a free lawyer. Sometime later, you decided this foreign terrorist operative carrying an al Qaeda bomb would be detained and prosecuted in the civilian system. After the warnings, Abdulmutallab clammed up and did not resume cooperation for weeks.

On January 20th, the heads of America's intelligence agencies testified they were not consulted on this decision, yet on February 3rd, you wrote a letter to Congress stating that Abdulmutallab was Mirandized "with the knowledge of and with no objection from all other relevant departments of Government."

In that same letter, you wrote, "I am confident that the decision to address Mr. Abdulmutallab's actions through our criminal justice system has not and will not compromise our ability to obtain information needed to detect and prevent future attacks."

There can be no doubt that treating terrorists as regular criminals will reduce our ability to obtain intelligence. And 6 years ago, you acknowledged that fact. In a Supreme Court brief, a brief you

failed to disclose as required during your confirmation process, you candidly admitted that the civilian criminal system possesses inherent limitations that “might impede the investigation of a terrorist offense under some circumstances,” including our ability “to detain a dangerous terrorist or to interrogate him or her effectively.”

Most recently, on March 6th, you curiously suggested Osama bin Laden should receive the same legal treatment as Charles Manson.

In light of the risks you described as inherent in the criminal justice system, do you really believe that if we capture bin Laden or any al Qaeda leaders, the first question we should ask is: “Do you want a lawyer?” Civilian trials for terrorist combatants are not required by law, policy, history, treaty, or plain justice. Yet this policy, it appears, still remains in effect, or at least unsettled.

There are, however, some important areas on which we do. The Department of Justice rightly has asserted state secrets privileges in appropriate cases. You have testified to the legality of military commissions, and I appreciate that even though they have not been used under your tenure. And you have supported the crack cocaine sentencing bill that we unanimously passed in this Committee, and I appreciate working with you on that.

But the course you have chosen on national security is steering us into a head-on collision with reality. The American people are not interested in terrorists being brought from Guantanamo to their own communities. Reality is a stubborn thing. Pretending that terrorists can safely be treated as common criminals will not make it so.

So I hope you are willing to reconsider those choices. I hope that the answers you provide today will help restore my confidence in the leadership at the Department, and I look forward to working with you toward that end.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Sessions.

Mr. Attorney General, we will take your testimony.

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

Attorney General HOLDER. Well, good morning, Mr. Chairman, Senator Sessions, and distinguished members of this Committee. I am pleased to be here today to discuss the important work of the United States Department of Justice.

One of the things that I pledged during my confirmation hearing was that I would be here regularly, and last year I had the privilege of appearing before this Committee three times, not including my confirmation hearing. And over the past 14 months since I became Attorney General, I have had the pleasure of working closely with many of you. I want to thank you all for your partnership and your ongoing support for the thousands of men and women who serve the Department and who tirelessly work to protect our country, enforce our laws, defend our interests in court, and ensure the integrity of our justice system.

Now, today I have been asked to report on the Justice Department’s progress, its priorities, and its goals. I am proud to tell you what we have accomplished and also what we plan to achieve.



Even before I took the oath of office last February, I made a pledge to every member of this Committee. I promised that under my leadership the Justice Department would vigorously pursue several critical objectives: combating terrorism, fighting crime, enforcing our laws in a nonpartisan manner, and reinvigorating the Department's commitment to integrity, to transparency, and to results.

I also promised that in our most important work, the work of protecting the American people, the Justice Department would lead with strength and by example, and that we would use every tool available to keep the American people safe.

Now, I never expected that fulfilling these promises would be easy. After all, ours is a time of growing demands and limited resources. And as we have confronted unprecedented threats, new responsibilities, and tough choices, the Justice Department, I believe, has made historic progress.

Over the last year, in addition to working tirelessly to protect our Nation from terrorism and from other threats, we have reinvigorated the other traditional missions of the Department. We have strengthened efforts to protect our environment as well as our most vulnerable communities. We have reinforced our mission to safeguard civil rights in our workplaces, our housing markets, our voting booths, and our border areas. We have made strides in ensuring that our prisons are secure and aimed at rehabilitation, which is not merely humane policy, it is smart policy, because reducing recidivism makes all of us safer. And as part of our focus on securing our economy and combating mortgage fraud and financial fraud, the Department has launched and is now leading the Financial Fraud Enforcement Task Force that President Obama called for last year, using legal tools that have been provided by this Committee.

At the same time, the Justice Department is working to make our criminal laws fairer. Last year, we launched one of the most comprehensive reviews in the history of the Federal sentencing policy. Our guiding objective—ensuring that sentencing practices are smart, that they are tough, that they are predictable, and that they are fair—is one that I know that every member of this Committee shares. I want to thank this Committee and the full Senate for the critical step that it took last month in unanimously approving a dramatic reduction in the disparity between crack and powder cocaine sentences. It was enormously heartening to me personally—and I mean this in a personal sense—to see the Committee come together in a bipartisan fashion to address this longstanding injustice. The 100:1 disparity undermined trust in the criminal justice system and diverted resources away from the prosecution of large-scale drug organizations. These reforms will serve the goals of law enforcement while ensuring fairness in sentencing.

Looking ahead, I hope the Judiciary Committee will help the Department achieve its goals and meet its responsibilities by confirming the President's law enforcement nominees more expeditiously. There are currently 19 United States Attorney nominees and 17 United States Marshal nominees awaiting Committee action. A backlog of this magnitude is unusual. I have spoken to the

Chairman and the Ranking Member about this concern, and I am hopeful that it will be addressed without further delay.

Every day the dedicated professionals of the Department of Justice help to fight our ongoing war against an enemy that continues to attack us at home and abroad. Over the past year, I am proud to say that the Department, working closely with our partners in the intelligence and national security communities, was extraordinarily successful in disrupting plots, obtaining intelligence, and incapacitating terrorists. We detected and disrupted a plot to attack the subways in Manhattan with explosive bombs that could have killed many Americans in what would have been one of the most, if not the most deadly attacks since September 11, 2001. Najibullah Zazi has already pleaded guilty to terrorism charges in this case, and we have also charged several of his associates with participating in the plot and related crimes.

We secured a guilty plea from David Headley for assisting the deadly attacks in Mumbai in November 2008 and plotting another attack in Denmark. As part of his plea, he has already provided valuable intelligence to the Government about terrorist activities abroad.

We have obtained the cooperation of Umar Farouk Abdulmutallab, who tried to bomb an airliner landing in Detroit last Christmas. Now, although I cannot, obviously, discuss the intelligence that he has provided, I can tell you that it has not just been valuable; it has been actionable.

We convicted Aafia Siddiqui of attempting to murder United States military and law enforcement agents in Afghanistan. Siddiqui is a Pakistani physicist captured in Afghanistan with explosives and information about nuclear, chemical, and biological weapons and descriptions of United States landmarks. She later opened fire on United States personnel. The Justice Department under the Bush administration indicted her in Federal court in 2008, and she was convicted several weeks ago in New York.

Now, most of this work was done by career professionals driven by no ideology except a loyalty to our Nation and a commitment to keeping our people safe. They work hard and, most importantly, they get results. Since September 11, 2001, Congress has provided the Justice Department broad authorities and significant resources to fight terrorism. I believe the Department has used these resources effectively, obtaining 160 convictions for terrorism offenses and 240 convictions for terrorism-related crimes.

Now, at a time when questions have been raised about the role of our courts, it is important to note that most of these convictions came during the last administration, which made the criminal justice system an integral component of its counterterrorism strategy. The Bush administration used the criminal justice system to interrogate, to prosecute, and to incarcerate terrorists for the same reason that the Obama administration has: It is an extremely effective tool to ensure justice and to protect the security of the American people.

Now, let me be clear. This administration will use every tool available to it to fight terrorism. Every tool. This includes both civilian courts and military commissions. Indeed, we have already re-

ferred six cases for prosecutor in commissions. We will no doubt refer other cases as well.

We have deployed the full extent of our intelligence, military, and law enforcement resources to defeat terrorists, and we have achieved, I believe, significant results. It would jeopardize those results to prohibit the use of the criminal justice system to prosecute terrorists, as some in Congress have proposed, and it would seriously weaken our National security. Instead of pursuing a narrow approach to fighting terrorism, we have to be flexible, we have to be pragmatic, and we have to be aggressive. And in every circumstance, we must choose the weapon that will be most effective.

That said, I know you all have questions about the prosecution of those charged with plotting the 9/11 attacks. No final decision has been made about the forum in which Khalid Sheikh Mohammed and his co-defendants will be tried. As I said from the outset, this is a very close call. It should be clear to everyone by now that there are many legal, national security, and practical factors that have to be considered here. As a consequence, there are many perspectives on what the most appropriate and effective forum is.

In making this decision, I can assure you that this administration has only one paramount goal: to ensure that justice is done in this case. In the pursuit of justice, we will enforce the law, and we will protect the American people.

Today I want you all to know that I continue to value and will work to uphold the trust that this Committee has placed in me. I also want to reassert my pledge that so long as I have the privilege of serving as Attorney General, the Department of Justice will be an instrument of our Constitution and a servant of the American people, not of any party and not of any political ideology.

We will continue working to protect our Nation's security, to advance the best interests of the American people, and to strengthen the values that have made our country a model to the world.

I thank you again for this opportunity to discuss the Justice Department's essential work, and I am happy to answer any questions that you might have. Thank you.

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

Senator KOHL. Thank you, Mr. Holder. We will now embark on questions in rounds of 7 minutes.

The Guantanamo Review Task Force recently completed its review of the 240 detainees to determine whether each would be prosecuted, transferred to another country, or held indefinitely. I am pleased to hear that you thoroughly reviewed each case. However, in your testimony today, you did not mention if and when you plan to close Guantanamo Bay.

Are you still determined to close that prison? If so, can you give us an update on your timeline for doing so? And what do you intend to do with the detainees who are too dangerous to release but for whom you lack sufficient evidence to prosecute?

Attorney General HOLDER. It is still the intention of this administration to close the facility at Guantanamo. There was, and I think still is—maybe not to the degree that it once existed—bipartisan support for the notion that the Guantanamo facility should be closed. It serves as a recruiting tool for those who have sworn

to harm this Nation. Both of the men who ran for President last year supported the closing of Guantanamo, as did President Obama's predecessor.

We will close Guantanamo as quickly as we can, as soon as we can. The work has been done with regard to the disposition of the 240 people who were there when we took over the facility. I can share those numbers with you about where these people should go. One of the things that we have in our budget for next year is funds in order to come up with another facility to which these people might be transferred, those who cannot be repatriated, and we would like to move on that plan, but we need Congressional support.

Senator KOHL. You say you have no timeline. Does that mean it might be this year, next year, the following year, the year after that?

Attorney General HOLDER. Well, one of the things that we need is an alternative site, and we have identified a place in Illinois, the Thomson family, and we have, as I said, in our budget a request for funds in order to open Thomson and to place in Thomson those who would be tried, either in military commissions or in civilian courts, those who would be held under the law of war, of detention, and those who might be temporarily housed there until they can be repatriated to some other country.

Senator KOHL. Are you saying you cannot close Guantanamo Bay until you have this other site under your control?

Attorney General HOLDER. Yes, we have to have an option, and that will require Congressional support for the funding request that we have made.

Senator KOHL. Mr. Attorney General, at a House appropriations hearing last month, you said that Osama bin Laden will "never appear in an American courtroom." You further stated that, "The reality is we will be reading Miranda rights to a corpse." In contrast, General McChrystal said that the military's goal is to capture him alive and bring him to justice, and CIA Director Leon Panetta said that should bin Laden be caught, he would be taken to a military base and interrogated by U.S. agents.

Mr. Holder, would you like to explain that comment and clarify what the administration has planned if and when, as we all hope, bin Laden is captured?

Attorney General HOLDER. With regard to Osama bin Laden, who is our target one for the United States, our plan is to capture him or to kill him. Our hope would be to capture him and to interrogate him, to get useful intelligence from him about the structure of al Qaeda, about al Qaeda's plans.

What I said in that hearing was an assessment of, I think, the likelihood that we are going to be able to capture him alive. What I said was that with regard to that possibility, both in our attempt to capture him and from what we know about instructions that he has given to the people who surround him, his security forces, I think it is highly unlikely that he will be taken alive. But our goal is to either capture Osama bin Laden or to kill him.

Senator KOHL. Mr. Attorney General, the last time you came before this Committee, you strongly defended your decision to try the 9/11 plotters in criminal court in New York rather than in military

tribunals. Since then, the President has said that he will review your decision. Do you still believe that criminal court is the right place for their trial? If they are moved to military tribunals, how would you address the concerns that critics have about such tribunals?

One month ago, you said that the administration was “weeks away.” When can we expect this decision to be made, Mr. Attorney General?

Attorney General HOLDER. Well, the administration is in the process of reviewing the decision as to where Khalid Sheikh Mohammed and his co-defendants should actually be tried. New York is not off the table as a place where they might be tried, though we have to take into consideration the concerns that have been raised by local officials and by the community in New York City. We expect that we will be in a position to make that determination in a number of weeks.

Senator KOHL. Thank you.

Finally, Mr. Attorney General, throughout my own State of Wisconsin, and I am sure all across the country, local law enforcement agencies speak about how vital the COPS program is to their ability to keep our communities safe. It is a highly effective program that has proven to be one of the most cost-effective ways to fight crime. Last year, I joined with Senators Feinstein, Leahy, and others in introducing legislation to reauthorize the COPS program and make improvements to the administration of the program.

Can we count, Mr. Attorney General, on your support for this legislation? Will you continue to fight for increased funding for the COPS program?

Attorney General HOLDER. Absolutely. The COPS program has historically proven to be one of the most effective ways in which the Federal Government can assist its State and local partners. I think the historic drops we have seen in crime over the last 10 years, 15 years, or so is a direct result of the fact that we have put more police officers on the street. State and local authorities do not necessarily always have the financial capacity to do that, and I think the COPS program has been an essential part in allowing our State and local partners to deploy more people.

It would be my hope that even in these tough budgetary times we will find a way to make sure that the COPS program remains a viable one.

Senator KOHL. Thank you very much, Mr. Attorney General.

We turn now to Senator Sessions.

Senator SESSIONS. Thank you, Senator Kohl.

Mr. Attorney General, if there is a problem with U.S. Attorneys and Marshals, I hope you will keep us posted on that. I think it is pretty clear that the administration has been slow in making those nominations. I do not believe there are any objections on our side to moving good nominees, and I do not believe Chairman Leahy has delayed that. So I think if you look at where the delays are, it is lack of nominations.

With regard to the Khalid Sheikh Mohammed decision, you made that decision. You declared in this Committee directly that it was going to be tried in New York, and you defended that as an appropriate way. It caused quite a bit of controversy at the time. I un-

derstand now the White House has suggested it would not be tried in New York, and I guess it makes me a bit uneasy, having served in the Department, to have politicians discussing where the cases ought to be tried. That is normally the Department of Justice professional prosecutors.

So what is your position about where the Khalid Sheikh Mohammed trial should take place? And are you uneasy that the White House is leaking statements about where a criminal case should be taken for trial?

Attorney General HOLDER. Well, I am not sure there have necessarily been leaks. I have said myself that the national security team is in the process of reviewing where the case might best be held. We have to take into consideration in making that—

Senator SESSIONS. Who is the national security team?

Attorney General HOLDER. The national security team includes the Secretary of Defense, Secretary of State, people from the intelligence community—the people who meet with the President every Tuesday afternoon to review where we stand around the world with regard to our terrorist efforts.

This is a trial that is unique in the sense that it does involve very real national security concerns, and I think the involvement of the White House—the national security component of the White House as well as the national security team in helping to make that determination makes sense.

I am very jealous in guarding the prerogatives of the United States Department of Justice.

Senator SESSIONS. Well, I think you should be, and I was a little—I would expect normally if it is under reconsideration that the Attorney General should announce it is under reconsideration and not politicians would make their announcement. But there is a venue problem, is it not, if the case is tried in civilian courts? The Constitution limits venue in criminal cases. But if it is tried by a military commission, you are not limited in that way. So to try it in Illinois, wouldn't that raise venue questions, for example?

Attorney General HOLDER. You are obviously a former United States Attorney, and the question that you ask is one that I asked. If there were the possibility that we moved this trial, what would the possible venues be? And I have received from the people who I asked that question a list of places in which the case could be tried.

What I will say is that the Southern District of New York, for instance, is a much larger place than simply Manhattan. There is also the possibility of trying the case in other venues beyond New York.

Senator SESSIONS. Well, I just think that the simpler and more logical decision would be to reconsider fundamentally and try this case where it should be, I think, in military commissions.

Isn't it true that the protecting of classified information that can be revealed during a criminal trial is a priority of our Government? In other words, we do not want to have a trial develop in such a way that classified information is revealed to the public. And on March 20th of this year, your Department answered questions I submitted to them about the danger of revealing classified information and the relevancy of that to criminal court or military commis-

sions. You testified there was not much difference, but the March 20 responses from your Department really tell a different story, citing “key differences” in classified evidence protections and military commissions trials that are not similarly present in Federal criminal law. Were you aware of this information when you testified before us in November?

Attorney General HOLDER. Yeah. I do not necessarily agree that there are fundamental differences between the protections that are available in civilian courts and those that might be available in military commissions. The modifications that have been made to the secrecy provisions really codify, I think, what judges do as a matter of routine in civilian court, with one exception, and that has to do with the possibility of interlocutory appeals, which, frankly, I think is a good idea and perhaps ought to be incorporated into what we do on the civilian side.

Much of the other enhancements that you see with regard to military commissions reflect what judges do on the civilian side.

Senator SESSIONS. Well, that is not what your responses say. They list seven different examples of how the military commissions are more effective in protecting intelligence sources and methods than a criminal trial. Do you dispute that?

Attorney General HOLDER. No. Well, I think that those seven instances that are listed—I will take your word that is the number—as I said, reflect the kinds of things that judges do, not because they are obligated to do them by rule or by statute, but because they do them in the way in which they interpret the CIPA statute.

As I said, I do think that the one enhancement that exists with regard to the military commissions, about the possibility of an interlocutory appeal, is something that we ought to consider. And we should always be looking at the CIPA statute to see how we can make it more effective.

Senator SESSIONS. Well, I agree with that, but I would just say to you, Mr. Holder, that when you try a person in civilian court, you have to give the Miranda warning upon taking them into custody. You have to tell them they are entitled to a lawyer, they are entitled to a speedy trial, they are entitled to file discovery of the Government’s case—all immediately, basically. And when you try them, hold them in military custody, you do not have to charge them at all because they are a prisoner of war until the war is over. But if they have violated the laws of war and committed criminal acts, they may be tried, if you choose to try them, in military commissions. It just makes perfect sense to me that these cases would be tried there. That is the result of a national consensus after the 9/11 Commission issued their report. Congress has passed legislation to that effect, and the President, one of his first acts was to set aside and stop these commissions. And you have blocked their progress since then, it seems to me.

So I think you need to re-evaluate this. I do not think the people of New York want this trial anywhere in their State or their city or the Southern District. There are many legal questions that will arise, so I just hope that you will re-evaluate this—apparently, the White House is; I hope that you will—and that we will soon have clarity about what the policy of the Department of Justice is.

Attorney General HOLDER. The decision that I made and the decisions that I will make with regard to the placement of any of these trials depends on what is best for the trial. I do this on a case-by-case basis with regard to the evidence that we would seek to admit, concerns about some of the evidence that might have to be admitted, depending on the forum that we would use, the impact of the use of certain evidence on the intelligence community and what it might do for our ability to interact with our allies.

There are a whole variety of concepts and of things that have to be taken into consideration, and what I have tried to do and what we will try to do is make these decisions on a case-by-case basis with the aim of being most effective in a particular trial and protecting the American people.

Senator KOHL. Thank you, Senator Sessions.

Senator Feinstein.

Senator FEINSTEIN. General, I think your last sentence was very important, and I think that the degree to which this dialog has escalated is really very unhealthy. Democrats did not do to President Bush following 9/11 what is being done to this administration with respect to their decisionmaking. And I really regret it, and I really find it reprehensible.

I believe that the best interests of the people of this Nation are served by the administration—you, Mr. Attorney General, and the President—having maximum flexibility as to in which venue these defendants should be tried.

I have served now on the Intelligence Committee for some 18 years, on this Committee for over 17 years, and I have never seen anything quite like this. The record is ignored. It does not matter that the Bush administration brought 200 terrorists to justice under Article III courts. It does not matter that the military commissions, which have been fraught with controversy, have convicted three, two of whom are out. It does not matter that Zazi pled guilty. That was a real threat. That was a real threat to the city of New York. The FBI did magnificent work. He pled guilty. David Headley is a serious terrorist. He pled guilty. And the fact of the matter is that Article III courts have other charges that they can use if they do not have the evidence to sustain a pure terrorist charge. You should have that option. You should also have the option of the military commission.

I have come to the conclusion that a lot of the attacks are just to diminish you, and I do not think you should buy into that at all. I think you should remain strong.

Now, I have had concern about New York City. I am a former mayor. I was mayor in the wake of an assassination, a major riot. I know what happens inside a city with a lot of scar tissue. And that is hard to perceive unless you have been there, done that, and understand it.

So I understand why New Yorkers feel the way they do. I also understand why the best interests of our country are served if you remain strong and make the decisions based on the legal facts and where we best get a conviction. And I just want to urge you to remain strong in that respect.

The record of the Article III courts in the conviction of terrorists in this country is unparalleled, and that is absolute fact.



I wanted to ask you a question on indefinite detention, if I might. The Immigration and Nationality Act and the PATRIOT Act both allow different types of indefinite detention under narrow circumstances. I think it is important that the executive branch strike the right balance between preserving the rule of law and releasing individuals who we know are determined to harm our Nation, and this is a difficult area.

I would like, Mr. Holder, to ask your opinion: In what narrow circumstances can the executive branch hold detainees who continue to pose a security threat but cannot be prosecuted for past crimes?

Attorney General HOLDER. Well, again, we have to look at these cases individually. We make these determinations on a case-by-case basis. People who we decide should be held under the laws of war have the right to a habeas proceeding, so a judge has the ability to look and make the determination as to whether or not the detention that we seek is, in fact, appropriate. We have won some cases in that regard. We have not been successful with others. Some are under appeal. Some of the people who have been ordered released by judges have been released.

We use that power, again, with the thought that what we want to do is to keep the American people safe and not release people who would pose a threat to the United States or not release people who we do not think can be placed in other countries and where remedial measures can be put in place to ensure that they would not pose a threat to our people.

So we use that power only where we think it can be appropriately used. I think if you look at the number of people that we had at Guantanamo, the number of people that we would seek to detain in that way is, I think, relatively small.

Senator FEINSTEIN. Thank you. I have a question here that I wanted to ask. I cannot find it.

About a year ago, we passed legislation with respect to the detention of children that are brought to this country not at their request but similar to the Elian Gonzalez case. I learned some time ago that we have about 5,000 children who at that time were subject to serious detention in jail facilities, some of them very, very young. And we passed a bill a year ago asking you to do certain things, and we have had no response to that.

Would you take a look at that and see if we can get that show on the road, so to speak?

Attorney General HOLDER. Yes, I will look at that. The concern that you have is one that I have as well. The detention—

Senator FEINSTEIN. These are regulations that have to be implemented.

Attorney General HOLDER. Right, and we will look at that. The concern about children and their detention and what that means for their development, their separation from parents, I mean, these are all things that are, I think, very legitimate concerns, so I will look at those regulations.

Senator FEINSTEIN. All right. Can you give us any kind of a timeline? I have waited a year, and if you could give us a timeline—a lot of children out there. This has to do with indefinite detention. It has to do with guardianship. It has to do with an ability to return them to the country if there is a place for them.

Attorney General HOLDER. What I can do is this: Maybe when I get back this afternoon to the Department, I will look to see what the state of play is, and then if I can, I will promise to get you a letter by the end of the week to give you a sense of when it is that we can start to do something in a substantive way.

Senator FEINSTEIN. Thank you. I appreciate it.

Thank you.

Senator KOHL. Thank you, Senator Feinstein.

Senator HATCH.

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

Mr. Attorney General, you have a very tough job, and I respect how difficult it is. My time is limited, so I will only be able to pursue a handful of subjects that I really want to take up with you, but I will be submitting several questions for the record.

One of the questions I will be submitting to you is why you felt the need to issue a memorandum to revise prosecutorial guidelines for Federal marijuana prosecutions. Congress enacted the Controlled Substances Act, the CSA, with the specific intent of making dangerous drugs illegal. Now, I want to make sure that you, as the highest legal law enforcement official in the land, are clear on what Congress' intention was with respect to the CSA, not the White House's vision or agenda of how the Controlled Substances Act should be enforced. So I will be looking for a timely response to that question.

But, briefly, I am sure that you are aware of the impending deadline for States to comply with the provisions of the Adam Walsh Act. As you know, I take a great interest in that Act. Recently, the President sat down with my good friend John Walsh on "America's Most Wanted" to discuss getting States to comply with the Adam Walsh Act. Right now I would like to get your pledge to work with me and my colleagues on getting the States and SMART, the S-M-A-R-T, on the same page before the July deadline without weakening or watering down the Adam Walsh Act. Is that OK?

Attorney General HOLDER. I will pledge to do that, but one thing I would say, Senator, is that we have to work also with the State Attorneys General who want to comply with this Act and, when I met with them, they expressed concerns about their ability to do so. I think we have to make them a part of the conversation as well.

I share your concern. I think that is an Act that we have to have fully implemented as quickly as we can and certainly within the deadline. But I also think that a part of that conversation ought to be the State AGs.

Senator HATCH. I have no problem with that. That Act is very important. It was a tough slog here to get that done and, I think, very, very important to have it done.

Now, before I move to the attempted terrorist attack that transpired aboard Northwest Flight 253, let me briefly ask you about obscenity enforcement. How is this administration enforcing Federal law prohibiting sexually explicit material that meets the Supreme Court's definition of obscenity?

Attorney General HOLDER. Well, there is a section within the Justice Department, the Child Exploitation and Obscenity Section,

that handles these matters. The people who are there are career employees who have worked under Republican as well as Democratic Attorneys General and I think who do a good job. The—

Senator HATCH. Well, I ask you this question—I asked this of your Republican predecessors because, in my judgment, they took a misguided and narrow approach to law enforcement in this area, so I am concerned. Sorry to interrupt you.

Attorney General HOLDER. No, I was just saying that the responsibility for the enforcement lies in that area, and I think they are quite aggressive in the prosecution and detection of these materials with a focus on, I think, child obscenity, which does not exclude other forms of obscenity that they can look at.

Senator HATCH. Yes, but there has been a pattern at the Department of Justice to prosecute only the most extreme obscene materials. Now, this particular type of material may virtually guarantee a conviction, but it is not the most widely produced or consumed and, therefore, its prosecution may have very little impact on the obscenity industry. So that is what I am concerned about. This approach of moving the prosecution line out to the fringe signals that material that is just as obscene, though less extreme, is let off the hook. I believe that approach is misguided and contributes to the proliferation of obscenity that harms individuals, families, and communities.

So I am very concerned about it, and I hope you will really take a real look at it because currently there is an Obscenity Prosecution Task Force at the Department of Justice. Now, will you allow the director of that task force to enforce Federal obscenity laws without restricting them to the most extreme obscene material?

Attorney General HOLDER. We will certainly enforce the laws using the limited resources that we have and go after those cases that, as we always do, have the potential for the greatest harm. There are First Amendment considerations that have to be taken into account, but it does not mean that we will not be serious about the enforcement of those laws.

Senator HATCH. OK. Let me transition and call your attention to the Christmas Day bombing attempt of Northwest Flight 253. On January 26th, I joined in sending a letter to you regarding the decision to charge Umar Farouk Abdulmutallab in Federal court. In your response letter back to me dated February 3, 2010, you laid out an explanation defending your decision to charge this terrorist in Federal criminal court. You further explained that you alone made this decision, but you referenced the previous administration's decision to charge Richard Reid and noted the similarity of these two cases.

Now, I would point out that in the Reid case, which occurred in December 2001, the military detention system did not yet exist. Attorney General Ashcroft did not have the option of military detention. However, you do because of the Military Commissions Act.

In the Military Commissions Act of 2009, Section 950(t), that defines crimes that can be prosecuted under the military commission. One of those crimes listed under 950(t) is hijacking or hazarding a vessel or aircraft. Clearly, the actions of this man jeopardized the lives of passengers and hazarded the aircraft.

Now, did you pursue the feasibility of prosecuting Abdulmutallab under a military commission based on Section 950(t) of the Military Commissions Act?

Attorney General HOLDER. Well, one thing I would say is that although the military commissions were not in existence at the time that Richard Reid was apprehended, law of war detention authority certainly did exist at that point.

With regard to the decision, it was a decision that I made after consultation on December the 25th. There were a couple of conversations that occurred with members of the intelligence community. And then on January the 5th, in a meeting that we held in the Situation Room, I laid out for members of the intelligence community as well as the defense community the decision, the thought that I had about pursuing this in the criminal sphere, and there were no objections raised to that.

The decision that was made with regard to Mr. Abdulmutallab was to place him in an environment, in a forum in which we could most effectively try the case. I think the decision that was made has been shown to be the right one given the fact that we had the ability to get information from him in that 1 hour interaction immediately after he was apprehended and then the information that he has since provided as a result of his decision to cooperate with the Federal Government.

Senator HATCH. Well, Mr. Chairman, my time is up. I appreciate your service and I appreciate your answers. I will submit a number of questions for you.

Attorney General HOLDER. Thank you.

[The questions of Senator Hatch appears under questions and answers.]

Senator KOHL. Thank you, Senator Hatch.

Senator Feingold.

Senator FEINGOLD. Thanks, Mr. Chairman.

The Committee is well aware of my support for Federal court trials, let me simply echo what Senator Feinstein said so well. Continued strength on your courageous actions in this regard. I have a statement that discusses that issue, and I would ask that it be placed in the record so I have time to discuss other topics.

Senator KOHL. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator FEINGOLD. Let me also take a moment to compliment you and Assistant Attorney General for Antitrust Christine Varney. Under your and her leadership, the Antitrust Division of the Department has made it clear, after many years of neglect, that enforcement of our antitrust laws is a priority for the Department, and I am especially grateful for the Department's focus on agriculture issues in partnership with the USDA, and I was very pleased to hear the Department will be holding a dairy workshop in Wisconsin in June. It means a great deal to our producers and others in the State of Wisconsin.

Let me turn to a couple other things.

Senator Kohl asked you about the COPS program. As you know, I strongly support that program and other Federal law enforcement

assistance grant programs. I hear repeatedly from law enforcement in Wisconsin just how important these grant programs are, particularly during tough economic times. The COPS hiring grants in the Recovery Act allowed my state to hire or rehire 58 police officers, and these were certainly needed in the jurisdictions where they were provided, but I do think it is important that these dollars are distributed fairly between cities and counties. In meetings I have had recently with Wisconsin law enforcement, it was brought to my attention that Wisconsin's sheriffs received zero COPS hiring grants through the Recovery Act.

Law enforcement everywhere is forced to do more with less these days, but this struck me as a bit of an unfair outcome for counties in my State. It is my understanding the Department is looking at possible changes to the grant methodology. Just a bit, sir, on the status of that review. How quickly can we expect it to be modified and sort of updated on that effort?

Attorney General HOLDER. Well, quickly, before I go through that, you are absolutely right that there is a focus in our Antitrust Division on the whole question of agricultural concerns. I will be attending, with Secretary of Agriculture Vilsack, a number of forums around the country. I think we have five scheduled; we have done one already in Iowa with Senator Grassley.

With regard to the question of the allocation of COPS funds, I think sheriffs—I think my numbers are correct here—got about 17 percent of the money that was awarded last year. We are in the process of looking at the allocation formula that we use. It was generally based on what the economic condition was in a particular jurisdiction, what the crime rates are in that same jurisdiction.

I have talked to representatives of the sheriffs' communities, and they raise, I think, very legitimate concerns. And so as we construct the methodology that we are going to be using next year, we will take that into consideration. And I would expect that we will probably have a determination made over the next few weeks as to what exactly the formula is going to be.

Senator FEINGOLD. Thank you.

Prosecutors and public defenders in Wisconsin have been telling me that they are having a harder and harder time attracting and retaining qualified attorneys in their offices. Many of these public servants have had to resort to taking a second job to pay off their law school debt. I am told that local prosecutor and public defender offices typically have attrition rates between 30 and 50 percent. This is obviously a serious problem in our criminal justice system and one of the many reasons I was a supporter of the John R. Justice Prosecutor and Defender's Incentive Act, which created a much needed student loan repayment program for prosecutors and public defenders. It was enacted in 2008 thanks in large part to the leadership and hard work of Senator Durbin, but DOJ has yet to issue guidelines to enable the States to solicit applications for loan assistance.

Can you tell me a bit about, update me on the status of our efforts to launch this? When do you expect that prosecutors and public defenders will be able to start applying for assistance?

Attorney General HOLDER. Well, even in these difficult economic times, I think the wisdom of that Act is from my perspective rel-

actively obvious. I have been concerned about the state of indigent defense. We have talked about that on a great many occasions. I am also concerned about what I hear from people who work on the other side, from prosecutors at the State and local levels. To the extent that we can come up with ways in which we can be of financial assistance to these groups, I think we need to do so.

So let me get back to the Department and see where we stand with regard to our loan assistance programs and regulations, and I will assure you that this is something that for me, given the travels that I have had a chance to do over these past 14 months, this is really a priority. I am really concerned about the state of our local criminal justice system and the ability to hold onto good people who only want to serve their communities. There are economic considerations that are driving good people out of the system.

Senator FEINGOLD. Thank you for that statement, and I will have a continued interest in this.

Law enforcement and corrections staff have long known that people with mental illness are significantly overrepresented in our prisons and jails. Our jails and prisons were never intended and are not equipped to be treatment facilities for the mentally ill, but, unfortunately, that is what they have often become.

Wisconsin has started looking at this issue and recently convened a task force of law enforcement officers, corrections staff, district attorneys, State legislators, and social service providers with the goal of developing a strategic plan to improve Wisconsin's responses to people with mental illness in the criminal justice system. This initiative would not have been possible without the leadership of our Chief Justice in Wisconsin, Shirley Abrahamson, who was able to obtain some funding for the Council for State Governments to organize this task force.

As I understand it, the council received Department funding for this and other mental health initiatives as a result of the Mental Illness Offender Treatment Crime Act. And while I was pleased that Wisconsin received some assistance for this initiative, it was one of just four States that received the aid out of more than 30 States that applied for assistance. We have historically allocated few resources to deal with this complicated problem, yet funding for mental illness programs is one of the most competitive grant programs in the Department.

Despite the high demand, the President's budget proposes consolidating this important program with the drug courts program, and I am concerned that that will mean not enough resources for either program.

Sir, why was that recommendation made?

Attorney General HOLDER. Well, I think what we have tried to do is, again, in these very difficult economic times, to come up with ways in which we can be most effective in distributing the limited funds that we have. The concerns that you raise are indeed very legitimate ones. We are very concerned about the way in which we have de-institutionalized our facilities and put so many people who I think would do much better in institutions that were well funded and well run, and instead we put them in the criminal justice system. I saw that as a judge here in Washington, DC.

What we have tried to do and what we continue to try to do is to come up with ways in which we can help our State and local partners and help our fellow citizens deal with issues that they have to confront.

Putting those two together, it seemed to us to identify ways in which we could consolidate those people who have drug problems and come up with alternatives to simply trying them and incarcerating them and to also deal with people who have mental issues and come up with ways in which we can help them other than by incarcerating them.

We will do the best we can with the resources that we have, but the concern that you raised I think is a very legitimate one and one that I think as a society we need to focus more attention on. I have witnessed this, as I said, as a judge, and I am very, very concerned about the way in which we treat the mentally ill and the desire to put them in the criminal justice system.

Senator FEINGOLD. Thank you very much.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Feingold.

Senator Grassley.

Senator GRASSLEY. I thanked you privately and I want to thank you publicly for having the hearings that you are having around the country on enforcement of antitrust or review of antitrust and agriculture. That is not the point of my questions, but I thought I ought to start out there on a very positive note.

[Laughter.]

Attorney General HOLDER. That is always appreciated.

Senator GRASSLEY. At the last oversight hearing, I asked you for a list of political appointees who previously represented detainees or advocated on their behalf. I think it was a very simple request, and you said, quote-unquote, that you would consider it. Since then, we have had a back-and-forth exchange with two letters signed by all Republicans on this Committee. Your staff has refused to provide the information, and yet the Justice Department managed to verify or provide names to Fox News.

You said this inquiry has called into question the integrity of political appointees at the Department, so I want to make clear that I am not here to call into question the integrity of any employee of the Department. In fact, I agree with the Department's view that personal attacks on the Department employees are inappropriate.

My inquiry, though, seeks to understand who is advising you on these decisions given the serious impact these issues have on our National security. These questions are about transparency, about openness, and about accountability. The platform positions President Obama ran on in 2008 and which culminated in a Presidential Memorandum on Openness and Transparency in Government that he assigned January of last year.

So a very simple yes-or-no question: Would you provide the names of political appointees at the Department who have previously represented detainees or advocated on detainee issues?

Attorney General HOLDER. With all due respect, Senator—and I know that your request comes from what I will call a good place. Yours was an honorable request, and the hesitance that I had I think has been borne out by what I have seen.

There has been an attempt to take the names of the people who represented Guantanamo detainees and to drag their reputations through the mud. There were reprehensible ads used to question their—in essence, to question their patriotism. I am not going to allow these kids, I am not going to be a part of that effort. And so, with all due respect, their names are out there now; the positions that they hold are out there. That has all been placed in the public record. I am simply not going to be a part of that effort.

I will not allow good, decent lawyers who have followed the greatest traditions of American jurisprudence, done what John Adams did, done what our Chief Justice has said is appropriate, I will not allow their reputations to be besmirched. I will not be a part of that.

Senator GRASSLEY. Well, remember that this is a request from this Committee, and I think all the people on it were very sincere about it. So I will move on.

You recently said that attorneys representing unpopular clients are patriots. I want to comment, though, that I doubt that you would share the same feeling for lawyers who represent the Mafia, and I doubt that you would hire them in the Justice Department.

The Department's response said that the Department of Justice does not keep a centralized data base of recusals, and it is the honor of the employees to recuse themselves.

Now, you know that large law firms like ones you have served in have conflict committees and procedures in place to ensure that rules are followed. Why shouldn't the Department of Justice, not just under your leadership but under leaderships before you, have some centralized system, a conflict system as private firms have?

Attorney General HOLDER. I think that is actually a legitimate concern that you raise, and that is something that I think is worthy of consideration, because you are right that there is within certainly the law firm that I was a member of such a data base. And that I think is something that we can consider at the Department.

Senator GRASSLEY. I want a Freedom of Information question and discussion with you. On January 21, 2009, President Obama issued a Presidential memorandum to the heads of all executive departments and agencies regarding Freedom of Information. That memorandum stated, "All agencies should adopt a presumption in favor of disclosure," and then directed you to issue new FOIA guidelines, which you issued March 19th last year. Your guidelines stated that, "An agency should not withhold information simply because it may do so legally." They also limited when the Justice Department would defend the denial of FOIA requests. I believe the guidelines were a good step in opening up Government and honoring President Obama's pledge for transparency.

However, when the Department posted the annual FOIA report back in March, the facts, I think, painted a very different picture. An analysis by the Associated Press found that in fiscal year 2009 Government agencies cited FOIA exemptions 468,000 times compared to 312,000 times in fiscal year 2008. One exemption, (b)(5), was used almost 71,000 times in fiscal year 2009 compared to 47,000 times in fiscal year 2008, and all of this occurred despite a total decrease in FOIA requests in fiscal year 2009. These num-



bers, I think, ought to be shocking to anybody that talks about transparency.

So what is the reason—I am going to ask two questions. What is the reason for the substantial increase in the use of FOIA exemptions by this administration? And if the use of exemptions continues to increase in fiscal year 2010, what will you do to personally ensure that agencies are more transparent and responsive to the public's right to know and to what the President says he wants his executive branch of Government to do?

Attorney General HOLDER. The President has been clear, and I think in the regulations that I issued I was clear, that FOIA and the release of information, the desire for transparency is something that is critical to this administration. The statistics that you have cited are indeed troubling. I am not exactly sure what the reason is, but I think it requires some further examination to ensure that those people who are responsible for making FOIA decisions are doing so in a way that is consistent with the desires of the President and the directions that I have issued.

We will review that and see what has happened. I can assure you, though, that the President is sincere, I am sincere, in trying to make sure that we are responsive—or more responsive to FOIA requests.

Senator GRASSLEY. I hope you will send your message to all the agencies from the President. I am done.

Senator KOHL. Thank you, Senator Grassley.

Senator Durbin.

Senator DURBIN. Mr. Attorney General, thank you.

In response to Senator Grassley's inquiry—and I respect the Senator from Iowa very much—I want to thank you. I think it was a courageous position you have taken, and the right one. History tells us that it was the Supreme Court that ruled that the Guantanamo detainees had the right to file petitions of habeas corpus. It was the Bush administration which said that they had the right to counsel. And the argument being made from the other side of the aisle, and their inspiration in Fox News, is that if anybody decides to represent a Guantanamo detainee, they disqualify themselves from future Government service because they cannot be trusted.

You know, if that is the premise of our system of justice that legal representation or possible inclinations toward one party over another disqualify you, where does it end? Does it end with prosecutors who fail to prosecute? Does it end with judges who may rule in favor of a defendant? I think you are standing up for a very fundamental principle and rule of law here that does go back to John Adams and the earliest days of this Nation, and I thank you for doing this. The men and women who have had the courage to stand up as professionals who have taken an oath to represent not only their clients but defend our Constitution and laws have the right to that kind of a defense, and I thank you for the courage to do so.

And I hope the record will reflect it was the Bush administration that said Guantanamo detainees have the right to counsel. This was not a decision made by the Obama administration. It was the right decision by the Bush administration. Let me add that, too.

On Miranda warnings, I think you are well aware—and we should say on the record—there is a lot of question here about using Article III courts for fear of giving a Miranda warning to a person. What was the policy of the Bush administration when it came to Miranda warnings for suspected terrorists arrested in the United States?

Attorney General HOLDER. I do not think it was fundamentally different from the policy that we now have in place, and one thing I think people have to understand is that the giving of Miranda warnings does not necessarily mean that the flow of information stops. In fact, I think a good case can be made that once people get Miranda warnings, the information flow continues, or that if it stops temporarily, once a lawyer is introduced, a defense lawyer is introduced into the mix, that lawyer then counsels his client, especially in terrorism cases, and given the really lengthy sentences that somebody faces in an Article III proceeding, that lawyer works to convince the client to cooperate with the Government. So Miranda warnings are not necessarily ones that have a negative impact on our ability to gain intelligence.

Senator DURBIN. Let us go back to a well-known case that has resulted in all of us taking our shoes off at airports: Richard Reid, the Shoe Bomber. How long after he was detained by the Bush administration's Department of Justice was it before he was given a Miranda warning?

Attorney General HOLDER. I think it was within a few minutes. I am not exactly sure.

Senator DURBIN. Five minutes is what the record reflects. Under the Bush administration, the Shoe Bomber within 5 minutes was given his Miranda warnings. That was the standard. And now to argue that a Miranda warning is somehow unwise, unsafe for America, is to ignore the obvious.

And what about the intelligence leaks? That is the second argument made about Article III courts, that you cannot successfully prosecute a terrorist in court without running the risk, if not in fact disclosing sensitive intelligence. What was the record under the Bush administration?

Attorney General HOLDER. The administration I think did quite well in trying cases in Article III courts and used CIPA to prevent the dissemination of information, of secret information from any of those proceedings.

Senator DURBIN. And one of the leading prosecutors in America, the U.S. Attorney for the Northern District of Illinois, Patrick Fitzgerald, who was in charge of the prosecution in the Southern District of New York of the African terrorist, said afterwards that he can do this without disclosing intelligence information following the law, backed up by others who had been through the same experience.

Have you had complaints from U.S. Attorneys when you have considered Article III prosecutions that somehow that may jeopardize and disclose intelligence information?

Attorney General HOLDER. No, I have not had that complaint, and I think our history shows that Article III courts are capable of trying cases without putting at risk intelligence sources and methods. The same is true, I think, of military commissions.

Senator DURBIN. Well, and that would be an option that you would protect, if you could make the choice.

Attorney General HOLDER. Right.

Senator DURBIN. Let me ask you this for the record, and it has been said by others: If you look at the scorecard since 9/11, how many successful prosecutions and convictions of terrorists have taken place in Article III courts under the Bush administration and Obama administration, and how many have taken place in military commissions?

Attorney General HOLDER. Well, I think we have had close to 400 successful prosecutions on the Article III side and three in the military commission side.

Senator DURBIN. So those who are arguing that we should shift all of these prosecutions to the military side would have to stop and explain why this dramatic record of success in Article III courts should be rejected at this point.

Now, let me ask you about the sensitivity of the people of New York with KSM. Tell me what is going through the mind of the administration and your mind when you think about that prosecution in that city after all that it has been through.

Attorney General HOLDER. Well, one thing I think we have to remember is that, contrary to what somebody said, there was an initial negative reaction to that decision, it is quite the contrary. I think when one looks at the initial reaction from people in New York, the reaction actually was a positive one.

That being said, as we are making this determination, we want to take into consideration what we have heard from the mayor, what we have heard from elected officials in New York City, what we glean from the people of the city that is evidenced in a number of ways, and try to come up with a way in which we can come up with a forum that will be most effective with regard to that case, whether it is a military commission or an Article III trial in New York City or in some other place.

Senator DURBIN. I want to make it clear that I am not creating or trying to cast any kind of negative impression about military commissions. I know Senator Graham and others have worked closely, and I do believe that it is a viable alternative that you should have at your disposal.

Is it not true, though, that under the procedural rules of military commissions there are some limitations compared to Article III courts, for example, when it comes to capital offenses?

Attorney General HOLDER. Yes. In an Article III court, you can certainly—a person can plead guilty to a capital offense. That is not allowed in the military commissions.

Senator DURBIN. There would have to be, in fact, some trial even if they wanted to plead guilty under those circumstances.

Let me ask one last question, or I suppose I have run out of time here, but let me thank you and let me try to reiterate what Senator Feinstein and Senator Feingold have added. I do not believe that our system of justice should be driven by fear and anger, and that appears to be a driving force among some political camps in this country. If we are going to be strong as a Nation, we will not be quivering in fear and reacting irrationally in anger. We are going

to stand by the rule of law and stand by principles that have guided us for a long time.

I thank you for your leadership.

Senator KOHL. Thank you, Senator Durbin.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for coming. This has been a very good discussion about some difficult issues, but one thing I would like to reiterate is that President Obama said the Nation was at war with al Qaeda. Do you agree with that?

Attorney General HOLDER. Yes.

Senator GRAHAM. I would just urge you to remain strong in that thought process because some people do not believe we are at war. Some people are just as patriotic as I am, but they believe we should be using the law enforcement model exclusively, and I think that is a formula for disaster. And there are some people who say you can never use Article III courts, and I disagree with them. Quite frankly, there could be times when an Article III court would be a superior forum. In my view, a financier of al Qaeda, you might want to take them to an Article III trial because you have more charging possibilities. Every al Qaeda operative is not at the same level as the next, so I agree with the idea of flexible, pragmatic, and aggressive. That is your standard. So I am one Senator on the Republican side who has not objected to Article III courts being used in a flexible, pragmatic, and aggressive fashion.

Now, when one is at war, we have to realize that the rules are different than fighting crime. Do you agree with that?

Attorney General HOLDER. That the—

Senator GRAHAM. The law of war is different than normal criminal law in certain aspects.

Attorney General HOLDER. In certain aspects, yes.

Senator GRAHAM. When we capture someone on the battlefield, under the law of war we have no obligation to read them their Miranda rights. Is that correct?

Attorney General HOLDER. That is correct. That is not typically done, but even in the Bush administration, a small, small number—

Senator GRAHAM. I totally agree that if you are going to charge someone under domestic criminal law, you should read them their rights. I would just urge my colleagues to understand that when you are fighting a war and you capture people on the battlefield—and the whole world is the battlefield, in my view—the primary goal is to find out what they know about enemy operations, get them off the battlefield, then reserve prosecution decisions later. So I hope we do not criminalize the war and we will remain flexible, pragmatic, and aggressive.

There are 48 people at Guantanamo Bay, I believe, that this administration has identified that are going to be held under the law of war on an indefinite basis because they present a national security threat, but the evidence is such you would not take them to a criminal proceeding with a military commission or Article III courts. Is that correct?

Attorney General HOLDER. Yes, I am just checking the numbers here. That is correct that there are 48 detainees who we have de-

terminated are too dangerous to transfer and not feasible for prosecution.

Senator GRAHAM. I want to, one, stand by you in that decision. I think it is a rational, logical decision, not generated out of fear or revenge, but out of necessity. We are not fighting crime. We are not fighting the Mafia. We are fighting an international, sometimes unorganized, organization called al Qaeda who is bent on our destruction, and some of these people need to be held under our values, under the law of war, with due process, but we should not view what they did as a common crime but as a military threat. And it is my understanding that every detainee, whether held under the law of war or not, will have their day in an Article III court. There is a habeas proceeding available to every detainee at Guantanamo Bay. Is that correct?

Attorney General HOLDER. That is correct.

Senator GRAHAM. And one of the judges recently granted a habeas petition to an alleged member of al Qaeda who confessed to being a member of al Qaeda, who swore allegiance to al Qaeda in the 1990's, but the judge decided to grant the habeas petition because the Government could not prove on the day of capture in 2001 they were still a member of al Qaeda.

It is my view, Mr. Attorney General, that we need to reform our habeas procedures and that a presumption should follow the detainee that once you are a member of al Qaeda, proven that on the day of capture, there would be a presumption that you are still a member of al Qaeda, and the court could hear evidence otherwise. This is just an example of why the Congress, in my view, ladies and gentlemen, needs to get more involved. So hang firm, stand strong, be fair, be aggressive, be pragmatic, but do not lose sight that we are at war.

Now, when it comes to confinement facilities, I share the President's concern that Guantanamo Bay has become an iconic image used against our troops in the field, and it would be preferable, in my view, to have a new facility that starts over and is not tainted by the past of Guantanamo Bay even though it is a well-run, secure facility now, and I would like to work with you in that regard. And I am losing the audience, apparently, but that is OK.

Now, when it comes to future captures, where would we put someone that was captured in Yemen that we believed to be a member of al Qaeda? Where would they be detained?

Attorney General HOLDER. Well, that is one of the issues, I think, that we have to wrestle with. It depends on, you know, what we ultimately want to—

Senator GRAHAM. Since my time is short, we are basically a Nation without a viable jail. This President is probably not going to send new people to Guantanamo Bay. Is that a fairly accurate statement?

Attorney General HOLDER. That is certainly something we would try to avoid.

Senator GRAHAM. Right. And if you send these people to Bagram Air Base, you are going to bring the Afghan Government down. So to my colleagues who think that we can close Guantanamo Bay and send them to Afghanistan and the Afghan Government becomes

the American jailer, I think you are making a serious mistake in the war on terror. Do you agree with that?

Attorney General HOLDER. I think we have to come up with options, and I think we need to work with the Congress to try to develop what those options might be.

Senator GRAHAM. This is music to my ears because I think we do, also, because we are fighting a war, we do not have a viable jail. Some people say use Guantanamo Bay, it is safe and secure. I would argue listen to the commanders, see if we can find a better jail that would meet the needs of this unique war on terror.

So at the end of the day, I think the decision to prosecute KSM in civilian court was a mistake. The fact that you are being flexible, pragmatic, and aggressive is the right track to take. And I would urge you to work with the Congress to see if we can fashion detention policy that allows us to be at war within our values, allows you to use Article III courts when appropriate, but never lose sight of the fact that if you are a member of al Qaeda, you have not violated our immigration laws; you are a continuing threat to the world. And the idea of holding someone with due process who is a member of al Qaeda until they die in jail is OK with me, because we have done it in every other war. But this is a war without end, so I am willing to do more than we have done in past wars, as long as we do not lose sight of the fact we are at war.

Thank you for your service, and I look forward to working with you as we solve these very difficult problems.

Attorney General HOLDER. Right. Thank you, Senator.

Senator KOHL. Thank you, Mr. Graham.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and thank you, Attorney General, for your service.

I just want to go over a little bit. I know New York came up in questions. Senator Durbin and then Senator Feinstein said something. And I just agree with what she said from her experience as a mayor, how difficult it would be handling a trial in a densely populated area. I know you have said you have not yet ruled it out. I hope you will. The overwhelming consensus in New York, as you know, is that it should not be there, and I just strongly urge you to make sure that that does not happen and to find a better alternative.

Attorney General HOLDER. Senator, if I could just interrupt, what I said was that it has not been ruled out but that we would take into consideration obviously the expressions of the political leadership there as well as what we are able to glean from the population in making that determination. So I want to make sure that that is a part of what I have said.

Senator SCHUMER. OK. I appreciate that. I am going to move on here to other areas in New York which are having other kinds of problems.

What we have found throughout the country, I think, the Gang Intelligence Center's 2009 Gang Threat Assessment found that gangs are increasingly migrating from urban areas to suburban and even rural communities. Unfortunately, there are two communities in New York that are all too familiar with this problem:

Newburgh in the Hudson Valley and Brentwood, Suffolk County, on Long Island.

The situation in Newburgh has become shocking over the past year. There are reports of shoot-outs in the town streets, strings of robberies and gang assaults with machetes. Homicides are up, rape is up, robbery is up, gun crimes are up, and anecdotal evidence suggests that the gangs in the area have started to target the schools, which is what gangs often do, to recruit new members. So Newburgh could very much benefit from increased Federal help and resources.

So my question is: Would you agree to go to Newburgh yourself or send a high-level official with expertise in this area to meet with local law enforcement and community leaders to work on decreasing this increasing gang presence?

Attorney General HOLDER. Yes, I would agree to have somebody, if not myself, go to Newburgh for the purposes that you indicated. But I would also want to make clear that the United States Attorney for the Southern District of New York has been focusing attention on the problem in Newburgh, has been working with the local officials there as well. And I think that we will see shortly some of the results of that work. But I will not preclude—

Senator SCHUMER. I think we need all levels. The U.S. Attorney obviously, I have been—you know, our office has been in touch with his. But we need some Washington presence as well.

Attorney General HOLDER. That is fine.

Senator SCHUMER. I appreciate your agreement to either you or a high official expert in this to come and help us.

The second question, related: A local newspaper in the Hudson Valley, the Times Herald-Record, reported that the FBI has brought Newburgh's violent gang situation to the attention of the White House because it was a serious example of what is happening with gangs. Will you commit to having the appropriate agencies in your Department examine the violence in Newburgh to determine whether increased Federal resources are warranted, as I believe they are?

Attorney General HOLDER. Yes, we are committed to that. I think that you will see that we have, in fact, been doing that. The problem that you note in these two communities is, as you say, acute and is worthy of Federal attention and Federal assistance to the local authorities who are trying to do the job but I think need some help.

Senator SCHUMER. Yes. I am not being critical.

Attorney General HOLDER. And I am not either.

Senator SCHUMER. I am just saying they need additional help.

Let me go to Brentwood, just similar problems: 50 arrests of gang members since December, 9 violent killings last year—in a small community, that is a heck of a lot—5 killings since this January in Brentwood and the surrounding areas. And the FBI did recently brief my staff on gang activity in Brentwood. I was pleased to hear that the FBI and other Federal partners are working closely now with local law enforcement. They have met with the community leaders. They are increasing resources significantly to fight gangs in the area.

So could you please elaborate on the work and involvement of the Department in Brentwood? Could you speak to what you are learning from those efforts? And, finally, given the gang threat assessments area of increasing gang migration to non-urban areas, would you elaborate on the work of the Department to increase Federal resources generally to fight gangs in these non-traditional areas?

Attorney General HOLDER. I think the gang problem is a very serious one. We have seen gangs that were centered in one city become national in their scope, national in their reach. We have seen, as you have indicated, a migration of gang activity from cities to rural and to suburban areas. And we in law enforcement have to adapt to that and break old models, old ways of thinking. Gangs are not simply an urban phenomena anymore.

With regard to Brentwood, I know that the FBI has given attention to that problem, as you have indicated. Our hope is that through our cooperation with the local authorities there, we could have a meaningful impact on the problem that has unfortunately afflicted the Brentwood area.

Newburgh and Brentwood are—you know, I am a New Yorker—two wonderful communities, and I think what we have seen there is unfortunately too typical of what we are seeing, increasing numbers of—

Senator SCHUMER. Anything specific you can let us know about Brentwood?

Attorney General HOLDER. Well, there are operational concerns I have with regard to revealing too much other than to say that the FBI is involved in a meaningful way with regard to the Brentwood problem. And, again, I think this is something that will bear fruit in a relatively short period of time.

Senator SCHUMER. If my office could get a briefing on some of those, that would be very helpful.

Attorney General HOLDER. Sure.

Senator SCHUMER. I do not have any more questions, so I will yield back my time.

Senator FEINSTEIN [presiding.] Thank you very much, Senator.

Senator Kyl.

Senator KYL. Thank you, Madam Chairman.

I, too, am going to first address some local issues, Mr. Attorney General. I am very disappointed that the administration appears to be putting a very low priority on securing our southern border. Violence there is escalating exponentially. Thousands of people have been killed just south of the border by drug cartels. Last week, Arizona buried a very fine citizen, a rancher in Cochise County, Robert Krentz. The violence is spreading, and yet action that I have requested from you and from the Secretary of Homeland Security is lacking.

Let me back up. I am talking about Operation Streamline for which both the Department of Justice and the Department of Homeland Security have responsibility. Last Friday, I visited the Yuma sector of the border and heard the tremendous success that Operation Streamline has brought to that sector of the border, similar to the Del Rio, Texas, sector. There is virtually no illegal immigration occurring there now. Part of it is because of a double and in some cases triple fence with adequate Border Patrol agents.



Part of it is the deterrent effect of Operation Streamline, which puts even first offenders in jail for at least a couple of weeks, and it can be up to a month or maybe even longer, depending on how many times people have crossed the border.

Now, this takes some resources from the Department of Justice, and I have asked you, when I met with you before your nomination hearing in 2009, about the funding for that. I discussed it again with you at your nomination hearing on January 15, 2009. We discussed this because the Department of Justice needs to provide the funding for certain elements of it. I asked you what resources were necessary for the Marshals Service, the courthouse renovations that may or may not be necessary, certain administrative costs—criminal clerks and those kinds of things, potentially additional judges, some additional detention spaces, though there appear to be plenty of opportunities to rent detention spaces. All of this would fall under the Department of Justice jurisdiction. I have gotten no response to these repeated requests.

So, finally, I attached an amendment to the fiscal year 2010 Department of Homeland Security appropriations bill that requires collaborative—the Department of Justice and the Department of Homeland Security to provide a report to us on what these costs are. That report was due from you and Secretary Napolitano on December 27th of last year.

In a response to me in March from questions I submitted on December 9th of last year, Secretary Napolitano wrote that, “The report is in the final stages of review process, and we anticipate Congress will receive it in the near future. Still have not received the report.

It is my understanding—and I would love for you to be able to verify that this is not true—that the Department of Justice has not been fully cooperative in providing the information necessary to complete the report. The Department of Justice is the chief law enforcement agency of the country responsible for seeing that the laws are obeyed, and that would assume also itself complying with laws, which has not been done here.

When can we expect to get the report, No. one? Second, do you support Operation Streamline or not? Will you support funding necessary—will you identify the things that would need to be done, and will you support that funding, including by making requests for the next budget of the administration to provide for funding necessary to both expand Operation Streamline to other sectors, including the Tucson sector of the border, where just about half of all of the illegal immigration is now coming through the southern border?

Attorney General HOLDER. Well, first I would express my condolences for the citizen in Arizona. That happened while I was in Arizona for a U.S. Attorneys conference.

It is, in fact, a priority for this administration to ensure that our borders are secure, and especially the border we are talking about, the southwest border. We have tried to work with our partners at DHS to be effective in that regard. I will check and see what the status is of that report. It is certainly not anything that has been brought to my attention by anyone either at DHS or within the De-

partment of Justice that we have been dragging our feet in the creation of that report.

There are a variety of mechanisms, I think, that we need to use in order to be effective at reducing the flow of illegal immigration and all that that implies, all the collateral problems that it tends to breed. And Operation Streamline is something that, you are correct, you and I have certainly discussed in the past.

We will look at all of the possibilities, I will look at all of the possibilities, and I will be supportive of, within the interagency process and dealing with the folks at OMB, supportive of those things that I think have proven to be effective so that we can use our money efficiently and so that we can be responsive to the citizens along the southwest border.

What I think we too often think of is that that is a local problem, and it is not. It is a national problem. What happens along the southwest border has an impact in Chicago, Washington—

Senator KYL. Could I just interrupt you? I agree. I have just got 7 minutes, as you know. Would you ask your staff to respond to my staff to set up even a telephone call between the two of us—it does not have to be a meeting—to further discuss this, especially after you have been able to verify the information and provide it to me, please?

Attorney General HOLDER. Sure. We will do that.

Senator KYL. Totally different subject. On February 26th, the House passed the Intelligence Authorization Act for this fiscal year. Just before that, it stripped a provision that would have criminalized cruel, inhuman, and degrading interrogations, which was a staggering provision in its breadth and ambiguity. A CIA agent, for example, could have been punishable with a prison sentence for up to 15 years if a court concluded that the agent blasphemed an individual's religious belief during the course of an interrogation.

Does the administration support adding such a provision to the Criminal Code?

Attorney General HOLDER. I am not familiar with that provision. Torture is certainly a violation of our law. When it comes to cruel, inhumane, and degrading treatment, I would want to look at that statute and see exactly what the intent was in trying to criminalize that. I am not familiar with that.

Senator KYL. Would you respond to me in writing as to what the Department's position on that would be? Because I suspect the issue will arise again.

Attorney General HOLDER. That is fine. I will do that.

Senator KYL. I thank you very much.

Senator FEINSTEIN. Thank you very much, Senator Kyl.

Senator Cardin.

Senator CARDIN. Thank you, Madam Chair, and, General Holder, it is always a pleasure to have you before our Committee. We thank you very much for your service.

I want to follow up on the points that many of my colleagues have raised in regards to Guantanamo Bay and the handling of the detainees that are there. I recently was in Guantanamo Bay. I had a chance to visit there 2 weeks ago, and it was my second visit, and the type of facility there is certainly one that is world class

from the point of view of how it treats detainees, the type of physical facilities, et cetera.

It was constructed in order to be able to obtain intelligence information from detainees. Its purpose was also to detain individuals and then, third, for pre-trial and trial purposes. Well, the actionable intelligence information is no longer as relevant as it was when it was first constructed. The number of detainees is far below its capacity. And it has not been used very much for pre-trial or trial cases. So as a practical matter, as a budget issue, and certainly from a symbol, Guantanamo Bay has to close.

Now, we have talked a little bit today about what do we do about the people that are there, how do we try them, do we use our Article III courts, do we use the military commissions. I support what some of my colleagues have said. I want to give you maximum choice. I do not want to restrict the way to get the most effective results. I do not want to give the detainees more rights than they should have, and that is, why restrict the venue in which we should try them?

But I want to deal with those that we cannot release now and we cannot try. You inherited this problem, but it is an issue that we have to deal with. On previous occasions, you have said that there will be a process for review to make sure that basic rights are afforded. How far along are we in making that type of review process public in order to get international recognition and hopefully support for how we are dealing with those that will continue to be detained without trial?

Attorney General HOLDER. Well, that is something that we are still working on. I think that there certainly needs to be a process by which an initial determination is made, and that has already occurred with regard to the task force and in the principals Committee that voted on making the decision to detain these 48 people. Obviously, there is a right for them to challenge that determination in Federal court, but as I have talked about with Senator Graham, there has to be, and the administration agrees with this, some kind of ongoing review mechanism put in place to ensure that somebody who is detained on this basis continues to be a danger.

It is something that we are still working through in the inter-agency—and, frankly, working with Senator Graham as well. My hope would be that we would have something that we will be able to share, and put in place, more importantly, in a relatively short period of time. But this is something that has been focused on.

Senator CARDIN. Let me just repeat the 9/11 Commission's recommendation that the United States engage its friends and develop a common coalition approach toward detention and humane treatment of captured terrorists. I guess my point is that it is fine for us to internally develop a review process, but if we do not put sunlight on it, if we do not open this process up, if we do not engage the international community, and if we do not engage the international community on how we are going to deal with detainees in the future, this war is not going to end anytime soon. And we are apprehending people today, and we still have yet to have a real international accord as to how these detainees should be handled. Should we have another Geneva-type convention to deal with this?

I think we are looking forward to some broader recommendations rather than trying to deal with this internally in this country.

Attorney General HOLDER. I agree with you. I do not think that review mechanism can be done entirely—it must be done in as transparent a way as we can. There is a symbolic significance to this review process in the same way that there is a symbolic significance to the continued existence of Guantanamo. We have to deal with this not only on a substantive level, but also on a symbolic level. And it would seem to me, again, taking into account a variety of things, that we want to make sure that this review process, the existence of this review process, is something that is widely known.

Senator CARDIN. When should we expect some specifics as to how these procedures are being handled? I have heard you say frequently as soon as possible, but it is getting late.

Attorney General HOLDER. It is a priority. We have now gotten to the point where we have made the determination; that very able testify made its recommendations, unanimously agreed to by the principals, that 48 people should be held in this way. Before, we were talking about something that was theoretical. Now it is real. We have identified who those people are, and I think it is now incumbent upon us to develop as quickly as we can what the review mechanism is going to be and how transparent we can make that.

Senator CARDIN. Sometime this year?

Attorney General HOLDER. I would certainly think that is—I certainly think we can do that.

Senator CARDIN. Sometime this month?

Attorney General HOLDER. I am not sure we can do that.

[Laughter.]

Senator CARDIN. I would just urge you—this is an issue that is difficult for us to defend when we do not have anything to defend, we do not have a policy to defend. So I would just urge you to get that to us as quickly as possible.

Let me turn to a separate subject dealing with our juvenile justice system. There have been recent reports that have been released showing that many of the individuals in our juvenile justice system have been victimized. I would hope that you are acting on that report, and the Department of Justice has significant responsibility in regards to how juveniles are handled in this country, not only from the Federal point of view but our States. And I would think this should be a very high priority, and I know our Committee is looking at legislation here, but we certainly welcome your thoughts as to what we should be doing in regards to improving our juvenile justice system.

Attorney General HOLDER. We would like to work with you in that regard. The reports that I have seen from a variety of contexts are very disturbing about how juveniles are treated, how they are victimized too often in facilities where, frankly, they should not be held. I think that the purpose of the juvenile system is rehabilitation, and if that is to occur, we have to have a juvenile system that is capable of doing that. And so I will look forward to working with you in trying to make our juvenile system what it can be and it too frequently is not.

Senator CARDIN. Thank you.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you, Senator Cardin.

I would like to take this opportunity to put in the record National Security Division statistics on unsealed international terrorism and terrorism-related convictions and also a letter dated February 18th from the Department.

[The information referred to appears as a submission for the record.]

Senator FEINSTEIN. Senator Cornyn.

Senator CORNYN. Thank you, Madam Chairman. Good morning, General Holder.

Attorney General HOLDER. Good morning.

Senator CORNYN. In the short time we have together, I want to ask you a little bit about the financial crisis and what the Department is doing to investigate and prosecute criminal activity there, the violence in Mexico and the work that the administration is doing to deal with that, and also what the administration is doing and what the Department is doing with regard to health care fraud, and I have some specific questions there.

I suspect you will agree with me that criminal prosecution can be an effective deterrent to those who might be tempted to commit future crimes.

Attorney General HOLDER. It is the most effective deterrent.

Senator CORNYN. I agree, and that is why, as we have seen the investigation of the financial collapse that reached its nadir with Lehman Brothers and AIG and this massive infusion of taxpayer money to help prop up our financial system and to get the economy going again, we are looking at financial regulatory reform coming out of the Banking Committee and the like. But one thing I have noticed that has been missing is show trials. We simply have not had the people who were guilty of criminal conduct brought to justice and tried in public and punished for committing crimes that the American people are paying for.

Can you sort of summarize for me what is happening so the American people can have some confidence that this ultimate deterrent will be utilized, where appropriate?

Attorney General HOLDER. Well, the President has created the Financial Fraud Enforcement Task Force, and that task force is looking at a variety of matters, and a variety of matters are under investigation. These are difficult cases to put together. They are complex by their nature. They are paper driven. They are not easy to put together.

I think over time we will see more of these trials, and I hope that they will have the deterrent effect that I think they are capable of having.

Having said that, there have been some successes. There have been indictments brought against Stanford, obviously the Madoff case. There have been some other high-profile matters. But I think the work—I would focus on the work of the Financial Fraud Enforcement Task Force, which is pretty comprehensive in its scope. It involved not only Federal prosecutors but State and local prosecutors as well, regulatory agencies, the SEC is an integral part of this. And I would think that you will see coming out of the work

of that task force the deterrent kinds of things that I think you and I both agree ultimately needs to be emphasized.

Senator CORNYN. Who is coordinating for the executive branch the investigations and prosecutions of those guilty of bringing our financial system into crisis 18 months ago? Because, of course, you have all these, an alphabet soup of different Federal agencies—the FDIC, the SEC, obviously the Fed, Treasury. Who is coordinating all that? Is it the Financial Fraud Enforcement Task Force, or is it a higher level and more specific to the financial crisis?

Attorney General HOLDER. It is coordinated by the Justice Department, and coordinated by me as the head of the Financial Fraud Enforcement Task Force. It is an unprecedented effort to take, as you put it, the alphabet agencies, Federal prosecutors together so that we can be efficient in the investigation of these matters and bring to bear the various expertises that exist in these different institutions, and then bring to justice as quickly as possible the people who are responsible for the frauds that were perpetrated.

Senator CORNYN. General Holder, turning now to health care fraud, some experts have estimated that as much as \$460 million is stolen from the Medicare program each year, and that is out of a \$425 billion annual program. Health and Human Services Secretary Sebelius has told me in a letter in response to an inquiry I made that there is as much as a 10-percent wrongful payment rate for Medicaid payments, 10 cents out of a dollar that could be applied to helping provide health care for low-income individuals.

I know that we have talked about this before, but my experience as a State Attorney General—and I would be surprised if yours is different—in that the pay-and-chase way of addressing Medicare and Medicaid fraud does not seem to work very well because you have limited resources, and that the detect-and-prevent approach has a lot to commend itself in terms of a superior approach. And I would just ask for your comments on that and ask hopefully for your commitment to work with us to sort of change the paradigm to make it a fairer fight between the good guys and the bad guys.

Senator CORNYN. General Holder, I would agree. We have worked, I think, in an unprecedented way—that is, the Justice Department with HHS—in trying to get at this problem. The amounts of money that are essentially stolen from the American people are astronomical. If we look at the last fiscal year, we have \$1.19 billion in criminal and civil settlement collections during fiscal year 2009. That is just a huge amount of money.

We have put together this HEAT effort, Health Care Fraud Prevention and Enforcement Action Teams that we have placed in seven cities—we are going to try to expand those I think to 13 this year—that have been particularly helpful, particularly useful in identifying places where we see this health care fraud. And we certainly need to detect it and hold people accountable where it occurs, but I think you are right, we have to come up with mechanisms—that probably means auditors and people like that—to prevent this from happening in the first place. These fraudsters, once they are detected, what we have found is that they move from one city to another. And so what we have to do is make it impossible for them to make money off these kinds of frauds. We have

even seen instances where we are now hearing that drug dealers are getting out of dealing drugs and into health care fraud because it is less dangerous and more lucrative, and that simply cannot be allowed to stand.

Senator CORNYN. General Holder, I commend the efforts that you have made and that you described, although I think we would have to all admit that it is just a tiny fraction of the money lost to health care fraud. So I would look forward to working with you to try to get into this detect-and-prevent mode rather than the pay-and-chase mode.

Let me just close on a question about the Merida Initiative and the violence in Mexico. The Chair and Senator Kyl and I all represent border States, but as you appropriately stated earlier, what is happening in Mexico and along the border affects our entire country.

As we know, there is a war basically going on now between the drug cartels and the Mexican Government. President Calderon is heroically taking on this challenge. We do not know how it is going to come out yet, and that worries me a lot. We have put a lot of money and a lot of effort into the Merida Initiative, and I believe you and Secretary Clinton, Secretary Napolitano, the Director of National Intelligence, and others traveled to Mexico City recently to visit with the Mexican Government. But why is it that what we are doing now does not appear to be working? And are you as concerned as I am that this violence will not result in a peace treaty between the Mexican Government and the cartels? One is going to win, and the other is going to lose, and we do not know what that outcome will be right now.

Attorney General HOLDER. Well, just for the record, I did not accompany them on the trip to Mexico. I was actually supposed to be before this Committee to testify, but it got postponed. So the Deputy Attorney General actually went in my place.

The work of our Mexican counterparts has been courageous. They have literally put their lives on the line. When one looks at the number of law enforcement officers, soldiers, civilians who have lost their lives in connection with this battle, it is indeed alarming.

I spent over 2 hours in Phoenix when I was down there at the U.S. Attorneys conference speaking with my Mexican counterpart, the Mexican Attorney General, about the progress that we are making. And I think progress has been made in Mexico.

It would be my hope that they will continue this effort. They need the help of the United States in a number of ways. The Merida Initiative is certainly one of the ways in which we can do that. I think we also need to focus on what they call the Iron River and the flow of illegal weapons that go from the United States into Mexico and that are then trained on very courageous Mexican soldiers and innocent Mexican citizens. We have used our DEA, our ATF, our FBI to try to help in that regard.

I think the battle of this is very much in the balance, and without continued American attention and continued American support, I think we decrease the chances that the Mexican Government will ultimately be successful. I am confident that President Calderon is committed to this fight, but I think we have to show ourselves to be good allies in that regard.

Senator CORNYN. Well, I appreciate your efforts there and look forward to continuing to work with you. I have some other questions, but I will have to submit those in writing. I would note that the latest estimate I saw is that 18,000 people have lost their lives as a result of this violence since 2006. I am not sure the American people have fully digested that and comprehended the scope and the severity of the threat occurring right on our southern border, and so we have a lot of work to do.

Attorney General HOLDER. Yes. I agree.

[The questions of Senator Cornyn appear under questions and answers.]

Senator CORNYN. Thank you.

Senator FEINSTEIN. Thank you very much.

I have on my list next in the following order: Senator Klobuchar, Senator Coburn, Senator Kaufman. Senator Franken, you are up.

Senator FRANKEN. Thank you, Madam Chairman, and, General Holder.

I am very concerned about the potential merger of Comcast and NBC Universal. I know that you are not allowed to discuss the specifics of the merger, but I want to delve into this a little bit with you today.

I am concerned because I see the potential here for consolidation of media in a way that is to me very frightening. You know, I worked at NBC a long time. I want the best for NBC. Jeff Zucker came to me and said this is good for NBC, and I said, "I know it is good for NBC." That is not the issue. The question is: Is it good for the American people?

And to me, what we have is a situation where—if this goes through, are we going to have a situation where Verizon and AT&T see the need to buy networks and studios? And are we going to get all our information—because Comcast is the largest cable provider and the third largest Internet provider. Are we going to be seeing a situation where five companies are controlling all the information that we get? And I think that is a very dangerous situation.

Are you familiar with fin-syn, what happened with the financial syndication laws in the early 1990s?

Attorney General HOLDER. Somewhat, yes.

Senator FRANKEN. You remember that basically the networks were prohibited from owning their own programs.

Attorney General HOLDER. Right, OK.

Senator FRANKEN. And that was reversed. During the testimony of that, all the different networks said why would we buy our own—you know, favor our own programs? We are in the business of getting ratings, and we just buy the best programs. Well, obviously, what has turned out to be the case is that has not happened at all. They favor their own programs. And this set the scene for Disney buying ABC, and for Paramount and Viacom buying CBS, and NBC merging with Universal, and Fox, of course, owns Fox. So right now we have incredible concentration, and most of the shows are owned by whoever owns that. And it has reduced competition for independent producers.

Now, what we are seeing with Comcast is that Comcast is—yes, it is a vertical integration, but it is also horizontal because they both have sports programming that anybody who is carrying—has



a cable network has to carry and would be really in bad shape if they do not.

My question is: How does the Department of Justice determine whether a merger is horizontal or vertical or both? And how does that impact the Department's analysis of this merger?

Attorney General HOLDER. Well, I am somewhat restricted in what I can say about the investigation that is underway with regard to the Comcast-NBC merger, but I can assure you that the Department is conducting a thorough investigation of that proposed transaction. And if a determination were made that Comcast's acquisition of NBC would substantially impact competition in violation of the antitrust laws, we are committed to taking very serious enforcement action.

I am not really at liberty to talk about it much because it is an ongoing investigation, but the Antitrust Division that has shown itself to be aggressive, appropriately aggressive, headed by Christine Varney; they are looking at this transaction.

Senator FRANKEN. Well, Mr. Varney, when he testified in front of the Commerce Committee last month, he testified about previous DOJ antitrust actions and discussed some of the significant conditions that DOJ imposed on the parties. I am skeptical, but I am still open to imposing conditions on a potential Comcast and NBC merger, but I have problems with imposing conditions. First, it is hard to enforce them since someone has to know a condition has been violated and then report that to DOJ. And, second, conditions almost inevitably expire after a few years. So I want to make sure that the Department of Justice—make sure that conditions, merger conditions would actually have enough teeth and have a long enough life that they would really impose real conditions to prevent the very thing I am fearing.

Attorney General HOLDER. Well, again, maybe I can just take myself away from the NBC-Comcast situation and simply say that when we look at these matters, we have a wide range of things that can be done, from barring, stopping the merger itself, to putting into place a variety of conditions that the parties have to agree to in order to allow the merger to proceed—again, not speaking about NBC-Comcast, but just more generally. And we can, I think, make those conditions ones that are enforceable, and have a degree of transparency there. Obviously, it involves having on the staff or having access to people who are experts in the field, not simply good antitrust lawyers at the Antitrust Division, but people who understand the particular field that we are trying to regulate. And I am confident that we do have that capacity.

Senator FRANKEN. Well, I would hope that I could in my office and the folks over at DOJ who are looking at this can have an exchange of ideas on this because this is something that affects people in ways they do not understand, including just your cable bill. So I want some kind of assurance that I will be able to do that.

Attorney General HOLDER. Well, now I care. I am a Comcast subscriber, and the fact that you point out it could have an impact on my cable bill has awakened—

Senator FRANKEN. I knew I could reach you somehow.  
[Laughter.]

Attorney General HOLDER. That is right. You have got the AG more than interested than I was going into this. But, seriously, we will be glad to——

Senator FRANKEN. The way to Holder is through his pocketbook. I know that.

[Laughter.]

Attorney General HOLDER. We would be glad to work with you, to listen to the concerns that you have and the observations that you have, given the experience that you have in the industry.

Senator FRANKEN. Thank you.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much.

I see that Senator Klobuchar has returned. Senator, you are up next.

Senator KLOBUCHAR. OK. Thank you very much, Madam Chair.

Thank you, Attorney General Holder. I first wanted to commend your Department, the Department of Justice, and specifically the U.S. Attorney's Office in Minnesota for the fine job it did on the Petters case, which, as you know, is I think second to Madoff in terms of loss and really affected a lot of people in our State, a lot of nonprofit groups that got ripped off. And he just received a 50-year sentence, and so I wanted to commend Todd Jones, the U.S. Attorney, as well as all of the great experienced line attorneys that worked on that case, so thank you.

Attorney General HOLDER. Thanks for sending Todd our way.

Senator KLOBUCHAR. All right. The second thing I wanted to focus us on is just what I have considered the elephant in the room when it comes to crime that is affecting people's lives, and that is crime on the Internet, that is cybersecurity issues that go way beyond individual people, but are going to, I think, at some point be a major problem for our country if we do not get on the front end of this and become as sophisticated as the crooks or even the terrorist groups that are trying to hurt our country or rip us off.

I was concerned on the more micro level for what affects people in their individual lives. A recent report from the Office of the Inspector General suggests that DOJ should be doing more to combat identity theft. The report stated that DOJ needs to ensure that its efforts to combat identity theft are coordinated and given sufficient priority. And it talked about the fact that there is not a person assigned with the responsibility to coordinate these efforts, and by some estimates, identity theft was the fastest-growing crime in America, in 2008 10 million estimated victims, up 25 percent from 8 million victims in 2005. We have heard the FBI has stopped collecting data on identity theft. That was in this report. Could you comment on this report and what your efforts will be to remedy it?

Attorney General HOLDER. I think you identified not only a problem that exists now but one that I think, if unchecked, is potentially the crime of the future. As many benefits as the Internet brings to us, we see criminals migrating to the Internet and using it as a basis to do a whole variety of cyber crimes, everything from identity theft to retail fraud.

The Department takes this very seriously. I think we have a good section within the Criminal Division that is effective. These people are experts at this. I think they could use more resources,

but they certainly have the attention of the Assistant Attorney General, Lanny Breuer, who runs the Criminal Division, and certainly of this Attorney General.

I think this is an area of crime that we have to get ahead of. There are ways in which we can do that, and we are committed to doing that.

Senator KLOBUCHAR. And I am now exploring this myself, but do you know why the FBI has stopped collecting the data on identity theft?

Attorney General HOLDER. I am not familiar with that, but I can examine that.

Senator KLOBUCHAR. It was in the report. I just introduced a bill with Senator Thune, and a piece of this is on peer-to-peer marketing and what is happening where people innocently go on a computer and maybe their kid has downloaded a P2P program, and then all their stuff gets stolen. We had a landscape company in Minnesota where the employee goes home, does their work at home, and the whole employee stuff, all of their company stuff is out on the market. Everyone is getting identity theft problems, individuals who just happened to access. I mean, I just—it is unbelievable to me. And the 2009 Internet crime report by the Internet Crime Complaint Center was released in mid-March. Complaints of Internet fraud were up 25 percent over a year ago, and the total dollar loss more than doubled from 2008. And so just where do you think we should go with this? Local law enforcement does not have the resources to figure this all out. A lot of it is international. Are there things we should be doing with other countries and their law enforcement? How do we get a handle on this?

Attorney General HOLDER. Well, I think that you have really hit on something, and I think this is not something that can be done on a local basis or even a national basis. One of the things that the Internet allows is for criminals in far-off places to almost be in your living room, bedroom, wherever it is that you have your computer. And the problem of identity theft and other kinds of cyber crime requires the cooperation of not only a concentrated effort here within our own country, but also with like-minded countries.

I was in Madrid last week talking to the EU Justice Ministers there and the whole question of cyber crime and how the Internet is used—one of the focuses we had there was on child pornography, but other things as well—is something that we are committed to working together to do. It means that we have to reach out not only to our allies but also to other countries that have been, frankly, somewhat reluctant to be cooperative. We have to use diplomatic pressure to make them be partners in this effort.

Senator KLOBUCHAR. OK. I was one of the sponsors on the Fraud Enforcement Recovery Act that the President has signed into law, and you talked about the forming of this task force. Could you talk about what has happened with that sense, what are the priorities, and talk about how the voices of local law enforcement will have a place at the table?

Attorney General HOLDER. Yes, I think it has been a good effort so far, and I think that as time passes—and not too long a period of time—the results will become manifest. What I think is really important about this is that this is not a Federal effort. This really

is one that involves our State and local counterparts, and they are involved in various subcommittees. They have leadership roles throughout the task force. The needs that they identify we try to deal with. The ideas that they have are, I think, excellent ones, and we try to incorporate them into the enforcement strategy.

I really think this is a model for the way in which we can work with our State and local partners. They are not junior partners. They are equal partners in this effort.

Senator KLOBUCHAR. OK. Then last, and I know Senator Cornyn brought this up, but just the health care fraud issue, and you and Secretary Sebelius announced the HEAT group. We have had discussions. One of the things that I have been most shocked by is that areas that tend to have more disorganized health care systems, like Miami, Florida, also tend to have more fraud, because not only are there issues of the Government watching over it with the \$60 billion loss a year, but also that no one else is watching over each other, like we might have in Minnesota where we have a more organized system so you cannot just set up a storefront and get the money sent there because then the money is not going somewhere else so someone notices it.

Could you talk about the progress—I know you have these hot spots including such as the one in Florida, but we just cannot afford to have the money bleeding off into this Medicare fraud anymore. And people always talk about it. It is a popular thing to talk about it, but if we do not really get something done, we are not going to help the American people.

Attorney General HOLDER. Well, I think with the use of these HEAT task forces, we actually are getting something done. I think we have measurable results. We have tried to identify the places where we have the greatest instances of health care fraud, and those are the places where we put the task forces. As I said, we have seven now, and I think we are supposed to go to 13 or 14 next year. But you are right. There are certain localities that have certain ways in which they conduct themselves, certain ways in which they organize themselves that make them more susceptible to this. And these fraudsters understand that, and they move from one city to another identifying those cities that are most vulnerable.

But I think Senator Cornyn's point is actually a good one, that we cannot simply be chasing these people, we have to come up with ways in which we prevent this fraud from occurring in the first place. So I think it has to be actually a dual effort.

Senator KLOBUCHAR. And then last—and I am not going to take any more of my colleagues' time here because I am over mine, but I will talk to you about this separately. Senator Durbin and I have a bill on organized retail crime. Organized retail crime costs retailers approximately \$30 billion per year, and, again, it is computer related because it is then being sold on eBay and other places. And so I think that there are some good ideas of how we can work to track and have those online marketers stop selling goods that they believe are stolen. And so I am going to talk to you about that later. Thank you.

Attorney General HOLDER. But just shortly, I think the point that you raise is a really good one. It is one thing for an individual to shoplift, take something. This is bad. You know, take it out

under their coat, take it out of the store. But when you have a whole bunch of people doing that and then using the Internet essentially as a way, a means by which you fence this material, you really kind of multiply the possibilities for these people, and you have what could be in the old days seen as a local problem become a truly national one with consequences for our economy, not just the local economy but for our National economy.

Senator KLOBUCHAR. Well, we would love to have the Department of Justice help on this bill and to get it done. Thank you.

Senator SPECTER. [presiding.] Thank you, Senator Klobuchar. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman Specter.

First of all, welcome, Attorney General Holder. I would like to begin by saying that I am very proud of and would like to associate myself with the remarks that Senator Feinstein made and to observe that the emblems of American justice, which is something that is admired and revered around the world and is a national asset in which we justifiably take great pride, are the blindfold and the balance, not the torch and the pitchfork. And I want to applaud your steadfast defense of the principles of American justice as Attorney General.

There has been considerable discussion about health care. I would like to let my colleagues know that Senator LeMieux and I are working on a piece of bipartisan legislation to look at predictive capabilities in health care fraud, and we will, of course, follow up with Senator Cornyn and Senator Klobuchar. And perhaps we have the beginnings of a good, strong piece of noncontroversial, anti-crime, bipartisan legislation, and I hope your office, Attorney General, will work with us on reviewing that legislation. But I think we could make some good progress off this hearing.

I wanted to go back to the question of military commissions again. When you and I were in a different hearing, you said that one of the values of Article III courts is the experiential base that they provide, that prosecutors going in can know what the answers are going to be to a whole array of questions and, therefore, can model out how the case is going to play out and can produce it more effectively.

We have already noted that there have been hundreds of Article III terror prosecutions versus only three military tribunal prosecutions, and it is my understanding that of those three military tribunals, a number of them were actually plea agreements and, therefore, did not contribute to the experiential base of those military commissions. Is that correct?

Attorney General HOLDER. I think that is correct. I am not sure exactly what the number is. I think there might have been two pleas, but I am not sure about that.

Senator WHITEHOUSE. Yes, that is my understanding as well. And, you know, that leads me to—here is a statement signed by Jack Goldsmith, who was the head of Office of Legal Counsel during the Bush administration. He said, “The legal and political risks of using the ill-fated military commission system are significant. Serious legal issues remain unresolved, including the validity of the nontraditional criminal charges that will be central to the commissions’ success and the role of the Geneva Convention. Sorting

out these and dozens of other novel legal issues raised by commissions will take years and might render them ineffectual. Such foundational uncertainty makes commissions a less than ideal forum for trying”—in this case, Khalid Sheikh Mohammed.

So you seem to have good support from the Bush administration in your view, and it is one that I share from my time in the prosecution world, that that experiential base is very important.

I would note that John Bellinger, who was top legal adviser to the National Security Council and the State Department under President George W. Bush, has said publicly that the rush to military commissions is based on premises that are not true. And Ken Wainstein, whom we have had before this Committee regularly, who was the Assistant Attorney General for National Security under the Bush administration, has said that, “Denying yourself access to one system in favor of the other could be counter-productive. I see the benefit of having both systems available. That is why I applauded the Obama administration when they decided to retain military commissions.”

Now, you have made the decision to go with both Article III courts and military tribunals as the circumstances justify. I wanted to ask you what role you think the legislature should have in that exercise of prosecutorial discretion. Again, 4 years as Attorney General, 4 years as United States Attorney, my view on this is that the legislature really has no proper business in the exercise of prosecutorial discretion. It is one of those areas—it is not in my interest now as a Senator to say so, but I believe that on principle it is one of those areas that the Constitution commends exclusively to one branch of Government, and that is yours, the executive branch.

Attorney General HOLDER. Well, as I indicated in a letter that I sent, I think, to this Committee, signed by me and by the Secretary of Defense, Robert Gates, that is the position that we took. This is, we believe, an inherently executive branch function to make the determinations as to which of those two forums should be used. We are in possession of the greatest amount of information. It is the way in which our Constitution, I think, has set up our system of Government. And the letter that we sent indicated that attempts by Congress, well meaning though they might be, to inject Congress into that role we think is inappropriate.

Senator WHITEHOUSE. Is just not the right place, yes. Well, I agree with you on that, and I want to also associate myself with Senator Graham’s remarks. I think his standard that we should be flexible, pragmatic, and aggressive in making those decisions is a good one, and I have confidence in leaving that decision to you and to the people that surround you in our National security establishment.

On the question of interrogations and the use of Miranda warnings, it is my—I have been on the Intelligence Committee for a couple years, and my exposure to the problem of interrogations, the question of interrogations, is that if you are going to do this effectively, you have to begin an interrogation with an interrogation strategy, and that that strategy is developed by trained professionals who are expert in this particular area. And the information that I have is that that strategy can include and on numerous occasions actually has included the provision of Miranda warnings to

the subject of the interrogation as a part of the experts' best practice of interrogation in that particular case. Is that not true?

Attorney General HOLDER. I think that is exactly right. If you talk to these FBI interrogators, these very good FBI interrogators, they talk about the need to establish a bond, some level of trust. And one of the things that at least a couple have talked about with me is that the giving of these warnings indicates to that person that you are going to be fair. They become more trusting and perhaps more desirous of sharing information. And I think what we have seen is that the giving of Miranda warnings does not necessarily mean that the information flow stops. I think quite the contrary, what we have seen over this past year with regard to Zazi, Abdulmutallab, Headley, all of whom were given Miranda warnings, the information flow was substantial and beneficial to our country.

Senator WHITEHOUSE. So whether and when to give Miranda warnings is something that should be left to the professional interrogators to develop as part of their professional interrogation strategy case by case.

Attorney General HOLDER. I think so. One of the things that the people on the ground had to determine in Detroit when Abdulmutallab tried to blow up that airplane, they had to make an almost instantaneous decision. How are we going to deal with this person? And they decided initially that they did not need to and should not give Miranda warnings to him so that they could, under the public safety exception, determine whether or not there were other people on the plane they needed to be concerned about, whether there were other people in other planes that they needed to be concerned about. And then afterwards, they decided, after consulting with people back here in Washington, that it was appropriate to give Miranda warnings that ultimately proved successful in getting more information out of them.

Senator WHITEHOUSE. Mr. Chairman, my time has expired. I have a number of questions that I will be asking as questions for the record. They relate to the cybersecurity issue, and I would like to ask, if I may, the cooperation of the Attorney General in assuring rapid responses to those questions. I am the Chairman of a task force on the Intelligence Committee that is performing a report for the Committee on cybersecurity, and I have promised my colleagues that I will have that report done by the end of June. And I would like to have your input soon, and I know that questions for the record can sometimes take weeks, months. They can sort of drift off into eternity. And if you could mark these as ones for a quick response, I would be very grateful. Thank you, Chairman.

[The questions of Senator Whitehouse appear under questions and answers.]

Senator SPECTER. Thank you, Senator Whitehouse.

We will go to round two after I finish my first round.

Mr. Attorney General, there will be another opportunity to test the constitutionality of the warrantless wiretaps through the appellate process and hopefully to the Supreme Court of the United States and from the decision made by Chief Judge Walker recently in the San Francisco case holding that the warrantless wiretaps

were unconstitutional, saying that the requirements of the Foreign Intelligence Surveillance Act precluded warrantless wiretaps; that there had to be probable cause and a warrant.

There was an opportunity to have a review by the Supreme Court of the United States in the case arising out of Detroit, in which the Federal court there declared the warrantless wiretaps unconstitutional. The Sixth Circuit decided there was no standing. I thought the dissent was much stronger than the two judges in the majority. It is well-known that standing is frequently used as a way of avoiding deciding tough questions, and the Supreme Court of the United States denied cert.

So at this point, after a lot of speculation, a lot of discussion, we do not know dispositively whether the President's power as Commander-in-Chief under Article II justifies warrantless wiretapping or whether the explicit provisions of the Foreign Intelligence Surveillance Act cover.

Would you press to have the case coming out of the San Francisco Federal court go to the Supreme Court for a decision there?

Attorney General HOLDER. We have really not decided what we are going to do at this point with the decision that was made by the judge. The focus there had really been not necessarily as much on the legality of the TSP as on the protection of sources and methods. And a determination as to what we are going to do with the adverse ruling that we got from the chief judge, the district court judge, has not been made as yet. We are considering our options.

Senator SPECTER. What do you think?

Attorney General HOLDER. Well, I think that I have not made up my mind yet. I think that we have to see what the impact will be on this case with regard to a program that I guess ended in, I think, 2007, 2006. My view is that to the extent that—I cannot get into too many operational things here, but the support of Congress, the authorization from Congress to conduct these kinds of programs, is the way in which the executive branch should operate. The executive branch is at its strongest, we have the firmest foundation when we work with Members of Congress to set up these kinds of programs, and especially when one looks at, as you point out, the requirements under FISA.

So I think that we will have to consider what our options are and try to understand what the ramifications are of the judge's ruling in the *Al Haramein* case.

Senator SPECTER. Well, since you have not made up your mind, I would urge you to make it up to get a decision. I filed a bill to compel the Supreme Court to take the warrantless wiretap case. Congress obviously cannot tell the Supreme Court how to decide a case, but we can deal with the jurisdictional issue. And as we look to the next round of nominations, I think one of the big areas of failing by the Court has been its refusal to take up cases and make decisions. They denied cert in the case involving the question of sovereign immunity where the survivors of victims of 9/11 were suing in tort with very strong evidence going very high up into the government of Saudi Arabia, and the Congressional determination on sovereign immunity was that it would not apply in that kind of a situation. And the Court, by deciding not to decide, is very deferential to Executive power.



I think that when we are looking for nominees to the Court, we are really looking to the standard of Chief Justice Roberts not to jolt the system, to follow the precedents. And we have not gotten that, notwithstanding assurances not to jolt the system. The system has been jolted very roughly. The *Citizens* case allowing corporations to advertise in political campaigns is illustrative.

I want to pick up one of the questions which Senator Whitehouse had asked about the Miranda warnings. The impact of not giving the Miranda warnings is widely misunderstood. If Miranda warnings are not given, all that it means is that the statements made by the subject of interrogation cannot be admitted into evidence against him in an Article III court. But when you dealt with somebody like the Christmas Day bomber, caught red-handed, you did not really need admissions or a confession. The evidence was overwhelming. And when we talk about the subtleties of interrogation, I find it hard to accept that the assistance of establishing a rapport and a bond by the interrogator with the subject would be sufficiently enhanced to warrant giving the Miranda warnings as a discourager for making statements. By the time you get through saying, "You have a right to remain silent, anything you say"—there are five of them, and then you get express waivers, you go back. But that is a big discouraging factor.

So that it would be my hope that the warnings would not be given. The most important thing in dealing with a terrorist is to get information to prevent future acts of terrorism, even if it means not convicting the individual. If you had to make—in my view, if you had to make a choice between convicting and getting information which might preclude a subsequent terrorist attack, the balance would all be on getting the information.

But is what you are saying that the policy of the Department is to make a judgment on the specific case as to whether to give Miranda warnings or not; that you leave it up to the interrogator if his judgment is that this rapport will be established, but you are not determining in all cases, are you, to give Miranda warnings?

Attorney General HOLDER. That is correct. There are overall exceptions, as you know, to the Miranda rule, and you can take advantage of those in interacting with the terrorists. I am not saying that they should be given in all circumstances. And one of the things you very correctly point out is that in interacting with these terrorists, suspected terrorists, you want to gain intelligence from them. That in some ways may be more important than trying to protect a potential criminal case.

So I think we have to have, again, this flexibility to decide what is it that we want to do. I mean, we look back on the Detroit incident, and we can say in retrospect that it was pretty obvious what happened on the airplane. But that is not necessarily what those agents had when they had this guy in front of them, his pants perhaps still smoking, and they do not know exactly what is going on at that point. But even so, they did not give Miranda warnings in that initial interaction with him.

So I am looking for flexibility, but with the thought that when it comes to terrorism, the gathering of intelligence is of critical importance.

Senator SPECTER. Well, I am glad to hear that, that you are not doing it automatically, and with the gathering of intelligence as the more important factor than the conviction.

Round two, Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman. It is good to see you in that chair even though from a different side of the aisle than I am familiar with.

Senator SPECTER. The chair is not on an aisle.

[Laughter.]

Senator SESSIONS. It is in the middle, isn't it?

I think your comments about Miranda are right, except I would have two little cautionary comments. One is Senator Graham asked you what was going to happen if somebody arrested bin Laden, would they be giving Miranda rights? You could not give a clear answer, but that person is not likely to be able to check with you at that moment. We need a policy, No. 1.

No. 2, according to the Miranda rule, as soon as a person is taken into custody, they are supposed to be advised of their rights before questions are asked, and that is the FBI policy. It is in their manual, and that is what they are going to do unless somebody explicitly tells them otherwise.

And, No. 3, there is no doubt in my mind, as Senator Specter has suggested, that when you tell an individual their right to have a lawyer, they have a right to remain silent, and that you will appoint them one and bring them one, you are going to get less actionable intelligence than if you did not do so. And, in fact, the first thing a good lawyer is going to say is, "Don't talk."

Now, you may have to make a plea bargain with them later and other things may happen, and the fact that some people do cooperate ultimately does not affect the rule. The basic fact is realistically you are going to get less information from that procedure, and that is why that is a big part of the reason that many of these cases need to be handled through military commissions and military custody.

Attorney General HOLDER. Well, Senator—

Senator SESSIONS. I will let you respond to that.

Attorney General HOLDER. OK. Senator, first off, maybe I was not clear. With regard to bin Laden, there would be no need to give bin Laden Miranda warnings. And if I was not clear there, I meant to be; that if he were captured, I cannot foresee any reason why—

Senator SESSIONS. Mr. Holder, the presumption is in your own report that they would be tried in civilian courts. And why wouldn't you give Miranda warnings? What basis—

Attorney General HOLDER. Miranda warnings—

Senator SESSIONS [continuing.]—Is there not to do so, unless you are going to try them in military commissions?

Attorney General HOLDER. Well, the concern with Miranda warnings is only whether or not the information that you would get from that person might be excluded. We have sufficient information, statements from bin Laden, so that there is no reason to Mirandize him at all, and you can still bring his case in the—

Senator SESSIONS. You could do that, all right. I acknowledge that that is possible.

Attorney General HOLDER. Right.

Senator SESSIONS. But for Abdulmutallab on Christmas Day, like you said, what did the agents know about the strength of their case? And there is a doctrine that says if the improperly obtained information as a result of not giving Miranda warnings can poison the entire prosecution and raise questions and create many defenses that would not otherwise exist. So I think the rule to me simply would be that you expect these terrorist individuals to be tried and taken into military custody. Isn't it true and isn't it appropriate that after they have been taken into military custody, if you chose to try them in civilian court, you could still do so?

Attorney General HOLDER. I suppose that is true, but I think there is—

Senator SESSIONS. We have done that a number of times, have we not?

Attorney General HOLDER. We have done it on at least a couple of—

Senator SESSIONS. What about Khalid Sheikh Mohammed? He has been in military custody, has he not? And you have declared him ready to go to trial in civilian courts.

Attorney General HOLDER. Right, and we have done that I guess with—

Senator SESSIONS. Well, that is the fact. You take them into military custody, and then you can try them at your option in civilian courts.

Attorney General HOLDER. Well, what I have been trying to say is that there is not—

Senator SESSIONS. Why wouldn't that be the right way to start the case and have a policy for every FBI agent, every police officer, every TSA airport official to begin—to not give Miranda warnings and not provide free attorneys to people who are attacking the United States of America?

Attorney General HOLDER. Well, but let us look at what happened with regard to the Detroit bomber, Abdulmutallab. The FBI agents, who have a policy, as you correctly—they are supposed to when people are taken into custody give Miranda warnings. They had the presence of mind, given their experience and given the concerns that they had and given their knowledge of the law, to understand that in that initial interaction they did not have to give him his Miranda warnings, and the information they got from him can be used in a trial against him under the *Quarles* exception, the public safety exception. And putting—

Senator SESSIONS. Well, I do not know if the public safety exception goes to 50 minutes. Have you had any case that has ever gone that long?

Attorney General HOLDER. Well, I think—

Senator SESSIONS. In other words, where you say to somebody, "Do you have a gun?" or "Do you have a bomb?" But after a while, that exception ends.

Attorney General HOLDER. Well, I am going to say as a former judge, given my experience, given that set of facts, I would think that the Government has acted appropriately here, and that statements from that gentleman would be admissible in a trial.

Senator SESSIONS. Well, I would just say that it would be—a defense lawyer would make that point, I am sure.

Attorney General HOLDER. Oh, I am sure they would. But they would lose in Holder's court.

[Laughter.]

Senator SESSIONS. This is really significant, the whole thing is. Let me just say about how we got to this point. And my friend Senator Durbin, the Democratic Whip, is so eloquent, but President Bush—the first case that came up was *Padilla*, and that was before military commissions had been established. He established military commissions, and the Supreme Court found them lacking, and the Defense Department stopped and had to rewrite the rules. And during that period of time up through 2006, the Congress passed legislation to effectuate military commissions in late 2006, and then it took some time for the rules to all be written and moving forward. But the plan was to try the several hundred people at Guantanamo that were going to be tried—all of them did not have to be tried—that they would be tried by a military commission. And Khalid Sheikh Mohammed's case was already proceeding as a military commission, was it not, until President Obama, when his first act was to stop that?

Attorney General HOLDER. Well, the case had been proceeding in a military Commission in a very halting fashion, and the decision that the Obama administration made was to put a halt to those things so that the commission procedures could be amended, and Congress actually passed those, I guess in 2009.

Senator SESSIONS. You had a commission, you co-chaired the commission to decide what to do, and you concluded that even those who had already been arrested and already are detained at Guantanamo, there would be a presumption that they would be tried in civilian court and not by a military commission. Has that been changed?

Attorney General HOLDER. That has not been changed. The presumption that we use—that is, I use, along with Secretary of Defense and all the people who worked with us, the protocol that we were given did have that presumption in it.

Senator SESSIONS. Well, so I would just say that there is not exactly a clean slate and you decide each case based on the facts of that case. You have got a presumption in favor of civilian trials.

Attorney General HOLDER. But it is a rebuttable presumption, and there are a variety of other factors that we take into account, not the least of which is, at the end of the day, in which forum can we be most effective, and I think the test is what I have actually done, which is to say that with regard to, I think it is five or six cases, that military commissions are the best places for them to be tried.

Senator SESSIONS. Well, we have a letter that came in on March 16th, a few weeks ago, from the Department of Defense, the Deputy Director, that there were no military commissions in 2009 pursuant to an order of the Secretary of Defense issued January 20, 2009. That is changing the policy by President Obama as soon as he took office. And prosecutors then sought continuances in each case that were already referred to a military commission. And the

convening authority ceased referring new charges to military commissions. And to my knowledge, that has not been changed, has it?

Attorney General HOLDER. No, but I believe that we are going to be making determinations as to where these cases ought to go. It is our intention to use military commissions as well as Article III courts, again, with that whole notion of being flexible, pragmatic, and aggressive.

Senator SESSIONS. Well, I think that is fair to say you would make some individual determinations on cases. Some of these are record cases, financing of terrorism, support of terrorism cases that could be easily handled in these courts. But it is pretty clear to me that you made a firm decision to go the other way, to civilian courts, with virtually all of these cases, and it is in error. And I hope that you will review that, and I hope the New York case will be the beginning of a re-evaluation of that policy.

Attorney General HOLDER. Well, I actually think that in terms of the decisions that I made back in October and November, that in terms of the number of individual cases as opposed to the number of defendants, that we actually sent more cases to the military commission than I did to the Article III court.

Senator SPECTER. Thank you, Senator Sessions.

Senator Graham.

Senator GRAHAM. Well, thank you, Mr. Chairman. And I think the exchange between the two Senators has been a pretty good flushing out of the complexities of the situation we find ourselves in. But I want to try to, if I can, you know, use some scenarios here to reassure people that the system needs to be improved, but is not completely by any means broken. If a military member stumbles on Osama bin Laden or some high-value target in Afghanistan, Pakistan, or you just name the location, no one is arguing that that moment in time they are going to read him his rights.

Attorney General HOLDER. No.

Senator GRAHAM. What they would do, as I understand it, is they would capture him pursuant to a military operation, which does not require Mirandizing the enemy prisoner, and they would obviously turn him over to some intelligence organizations. That would be the case, right?

Attorney General HOLDER. We have this High-Value Interrogation Group, the HIG, that is designed especially for those high-value—

Senator GRAHAM. And this goes to Senator Sessions' point. I think he is right on point here. The HIG is—I want to compliment you. I think it is a great organization to have. As I understand it, it is a collaborative group of people who will be the primary interrogation team when a high-value target is captured, whether in the United States or outside the United States.

Attorney General HOLDER. That is correct. These mobile interrogation teams would go to the place and do the interrogation.

Senator GRAHAM. Right. And they will—their primary purpose is intelligence gathering, and they will be able to assess what the individual knows about enemy operations.

Attorney General HOLDER. That is correct.

Senator GRAHAM. Then they will decide if and when to Mirandize, which is absolutely fine with me.

Attorney General HOLDER. That will be a part of the process.

Senator GRAHAM. Right, as long as we start with the idea that the initial purpose is to gather intelligence. And I think that is your policy with the HIG, is that they will get to assess the detainee in terms of what they know about the war. Is that correct?

Attorney General HOLDER. Yes, these high-value detainees are people who we think their primary value to us is to gain intelligence, to learn about targeting, structure, a whole variety of things.

Senator GRAHAM. Right. And under the law of war, it is lawful to interrogate someone. Obviously, we are not torturing these people, but we will have authority to do that. So I think that is, quite frankly, a pretty good set-up.

Now, when it comes back to—and I do not want to micromanage from Congress, you know, to tell an agent what to do and when to do it, as long as we are viewing these suspects not as a normal criminal threat but as part of a military threat, trying to find out what they know. What additional rights would a detainee have, if any, if they were transferred from Guantanamo Bay, Cuba, to, say, Illinois? Would the transfer of location create more rights for the detainee than if they were just left in Guantanamo Bay?

Attorney General HOLDER. That is a question that I think has not really been answered yet, one that we are not sure about. I think that certainly as an advocate I would argue that there are not other rights that would necessarily appertain, but it is not clear to me how the courts are going to rule.

Senator GRAHAM. I think that is a very good point, and this is a situation where Congress could help give the courts clarity. Is that correct?

Attorney General HOLDER. I think that is correct.

Senator GRAHAM. And as a matter of fact, I think most judges—Judges Lamberth and Hogan have been in their opinions, habeas opinions, have been asking for Congressional help. Have you been reading those opinions?

Attorney General HOLDER. Yes, I have been reading those opinions.

Senator GRAHAM. I have never seen a judge so open about Congress needs to help, because if a detainee is ordered released by the judge, the habeas petition is granted, what happens next? Do we have to release them in the United States? And if we cannot find a third country, what do we do with them?

Attorney General HOLDER. There is no requirement that they be released into the United States, and in those instances where we have decided not to appeal and release has occurred, they have typically been taken to a third country.

Senator GRAHAM. What if you cannot find a third country who will take one of these people? What do we do?

Attorney General HOLDER. They do not have to be released into the United States, and they would remain in custody while our efforts to try to find a location would continue.

Senator GRAHAM. But let us play this out. A habeas petition is meaningless if it cannot eventually result in release. Is that true?

Attorney General HOLDER. Well, I would not say that. It gives the possibility to a detainee, a possibility that he can be relocated, and that would not exist before the judge made that determination.

Senator GRAHAM. Could we go 10 years in trying to relocate that detainee?

Attorney General HOLDER. You would hope not. You would hope that you would be able to come up with a place for them to go.

Senator GRAHAM. Would you agree that it would be helpful if Congress spoke about a case like this to give some guidance to the judges?

Attorney General HOLDER. Well, I mean, I think it could be helpful, though I think I have a cautionary note that Congress can provide guidance except in those areas where a judge makes the determination that what the judge is doing is of constitutional dimension. Congress in that area cannot—

Senator GRAHAM. I totally agree, and we are in a dilemma as a Nation here, and I do worry about the international community. I want them to be more open to the idea of what we are doing makes sense. But Great Britain has changed their criminal laws to allow people to be held for up to a year without trial. Is that correct?

Attorney General HOLDER. Yes, though I think the courts have kind of pushed back a little bit with regard to their—I forget what kind of orders they are called, but—

Senator GRAHAM. I totally agree, and I think we have the right theory here, that if you are an enemy combatant, then the law of war takes over, because there is no provision in domestic criminal law to hold anyone indefinitely without trial. Is that correct?

Attorney General HOLDER. Yes, without trial and held incommunicado, the various—you know, even with regard to—the courts have not really come down—

Senator GRAHAM. And nor do I want such a rule. I mean, if you are going to be charged with a crime, I think you need to have your day in court. But if you joined the enemy force, I am willing to give you your day in court, but it is not a crime you are fighting. You should not have joined al Qaeda.

As I understand it, every member of al Qaeda that you hold as an enemy combatant will appear before a Federal judge in the habeas proceedings.

Attorney General HOLDER. Right, if they seek habeas review.

Senator GRAHAM. Right. It is up to them. But if they want their day in court, the judge has to agree with the Government that the evidence is compelling, reliable, and legally obtained to hold them as an enemy combatant. Is that correct?

Attorney General HOLDER. That is correct, under the AUMF, right.

Senator GRAHAM. Right. And both of us are trying to work with the system that gives ongoing review because enemy combatant determination could be a de facto life sentence.

Attorney General HOLDER. Well, the—

Senator GRAHAM. OK. If the judge rules for the Government, we believe that you should have an ongoing review process.

Attorney General HOLDER. OK, yes.

Senator GRAHAM. An annual review process. And I want to compliment the administration. I think what you all are doing there

makes sense so that there is an annual review of this person's status, because the enemy combatant determination could be a de facto life sentence because this war is not going to end anytime soon. There will never be a formal surrender. So it is an accommodation we are trying to make, sort of a hybrid system.

So what I would like to do is try to get this Committee to work with you to deal with what happens when a habeas petition is granted, institutionalize an ongoing review process so we could look anybody in the world in the eye and say no one in an American military prison is held arbitrarily, they have independent judicial review, and every military commission verdict is appealable to the civilian system. Is that correct, under the laws we have, the military commission laws?

Attorney General HOLDER. Every military finding is appealable to the civilian—

Senator GRAHAM. Yes, every verdict.

Attorney General HOLDER. I believe that is correct.

Senator GRAHAM. It is. So there is Article III review of our military commissions. There is Article III review of our enemy combatant determinations, and obviously if you go into Article III court, you have Article III ownership there. So what I am trying to establish with your help is that there will be an independent check and balance throughout every lane, no matter what lane you use. But when it comes to closing Guantanamo Bay, 59 percent of the American people now object to it. There has been about a 20-point shift. And I know I am over my time, but I think this is important. Why do you think that has happened?

Attorney General HOLDER. I honestly think that there has been a lot of misinformation placed out there, and without casting aspersions on anybody in this room, I think there has been unnecessary politicization with regard to national security issues that I do not think have served this Nation necessarily well.

Senator GRAHAM. Can I give you an alternative theory? And there is probably some truth to that. I am not saying that you are all wrong. I think there are a lot of people in this country worried about we do not have a coherent policy. And as I have tried to discuss with you, this is hard. This is sort of new areas. And the Christmas Day bomber probably highlighted it to people. It was a bit unnerving because they saw this guy as not a common criminal and Miranda warnings—we all watch TV—are associated with “Dagnet” and all this other stuff.

So I think it would be helpful not only to focus on our allies but also the American people and assure them that as we go forward in this war on terror, we are going to live within our value system, but we are going to have a legal system that will protect you and your family against people who are committed to our destruction. It will not include torture. It will be transparent; it will be open. But it will be based on the principle, as Senator Specter said, this is not a normal criminal operation.

I think if we could do that, Mr. Attorney General, not only would you serve the moment well here in America, you would serve the future well. And I look forward to helping make that happen. We have got to assure the American people, not just our allies, that we have a good system that will protect us against what I think is an



enduring threat. We will be fighting this war long after you and I have left the political arena. I wish it were not so, but I believe it to be so. So let us park some of the rhetoric and see if we can find a solution.

Thank you for your service. I really admire what you are trying to do for the country.

Attorney General HOLDER. I think the point that you last made actually is a very good one, and I think that it is incumbent upon people like myself to be more forthcoming, perhaps more clear with the American people about what our intentions are, and to explain to them in ways that perhaps we have not done, that I have not done effectively to date, so that there is a degree of assurance that they have, because I think you are probably right that in addition to whatever I have mentioned, the factors that you have mentioned are also probably some factor in why that approval, or that approval notion, of closing Guantanamo has dropped.

Senator GRAHAM. I think the Congress could be a good partner for you, and if the Congress and the executive branch were working together, I think it would help us in court, and I think it would help the American people be reassured. Thank you.

Senator SPECTER. Thank you, Senator Graham.

Before yielding to Senator Grassley for his second round, I intend to turn the gavel over to Senator Cardin in a few moments. In lieu of a second round, just a couple of comments.

On the pending nomination to the Supreme Court, I may be consulted on the subject. I am sure you will be. Just a word or two of my thinking on it. I believe the President ought not to be concerned about a filibuster, but ought to face squarely the fact that the Supreme Court is an ideological battleground and the lines are drawn. Chief Justice Roberts testified extensively in his confirmation hearings that he was going to try to draw a consensus and narrow the issues. Well, that certainly has not happened. It has been anything but that.

Chief Justice Roberts was very forceful in saying that he would not jolt the system. Well, *Citizens United* is one hell of a jolt. It is hard to figure a jolt harder than that one on 100 years of precedent. And the theory which has been advanced about finding a judge who will be a consensus judge, be the fifth vote and not the fourth vote, and some specific comments about bringing Justice Kennedy over into the fifth vote with the new appointee plus the three others on the Court I think is highly unlikely.

The precedent which is cited in the *Rasul* case, where Justice Stevens wrote an opinion identifying habeas corpus as a constitutional right going back to the Magna Carta, and then inexplicably in *Boumediene* the Court of Appeals for the District of Columbia said that it was decided on statutory grounds, statutory habeas corpus and constitutional habeas corpus, is about as far-fetched as an interpretation can be. And then when the petition for cert was filed in *Boumediene*, there were only three Justices. Everybody was surprised that Justice Stevens did not vote to grant cert, but as it has been speculated, and apparently with some real foundation, Justice Stevens did not want four Justices to grant cert and have *Boumediene* upheld, but waited until there was some disclosures about major failings in the commissions which on a petition for re-

consideration for cert it takes five Justices, not four. And then there were five, and Justice Kennedy wrote the opinion in *Boumediene*.

But I think it is fanciful thinking looking for that kind of collegiality to carry the day, so that I would hope that the ideological battleground would be recognized. And President Obama is not halfway through his second year. He may have an opportunity for other Supreme Court picks which would line up with Breyer and Ginsburg and Sotomayor. So that if you have an opportunity, if the President is not watching this Judiciary Committee session, pass on the word.

Attorney General HOLDER. Well, I am sure, Mr. Chairman, you are going to have that opportunity yourself, but I will pass along what you said.

Senator SPECTER. Well, that concludes the hearing. Thank you very much, Mr. Attorney General.

Attorney General HOLDER. OK. Thank you.

Senator SPECTER. Let me join Senator Graham's commendation to you for doing a very good job.

Attorney General HOLDER. Thank you, sir.

[Whereupon, at 12:31 p.m., the Committee was adjourned.]

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



U.S. Department of Justice

Office of Legislative Affairs

QUESTIONS AND ANSWERS

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Office of the Assistant Attorney General

Washington, D.C. 20530

December 10, 2010

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

Dear Chairman Leahy:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder, before the Committee on April 14, 2010, at an oversight hearing. We hope that this information is of assistance to the Committee.

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

Sincerely,

A handwritten signature in black ink, appearing to read "R Weich".

Ronald Weich  
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions  
Ranking Member

Questions for the Record  
Attorney General Eric H. Holder, Jr.  
Committee on the Judiciary  
United States Senate  
April 14, 2010

**QUESTIONS POSED BY CHAIRMAN LEAHY**

**Benefit of Federal Criminal Courts vs. Military Commissions**

1. **Since September 11, there have been 400 terrorism-related convictions in federal court and there are hundreds of terrorists locked up in our prisons. In comparison, only three individuals have been convicted in military commissions.**
  - a. **What are the risks of insisting that all terrorism suspects be tried in a military commission? What limitations would government face in trying suspects in military commissions that it does not face in the Federal court system?**

**Response:**

The United States is engaged in an armed conflict against al Qaeda, the Taliban and associated forces engaged in hostilities against the United States and its coalition partners. In order to win this conflict, we must bring to bear all elements of national power. The criminal justice system has proved an effective tool, both for incapacitating terrorists and for gathering valuable intelligence. Insisting that all terrorism suspects be tried in a military commission would take away this tool, limiting the United States government's ability to effectively combat terrorism and would, as a result, increase the threat to national security and the danger to American citizens.

The criminal justice system has been used to incapacitate terrorists and to collect valuable intelligence for years. Since the 1990s, numerous individuals charged with terrorism violations have been successfully prosecuted and sentenced in federal court, including more than 30 in 2009 alone. Among those convicted are Ramzi Yousef and others for the 1993 World Trade Center bombing and the Manila Air plot; Sheikh Omar Abdel-Rahman (the "Blind Sheikh") and others for the plot to bomb New York City landmarks; and Zacarias Moussaoui in connection with the September 11 conspiracy. Many foreign terrorists convicted in our criminal justice system are serving life sentences in maximum security prisons.

It is important to note that there are some terrorists who could be prosecuted in the federal courts, but not in the military commissions system. Jurisdiction in the military commissions exists only in cases where prosecutors are able to prove that the accused is

an alien who was part of al Qaeda at the time of commission of the offense or who has engaged in, or purposefully and materially supported, hostilities against the United States or its coalition partners. "Hostilities" is defined by the 2009 Military Commissions Act (MCA) as "any conflict subject to the laws of war." U.S. criminal jurisdiction, by contrast, would allow for prosecution of U.S. citizens, members of terrorist groups other than al Qaeda, lone wolf terrorists, and others acting in a context not subject to the laws of war. Additionally, whereas a military commission has jurisdiction to try only a limited set of offenses, the federal criminal code covers a broad spectrum of illegal acts, including criminal code violations such as lying to investigators or passport fraud that are not part of the laws of war and would not otherwise be available to military prosecutors.

Finally, the framework, procedures, and rules established under the MCA are as yet untested and it is expected that they will be subject to vigorous legal challenges by defendants. The Administration strongly supported the efforts to reform the military commissions and believes that changes made by Congress in the MCA will help ensure that commission proceedings are fair, effective, and lawful. We intend to use military commissions to prosecute terrorists where appropriate. It is in the best interests of the Nation that we in the Executive Branch continue to make the decision, based on the law, facts, and circumstances of each case, as to which forum is more appropriate.

**b. What is the benefit of trying terrorism suspects in Federal criminal courts rather than in military commissions?**

**Response:**

First and foremost, as stated above, federal criminal courts have an established track record of trying and convicting terrorists and sentencing them to substantial terms of imprisonment. Second, several foreign partners have told us that they will provide mutual legal assistance or extradite terrorism suspects only if they will stand trial in Article III courts, and not if they will stand trial before military commissions. International cooperation is often key to the effective investigation and prosecution of international terrorism cases. Third, military commissions simply cannot be used to try some terrorism suspects, either because they are U.S. citizens or because their conduct does not constitute an offense triable by military commission. For some offenses triable by military commission pursuant to the MCA, such as conspiracy and material support, defendants may argue that such charges were not law of war offenses at the time of their crimes. Finally, plea practice, in particular the ability to plead guilty in a capital case, and the sentencing structure are well-settled and clearly defined in federal court.

**c. Do you agree with those who say that the Christmas Day bombing suspect, Umar Farouk Abdulmutallab, should have been held in military custody because military interrogators would have done a better job questioning him than those highly experienced FBI interrogators?**

**Response:**

No, the facts do not support this assumption. To the contrary, the expertise of FBI interrogators is recognized throughout the national security community, and the Department of Justice and FBI work closely with the rest of the intelligence community to ensure that interrogations produce as much useful and relevant information as possible. Experienced interrogators - across the law enforcement, intelligence, and defense communities - agree that successful interrogation does not depend on particular "techniques." Instead, successful interrogation depends on lawful interrogation strategies based on extensive knowledge of an arrestee and his organization. In addition, the criminal justice system provides powerful incentives for suspects to provide accurate, reliable information. As a result, the criminal justice system has been the source of extremely valuable intelligence on al Qaeda and other terrorist organizations, including in this case.

**The Department of Justice's Interrogation Procedures**

2. **Since the failed Christmas Day bombing, critics of the Administration's interrogation decisions have argued that the High-Value Detainee Interrogation Group, known as the "HIG," should have interrogated the Christmas Day bombing suspect. The critics question whether terrorism suspects should be given *Miranda* warnings, even though those critics did not raise such a concern during the Bush administration. This has led to a debate about the best way to interrogate terrorism suspects. What are the Administration's current policies for detaining and interrogating terrorism suspects? How does that policy support the collection of valuable intelligence, and simultaneously prevent dangerous suspects from being set free?**

**Response:**

Interrogating suspected terrorists to obtain intelligence about terrorist activities and impending terrorist attacks is critical to our national security, as is ensuring that such individuals can lawfully be detained so that they do not themselves pose a threat to our communities. Determinations about how to handle specific situations involving arrests of terrorism suspects are made on a case-by-case basis based on the facts and the law. Absent some other lawful course of action or extraordinary circumstances, individuals in law enforcement custody are treated in accordance with the standard practices and policies of the responsible law enforcement agency and the requirements of the criminal justice system. In Abdulmutallab's case, the initial interrogation was conducted without *Miranda* warnings under a public safety exception (the *Quarles* exception) that has been recognized by the Supreme Court. See *New York v. Quarles*, 467 U.S. 649 (1984). Subsequent interrogation was conducted with a *Miranda* warning after consultations between FBI agents in the field, FBI headquarters, and career federal prosecutors.

Under the *Quarles* exception, agents may ask questions that are reasonably prompted by a concern about public safety or the safety of the arresting agents without providing an advice of rights. When those questions have been exhausted, under existing policy, the arresting agents typically advise the defendant of his Miranda rights. Administering Miranda warnings enhances our options for incapacitating terrorists because it allows us to use their statements against them in a criminal prosecution. In many cases, there may be no lawful mechanism to detain a terrorism suspect other than a criminal prosecution. However, more extensive public safety questions may be necessary when a suspected terrorist is apprehended – e.g. about the activities of co-conspirators, the existence of any coordinated attacks, the plans and intentions of those who may be directly involved in or facilitating the attacks from within the United States or abroad, and information about the weapons and tactics involved – than when ordinary criminals are arrested.

It is important to note that neither advising a suspect of his Miranda rights nor providing him access to counsel prevents us from obtaining intelligence from him. Many criminal defendants, including those arrested for crimes related to terrorism, waive their Miranda rights and talk voluntarily to investigators. In many other cases, defendants decide to cooperate after consulting with counsel. Indeed, where defense attorneys conclude that the government has strong evidence to support a conviction and lengthy sentence, they often encourage their clients to cooperate. Of course, it is not possible to know whether defendants who decline to cooperate after receiving a Miranda warning would have cooperated if the warning had not been provided. Miranda warnings are far less determinative of the prospects for obtaining long-term cooperation in the criminal justice system than other factors, such as the strength of the government's case against a defendant, the skill and expertise of the interrogator, and the interrogator's background knowledge about the target and the subject matter. We believe the record shows that over the years the criminal justice system, has been a very effective tool for collecting intelligence and protecting the country via successful prosecution and incarceration of terrorists.

The High-Value Detainee Interrogation Group (HIG) is available to support interrogations of terrorism suspects whether they are arrested in the United States or overseas. The decision whether HIG personnel will conduct or participate in the interrogation in any particular case is made on a case-by-case basis.

### **Outstanding OLC Index**

- 3. In March, the Department of Justice released another Office of Legal Counsel memorandum regarding detention and interrogation techniques used during the Bush administration. I am encouraged by this Administration's commitment to releasing more information and increasing transparency, but I also think it is well past the time when this Committee should have the assurance that it has seen all of the relevant documents related to the detention and interrogation policies of the last administration.**

**I have asked about this several times now. When will the Administration be prepared to provide this Committee with an index of all relevant documents contained in the Committee subpoena issued on October 16, 2008?**

**Response:**

The documents referenced in the Committee's October 16, 2008 subpoena include numerous classified and unclassified memoranda, none of which were distinctly categorized or organized in particular locations within the Office of Legal Counsel (OLC) as "legal analysis and advice . . . concerning the Administration's national security practices and policies related to terrorism." OLC has worked diligently to identify all such responsive documents, and the Department is presently coordinating an interagency process to determine the form in which some or all such documents may be identified to the Committee, consistent with the Executive Branch's legitimate classification and confidentiality considerations. That review is being conducted consistent with OLC's long-established "third-agency practice," in which OLC consults with all other entities in the Executive Branch that have equities in the legal advice reflected in its memoranda before any decisions are made about whether and how disclosure would be appropriate. Where such documents are classified, moreover, the Department generally was not the classifying entity, and therefore any declassification decisions must be made outside the Department.

However, as the question notes, since January 2009, the Department has released over 40 OLC opinions and other legal memoranda concerning national security-related matters—including many involving interrogation and detention—with separate releases on March 2, 2009; April 16, 2009; August 24, 2009; December 15, 2009; March 15, 2010; and June 4, 2010. OLC has posted many of these documents on its FOIA Reading Room webpage: <http://www.justice.gov/olc/olc-foia1.htm>. The Department will continue to make additional OLC memoranda available to the Committee and to the public when possible, consistent with the President's and Attorney General's directives on transparency and with the Executive Branch's legitimate classification and confidentiality considerations.

**Patriot Act Implementation**

4. **Last year, a bipartisan majority of this Committee voted to report favorably the USA PATRIOT Act Sunset Extension Act (S.1692), reauthorizing three expiring provisions of the Patriot Act, but also increasing the transparency and accountability of this legislation. Unfortunately, Congress recently passed a one-year extension of the expiring Patriot Act provisions with none of the improvements included in the Judiciary-passed legislation. I wrote to you in March 2010 asking you to implement key provisions included in that bill without waiting another year to pass legislation. Will you commit to working with me to implement the oversight and accountability provisions that were included in the USA PATRIOT Act Sunset Extension Act without further delay?**



**Response:**

The Department appreciates your efforts and those of Sen. Feinstein and your Committee colleagues to craft balanced legislation that would reauthorize these essential authorities while enhancing protections for privacy and civil liberties. Although that bill was not enacted, we look forward to working with you to make progress toward those goals.

**State Secrets**

5. **September 23, 2009, you announced new policies that will guide how and when the Justice Department may invoke the state secrets privilege. After this Committee's last oversight hearing in November, I wrote to you asking about the use of the privilege. In your written response, you stated that there may be cases in which you do not provide the court with a "robust evidentiary submission." I was pleased to see, however, that in the *Al Haramain* case, the first in which the Obama administration asserted the state secret privilege, the Department provided the judge with a classified description of the reasons why the Department believed the privilege applied. Please describe to the Committee what types of cases would justify a decision to *not* provide the court with a "robust" evidentiary submission. In cases where the Department determines it will not make that evidentiary submission, how can anyone be sure that that the Court has a complete record of the evidence the government is using to assert this significant privilege?**

**Response:**

The protocols we have established serve to ensure that each assertion of the state secrets privilege in litigation has been subjected to a rigorous formal process that requires serious and personal consideration by officials at the highest levels of the Department. The Department fully agrees that the Judiciary plays a vital and essential role in independently reviewing assertions of the state secrets privilege. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953) ("The court itself must determine whether the circumstances are appropriate for the claim of privilege."). Although there may be variations in the degree of disclosures the Department is able to make in particular cases, it is standing Department practice to provide Article III judges access to information sufficient to understand and justify the privilege in any case where the privilege is invoked, even where the material is highly sensitive. The Department is not aware of a case where sufficient information was not provided to an Article III judge when the privilege was invoked in order for the court to appropriately evaluate the Executive Branch's invocation of the privilege.

**Faster FOIA Act of 2010**

**6. I commend you for the progress that the Department has made on improving the implementation of the Freedom of Information Act ("FOIA"). In March, you announced that the Department disclosed more than 1,000 additional full releases and almost 1,000 additional partial releases under FOIA in 2009 than it released during the year before. However, despite this progress, the Department -- and many other federal agencies -- are still plagued by significant FOIA delays. The Department's most recent Annual FOIA Report states that the Department had a backlog of almost 5,000 FOIA requests at the end of last year. In March, Senator Cornyn and I introduced the bipartisan Faster FOIA Act of 2010. The bill creates a bipartisan Commission to study agency FOIA backlogs and makes recommendations on how to improve FOIA implementation. The bill was reported favorably by the Judiciary Committee on April 15, 2010. Given the need to do even more to make our Government more transparent and accountable to the American people, will you support the Leahy-Cornyn bill?**

**Response:**

The Department agrees in order to make government more open and accountable, it is important to reduce FOIA backlogs. Across the Administration, agencies are taking concrete steps to respond to requests more quickly. As a result, many agencies have vastly improved average processing times. Indeed, in FY 2009, the fifteen Cabinet agencies plus the EPA and Federal Reserve Board cut their overall FOIA backlog by 56,320 requests -- or 45% -- from FY 2008. Although the Department's own backlog increased slightly, the increase is attributable to a recent policy change at the FBI that has resulted in the Bureau conducting broader, more extensive searches. In other words, the FBI has instituted a policy that will take more time to complete but will lead to a more transparent approach. Discounting the FBI's backlog, the Department's overall FOIA backlog decreased in FY 2009.

Given the President's and Attorney General's commitment to further reform, it is unclear whether a new commission is necessary. The Department supports the goals of the original Leahy-Cornyn bill, however, and looks forward to working with Congress on the legislation.

**Children Exposed to Violence Initiative**

**7. I appreciate your efforts going back more than a decade to address the problem of children exposed to violence. I hope that is something on which Senators on both sides of the aisle can join with you and work collaboratively. I have long supported programs that incorporate prevention, intervention, and treatment in order to provide a comprehensive approach to issues facing our communities. I understand that the Children**

**Exposed to Violence Initiative is in its early stages, and I would like to know how you envision the future development of the program.**

- a. **According to a grant solicitation released earlier this month by the Office of Juvenile Justice and Delinquency Prevention at the Department, Phase I of the Children Exposed to Violence Initiative provides for the funding of up to eight communities over a 24 month period to combat the issue of children exposed to violence. How does the Department plan to expand this program to more communities nationwide?**

**Response:**

The subject of children and violence has been both a personal and a professional concern of mine for a long time, going back to my days as the United States Attorney for the District of Columbia and as an Associate Judge of the Superior Court of the District of Columbia. A recent study sponsored by the Office of Juvenile Justice and Delinquency Prevention and supported by the Center for Disease Control and Prevention, the National Survey of Children's Exposure to Violence, found that a majority of children in the United States have been exposed to violence, crime, or abuse in their homes, schools, and communities. The consequences of this problem are significant and widespread, but studies have shown that early identification of children exposed to violence and early intervention can mitigate the effects of violence, enhance resiliency, and foster healthy child development. By addressing children's exposure to violence now, the Department can help communities prevent violence and other crime in the future.

The Children Exposed to Violence (CEV) Initiative represents a Department-wide effort, led by the Office of Justice Programs, the Office on Violence Against Women, and the Office of Community Oriented Policing Services. In FY 2010, Phase I of the CEV Initiative will begin with a planning stage for identifying up to eight localities as demonstration sites to develop collaborative strategies, protocols, and procedures for addressing children's exposure to violence. The announcement of the selected sites is planned for the Fall of 2010.<sup>1</sup> Phase I will then develop parameters for evaluating the

<sup>1</sup> Phase I also includes funds for related efforts to address children's exposure to violence. Descriptions of the FY 2010 CEV grant solicitations are as follows:

1. **FY 2010 The Attorney General's Children Exposed to Violence Demonstration Program: Phase I** will fund up to 8 communities to develop and support comprehensive community-based strategic planning to prevent and reduce the impact of children's exposure to violence in their homes, schools, and communities;
2. **FY 2010 Evaluation of the Attorney General's Children Exposed to Violence Demonstration Program: Phase I** will fund the first phase of an evaluation of the demonstration component of the CEV Initiative, including: data assessment for program evaluation; coordination with the CEV technical assistance provider on data collection, measurement and evaluation issues; and the development of a comprehensive strategy to evaluate the impact of the CEV demonstration program in Phase II;

effectiveness of the demonstration program, including: developing a process for data collection; developing a process for performing data assessment; and developing measurement and evaluation factors to be considered.

In FY 2011, in Phase 2, the Department plans to select four communities as full demonstration sites to receive funding to implement a comprehensive set of strategies to address exposure to violence in the home or in the community for children and youth who are 17 years of age or younger. The four sites not selected will continue to receive limited funding to continue their work. Also in FY 2011, there is a \$37 million request in the President's budget to support the expansion of this Initiative. The Department plans to launch a second grant program that will make funding available to 30 or more communities and multiple states using these funds, should Congress make them available. This larger group of communities will benefit from the "lessons learned" from the initial set of demonstration sites through a broad training and technical assistance program.

**b. Please provide a description of subsequent phases of the Children Exposed to Violence Initiative.**

**Response:**

As described above, Phase I will select up to eight localities to develop comprehensive, multi-disciplinary plans to improve prevention, intervention, treatment, and response systems for children exposed to violence in their homes, schools, and communities.

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3. **FY 2010 Research and Evaluation on Children Exposed to Family Violence** will fund multidisciplinary research and evaluation proposals related to childhood exposure to family violence and the impact of domestic violence on child custody decisions;
  4. **FY 2010 Action Partnerships for Professional Membership and Professional Affiliation Organizations Responding to Children Exposed to and Victimized by Violence** will fund programs to develop or improve the capacity of members of national professional membership and professional affiliation organizations to advance victims' rights and improve services, with a focus on children exposed to or victimized by violence;
  5. **FY 2010 Public Awareness and Outreach for Victims in Underserved Communities** will support the planning and development of public awareness campaigns focusing on services available to child victims of violence within underserved and socially isolated populations including, but not limited to, those historically underserved due to race, socio-economic status, disability, or sexual orientation; and
  6. **FY 2010 Child Protection Division Fellowship Program on Children's Exposure to Violence** will provide a professional development opportunity to candidates with expertise in children's exposure to violence to help implement collaborative cross-agency strategies, policies, and evidence-based practices to support the Office of Juvenile Justice and Delinquency Prevention in its programming in this area.

In Phase II, demonstration sites will be selected to implement a comprehensive set of strategies to address exposure to violence in the home or in the community for youth ages 0 through 17. The results of Phase II will enable the Department to further develop strategies that can be used throughout the country. Additionally, with FY 2011 funding, the Department plans to expand funding to thirty or more communities and multiple states to implement evidence-based intervention and treatment strategies for children exposed to violence, as well as to expand training and technical assistance. Finally, with this funding, the Department anticipates increasing the investment in science to improve our understanding of what works to prevent exposure to violence and to reduce the negative impacts of such exposure.

### Crime Reduction Strategies

- 8. The Judiciary Committee has heard on numerous occasions, including at a field hearing on March 22, 2010 in Barre, Vermont, from communities that are developing effective solutions to a persistent problem with drugs and related crime. Will you work with me to find ways to encourage communities nationwide, and particularly state and local law enforcement, to adopt innovative practices that have been shown to reduce crime and save money?**

#### Response:

Yes. We are committed to both goals and the Department would benefit from the information gathered at field hearings such as these.

### Fraud

- 9. The Justice Department has a critical role to play in combating the scourges of financial fraud, mortgage fraud, and health care fraud — forms of fraud that siphon away billions of dollars from hard-working Americans each year. When the Senate last year passed the Fraud Enforcement and Recovery Act, which I introduced with Senators Grassley and Kaufman, we gave investigators, prosecutors, and whistleblowers important new tools to improve enforcement of financial fraud. With the enactment of health care reform legislation, we are doing the same with health care fraud. You have announced major new Department of Justice initiatives, in some cases implemented jointly with other agencies, to combat fraud. Since we discussed this issue in the November 2009 oversight hearing, what has the Justice Department done to expand the fight against health care fraud and to improve enforcement of financial and mortgage fraud?**

**Response:**

The Department of Justice and the Department of Health and Human Services (HHS) have renewed the commitment to fight healthcare fraud. Through the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), a senior-level joint task force, we are marshaling the combined resources of both agencies in new ways to combat all facets of the problem.

Our criminal enforcement efforts are led by our Medicare Fraud Strike Force prosecutors and agents who are using Medicare claims data to target a range of fraudulent health care schemes, deploying appropriate criminal and civil enforcement tools in fraud hot spots around the country. Since it began operating in 2007, the Strike Force has charged more than 720 defendants in over 430 cases totaling more than \$1.65 billion in fraudulent billings to Medicare. All told to date, more than 390 defendants have been convicted, and more than 270 have been sentenced to prison. Because this is a model that works, as part of the HEAT initiative, we have expanded Strike Force operations from two to seven metropolitan areas.

Specific highlights of Strike Force accomplishments since November 2009 follow:

- In December 2009, the Department and HHS announced indictments of 30 individuals charged by Strike Force prosecutors in Miami, Detroit, and Brooklyn with submitting more than \$61 million in fraudulent billings to Medicare for various schemes involving unnecessary medical tests, durable medical equipment, home health services, and injection and infusion treatments. The Department and HHS also announced plans to expand Strike Force operations to the Eastern District of New York, Middle District of Louisiana, and Middle District of Florida.
- In January, the Department filed charges against 13 Detroit-area individuals in connection with two home health care agencies that allegedly purported to provide in-home health services in a scheme to defraud the Medicare program of more than \$14.5 million for therapy services that were medically unnecessary and were never performed.
- In March 2010, Department prosecutors indicted six Miami-area residents for their alleged role in a \$13.6 million health care fraud scheme involving a Miami-area HIV infusion clinic that billed the Medicare program for HIV infusion therapy services that were medically unnecessary and were never provided.
- In May, 2010, the Department and HHS announced the indictments of four Brooklyn, N.Y.-area residents who were charged in connection with a \$2.8 million health care fraud scheme allegedly operated from a Brooklyn-area clinic that purported to specialize in providing physical therapy and various diagnostic tests that were not actually rendered and were not medically necessary.
- In July 2010, the Department unsealed charges against 94 doctors, health care company owners, executives and others for their participation in schemes to collectively submit more than \$251 million in false claims to the Medicare program. More than 360 law enforcement agents from the FBI, HHS-Office of

Inspector General (HHS-OIG), multiple Medicaid Fraud Control Units, and other state and local law enforcement agencies participated in the operation. The 94 individuals were charged in Miami, Baton Rouge, Brooklyn, Detroit, and Houston in connection with various Medicare fraud-related offenses, including conspiracy to defraud the Medicare program, criminal false claims, violations of the anti-kickback statutes and money laundering. The charges were based on a variety of fraud schemes, including physical therapy and occupational therapy schemes, home health care schemes, HIV infusion fraud schemes, and durable medical equipment (DME) schemes. The operation was the largest federal health care fraud takedown since Strike Force operations began in 2007.

Our civil enforcement efforts have, since HEAT was formed in May of 2009, recovered more than \$2 billion on behalf of federal government health care programs -- about \$670 million of that since November 2009. These recoveries have resulted from a variety of matters brought under the False Claims Act and other statutes, including the following:

- In January of this year we announced a \$24 million False Claims Act settlement with FORBA, Inc., a dental management company that operated a chain of pediatric dental clinics known as "Small Smiles." We alleged that Small Smiles dentists often performed unnecessary and painful dental services on behalf of children insured by Medicaid, all for the purpose of maximizing reimbursement from Medicaid. Our investigations of individual dentists are continuing.
- In February of 2010, we announced a consent judgment against two owners of the City of Angels Hospital in Los Angeles. We alleged that these individuals had paid kickbacks to the managers of homeless shelters in the Skid Row area of that city to induce the managers to send the shelter clients to City of Angels for medical services they often did not need and for which Medicaid and Medicare paid.
- In April of this year, we obtained a \$520 million settlement agreement with AstraZeneca LP and AstraZeneca Pharmaceuticals LP to resolve allegations that AstraZeneca illegally marketed the anti-psychotic drug Seroquel for uses not approved as safe and effective by the FDA. The federal recovery in AstraZeneca was approximately \$302 million.
- Also in April we announced settlements with Schwarz Pharma, Inc. and two Johnson & Johnson subsidiaries, for false claims seeking reimbursement and for off label marketing violations, respectively. On May 4, we announced another off-label marketing settlement, this time with Novartis. The cumulative federal recovery from these three settlements was over \$100 million.

Economic crimes pose a continual threat to the vitality of our finance and housing markets and the economic recovery. Financial, corporate and mortgage frauds are significant problems and a major focus of the Justice Department. For example, the integrity of our capital markets depends on the ability of investors to receive, and rely on,

accurate financial information. Similarly, abuses such as mortgage lending and securitization frauds, foreclosure rescue scams, reverse mortgage scams and bankruptcy schemes, have affected the health of our housing markets. In addition, 15 United States Attorneys' Offices have already reported opening matters concerning entities receiving economic recovery funds. Vital funds appropriated to our armed forces overseas are being diverted.

Late last year, the Administration announced the creation of the Financial Fraud Enforcement Task Force, an inter-agency task force that advises me on the prosecution and investigation of financial crimes and violations, coordinates with federal, state and local law enforcement partners, and brings to bear the full array of criminal and civil enforcement in confronting a broad array of fraud. Enforcement is a key Task Force mission. It focuses on the types of financial fraud that affect us most during this time of economic recovery, including mortgage fraud, securities fraud, financial discrimination, and fraud related to economic recovery programs (e.g., the American Recovery and Reinvestment Act and the Troubled Asset Relief Program).

Since November 2009, the Task Force has established a Financial Fraud Coordinator in every U.S. Attorney's Office to ensure that financial fraud enforcement is aggressively sought throughout the country. This robust strategy has paid off. Through a coordinated effort, we have brought to justice those in the finance industry who have embezzled their clients' money, who have attempted to defraud the U.S. government of millions of dollars, who engage in discriminatory lending practices, and many more. We have seized the assets of these wrongdoers, and we will continue to expand our efforts to confront the broad array of financial fraud.

In the area of mortgage fraud, for example, the FBI has more than doubled the number of investigating agents and has created the National Mortgage Fraud Team. As of March 31, 2010, the FBI was investigating more than 3,000 mortgage fraud cases and 45 corporate fraud matters related to the mortgage industry. U.S. Attorneys' Offices are participating in 23 regional mortgage fraud task forces and 67 mortgage fraud working groups and are leveraging both criminal and civil tools, including civil injunctions and civil monetary penalties, to combat mortgage fraud and related abuses.

This comprehensive strategy against mortgage fraud has achieved notable results. In June, the Task Force announced Operation Stolen Dreams, the broadest mortgage fraud sweep in history. Through the coordinated effort of federal, state, and local partners, Operation Stolen Dreams involved more than 1,500 criminal mortgage fraud defendants, nearly 400 civil fraud defendants, and an estimated aggregate loss figure exceeding \$3 billion. This mortgage fraud sweep exceeded prior efforts in size, by orders of magnitude, and also differed from previous efforts because it included a broad array of enforcement cooperation with state and local authorities, who used a cross-section of civil, bankruptcy, and other enforcement tools to confront the varying forms of fraud. This effort reinforces the strength of the Task Force strategy of building broad coalitions and using all the enforcement tools available, and we expect this approach to continue to be effective.



The mortgage fraud cases that have been prosecuted show the harm caused by such schemes and why such cases will continue to be a priority in the fight against fraud. For example, in the Southern District of Ohio, Gregory S. Chew was convicted on charges stemming from a mortgage fraud scheme involving 57 property investors and 246 residential properties located throughout the greater Dayton area. Chew and a co-conspirator obtained \$17 million in loans from more than 39 victimized mortgage lending institutions and pocketed \$7.6 million of the loan proceeds. In the District of Arizona, Mario G. Bernadel, was sentenced to nearly 17 years in prison for his conviction on multiple counts for leading a mortgage fraud scheme in Phoenix that cost banks over \$9 million. Forty individuals were arrested and charged in connection with a major mortgage fraud scheme in the Eastern District of Texas. All 40 defendants, from Texas, Florida, Massachusetts, Tennessee, and Georgia, are charged with one count of conspiracy to commit mail and wire fraud. In the Central District of California, Milton Retana, who preyed on Spanish-speaking investors with promises of hefty returns during the real estate bubble, was sentenced in April 2010 to 25 years after bilking approximately 2,300 victims who suffered losses of approximately \$33 million. Retana promised investors that he would buy and sell real estate with guaranteed returns as high as 84 percent each year but used only a tiny fraction of the victims' money to purchase real estate.

The Task Force also has seen results in combating fraud in the investment and finance arena. For example, in June, the Criminal Division and its partners at the U.S. Attorney's Office for the Eastern District of Virginia, the FBI, the Special Inspector General for the TARP, HUD, and the FDIC, obtained an indictment against Lee Farkas, the former chairman of Taylor, Bean & Whitaker (TBW). Farkas is accused of orchestrating a scheme that led to the collapse of TBW and Colonial Bank, one of the country's 50 largest banks in 2009. By selling sham mortgage assets to Colonial Bank, Farkas and his co-conspirators created a loss totaling near \$2 billion.

The Farkas indictment is just one example of our enforcement efforts against Wall Street fraud. Since the formation of the Task Force, there have been numerous enforcement actions focused on financial institutions or their executives, including the following:

- In June, an indictment in Brooklyn was unsealed against a former high-ranking executive of Aeropostale Inc., a publicly-traded clothing retailer, for a kickback scheme in which the executive, Christopher Finazzo, received more than \$14 million in exchange for causing Aeropostale to buy over \$350 million in merchandise from a supplier.
- In March, the U.S. Attorney's Office for the Southern District of New York brought charges against the former president of Park Avenue Bank for attempting to fraudulently obtain more than \$11 million in taxpayer rescue funds from the TARP.

- In January, seven Wall Street professionals and attorneys from New York, New Jersey, and Connecticut were indicted for securities fraud and conspiracy for the participation in an insider-trading scheme regarding mergers and acquisitions of public companies.

In our continuing efforts directed at protecting “Main Street” victims, the Task Force and its partners have worked diligently to root out fraudsters who rely upon seemingly legitimate investments and business opportunities to deceive unsuspecting investors. Recent enforcement efforts from the past few months include the following:

- On September 15, 2010, Nevin Shapiro, the former CEO of Capital Investments USA, Inc., pleaded guilty in Newark, New Jersey, to fraudulently soliciting funds for a non-existent grocery distribution business. Mr. Shapiro’s \$880 million investment fraud scheme resulted in between \$50 million and \$100 million in losses to investors.
- On the same day, September 15, Frank Castaldi, an accountant and businessman, was sentenced in Chicago to 23 years in prison for bilking hundreds of investors – many of them elderly Italian immigrants – out of more than \$30 million.
- On September 13, 2010, defendant Michael Goldberg pleaded guilty in Bridgeport, Connecticut, to three counts of wire fraud relating to his operation of a \$100 million investment fraud scheme that cheated investors out of more than \$30 million over an approximately 12-year period. Mr. Goldberg solicited more than 350 individuals to invest money in “diamond contracts” and to purchase distressed assets from JP Morgan Chase Bank.
- On September 9, 2010, Christian Allmendinger, Adley Abdulwahab, and David White – three principals in a group of businesses that acquired and marketed life settlements to investors – were arrested and charged in an 18-count indictment filed in Virginia federal court for their alleged roles in a \$100 million fraud scheme with more than 800 victims across the United States and Canada.
- On August 24, 2010, a federal judge in Minnesota sentenced Trevor Cook, who orchestrated a Ponzi scheme by selling \$158 million in bogus foreign currency trading investments, to a term of 25 years in prison.
- On July 22, 2010, in Louisiana, Matthew Pizzolato received a 30-year prison term for a \$15 million scheme that targeted retiree investors with the promise of no risk and high rates of return.
- On April 29, 2010, Mario Levis, the former Treasurer and Senior Executive Vice President of Doral Financial Corporation was convicted in the Southern District of New York on securities and wire fraud charges after a five-week trial for his role in a scheme to defraud investors and potential investors in the stock of Doral that caused \$4 billion decline in shareholder value.

- On April 27, 2010, defendant Charles Hays was sentenced to 117 months in prison for his role in running a Ponzi scheme involving commodity pools. He was ordered to pay more than \$21 million in restitution, as well as victim attorney's fees.

From California to Texas to Minnesota to New Jersey, the Task Force and its law enforcement partners are bringing cases against the financial criminals who use trust as a weapon to victimize people in this country. This is an important priority for the Task Force and the Department, and we expect you will see more enforcement actions in the coming months.

**QUESTIONS POSED BY SENATOR FEINSTEIN**

**10. As you may be aware, when DOJ enters into information sharing agreements with State, tribal and local law enforcement agencies, it is barred from signing mutual indemnification agreements. This lack of mutual indemnification means that State, tribal and local law enforcement agencies could be held liable in the event of inappropriate or illegal use of the information by a Federal agent. While some larger law enforcement agencies can afford that legal exposure, the vast majority cannot. As a result, the continuing ability of State, tribal and local law enforcement agencies to fully participate in information sharing initiatives may be at risk.**

- a. Have any State, local or tribal law enforcement in California expressed their inability to sign an Intergovernmental Agreement (IGA) or Memorandum of Understanding (MOU) for information sharing with DOJ?**

**Response:**

The Department of Justice exchanges information with thousands of state, local, and tribal law enforcement partners, including partners in many parts of California. The Department does not indemnify any of these partners. A small number of local law enforcement agencies within California have sought to include an indemnification provision in their information sharing agreements. However, the vast majority of the Department's law enforcement partners, including those in California, have entered into information sharing agreements without raising the question of indemnification.

As a general matter, most information sharing agreements between the Department and its law enforcement partners provide that federal, state, local and tribal agencies will be liable for the improper acts and omissions of their own employees. Consequently, if a federal agent were to use information provided by a state, tribal, or local law enforcement agency in an inappropriate or illegal manner, it is unclear how the non-federal agency could be held liable. We are not aware of any case in which that has happened.

- b. Is DOJ barred from signing an agreement with mutual indemnification provisions? If so, under what authority? Lastly, do you believe that a change in the law is necessary?**

**Response:**

The Anti-deficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, prohibit the Department from entering into unlimited mutual indemnification agreements. Under these statutes, agencies may not obligate or expend funds in excess of the amount available in their appropriations. Agencies are also prohibited from obligating funds in advance of appropriations. In light of these

restrictions, each financial obligation assumed by an agency must be for a definite amount. Otherwise, an agency's obligations might grow to exceed the amount of funding appropriated by Congress.

While the Department could avoid violating the Anti-deficiency Act and the Adequacy of Appropriations Act by entering into a limited or capped indemnification agreement or by seeking a change in applicable law, neither option is necessary or advisable from a policy perspective. As the Comptroller General has explained, indemnification, even where limited, "could have disastrous fiscal consequences for an agency as well as present other practical problems. For example, payment of an especially large indemnity obligation at the beginning of a fiscal year could wipe out the entire unobligated balance of an agency's appropriation for the rest of the fiscal year, forcing the agency to seek a supplemental appropriation to finance basic program activities. Conversely, if a liability arises toward the end of the fiscal year it is quite possible that no unobligated balance would be available for an indemnity payment, which means indemnification could prove to be largely illusory from the standpoint of the beneficiary." See U.S. Government Accountability Office, Principles of Federal Appropriations Law, Third Ed., Vol. II, at 6-60 (2008).

For this, and other reasons described by the Comptroller General, the Department's indemnification of its state, local and tribal partners would be ill-advised. As noted above, the Department has information sharing arrangements with thousands of state, local and tribal partners. Presumably, if an indemnification option were offered to one partner, others would request similar protection. Even if the risk of legal liability were low, fiscal responsibility would require the Department to account for a financial obligation of this magnitude. As a result, the Department would likely have fewer funds available to carry out its criminal justice and national security missions. While the Department is sympathetic to the concerns raised by certain of its partner agencies, it believes that the legal risk to state, local and tribal law enforcement agencies, when balanced against the potential mission impact of the Department indemnification, warrants neither a change in applicable law nor a modification of the Department's current practice.

#### U.S. Consulate Murders in Ciudad Juarez

- 11. On March 13<sup>th</sup> in Ciudad Juarez, Mexico two Americans and one Mexican citizen affiliated with the U.S. Consulate were killed. It is said that these attacks may have been the result of mistaken identity. This is yet another example of the viciousness of the drug trafficking organizations. It must be stopped. I recently met with the Mexican ambassador and he knows that we stand ready to help in any way possible. President Calderon has waged a courageous war against the drug trafficking organizations and I strongly urge him to continue. The unprecedented levels of violence must end.**

- a. **Do you have an update on this investigation and what resources is the Justice Department dedicating to finding the persons responsible?**

**Response:**

The investigation into these crimes is ongoing. The FBI is working with the Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), U.S. Immigration and Customs Enforcement (ICE), the El Paso Sheriff's Office, and Mexican military and law enforcement authorities in this effort. To supplement the FBI resources ordinarily available in El Paso and Mexico, which include both the Resident Agencies in that area and the FBI's Legal Attaché office in Mexico City, the FBI has deployed over 20 investigative and analytic personnel from several other field offices. In addition, the FBI's Office of Victim Assistance is providing support to the family members of the deceased U.S. Consulate employees. To date, the coordinated effort of the above agencies has led to the arrests of five individuals by the Mexican authorities and the identification of at least seven others either involved in or with knowledge of the crime.

- b. **Have you seen any indication that this type of violence is going to spill across the border and what efforts are being made to prevent that?**

**Response:**

The Department is very concerned about the increase in the number of kidnappings of U.S. citizens by Mexican criminal enterprises which are a major problem in southeast Texas (the Laredo, McAllen, and Brownsville areas) and in the San Diego-Tijuana area. Assaults on U.S. law enforcement officials by Mexican criminal enterprises, including the murders of U.S. Border Patrol Agents Luis Aguilar in 2008 and Robert Rosas in 2009 and the recent murder of rancher Robert Krentz, Jr., in Douglas, Arizona, all raise serious concerns about the violence in Mexico spilling over into the United States.

To address this increase in violence, the FBI has created a Southwest Intelligence Group located at the El Paso Intelligence Center to serve as the central point of contact for all southwest border related violence and corruption matters. The FBI has also established a hybrid Criminal Enterprise/Violent Crime Squad in the San Diego Field Office to target the Mexican criminal enterprises engaged in the kidnapping of U.S. citizens for ransom. The FBI has developed a strong Border Liaison Officer program that fosters and maintains strong, cooperative working relationships between FBI agents and their Mexican counterparts. The FBI is assisting in the establishment and training of vetted Mexican Kidnapping Investigative Units (MKIUs) throughout Mexico to help address the proliferation of kidnappings. The first training session for MKIUs was conducted in Florida in November 2009. Forty officers from the MKIUs serving the Mexican states of Chihuahua and Baja California Norte received extensive training in the investigation of kidnappings. The second training session was completed in January 2010, during which 15 law enforcement officers from the Mexican state of Zacatecas

received training. Additional sessions are scheduled during 2010 to train law enforcement officials from the Mexican states of Michoacan, Aguascalientes, Tamaulipas, Nuevo Leon, Coahuila, and Sonora.

In April 2009, ATF developed the Gun Runner Impact Team (GRIT) to aggressively target and disrupt groups and organizations responsible for trafficking U.S. firearms to Mexico by focusing on a large number of firearms trafficking leads developed from gun trace information. The deployment of GRIT in the Houston, Texas area in 2009 resulted in the initiation of 276 new criminal cases, 103 of which were referred for prosecution, including 72 gun trafficking cases. These cases involved 189 defendants, of which 150 were associated with trafficking cases accounting for an estimated 644 firearms trafficked. As a result of the GRIT initiative, ATF seized 443 firearms, 141,442 rounds of ammunition, \$165,234 in currency, over 5 kilograms of cocaine, and 1,500 pounds of marijuana. ATF conducted an extensive post-GRIT assessment to identify significant lessons learned during the Houston GRIT and is currently applying these lessons to a second GRIT operation in Phoenix.

#### **Politicization of Immigration Courts**

**12. The revelation that the previous Administrations had appointed more than forty Immigration Judges based on partisan interest and political favor – not based on merit – fundamentally calls into question whether the immigration court system as a whole comports with due process, fairness, and judicial neutrality.**

- a. What has DOJ done to restore fairness, neutrality, and due process to the immigration court system? Have you been able to make these changes under the existing DOJ organizational structure? If not, what do you need to make sure that neutrality is returned to the immigration court system?**

#### **Response:**

The Executive Office for Immigration Review (EOIR) has been provided the guidance and support necessary to ensure a fair, expeditious, and uniform immigration court system. Through accountability measures, selection and training enhancements, and additional resources, EOIR's immigration judge corps is continuing to improve.

#### *Selection & Training*

The current process for hiring immigration judges is designed to select the best qualified individuals for the positions. The hiring process involves casting a wide net to identify a large pool of candidates, which includes placement of job opportunity announcements on the Department's website and on the Office of Personnel Management's federal employment website, [www.usajobs.gov](http://www.usajobs.gov). The Department also

notifies well-established legal organizations about the immigration judge positions. EOIR's human resources staff then refers qualified applications to the Office of the Chief Immigration Judge.

The selection process also includes a rigorous review of the potential candidates. EOIR management evaluates applications based on the following six criteria: 1) ability to demonstrate the appropriate temperament to serve as a judge; 2) knowledge of immigration laws and procedures; 3) substantial litigation experience, preferably in a high-volume context; 4) experience handling complex legal issues; 5) experience conducting administrative hearings; and 6) knowledge of judicial practices and procedures. Senior EOIR personnel conduct interviews. The Chief Immigration Judge and the Director of EOIR review the results and identify the top candidates for referral for interview by a second panel of senior Department officials who interview finalists before recommendations for hiring are made through the Deputy Attorney General to the Attorney General.

Once selected, immigration judges are both tested and trained. For example, in April 2008, EOIR began testing new immigration judges on the key principles of immigration law. The immigration judges are required to pass the examination before presiding over cases.

EOIR also established a training plan that incorporates expanded training for new immigration judges, a mentoring program, periodic training on legal and procedural issues, management training, new and expanded reference materials, and legal training conferences. As a part of this expanded training, EOIR held a week-long legal conference for immigration judges in August 2009 and in July 2010.

In addition, to ensure due process, fairness, and judicial neutrality in the immigration court system, all new immigration judges now receive training on bias and professionalism as well as on their obligation to be impartial adjudicators. They also receive training on the proper procedures for receiving and weighing evidence and on the applicable burdens of proof during the various stages of an immigration court proceeding.

#### *Resources*

To improve consistency in the immigration court process, EOIR developed a comprehensive online *Immigration Court Practice Manual* that incorporates uniform procedures, requirements, and recommendations for practice before the immigration courts. EOIR continues to update the manual regularly in response to changes in law and policy.

EOIR also maintains an *Immigration Judge Benchbook* that contains a growing library of reference materials on immigration law topics and up-to-date decision templates with links to relevant reference materials. The *Immigration*



*Judge Benchbook* is publicly available at <http://www.usdoj.gov/eoir/vll/benchbook/index.html>.

#### *Accountability*

To improve oversight of the immigration judges, EOIR has implemented a variety of processes and programs. For example, on July 1, 2009, EOIR implemented performance evaluations for immigration judges. These assessments of the judges' strengths and weaknesses provide the judges with meaningful feedback.

EOIR also established an assessment program that focuses on training and professional development, including mentoring by experienced immigration judges and individualized training plans, as necessary.

Further, EOIR has deployed supervisory assistant chief immigration judges (ACIJ) in the New York, Los Angeles, Miami, San Francisco, and San Antonio immigration courts to enhance the supervision of immigration judges nationwide.

Moreover, EOIR established procedures for investigating complaints and implementing appropriate follow-up actions, led by a full-time ACIJ for Conduct and Professionalism, who reviews and monitors all complaints and works with the supervisory ACIJs to ensure the fair and timely resolution of such complaints. EOIR has also created a website for the public to file complaints about immigration judges and a system to track such cases. EOIR has acted promptly with respect to complaints and has taken remedial or disciplinary action where appropriate to address individual training or professionalism concerns regarding its judges. EOIR has published a detailed summary of its complaint process on the agency website and has developed a system for collecting statistics on complaints and their outcome. EOIR continues to refine these mechanisms on an ongoing basis.

- b. Under what authority should immigration judges be hired and how do we ensure that they are able to act independently?**

#### **Response:**

The Department believes that the current hiring authority under which immigration judges are hired is appropriate. In addition, it is the Department's policy to advertise every attorney vacancy and to evaluate all applications against established criteria.

The decisional independence of immigration judges is provided for by statute, 8 U.S.C. § 1101(b)(4), and in regulations, 8 C.F.R. §§ 1001.1(l) and 1003.10, to which the Department must adhere. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

**Passport Fraud**

**13. In the past few years, the issue of lost, stolen and fraudulent passports has been thrust into the spotlight, particularly from countries participating in the Visa Waiver Program. More recently, the integrity of the U.S. passport has come into question when a Government Accountability Office (GAO) report found that our own system of issuing U.S. passports is flawed.**

**a. How many passport fraud cases has your Department prosecuted?**

**Response:**

From FY 2005 to the present, there have been over 10,000 criminal cases filed by the United States Attorneys' Offices charging passport and visa fraud violations including issuance without authority, false statements in applications, forgery, or fraud and misuse of visas, permits and other documents. Additional cases involving passports or visas may have been filed under identity theft or other statutes.

**b. Do you have the tools you need to prosecute these cases effectively – to not just hold the bearer of the passport accountable, but all those distributing and selling these passports?**

**Response:**

The Department is examining whether we have all the legal tools we need to prosecute passport fraud. If we conclude that there are deficiencies in current federal law, we will report back to you and would be pleased to assist the committee in developing new legislation addressing them.

In particular, we are examining whether enhanced penalties for those engaging in large scale and organized passport fraud would be helpful.

**Border Tunnels**

**14. In response to security breaches, I introduced the Border Tunnel Prevention Act, which was enacted in October 2006, to make it a federal crime to finance, construct or use a border tunnel. Mr. Holder, will you provide this Committee with an update on how the Department of Justice is enforcing the provisions of the Border Tunnel Prevention Act to investigate and prosecute those who construct and use border tunnels to smuggle drugs, guns or people in and out of the United States?**

**Response:**

The Department has been active in apprehending and prosecuting defendants who use tunnels to smuggle drugs into the United States. Since the enactment of the Border Tunnel Prevention Act, there have been numerous federal investigations involving use of tunnels from Mexico into the United States, primarily in the Southern District of California. Individuals who use tunnels to smuggle drugs into the United States have been typically charged with violations of Title 21 of the United States Code, which prohibit the importation and distribution of controlled substances. Those provisions carry statutory mandatory minimum sentences, presumptively require pre-trial detention, and are extremely effective tools in combating this particular type of crime.

In early November, after discovery of a tunnel in the San Diego area, two defendants were charged by complaint with conspiracy to distribute over 40,000 pounds of marijuana and two other defendants were charged by complaint with conspiracy to distribute approximately 19,000 pounds of marijuana. As currently charged, the defendants, if convicted, face mandatory prison sentences ranging from 10 years to life.

The Border Tunnel Prevention Act, codified at 18 U.S.C. Section 555 is a useful tool in prosecuting cases in which there is no readily provable evidence of drugs or it is difficult to tie specific defendants to the tunnel. It may also not be possible to develop further evidence where the priority is to shut down the tunnel rather than allowing it to remain open for surveillance or other investigative purposes.

For example, in December 2009, ICE Special Agents executed a search warrant at a warehouse located in Calexico, California, where they discovered the exit point to a tunnel. During the search of the tunnel, agents discovered a hotel receipt in the name of Daniel Alvarez who was later arrested and prosecuted by the United States Attorney for the Southern District of California for a violation of 18 United States Code § 555. The defendant was sentenced to 15 months. To our knowledge, Alvarez is the first defendant to be convicted under the Border Tunnel Prevention Act.

**Indefinite Detention**

- 15. The Immigration and Nationality Act and the PATRIOT Act both allow different types of indefinite detention under narrow circumstances. It is important that the Executive strikes the right balance between preserving the rule of law and releasing individuals who we know are determined to harm our nation.**
  - a. Mr. Holder, in your opinion, in what narrow circumstances can the Executive branch hold detainees who continue to pose a security threat but cannot be prosecuted for past crimes?**

**Response:**

The Executive Branch can continue to hold detainees who pose a security threat when there is a lawful basis to do so. The 2001 Authorization for Use of Military Force (AUMF), as informed by the law of war, provides authority to detain until the end of hostilities persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks, as well as persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. Immigration authorities also may be relied on to hold in immigration detention non-citizens who have been acquitted or who have completed their criminal sentence and whose release would endanger the national security, pending their removal from the United States.

- b. **What would be some of the guidelines for a statutory framework for indefinite and preventive detention in such narrow circumstances?**

**Response:**

The Administration believes that the AUMF and other existing statutes provide adequate authorization to detain. We are not seeking additional legislation at this point.

**State Secrets**

- 16. It is my understanding that the Department of Justice has implemented internal checks and reviews in order to prevent the abuse of the State Secrets privilege. While I am pleased with the direction that the Administration has taken, the bill considered by this Committee earlier this year would also provide greater judicial oversight and review of the executive branch's use of the state secrets privilege. Do you agree that federal judges have a role in reviewing national security assertions? If so, is it practical to allow judges to review classified documents in review?**

**Response:**

As you are aware, last year the Department adopted formal procedures for when the government may invoke the state secrets privilege. Under these procedures, the state secrets privilege may be asserted only in narrowly tailored circumstances to prevent significant harm to the national security. Under no circumstances may the privilege be asserted to conceal violations of the law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency of the government; to restrain competition; or to prevent or delay the release of information that could not be expected to significantly damage the national security. The protocols establish rigorous procedural

safeguards, including creating a State Secrets Review Committee consisting of senior Department officials. Before invoking the state secrets privilege, the government component seeking to assert the privilege must provide the head of the appropriate Department of Justice division a detailed affidavit about the information and why its disclosure could be expected to significantly damage the national security. The division head must then recommend to the Review Committee whether or not the Department should defend the assertion of the privilege. After consultation with the Office of the Director of National Intelligence, the Review Committee submits a recommendation to the Deputy Attorney General, who in turn makes a recommendation to the Attorney General. The Department will not defend an assertion of the privilege without personal authorization from the Attorney General. Credible allegations of government wrongdoing are reported to the Inspector General. Moreover, the Department provides periodic reports to the appropriate congressional oversight committees explaining the basis for asserting the privilege in all cases in which it has been invoked.

The protocols we have established serve to ensure that each assertion of the state secrets privilege in litigation has been subjected to a rigorous formal process that requires serious and personal consideration by officials at the highest levels of the Department. That said, the Department fully agrees that the Judiciary plays a vital and essential role in independently reviewing assertions of the state secrets privilege. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953) ("The court itself must determine whether the circumstances are appropriate for the claim of privilege."). It is standing Department practice to provide Article III judges access to information sufficient to understand and justify the privilege in any case where the privilege is invoked, even where the material is highly sensitive.

#### **Salcedo Murder Investigation**

**17. Robert "Bobby" Salcedo was murdered in Gomez Palacio, Durango on December 30, 2009. Mr. Salcedo was a U.S. citizen and resident of El Monte, California where he was a member of the school board and an assistant principal at El Monte High School. I was shocked and outraged by this crime. Mr. Salcedo had done nothing wrong and was simply in the wrong place at the wrong time. The Ambassador to the United States from Mexico, Arturo Sarukhan has advised me that Mexican authorities have been in contact with the FBI and ATF on this matter. Can you provide me an update on this investigation to include the level of cooperation between U.S law enforcement and the Mexican authorities on this case?**

#### **Response:**

The investigation into this murder was initially handled by authorities for the Mexican state of Durango. It has since been transferred to Mexican authorities at the federal level. The FBI's Legal Attaché in Monterrey has been in close contact with investigators at both levels of the Mexican government to offer assistance. The FBI has

no investigative authority in Mexico in the absence of a request for such assistance from Mexican authorities. At this time the Mexican authorities have not requested assistance from U.S. law enforcement. However, the FBI Legal Attaché in Mexico has helped to establish a telephone line to receive tips regarding this murder or any others in Mexico. The FBI will provide to appropriate state and federal Mexican prosecutors any information we receive from this telephone tip line.

**Gun Show Loophole**

**18. Last month, it was reported that John Bedell, who shot two Pentagon police officers, received a letter from California law enforcement that he was prohibited from possessing a gun. Yet, according to news reports, 19 days later he bought a gun from a private seller at a Nevada gun show and used it to attack two federal police officers. Under the so-called gun show loophole, private sellers do not have to conduct background checks or complete paperwork on the people who buy their guns. Time and time again, this dangerous loophole in the law has contributed to violent crime and undermined the safety of our police officers.**

- a. Does the Justice Department support legislation to close the gun show loophole?**

**Response:**

The Department is committed to keeping guns out of the hands of criminals by vigorously enforcing federal gun laws. The Department regularly evaluates its enforcement authorities and is currently focusing its efforts on enforcing existing law and maximizing the effectiveness of the tools currently at our disposal.

- b. Is the Justice Department working to identify which gun shows are disproportionate sources of guns used in crimes and does the Justice Department plan to step up enforcement at gun shows that are disproportionate sources of guns used in crimes?**

**Response:**

ATF develops proactive strategies to assess and combat illegal firearms trafficking to criminals, terrorists, gangs, juveniles and those that are legally prohibited from possessing a firearm. As with all of its investigations, ATF bases its decisions to conduct investigative operations at gun shows on special intelligence and information indicating that illegal activity is taking place at a specific gun show or flea market.

**QUESTIONS POSED BY SENATOR FEINGOLD****COPS**

**19. You stated during the April 14 hearing that the Department is looking at the allocation formula that is used for the COPS Hiring Program and that you are in the process of adopting a methodology that would take into consideration concerns raised by sheriffs' offices. What is the status of this review, and how quickly do you anticipate being able to modify the grant application process to ensure that counties receive an appropriate portion of COPS Hiring grants?**

**Response:**

The Fiscal Year 2010 appropriation for the COPS Office included \$298 million for the COPS Hiring Program. COPS invited the more than 6,000 pending applicants from the COPS Hiring Recovery Program (CHRP) to provide updated financial data, crime data and to revise their community policing plan. These updates will allow the COPS Office to make awards using the most recent data available. With only \$298 million available in FY 2010 for hiring and more than \$7 billion in pending requests, this approach was the most efficient and expedient way to administer the program in 2010.

The President has requested \$600 million for COPS hiring in his FY 2011 budget request. The COPS Office is currently exploring ways to develop an even better methodology for administering its hiring program, which will address the perceived discrepancies in funding between cities and counties. That process will be finalized for the FY 2011 hiring program.

The COPS Office has a long history of allocating hiring grants efficiently to more than 13,000 of the 18,000 state, county, local, and tribal law enforcement agencies across the United States, including by making those awards to the agencies demonstrating the greatest need. Following COPS current authorization, hiring grants have been awarded to agencies serving both large and small populations, as well as distributed across all 56 U.S. states and territories. The COPS Office has listened to and understands the concerns raised by sheriffs' offices and will continue to explore ways to improve their awarding process. It is important to note, however, that the COPS Office must maintain the integrity of the awarding process and cannot make assurances that particular counties receive a portion of COPS hiring grants.

**Incentives for Public Attorneys**

**20. You stated during the April 14 hearing that you support the John R. Justice Prosecutors and Defenders Incentive Act. Please provide an update on the status of the Department's efforts to launch this program. When do you**

**expect that prosecutors and public defenders will be able to start applying for assistance?**

**Response:**

The Office of Justice Program's (OJP) Bureau of Justice Assistance (BJA), which is responsible for the administration of the John R. Justice Program (JRJ), has determined that a partnership with the Governors across the country and their designated state agencies is the optimal method of administering this program. Many state agencies have experience in administering loan repayment programs. Governors are also most familiar with conditions in prosecutor and public defender offices in their jurisdictions and the challenges resulting from attorney shortages and unmanageable caseloads.

JRJ funds are available to states based on the total population of each state according to the latest available Census data. OJP's Bureau of Justice Statistics (BJS) has calculated a minimum base allocation for each state and the District of Columbia in the amount of \$100,000. This minimum base allocation has been enhanced by an amount proportional to each state's share of the national population. By using these funds to provide student loan repayment assistance, Governors can encourage attorneys in their states to enter or continue employment as prosecutors and public defenders, and help strengthen state justice systems.

A funding solicitation was released on May 26, 2010 and each of the 50 states as well as the District of Columbia applied for and was awarded a portion of the JRJ funding. States will administer the program by providing loan repayments on behalf of prosecutors and public defenders in their state. BJA has been working very closely with each governor-designated agency to ensure that the states are implementing JRJ programs that are consistent with both the Act and the JRJ solicitation. It is anticipated that all states will begin to solicit applications from prosecutors and public defenders before the end of the calendar year and many states have begun this process. The District of Columbia has requested and has been granted additional time to establish their program due to anticipated staff turnover from the recent mayoral election. As more information becomes available, it will be posted at:  
<http://www.ojp.usdoj.gov/BJA/grant/johnrjustice.html>.

**Review of Classified Materials**

- 21. In your March 22, 2010, responses to Questions for the Record from the November 18, 2009, Department of Justice Oversight hearing, you stated that there was an ongoing review of whether to withdraw the January 2006 White Paper and other classified Office of Legal Counsel (OLC) memos providing legal justification for the NSA's warrantless wiretapping program. What is the current status of that review? When will it be complete?**



**Response:**

The Department is still conducting its review, and will work with you and your staff to provide a better sense regarding the timing of the completion of the review.

**Military Commissions Act**

**22. Under the Military Commissions Act of 2009, the Secretary of Defense, at least partly in consultation with the Attorney General, must issue rules to govern military commission proceedings.**

- a. Have all the rules and regulations necessary to move forward with a military commission trial been finalized and issued?**

**Response:**

Yes. On April 27, 2010, the Secretary of Defense issued the Manual for Military Commissions (2010 Edition). It is available at <http://www.defense.gov/news/d2010manual.pdf>.

- b. The military commission system is the subject of a constitutional challenge in the D.C. Circuit that is at the beginning stages of litigation. In addition, someone charged in a military commission prosecution could bring a legal challenge to the system itself before trial begins. In fact, when a military commission defendant named Salim Ahmed Hamdan challenged a prior version of the military commission system, his case was resolved by the Supreme Court after years of litigation, and the military commission system was struck down as unconstitutional. How likely is it that the first few military commission trials under the Military Commissions Act of 2009 will be subject to legal challenges, and that the trials themselves might not begin for several years?**

**Response:**

In the past, there have been a number of legal challenges to attempts to institute military commissions that have consumed substantial Executive Branch resources and taken several years to litigate. We believe that additional attempts to challenge future military commissions are likely, and the Department of Justice would vigorously defend against such suits. In any such hypothetical litigation, the potential for a stay or injunction of any military commission proceedings would be a possibility, although two federal district judges previously refused to enjoin commission proceedings under a prior version of the MCA enacted after the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). See *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008).

- c. **The Department has achieved significant successes in the Zazi and Headley cases. In both cases the Department used the criminal justice system to obtain intelligence and ultimately guilty pleas. What would it have done to the government's counterterrorism efforts in those cases if you had not had the option of charging those men in federal criminal court?**

**Response:**

It would severely hamper the government's counterterrorism efforts to not have at its disposal all available tools, including the ability to prosecute cases in federal criminal courts. In both the Zazi and Headley cases, the ability of prosecutors to leverage the tools available to them in the criminal justice system has led to the collection of extremely valuable intelligence on terrorist operations. The criminal justice system provides powerful incentives for suspects to provide accurate, reliable information, and the Department of Justice and FBI work closely with the rest of the intelligence community to maximize information and intelligence obtained from each cooperator. Further, the criminal justice system has proven to be very useful as a tool to dismantle terrorist organizations and to incapacitate individual terrorists through the imposition of lengthy prison sentences. The successes in these two cases, as well as many others, demonstrate the value of having a wide range of tools available to the government in its counterterrorism efforts, including the option to bring charges in federal criminal court.

QUESTIONS POSED BY SENATOR SCHUMERBureau of Prisons Staffing Concerns

23. I wanted to highlight what I see as an issue of growing concern for our criminal justice system – the overcrowding and understaffing of our federal prisons. I understand that the Department recently met with prison guards to discuss these matters and was glad to see the significant increase in the President’s 2011 Budget Request for the Federal Prison System. These are steps in the right direction, and I commend the Administration for them, but we still have a long journey to travel. Last year, I visited the Federal Correctional Institutions in Otisville, New York. I was troubled to discover that the federal institution in Otisville was operating 42.7 percent over its rated capacity and was 14 percent understaffed at that time. Unfortunately, the plight of this New York facility is becoming the rule and not the exception for our federal prisons. These conditions present an unnecessary and genuine risk not only to inmates, but also to the officers and staff who work at federal prisons. The slaying of Correctional Officer by prison inmates in 2008 and the recent string of assaults in federal penitentiaries serve as tragic indicators of an underfunded system. What is even more shocking is that shortly after my visit to FCI Otisville, as the Bureau of Prisons (BOP) was assuring New Yorkers of more staff being hired, even more positions were cut. Since my visit to FCI Otisville, the BOP has eliminated 16 staff positions, and it is my understanding that they stand to lose three more. With the removal of these positions, the BOP can assert that the facility is 93 percent staffed even while the situation on the ground has not improved.

- a. What decisions went into the elimination of these positions from the staffing complement at FCI Otisville?

Response:

Fully staffing existing positions and adding new positions has been a high priority for the BOP in recent years, and will remain so for the foreseeable future. The BOP has not initiated any position reduction initiatives since Fiscal Year 2006, when the agency began three initiatives that impacted staffing levels. However, regional offices provide oversight regarding institution operations, including adjustments to staffing levels at institutions as needed to address authorized positions, security, and other issues that arise. As regions identify required changes in authorized staffing levels, they have the latitude to either realign positions within the region or to submit a request for an increase to authorized positions.

As such, the BOP’s Northeast Regional Office reviewed staffing levels at each institution within the region to ensure equitable distribution of positions among similarly situated institutions (i.e., security level, inmate population, inmate services). This

process led to a reduction of 14 positions. However, the Central Office provided the institution with 11 new positions, resulting in a net decrease of 3 positions during Fiscal Year 2009. It is important to note that FCI Otisville's staff-to-inmate ratio (1:7.93) is the lowest among similarly situated institutions in the Northeast Region, and that total staffing and custody staffing percentages (91.7% and 94.4%, respectively) are among the highest in the region among similarly situated institutions. Thus, we are confident the cost savings achieved through this realignment will allow us to continue to operate safe and secure prisons while judiciously utilizing our resources.

- b. Has the BOP eliminated positions from other federal prison facilities? If so, which facilities? If not, why only FCI Otisville?**

**Response:**

BOP has not initiated any agency-wide position reduction initiatives since 2006. However, as previously stated, Regional Offices have the latitude to realign positions at institutions as needed. It is likely that institutions throughout the six regions have experienced realignments at the determination of the respective Regional Directors.

- c. How is staff need determined in our federal prison facilities?**

**Response:**

As required by BOP policy, local and regional reviews of authorized staffing levels are conducted quarterly as part of the development of the Annual Workforce Utilization and Staffing Plan. Regions provide oversight with regard to authorized position levels and onboard staffing, crowding levels, and special circumstances and security issues that arise. As regions identify required changes in authorized staffing levels, they either realign positions within their region or submit a request for an increase to authorized positions for consideration to the Resource Allocation Subcommittee (RAC). The RAC is comprised of seven members of the Executive Staff (four Assistant Directors and three Regional Directors) and is co-chaired by the Assistant Director for Administration and the Assistant Director for Human Resource Management.

Additionally, the Executive Staff conducts quarterly reviews of institutions that fall under each security level, including a review of authorized positions and staffing levels. Adjustments are made to authorized position levels when new programs are added, during mission changes (e.g., changes from male to female inmate populations or changes in security level), expansions, and as other needs are identified.

All authorized position levels for BOP facilities are approved by the RAC. Each Region submits to the RAC a request for positions in support of their proposed staffing plan. The plan contains a number of specific questions regarding facilities and programs, which assist the RAC in determining the number of positions necessary for safe and secure operations.

The completed plan is then reviewed by the Administration Division and Human Resource Management Division. These divisions review pertinent information that affects staffing, including the number of positions in the budget, planned capacity and anticipated crowding, projected staff-to-inmate ratios based upon the position request, anticipated staffing based on positions requested, and projected average daily inmate population levels.

In the end, the RAC reviews all of this data and makes a recommendation to the Director regarding the number of positions that should be allocated to requesting facilities. Due to funding constraints in recent years, the RAC has made a concerted effort to have equity in the number of approved positions for similarly-situated facilities (e.g., same security level, medical care level, design layout, capacity).

**QUESTIONS POSED BY SENATOR CARDIN****Human Trafficking**

**24. A number of our European partners in combating trafficking and the recommendations of multilateral institutions, like the OSCE, recommend the provision of victim services regardless of cooperation with law enforcement. It is clear that U.S. policy seeks to balance the needs of these victims with the importance of prosecuting traffickers by issuing visas for residency contingent on law enforcement cooperation. This cooperation is seen as the only way to interrupt the trafficking pipeline.**

- a. How might a cooling off period, giving the victim substantial time to avail themselves of support services, or other mechanisms help facilitate victim cooperation with law enforcement?**

**Response:**

A “cooling off” period has several priorities, including protecting and stabilizing victims so that they can cooperate in investigations. While U.S. law does not include a formal cooling off period, it is able to accomplish many of the same purposes. For example, the Department of Justice’s Office for Victims of Crime funds numerous non-governmental victim service organizations to provide services to individuals (potential victims) who may be victims of human trafficking before they are formally certified by the U.S. government as victims, in recognition of the fact that it often takes time for a victim to stabilize and confide.

Victims may receive services regardless of their immigration status and there are no immigration consequences. There is no initial requirement that victims cooperate with law enforcement to receive these services. Once victims make an affirmative decision not to make a report to or work with law enforcement, services terminate. Persons who are found to be trafficking victims and are “necessary to effectuate prosecution” (submit to an interview, remain available to testify etc.) are eligible for temporary immigration status, work authorization, public benefits, and services. Minors are exempt from the cooperation requirement. Additionally, the U.S. offers long term immigration relief to foreign victims who have complied with reasonable requests of law enforcement or who are “unable to cooperate with such a request due to physical or psychological trauma.” There is a wide variety of policies and practices in places throughout Europe. Generally, some combination of services, immigration status, and/or work authorization is provided for a short period of time, generally 45 to 90 days and sometimes up to six months. After this point, victims are deported if they choose not to cooperate with law enforcement. The cooperation requirement is typically a formal affirmative agreement to testify or to swear out a complaint. Victims may be eligible to lawfully remain while assisting law enforcement but are then returned to their country of origin. NGOs report that victims are reluctant to come forward and accept the reflection period because regardless of

whether they decide to work with law enforcement or not, deportation is usually the end result. The U.S. approach offers services without immigration consequences as a humanitarian measure as well as an incentive to work with law enforcement.

**b. What legal adjustments might generate a more victim-centered approach that still meets our prosecutorial goals?**

**Response:**

The existing legal standard appropriately balances victim-centered concerns with prosecutorial goals, serving the same purposes as a cooling off period but with a more individualized approach to determining the appropriate period of stabilization before cooperation requests can reasonably be made. However, programs to enhance the expertise of victim service providers in addressing trafficking-related trauma and law enforcement expertise in victim-centered investigations would strengthen implementation of these existing legal provisions.

Additional resources would permit OVC to offer greater and longer-term humanitarian assistance to trafficking victims. OVC could extend services to victims who have made the decision not to cooperate with law enforcement; these victims are often in greater need of assistance because they fear retaliation by the traffickers and are unable to overcome the mental anguish. Services could result in a later decision to be helpful to law enforcement.

Additionally, it would be helpful to take a comprehensive approach in any legislation to encompass services to all victims, whether citizen or non-citizen, adult or child, sex trafficking or labor trafficking.

Funding for trafficking-specific technical assistance programs would help build the capacity of current DOJ grantees to identify and assist trafficking victims; thereby enlarging the network of trained organizations without requiring substantial resources for additional grant programs.

The Department of Health and Human Services also has responsibility in these areas.

**Trafficking Victims Protection Reauthorization Act**

**25. As you know, I worked closely with my colleagues on the Senate Judiciary and Foreign Relations Committees on provisions in the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA - signed into law on December 23, 2008 - Public Law 110-457). This legislation included greater interagency coordination of victim identification, additional training about trafficking in persons for U.S. Foreign Service officers, as well**

**as mechanisms for greater oversight of international contractors and U.S. diplomatic missions.**

**a. How is the domestic implementation of this legislation proceeding?**

**Response:**

Multiple U.S. government agencies have collaborated to implement these provisions. DOJ, HHS, and DHS have established a Minor Victims Working Group to implement the victim identification procedures. The training of U.S. Foreign Service Officers and oversight of international contractors and U.S. Diplomatic Missions are primarily implemented through the Departments of State and Defense.

**b. Have the newly introduced legal protections provided the necessary tools for the effective prosecution of traffickers?**

**Response:**

The enhanced criminal provisions in the TVPRA have provided law enforcement with valuable tools to conduct the effective prosecution of traffickers, and the enhanced victim protection provisions have assisted in conducting victim-centered investigations and prosecutions.

**26. Prior to the reauthorization, the Department of Justice expressed a number of reservations about the TVPRA prior to its passage. One challenge that was noted was the need to retrain law enforcement and prosecutors throughout the U.S. on the updates of the TVPRA.**

**a. How is this retraining proceeding?**

**Response:**

The Department of Justice supported S. 3061 and the enhanced criminal provisions it introduced. The Department, in partnership with other law enforcement agencies, has actively trained victim advocates, as well as federal, state, and local law enforcement agents and prosecutors, in the new TVPRA provisions. This training has included distribution of written guidance, broadcasts of nationally televised interactive training via the Justice Television Network, and live in-person training courses at the National Advocacy Center, Quantico, the Federal Law Enforcement Training Center, and the National Human Trafficking Conference.

**b. Are all of regional task forces completely aware of and optimizing the tools offered?**



**Response:**

Task force members were invited to convene at the local U.S. Attorney's Office to participate in the interactive Justice Television Network Training. The majority of regional task forces participated in the live, interactive broadcast, and others assembled to participate in rebroadcasts. Moreover, Office of Victims of Crime (OVC) has organized regional trainings for multiple task forces and its Technical Assistance and Training Center has provided substantive guidance to the task forces.

In addition, OVC and the Bureau of Justice Assistance (BJA) hosted the first *Anti-Human Trafficking Task Force Regional Training Forum* in Tampa, Florida in December 2009. The forum was designed to address the specific needs of task forces in the South and Southeast regions of the U.S. Eleven task forces attended. Additional forums are being planned for the Northeast and West Coast in Fall 2010.

OVC and BJA are also in the final stages of developing an online *Human Trafficking Task Force Operations e-Guide*, which is designed to address the challenges faced by new and existing task forces and serve as a portal to timely resources and training and technical assistance opportunities.

Additionally, BJA is currently piloting a new *Advanced Human Trafficking Investigators* training. This training will be used to enhance the skills of law enforcement officials charged with investigating human trafficking crimes. Finally, in FY 2010, BJA will work with our partners in the field to develop and pilot Human Trafficking training for prosecutors and judges.

- c. Are law enforcement actively engaging in anti-trafficking police measures?**

**Response:**

The Department has actively helped train federal, state, and local law enforcement to engage in pro-active anti-trafficking measures, such as engaging with non-governmental community organizations, conducting outreach to gather intelligence on sectors of their communities that may be vulnerable to human trafficking, and identifying potential human trafficking indicators. As a result of training like this, increasing numbers of law enforcement agencies are demonstrating proficiency at incorporating anti-trafficking measures into their law enforcement practices and procedures.

- d. Or has law enforcement taken the position that law enforcement does not have an affirmative duty to protect (non)citizens from the human rights violations of private actors?**

**Response:**

The anti-trafficking laws unequivocally protect all individuals—citizens and non-citizens alike—from human trafficking. Many of our most successful human trafficking prosecutions have freed human trafficking victims, whether citizens and noncitizens, from abuse of their human rights at the hands of traffickers.

- e. **Does the perspective vary from the federal to the state and to the local level?**

**Response:**

Levels of awareness, experience, and expertise continue to vary, but it is impossible to offer general conclusions. Some federal, state, and local law enforcement officers have demonstrated exemplary expertise and leadership in protecting human trafficking victims and apprehending human traffickers, while others at all levels continue to need additional training. The Department and its interagency partners continue to engage in outreach and training to raise awareness in victim-centered human trafficking investigations and prosecutions.

- f. **What legal remedies are available to victims when law enforcement fails to actively pursue human trafficker offenders?**

**Response:**

As highlighted above, the Trafficking Victims Protection Act provides a number of remedies that are available to victims who are willing to be interviewed by law enforcement. For example, continued presence, a form of temporary immigration relief, is available during the pendency of an investigation or prosecution. Should law enforcement not actively pursue a human trafficker, victims could still apply for a T Nonimmigrant visa by demonstrating their good faith efforts to report to and cooperate with law enforcement. Moreover, wholly independent of any law enforcement action, trafficking victims may bring a civil action against the trafficker under 18 U.S.C. 1595 and may remain in the United States lawfully until the civil action is concluded as long as the victim exercises due diligence in pursuing the civil action. Even without criminal enforcement, victims could pursue obtaining back wages through the Department of Labor or may have claims that could be brought through the Equal Employment Opportunity Commission.

- g. **How are local government agencies at the county and city level addressing the problem of human trafficking?**

**Response:**

Many local government agencies have been active members of anti-trafficking task forces and have assisted in raising awareness in the community to identify signs of human trafficking.

- h. How are social service agencies such as Medicaid/Medicare, housing assistance, foster care agencies, Child Protective Services, government mental health agencies, and shelters working with law enforcement to protect victims and catch human traffickers?**

**Response:**

Anti-trafficking service provider grantees of the Department's Office for Victims of Crime are required to provide comprehensive services to victims that require extensive service referral networks. These grantees therefore engage local social services agencies most directly and represent them when participating as part of DOJ funded local anti-trafficking task forces. The Department of Health and Human Services also has responsibility in this area.

- i. What methods have been employed to inform the above mentioned social service agencies and their employees about the signs of human trafficking and reporting measures?**

**Response:**

DOJ task forces and the non-governmental victim assistance organizations that are OVC grantees, in partnership with HHS and others, have used a number of methods to inform social service agencies about the signs of human trafficking. For example, they have invited social service agencies to local and regional trainings, developed public awareness campaigns, and used hotline numbers for reporting signs of human trafficking.

- 27. It is clear that human trafficking is funded through sophisticated means and the profits of exploitation are difficult to track. What role can financial oversight play in stopping pipelines for trafficking?**

**Response:**

The Department of Justice aggressively tracks the proceeds of criminal organizations engaged in human trafficking in its investigations and prosecutions. The Department makes every effort to charge related money laundering and racketeering crimes, as well as to seize profits for restitution and forfeiture.

**QUESTIONS POSED BY SENATOR WHITEHOUSE**

**28. As the attached statement reflects, I believe that the Bush Administration OLC's omission of *U.S. v. Lee*, 744 F.2d 1124 (5th Cir. 1984), from its evaluations of the legality of waterboarding is a more egregious example of incompetent lawyering (by John Yoo, Jay Bybee, and Steven Bradbury) than the OPR Report, and particularly the accompanying decision memorandum issued by David Margolis, recognizes. While I understand that you do not intend to revisit the decision reached by Mr. Margolis, I hope that the Department will be more alert to the significance of its own prosecutions in the future.**

- a. May I count on your assurance that, under your leadership, the Department, should it evaluate the legality of waterboarding or other interrogation method, will pay all proper attention to prosecutions the Department itself has brought for the use of that method?**

**Response:**

In addition to conducting its own thorough research of any relevant statutes, legislative history, case law, prior office opinions, historical precedents, and other materials, the Office of Legal Counsel generally solicits views from executive agencies or components of the Department that have special expertise or interest in the subject matter of an opinion request. For example, when an opinion request involves the interpretation of a criminal statute, the Office typically seeks the views of the Department's Criminal Division. This practice helps to ensure that all relevant materials are considered by the Office in drafting an opinion.

- b. Will you also consider what the standard should be for candor in OLC opinions, and how Rule 3.3 should (for the reasons in the attached statement) be used as a reasonable guide, providing useful precedent?**

**Response:**

As standard practice, the Office of Legal Counsel strives to provide in its opinions a balanced presentation of arguments – including any relevant precedents – on each side of an issue that well exceeds the minimum standards established by Rules of Professional Conduct.

**QUESTIONS POSED BY SENATOR SESSIONS**

**29. At the Committee's April 14, 2010, oversight hearing, Senator Hatch asked you, "did you pursue the feasibility of prosecuting Abdulmutallab under a military commission based on Section 950(t) of the Military Commissions Act?" You responded, "it was a decision I made after consultation on December 25<sup>th</sup>. There were a couple conversations that occurred with members of the intelligence community. And then on January the 5<sup>th</sup>, in a meeting that we held in the Situation Room, I laid out for members of the Intelligence Committee – intelligence community as well as the defense community the decision – that thought that I had about pursuing this in the criminal – in the criminal sphere, and there were no objections." In your response, you never addressed whether the military commission option was specifically raised and discussed with the intelligence community.**

- a. There has been significant confusion about the agencies and agency heads that were and were not consulted on the day Mr. Abdulmutallab was detained. With which other agencies and officials did you personally consult on December 25, 2009, regarding Mr. Abdulmutallab?**

**Response:**

On December 25, 2009, the Attorney General made the decision to charge Abdulmutallab with federal crimes. That decision was made with the knowledge of, and with no objection from, all other relevant departments of the government, including both Intelligence Community and defense agencies.

- b. In your December 25 consultation with the members of the intelligence and/or defense communities, did you specifically discuss the feasibility or merits of transferring Mr. Abdulmutallab for military detention and interrogation?**

**Response:**

Please see the response to 29a.

- c. In your January 5, 2010, meeting in the Situation Room, did you specifically discuss the feasibility or merits of transferring Mr. Abdulmutallab for military detention and interrogation?**

**Response:**

In the days following December 25—including at the January 5, 2010 meeting, the possibility of detaining Mr. Abdulmutallab under the law of war was explicitly discussed.

- d. **Given that you noted the lack of objection to your decision to proceed “in the criminal sphere” during your hearing, did anyone with whom you consulted at either of the two discussions described above voice either objection or openness to the possibility of transferring Mr. Abdulmutallab for military detention? If so, please explain.**

**Response:**

As the Attorney General has previously indicated, at the January 5, 2010 meeting, there were no objections to his analysis that it would be appropriate to address Abdulmutallab’s case through our criminal justice system. No agency supported the use of law of war detention for Abdulmutallab. Because the Executive Branch has substantial confidentiality interests in the contents of its internal deliberations in reaching its final decisions, the specifics of those deliberations cannot be disclosed.

- e. **During either the December 25 consultation or January 5 meeting, did you specifically discuss the feasibility or merits of the military commission option for proceeding against Mr. Abdulmutallab?**

**Response:**

The government considered all potential lawful means for detaining and prosecuting Mr. Abdulmutallab.

- f. **Did anyone with whom you consulted at either of the two discussions (December 25 or January 5) voice either objection or openness to the possibility of proceeding against Mr. Abdulmutallab via the military commission process? If so, please explain.**

**Response:**

Please see the response to 29d.

- g. **During the December 25 consultation, did you specifically discuss whether it was appropriate to provide Mr. Abdulmutallab with warnings pursuant to *Miranda v. Arizona*? If so, was the proper timing for those warnings discussed? Did anyone with whom you consulted voice either objection or openness to the provision of *Miranda* warnings? If so, please explain.**

**Response:**

The FBI has a consistent, well-known policy of providing *Miranda* warnings prior to custodial interrogations conducted in the United States. On December 25, 2009, the FBI informed its partners in the Intelligence Community, as well as representatives from the defense agencies, that Abdulmutallab was provided with *Miranda* warnings after an

initial questioning under the public safety exception to *Miranda*. No agency objected to this course of action or recommended a different course of action.

**30. Earlier this month, the Department of Justice submitted to the Committee a supplemental questionnaire on behalf the President's nominee to the Ninth Circuit, Professor Goodwin Liu. This supplemental questionnaire consisted of 117 new items and previously omitted information. Just before Professor Liu's rescheduled hearing, nine more items were produced.**

- a. Given the questionnaire omissions regarding Professor Liu, as well as the recently discovered omissions from your own questionnaire, what steps has the Department of Justice taken to ensure the questionnaires that have already been submitted, as well as those that future nominees will submit, are accurate and complete?**

**Response:**

The Department takes its obligation to assist nominees with their questionnaires very seriously and is committed to ensuring that those questionnaires are accurate and as complete as possible. In the instances referenced, Department staffers regret that they failed to meet the standards the Committee expects, and recognize their error in not construing the language of the questionnaire to include all material the Committee was seeking.

In addition, after those incidents occurred, the Senate confirmed Christopher H. Schroeder to the Department as Assistant Attorney General for the Office of Legal Policy (OLP), which handles judicial nominations for the Department. With his arrival, the Department has redoubled its efforts to ensure the questionnaire responses are as complete as possible, and has endeavored to impress upon the nominees their obligations to do so as well. As a former chief counsel of the Senate Judiciary Committee, Assistant Attorney General Schroeder fully understands the importance of nominee submissions to the Senate. Under his leadership, OLP and the Department will ensure the completeness and accuracy of questionnaires.

- b. It would be difficult to characterize failing to disclose 117 items as a mere oversight. Can you please explain how, in Professor Liu's case, the Department of Justice allowed such a deficient questionnaire to be submitted?**

**Response:**

In the Internet Age nominees have an obligation to search much more than just their recollections and personal files. In assisting Professor Liu, the Department did not engage in sufficient Internet searches to ensure that all accessible material was supplied in the first instance. In addition, the Department did not construe the language of the

questionnaire sufficiently broadly to include all material the Committee was seeking. The Department is committed to ensuring this mistake is not repeated.

**31. It is my understanding that the Department of Justice has not scheduled any federal executions since 2006, when U.S. District Judge Ellen S. Huvelle suspended the scheduled executions of James Roane, Jr., Richard Tipton, and Cory Johnson, due to concerns about the federal lethal injection method under the Eighth Amendment. Following the suspension of the death penalty in those cases – the last executions to be scheduled by the Bureau of Prisons – the Supreme Court heard an Eighth Amendment challenge to Kentucky’s lethal injection method of execution in *Baze v. Rees*, 553 U.S. 35 (2008). That case, which was decided in 2008, found that Kentucky’s method of execution by lethal injection did not constitute cruel and unusual punishment and was, therefore, fully constitutional. Notwithstanding your statements about seeking a death sentence for KSM and the other 9/11 defendants, I am unaware of any effort by the Department of Justice under your tenure to follow the Court’s ruling in *Baze* and schedule any federal executions or, failing that, to revise the lethal injection protocols to allow Bureau of Prisons officials to enforce federal judgments in death penalty cases, like the heinous murders near Richmond, Virginia, carried out by Roane, Tipton, and Johnson in 1996.**

- a. Has the Obama administration scheduled any federal executions during its tenure in office, including rescheduling the executions of Roane, Tipton, and Johnson?**

**Response:**

No. On December 6, 2005, federal death row inmates James Roane, Jr., Richard Tipton, and Cory Johnson filed a civil suit in the United States District Court for the District of Columbia against then-Attorney General Alberto Gonzales, the Director of the Bureau of Prisons, and other federal officials challenging the constitutionality of the federal government’s lethal injection protocol, including its reliance on a three-drug chemical cocktail to cause a prisoner’s death. *See Roane, et al. v. Holder, et al.*, 1:05-cv-02337 (D.D.C. 2005). Statutory and administrative challenges were lodged against the government’s lethal injection protocol as well. The district judge in that case entered an order staying the plaintiff-prisoners’ executions. Since then, three other federal death row inmates who had exhausted their first collateral challenges under Title 28, United States Code, Section 2255 to their capital convictions and death sentences – Orlando Hall, Bruce Webster, and Anthony Battle – were allowed to intervene as plaintiffs in the *Roane* litigation and were afforded the benefit of the stay order that was in place in the *Roane* case.

The *Roane* litigation remains on-going. In the wake of the Supreme Court’s decision in *Baze v. Rees*, 553 U.S. 35 (2008), that upheld the constitutionality of Kentucky’s lethal injection protocol that is similar in important respects to the federal



government's lethal injection protocol, the government attorneys handling the *Roane* case moved for judgment on the pleadings and to lift the stay barring the plaintiff-prisoners' executions. The district court denied the government's motion for judgment on the pleadings, but has not yet ruled on the motion to dissolve the stay. Instead, the court allowed the plaintiff-prisoners to reopen fact discovery and has allowed both sides to submit expert reports in anticipation of the filing of motions for summary judgment and adjudication of the government's pending motion to lift the stay order.

- b. **To the extent no such executions have been scheduled, please explain why all federal executions remain suspended and whether any actions are being taken to allow the Bureau of Prisons to honor the judgments rendered in the many federal murder cases currently awaiting action, consistent with your commitment during your confirmation to enforce the death penalty as "enacted by the United States Congress and interpreted by the courts[?]"**

**Response:**

Since post-*Furman* procedures were first enacted in 1988 to permit federal death sentences to be imposed in a constitutional manner, it has been the policy of the Justice Department not to schedule executions until after a federal death row inmate has completed his first (and presumptively only) collateral attack on his capital conviction or death sentence under Title 28, United States Code, Section 2255. At that juncture, absent executive clemency, there is a reasonable likelihood that an execution will be carried out as scheduled. As noted in our answer to subpart (a), several of the *Roane* plaintiff-prisoners already had execution dates set when they commenced their civil challenge to the government's lethal injection protocol, and other plaintiff-prisoners were allowed to intervene in the action after they had completed their first Section 2255 actions and were about to have execution dates set for them. By court order, the government is precluded from executing any of the *Roane* plaintiff-prisoners under the government's lethal injection protocol. Both during the previous Administration and during this Administration, the government has aggressively sought dissolution of the existing stay so that new execution dates can be set and the capital judgments of the various plaintiff-prisoners may be carried out.

32. As explained in the briefs and opinions in *Medellin v. Texas*, 552 U.S. 491 (2008), the United States is party to the Vienna Convention on Consular Rights. Article 36 of the Vienna Convention provides that any foreign national detained for a crime must be given the right to contact his consulate. Although the issue in *Medellin* was whether state officials were bound by the Vienna Convention, it appears from the decision and the brief of the Solicitor General that the United States regards itself as bound to follow Article 36.

- a. **Is it the Department of Justice's position that federal law enforcement officials must advise foreign nationals of their consular rights if they are detained by those federal officials for a criminal offense?**

**Response:**

The Vienna Convention on Consular Relations (VCCR) entered into force for the United States in 1969. The VCCR is a self-executing treaty, and its provisions, including Article 36, constitute binding federal law. The United States also has binding obligations to provide consular notification and access under a number of bilateral consular conventions, and agreements. Department of Justice regulations and policies are designed to comply with Article 36 of the Vienna Convention on Consular Relations and these other bilateral instruments. Article 36 specifically requires a host country to advise "without delay" a foreign national of his option to have his consulate notified of his arrest or detention within that country.

- b. **Is there a protocol in place for the advice of such consular rights?**

**Response:**

28 C.F.R. § 50.5, *Notification of Consular Officers upon the arrest of foreign national*, establishes the Department of Justice procedures for consular notification. Section 50.5(a) provides as follows:

(1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.

- c. **Was Umar Farouk Abdulmutallab advised of his consular rights at any time after he was arrested in Detroit? When was he advised of these rights, and how soon was that relative to his detention and initial interrogation?**

**Response:**

On December 25, 2009, Abdulmutallab was detained by U.S. Customs and Border Protection (CBP) officers at the airport. No consular notification was attempted on that date. On December 26, 2009, officials from the Nigerian Embassy appeared at the FBI's Detroit Office, having been alerted by the news media to the fact that Mr. Abdulmutallab was a Nigerian national and was in custody. Embassy officials were granted access to Abdulmutallab the same day. The United States Attorney's Office was aware of the Nigerian Embassy's involvement and did not separately notify the consulate.

33. **According to articles published in March 2010 in *Newsweek*, *The Washington Times*, and *National Journal*, you reportedly appointed Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois, to investigate whether lawyers representing certain Guantanamo detainees illegally compromised the identities of Central Intelligence Agency employees by having photos taken of those employees and then showing such photos to the detainees. According to the reports, some of the photos were found in the cell of a Guantanamo detainee.**

- a. **Was the appointment of U.S. Attorney Fitzgerald necessary due to a conflict or recusal within the Department of Justice?**

**Response:**

The Department determined that it would be prudent to reassign investigative authority of this matter to a United States Attorney's Office that was otherwise uninvolved in any ongoing investigations or prosecutions that may involve these detainees.

- b. **The March articles mentioned above note that the conduct at issue relates to the alleged actions of the John Adams Project, which reportedly hired private investigators to take photos of the CIA employees. Has anyone currently employed by the Department of Justice worked with the John Adams Project? If so, have they been recused from all matters relating to Mr. Fitzgerald's investigation?**

**Response:**

The Department has not examined whether anyone currently employed by the Department of Justice has ever worked with the John Adams project. None of the attorneys working on this investigation has worked for the John Adams Project.

- c. **Without commenting on the specifics of the Fitzgerald investigation, do you believe it is improper for attorneys for Guantanamo detainees to disclose the identities of covert agents to their clients? Under what statutes or authorities would this be improper?**

**Response:**

Because the investigation is ongoing, it would be improper for the Department to respond to this question at this time.

**QUESTIONS POSED BY SENATOR HATCH****Federal Marijuana Enforcement in States With Medical Marijuana Laws**

34. In October 2009, Deputy Attorney General David Ogden issued a memorandum on investigations and prosecutions in states authorizing the medical use of marijuana. This memorandum was meant to provide “clarification and guidance” to federal prosecutors in these states.

Congress enacted the Controlled Substances Act (CSA) with the specific intent of making dangerous drugs illegal. Currently, the Drug Enforcement Administration has categorized marijuana as a schedule I drug.

Schedule I drugs have a high tendency for abuse and have no accepted medical use. This schedule includes drugs such as Marijuana, Heroin, Ecstasy, LSD, and GHB. Pharmacies do not sell Schedule I drugs, and they are not available with a prescription by physician. I would note that currently Cocaine is categorized by the DEA as a Schedule II drug along with Opium, Morphine, Fentanyl, Amphetamines, and Methamphetamines. Schedule II drugs may be available with a prescription by a physician.

Given my long legislative history with the Food, Drug & Cosmetic Act as well as the Dietary Supplements Health Education Act, I am very familiar with the processes involved in scheduling drugs and the evaluation of substances by DEA. As I just pointed out, the DEA schedules drugs. Currently, the DEA has determined that Marijuana is a schedule I drug. That means it has no valid medical use.

- a. Is the DEA re-evaluating the scheduling of Marijuana as a Schedule I drug?

**Response:**

The DEA has received two petitions to reschedule marijuana. In responding to these petitions, the DEA is required by the Controlled Substances Act (CSA) to consider the statutory definitions of each drug schedule. *See* 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* In order for a drug to be placed in Schedule I, the DEA must find that it has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and that there is a lack of accepted safety for its use under medical supervision. 21 U.S.C. § 812(b)(1)(A)-(C). To be classified in one of the other schedules (II through V), a drug of abuse must have, *inter alia*, a “currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(2)(B), (3)(B), (4)(B), (5)(B). The DEA must also consider: (1) the drug’s actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the drug; (4) its history and current pattern of abuse; (5) the scope, duration,

and significance of abuse; (6) what, if any, risk there is to the public health; (7) the drug's psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under the CSA. 21 U.S.C. § 811(c). Finally, before initiating proceedings to reschedule a drug, DEA must gather the necessary data and request from the Secretary of the Department of Health and Human Services (HHS) a scientific and medical evaluation and recommendations as to whether the controlled substance should be rescheduled as the petitioner proposes. 21 U.S.C. § 811(b); 21 C.F.R. § 1308.43(d); *Gettman v. DEA*, 290 F.3d 430, 432 (D.C. Cir. 2002). HHS's recommendations regarding scientific and medical matters are binding upon the DEA.

If the Administrator determines that the evaluations and recommendations of the Secretary and "all other relevant data" constitute substantial evidence that the drug that is the subject of the petition should be subjected to lesser control or removed entirely from the schedules, he or she shall initiate proceedings to reschedule the drug or remove it from the schedules as the evidence dictates. 21 U.S.C. § 811(b); 21 C.F.R. § 1308.43(e).

**b. Is it the department's intention to move Marijuana off schedule I so that it can be legalized?**

**Response:**

DEA is currently evaluating two petitions to reschedule marijuana. DEA's authority is limited to that provided by the CSA. As set forth above, marijuana would not be rescheduled unless (1) HHS makes a scientific and medical evaluation and recommends for rescheduling, and (2) the Administrator determines that the Secretary's evaluation and recommendations and all other relevant data constitute substantial evidence that marijuana should be rescheduled. At this time, while these two petitions are pending, the Department is unable to comment further on scheduling matters. This Administration opposes the legalization of marijuana and is vigorously enforcing the Controlled Substances Act.

**c. Can you clarify what seem to be inconsistencies with Marijuana being categorized as a Schedule I drug versus Cocaine and Methamphetamine being categorized as Schedule II drugs?**

**Response:**

There are no inconsistencies with respect to marijuana being a schedule I controlled substance versus cocaine and methamphetamine being schedule II controlled substances.

Under the Controlled Substance Act (CSA), controlled substances are placed in one of five schedules. Schedule I substances are defined under 21 U.S.C. § 812(b)(1)(A-C). These substances have a high potential for abuse, do not have any accepted medical

use in treatment in the United States, and there is a lack of accepted safety for use of the drug under medical supervision.

Marijuana was made a Schedule I controlled substance when the Comprehensive Drug Abuse Prevention and Control Act was passed in 1970 because it did not have an accepted medical use in treatment in the United States. This fact remains the case today. The Food and Drug Administration has never approved marijuana for legitimate medical use in the United States nor has it approved smoked marijuana for any condition or disease indication.

Conversely, cocaine and methamphetamine both have an accepted medical use(s) in the United States and, therefore, do not meet the statutory definition for Schedule I. Cocaine is used as a topical anesthetic in eye or nasal surgery. Methamphetamine (marketed under the trade name of Desoxyn®) has been approved for use in the treatment of attention deficit and hyperactivity disorders. Additionally, one specific isomer of methamphetamine is also used in an over-the-counter nasal decongestant product (marketed under the trade name of Vicks® VapoInhaler®.)

- d. Can you explain your rationale behind the department's decision to provide federal prosecutors with enforcement discretion through this memorandum knowing that by legal definition Marijuana has no medical benefits?**

**Response:**

The memorandum issued by Deputy Attorney General Ogden on October 19, 2009, made clear that the Department "is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels." The Department's decision to provide federal prosecutors with enforcement discretion in cases involving "medical marijuana" is based on our commitment to use taxpayer dollars in an efficient and rational manner when it comes to allocating investigative and prosecutorial resources. The Department has determined that the most effective way to enforce the Controlled Substances Act with respect to marijuana is to target significant traffickers, and those who are in violation of state laws. Prosecution of significant traffickers and commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.

- e. How is that you are directing U.S. Attorneys Offices to utilize discretion in enforcement cases involving a Schedule I substance while aggressively pursuing federal prosecutions of a Schedule II substance (i.e. cocaine)?**

**Response:**

U.S. Attorney's Offices are vested with "plenary authority with regard to federal criminal matters" within their districts. In exercising this authority, they are invested by statute and delegation from the Attorney General with broad discretion in all cases. They continue to aggressively pursue federal prosecutions of all controlled substances, including cocaine and marijuana, when federal interests are at stake.

- f. **Can you provide the most recent statistics regarding federal prosecution of marijuana distribution in the 14 states that currently legalize medical marijuana to include the amount of marijuana used in determining sentence level (grams/kilograms/plants)?**

**Response:**

In FY 2009, the United States Attorneys' Offices in the 13 states in which medical marijuana laws were already in effect (New Jersey and DC were not in effect during this time), filed over 1,300 cases charging the distribution, possession with intent to distribute, or manufacture of marijuana (or a conspiracy to do so). In FY 2009, 694 defendants in those 13 states were sentenced to prison terms of higher than one year, and over 100 defendants were sentenced to prison terms exceeding 5 years. (A sentencing held in FY 2009 may relate to a case filed in a prior year). While the Department does not track the marijuana quantities involved in prosecutions in a systematic manner, data collected by the United States Sentencing Commission may address this issue.

- g. **Prior to the issuance of this memo can you tell me how many declination letters were issued by U.S. Attorneys offices located in the 14 states to DEA case agents in investigations of illegal marijuana dispensaries?**

**Response:**

Declinations may be conveyed to investigating agencies orally rather than by a formal letter. DEA does not track the number of cases which are declined for prosecution by United States Attorney's Offices. As part of its attorney caseload management system, the Executive Office for United States Attorneys tracks some declinations. However, the declinations that are tracked in the case management system are not separated into categories reflecting whether the targets or subjects of the investigations claimed to be selling marijuana for medical purposes.

**Padilla Amicus Brief and Military Detention**

35. **You responded to me via letter on February 3, 2010 regarding your decision to prosecute Abdul-Mutallab in an Article III court. You stated that Jose Padilla's law of war custody "raised serious statutory and constitutional**



questions in the courts concerning the lawfulness of the government's actions."

**You support that statement by citing the Second Circuit's decision which held that the President did not have the authority to detain Padilla under the law of war. However, the Second Circuit's opinion was vacated by the Supreme Court. The Fourth Circuit was given the case by the Supreme Court and they found that the President did have the authority to detain pursuant to the Authorization to Use Military Force (AUMF).**

**Recently, the Senate Judiciary Committee learned that you filed an *Amicus* brief in the Jose Padilla case as a private citizen. In that brief you took the position that the court should deny to the Executive, the authority to detain Padilla in military custody. Your brief also argued that additional authority would be required to detain citizens in the United States and that if that authority were necessary it should come through congressional action.**

**When I take your argument in the Padilla Amicus brief and juxtapose it to the Abdul-Mutallab case, it concerns me that your default position as a private citizen and now as Attorney General has been to never even consider military commissions as a viable option for terror trials.**

- a. **Can you tell me if you were aware of the Fourth Circuit's decision in Padilla and did you factor that precedent into your analysis of the Abdul-Mutallab case?**

**Response:**

Yes, the Department is aware of the Fourth Circuit's decision in *Padilla v. Hanft*, 423 F.3d 386 (4<sup>th</sup> Cir. 2005). Yes, the Department considered that opinion, along with a number of other legal and practical considerations, in determining that the criminal justice system was the most appropriate and best-suited option for obtaining intelligence from Abdulmutallab and ensuring his long-term incapacitation. Moreover, as noted in response to question 29a, no Executive Branch agency has objected to that determination or proposed an alternative.

- b. **Do you as Attorney General recognize, as did the Fourth Circuit, that the AUMF authorizes the President to detain enemy combatants?**

**Response:**

The Attorney General has consistently stated that, where appropriate, law of war detention under the 2001 AUMF is a basis for detaining al Qaeda operatives during the U.S. armed conflict with al Qaeda.

**Miranda of Enemy Combatants**

36. Last month, before the House Appropriations Subcommittee, you made reference to the “reality” that any *Miranda* rights read to Osama bin Laden will be in fact recited to a corpse.

When you discussed the hypothetical capture of Osama Bin Laden, dead or alive, your first reaction was to bring up *Miranda* rights that would in fact be administered in a combat theatre. The administration and the department have denied any instance of requiring that *Miranda* be given to enemy combatants upon capture on the battlefield. However, I am troubled that your immediate response to the hypothetical posed by the Congressman was to in fact discuss *Miranda* for Bin Laden.

- a. Knowing that Osama Bin Laden and Ayman Al Zawahiri are under indictment for the 1998 East African Embassies bombings, is it your position that upon live capture they should be *Mirandized* first in order to preserve the possibility of criminal prosecution in that case?

**Response:**

No. The first priority in questioning any overseas detainee who might have timely and actionable intelligence overseas is to obtain that intelligence in order to protect our troops and further our national security. *Miranda* warnings are never given to such detainees if the national security professionals on the ground conclude that doing so will hinder our counterterrorism efforts. In addition, as you know, section 1040 of the FY 2010 National Defense Authorization Act prohibits members of the U.S. Armed Forces, officials or employees of the Department of Defense or a component of the intelligence community (other than the Department of Justice), absent a court order to the contrary, from reading *Miranda* warnings to foreign nationals who are captured or detained outside the United States as enemy belligerents and are in the custody or under the effective control of the Department of Defense. Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are given only in a very small number of cases overseas and only when consistent with military and intelligence needs.

- b. Do you consider either of these men enemy combatants for their involvement in the attacks of 9/11?

**Response:**

Both men committed acts of war. They also committed criminal offenses.

**Guantanamo Detention**

**37. In looking at what is supposedly a group of more than 300 terrorists currently imprisoned domestically, it is clear that the vast majority are not held in circumstances that would seem to befit the threat level of Al Qaida terrorists. Only 33 international terrorists are held at the nation's only Supermax facility in Florence, Colorado.**

- a. Can you give me an explanation as to why you believe the group of 300 is comparable to the likes of foreign fighters captured on the battlefield?**

**Response:**

The U.S. Bureau of Prisons safely and securely incarcerates in U.S. prisons more than 300 individuals with a history of or nexus to terrorism. Those who pose the greatest threat are held in the U. S. Penitentiary-Administrative Maximum Security facility in Florence, Colorado. Others are held in less restrictive conditions, consistent with the threat that they pose. These same security-threat assessments are implemented at the Guantanamo Bay Detention Center where certain detainees are held in maximum-security units while others are held in much less restrictive conditions.

- b. Since January 2009, how many terrorists successfully prosecuted by the department have been sentenced to institutions comparable in security level to the Supermax in Florence, Colorado or the maximum security camp located at Guantanamo?**

**Response:**

Of those prosecuted since 2009, 11 have been sentenced and designated to a permanent BOP facility. Of the eleven, one has been sentenced to the U. S. Penitentiary-Administrative Maximum Security in Florence and the other ten are currently imprisoned in facilities consistent with the threat level they pose. As stated above, these same security threat assessments are implemented at the Guantanamo Bay Detention Center where detainees are held in a range of facilities with varied security measures based on the threat that they pose.

- c. How many successfully prosecuted terrorists are currently detained by the Bureau of Prisons under Special Administrative Measures (SAM) or special confinement conditions?**

**Response:**

There are 24 terrorism inmates in BOP custody under Special Administrative Measures (SAMs). Of those inmates, 22 have been found guilty and sentenced; the

remaining 2 have pled guilty and are awaiting sentencing.

**MLAT Cooperation in Cybercrime Investigations**

**38. Recently, I introduced the International Cybercrime Reporting and Cooperation Act. One of the key components of this legislation is to develop action plans for countries that are considered a country of cyber concern. A country could be classified a cyber concern if that nation continuously fails to investigate or prosecute persons who carry out cyber related violations like network intrusion, data breach, identity theft, wire fraud and money laundering. Often these violations are investigated by the United States Secret Service or the FBI. Both of these agencies have a strong presence internationally in countries that seem to be the point of origin for cybercrime and the aforementioned violations.**

- a. Is the department continuing to monitor international cybercrime trends so that Mutual Legal Assistance Treaties are evolving and expanding to meet the needs of criminal investigators pursuing the perpetrators of these crimes when they are located outside the United States?**

**Response:**

The Department continually monitors international cybercrime trends so that it can adapt accordingly. Generally, modern Mutual Legal Assistance Treaties (MLATs) are negotiated to cover the broadest spectrum of criminal conduct. Except in very limited circumstances, assistance available pursuant to MLATs is not restricted to specified offenses. Consequently, every effort is made during negotiations to ensure that all manner of assistance contemplated by the treaty will be available to investigations and prosecutions involving cybercrime as well as all other types of serious crimes. Our modern MLATs, and even our oldest MLATs, have proven effective in securing assistance in support of cybercrime investigations.

- b. What is the status of MLAT treaties with Russia and China regarding cybercrime investigations?**

**Response:**

The provisions of the U.S./Russia MLAT allow for assistance in cybercrime investigations. The United States and China exchange mutual legal assistance pursuant to an executive agreement (the U.S./China Mutual Legal Assistance Agreement (MLAA)). The provisions of the MLAA would not preclude assistance in cybercrime matters.

- c. **What is the level of cooperation with the department's counterparts in Russia and China with respect to cybercrime violations and money laundering?**

**Response:**

The cooperation between the Department and its Russian counterparts on specific cybercrime matters has varied. For example, in 2008, in response to an MLAT request, Russian authorities executed 12 search warrants and opened their own investigation into computer intrusions into New York City financial institutions that were conducted from Russia. Six persons were charged and are currently being prosecuted in St. Petersburg for offenses related to the activity in the United States. Russia has also facilitated the repatriation of modest amounts of money to victim banks in two cases. Ultimately, Russian cooperation is typically offered on a case by case basis on those matters that Russian authorities deem to be significant. The Department continues to search for opportunities to develop more systematic cooperation.

The Department and its Chinese counterpart, the Ministry of Public Safety (MPS), continue to develop cooperative avenues. Information sharing on investigative referrals remains low. As part of our efforts to improve sharing, the FBI recently was invited to China to discuss areas for future law enforcement cyber cooperation, which the FBI already has followed up on. In addition, U.S. law enforcement authorities continue to work with the MPS to combat the manufacture and export of counterfeit network hardware from China. This ongoing work is being facilitated by the IP Criminal Enforcement Working Group of the U.S. - China Joint Liaison Group for law enforcement, which is co-chaired by the Criminal Division and the MPS. The Working Group is dedicated to increasing cooperation in intellectual property enforcement efforts and pursuing more joint IP criminal investigations with China. The success of this cooperation can be demonstrated by Operation Network Raider, a domestic and international enforcement initiative targeting the illegal distribution of counterfeit network hardware manufactured in China, which resulted in 30 felony convictions and more than 700 seizures of counterfeit Cisco Systems, Inc. network hardware and labels with an estimated retail value of more than \$143 million.

**Money laundering.** The U.S. has partnered with Russia in at least two significant money laundering investigations that have yielded substantial cooperation that is ongoing under the MLAT. Recent cooperation from Russian authorities in obtaining financial records may signal increased opportunities for cooperation from Russia in the future. The United States also has assisted in a substantial number of Russian requests involving money laundering related to fraud offenses.

Cooperation from China historically has not been strong in money laundering cases, although China provided strong support for a money laundering prosecution in the United States related to offenses committed by managers of the Bank of China. Continued engagement with China in on-going matters may encourage greater cooperation on money laundering and forfeiture matters.

**ATF National Integrated Ballistics Information Network**

39. In 1999, ATF established and began administration of the National Integrated Ballistic Information Network (NIBIN). In this program, ATF administers automated ballistic imaging technology for NIBIN Partners. These partners are Federal, State and local law enforcement, forensic science, and attorney agencies in the United States that have entered into a formal agreement with ATF to enter ballistic information into NIBIN. Partners use Integrated Ballistic Identification Systems (IBIS) machines to acquire digital images of the markings made on spent ammunition recovered from a crime scene or a crime gun test fire and then compare those images (in a matter of hours) against earlier NIBIN entries via electronic image comparison.

I am aware that there are 209 IBIS machines deployed nationwide. Out of this 209 number, 180 need to be refreshed. ATF's limited budget for this program has been directed towards refreshing and replacing machines already deployed before placing new machines in jurisdictions that are in desperate need of one. Since 2005, funding has been sought to refresh the existing machines. However, OMB has continuously cut this item from ATF's budget.

Recently, ATF received 3.2 million in asset forfeiture funds which was used to refresh the service network, for a software upgrade and one new international server located in Mexico. ATF also received \$4 million in the President's Supplemental Budget which will be used to refresh machines located along the Southwest border.

**When will DOJ properly fund this program to a level in which agencies located outside the Southwest border can receive these machines?**

**Response:**

The Department has been very supportive of the NIBIN Program. Without the Department's support, NIBIN would not have received the above-referenced \$7.2 million in additional funds in FY 2009. Moreover, the replacement of the correlation servers was a critical first step to upgrading the equipment at the NIBIN partner sites.

As recently as the FY 2011 budget request, and in an FY 2010 supplemental request, the Department included a significant infusion of funds for refreshing NIBIN equipment. Be assured that the NIBIN program has developed an equipment replacement plan to be implemented in phases as additional funding becomes available.

**QUESTIONS POSED BY SENATOR CHARLES GRASSLEY****Department of Justice Management of Potential Conflicts of Interest**

40. In a November 24, 2009, letter to you, I asked for a list of Department attorneys who had been recused from working on certain issues. Assistant Attorney General Ron Weich responded on your behalf on February 18, 2010, and stated, “the Department does not maintain comprehensive records of such information.” Based upon this answer, it appears that attorneys at the Department are left to police themselves to ensure that there are no actual or perceived conflicts of interest and that they recuse themselves when necessary. This is contrary to the way many large law firms operate.

At the hearing, I asked you why the Department did not keep a centralized database of conflicts similar to that of a large law firm. You said it was a “legitimate concern” and was “worthy of consideration.” I believe a Department-wide database to manage conflicts and recusal is long overdue.

- a. Are employees at the Department notified when an employee is recused from working on certain matters? If so, how? If not, why not?

**Response:**

The Department has over 110,000 employees, including over 10,000 attorneys, spread across numerous offices, divisions, and other components, including 93 U.S. Attorneys’ Offices, seven litigating divisions, and five law enforcement bureaus.

Given the size of the Department and the number of attorneys in the Department, it is not practical and would not be useful to notify all employees of conflicts. In general, notice of recusals is provided only with regard to specific pending matters, such as when a lawyer who would ordinarily work on a case, or who is asked to do so, is unable to due to a conflict. Senior Department officials disseminate their recusal list proactively as necessary. For example, the Office of the Attorney General disseminates the Attorney General’s recusal list to its staff, to officials in the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the litigating divisions and the major components.

- b. If an attorney sought to determine which Department employees are recused on a certain manner, how would they obtain that information?

**Response:**

An individual case file does not identify all persons who potentially may be recused from a matter. Most employees in an office will not be assigned to work on any given matter, so the focus is to take steps to ensure that anyone who does work on a matter has no conflicts. To the extent an attorney working on a case seeks to discuss the matter with a recused attorney, it is standard practice for the latter to provide notice of his or her recusal.

**c. Will you commit to implementing such a system during your time as Attorney General? Why or why not?**

**Response:**

The Department has given consideration to the viability of such a system. After reviewing the issue, the Department does not believe that such a system is warranted. The Department is not aware of any reason to question the diligence of Department attorneys in adhering to applicable rules governing recusals and conflicts of interest. Accordingly, the Department does not believe that the significant investment in resources that would be required to design and monitor such a system is necessary or advisable.

In addition, we believe that the comparison of the Department to private law firms is misplaced. Large private firms have a central conflicts check system for many reasons that do not apply to government practice. Specifically, an attorney who is a member of, or associated with, a private firm may have formerly represented clients who are adverse in a matter to proposed new clients or new representations of the law firm. When one law firm attorney has such a conflict of interest, it is imputed to all other attorneys in the law firm. Imputation of conflicts exists in private law firms in part because the firm is considered to be one unit, sharing financial risks and benefits..

Id. § 14.3. Thus, if one attorney in the law firm is prohibited by a prior representation from undertaking a new representation, under most circumstances, no other attorney in the law firm could undertake the representation. Undertaking such representation despite the imputed conflict of interest subjects the law firm to disqualification and possible claims of malpractice. To manage this risk of disqualification and malpractice, law firms institute sometimes elaborate conflicts of interest checks and consult the system before agreeing to represent new clients or hire new attorneys. (Of course, this is not to say that such systems, even when elaborate, catch all conflicts that might otherwise be apparent at the inception of a representation or that may develop as a representation unfolds.)

By contrast, although screening of a disqualified government attorney is usually prudent, conflicts of interest are generally not imputed within government law offices. See ABA Model Rule 1.11 cmt. [2] (“Because of the special problems raised by imputation within a government agency, [the Rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.”). The distinction between private firms and government offices has been drawn



for several reasons, including the fact that government lawyers do not have the same financial stake in the outcome of cases as do members of a firm; and that disqualifying an entire office of government lawyers deprives the office of its ability to carry out its statutory functions and could constitute a violation of constitutional separation of powers. (The Department is aware of two states where non-binding precedent is conflicting or ambiguous on this point, but the Department believes that the better reading of those states' rules is that, as in other jurisdictions, conflicts are not imputed within government law offices.)

Because it is extremely unlikely that the Department of Justice would ever be disqualified from representing the United States in a matter simply because of a former client conflict of a Department attorney, there is no need for the Department to emulate those large law firms that use an organization-wide system. Rather, it is appropriate under the rules of professional conduct for offices to develop their own reasonable systems to address the former client conflicts of new hires. And, it is equally appropriate to rely upon government lawyers to notify supervisors if they are assigned to matters that raise conflict of interest concerns.

**d. Will you support legislation in Congress requiring the Department to implement such a system? Why or why not?**

**Response:**

As discussed above, the Department believes that such a system is not necessary to check for potential conflicts. Accordingly, the Department believes that the expense of implementing such a system would not be a prudent use of taxpayer dollars.

**Freedom of Information Act**

**41. At the hearing I asked you about the alarming increase in the use of exemptions to block access to information and records sought under the Freedom of Information Act (FOIA). Specifically, I pointed out statistics from the Associated Press regarding the increase use of exemptions. The analysis from the Associated Press found that in FY 2009, government agencies cited FOIA exemptions 468,872 times compared to 312,683 times in FY2008. One exemption, (b)(5), was used 70,779 times in FY2009 compared to 47,395 times in FY2008 and all this occurred despite a total decrease in FOIA requests for FY2009. These numbers are shocking.**

**On January 21, 2009, President Obama issued a Presidential Memorandum to the heads of all executive departments and agencies regarding the Freedom of Information Act (FOIA). That memorandum stated, "all agencies should adopt a presumption in favor of disclosure," and directed you to issue new FOIA guidelines, which you issued on March 19, 2009.**

**You agreed that these statistics were "troubling" and that you weren't**

**“exactly sure what the reason is.” You also stated that this matter warrants further examination to ensure that “those making FOIA decisions are doing so in a way that’s consistent with the desires of the President and the directions [you] have issued.”**

- a. **When will you begin this review of FOIA policies?**
- b. **How will you conduct this review?**
- c. **How long to you believe it will take to conduct this review?**
- d. **Will you pledge to share the results of this review with the Judiciary Committee? If not, why not?**
- e. **What is the reason for the substantial increase in use of FOIA exemptions by this Administration?**
- f. **If the use of exemptions continues to increase in FY2010, what will you do personally to ensure that agencies are more transparent and responsive to the public’s right to know?**

**Response to a-f:**

The Department has completed its review of this matter. As an initial matter, the Department has concluded that the invocation of exemptions, without any correlation to the amount of material withheld pursuant to the exemptions, is not an accurate metric of agency transparency. Invoking an exemption simply means that an agency referred to an exemption; it does not reflect how much, or how little, material was withheld. For example, an agency might withhold a single paragraph in a one-hundred page document by invoking three different exemptions. Conversely, the agency could withhold the entire one-hundred page document citing just one exemption. Thus, the number of times exemptions are used does not necessarily correlate to the amount of material that is withheld.

Our review confirms that an increase in the number of times exemptions are asserted is related to the number of times that an agency partially releases documents in response to a request. That is, generally speaking, agencies that saw significant increases in partial releases also saw significant increases in the number of exemptions they invoked. Similarly, agencies that saw slight decreases in the number of partial releases generally also saw slight decreases in the number of exemptions they invoked. As agencies identified more and more documents that they could partially release rather than withholding them entirely—as my FOIA Guidelines directed them to do—their invocations of exemptions to cover the exempt portions of those additional releases increased proportionally.

When looking at data from twenty-five key agencies, the number of FOIA responses resulting in a full or partial release of documents increased during the past fiscal year. These increases demonstrate greater transparency.

#### AIG Bonuses

**42. Months after the taxpayer bailout in 2009, AIG paid \$165 million in bonuses to employees of the AIG financial products unit that nearly destroyed AIG and nearly caused an economic depression.**

**At the time, President Obama said that he wanted to pursue every legal means possible to recover the money. You were quoted at the time saying that your department was working with Treasury to determine what could be done.**

**We now know that another \$198 million in bonuses was paid this year. According to Treasury, approximately \$40 million was voluntarily returned from the 2009 payments or deducted from the even larger 2010 payments. But a \$40 million refund is not much considering that \$263 million of taxpayer dollars went out the door to these AIG employees. This is especially troubling given that Congress required Treasury to ensure that AIG and other bailed out companies meet "appropriate standards" for executive compensation.**

**a. What exactly did your Justice Department do to recover these bonuses, and please be specific?**

#### Response:

Early last year, the Department consulted extensively with the Department of the Treasury regarding the legal, regulatory and legislative avenues available for recovering the bonus payments AIG made in 2009. Kenneth R. Feinberg was appointed as the Special Master for TARP Executive Compensation at the Department of the Treasury in June 2009 and, thereafter, assumed responsibility for addressing TARP-related executive compensation issues. In that capacity, Mr. Feinberg negotiated reductions in the 2010 AIG bonus payments and obtained assurances that the full amount of the \$45 million in bonus payments which employees agreed to refund last year will indeed be returned. We defer to him for further information regarding the execution of his compensation review responsibilities.

**b. The requirement in the Recovery Act that AIG meet appropriate standards for executive compensation was not subject to the grandfather provision. So the only legal reason to leave the bonuses in place was if they were considered "appropriate." Do you think that**

**over \$220 million in bonuses for AIG employees was appropriate? If not, why didn't you do anything?**

**Response:**

As stated above, Kenneth R. Feinberg was appointed as the Special Master for TARP Executive Compensation at the Department of the Treasury in June 2009. He is responsible for making determinations regarding executive compensation paid by certain TARP recipients including AIG. Mr. Feinberg has identified the criteria he utilizes in making his determinations. *E.g.*, October 28, 2009 Testimony of Kenneth Feinberg before the House Committee on Oversight and Government Reform; [http://www.ustreas.gov/press/releases/tg334.htm#\\_ftnref1](http://www.ustreas.gov/press/releases/tg334.htm#_ftnref1). We defer to him on this subject.

**Southwest Border Prosecution Initiative**

**43. Since 2001 Congress has provided over \$200 million in funding for the Southwest Border Prosecution Initiative (SWBPI), an initiative that the Office of Justice Programs (OJP) monitors. The intent of the SWBPI is to reimburse the states of Arizona, California, New Mexico, and Texas, for prosecuting cases that were either declined by the United States Attorney's office or initiated by a federal law enforcement agency. Congress intended the program to assist those counties along the Mexican border that had a high incidence of crime and where the federal government did not have the resources to prosecute all the federal crimes. In a March 2010 Audit Report by the U.S. Department of Justice, Office of the Inspector General Audit Division, of all nine California counties audited, between fiscal years 2002 and 2007, 85% of the money the OJP reimbursed to these counties was unallowable and unsupported. In dollar terms, OJP paid out \$12.2 million to counties for cases that did not qualify.**

- a. What mechanism was in place by OJP, to review and approve the applications submitted by the counties who claimed SWBPI reimbursements?**

**Response:**

Prior to FY 2008 third and fourth quarter applications, SWBPI applicants were not required to provide documentation supporting reimbursement requests. Upon receipt of an application and a certification from the applicant regarding compliance with SWBPI requirements, the requests were funded by the Department's Bureau of Justice Assistance (BJA). Jurisdictions were only required to enter the number of federally declined cases that they prosecuted during the reporting period, and were reimbursed based on the length of time the case was open.

OJP acknowledges that past reviews of SWBPI applications were not adequate. In response to the audit findings and recommendations identified in the March 2008 OIG audit report, as well as changes in program implementation, BJA has now aggressively taken action, specifically in the form of programmatic guidance, to improve the application and review process. These changes, identified below, have improved the accountability of the SWBPI Program and will reduce the potential for future issues:

**A. Added a New Certification to be Acknowledged by the Chief Executive of the Requesting Entity**

In FY 2009, BJA provided a certification for SWBPI applicants to acknowledge that they accepted the terms and conditions of the program and that their request was accurate. This certification, which was not in place at the time of the audit, reads as follows: "As the chief executive officer of this jurisdiction, my submission of this application for funding under the Southwest Border Prosecution Initiative represents my legally binding acceptance of the terms set forth on this form, my statement as to the truthfulness and accuracy of representations made on this form, and my acceptance of the program's terms and conditions."

**B. Expanded Data Collection for SWBPI Reimbursement Requests**

Prior to reimbursement, BJA now requires SWBPI applicants to provide the following information for each case: case number, defendant name, arrest date, disposition date, and referring federal agency. Additionally, for pre-trial detention reimbursements, case data must include the defendant booking date, release date, and daily per diem rate of the corrections facility. The collection of this data enables BJA to conduct more thorough and detailed reviews of applicant reimbursement requests to ensure allowability.

**C. Implemented Additional Fiscal Controls**

BJA is in the process of changing the application period from quarterly to annually. This procedural change will provide BJA with more time to review case data and other documentation submitted by applicants, as well as to request additional documentation from grantees in an effort to verify the eligibility of the cases. The FY 2010 applications were based on case data from FY 2009.

The change to an annual application period also will reduce the risk of jurisdictions submitting eligible cases for reimbursement in the wrong quarter -- one of the audit findings identified by the OIG for multiple jurisdictions, including Alameda County, California; Brooks County, Texas; and Yuma County, Arizona.

**D. Modified the SWBPI Award Calculation Methodology**

Beginning with FY 2009, BJA began basing the award calculation process on the actual costs incurred by a jurisdiction, rather than the length of time a case remained open, which was the previous criterion. Additionally, BJA has been working with prosecutors in the Southwest border states to create an award calculation methodology that more accurately captures actual costs. For the FY 2010 applications, BJA used the percentage of federally declined cases of a jurisdiction's total case load to create a percentage reimbursement rate. This rate will be applied to the reported salaries of judges, prosecutors, and public defenders to determine the award amounts.

#### **E. Enhanced Monitoring and Review Efforts**

BJA has taken a number of steps to enhance monitoring and review efforts. A summary of the efforts are described below.

- Beginning in FY 2009, BJA began reviewing the average prosecutor salary of each jurisdiction and comparing it to the salaries claimed on SWBPI applications to identify anomalies. Additionally, BJA began examining the case data for duplicate records and similar names to avoid the potential for duplicative payments. As appropriate, BJA conducts outreach to jurisdictions where high salary rates or similar case data need to be explained, changed, or omitted.
- In FY 2009, OJP's Office of the Chief Financial Officer (OCFO), with BJA's programmatic assistance, conducted on-site visits of two SWBPI recipients to review eight SWBPI awards. BJA and OCFO will continue these joint financial-programmatic site visits in the future.
- In FY 2010, BJA established a payment analysis and review unit that will conduct both random and targeted reviews of payment requests and disbursements to ensure the necessary documentation is in place and that the payments are justified. These reviews will take place in the form of pre-award verification and post-award monitoring.
- BJA leadership also has proactively discussed the SWBPI Program with OIG senior staff, and has requested their support in strengthening the program structure. Specifically, BJA, OJP, and the OIG have agreed to work together to prevent and detect fraudulent and erroneous reimbursement requests and resulting payments.

In February 2009, OJP successfully closed the 13 OIG audit recommendations and will continue to identify ways to further strengthen internal controls for the program. Finally, BJA has committed to increasing staff support to conduct recurring reviews and analyses of SWBPI submissions.

- b. Since the inception of the initiative, how many applications, by year, have been denied?**

**Response:**

BJA has never denied any SWBPI applications which were submitted on time and in accordance with program guidelines. However, BJA has not approved requests by some jurisdictions for extensions of the application period.

- c. **Why did the OJP provide funding for 85% of unallowable or unsupported activities?**

**Response:**

The claims submitted by these jurisdictions were unsubstantiated; however, as acknowledged above and cited in the OIG audit, OJP's internal management and oversight procedures were improved as a result.

- d. **This audit was for only nine California counties, how much unallowable or unsupported funding was provided to the remainder of the California counties as well as the counties in Arizona, New Mexico and Texas?**

**Response:**

The OIG found that five counties in Arizona, New Mexico, and Texas received \$7.4 million in unallowable or unsupported funding for SWBPI cases. However, funds have been returned or costs supported for four of the five counties totaling \$5.5 million. DOJ expects to collect the remaining \$1.9 million from the other county in 2010.

- e. **What measures are in place to assure the U.S. Taxpayer that all funding is now appropriate?**

**Response:**

In response to the audit findings and recommendations identified in the March 2008 OIG audit report, as well as changes in program implementation, BJA has now aggressively taken action, specifically in the form of programmatic guidance, to improve the application and review process. These changes have substantially improved the accountability of the SWBPI Program, and will reduce the potential for future issues. To summarize, BJA: (1) added a new certification to be acknowledged by the Chief Executive of the Requesting Entity; (2) expanded data collection for SWBPI reimbursement requests; (3) implemented additional fiscal controls; (4) modified the SWBPI award calculation methodology; and (5) enhanced monitoring and review efforts.

**The United States Attorney's offices for the Northern and Eastern Districts of California pursued civil recoveries for the unallowable SWBPI reimbursements for seven California counties. Settlement agreements were**

**reached totaling \$11.03 million with recoveries totaling \$9.17 million. OJP has stated it will pursue remedies of the unallowable reimbursements for the remaining two counties.**

**f. When will the remainder of the \$11.03 million be collected?**

**Response:**

The remainder of the \$11.03 million will be collected from the California counties in annual installments over the next four years. The annual installments were negotiated by the U.S. Attorney's Offices for the Northern and Eastern Districts of California.

**g. Why were 100% of the unallowable reimbursements not recovered?**

**Response:**

The reimbursements were not 100% recovered because the United States Attorney's Offices for the Northern and Eastern Districts of California negotiated a settlement agreement with the counties for reimbursement of the questioned costs, which include interest payments. These negotiated settlements avoided the additional cost and allocation of resources associated with protracted litigation.

**h. How much did it cost the Department of Justice to go forward with this suit to collect the money?**

**Response:**

We do not know how much it cost the Department of Justice to negotiate the settlement agreements with the counties.

**i. Where did the \$9.17 million recovered end up?**

**Response:**

The \$9.17 million was deposited in the SWBPI account.

**j. Has OJP begun to pursue remedies for the remaining two California counties?**

**Response:**

The remaining two California counties, Siskiyou County and Mendocino County, negotiated a settlement agreement with the United States Attorney's Offices for the Northern and Eastern Districts of California, and will be submitting annual installments over the next 4 years.



**San Francisco County, which is over 500 miles from Mexico, was audited in 2007 and counseled about improperly claiming SWBPI reimbursements. Yet, San Francisco County continued to submit unqualified SWBPI claims and continued receiving money from OJP.**

- k. **The 2007 audit of San Francisco County made it clear that past applications did not qualify for SWBPI reimbursements, why did OJP continue to approve unqualified San Francisco Counties SWBPI applications?**

**Response:**

As an initial matter, the authorizing language in the appropriation provides funding “for the Southwest Border Prosecutor Initiative to reimburse State, county, parish, tribal, or municipal governments for costs associated with the prosecution of criminal cases declined by local offices of the United States Attorneys.” OJP’s guidance limits funding to the four southwest states with a border contiguous to Mexico, but notes that the law itself does not limit eligible jurisdictions within those states.

The only SWBPI reimbursement paid to San Francisco County after the audit findings was for the application it submitted in the first quarter of FY 2007. This award, which covered federally initiated cases between October and December 2006, was released to San Francisco County on November 8, 2007 in the amount of \$336,254. At the time of the payment, BJA believed that the costs were allowable. As such, BJA proceeded with releasing payment to San Francisco County. In a September 2008 audit, the OIG questioned all of the costs paid in November 2007 and added these costs to the total unallowable SWBPI reimbursements.

- l. **Has a San Francisco County application ever been denied?**

**Response:**

BJA has never denied any SWBPI applications which were submitted on time and in accordance with program guidelines.

**Not only did OJP authorize millions of dollars of unallowable payments, the Department of Justice had to initiate legal proceedings and incur additional expenses to ensure that a portion of the money was returned.**

- m. **What is the Department Of Justice doing to prevent the waste, fraud and abuse that is taking place within the OJP and this program, the SWBPI?**

**Response:**

OJP has implemented a series of grant management policies, procedures, and practices to prevent waste, fraud, and abuse in its grant programs. A summary of those efforts include:

- Financial and Programmatic Monitoring. OJP conducts site visits and desk reviews of a sample of active awards throughout the year to ensure that grantees are in compliance with award terms and conditions, and grantee expenditures are properly supported and in accordance with grant program guidelines.
- Resolution of OIG and Single Audit Reports. OJP works with grantee personnel and OIG officials to ensure that corrective actions are implemented to improve grantee internal controls and accounting practices, to address compliance issues and to promptly resolve and correct deficiencies cited in external audit reports.
- Coordination with OIG Investigations Office. OJP is in regular contact, and meets quarterly, with the OIG's Fraud Detection Office to share information regarding OJP grantees under investigation (or being considered for investigation).
- Maintenance of High-Risk Policy. OJP maintains a process for designating non-compliant or unresponsive grantees as high-risk, which includes imposing special conditions and other restrictions on new awards, as appropriate to protect the Department's grant funds.
- Internal Control Reviews. OJP's Office of Audit, Assessment, and Management (OAAM) reviews and assesses key financial, programmatic, and operational controls, and makes recommendations for improvement, as needed, to evaluate OJP's internal control process as part of the annual Office of Management and Budget Circular A-123 Reviews.
- Over the past two years, OJP has also implemented a number of changes to improve oversight and accountability over the SWBPI Program, many of which were in response to the March 2008 OIG audit report. Many of the improvements are described in response to question 43a.

**n. What steps are being taken to assure this does not reoccur within the SWBPI or any other program monitored by the OJP?**

**Response:**

OJP's grant monitoring and oversight is an integrated process of programmatic, financial, and administrative management that occurs throughout the grant lifecycle from the award through the closeout of the grant. Since FY 2008, OJP's Office of Audit Assessment and Management (OAAM) has been providing monitoring oversight by

tracking the progress of monitoring efforts to ensure that OJP's bureaus and program offices monitor at least 10 percent of their open award funds annually, as set forth in Public Law 109-162, "Violence Against Women and Department of Justice Reauthorization Act of 2005."

Programmatic monitoring of the content and substance of grant programs is accomplished by conducting desk reviews and on-site visits and engaging in substantive grantee interaction. Each year, OJP bureaus and program offices assess risk and performance factors associated with their grant programs to determine which grants are most in need of on-site monitoring and plan on-site visit activities accordingly. Throughout the year, OJP grant managers conduct on-site monitoring visits to assess grantee performance and compliance with programmatic and Federal grant administration requirements. In addition to on-site monitoring, OJP policy recommends that grant managers conduct desk reviews of each open and active award every six months, but not less than once annually.

In addition to programmatic monitoring, OJP's Office of the Chief Financial Officer (OCFO) conducts financial monitoring of OJP awards, and grants issued by the Department's Office of Community Oriented Policing Services (COPS) and Office on Violence Against Women (OVW). The objectives of these financial monitoring reviews are to ensure grantee compliance with financial guidelines and general accounting practices, and to ensure proper fiscal management of grant expenditures.

- o. What other programs does OJP monitor and how much money is involved with each program? Please provide a listing for fiscal years, 2007 through 2010.**

**Response:**

OJP's grant monitoring and oversight is an integrated process of programmatic, financial, and administrative management that occurs throughout the grant lifecycle from the award through the closeout of the grant. Programmatic monitoring of the content and substance of grant programs is accomplished by conducting desk reviews and on-site visits, and engaging in substantive grantee interaction. Each year, OJP bureaus and program offices assess risk and performance factors associated with their grant programs, to determine which grants are most in need of on-site monitoring and plan on-site visit activities accordingly. Throughout the year, OJP grant managers conduct on-site monitoring visits to assess grantee performance and compliance with programmatic and federal grant administration requirements. In addition to on-site monitoring, OJP policy recommends that grant managers conduct desk reviews of each open and active award every six months, but not less than once annually.

Since FY 2008, OAAM has been providing monitoring oversight by tracking the progress of monitoring efforts to ensure that OJP's bureaus and program offices perform on-site monitoring of at least 10 percent of their open award funds annually, as set forth

in Public Law 109-162, "Violence Against Women and Department of Justice Reauthorization Act of 2005."

Since OAAM began tracking on-site monitoring activity in FY 2008, OJP has programmatically monitored approximately 3,014 awards totaling \$5.6 billion. See Table 1 below.

**Table 1. FY 2008 - FY 2010 Programmatic On-Site Monitoring Completed by Total Award Amount and Number of Grants**

	Grant Award Amount Monitored (In Millions)		Number of Grants Monitored	
	Total Award Amount of Open Grants at the Start of the Fiscal Year	Award Amount Monitored	Total Number of Open Grants at the Start of the Fiscal Year	Number of Grants Monitored
OJP Total - FY 2008	\$ 7,261	\$2,461	8,969	1,236
OJP Total - FY 2009	\$ 6,715	\$1,397	9,693	1,031
OJP Total - FY 2010 (as of June 30, 2010)	\$ 8,379	\$ 1,740	12,394	747
<b>Total</b>	<b>\$22,355</b>	<b>\$5,598</b>	<b>31,056</b>	<b>3,014</b>

Source: OJP Office of Audit, Assessment, and Management

In addition to programmatic monitoring, OJP's OCFO conducts financial monitoring of OJP awards and grants issued by the Department's COPS Office and OVW. The objectives of these financial monitoring reviews are to ensure grantee compliance with financial guidelines and general accounting practices, and to ensure proper fiscal management of grant expenditures.

Since FY 2007, the OCFO has conducted financial monitoring of OJP grantees, through desk reviews and on-site monitoring visits of approximately 2,400 awards totaling \$5.9 billion (see Table 2 below).

**Table 2. FY 2007 - FY 2010 Financial Monitoring Conducted by OCFO Staff**

	Number of Grants Monitored by OCFO Staff	Award Amount Monitored by OCFO Staff (in Millions)
OJP Total - FY 2007	919	\$2,265
OJP Total - FY 2008	957	\$1,841
OJP Total - FY 2009	961	\$937
OJP Total - FY 2010 (as of March 31, 2010)	975	\$2,600
<b>Total</b>	<b>3,812</b>	<b>\$7,643</b>

Source: OJP Office of the Chief Financial Officer

As discussed earlier, OJP will continue its efforts to improve oversight and accountability of the SWBPI program.

#### Thomson Illinois Prison Purchase

44. The 2011 Budget the President submitted to Congress includes \$237 million to purchase a state prison in Thomson, Illinois. This purchase is designed to create more bed space for the Federal Bureau of Prisons, with part of this facility to be utilized to house detainees currently held at Guantanamo Bay.

I agree that the Thomson, IL prison should be purchased and brought online as a federal prison to reduce prison overcrowding in the federal system. However, I strongly disagree with the idea that this facility should be used to house terrorist detainees relocated from Guantanamo Bay to U.S. soil.

Purchasing state prisons that are not being utilized as opposed to wasting taxpayer dollars on new construction can be a cost effective way of addressing the increased federal prison population. However, have some concerns about this deal. I'm concerned that it appears we're paying top dollar and giving the state of Illinois a sweetheart deal for the prison equivalent of a foreclosure.

- a. Has the Department reached an agreement with the State of Illinois to purchase the Thomson facility?

#### Response:

The FY 2011 President's Budget Request includes \$170 million for the acquisition and renovation of the Thomson Correctional Facility in the BOP's Buildings and Facilities account. The request also includes proposed funding of \$66.879 million in Salaries and Expenses to begin the activation process, which is not part of the estimated

purchase cost. Activation funding is for staffing, operations, and initial equipment and supplies.

The acquisition process is by no means complete, and negotiations on price have yet to begin. According to federal procurement rules, negotiations may not commence until a formal appraisal is conducted. In addition, the State of Illinois has a series of requirements it must comply with before it enters into negotiations. Throughout this process, BOP will fully comply with all applicable rules and regulations. Currently, the BOP is in the process of completing several necessary steps which include an Environmental Assessment, appraisals, surveys, and title work.

**b. If yes, what is the final negotiated price of the facility?**

**Response:**

Negotiations on price have yet to begin.

**c. What is the anticipated cost to renovate the facility?**

**Response:**

The renovations in the request for BOP are estimated to be approximately \$15 million.

**d. How much of the anticipated renovation cost is attributed to retrofitting the prison for federal use?**

**Response:**

All BOP anticipated renovations are expected to be for federal prison use. Some renovations, such as security enhancements, are necessary to bring the institution in compliance with federal prison standards.

**e. How much of the anticipated renovation cost is attributed to retrofitting a portion of the facility for use as a military detention facility to house terrorist detainees currently held at Guantanamo Bay?**

**Response:**

None of the funding proposed in the FY 2011 President's Request for BOP is expected to be used for renovations to house detainees currently held at Guantanamo Bay. As stated in the response to question 44d, all renovations are expected to be for federal prison use. Some renovations, such as security enhancements, are necessary to bring the institution in compliance with federal prison standards.

- f. **The Thomson facility cost \$140 million when it was completed. The FY2011 Budget request the President submitted is asking taxpayers to pay \$237 million for it, despite the fact it has sat vacant for nearly 10 years. Even if that cost includes \$100 million for renovations, taxpayers are still being asked to essentially pay fair market failure for a foreclosure. Why are we paying market price for the prison in the worst real estate market in decades?**

**Response:**

The FY 2011 President's Budget Request includes \$170 million for the acquisition and renovation of Thomson in the BOP's Buildings and Facilities account. The request also includes proposed funding of \$66.879 million in Salaries and Expenses to begin the activation process, which is not part of the estimated purchase cost. Activation funding is for staffing, operations, training, supplies, and initial equipping of the facility.

The negotiations and establishment of a purchase price will not occur until the BOP completes the necessary Environmental Assessment, appraisals, surveys, and title work.

- g. **It seems to me this is a pretty good deal for the state of Illinois, but a bad deal for the American taxpayer. Will you provide Congress with documents that support the price the American taxpayers are being asked to pay? If not, why not?**

**Response:**

The BOP is in the process of completing several necessary steps to include an Environmental Assessment, appraisals, surveys, and title work. The acquisition process is by no means complete, and negotiations on price have yet to begin. According to federal procurement rules, negotiations may not commence until a formal appraisal is conducted. In addition, the State of Illinois has a series of requirements it must comply with before it enters into negotiations. Throughout this process, BOP will fully comply with all applicable rules and regulations.

**Responsiveness to Inquiries**

- 45. The Department of Justice continues to frustrate Congressional oversight efforts. This ranges from late and incomplete responses to refusals to provide information to Congress based upon no actual privilege. In some cases, there is not even a privilege that would apply to support efforts to withhold information.**

**Recently, the Department addressed your failure to provide relevant**

**documents to the Committee prior to your confirmation. That response stated that it was an accidental omission but that it really didn't matter because the documents were publicly available. Curiously, this same rationale was applied to the Department's response to my inquiry regarding political appointee recusals.**

**Based upon these statements, it appears the Department, under your leadership, is arguing that withholding requested information from Congress is okay if it is information that is publicly available in some form.**

- a. These responses indicate that the Department believes that Congress should do a better job of hunting down publicly available information. In fact, the Office of Legislative Affairs refuses to provide this information. In light of this position, why should Congress honor your latest budget request for \$305,000 to fund three attorneys in the Department's Office of Legislative Affairs?**

**Response:**

We regret any misunderstanding, and wish to clarify that we believe it is important to make our best efforts to respond to Committee requests for information about Department activities in a timely fashion. If the Department does not maintain the requested information in searchable systems of records, it may be more readily available through public sources and, under those circumstances we would be remiss if we failed to point that out in responding to Committee requests. Decisions about how best to respond to Committee requests are made through a deliberative process involving the relevant Department components. The Office of Legislative Affairs is charged with coordinating that process for accommodating the Committee's information needs and communicating with the Committee on behalf of the Department. In this respect, the provision of additional attorneys would enhance the Office's ability to fulfill that mission in a more timely fashion, which is a goal we all share.

- b. You promised this Committee you would do better, why have you failed to live up to that promise?**

**Response:**

As indicated above, we believe it is important to make our best efforts to respond to Committee requests in a timely fashion. Sometimes, the nature and volume of the requested information does not permit us to respond as quickly as you or we would like, but we remain committed to working with you to reach acceptable accommodations wherever possible.



**FBI Whistleblowers and OARM Review**

**46. On March 15, 2007 the Department of Justice Office of Inspector General (OIG) found that whistleblower Robert Kobus was retaliated against for pointing out fraudulent activities within the FBI. It has been over three years since these findings were completed by the OIG and referred to the Office of Attorney Recruitment and Management (OARM), yet there has still been no action on the appeal.**

- a. Do you believe three years is a reasonable time for the OARM to wait to proceed with an FBI appeal?**

**Response:**

The time required for OARM's final resolution of an FBI whistleblower case is dependent upon a number of factors, including the complexity of the legal and factual issues presented; the time for and extent of discovery, as well as the time for the parties' respective briefs on the issues (for which deadlines are usually extended due to requests made by the parties); any stays of proceedings before OARM pending resolution of concurrent legal/administrative actions (e.g., while awaiting a verdict in a Title VII case in Federal Court or the completion of investigative procedures and findings by the Conducting Office); the voluminous nature of the case files and record evidence; and the number and length of status conferences/hearings and OARM's opinions and orders (which can range between 20 and 60 pages in length). These are examples of some of the factors that may affect the time to adjudicate cases. Under the requirements of the Privacy Act the Department cannot discuss the specific details of this matter.

- b. Of the past 10 FBI appeals heard by the OARM; what was the average length of time between the filing of the appeal and the first hearing?**

**Response:**

Not all FBI whistleblower cases proceed to a substantive hearing on the merits before the Director of OARM, as some cases are submitted for adjudication on the written record alone. A hearing on the merits before the Director is equivalent to an administrative trial, involving the presentation of witness testimony, examination/cross examination of witnesses, evidentiary rulings on the admissibility of testimony and exhibits, and a court transcriber to record the proceedings. A merits hearing before the Director of OARM is generally not "the first hearing" in a case, as OARM routinely holds other (typically telephonic) hearings and status conferences with the parties throughout the course of proceedings (on issues of jurisdiction, discovery, briefing schedules, etc.).

Only two cases have proceeded to a merits hearing before OARM. In the first case, the merits hearing was held approximately four years after OARM's receipt of the

complainant's request for corrective action. There, the complainant's request for corrective action was supplemented more than one year after OARM's receipt of the complainant's initial request; the parties engaged in discovery for approximately thirteen months after OARM's receipt of complainant's supplemental request for corrective action; after numerous requests by the parties for extensions of time to file their briefs on the merits, briefing concluded more than three years after complainant's initial request for corrective action to OARM was filed; within four months of receiving the parties' final merits briefs, OARM issued a decision finding that the complainant had prevailed on her burden of proof, but that a hearing was required for OARM's assessment of the evidence in support of the FBI's burden of proof; and OARM held a week-long merits hearing with the parties approximately eight months after issuance of its written decision on the merits on complainant's burden of proof.

In the second case, the merits hearing was held approximately sixteen months after OARM's receipt of the Conducting Office's report of investigation on complainant's reprisal claims. During the time between OARM's receipt of the Conducting Office's report and the merits hearing before the Director, the parties were afforded 30 days to comment on the Conducting Office's report, OARM considered its jurisdiction over additional claims raised by the complainant and her specific request for corrective action, and the parties engaged in discovery and submitted their respective pre-hearing merits briefs for OARM's consideration of the issues.

The length of time between a complainant's request for corrective action and a hearing on the merits before the Director of OARM, like OARM's final written determination in a case, is dependent upon the circumstances of the case and OARM's docket at the time.

- c. **Examining FBI appeals heard by the OARM in the last 8 years, how many times has the Director determined that the FBI retaliated against a whistleblower? For each instance listed in this response, please provide a statement describing the retaliation found and all the corrective actions have taken on behalf of the whistleblower, including the reimbursements for costs, back pay and benefits, and other consequential damages authorized.**

**Response:**

In the last eight years, OARM has found in favor of four complainants, as follows:

(1) OARM concluded that the FBI retroactively charged the complainant with four hours of Absence Without Leave (AWOL) in reprisal for his protected disclosure. As corrective relief, OARM ordered the FBI to pay \$13,422.50 in reasonable attorneys fees and costs, as well as four hours of regular pay for the date complainant was charged AWOL.

(2) OARM concluded that the FBI issued the complainant a “Does Not Meet Expectations” performance appraisal report (PAR) in reprisal for her protected disclosure. As corrective relief, OARM directed the FBI to remove complainant’s Does Not Meet Expectations PAR for the applicable rating period from the system and replace it with a corrected PAR reflecting a “Meets Expectations” rating; and to pay attorneys fees, taxes, and expenses in the amount of \$65,216.51 to complainant’s counsel.

(3) OARM concluded that the FBI decided not to select complainant for an Assistant Legal Attaché (ALAT) Rome position in reprisal for his protected disclosure. As corrective relief, OARM ordered that the FBI: (1) effect complainant’s retroactive promotion; (2) pay complainant back pay, plus interest, in the amount of \$65,481.70, plus an additional amount of back pay plus interest to be calculated by the FBI from the date of the last calculation by the FBI submitted to OARM, up to the date on which Complainant’s adjusted salary at the GS-14, Step 8 level commences; (3) reimburse complainant for lost FERS contributions to his retirement account totaling \$12,926.88, plus an additional amount of lost FERS contributions to his retirement account to be calculated by the FBI for the period from the date of the last calculations by the FBI submitted to OARM, up to the date on which his adjusted salary at the GS-14, Step 8 level commences; (4) reimburse complainant \$132,990.00, which is equal to the value of the tax-free Department of State’s maximum housing allowance for the ALAT Rome position for the period of the non-selection; (5) pay \$11,571.94 to compensate complainant for the transportation benefit he would have received for his two children to and from the American Overseas School in Rome, had he been selected for and served in the ALAT Rome position; and (6) restore 16 hours of annual leave to the complainant’s annual leave balance.

(4) OARM concluded that the FBI issued complainant a negative PAR and proposed her removal from service in reprisal for her protected disclosure. As corrective relief, OARM directed the FBI to remove from the system and complainant’s official personnel file the negative PAR, the notice of proposed removal, and any personnel documents referring to the PAR at issue or the proposal notice. OARM additionally found the complainant was entitled to reasonable attorneys fees and costs, any reasonable costs complainant personally incurred in pursuit of her request for corrective action before OARM, back pay, interest on the back pay, and related benefits covering the period from the date of complainant’s involuntary retirement to the date on what would have been her mandatory retirement date on her 57<sup>th</sup> birthday. OARM’s Final Corrective Action Order specifying the exact amounts of the attorney’s fees and reasonable costs incurred by complainant is pending, as OARM is awaiting receipt of complainant’s fee request and itemized list of other reasonable costs she incurred in pursuit of her request for corrective action.

- d. In the last 8 years, how many appeals filed with OARM have been dismissed upon failures to follow the procedures outlined by OARM for filing an appeal?**

**Response:**

In the last eight years, OARM has dismissed without prejudice to refiling five cases involving a complainant's failure to exhaust his/her administrative remedies with the Conducting Office. To date, none of those complainants have refiled their requests for corrective action with OARM.

- e. **In the history of the OARM review of FBI whistleblower appeals, how many times has either party appealed a final determination by the Director to the Deputy Attorney General for review? Please provide a list of all appeals indicating which party filed the appeal and the final determination by the Deputy Attorney General.**

**Response:**

In the history of OARM's adjudication of FBI whistleblower cases, there have been three appeals to the DAG, as follows:

- (1) Complainant appealed to the Office of the Deputy Attorney General (ODAG) OARM's Final Determination denying complainant's request for corrective action. OARM's Final Determination was affirmed.
- (2) Complainant appealed to the ODAG OARM's Final Determination which granted complainant's request for corrective action based on one claim (complainant's AWOL reprisal claim), but concluded that complainant had failed to prevail on the merits of several other reprisal claims. OARM's Final Determination was affirmed.
- (3) Complainant and the FBI separately appealed various portions of OARM's Final Corrective Action to the ODAG, and OARM's Final Corrective Action Order was affirmed.

QUESTIONS POSED BY SENATOR KYL

**47. On February 26, 2010, the House passed the Intelligence Authorization Act for Fiscal Year 2010. Right before it passed the bill, the House stripped a provision that would have made intelligence officials subject to a prison sentence of up to 15 years if found guilty of participating in a “cruel, inhuman, and degrading” interrogation.**

**At the hearing, I asked you whether the administration supports adding such a provision to the criminal code. You said that you were unfamiliar with the provision, but you agreed to assess it and provide me with a written response.**

**Please provide a written response explaining whether the Department of Justice supports criminalizing “cruel, inhuman, and degrading” interrogations.**

Response:

Section 1003 of the Detainee Treatment Act (DTA) of 2005, 42 U.S.C. § 2000dd, provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Consistent with the DTA, the Convention Against Torture, and Common Article 3 of the Geneva Conventions, Executive Order 13,491 also prohibits “cruel treatment” and “humiliating and degrading treatment” of individuals detained in any armed conflict, when such individuals are in the custody or under the effective control of the U.S. Government or detained in a facility owned, operated, or controlled by the U.S. Government. Any interrogations by U.S. government personnel of such individuals must comport with these standards. In addition, there are various federal criminal statutes that can be used, depending on the context, to punish abusive conduct by government personnel toward detainees in their custody. The Administration has not proposed new legislation on this issue, and the Department did not have an opportunity to review the provision in the House bill before it was withdrawn from consideration. As a matter of practice, the Department does not take positions on legislation that is no longer pending before Congress.

**48. On March 16, 2010, you testified before the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies. In response to a question about what would happen to KSM if he were acquitted or otherwise ordered released by a court, you said, “It’s not going to happen. But if that were to be the case, he would not be released.”**

**A frequently cited justification for using civilian courts to try individuals who could be tried in military commissions is that civilian courts better represent American values of fairness and due process to the rest of the world.**

**Won't any relative perception advantage that civilian courts have *vis-à-vis* military commissions be undermined or negated by your acknowledgment that KSM would never be released, even if he were acquitted in a civilian trial?**

**Response:**

As a matter of legal authority, the question of guilt or innocence in a criminal prosecution (whether by military commission or civilian court) is separate from the question of whether the government has authority to detain under the authority provided by Congress in the 2001 Authorization for Use of Military Force (AUMF), as informed by the law of war. This authority could be relied upon, where appropriate, to detain individuals after an acquittal, whether in a military commission or in federal court. In addition, immigration authorities may be relied on to hold in immigration detention non-citizens who have been acquitted or who have completed their criminal sentence and who endanger the national security, pending their removal from the United States.

**49. When you and I met in 2009 prior to your nomination hearing, and at your nomination hearing on January 15 of 2009, I asked you about Operation Streamline funding. To remind you about the program, as I explained back in January 2009, Operation Streamline is a program currently used very successfully in a few Border Patrol sectors, including in the Yuma, Arizona sector, that charges most illegal border crossers with a misdemeanor and requires them to spend between 15 and 60 days in jail.**

**It has had a great deterrent effect. In the Yuma Border Patrol sector, the program is so successful that illegal crossings are a mere fraction of what they were in Yuma just two years ago.**

**Unfortunately, though, the program has not been fully deployed in the Tucson Sector. As we discussed in January 2009, there is a clear Justice Department component to the program. I asked in our meeting before your nomination hearing and at your hearing what resources are needed to effectively continue this high-deterrence program in existing Streamline sectors (including Del Rio, Texas) and what resources are needed to expand the program to other Border Patrol sectors. I asked what resources, among others, would be needed for the United States Marshals Service (including number of additional Deputy U.S. Marshals), courthouse renovation, administrative increases (that is, criminal clerks for each District to process additional cases), additional judges, additional detention space that would fall under Justice jurisdiction, and other costs.**

**After asking you and Department of Homeland Security Secretary Janet Napolitano to provide details and to budget for the costs without answer, I attached an amendment to the FY 2010 Department of Homeland Security Appropriations bill that requires, collaboratively, that DHS and DoJ provide**

**a report to Congress on the resources needed to effectively manage existing Streamline programs and to expand Operation Streamline to other sectors.**

**That report was due from you and Secretary Napolitano on December 27, 2009. In a response to me in March 2010 about the report (from questions I submitted on December 9, 2009), Secretary Napolitano wrote that “the report is in the final stages of the review process and we anticipate Congress will receive it in the near future.” I still have not received the report.**

- a. It is my understanding that the Department of Justice has not fully cooperated in completing its part of the report. If true, why hasn't your agency responded in full?**

**Response:**

The Department has submitted the information requested by DHS to complete its report.

- b. When will you complete the report?**

**Response:**

As noted above, the Department has submitted the information requested by DHS to complete its report, and DHS submitted the report dated August 13, 2010 to Congress.

- c. Do you support robust funding and an expansion of Operation Streamline?**

**Response:**

Border security and immigration policy continue to be important issues for the Department and the Administration. For that reason, we are pleased that Congress answered the President's call to bolster the essential work of federal law enforcement officials along the Southwest Border through the passage of the Border Security Enforcement Act of 2010, which provides the Department of Justice with \$196 million toward Southwest border enforcement and infrastructure.

As representatives of the Department have expressed previously, we support the concept of Operation Streamline, but we have also noted the enormous downstream effect of any “Streamline” type immigration enforcement initiative. Among one of my principal concerns is the downstream impact in terms of detention capacity. System capacity presents very real constraints that need to be addressed before Operation Streamline can be expanded beyond where it is today. Court space and the number of judges limit the number of detainees that can be processed. Detention bed space along the Southwest Border and within a reasonable distance is also a physical constraint on the number of people the system can handle. This burden will be eased, in part, by the

Border Security Enforcement Act through which the Department will receive funds for expanding detention space and the courthouse infrastructure in the Yuma sector of Arizona. This will allow for some increase in Operation Streamline; however, there are significant capacity constraints on expanding it further.

In addition, there are certain critical impediments that would arise if Operation Streamline were implemented across the Southwest Border. These impediments include the physical constraints of courthouses along the border, including the number of defendants that can be processed in a given day and existing cell block space; the number of judges, magistrates, and other judicial personnel; and the number of detention beds located in reasonable proximity to the given courthouse where defendants can be housed. Presently, the court house structures are inadequate to process large numbers of additional defendants. The U.S. Marshals Service and U.S. Attorneys would have to waive a number of their internal requirements in order to process the increase in defendants. Even increasing the daily shift in operations within the court houses, particularly in Tucson and San Diego, would be insufficient to process the increase in number of defendants.

Also, an increase in enforcement activity along the Southwest Border would affect the workload and funding needs of the rest of the entire criminal justice system. For example, felony drug arrests and subsequent additional investigations would likely increase, resulting in the need for additional Drug Enforcement Administration agents and support staff, and the need for additional attorney and intelligence analyst personnel deployed as part of the Organized Crime Drug Enforcement Task Forces (OCDETF) Program. Further, additional Bureau of Alcohol, Tobacco, Firearms and Explosives personnel would be needed to address gun trafficking arrests and investigations. In addition, Operation Streamline would increase the fugitive warrant workload, which in turn further impacts the U.S. Marshals Service. The workload of other parts of the system, including the Executive Office for Immigration Review and the Civil Division's Office of Immigration Litigation, would also increase. These related costs were not included in the estimates previously calculated.

In total, the FY 2011 Budget requests \$3.49 billion for the Department of Justice's Immigration and Southwest Border related activities. This represents an increase of \$228 million (7 percent) from the FY 2010 enacted level. This funding will allow us to expand our investigations and prosecutions as well as alleviate some of the fiscal stresses related to downstream immigration enforcement initiatives.



**QUESTIONS POSED BY SENATOR GRAHAM**

**50. I am interested in the recent activity of the Department of Justice and Department of Agriculture in agricultural antitrust issues. I note the series of public hearings you are holding to examine these issues in a number of different segments, including poultry and fruits and vegetables, two commodities that are important to South Carolina.**

**As you move ahead in this endeavor, I am interested in your response to the following questions:**

- a. What are your intentions regarding the information that you collect in this process? Please provide specific details about the anticipated use and what role you see Congress will play in this activity.**

**Response:**

The Department of Justice has heard concerns from Congress, farmers, and consumers about changes in the agricultural marketplace, including increasing concentration and vertical integration. Through these joint workshops we have started to examine the dynamics of competition in agriculture markets, review the state of the law and current economic learning, and provide an opportunity for farmers, ranchers, consumer groups, processors, the agribusinesses, and other interested parties to provide examples of potentially anticompetitive conduct.

The goals of the workshops are to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues, as well as to listen to and learn from parties with real-world experience in the agriculture sector. Members of Congress took an active role in the first of these workshops, in Ankeny, Iowa, on March 12, 2010, and in Normal, Alabama, on May 21, 2010, contributing their perspective and listening to the participants. We expect active participation from members of Congress in the coming workshops as well. Through the dialogue established in these workshops, the Department and USDA hope to be able to learn how we can ensure that antitrust enforcement and regulatory actions are as effective as possible.

- b. How do you intend to balance any actions taken to address antitrust issues with the need to maintain a business-friendly climate in which agriculture will continue to grow here in South Carolina and the rest of the United States— and not move overseas?**

**Response:**

The Department of Agriculture and the Department of Justice both feel that it is important to have a fair and competitive marketplace that benefits agriculture, our nation's rural economies and consumers. Proper enforcement of the antitrust laws, in

conjunction with USDA's regulatory role, ensure that farmers and processors can participate in a competitive environment free from improper manipulation, coercion, or exclusion, and can strive to give consumers better products at fairer prices. We believe these workshops will be important in helping us ensure this nation maintains a vibrant and globally competitive agriculture industry.

**51. Organized retail crime is a growing problem. Gangs of criminals steal large amounts of goods like baby formula and resell them to the public. Please answer the following questions about the Department of Justice's response to organized retail crime:**

- a. Based on the crimes that the Justice Department has investigated, where do you think all this ill-gotten money is going?**

**Response:**

In numerous cases of organized retail crime prosecuted across the country, the Department's experience is that the criminal proceeds of these crimes flow predominantly to the organizers and ringleaders of the schemes, who typically use the proceeds to support lavish lifestyles and purchases of expensive items (e.g., cars and homes). For their role in the schemes, lower-level participants typically receive substantially smaller amounts of money. The Department has not seen evidence supporting a trend of retail-theft or fencing organizations laundering their criminal proceeds through foreign financial institutions or systems, or sharing their proceeds with other criminal organizations.

- b. Has the Department seen patterns of this money being used to support terrorist activities abroad?**

**Response:**

The Department has not seen any such patterns. While the Department is fully aware of the possibility that organized retail theft could develop into another means of financial support for terrorist groups or activities, there is no evidence that such a trend has developed.

QUESTIONS POSED BY SENATOR COBURN

**52. In response to written questions following the November Department of Justice oversight hearing, you confirmed that Ms. Johnsen has been involved in hiring attorneys for OLC. You stated:**

**Professor Johnsen's participation in this process has been appropriate and consistent with the past practice of presidential nominees of both parties. Like such other nominees, she was involved in the consideration of candidates for political appointments, such as those persons who would serve as her deputies should she be confirmed. By contrast, with respect to applicants for civil service positions, Professor Johnsen simply forwarded some resumes for attorney positions to the Acting Assistant Attorney General for OLC and occasionally offered her views as to some candidates for those positions who came to her attention and on general attorney staffing issues.**

- a. Can you explain to which "past practices of presidential nominees of both parties" you were referring? Did those nominees have bipartisan opposition?**

Response:

My answer referred to the past practice of nominees to head Department components. The Department does not have records indicating who opposed the prior nominees to head OLC.

- b. Which other unconfirmed nominees are similarly participating in the hiring process? Was Chris Schroeder participating in the hiring process for the Office of Legal Policy prior to his confirmation?**

Response:

Chris Schroeder did not participate in the hiring process for career employees in OLP while his nomination was pending. He neither consulted on hiring decisions for such positions, nor forwarded resumes or recommendations for candidates for such positions. Consistent with the past practice of presidential nominees of both parties, he was involved in the consideration of candidates for political appointments, including one deputy and one senior counsel.

**53. You and I have had a number of exchanges about whether — especially in light of the shootings at an Army recruitment center in Little Rock and the tragic attack at Ft. Hood — U.S. soldiers should be protected as a class by federal hate crimes laws. In written responses you submitted four months**

after receiving the questions, you indicated that you “do not believe additional legislation is needed, especially in light of the recently enacted law criminalizing assaults on members of the Armed Services.”

- a. **Notwithstanding the fact that every other class you endorsed for such protection was also already covered by existing criminal law, is it still your position that violent crimes committed against U.S. soldiers, because they are U.S. soldiers, should not be covered by the hate crimes statute?**

**Response:**

The mass murder committed at Ft. Hood in November 2009, as well as the murder of Army Private Long and the wounding of Private Quinton I. Ezeagwula at a Little Rock Armed Forces recruiting center, are reprehensible crimes of violence. Acts such as these are criminalized by several federal laws.

Violent assaults of United States military members may be prosecutable under 18 U.S.C. § 1389, which was added to the criminal code by the Matthew Shepard James Byrd Jr. Hate Crimes Prevention Act. *See* 18 U.S.C. § 1389. Section 1389 makes it a crime to assault or batter a service member or to assault or batter a family member of a service member or to destroy their property, when such acts are committed “on account of” the service member’s military status or service. It also makes it a crime to attempt or to conspire to do so.

In addition, 18 U.S.C. § 111(a)(1), which pre-dated enactment of Shepard-Byrd Act, prohibits forcible assault of military personnel on account of the officer’s performance of his or her duty, and 18 U.S.C. § 1114 prohibits the killing or attempted killing of such an officer.

Significantly, these federal laws cover violent actions in a way that protects service members as well as other kinds of victims, and target violent acts motivated by a victim’s military status or service. In this way, these statutes protecting service men and women are similar to the “hate crimes” that were criminalized under 18 U.S.C. § 249 which prohibits acts of violence undertaken “because of” bias or prejudice based upon the characteristics identified in the statute.

Prior to passage of Section 249, many of the groups now protected under the Shepard-Byrd Act were left unprotected by federal law. Specifically, there were no federal laws that criminalized violent acts undertaken because the victim, or someone associated with the victim, was lesbian, gay, bisexual or transgender. Furthermore, only the Housing Laws protected persons in the disabled community who were attacked because of their disability.

- b. **The federal hate crimes law requires you or your designee to issue guidelines that shall establish “neutral and objective criteria for**

**Response:**

These guidelines have been promulgated and added to the United States Attorneys Manual as required by Congress. The guidelines, which were added to Chapter 8 of the Manual, state, in full:

**8-3.300****Neutral and Objective Criteria for Guiding Prosecutorial Discretion**

Government Attorneys shall enforce 18 U.S.C. § 249 in a neutral and objective manner. All prosecutions shall comport with the Principles of Federal Prosecution set forth in USAM Chapter 9-27.000. Attorneys for the government are particularly instructed to follow the dictates of USAM 9-27.260, which prohibits attorneys for the government from being influenced in making prosecution decisions by any subject's race, religion, sex, national origin, or political association, activities or beliefs. In addition, government attorneys should not be influenced by a subject, victim, or witness's sexual orientation, gender identity, or disability, except to the extent such characteristic is relevant to a determination whether the statute has been violated.

Section 249 requires that attorneys for the government consider whether evidence is sufficient to prove that a criminal act identified by the statute occurred because of the actual or perceived race, religion, gender, national origin, sexual orientation, gender identity, or disability of any person. In no case, however, shall the government attorney be influenced by his or her own personal feelings concerning the subject or the subject's associates; the victim or the victim's associates; or a witness or a witness's associates. Nor shall the attorney for the government be influenced by the effect the decision to prosecute (or not to prosecute) may have on the attorney's own professional or personal circumstances. *See USAM 9-27.260*. No attorney for the government may make prosecution or declination decisions based solely upon the speech or expressive conduct of a subject, victim, or witness. Nor shall any attorney for the government make such prosecution or declination decisions based solely upon a such person's [sic] affiliation with any group advocating for or against rights of persons with the characteristic identified by statute. Such factors may be considered only to the extent that they inform a reasoned, neutral decision about whether § 249—or any other criminal statute—has been violated.

In choosing to pursue a prosecution under this statute, the primary responsibility of Government attorneys shall be to seek justice. A government attorney shall file only those charges which he or she reasonably believes can be substantiated at trial through admissible evidence. Charging and declination decisions should be made based upon the facts and totality of the circumstances in each individual case.

- c. **What *specific* steps have you taken to ensure that the new hate crimes law is enforced in a way that does not infringe upon an individual's rights to free speech or the free exercise of religion, as the law directs?**

**Response:**

In addition to promulgating the guidelines, set forth above, the Department has developed several trainings for federal prosecutors. These trainings review the elements of the statute and discuss how to determine evidentiary sufficiency. In addition, these trainings explain and outline First Amendment law and restrictions on prosecutions.

- d. **What actions have you taken to communicate to other federal officials and prosecutors the importance of enforcing the law in such a manner?**

**Response:**

Trainings designed specifically for law enforcement have been provided to FBI agents, and federal and state law enforcement agents have been invited to numerous trainings, which are being conducted throughout the country.

**54. Please provide the Department of Justice's annual year-end balance for its Working Capital Fund for fiscal years 2006 through 2009.**

**Response:**

The Department's year-end balance for the Working Capital Fund for fiscal years 2006 through 2009 is as follows:

*(dollars in thousands)*

	FY 2006	FY 2007	FY 2008	FY 2009
<b>Ending Balance</b>	\$76,528	\$65,469	\$51,825	\$28,354

- a. **Also, please provide projected balances within this same account for fiscal years 2010 and 2011.**

**Response:**

The FY 2010 Working Capital Fund balance is \$25,336,000. The Department does not project year-end balances for the current or future fiscal years for the Working Capital Fund.

**55. Please provide the Department of Justice's annual year-end total of unobligated balances for fiscal years 2006 through 2009.**

The amount of year-end, discretionary unobligated balances for the Department of Justice for fiscal years 2006 through 2009 is as follows:

*(dollars in thousands)*

	FY 2006	FY 2007	FY 2008	FY 2009
<b>Unobligated Balances</b>	\$357,815	\$409,318	\$141,014	\$129,154

- a. **Additionally, please provide the projected unobligated balance totals for fiscal years 2010 and 2011.**

**Response:**

The FY 2010 unobligated balance for our annual accounts is \$130,135,000. The Department does not project future year unobligated balances.

- 56. Please provide the annual amount of expired unobligated balances transferred into the Working Capital Fund for fiscal years 2006 through 2009. Please note that this is different from your Working Capital Fund totals.**

**Response:**

The annual amount of expired unobligated balances that have been transferred into the Working Capital Fund for fiscal years 2006 through 2009 is as follows:

*(dollars in thousands)*

	FY 2006	FY 2007	FY 2008	FY 2009
<b>Transfers In of Expired Balances</b>	\$122,653	\$60,871	\$182,671 <sup>1</sup>	\$90,529

<sup>1</sup> Of this amount, \$99 million was annual FBI CJIS user fees allotted for Congressionally-directed projects.

- 57. At the June 2009 Justice Department oversight hearing, I asked how the Justice Department was adhering to your confirmation acknowledgement that grant management be treated as a “consistent priority” to prevent problems. In response to my written questions, you stated that “all three grantmaking components have embraced the recommendations in the OIG report. Each of the Department’s grant-making components has implemented the OIG’s recommendations...” Furthermore, at the November 2009 Justice Department oversight hearing, Senator Grassley asked you about the status of the 43 recommendations the OIG made in its November 2009 report which highlight grant management as, for the 9<sup>th</sup> straight year, a top 10 management challenge.**

- a. **Your response to Senator Grassley's question, received the day before your March 2010 hearing, stated, "each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 funding and Recovery Act grants." I am concerned with your response because, not only did it not specifically answer Senator Grassley's inquiry as to compliance with each individual recommendation, it is also inconsistent with findings of the OIG noted in a December 2009 review of Recovery Act awards under the Byrne program.**
- i. **Please list the 43 specific OIG recommendations referenced in the November 13, 2009 OIG Report on Top Management and Performance Challenges of the Department of Justice, and how each of DOJ's grantmaking components is responding or has responded to such recommendations.**

**Response:**

Please see attached report, which lists the 43 specific OIG recommendations referenced in the November 13, 2009 OIG Report on Top Management and Performance Challenges of the Department of Justice, and how each of the Department's grant-making components is responding or has responded to the recommendations.

- ii. **While the December 2009 OIG report on the Byrne grant awards in the Recovery Act noted the grants were awarded in a prompt, fair and reasonable manner, the report notes that many applications were incomplete, resulting in awards to applicants who had not provided the required information.<sup>2</sup> That report also noted that grantees did not provide evidence that they could "accurately track Recovery Act funds separately from other federal funds."<sup>3</sup> In additional, the report notes that, although the application requires each grantee to develop performance measures and include that on its application, the Bureau of Justice Assistance (BJA) did not require that from every grantee.<sup>4</sup> Please list each of these concerns, as well as any others mentioned in the December 2009 report, and provide details regarding how the Department has remedied each.**

**Response:**

*Concern #1: While the December 2009 OIG report on the Byrne grant awards in the Recovery Act noted the grants were awarded in a prompt, fair and reasonable*

<sup>2</sup> Office of the Inspector General, Review of the Edward Byrne Memorial Justice Assistance Grant Program, Recovery Act Formula Awards Administered by the Department of Justice's Office of Justice Programs, December 2009, at p. 2.

<sup>3</sup> *Id.* at 5-6.

<sup>4</sup> *Id.* at 6.



*manner, the report notes that many applications were incomplete, resulting in awards to applicants who had not provided the required information.<sup>11)</sup>*

BJA is carefully reviewing all of its FY 2010 funding solicitations for formula grants to describe material as “required” only when that is the case. When required materials are not submitted with the application package, BJA now places a special condition on the award preventing the recipient from obligating, expending, or drawing down funds until the required materials have been submitted. During FY 2009, some information (such as a project abstract) which was not essential to the grant application process was mistakenly listed as required in the grant solicitation. However, in FY 2010, applicants may be “requested” to provide additional, non-essential information (such as project abstracts), but will not be “required” to do so.

*Concern #2: That report also noted that grantees did not provide evidence that they could “accurately track Recovery Act funds separately from other federal funds.”<sup>12)</sup>*

The OJP Financial Guide, which must be followed by all OJP grant recipients as specified in the award special conditions, requires that “each award must be accounted for separately. Recipients and subrecipients are prohibited from commingling funds on either a program-by-program basis or project-by-project basis. Funds specifically budgeted and/or received for one project may not be used to support another. Where a recipient’s or subrecipient’s accounting system cannot comply with this requirement, the recipient or subrecipient shall establish a system to provide adequate fund accountability for each project it has been awarded.”

Additionally, part of the review process in the Office of the Chief Financial Officer’s financial monitoring site visits includes verifying that a separate account is established for each individual award (both Recovery Act and non-Recovery Act) within the grantee’s accounting system; and that the expenditures recorded in each account support the amounts reported on the grant’s Financial Status Report. Further, as part of their programmatic monitoring efforts, OJP program offices (including BJA) confirm that grantee funds are not commingled.

*Concern #3: In addition, the report notes that, although the application requires each grantee to develop performance measures and include that on its application, the Bureau of Justice Assistance (BJA) did not require that from every grantee.<sup>13)</sup>*

Each Recovery Act State and local Justice Assistance Grant (JAG) award included a special condition requiring the grantees to report performance measures in the Performance Measurement Tool (PMT) maintained by OJP. OJP provided outreach and training to all grantees through regional trainings, webinars, and conference calls, and continues to monitor compliance with the reporting of performance measures.

<sup>11)</sup> Office of the Inspector General, Review of the Edward Byrne Memorial Justice Assistance Grant Program, Recovery Act Formula Awards Administered by the Department of Justice’s Office of Justice Programs, December 2009, at p. 2.

<sup>12)</sup> *Id.* at 5-6.

<sup>13)</sup> *Id.* at 6.

For FY 2010, all JAG grantees will be required to report on standard performance measures listed in the PMT, but will not be required to include any additional performance measures. If FY 2010 JAG recipients do not timely report data for the required performance measures, they may be subject to remedial action, such as withholding of grant funds, non-certification of new awards, or designation as high risk.

- b. **In reference to COPS grants, the Office of the Inspector General's April 1, 2009 – September 30, 2009 Semiannual Report also noted, “we continued to find the use of grant funds that were not supported by documentation or were unallowable based on the terms and conditions of the grant. In addition, we continued to find use of grant funds that were not related to grant expenditures.”<sup>5</sup> Specifically, how has the Justice Department complied with this recommendation? Please provide examples of specific improvements in grant awards as a result of this recommendation.**

**Response:**

The April 1, 2009 – September 30, 2009 Semiannual Report referenced an audit of Team Focus, Inc. (TFI), which identified \$718,443 in questioned costs (of which \$87,795 were related to COPS grants). The COPS Office agreed with the findings and the audit for the COPS Office issue was closed in November of 2009.

Specific actions taken by COPS and TFI to close the audit include:

- TFI updated their Financial Controls and Operating Procedures Manual to properly delineate financial roles and responsibilities;
- TFI submitted additional documentation for draw downs on its COPS grant funding; and
- COPS requested, and TFI repaid \$59,694 in unsupported other direct costs in September 2009.

The COPS Office has a distinguished record of rigorous review and enforcement of its grant terms and conditions. When issues are identified, the COPS Office moves swiftly to remedy them.

**58. Following the June 2009 oversight hearing, you stated in response to my written question regarding President Obama's promise to conduct “an immediate and periodic public inventory of administrative offices and functions and require agency leaders to work together to root out redundancy” that “the Department is committed to identifying savings and efficiencies...Senior leadership of the Department is considering proposals for organizational change that will reduce costs and improve operational effectiveness.” That hearing took place in June 2009, and your responses came in October 2009.**

<sup>5</sup> Office of the Inspector General, Semiannual Report to Congress, April 1, 2009 – September 30, 2009, at p. 13.

- a. **While I am encouraged to know that senior leadership is considering proposals, I want to know what proposals for organizational change were examined. Was a particular proposal ultimately adopted? If so, how have you implemented any proposals for cost-savings and efficiencies in the Department?**

**Response:**

In June 2009, the Attorney General reached out to the Department for ideas to reduce costs and improve efficiency, and the Department's employees responded with many ideas for how the Department could save money and operate better. Twelve savings and efficiency initiatives were identified for immediate implementation and four initiatives required additional review before being phased in during FY 2010. The annual recurring cost savings, once all initiatives are fully implemented, is estimated to be over \$32million. In FY 2010, the Department of Justice has recorded total savings of \$35 million, exceeding its target. The initiatives are predominately in the area of finance and contracts, e.g., consolidating wireless and information technology (IT) contracts; consolidating IT security; and reducing paper consumption.

To institutionalize these efforts, the Department established an Advisory Council for Savings and Efficiencies (SAVE Council) in June 2010. The SAVE Council is comprised of departmental component representatives who direct and oversee an ongoing Departmental effort to work smarter and more efficiently, share good business practices, and save resources including time and taxpayer dollars. The Council will ensure accountability for performance improvements resulting in cost savings, cost avoidance, and streamlined processes across the Department.

- b. **Did any such proposals call for an in-depth review of current grant programs and their effectiveness? Were those results communicated to Congress? If not, why not?**

**Response:**

Not at this time. With the establishment of the Council, this is a potential program area that can be examined.

- c. **Did the Department identify any grant programs that were poorly managed or duplicative and thus in need of elimination? If so, please provide specific examples of such programs. If not, why were none identified?**

**Response:**

No. With the establishment of the Council, this is a potential program area that can be examined.

**59. The President's proposed FY 2011 Budget for the Department of Justice requests \$6.8 billion to activate new prisons and increase correctional staff, a 10% increase from FY 2010. The Budget specifically provides for the activation of 2 new prisons— Berlin, New Hampshire and Thomson, Illinois. Berlin was listed on the Bureau of Prisons' (BOP) construction priority list in its budget justification and was recently completed for activation; however, the Thomson facility is an existing state facility purchased by the BOP and will be upgraded for federal use.**

- a. **Considering that significant funds are set aside in each appropriations cycle for every proposed new facility, and the BOP maintains a detailed construction and modernization/repair schedule, can you explain why both the Berlin facility and the Thomson facility took priority over other facilities listed in the BOP's budget justification?**

**Response:**

The FY 2011 President's Budget Request for the BOP's Salaries and Expenses (S&E operating funds) appropriation is \$6.5 billion. Included in this amount is \$66.879 million to begin activation of USP Thomson, IL; \$28.5 million to begin activation of FCI Berlin, NH; and \$59 million to increase current staffing levels. Activation funding is for staffing, operations, training, supplies, and equipping of a new facility.

The BOP's Buildings and Facilities (B&F) appropriation is a construction account providing for only new construction/acquisition and modernization/repair. Of the \$269.7 million in the FY 2011 President's Budget Request for B&F, \$170 million is for the acquisition and renovation of the Thomson facility. No additional funding for acquisition or new prison construction is requested for any other proposed new facility.

In reviewing the BOP Status of Construction report, Exhibit O in the B&F Congressional justifications, the construction completion date for FCI Berlin is September 2010. FCI McDowell and FCI Mendota have already begun the activation process this year, FY 2010. FCI Berlin is next to be completed; therefore, it is the next project in need of activation funding (S&E operating funds) in FY 2011. Regarding the Thomson facility, since it is an acquisition and renovation versus construction, it can be ready to begin activation in the year of purchase, planned for FY 2011.

The next new construction projects to be completed are the Secure Female FCI Aliceville in September 2011, and USP Yazoo City and FCI Hazelton in the summer or fall of 2012. S&E activation funding will be needed in future years to staff, equip, and operate these facilities. All additional projects listed on the Status of Construction which are not fully funded are listed in priority order, and construction contracts cannot be awarded until B&F new construction funding is provided in future enacted appropriations.

- b. **Were there any other state facilities considered for acquisition? Why or why not? If so, why was Thomson chosen above other facilities available for purchase and upgrade?**

**Response:**

When considering options to expand inmate bed capacity, the BOP's Capacity Planning Committee regularly considers existing state facilities that are available to ensure that the most cost-effective options for capacity expansion are chosen. In earlier years, the only state prisons offered to the BOP for purchase were being exceeded by the states because they were old and obsolete, and the states were moving to newly constructed modern prisons and abandoning the old facilities. In the case of Thomson Correctional Center (TCC), the BOP determined that TCC was suitable to meet the special administrative high security needs of the BOP. The TCC is a modern (constructed in 2001), never-utilized facility, built specifically to house maximum security inmates.

Per OMB's Capital Programming Guide (OMB Circular No. A-11, Part 7), the BOP completed a 300 Capital Asset Plan and Business Case Summary for the Thomson facility. The benefits of acquiring (within one year) and modifying a never-utilized, solidly-built, 1,600 cell high security facility in Thomson, Illinois, for approximately \$170 million outweighed the benefits of constructing a new high security facility for between \$220 and \$300 million in the current market over approximately 3 to 4 years.

- c. **Please provide the details of the cost to acquire the Thomson facility versus the cost of new construction of similar facilities already listed in the BOP's budget justification as at or near completion.**

**Response:**

In reviewing the BOP Status of Construction report, Exhibit O in the B&F Congressional justifications, the cost estimates for all fully funded new construction projects (FCI McDowell, FCI Mendota, FCI Berlin, Secure Female FCI Aliceville, USP Yazoo City, and FCI Hazelton) range from \$215 million to \$276 million. Also, these facilities currently under construction are all smaller and less secure than the Thomson facility and will provide less bed space, so building something similar to the size of Thomson would cost more.

Department of Justice's Grantmaking Components  
 Response to Improving Grant Management and Oversight:  
 Addressing Key Issues Identified by the Office of Inspector General  
 May 2010

Report Section	#	Report Element	Activity	Description
1. Grant Program Development	1.1	Ensure that program objectives are developed in a timely manner to focus the efforts of all participants and to clarify expectations.	Improving the Solicitation Development and Review Process	<p><b>Office of Justice Programs (OJP) Response:</b> OJP maintains an automated solicitation review process. The Office of Audit, Acquisition, and Management (OAM) will continue to monitor and streamline the process to ensure established timelines are met and solicitations are issued in a timely manner. This includes the periodic review and update of the OJP-wide solicitation template to ensure it reflects key elements of the program announcement, such as program purpose, eligibility, performance measures, and solicitation criteria. In FY 2010, the solicitation review process was revised to include an expedited review for reporting solicitations, allowing for solicitations to be processed sooner. In addition, solicitations are now generally posted for a minimum of 45 days to provide adequate time for applicants to identify the funding opportunity and prepare a quality proposal. OJP also ensures that solicitation selection decisions are publicly announced through the OJP web site, bureau and program office websites, Grants.gov, and available interviews, if applicable.</p> <p><b>Community Oriented Policing Services (COPS) Office Response:</b> In accordance with recommended practices, program objectives have already been established and approved by the Office of Management and Budget (OMB) for all COPS Office programs, including the new COPS Hiring Recovery Program (CHRP) to be funded through the American Recovery and Reinvestment Act of 2009. The overall program objective focus is to increase the capacity of law enforcement agencies to improve community policing strategies to enhance their capacity to prevent, solve, and control crime. In addition, COPS-specific program objectives include the creation and preservation of more law enforcement officer jobs.</p> <p><b>Office on Violence Against Women (OVW) Response:</b> OVW's program development practices already meet the standards that OIG requires. OVW ensures that each solicitation it issues is great</p>

				<p>program is well developed and to evaluate the appropriateness of the funding levels for various program activities. These include reviewing the legislative history, if any, clarifying program scope and objectives, consulting with experts in the field, developing policies that are consistent with the legislative intent of that program, monitoring and reaching out to eligible applicants, and developing program specific technical assistance. Before issuing a specific grant solicitation, CDFW reviews for each of these areas the level of risk and that a plan is in place to implement the program within a given fiscal year. We also evaluate the process when updating or restructuring an existing CDFW grant program to meet new legislative requirements.</p> <p>CDFW is currently drafting a Grant Program Development Manual to provide guidance to CDFW staff on developing new grant programs. Several sections are in final draft, and we hope to have the entire manual completed in FY 2011. CDFW does not have awards to providers yet in anticipation of an application.</p>
<p>1. Grant Program Development</p>	<p>1.2</p>	<p>Ensure that each program solicitation has measurable and attainable performance measures to ensure that legislative objectives and program objectives are met</p>	<p>Developing Performance Measures</p>	<p><b>CDFW Response:</b> CDFW has used a business management process to ensure the development and use of performance measures to assess program results. Incorporations are actively being implemented, including establish procedures for developing standard performance measures and writing data, and including the use of a comprehensive catalog of all performance measures used by the program offices. The Office of the Chief Financial Officer (OCFO) also has a performance management team dedicated to developing performance measures, aggregating data, and maintaining the performance measures catalog.</p> <p><b>OCDFW Office Response:</b> Three measurable and objective performance measures specific to the Recovery Act have been created by the OCFO Office and approved by CDFW. These measures – the average community policy capacity of CDFW using Recovery Program grants, the number of jobs created, and the number of jobs preserved – will be measured through quarterly program reports including the number of new urban shelter jobs created yearly.</p>

				<p>presented, as well as through an annual survey that gauges the community policing capacity implementation rating of grantees. After-Disaster Act grants will also include the measure pertaining to increasing the capacity of law enforcement agencies to implement community policing strategies to enhance their capacity to prevent, solve, and control crime. This DHS-approved measure applies to all grant programs.</p> <p><b>DHW Response:</b> DHW has identified detailed performance measures for each of its grant programs. These measures are included in DHW grant program solicitations and are obtained through grantee progress reports. All DHW grant program solicitations include Government Performance and Results Act (GPRA) measures. Program solicitations also include a list for applicants to address samples of the progress report forms that grantees must complete during the life of the grant. These include annual progress reports for DHS discretionary programs and annual progress reports for DHS formula grants and independently collect data regarding program measures for each of DHW grant programs. Although there are some similarities across DHW grant forms, DHW operates a <i>best-of-award</i> of form. Analyzing these forms based on the goals and objectives of the individual grant programs.</p>
2. Grant Applications	2.1	Establish and publish an internet site where grantees can obtain questions and receive answers within 1 business day, if it is	Technical Assistance	<p><b>DJP Response:</b> DJP maintains a dedicated toll-free number to offer real-time support on general requirements for receiving funds, consistent with the Grants Management System (GMS), and maintains in-person offices regarding DJP grant programs. GMS is a web-based, data-driven application that provides end to end support for the application, award, management, and cash of grants for DJP, DHW, and the Department of Homeland Security's Federal Emergency Management Agency, Grants Program Directorate.</p> <p>Recipients of DJP funding can submit questions about payments or any other financial matters to the OIGPO Customer Service Center through a toll-free phone number or by e-mail at <a href="mailto:ask.oig@oigpo.dhs.gov">ask.oig@oigpo.dhs.gov</a>. Program Office Points of Contact, Email feedback refers collect if appropriate.</p>



	<p>telephone hotline to speak with a grant advisor.</p>	<p>OJP staff for programmatic questions. Program office points of contact and phone numbers are provided on the cover page of each program announcement for project-specific inquiries. For Recovery Act grant applications, many offices created designated mailboxes or hotline numbers for grantees with an established response time of 1 business day. Program offices will continue to convene conference calls with grantees and stakeholders with the participation of representatives from the OJP Office of General Counsel, OCFD, and OAAM to answer legal, financial, and grant management questions. OJP leadership will continue to encourage this practice for new and complex programs, as well as for those programs under which a large number of applications will be submitted.</p> <p><b>COPS Office Response:</b> The COPS Office maintains a highly developed Internet site through which applicants have been able to submit questions (and receive answers via e-mail), review categories of frequently asked questions, listen to a "podcast" pertaining to CHRP funding, and download program materials for use during the on-line application process. COPS also maintains an in-house call center for law enforcement agencies to contact for assistance with both grant application and award maintenance questions; more complex grant matters are immediately transferred to Grant Program Specialists for resolution. In fact, during the solicitation period for CHRP (March 16 – April 14, 2009), COPS received and responded to more than 18,200 calls and 4,300 e-mails through the call center and website.</p> <p><b>OVW Response:</b> OVW maintains public e-mail accounts for each of its grant programs. OVW publishes the addresses for these accounts in its program solicitations, and potential applicants are advised to submit questions by e-mail to these accounts. In the past, each grant program unit within OVW established its own protocol for responding to e-mail inquiries from potential applicants. Due to current staffing limitation and the high volume of inquiries, OVW continues to work to improve its response time. With our anticipated staffing increases in FY 2011, OVW will address this issue.</p>
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			<p>Although OVW does not operate a hotline for potential applicants, OVW offers its main phone number in each program solicitation and suggests that potential applicants call if they have questions or concerns about the solicitation or application requirements. OVW's receptionist answers all applicant calls and routes them to an OVW Grant Program Specialist who has expertise in the program requirements. On average 1/3 of each program's applicants are applying for supplemental/continuation funding. These applicants routinely address their questions to their assigned OVW program specialist. In addition, OVW identifies an OVW Grant Program Specialist as the point of contact for each OVW grant program solicitation.</p> <p>At present, OVW does not have sufficient staffing to establish a dedicated toll-free hotline to respond to applicant inquiries about its solicitations. OVW will continue, however, to encourage applicants to submit their questions by e-mail to the public e-mail addresses included in each program solicitation. OVW also will continue to route applicants who call to one of the Grant Program Specialists from the unit that issued the relevant solicitation.</p> <p>In addition to responding to applicant e-mails and calls, OVW provides more formal pre-application venues for potential applicants to new programs or programs that draw a less-sophisticated pool of applicants. Starting in FY 2007, OVW's Grants to Indian Tribal Governments Program hosted a series of pre-application conference calls to offer potential applicants an opportunity to hear from OVW staff about the program and the application requirements. Callers were given an opportunity to ask questions about the requirements and to discuss whether specific activities would be allowable under the program. Each of the calls was scripted and the number of participants was limited to ensure that all callers received consistent information and had ample opportunity to ask questions.</p> <p>Members of the Tribal Unit recorded questions posed by participants that they could not answer during the calls without consulting with OVW's attorneys. After obtaining the answers, Unit members e-mailed</p>
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				<p>the question and OVW's response to all teleconference participants. Staff also encouraged participants to e-mail or call Tribal Unit members directly if they had further questions. OVW staff also participated in pre-application webinars designed to provide information and answer questions related to the DOJ Consolidated Tribal Assistance Solicitation. Since then, the Office has held pre-application conference calls for several other grant programs, including the FY 2009 Culturally and Linguistically Specific Services Program and the Recovery Act Transitional Housing Program. In FY 2010 seven additional programs held pre-application calls. During these calls, participants were given the name, e-mail address, and direct phone number of a member of OVW's staff who could answer their follow-up questions. In addition, to accommodate the overwhelming demand for Recovery Act information, OVW added the script that staff used for the Recovery Act Transitional Housing calls, as well as a fact sheet about the grant program, to the OVW website. We will continue to use pre-application calls and outreach, particularly as we launch new grant programs with new groups of eligible grantees. For example, the Culturally and Linguistically Specific Services Program supports community-based, grassroots programs that serve specific racial, ethnic, and other cultural groups who have never before applied for OVW funds. Pre-application calls provided a vehicle for us to answer their many questions about the application process and the solicitation. Pre-application calls were also used very successfully as an outreach tool to encourage new applicants to apply for Recovery Act monies.</p>
2. Grant Applications	2.2	Expand opportunities for e-training for grantees, such as tutorials and grant do's and don'ts.	Expanded E-Training for Grantees	<p><b>OJP Response:</b> OJP provides grantees with customized, intensive training to ensure they are managing their grants effectively. OAAM has recently expanded on-line training opportunities for grantees.</p> <p><b>Current Training:</b>  <b>GMS On-line Training Tool:</b> The GMS On-Line Training Tool provides step-by-step instructions to complete various functions within GMS, such as grant adjustment notices, progress reporting, and closeouts, as well as guidance on administrative policies.</p>

			<p><i>Post-award Grant Administration.</i> A training presentation on post-award grant management is available to grantees on the OJP funding resources webpage.</p> <p><i>Recovery Act Requirements and Reporting grantee training.</i> OJP, in cooperation with the OVW and COPS Office, has hosted three webinars on Recovery Act requirements and implementing guidance. Key areas covered include calculating and reporting jobs data, recipient reporting requirements, and using the central reporting solution, <a href="http://www.FederalReporting.gov">www.FederalReporting.gov</a>. These webinars remain accessible to grantees through the OJP Recovery Act Website.</p> <p><i>Grants 101:</i> A step-by-step on-line tutorial on the grant process designed to help prospective grantees prepare more effective applications. The tutorial includes an overview of the OJP grant process for both competitive and noncompetitive programs; description of the application review process; and expert tips to help applicants find new funding opportunities and write strong proposals.</p> <p><b>Forthcoming Training:</b></p> <p><i>How to Write a Quality Application.</i> This training is an on-line course that provides instructions, job aids, and expert advice on the planning, researching, and writing of a grant application.</p> <p><b>COPS Office Response:</b> In preparation for the COPS Hiring Recovery Program, COPS has awarded funding to establish an interactive CHRP "eLearn Center" to deliver both grants management training and community policing training to grantee agencies. At their own convenience and at far less cost than instructor-led training, CHRP grantees will have access to information and resources on-line that will help them effectively administer their grant and employ sound community policing practices. The COPS website also provides substantial guidance to grantees regarding proper award maintenance, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. <b>Going</b></p>
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				<p>forward, the COPS website will also serve as a portal to access the on-line training being created for CHRP grantees, and which is likely to be expanded to future grantees of other COPS programs.</p> <p><b>OVW Response:</b> OVW does not currently have the capacity to offer its grantees programmatic e-learning opportunities. However, OVW joined the OJP and the COPS Office in conducting a series of web-based seminars for recipients of the Recovery Act funds. Recovery Act grantees who were unable to participate in the live seminars were able to access video recordings on OVW's website. OVW is working with the Department's Office of Public Affairs to update our website, and we hope to provide more e-learning opportunities in the future. OVW will continue to work with OJP and COPS to identify areas for e-learning on which we can collaborate.</p> <p>OVW grantees do have access to on-line training for OJP's Grants Management System (GMS). OVW currently has a contractual agreement with OJP to use GMS, a web-based, data-driven application that provides end-to-end support for the application, award, management, and audit of OVW grants. GMS includes an On-line Training Tool that provides step-by-step instructions to complete various grants administration functions within GMS.</p>
2. Grant Applications	2.3	Use the application process to identify red flags for granting agencies to follow-up on prior to making awards.	Risk Assessment and Application Analysis	<p>OJP, OVW, COPS Office, and the Associate Attorney General's Office are currently working together to develop DOJ-wide procedures for managing the Department's high-risk grantee program. The OJP/OAAM will maintain the consolidated listing of all DOJ high-risk grantees, and will determine special conditions to be applied to new DOJ grants awarded to high-risk grantees.</p> <p><b>OJP Response:</b> In September 2007, OJP created a high-risk grantee designation policy to ensure that program offices address a grantee's risk status during the grant award process, consistent with government wide regulations concerning high risk grantees. OJP deems grantees to be high-risk if the grantee: 1) has a history of unsatisfactory</p>

			<p>performance; 2) is not financially stable; 3) has a financial management system which does not meet the government-wide established standards; 4) has not conformed to terms and conditions of previous awards; 5) has open Office of the Inspector General (OIG) audit report recommendations that have been open more than one year; 6) is subject to an OIG investigation where grant non-compliance issues were noted that require corrective Response; or 7) is otherwise not responsible. Beginning in FY 2009, additional special conditions are imposed on high risk grantees, including but not limited to, increased monitoring, required training, and prohibitions on drawing down funds until requirements have been met.</p> <p>Prior to awarding grants but once tentative grant decisions have been made, OJP's OCFO conducts a fiscal integrity and financial capability review before approving an applicant's budget. This review includes a review of the applicant's past performance with OJP (if applicable), including compliance with quarterly financial and annual audit reporting requirements, cash management, and resolution of monitoring findings and recommendations. New applicants which are not state, local, or tribal governments are required to submit a financial capability questionnaire signed by an independent CPA and audited financial statements. OCFO also queries the Dun and Bradstreet database to obtain information on the applicant's credit worthiness, bankruptcies, etc. In some instances, other federal agencies are contacted for information regarding past performance.</p> <p><b>Program Office Review:</b> During the application review process, program offices review prior grantee performance as it can be a major factor in consideration for future funding.</p> <p><b>COPS Office Response:</b> For the COPS Hiring Recovery Program, once all applications had been submitted, COPS staff immediately reviewed the data they contained. In some cases, COPS called applicant agencies to verify information provided in their applications. In total, the COPS Office contacted more than 1,700 agencies to validate their data, and reviewed more than 275,000 individual data</p>
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				<p>points. This data process, while time-consuming, was crucial to ensuring that all applicants were properly evaluated based on accurate and reliable economic, crime, and community policing data. Once the initial data were verified, the next phase of the review process included in-depth budget reviews and evaluations of the retention requirement information and other aspects of the applications. Finally, in preparing the CHRP award list, COPS looked at the total number of sworn positions being requested by each agency to determine how to best allocate the funds available.</p> <p><b>OJV Response:</b> OVW has recently established an in-house Grants Financial Management Division (GFMD) and is in the process of staffing that division. While the OVW GFMD is developed, we will continue to contract with OJP for certain financial management services and support. Once established, OVW's GFMD staff will review all applicant budgets and ensure that potential grantees are not delinquent on any A-133 audits; do not appear in GSA's Excluded Parties List System; and are current on all financial reports.</p> <p>GFMD will then conduct a financial review of the budget and supporting documentation submitted by applicants to assess the reasonableness, allowability, and appropriateness of proposed costs for project activities. They will determine the adequacy of the applicant's accounting system and operations to ensure that Federal funds, if awarded, will be managed and expended in a judicious manner.</p> <p>Based on OIG's recommendations, OVW has revised its program solicitations to require all applicants to provide detailed descriptions of the following: (1) mechanism for segregation of grant funds; (2) written accounting procedures; (3) existing inventory systems; (4) accounting mechanisms for tracking all grant draw downs and expenditures; (5) tools to assess risk and processes to help identify and mitigate potential risks; and (6) records retention policy.</p>
2. Grant Applications	2.4	Include verification in	Grantee Time and Attendance	<b>OJP Response:</b> As a condition of receiving an award and stipulated in the OJP Financial Guide, recipients must agree to establish and

		the application process that timesheets for all personnel are maintained to document hours worked for grant and non-grant related activities.	Policies and Procedures	<p>maintain adequate accounting systems and financial records to accurately account for funds awarded to them, and ensure that an adequate system exists for each of its subrecipients.</p> <p>For grantees that have received OIG audit findings relating to the implementation of time and attendance policies and procedures, OJP imposes a special condition on new awards requiring submission of time/attendance policies and procedures and documentation stating how grant-related payroll costs will be allocated. The recipient may not obligate, expend, or draw down funds under this award until the OJP program office has received, and OJP has reviewed and approved the time/attendance policies and procedures.</p> <p><b>COPS Office Response:</b> In the CHRP application guide, agencies were advised that they must have an accounting system in place that would be able to track all grant expenditures if awarded funding. Awarded agencies were instructed in the CHRP Grant Owner's Manual that all grant expenditures (salary and fringe benefit payments) must be based on payroll records supported by time and attendance records or their equivalent. [All such financial records must be maintained for at least three years from the date that the COPS Office officially closes the grant.]</p> <p><b>OVW Response:</b> FY 2011, all OVW solicitations will require that applicants submit information pertaining to their time and attendance policies as part of their proposal for funding. As noted above, OVW is in the process of developing in-house grants financial management services. This new division will be responsible for providing grants financial management training at OVW grantee orientations starting in FY 2011. OVW's GFMD will ensure that time and attendance issues are included in these trainings.</p>
2. Grant Applications	2.5	Enhance pre-award screening to ensure only	Pre-award Screening	<p><b>OJP Response:</b> As outlined in the OJP Grant Manager's Manual, program offices are responsible for conducting a programmatic review of applications prior to the application being submitted for peer review. Program office staff review the application to make sure that proposed</p>



	<p>applications that meet solicitation objectives and requirements are sent to peer reviewers.</p>	<p>activities are reasonable, measurable, and achievable, as well as consistent with program or legislative requirements and agency objectives. Since 2008, OAAM has coordinated an OJP-wide peer review process to ensure peer reviews are rigorous, cost-effective, consistent, and transparent across all OJP program offices. In July 2008, OJP issued an OJP-wide peer review policy and procedures to further improve the peer review process by establishing a sound methodology for scoring applications and common peer review forms. In March 2009, the peer review policy was revised to promote the independence of the OJP science agencies. In February 2010, based on an assessment of its peer review process, OJP implemented changes to its scoring methodology that integrates a banding process.</p> <p><b>COPS Office Response:</b> The peer review process will not apply to funds awarded under ARRA. In FY2009, the only COPS program to utilize a peer review process will be the Child Sexual Predator Program (CSPP). For CSPP, only those applications which meet solicitation objectives and requirements will be sent to peer reviewers.</p> <p><b>OVW Response:</b> OVW already engages in a careful internal review process that meets this standard. As specified in each of OVW's grant program solicitations, all applications submitted to OVW undergo an initial review by an OVW Grant Program Specialist. The Specialist reviews the application using an internal review scoring form based on the objective criteria included in all OVW grant program solicitations. This internal review identifies whether an application is eligible and complete, ensures that activities proposed in the application are within the statutory scope of the grant award program and do not compromise victim safety, and identifies potential problems or issues that may need to be addressed if the application is selected for funding consideration. Applications that are ineligible, substantially incomplete, or do not meet solicitation requirements will not be forwarded to peer review.</p> <p>OVW also uses pre-award screening to assess whether to continue to fund current grantees. OVW requires its current grantees to submit a Status of the Current Project section if they are seeking continuation.</p>
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				<p>funding from the same OVW grant program. The Grant Program Specialist reviews this section, as well as the grantee's programmatic and financial reports, on-site monitoring reports, and other documentation, to ensure that the grantee has made good progress towards implementing the goals and objectives of its current OVW-funded project, has not spent grant funds on unallowable costs, and has otherwise satisfied each of the special conditions of its current award.</p> <p>In FY 2010 enhanced its Grant Assessment Tool (GAT) to improve the internal application review process. The GAT enhancements will make the process of identifying compliance issues with current grantees faster and more efficient by enabling Program Specialists to access a succinct and comprehensive overview of the grantee's performance on each of its current OVW grant awards. (Current OVW grantees are not required to submit a Status of the Current Project section if they are seeking new funding from a different OVW grant program; the GAT can query the grant award status of any current grantee.) This will significantly improve OVW's intra-office coordination of the review of proposals that have been submitted by one applicant to multiple OVW grant award programs.</p>
2. Grant Applications	2.6	Establish criteria to gauge the risk associated with new grantees. For new grantees assessed to be high-risk, agencies should conduct background checks.	Timely Risk Assessment	<p><b>OJP Response:</b> OJP uses a Grant Assessment Tool (GAT) to rate individual grants against a set of criteria to determine monitoring priority. New grantee status is a factor in this risk calculation. In FY 2010, OAAM established a process to run quarterly reports on Recovery Act grantees, many of which are new grantees, to review performance metrics, such as reporting compliance and drawdown activity, to identify potential at-risk grantees in real time. OAAM works with the program offices to conduct the necessary follow-up with the grantees.</p> <p>OJP gathers and assesses information on new grantees during the application review process. The OCFO conducts a fiscal integrity and financial capability review before approving an applicant's budget. New applicants which are not state, local, or tribal governments are required</p>

			<p>to submit a financial capability questionnaire signed by an independent CPA and audited financial statements. OCFO also queries the Dun and Bradstreet database to obtain information on the applicant's credit worthiness, bankruptcies, etc. In some instances, other federal agencies are contacted for information regarding past performance.</p> <p><b>COPS Office Response:</b> The COPS Office determined that no additional risk would be associated with awarding grants to agencies that had never before received a COPS grant. However, first-time COPS grantees, as well as those grantees which have not received COPS awards for some time, will be assessed with higher point values within the risk assessment model established for monitoring grantees.</p> <p><b>OVW Response:</b> OVW does not presently have the capacity to perform extensive background investigations on each of its applicants. As specified in all OVW grant program solicitations, OVW currently considers whether or not an applicant has complied with the OMB Circular A-133 Single Audit submission requirement that is a standard special condition on every Department of Justice grant award. (Legal entities, such as state and tribal governments, and nonprofit organizations, who are subject to OMB Circular A-133 are required to conduct an independent audit if they have expended \$500,000 or more in Federal funds during the entity's most recent fiscal year. The results of that audit must be submitted to the Federal Audit Clearinghouse within nine months of the conclusion of the entity's fiscal year.) Starting in FY 2010 OVW's CFMD will identify if an applicant is delinquent on its required Single Audit. To improve coordination, DOJ established a Grants Challenges Working Group with representatives from OVW, OJP, and COPS. This working group meets bi-weekly and serves as a forum for cross-cutting grant issues.</p> <p>OVW also receives monthly updates from OAAM on grantees that have been designated as high-risk. OVW uses OAAM's monthly list to identify high-risk applicants during the internal review process. The protocol that OVW has established with OAAM is that OAAM provides OVW with a list of special conditions that must be added to any award</p>
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				<p>that OVW makes to a grantee on the high risk list. OVW adds these mandatory special conditions during its award-making process. The aforementioned meetings between OVW, OJP, and COPS are streamlining this process.</p> <p>As part of OVW's Recovery Act efforts, OVW developed its own high-risk assessment tool. In addition, OVW staff involved with reviewing Recovery Act grant applications used the online National Federal Audit Clearinghouse database that is maintained by the U.S. Department of Commerce to check the status of each applicant's Single Audit submission status. OVW plans to continue to enhance its high-risk evaluation process by incorporating a check of the Excluded Parties List that is maintained online by the General Services Administration.</p>
2. Grant Applications	2.7	Review open OIG Audit and Inspections reports to determine whether grantee progress in implementing corrective action is sufficient to award additional grants.	Timely Corrective Action on Audit Findings	<p><b>OJP Response:</b> The OJP Risk Assessment Program includes a review of applicants' risk status during the grant award process. All grantees with open audit recommendations for over one year are placed on the high risk designation list. If an award is made, special conditions are imposed related to the particular audit findings. OJP also tracks grantees with audit reports open for less than one year to closely monitor their progress in establishing and implementing corrective actions or addressing questioned costs.</p> <p><b>COPS Office Response:</b> Our vetting process provides an opportunity for various COPS divisions and certain relevant U.S. Department of Justice (DOJ) components to identify entities to which it may be inappropriate or inadvisable to award a grant. As part of the vetting process, a vetting list is generated of applicants eligible to receive funding under a specific grant program based on a review of agency applications. This vetting list is distributed pre-announcement to relevant points of contact within the COPS Office, including the COPS Audit Liaison Division (ALD). COPS ALD provides feedback to the grant-making division regarding whether grantee progress in implementing corrective action for any open audit reports is sufficient to award additional grants.</p>

				<p><b>OVW Response:</b> OVW currently relies on OJP/OAAM to identify grantees as high-risk and to maintain a list of grantees with open OIG audits. Some of the grantees who have open audits from OIG are included on OJP/OAAM's high-risk list. OJP also maintains another list of grantees who have not been identified as high-risk, but who have an open OIG audit. OVW consults both lists during its application review process.</p> <p>OVW has an Audit Liaison to support OVW's efforts to more effectively and efficiently work with grantees to resolve findings from OIG Audit and investigative reports. The Liaison will also be able to quickly provide OVW Grant Program Specialists with an update on the status of the grantee's efforts to resolve audit findings.</p>
2. Grant Applications	2.8	Ensure that no ongoing OIG or other criminal investigations are in process before deciding to make awards.	OIG Coordination	<p><b>OJP Response:</b> OJP meets quarterly with the OIG Fraud Detection Office to discuss on-going criminal investigations of DOJ grant recipients. Based on the nature of the investigation, and the grantee's high risk status, OJP determines whether to issue new awards or adjust grant conditions to account for identified issues.</p> <p><b>COPS Office Response:</b> As mentioned above, our vetting process provides an opportunity for various COPS divisions and certain relevant U.S. DOJ components to identify entities to which it may be inappropriate or inadvisable to award a grant. As part of the vetting process, a vetting list is generated of applicants eligible to receive funding under a specific grant program based on a review of agency applications. This vetting list is distributed pre-announcement to relevant points of contact within the COPS Office and within the following DOJ components: U.S. Attorney's Offices; the Civil Rights Division; OIG Investigations; the OJP Office for Civil Rights; the Public Integrity Section; and the Criminal Division. In addition to a description of the program being vetted, the COPS Office provides guidance to these components in the memorandum that accompanies every vetting list instructing reviewers to provide reasons why it would be inadvisable or inappropriate to award an applicant on the list. This direction is</p>

				<p>purposefully kept hidden, in order to give reviewers complete discretion to refuse CUPB of any reason why funding should be withheld from any agency.</p> <p><b>CWV Response:</b> The CWV Audit Liaison and Associate Directors work with OIG and OIG/AMM to identify whether applicants recommended for funding are a part of an ongoing OIG or other criminal investigation.</p>
<p><b>3. Award Process</b></p>	<p><b>3.1</b></p>	<p><b>Document key aspects of the award process and maintain files documentation</b></p>	<p><b>Documenting Funding Decisions and Managing Records</b></p>	<p><b>CUP Response:</b> Since May 2005, CUP has implemented a policy issued by the Associate Attorney General requiring OIG grant-making components to maintain documentation to support all discretionary funding recommendations and decisions. Such documentation must clearly explain the choices made, the reasons for the choices, and the policy consideration on which the decisions were based. In March 2008, the CUP Acting Assistant Attorney General issued a memo to continue the practice of documenting all discretionary funding recommendations and decisions. That day, the CUP Liaison and Affairs have maintained records supporting the following decisions. In March 2007, CUP Assistant Attorney General issued a memo regarding the review of all award recommendations and decisions issued under existing recommendation procedures. The CUP also issued policy guidance regarding the program office to fully document all grant award decisions including a description of factors that were used to make decisions regarding which applicants to recommend for funding. All grant award documentation is maintained in the OIG's official files. Financial documents are placed on program office web sites. In addition, beginning in FY 2008, all of CUP's award decisions are posted on the CUP website, including the text of award, the request, and the award amount.</p> <p><b>The OIG is the source for the official grant file and includes available documentation for all actions taken during the life of the grant.</b></p> <p><b>COPS Office Response:</b> COPS independently audits the numbers of awards given to various groups in compliance with Senate Process (multiple grants effort) - began in FY2005 and ongoing since that time.</p>

with the goal of ensuring continued process improvement by analyzing current business processes, identifying weaknesses, and taking proactive steps to implement solutions. This effort has been integral to CDM's success in ensuring that proper internal controls are in place within the grants management process as required by Office of Management and Enterprise (OME) guidelines, and that subsequent and improvement work has been made and be both robust and responsive to changes on the OME OIG's beyond the robust and maintenance of funding as he provided through the Recovery Act. As part of the OME procedure, all aspects of the above process are tracked for quality, and documentation for every step of the process will be maintained appropriately.

**OME Response:** OME already has procedures in place to ensure that these and other aspects of the grant process are well documented.

**OME Comment:** Although OME manages two federal grant programs, the vast majority of OME's income are made on a competitive basis. OME's competitive grant programs are the **Child Abuse and Neglect Program**, **Child Abuse Program**, and the **Child Abuse and Neglect Program**. In addition, grants under OME's **Child Abuse and Neglect Program** and **Child Abuse and Neglect Program** are made to conditions specified by the U.S. Department of Health and Human Services and the Centers for Disease Control. For these awards, the OME system was developed as part of the federal grant program, and program funding justification letters include these awards. Currently, OME does not have competitive grants under the **Child Abuse and Neglect Program** and **Child Abuse and Neglect Program**. OME is currently in the process of developing a new system to manage these awards. OME has developed a grant management system that is consistent with federal guidelines regarding grant management. OME has developed a grant management system that is consistent with federal guidelines regarding grant management, including other awards, including federal grants awards.

			<p>addressing police officers who testify, it may result in a qualified agency or organization and request that it submit a contract proposal for consideration by the Director. OVA documents all key aspects of the award process which has competitive technical evaluation criteria set forth.</p> <p>(C) Peer Review Committee: OVA has contracted with Lockheed Martin Corporation to provide technical support for OVA's peer review process. During peer review, members of the committee are responsible for using and scoring applications within OVA's guidelines. Each peer review panel is supported by a recorder who records the panel's discussion. The recorder captures the reviewers' consensus comments for each application and provides a summary that is used to all interested applicants. Comments and consensus comments reports are critical to the peer review process because they assist program staff in making funding recommendations to the Director and are also used to provide constructive feedback to the applicants.</p> <p>(D) Selection from Peer Review Scores: OVA has procedures in place to document the basis for award recommendations and selection. This includes the review scores, comments by each reviewer, the program's distribution of scores, and performance ratings of specific areas. OVA documents and publishes the basis for all funding recommendations in a comprehensive report available to all interested parties. Each of these comprehensive reports are classified as public information and include the funding recommendation memorandum, which includes a justification for the recommendation and a list of all off-score funding recommendations, including those that require further review. A list of all applications received including those that require further review is not provided to peer reviewers and the reasons why the applications are not recommended for funding and the reasons why the applications are recommended for funding are not recommended for funding.</p> <p>(E) Conflict of Interest: OVA has procedures in place to identify</p>
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				<p>identify and document conflicts of interest among agency staff and external experts involved in their reviews. All GPM Program Specialists are required annually to complete the Electronic Financial Disclosure Form (EFD-100a), which are reviewed by supervisors and the Office's Deputy Designated Agency Chief Official for potential conflicts. When reviewing applications, GPM staff are also required to identify the college and/or university from which they graduated or any other institutions of education with which they have an affiliation. During the peer review process, GPM's contract manager must review to identify all potential conflicts of interest by completing a conflict form.</p>
3. Award Process	3.2	Establish a DCU-wide procedure for awarding grants to ensure equitable and high-risk grants prior to awarding funds.	Managing a High-Risk Grants List	<p>DOJ Response: The DOJ-wide Grants Management Challenge Workshop is a newly created interagency initiative established by the Office of the Associate Attorney General. This group, led by the Deputy Associate Attorney General and consisting of representatives from OIG, OIG, and OIG, meets bi-weekly to share information and develop coordination procedures and protocols to a wide variety of grant administration and management issues, including high-risk grants. The workshop is currently developing DCU-wide procedures for managing the Department's highest risk grant portfolio. The OIG/DOJ will review the coordination of all DOJ high-risk grants, and will determine special conditions to be applied to new DOJ grants awarded to high-risk grantees.</p>
3. Award Process	3.3	Creating separate accounts for high-risk grants to ensure that funds are used for their intended purpose.	High-Risk Grants Coordination	<p>OIG Response: Beginning in FY 2008, high-risk grantees who were found to have committed DOJ grant funds under final other significant accountability-related concerns, as a condition of their award, are required to maintain a separate bank account to be used solely for transactions and expenditures related to that award. The contract manager will require request of draw down funds from the account and OIG has reviewed the bank account information submitted.</p> <p>OIG's Office Response: As detailed in the OIG Grant Office's Manual, grant recipients agree to maintain accounting systems and records that adequately track, summarize, and report on all funds from</p>

				<p>the Recovery Act award (including officer time, salaries and fringe benefits paid, and the number of jobs created and jobs preserved), separate from all other funds (including other CDFIs and federal grants awarded for the same or similar purposes).</p> <p><b>CDFI Response:</b> CDFI proposes adding the following special condition on all awards made in FY 2010 to regular grantees, regardless of the particular issues related to any high-risk designation: "The recipient agrees to maintain a separate bank account to be used solely for expenditures and expenditures related to the award. Documentation of the establishment of the separate bank account must be provided to CDFI. The recipient may not obligate, expend or draw down funds under this award until CDFI has reviewed and approved the bank account information submitted."</p>
<p><b>3. Award Process</b></p>	<p>3.4</p>	<p>Creating separate award processes to determine a grantee's progress on implementing the requirements of their grant below awarding additional grants to eligible recipients</p>	<p><b>Price-Targeted Performance Review</b></p>	<p><b>CDFI Response:</b> CDFI has a rigorous application screening process to ensure only quality performance can be bid for a major factor in consideration for future funding. During the application review process, program officers review price/grantee performance as a factor for a major factor in consideration for future funding.</p> <p><b>CDFI/CDFR Response:</b> As indicated by the CDFI, CDFR reviewed grantee progress on the implementation of prior grants before awarding CDFR funding.</p> <p><b>CDFI Response:</b> As described in the Awards section above, CDFI has a rigorous application screening process in place to review price/grantee performance. When CDFI is reviewing applications for funding, CDFI could be required for review of any additional funding provided to measure the progress of the current project. This helps to determine if the project can be made stronger with additional funding. CDFI determines if additional funding can enhance the current project or if it is not needed. CDFI also conducts a data review on grants applying for additional funding. Information collected as part of the data review includes whether progress reports submitted by the applicant demonstrate the effectiveness of the current project, whether the</p>

<p>I. Award Process</p>	<p>N.5</p>	<p>Creating agencies shall include any/number of items consistent in quality with budget.</p>	<p>Information throughout Project Event Documents and City Pages Training for Greenbook</p>	<p>greenbook has suffered in programmatic response and OMB must reporting requirements, and whether the grant funds have been spent in a timely manner.</p> <p><b>DUP Response:</b> DUP requires a special condition on all awards requiring grantees to report potential fraud, waste, and abuse, and other concerns. The contractor agrees that the response will comply with the DCA/OCG any available evidence from a principal investigator, agent, contractor, subcontractor, or other person has either (1) awarded a false claim for funds under the Public Contract Act or (2) awarded a contract in that violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar prohibited involving funds.</p> <p>DUP works with the OIG to provide grant fund training to grantees of high-risk/complex transactions or other appropriate means in FY 2010. DCA/OCG is required to release or review post-award training for grantees, which will include information on preventing and providing assistance. OIG/OIG provides grant fund training as part of their regular business training sessions.</p> <p>The DCA/OCG website provides information on how to report fraud, waste, and abuse to the grantees and the public and provides links to the DCA/OCG website.</p> <p><b>DOPE DCA/OCG Response:</b> Both the DCA/OCG application (as provided to all applicants) and the DCA/OCG award document and Grant Owner's Manual (which is every grantee's award package) include information on fraud detection and instructions for how to report potential fraud, waste, abuse, and other concerns. Public information will be included as part of the DCA/OCG program website on how to report training.</p> <p><b>OCM Response:</b> OCM requires a special condition on all awards requiring grantees to . . . previously cited in the DCA/OCG any available evidence that a principal investigator, agent, contractor, subcontractor, or other person has either (1) awarded a false claim for</p>
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				<p>grant funds under the False Claims Act, or 2) presented a credible risk of identification of loss pertaining to fiscal, position of interest, territory, priority, or service independent of the grant funds. This condition also applies to any subcontractors. Potential fraud, waste, abuse, or mismanagement should be reported to the OIG by email: Office of the Inspector General, U.S. Department of Justice, Investigations Division, 1225 Pennsylvania Avenue, N.W., Room 5702, Washington, DC 20545. E-mail: oig@oig.dhs.gov. For more information on OIG's mission and activities, visit our website at <a href="http://www.oig.dhs.gov">www.oig.dhs.gov</a>.</p> <p>OIG staff nation presentations regarding fiscal operations, waste, and abuse of all of OIG's new grantee operations, which are mandatory for new grantees to attend. OIG also has similar OIG presentations at its annual DFCP Administrators meetings, which are attended by officials from the 16 States and Territories that administer funding under the DFCP Formula Program. OIG will include OIG presentations at all conferences directed at grantees and will ensure that grantee questions about OIG grantee operations or an actual issue or claim come to a final resolution on this issue. OIG will coordinate with OIG and OIG's efforts for all these agencies are posting OIG based information on our website and placing OIG letters in award packages. Lastly, OIG will also place OIG letters in part of their financial training materials. OIG grantees are encouraged to attend some regional financial training sessions.</p>
<p>I. Award Process</p>	<p>NS</p>	<p>Designate "Contract" work orders or issue to subcontractors or grantees.</p>	<p>Numbering Methodologies For all Department or its Recipients</p>	<p>OIG Response: OIG is conducting research on "contract" methodologies and how to "numbering" and how these methodologies affect a contractor's ability to manage grant funds. Current research shows that more states have been over processes or criteria for making these determinations, and it is not always clear that these determinations will be defined for more or all circumstances, or that they require the same response from OIG. OIG may modify its regional policy and practices based on the continued research and analysis of these issues.</p>

				<p><b>DDP's Office Response:</b> Given the fiscal distress experienced by many state, local, and tribal law enforcement agencies, the Recovery Act requires that C-PTF funds be allocated to procure and promote economic recovery, to assist those most affected by the recession, and to assist state and local government budgets in order to maintain and invest resources in essential services and infrastructure, state and local law enforcement. In making a variety of fiscal health questions, the Recovery Act focused on getting an overall view on position of the state's budget being submitted by agencies through reports and available resources that all agencies, business communities to target, state, local, and tribal report. Evaluation of fiscal distress was therefore not a factor in categorizing agencies as high-risk.</p> <p><b>DDP's Response:</b> An assessment of the C-PTF's impact is responsible for DDP's review of state, local, and tribal law enforcement agencies. DDP is currently conducting research on "disaster" participation and those in "recovery," and how these designations affect a jurisdiction's ability to manage your state. Current research shows that most states have been very successful in making these designations, and it is not always clear that these designations will be defined the same in all circumstances, or that they receive the same response from other. DDP may result in high-risk policy based on the continued research and analysis of these designations.</p>
4. Monitoring	4.1	Establish a risk assessment model for monitoring grants	Determining Priority of Grants Based on Risk Factors	<p><b>DDP Response:</b> DDP program offices use the Grant Assessment Tool to systematically and objectively assess risk associated with grants and grantees. The monitoring assessment process involves studying a monitoring priority level to individual grants based on a standard set of risk indicator criteria. The tool enables managers to monitor monitoring activities based on potential compliance and program non-compliance across the DDP program offices. In FY 2010, risk factors related to Recovery Act requirements and objectives were added to the grant assessment tool to identify those Recovery Act grants that in case of an oversight, to identify a risk criteria related to grantees on the DDP high risk for non-compliance.</p> <p><b>DDP's Office Response:</b> DDP will continue to maintain oversight of the</p>

grant monitoring process for OOPS and QIP has begun working with the grant-making component to update and refine the risk assessment matrix and the risk monitoring process related to the grant-making process. OOPS staff will continue to conduct on-site visits, perform office-based grant reviews, and issue citizen complaints regarding grant administration concerns, as well as monitor the timely and accurate incorporation of grant reports through the careful review of programmatic progress reports and grantee submission and modification requests.

**QIP Response:** Over FY 2008, QIP has been engaged in an ongoing initiative to improve grant monitoring. In FY 2008, QIP completed a Monitoring Working Group to update its Monitoring Manual and its QIP Program Specialist and staff working training. During FY 2008, the QIP Monitoring Working Group decided to completely overhaul the Monitoring Manual, delaying its release. The newly revised Monitoring Manual will be released by the end of July and will be used by Program Specialists to monitor FY 2008 monitoring plans and grantee compliance in monitoring grant programs. At the beginning of each fiscal year, Program Specialists are required to submit a monitoring plan to supervisors and be approved. The monitoring plan is a proposed schedule for monitoring site visits to grantees within the 12 month period. Grantees are ranked for on-site monitoring based on a set of priorities: current performance, high-risk activities, and programmatic priorities.

The QIP Grant Assessment Tool (GAT), developed as part of the monitoring upgrade occurring in 2008, was enhanced and rolled out during 2008. QIP uses the GAT which was updated in FY 2008, to monitor and regularly assess grant activities. Using this tool, QIP Program Specialists identify and set monitoring priorities for potentially at-risk grantees based on a standard set of criteria. The GAT also enables QIP to track risk assignments completed by Program Specialists and derive conclusions on which to grantees receiving multiple program awards. All QIP Program Specialists are required to use this tool to perform initial site assessments for all new grants and

				<p>supplemental grant awards. In preparing monitoring plans and conducting site visits, the OAT assigns Program Directors to identify and monitor high-risk grantees. As a result, staff members are more aware of potential risks and better prepared to address grantees during on-site monitoring activities.</p> <p>OAT is currently conducting its monitoring on-site programmatic monitoring of 10% of the active grantees. With additional staff and personnel available, OAT is currently monitoring approximately 10% of the active grantees. OAT is currently monitoring approximately 10% of the active grantees. OAT is currently monitoring approximately 10% of the active grantees. OAT is currently monitoring approximately 10% of the active grantees.</p>
4-Monitoring	4.2	Increase monitoring of grantees and compliance by increasing site visits and reviewing reporting particularly for new grantees.	Monitoring Levels	<p><b>OAT Response:</b> OAT's program offices maintain 21% of open active grant funding through on-site programmatic monitoring with a FY 2009 budgeting approximately \$1.4 million in FY 2009 grant funding.</p> <p>OAT's OCFs conducted financial monitoring for over 400 of grants in FY 2009 representing over \$300 million in FY 2009 grant funding. OCFs conduct financial monitoring reviews of OAT, OAW, and ODFI grantees and provide technical assistance, including on-site direction and policy decisions, to grantees and program offices. The review conducted by OCFs accounts for the adequacy of the grantees' accounting systems and financial record keeping, testing financial transactions, assessing program compliance, reviewing financial management systems of activities, and making recommendations for improvement. OCFs is responsible for following up with grantees to ensure recommended improvements are implemented.</p>

			<p>In May 2008, CIP released an updated monitoring matrix that enables grant managers to communicate the outcomes of site visits to grantees in a timely manner, and has several functional improvements, including a more user-friendly design that grants managers may send reports and letters in their department for review. The ability to track monitoring on a site-visit basis, and not just by individual grant, facilitating resolution and tracking, and a greater emphasis on seeking formal management.</p> <p>Effective in FY 2009, CIP program offices are required to provide on-site monitoring for at least 50% of the number of open action awards, in addition to the statutory requirement of 10% of open action award dollars. Because of its large volume of awards, EPA on-site monitoring will be completed for at least 5% of its action awards.</p> <p>In addition to on-site visits, desk reviews are required on every open action award each fiscal year.</p> <p>In December, FY 2008 annual reporting data using the Grant Agreement Tool, CIP placed greater emphasis on compliance with requirements for programs in FY 2008. CIP will be conducting the Year 1 status of grantees as a milestone for monitoring programs.</p> <p><b>CIP's Office Response:</b> As mentioned above, CIP's staff will continue to conduct on-site visits, perform office-based grant reviews, and review other complaints regarding grant administration concerns. We will continue to timely and appropriate implementation of grant projects through the timely review of proposals, program reports, and grantee performance and monitoring reports. Furthermore, information gathered through grantee quarterly program reports, program reports and compliance monitoring reports will identify all reporting compliance issues that have been identified and implemented within the time frame of CIP's monitoring. CIP's staff will be consistent with higher performance within the risk assessment model described in section 4.1.</p>
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			<p><b>DWR Response:</b> Outside of the Recovery Act initiative, CFW has had a significant increase in new programs that has not had the Staff and Expense funding to hire new staff to assist with developing and administering these programs. This makes it difficult to increase the number of staff with expertise. In spite of this, some CFW Program Specialists are able to conduct some the research required for grants within the fiscal year, and CFW recognizes this effort in work performance ratings when monitoring a row of the critical criteria.</p> <p>In May 2008, CFW created a Discretionary Program Risk Assessment Check Sheet used to determine the level of risk a Recovery Act applicant poses if awarded federal funding. CFW used this check sheet to assess a Recovery Act applicant's potential strategic risk, operational risk and reporting and compliance risks. Through this assessment, CFW has distinguished low, moderate and high-risk applicants, and established priorities for specialized monitoring of higher-risk applicants that are receiving funding. To date, this assessment has concluded that the majority of the CFW Recovery Act applicants pose a low to moderate risk. Very few have seemed to be high-risk applicants.</p> <p>CFW Program Specialists conduct desk reviews of all active grant files. Desk reviews include reviewing of grant activities throughout the grant award period, assist Program Specialists in preparing for site visits, and can occur in conjunction with or independent of a site visit. A desk review consists of reviewing grant files to ensure they are complete, accurate and up-to-date, and helps Program Specialists in prioritizing and determining the level of risk based on factors such as non-compliance with special conditions, significant delays in permit implementation without reasonable justification, or history of delinquent reporting.</p> <p>Desk reviews are required once per 24-month grant award and twice per 36-month grant award, but there is no established cycle for when desk reviews must occur. CFW is considering developing a desk</p>
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			<p>review cycle for Program Specialists to incorporate into their annual monitoring plans. These requirements are being provided and will be included in the new OVA Monitoring Manual. In spite of this, OVA has initiated monitoring efforts with the implementation of the Grant Assessment Tool (GAT). The GAT has helped Program Specialist profiles and spot checks move quicker. Together with the capability of identifying specific issues within the GAT and having a check-out system to minimize the amount of back-log, capacity is not a major concern for OVA.</p> <p>OVA Program Specialists are currently required to review and approve grantee progress reports. These semi-annual reports (interim/progress reports) and annual reports (final reports) are currently detailed: grantee budget submission quantitative data regarding funded activities and performance measures and provide detailed narrative descriptions of their progress meeting the goals and objectives of their grant awards. OVA staff also review OMB Required Recovery Act Reports on a quarterly basis.</p> <p>Program Specialists also conduct general reviews of financial reports and grant expenditures as they compare to the approved budget. This review includes:</p> <ul style="list-style-type: none"> <li>• reviewing for SF 285 for compliance and identifying delinquent financial reports;</li> <li>• identifying over/under/above budget transactions;</li> <li>• reviewing multi-award sharing requirements; and</li> <li>• coordinating with OIG/IG/CFDA Monitoring Teams to conduct sub-awards where significant financial irregularities are discovered.</li> </ul> <p>As mentioned above, OVA usually holds monthly grantee coordination meetings required by statute and subject to congressional question. These coordination meetings are generally held during the first quarter of the grant cycle and are typically designed to bring grantees together shortly after receiving their awards but before their projects are in full implementation. The coordination includes presentation from the OIG, OIG/CFDA, as well as OVA Program</p>
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				<p>Specialist and attorneys, who advise grantees of mandatory programmatic requirements and critical fiduciary obligations.</p> <p>In order to holistically manage and monitor grants and cooperative agreements, programmatic and financial staff must work in concert with one another. Specifically, these personnel must both understand the purpose of OAW grant programs and work closely together within the same organization, to achieve the same goals and implement statutory guidance and policies. Combining programmatic and financial monitoring efforts can achieve more comprehensive oversight and may reduce potential vulnerabilities. For this reason, OAW requested and received approval to establish a new issue: Grants Financial Management Division which will work in close collaboration with our well-established Program Division. In addition, to more efficiently and comprehensively monitor grantees, OAW has requested additional Program Specialists in order to better manage grant funds. This will allow us more direct contact and oversight with grantees.</p>
4 Monitoring	4.3	Conduct site visits either in the grant period or within 90 days of the site visit, ensure that grantees are monitoring accounts receivable, accounts payable and equipment support.	Developing an Access Monitoring Plan and Site Visit Checklist	<p>OAW Response: OAWM coordinates the development of a programmatic and financial monitoring plan for OAW and the OCEPS Office, which includes all planned on-site monitoring for the upcoming fiscal year. With this plan in place, the OAW and OCEPS Office grant management and finance staff have the ability to coordinate their monitoring efforts within and between program offices and with the OCFU. The plan has helped OAW achieve a more comprehensive, coordinated oversight effort. In FY 2011, OAWM will work with OAW, the OCEPS Office, OAW, and OCFU to issue a coordinated monitoring plan in early October which will allow for increased post-visit monitoring.</p> <p>While monitoring site visits, program office grant managers use the Grant Monitoring Site Visit Checklist to ensure that while visits they have reviewed grantees activities to ensure that accurate financial records and documentation are being maintained. The OCFU conducts detailed audits financial systems to ensure that grantees are maintaining adequate accounting systems and financial records that accurately record the funds, and grantees are maintaining appropriate to ensure that adequate financial systems are being maintained.</p>

			<p><b>COPS Office Response:</b> The visit to CHRP grantees began in FY2010. As with all COPS monitoring site visits, each agency visited is reviewed to ensure that they are maintaining accurate accounting records and adequate expenditure support. For CHRP, it should be noted that many factors can delay the hiring of police officers at the local level, including recruiting, training, and other regulatory issues. Historical hiring practices for COPS grantees reflect that it can take an average of 12 to 15 months to hire new positions. Therefore, the majority of site visits to take place in FY2010 visited to grantees agencies with previously awarded, rather than under other COPS programs as well as newly awarded CHRP grants.</p> <p><b>COPW Response:</b> Annually, COPW Program Specialists attend detailed on-site monitoring visits. When developing these plans, Program Specialists consider the following: how long a grantee has been receiving COPW funds, how much funding a grantee has received, and whether the grantee has ever had a site visit. Program Specialists also consider unique circumstances when determining site visits. For example, if a grantee is implementing an innovative project that may demonstrate promising practices, COPW will have the intention to observe this project first-hand. Also, site visits to high-risk grantees are typically given top priority.</p> <p><b>Notes:</b> COPW site visits are programmatic in nature. Program Specialists routinely ensure that grantees are implementing a project that is consistent with their approved budget. At present, however, COPW relies on COPS/COPD to conduct financial on-site monitoring, which should include review of receipts and support for expenditures. With the anticipated increase in program staff, COPW hopes to be in a position to conduct some joint monitoring visits with COPS/COPD in the future. Please see COPW's response to interagency letter A-12 below which discusses the issue of conducting site visits under the grant period.</p>
A. Monitoring	A.4	Regular visits	COPW Response: COPS remains the primary financial quarterly financial

	<p>specificity in grantee reporting</p>	<p>in CDFP or other reporting activities</p>	<p>status reports, as well as program reports. (However, for program reports vary by program). All CDFP grantees are required to submit program reports that contain a narrative summary of their activities for the reporting period, as well as performance measurement data that is specific to their particular program. For selected programs, CDFP officials have decided to tailor our program reports that collect qualitative data in response to specific targeted questions for the program. Program managers are encouraged to request additional information from grantees to support information provided in reports including performance and financial data if the reported information is not sufficient to retain operations or resources.</p> <p><b>CDPE Office Response:</b> Grantee performance under CDFP will be measured through quarterly program reports including the number of new secure office jobs created and the percentage, as well as through an annual survey that gauges the community policing capacity implementation rating of grantees. Information gathered through both the program quarterly reports and program reports and quarterly financial status reports will assist in measuring requirements outlined within the Community Policing Implementation guidance issued by CDFP. These CDFP program reports are required to submit program reports based on their agency type. For example, law enforcement and fire agencies must submit reports quarterly, while education and non-profit organizations must submit reports on a quarterly basis.]</p> <p><b>CDFP Response:</b> All DVW grantees are required to submit quarterly financial status reports and semi-annual program reports. If grantees or recipients have other reporting requirements, Program Operations may request a copy of the grantee's additional reporting requirements. CDFP Program Operations will also request annual performance reports. CDFP Program Operations will request annual reports of financial reports and performance data for each grantee and recipient. CDFP will request reports, budget forecasts, and requests for federal project period extensions. This is done periodically or as needed and at the time of required annual check-in reports. When a sufficient expenditure is beyond the scope of the program or quarterly</p>
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				<p>unimpaired. CDFW's CFMG will attempt to resolve such infractions. Improvement Plan (CIP) conduct addresses regulatory activity based upon these. CDFW's CFMG in consultation with CDFW's program specialist will work with grantee to resolve any financial discrepancies.</p>
4. Monitoring	4.5	For grantees designated as high-risk, grant reports must be submitted periodically require the submission of supporting documentation to reported expenditures not be visited	Division Department of Expenditure Data	<p><b>CIP Response:</b> CIP assesses special conditions of all high-risk grantee events notifying the grantee of enhanced monitoring requirements. During grantee visits, CIP's financial expertise conduct grant expenditures to review that expenses are reasonable, allowable and supported. In circumstances where warranted, grantees are required to submit supporting expenditure documentation to CIP prior to disbursement. As part of the desk review process high-risk grantees may also be asked to submit additional expenditure documentation.</p> <p><b>CDFW Office Response:</b> The CDFW Office will consider requiring the periodic submission of supporting documentation from high-risk grantees so that important expenditures can be verified. However, site visits will be performed for those grantees determined to be at highest risk through the monitoring risk assessment model.</p> <p><b>CDFW Response:</b> Currently through CDFW's compliance agreement with USFWS/CDFW, financial specialists conduct desk reviews and site visits to sample grant expenditures to ensure that expenses are reasonable, allowable, and supported. In circumstances warranting additional verification, grantees are required to submit supporting expenditure documentation to CIP prior to disbursement.</p>
4. Monitoring	4.6	Ensure the state administering agencies engage in and report back to the granting agency on	Subgrantee Monitoring Oversight	<p><b>CIP Response:</b> As part of the CIP monitoring procedure, CIP grant managers further provide required monitoring of subgrantees. Using the Grant Monitoring Site Visit Checklist, CIP documents grantee compliance of subgrantee compliance with the conditions of the subaward. An Appendix A-3 contract includes a special condition notifying grantees that they are required to have established policies and procedures for subgrantee monitoring.</p>

		their specific monitoring and oversight of subgrants		<p><b>CCPS Office Response:</b> Not applicable under CHRF (grants agencies may not award subgrants).</p> <p><b>OWF Response:</b> OWF is collaborating with one of our technical assistance providers and State STDP Administrators to develop a STDP Administrator's Manual. This manual will serve as a source of guiding principles for STDP Administration and will be developed over the next 30 months. Monitoring is one of the issues being addressed in this manual. OWF does not however, have the authority to monitor but State STDP Administrators report on their monitoring of subgrantees. Through the collaboration on this manual, OWF emphasized accountability to STDP Administrators. Over the next 12 months, OWF will take the lead in developing the monitoring component.</p>
3. Monitoring	4.7	Require state agencies to make subgrant award decisions publicly available to the public.	FFATA Subject Reporting	<p><b>OWF Response:</b> Grantees and subgrantees of Recovery Act funding are required to submit award information for posting on FederalReporting.gov. In addition, the Federal Funding Accountability and Transparency Act (FFATA) requires state award recipients to report detailed information on subgrants. OWF is currently working on policies and procedures for reporting this information for posting on USReporting.gov. When the OMB guidance is finalized, OWF will provide support to grantees in meeting these reporting requirements.</p> <p><b>CCPS Office Response:</b> Not applicable under CHRF (grants agencies may not award subgrants).</p> <p><b>OWF Response:</b> State agency grantees are restricted by their governing body as to what information can and cannot be released on the internet. OWF is currently developing a matrix to be completed by State STDP Administrators on how they are implementing the STDP program policies and procedures in their own states. When completed, the matrix will provide a snapshot of how states are addressing the goals and objectives of their State implementation plans and it will highlight local project successes and grant award awards. This project is currently in the data collection phase and information will</p>

				<p>be posted on the CFW website during FY 2010. OAHF has also successfully persuaded State OIGP administering agencies to adopt specific special conditions from their CFW awards and incorporate them in their subgrant awards to provide better monitoring insight. CFW is coordinating this effort with the jurisdictions and will host webinars to convey pertinent information and obtain feedback.</p>
4. Monitoring	4.3 and 4.5	How is process to ensure that all instances of alleged misuse of grant funds are properly documented and reported to the agency authority and the OIG for follow-up?	Grant Fraud and Abuse Reporting Policy and Training	<p><b>CDF Response:</b> Training in 2008 over 200 CDF staff attended CDF-led training on detecting and preventing fraud and in FY 2010 additional fraud-related training will be provided across CDF. CDF works with OIG staff to coordinate grant fraud training at CDF sponsored conferences and meetings. Additionally, a grant fraud component has been included in the OIG's Regional Financial Management training activities.</p> <p>Reporting instructions to communicate any concern to supervisors and, as appropriate, to OIG, OIGM, OIGC, or directly to the OIG's Fraud Detection Office have been posted on the CDF's Portal. Program offices are given an opportunity to submit recommended grants or questions for inclusion in the OIG's annual audit plan, as well as the OIG's financial monitoring plan.</p> <p>CDF Instruction 7-92.01 sets both CDF policy and procedures for: 1) examining allegations of misuse of funds; 2) examining allegations of program or financial non-compliance by a recipient of a grant or cooperative agreement; 3) examining alleged conflicts of interest; and 4) referral of those allegations to the OIG when appropriate.</p> <p>Moreover, in FY 2010, the CDF's Grant Monitoring Guidelines were modified to include guidance for grant resumption to ensure that when grants have been checked for potential indicators of fraud, waste, and abuse.</p> <p><b>OCDE Office Response:</b> All OCDE staff responsible for over-seeing, administering, and monitoring grants are aware of their responsibility to report anomalies or other indicators or instances of the misuse of grant funds. The OCDE's Fraud Detection Cellar (FDC) provides immediate</p>



				<p>sworn-in training to CCPS Grant Program Specialists, Accounting Specialists, and audit and legal staff, and conducted fiscal provider training specific to the Recovery Act in April 2009. The CCPS Office meets on a quarterly basis with the CLP-OCFO, OIGAFDO, and OIG Audit Division to discuss the status of ongoing grant investigations and provide referrals of possible grant fraud to OIGAFDO. Furthermore, CCPS coordinates closely with the OIGAFDO on any investigation initiated by other federal offices that may involve CCPS grant funding and provides documentation and information for prosecution as appropriate.</p> <p><b>QW Response:</b> QW does not currently have a protocol on reporting and processing complaints from grantees and members of the general public about grant fund misuse or fraud. Historically, QW has received infrequent reports alleging misuse of QW grant funds, and has processed each of these reports on a case-by-case basis to determine the best course of action following up on the allegations. In order to establish consistent guidelines, QW will address this issue with the DOJ Grants Challenge Working Group previously mentioned. QW also plans to work with the OIG to address these issues with its grantees.</p> <p>During the first quarter of 2009, QW staff attended training conducted by OIG-OCFO on grant fraud and abuse. QW continues to incorporate this training into its annual grantee orientations, which QW program specialists are required to attend. As described above, QW and OIG will work together to develop policies and procedures that ensure QW staff take the necessary steps required to provide relevant information regarding grant fraud, waste and abuse to the OIG for audit and investigation.</p>
4. Monitoring	4.10	Require grantees to display OIG hotline numbers in contracts	OIG Materials included in Award Packages	<p><b>QW Response:</b> QW will work with OIGAFDO to obtain flyers or other materials to provide to grantees. Grantees will be requested to post the materials in common areas.</p> <p><b>CCPS Office Response:</b> Rather than requiring the display of OIG</p>

		<p>appear to ensure proper oversight of fiscal actions to the CEO.</p>		<p>qualify (appear with) law enforcement agencies. COPS believes that these grantee agency personnel directly involved with the administration and oversight of COPS grants will benefit most from having such information included within the COPS grant management materials, such as the grant award documents, Grant Owner's Manual, COPS website, and COPS "at user Center" training site.</p> <p><b>COW Response:</b> COW will work with CEO to obtain permits and additional resources needed to present to grantees. Also, the COW's annual grant orientation, which usually occur at the same fiscal quarter that awards issue, will provide CEO with an excellent opportunity to present the holding points during their presentation segment. COW will request grantees to post this information in relevant areas.</p>
4. Monitoring	4.11	<p>include a requirement for Recovery Act grantees and subgrantees to promptly refer evidence of fraud, etc. to the CEO.</p>	<p>Grant Fraud and Abuse Reporting Specific Condition</p>	<p><b>COP Response:</b> COP imposes a special condition on all awards requiring grantees to report potential fraud, waste, and abuse, and similar misconduct. The condition states that the recipient must promptly refer to the CEO/CEG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other person has either (1) submitted a false claim under the False Claims Act, or (2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct.</p> <p><b>COPS Office Response:</b> As part of grant conditions of the "Recovery Act Accountability and Transparency" for each COPS award, the grantees "agree to promptly refer to the Office of the Inspector General any credible evidence that a principal, employee, agent, contractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving Recovery Act funds."</p> <p><b>COW Response:</b> COW imposes a special condition on all grant awards. In addition to Recovery Act awards, requiring grant recipients to promptly refer to the CEO/CEG any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor, or other</p>

				<p>person has either: 1) submitted a false claim for grant funds under the False Claims Act or 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or other misconduct involving grant funds. This condition also applies to any subsequent grants. Potential fraud, waste, abuse, or misconduct should be reported to the OIG. There is an approved special condition that requires grantees or subgrantees to notify OIG and OIG's Office of Management. OIG will work with JAG's Office of General Counsel to develop a special condition addressing misappropriation of funds.</p> <p>OIG's Recovery Act search also include a special condition addressing grantees that misuse of award funds may result in a range of penalties, including suspension of current and future funds, suspension or debarment from federal grants, revocation of funding provided under an award, and civil and/or criminal penalties.</p>
4. Monitoring	4.12	For grantees with the potential for significant problems, review the use of special conditions.	Increased Use of Special Conditions	<p><b>OIG Response:</b> OIG has created a number of new special conditions in Recovery Act awards as well as those recipients designated as high-risk that may necessitate actions such as increased monitoring and/or prohibition on the disbursement of funds until certain requirements are met.</p> <p><b>IGMS Office Response:</b> All IGMS grantees are required to comply with the grant conditions associated with their IGMS awards. In limited circumstances, awards may also be subject to special conditions that prevent grantees from drawing down or receiving grant funds until the special conditions are satisfied as determined by the IGMS Office. For grantees funded under OIGMS, there are no grant conditions associated with their awards, including that are related to those pertaining to reporting requirements, financial costs, recordkeeping, grant submissions and modifications, awarding and evaluation, community policing services, assessment and certification, and Recovery Act accountability and transparency.</p> <p><b>OMW Response:</b> OMW has been proactive with implementing measures that are relevant to all grant funds that are awarded to</p>

				<p>grantees that have the potential for significant problems. For example, individuals are absolutely eligible to apply for grants from OVP's Tribal Domestic Violence and Sexual Assault Justice Program. Private individuals can receive a grant award on behalf of a group of individuals who are interested in starting a separate tribal coalition. One of concerns for the increased risk involved in making grant awards to individuals, OVP automatically screens such awards as high risk and tracks them through the UAT system. To reduce risk of misuse or waste, OVP restricts award sizes for individuals who are grantees and restricts funds to a maximum of \$25,000.</p> <p>Also, OVP's Tribal Unit worked very closely with DOJ's Office of Criminal Counsel to create a special condition that allows for individuals who are grantees to develop the incorporated tribal coalition as the recipient is referred on the grant award and address other potential legal issues that may be encountered under such arrangements. Another special condition imposed by such awards also restricts the grantee's access to grant award funds until the grantee submits proof to OVP that the tribal coalition has been incorporated, has created bylaws, and has established a board of directors.</p>
4. Monitoring	4.15	Establish early intervention mechanisms to track the work of high-risk grantees within 90 days of award.	Mitigating Risk with On-site Monitoring	<p>OJP Response: Grantees that have been designated as high-risk have a special condition on their awards to acknowledge that they will be subject to additional financial and programmatic on-site monitoring, which may be on short notice, and agree that they will cooperate with any such monitoring. High risk grantees must also promptly provide upon request, financial or programmatic related documentation related to their award, including documentation of expenditures and achievements and within 100 days of the award, agree to enroll staff in grantee official completion a DOJ-sponsored financial administration training, which includes a session on grant fund prevention and detection.</p> <p>DOJ will track on-site monitoring visits for high-risk grantees through quality assurance system. DOJ will provide program officers with a</p>

			<p>summary of high-risk grantee site visits conducted and will report on program office compliance with this requirement in the FY 2010 Monkeys Report.</p> <p><b>COPS Office Response:</b> As explained earlier, site visits for COPS grants began in FY2010. It should be noted that many factors can delay the timing of police officers at the local level, including recruiting, training, and other temporary issues. Historical timing provided by COPS grantees reflect that it can take an average of 12 to 18 months to fill officer positions. Therefore, the majority of site visits to take place in FY2010 will be to grantees agencies with previously awarded, active grants under other COPS programs as well as newly awarded COPS grants.</p> <p><b>OWB Response:</b> During early stages of project implementation, OWB subjects high-risk grantees to more intensive local and programmatic monitoring. When developing monitoring plans, OWB Program Specialists identify high-risk grantees. OWB, however, will not make multi-visit site visits within 30 days of the award. Thirty days after grant awards are issued, most grantees have not assigned the award, failed to create award terms, hired project staff, or resumed any project activities. Thus, monitoring even high-risk grantees at this stage, or even 30 days after award acceptance, may not address any issues. OWB will consider implementing a process for conducting site visits to high-risk grantees within the first 6 months of the award cycle. OWB will, however, require high risk grantees to attend the program grantees calendar regardless of the grantee's status as new or continuation.</p> <p><b>Also, as a prevention measure, OWB and COPS OMM have designated several Special Conditions specifically for high-risk grant recipients. These Special Conditions mandate that high-risk grantees participate in COPS's regional grant administration training with 120 days of receipt of award.</b></p> <p><b>Additionally, separate bank accounts to be used solely for expenditures and expenditures related to the COPS award must be provided.</b></p>
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				<p>documentation of the separate health issues to OPM.</p> <ul style="list-style-type: none"> <li>periodically provide OPM with financial or programmatic-related documentation directly upon request.</li> <li>periodically cooperate with OPM's financial and programmatic on-site monitoring on short notice.</li> <li>submit a copy of the subcontractor monitoring policies and procedures to OPM, and</li> <li>submit a copy of their time/attendance policies and procedures, which must include how grant-related payroll costs will be allocated.</li> </ul> <p>OPM also audits high-risk grant requests from accounting newly awarded grant funds until: 1) outstanding audit issues are resolved; 2) procurement policies and procedures are submitted and approved by OPM; or 3) grantee's time/attendance policies or monitoring procedures have been submitted and approved by OPM.</p>
4. Monitoring	4.14	Consider sending supporting documentation from all providers the randomly selected breakdown requests.	Monitoring Breakdown Breakdown	<p><b>OPM Response:</b> OPM reports quarterly on the breakdown status of Recovery Act projects to determine whether there are situations that would warrant further review by a program manager or OPMO under House rules documentation from grantees. In addition, OPM's Enterprise Reporting Tool (an online report generator using data from OAS and the PMIS) the OAS financial management system now allows grant managers to check breakdown problems through time. Beginning in FY 2008, a review of breakdown problems is required as part of conducting the annual desk review and as preparation for on-site grant monitoring.</p> <p><b>OPM's OIRA Response:</b> After preliminary implementation of the CHRS program, OPM will consider whether it would be of any benefit to seek supporting documentation from all providers for randomly selected breakdown requests.</p> <p><b>OPM Response:</b> OPM will work with OIG to integrate the use of OIG's Enterprise Reporting Tool. This is an online report generator using data from the Grants Management System, the Financial Management Information System II, and the OAS financial management system.</p>

				<p>Unfortunately at this time, C&amp;V does not have direct access to this link as it is accessed via OJP's Portal. If OJP Program Specialist or OIGMS analysts had access to this link, they could check database patterns in real time.</p>
4. Monitoring	A 15	<p>Review and modify existing internal codes or grant reporting systems so that it is clear that personnel are required to report potential or other indicators of the misuse of grant funds.</p>	<p>Grant Fraud and Abuse Reporting Policy and Training</p>	<p><b>OJP Response:</b> Training in 2008, over 500 OJP staff attended OIG-led training regarding and preventing fraud and in FY 2010 additional fraud-related training will be provided across OJP. OJP works with OIG staff to coordinate grant fraud training at OJP sponsored seminars, webinars, and meetings. Additionally, a grant fraud component has been included in the OIG's Regional Financial Management training seminars.</p> <p>Reporting instructions to communicate any concern to supervisors and, if appropriate, to OIG, OIGM, OIGC, or directly to the OIG's Fraud Detection Office have been posted on the OJP Portal and will be provided by OJP common areas. Program offices are given an opportunity to submit recommended grants or activities for inclusion in the OIG's annual audit plan, as well as the OIG's financial monitoring plan. In addition, OJP has policy and procedures in place for: 1) assessing allegations of misuse of funds; 2) supervising allegations or suspicion of financial non-compliance by recipients of grant or cooperative agreements; 3) accounting alleged conflicts of interest; and 4) release of those allegations to the OIG when appropriate.</p> <p><b>Monitoring:</b> in FY 2010, the OJP Grant Monitoring Guidelines were modified to include guidance for grant managers to ensure that when recipients have checked for potential indicators of fraud, waste, and abuse.</p> <p><b>OIG's OIGM Response:</b> As mentioned previously, all OIGM staff responsible for monitoring, administering, and monitoring grants are aware of their responsibility to report suspicion or other indicators of the misuse of grant funds. The OIG's Fraud Detection Office (FDO) provides periodic fraud awareness training to OIGM's OIGM Program Specialists, Monitoring Specialists, and civil and legal staff, and conducted fraud prevention training specific to the Recovery Act in April.</p>

				<p>2008. Furthermore, OIGPS staff are trained through a variety of courses that focus on federal grant management and oversight responsibilities for federal grant income, and the OIGPS Office Legal Division provides frequent training to employees on the re-supplying requirement.</p> <p><b>OIGW Response:</b> As described in OIGW's response to OIG recommendation #8, OIGW plans to work with OIG throughout the next fiscal year to identify policies and procedures that ensure OIGW staff have the necessary skills required to provide detailed information regarding grant fraud, waste and abuse to the OIG for audit and investigation.</p>
3. Reference	5.1	Establish a better policy by determining when to allow reimburse approval for violations of regulations or where work resulting the failure to comply established code.	Exempting OIGPS Monitoring Personnel	<p><b>OIG Response:</b> In FY 2008, as part of an OIGAM assessment of OIGPS monitoring personnel, OIGAM reviewed OIGPS policies on administrative appeals. OIGAM made recommendations that OIGPS should limit the reimbursement of penalties for administrative appeals for unauthorized expenditures to ensure it is utilized only in appropriate circumstances. In FY 2009, OIGPS will be reviewing a working group to ensure that administrative appeals that are not used as a means to circumvent the law are not used. OIGPS will be reviewing the OIGPS administrative appeals process and will be completed by July 31, 2009.</p> <p><b>OIGPS Office Response:</b> OIGPS determines whether to allow a reimbursement for approval for violations of regulations and conditions (including the grantee to repay unexpended funds) on a case-by-case basis, taking into consideration such factors as the severity and extent of the specific violation and the grantee's ability to repay the costs to the grantor. Administrative appeals and employment of other personnel and may be taken by the OIGPS Office to remedy grant violations. OIGPS is currently reviewing administrative appeals procedures of the inhibitor by the grantor. Qualifying all or part of the cost of the activity or action in a reimbursement, liability or penalty responsibility for the grant, including a grant grant or monitoring, will be provided to grant funds to the agency and appropriate actions are taken to ensure compliance with federal law. For agency that includes grant awards, re-supplying and/or control enforcement by</p>



				<p>Other agencies, under taking other measures that may be legally available.</p> <p><b>QMW Response:</b> Historically, QMW has considered grantee requests for additional approval of unallowable costs identified as part of an indirect charge-by-cost study. QMW will raise this issue with the [D] Grant Challenge during OIG.</p>
1. Performance	6.2	<p><b>Issue:</b>                  PW appropriate information to collect order to ensure program performance.</p>	<p><b>Defending:</b>                  Performance Measurement System</p>	<p><b>QMW Response:</b> Program performance measures are defined in the grant program announcements. Grantees are required to report evidence of performance measures in program and performance reports, as well as sophisticated systems, such as the Performance Management Tool, currently used by the RIA and the Office of Grants Administration and Delivery Policy (OIGAD). In addition, OIGAD and OIG are providing technical assistance to program offices in the use of logic models, development of performance measures, and data collection and analysis methods. As part of its program assessment function, OIGAD will continue to assess grantee performance data, review program logic model feasibility, and measure program outputs and outcomes against performance goals.</p> <p><b>QMW OIGAD Response:</b> OIGAD Audit: OIGAD guidance was issued in the Grant Owner's Manual that the following information will be collected through Recovery Act program reports:</p> <ul style="list-style-type: none"> <li>Total amount of funds received; and if that, the amount spent on projects and activities;</li> <li>A list of those projects and activities funded by these amounts;</li> <li>A description;</li> <li>and a list of the projects and personnel.</li> </ul> <p>The reports submitted monthly to the OIGAD OIGAD will request information about the status of the agency's policy under delivery of essential services and enforcement officers and its grant-related recovery policy activities.</p> <p><b>QMW Response:</b> Grant OIGAD: QMW has implemented the OIGAD</p>

				<p>Measuring effectiveness involves an intensive effort to improve how we measure and review the work of OVA's grantees. In 2003, OVA entered into a cooperative agreement with the Michigan School of Public Services' Catherine E. Clark Institute for Child and Family Policy (the Michigan School) to develop and implement some of the reporting tools to improve the effectiveness of OVA grant funding. Over the last two years, the Michigan School's Clark Institute has developed, revised, and refined comprehensive program input forms for grantees to collect for observation and impact data through OVA's. A major goal of this effort has been to establish clearly defined, clearly defined, measurable performance measures for OVA grant programs. Many of these quantitative measurements are standard across OVA grant programs, while others are tailored to reflect the different statistically authorized activities that grantees perform.</p> <p>Over the years, OVA has worked closely with the Michigan School to create these reporting forms and to make other tools to capture additional information by OVA's staff. OVA collaborates with the Michigan School to develop new program reporting tools for the grant programs that OVA launched in Fiscal Year 2003, and to continue working with the school to develop forms for the programs being launched in Fiscal Year 2010. The Michigan School also has created two business databases that grantees may use to help collect necessary data over the course of a reporting period.</p>
<p>5. Performance</p>	<p>5.2</p>	<p>Assist grantees in developing the appropriate structure to collect and analyze academic program performance</p>	<p>Technical Assistance for Grantees</p>	<p><b>OVA Response:</b> Many OVA program offices offer direct technical assistance to grantees in the areas of performance measurement data collection. In particular, the OVA's and OVA have web pages dedicated to grantees on collecting, organizing, and reporting on performance measures.</p> <p><b>OVA Response:</b> The Michigan School also plays an ongoing role in training OVA grantees on how to complete these forms. They make presentations at each of OVA's annual, large grantee selection conferences and offer training by teleconference on a non-regular basis for each OVA grant program.</p>



				<p>While grants support the grantee to submit a Final Grant Agreement Notice requiring approval for a change in project scope. While both parties must be written documentation for the grantee can add to the file to show the CDM approval to request, the discrepancy in the policies from the program cost to the need will be addressed.</p> <p>CDM will develop a standard policy regarding the documentation of CDM's approval process for grants-related changes to the scope of their project. CDM's working group on improving its grant management process will develop this policy, as well as the other new policies and procedures that are necessary to improve the administration of grant funds.</p>
K. Performance	7.6	Have grants been placed in account that of the state made it possible to transfer to another account?	Monitoring Official Grant Files in an Automated System	<p><b>CDM Response:</b> As of May 2008, with the implementation of the monitoring module, CDM is a full-service "one-stop shop" for grant monitoring and funding requests to manage their records. The web-based system tracks the life cycle of a grant and interfaces with both the program and support office and the funding requests. Each stage of the grant process, including application, award, reporting, monitoring and closure, is incorporated within the system. Correspondence and records are maintained as part of each individual grant file. Accounts, verification records and generated files are linked leading to the award of a grant and reminders to submit reports on time.</p> <p><b>CDM Response:</b> CDM has a memorandum agreement with CUP which includes use of the CUP Grants Management System which provides an additional mechanism for administering and managing grant records. CDM's Grants Management Working Group is currently considering the advisability of and requirements for establishing CDM as the initial grant file.</p>
K. Performance	7.4	Ensure that agencies have a process in place to ensure the quality of financial data reports	Administering and Monitoring with Program and Financial Status Reports	<p><b>CDM Response:</b> CUP requires agencies to submit periodic program reports and financial reports through the CDM program reporting and financial reporting modules. Program status and CO-100s are submitted online to these reports to ensure that project activities are not back, and meeting established deadlines. When revisions or corrections arise from the review of the report, the grant manager can</p>

	<p>grantee's narrative program report, to identify any potential risk of being in non-compliance with the grant.</p>	<p>Send the program report back to the grantee with a change request. The grantee can make the necessary changes and resubmit the report. The OIG will perform a financial review and conduct a risk assessment in order to identify any errors, provide technical assistance, and identify a needed CTR. If necessary, the review team may submit a request to the OIG's Customer Service Center. The grantee will respond to any request from the OIG and submit the request to the OIG's Customer Service Center.</p> <p><b>OIG's Office Response:</b> OIG's Office will review OIG's program report to ensure grantee performance and compliance with the grant. The Office will review the grantee's report and identify any errors and provide technical assistance and assistance. Furthermore, the Office will identify any errors and provide technical assistance and assistance. The Office will identify any errors and provide technical assistance and assistance. The Office will identify any errors and provide technical assistance and assistance.</p> <p><b>OIG's Response:</b> OIG's program report to submit the report to the OIG's Office. The OIG's Office will review the report and identify any errors and provide technical assistance and assistance. The OIG's Office will identify any errors and provide technical assistance and assistance. The OIG's Office will identify any errors and provide technical assistance and assistance. The OIG's Office will identify any errors and provide technical assistance and assistance.</p>
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				<p>review each section of the report. Program specialists review each report to determine if the information is complete and accurate, if the information is the same as the information in the reports. Corrections are made to the Program Specialist in CRIS, which makes the process of creating reports easier.</p> <p>Program Specialists provide follow-up contact with grantees that appear to be having difficulty developing or implementing their grant-based projects. There are no additional reporting requirements beyond the information provided. CDM Grant Program Specialists use CRIS or GAT to create an individualized monitoring plan for every CDMV grantee. Grantees that are identified by GAT as being in need of corrective measures are contacted immediately by their assigned Grant Program Specialist. The assigned frequency of a grant and other data are provided on a weekly basis. The grantee who may be struggling will receive more frequent supervision. The use of intensive supervision instruction will ensure CDMV is always in touch with grant development and implementation problems. Further, an audit of the grantee's records is conducted as necessary.</p>
1. Performance	5.4	Grants for operating expenses are provided to grantees in monthly installments. Monthly installments are provided to grantees in monthly installments. CDMV will	Accounting Code Project	<p>CDM Response: Grantees must submit financial reports to CDMV for the reporting period and program reports to CDMV after the reporting period. If the grantee has not submitted either the financial or program report timely, an automatic action is taken that prohibits the grantee from issuing direct grant funds. CDMV makes the grantee's report of the grantee. Once the grantee submits the corrected report, CDMV immediately processes a payment of grant funds and the funding begins to flow.</p> <p>CDM Response: The grantee is a grantee of the CDMV. CDMV will provide program management services, including the receipt of program reports from grantees. CDMV has a budget and a grantee who receives reports from grantees. CDMV will provide program management services to grantees.</p>

		minutes	
6. Training	5.1	Key position officials should be required to take annual grant administration training	<p>Providing Ongoing Training Opportunities</p> <p><b>CLP Response:</b> Financial Management. Monthly Regional Financial Management Training courses are available for anyone involved in financial administration of formula or discretionary grant programs administered by CLP. The courses include the application process, procurement, methods of payment, matching requirements, financial reporting, instruction on awarding funds, program-specific updates, information on grant-related financial regulations and Office of Management and Budget orders, and transfer-in notices. The courses are free to recipients of Department of Justice funding programs. In FY 2011, OIG-O provided training to Recovery Act grantees focused on general management issues, as well as those specific to recovery funds for grantees funded by the Recovery Act. The CLP Financial Guide, available on-line, serves as a primary reference manual to assist award recipients in fulfilling their fiduciary responsibility in managed grant funds and award funds are used for the purposes for which they were awarded. The Guide serves as a day-to-day management tool for CLP award recipients and may also be used by recipients in administering their grant programs. The provisions of the Guide apply to all CLP awards. OIGM provides grantees with customized, interactive training to ensure they are managing their grants effectively. Courses developed through Ask are required to attend OIGM sponsored financial management training.</p> <p>OIGM has recently expanded on-line opportunities for e-learning grantees.</p> <p><b>Online Training</b></p> <p><b>CLP On-line Training Tool:</b> The CLP On-Line Training Tool provides helpful instructions to complete various functions within CLP, such as grant administration, program reporting, and awards, as well as provide guidance on administrative policies.</p> <p><b>Post-award Grant Administration:</b> A training presentation on post-award grant management is available to grantees on the CLP funding</p>

				<p><b>Recovery Act Requirements and Reporting</b> provides training. CDFP in cooperation with the CFAW and CDFP has hosted three webinars on Recovery Act requirements and reporting (see below). Key areas covered include calculating and reporting job-creation reporting requirements, and using the contractor's website.</p> <p><b>www.federalcontractors.com</b> - This website is available to contractors through the CDFP Recovery Act website.</p> <p><b>Checklist</b> - A step-by-step on-line table on the grant process designed to help prospective grantees prepare more effective applications. The table includes an overview of the CDFP grant process, the best competitive and non-competitive programs, description of the application review process, and support for help applicants find new funding opportunities and write strong proposals.</p> <p><b>Full-service Training</b></p> <p><b>Grant-Writing Faculty Application</b> - This training is an on-line course that provides instruction, guidance, and expert advice on the planning, development, and writing of a grant application.</p> <p><b>CDFP Office Response</b> - As described previously, the CDFP website provides additional guidance to grantees regarding proper award management, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. Additional on-line resources available related to funding to be provided under the Recovery Act include detailed information on contracting and reporting requirements, how to maintain a fully compliant award file, and an instructional program for CDFP program applicants in preparation for the CDFP Funding Opportunity Program. CDFP has conducted training to establish an understanding of the award Center to deliver both grant management training and compliance training to grantees agencies. All these trainings and all the help and other instruction and training CDFP provides will have</p>
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access to information and resources on-line that will help them effectively address their grant and service-related community policing projects. With the state implementation of the COPS model training, COPS will continue the success of the at-home Center to provide the potential for enhanced development of the workers, including an use for other mandatory training or specific training followed in high-risk areas.

**COPS Response:** Currently, COPS continues to provide information for all new grantees receiving support from each of our discretionary grant programs. These regulatory materials are mandatory for new grantees and new project director of continuing grants. Consultation questions with experienced project director may also occur. We provide new grantees with comprehensive information and resources on grants management and substantive guidance on how to effectively implement the COPS program from which they are receiving support. We provide guidance on how to utilize COPS' Grants Management System to submit required grant activities, including the submission of required reports (financial and programmatic), monitor, including Grant Agreement Notices (to report compliance regarding change of scope, budget, personnel, and change of contact information), and closing out the grant.

To ensure that grant recipients understand how to comply with relevant federal regulations and policies, several Department of Justice agencies are also responsible for law enforcement consultation, including COPS' Office of Compliance and the DOJ's Office of the Inspector General. The Office of the Inspector General's Fraud Detection Office participation is particularly addressing grant fraud prevention and risk assessment factors to prevent participants of the specific rules to these funds, encourage discussion of fraud prevention and detection techniques, and emphasize appropriate consequences when they identify instances of misuse of funds. As previously mentioned, the DOJ also makes a presentation at our annual conference for State COPS Administrators and State Council Directors. The DOJ will focus particularly on the aspects of all grant-received grants.

				<p>opportunities.</p> <p>During FY2011, CVM will develop training opportunities for all graduates to take advantage of throughout the life of their award. Specifically, we will:</p> <ul style="list-style-type: none"> <li>• Add a section to our website devoted to grant management. We will include all of the information provided in our previous publications so that new grant staff can easily access it. In addition, we will develop our new "Managing Public Contracts" on grant management.</li> <li>• Explore the possibility of conducting webinars or conference calls throughout the grant management process that have been identified as problematic by the CRA and CVM staff. Determine the feasibility of implementing an on-line grant administration training program that can administer it and to ensure the recipient understands the basic requirements and can track the recipient's completion of the training.</li> <li>• Develop a web site to our grantees providing information and resources about public access to identify on grant management problems and issues to the CVM training Grant Management Training Unit.</li> <li>• Develop FY 2011 proposals to include funds in their budgets to attend Financial Management Training Courses.</li> </ul>
A. Training	B.2	Offer areas of training to grant managers in public administration, financial, and programmatic management, by the use of classroom type model.	Providing Grant Manager Training Opportunities	<p>CVM Response: CVM will provide a continuous schedule of training courses for CVM staff.</p> <p>Accountability for Andrew Creek Program, its distribution, retention, distribution and ongoing performance, including a project evaluation for programmatic, financial, management, and administrative aspects, reporting on grant performance, ongoing program issues, and developing a plan for ongoing performance.</p> <p>Attend Grant Manager Annual Training. Attend the CVM and DPO policy and program training and production. Topics discussed in FY 2010 training included the following: Financial Aid requirements, identifying high risk grantees, financial management, compliance and</p>

				<p>reports, and reviews.</p> <p><b>Processing an Award:</b> Covers the award process from generating the solicitation, non-solicit documents (backlog) through issuing the award to the grantee. CFP's policies and procedures are described as well as various types of funding opportunities.</p> <p><b>Post Award Grant Management:</b> Focuses on the grant manager's role in managing changes to grants, reviewing progress reports and financial reports, resolving grants, and closing grants.</p> <p><b>Effective Grant Monitoring:</b> Focuses on grant monitoring and oversight as an integrated process of programmatic, financial, and administrative management that occurs throughout the grant life cycle from award through the cessation of program activity.</p> <p><b>CFP's Office Response:</b> As mentioned previously, the CFP's Fiscal Personnel Office (FPO) provides periodic fiscal assessments to the CFP's Grant Program Operations, Monitoring, Evaluation, and Audit and Risk Staff and conducted fiscal assessment training specific to the necessary skill set for CFP's employees. CFP's staff also trained through a variety of courses that focused on grant management and oversight responsibilities for federal grant awards, and the CFP's Office Legal Division provides regular training to employees on the corresponding regulations.</p> <p><b>CFP's Response:</b> CFP's grant program operations staff for new grant solicitations which are offered to our grantees and awarded in FY 2011. CFP has conducted internal grant administration training for CFP staff. Additionally, grant administration have attended various grant management courses, in addition, the CFP Financial Management team, CFP's former Grant Program Operations and currently monitoring all federal grants administration and management training curriculum which will be mandatory for all CFP grant administrators.</p>
R. Evans	1.5.3	Grant	C. Executive	CFP Response: CFP supports annual training process and through the

		<p>responsibilities for grant managers to discuss current questions and concerns about the process of grant review and compliance.</p>	<p>Responsibilities for Grant Managers</p>	<p>Need regularly with agencies developed in advance and minutes received and distributed to grant managers. Examples of these groups include the Grants Management Board to discuss policy and management issues, the OIG's Work Group to discuss technical issues with OIG, the Business Process Improvement Steering Committee to discuss grant management process and procedures, and the Working Working Group to discuss current monitoring practices and emerging needs. OIG is currently working on formulating communication strategies for discussing grant performance issues and compliance based questions for grantees. OIG has developed a portal page for grant managers, which includes documents and announcements about grant management best practices, policies, and procedures.</p> <p>OIG's Office Response Grant managers are always able to provide feedback and questions, and discuss areas of concern by calling or e-mailing the OIG's Grant Program Specialist assigned to their state or the OIG's Office Response Center. In addition, as the OIG's Office of the Chief Counsel develops the performance of a variety of different regulatory mechanisms, including webinars, "chat sessions," and other methods of discussion, we will be happy.</p> <p>OIG's Response: OIG manages grant in both of these. These issues need each week to discuss a variety of programmatic and grant related issues. OIG periodically holds "all program specialists" meetings. As part of the training curriculum currently being developed by OIG's grant administration, opportunities should be provided for all program specialists to connect and collaborate. Additionally, many of OIG's special initiatives are designed and managed across management levels, providing opportunities for grant managers to collaboratively address some key regulatory issues.</p>
7. Communications	7.1	<p>Increases communication with grantees and raise questions in</p>	<p>Communicating Through the OIG Web Site, USA Spending.gov, and</p>	<p>OIG Response: OIG maintains an active website to inform its users about current news, research, and opportunities for funding. OIG oversees the timely submission of grant award information to the public web site, USA Spending.gov (and for Recovery Act funding, to FederalRegister.gov). OIG also offers a free e-mail subscription</p>

	particular.	Recovery.gov	<p>service through GovDelivery. This service allows visitors to OJP web sites to receive notifications by e-mail when new information is available.</p> <p><b>COPS Office Response:</b> As described previously, the COPS Office maintains a highly developed Internet site through which applicants have been able to submit questions (and receive answers via e-mail), review categories of frequently asked questions, listen to a "podcast" pertaining to CHRP funding, and download program materials for use during the on-line application process. The COPS website also provides substantial guidance to grantees regarding proper award maintenance, including grant management resources (such as Grant Owner's Manuals and program fact sheets), training materials for grant administration, and contact information for additional assistance. Going forward, the COPS website will also serve as a portal to access the on-line eLearn Center training being created for CHRP grantees, and which is likely to be expanded to future grantees of other COPS programs. Use of this training module will be tracked via the on-line learning system. Also as mentioned, COPS maintains an in-house call center for law enforcement agencies to contact for assistance with both grant application and award maintenance questions; more complex grant matters are immediately transferred to Grant Program Specialists for resolution.</p> <p><b>OVW Response:</b> OVW uses a number of vehicles to foster communication with current grantees, both new and continuation. As previously stated, each OVW grant program hosts a new grantee orientation, which typically occurs within the first quarter of the grant project period. The orientation provides the opportunity for OVW Program Specialists to meet one-on-one with each grantee assigned to them. In addition, all OVW grant programs host technical assistance trainings and events, which are available to grantees throughout the project period. Several of the meetings create time on the agenda for grantees to meet with their assigned Program Specialists for an extensive period of time. During these opportunities, Program Specialists and grantees discuss topics such as project implementation,</p>
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			<p>pressing concerns, or products developed utilizing OVW grant funds.</p> <p>OVW strives to conduct on-site monitoring visits to 10% of OVW's grantees, annually. Typically, site visits are one to two days in duration. They are excellent opportunity for the Program Specialist and grantee to meet for a significant period of time and for the Program Specialist to monitor the grant project. Although site visits are an ideal form of communication between the granting agency and the grantee, OVW does not have the resources needed to conduct a site visit with all OVW grantees. Program Specialists, on average, manage a grant load of approximately 90 active grants.</p> <p>OVW has entered into a number of cooperative agreements with organizations that are experts in the fields of domestic violence, dating violence, sexual assault, stalking and topic specific issues, such as elder abuse, disability, immigration, culture and the criminal justice system. These experts, known as technical assistance providers (TA providers) provide technical assistance to OVW grantees. TA providers interact with grantees using a number of mediums: on-site assistance; telephone; conference calls; e-mail and web-based training. TA providers have a firm understanding of what is occurring at the service level and within the organizations that OVW funds. OVW and the TA providers are in frequent, regular contact and discuss the grant program and grantees. Although TA providers are not the granting agency, they do represent the grant program and act as a contact for grantees.</p> <p>Various OVW grant programs have offered TA providers funding to provide on-site technical assistance to some grantees. The purpose of the on-site assistance can vary. Sometimes it is offered to provide grantees who may be struggling with the technical expertise necessary to help them develop and implement their grant-funded project. OVW TA providers have also used on-site assistance to provide local communities with customized training events as a cost-effective means of delivering training to a larger local audience. (Although TA Providers greatly enhance communication between OVW grantees and OVW, as well as among OVW grantees, they do not play a role in grant</p>
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				<p>monitoring. Program monitoring is an inherently governmental function, which is performed by OVW staff. Moreover, TA providers are subject-matter experts in the field of violence against women; they are not qualified or well-suited to provide grantees with assistance on administrative compliance issues.)</p> <p>OVW has several policies around communicating with grantees. OVW's goal is to have Grant Program Specialists respond to all inquiries received from grantees within the USDOJ standard 24-hour response time. Telephone calls and e-mails must be returned within 24 hours when the Program Specialist is in the office and not on travel. When Program Specialists are on travel, telephone calls and e-mails must be returned within 24 – 48 hours. As a means to improve communication and increase work productivity, all Program Specialists have been issued Blackbernes and laptop computers, which allow access to DOJ and OVW computer systems.</p> <p>OVW's previous attempts to establish a back-up system for its Grant Program Specialists have not met with much success due to general staffing resource issues. However, OVW does have a policy that requires each of its Grant Program Specialists to set up an out-of-office reply for e-mails that they may receive during their absence from the office. The reply states the dates of absence for the Specialist, and provides a phone number that grantees can call if they require immediate assistance. If the Specialist is on personal leave and is unable to respond to inquiries, the reply will indicate that as well.</p>
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Performing Recovery Act Outreach Efforts	<p><b>OJP Response:</b> Immediately upon passage of the Recovery Act, OJP employed an outreach effort using various communication vehicles to ensure that all potential and eligible applicants were informed of the funding opportunities, the process of applying for funds, and the reporting requirements of the Recovery Act. Outreach includes, but is not limited to— conducting Recovery Act recipient reporting trainings at program office and OCFO-sponsored conferences; OJP leadership and staff attending intergovernmental meetings and conferences to present and answer questions on Recovery Act requirements; and developing FAQs and tools to provide information to recipients and make available</p>

				<p>on the OJP website.</p> <p><b>OVW Response:</b> OVW, through TA providers, conducts conference calls and occasionally, webinars. A Program Specialist usually participates in such events, which allows for another opportunity to interact with grantees. OVW participated in a series of web-based seminars for recipients of OVW Recovery Act funds. OVW will explore how it can expand the use of this technology for all OVW grant recipients.</p>
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Enhancing GMS	<p><b>OJP Response:</b> To increase communication with grantees, OJP has enhanced a number of internal and external interfaces in GMS. The recent addition of a monitoring module in GMS provides an interface to enable grant managers to communicate the outcomes of site visits to grantees in a timely manner.</p> <p><b>OVW Response:</b> As stated earlier, OVW utilizes OJP's Grants Management System. As such, OVW has a representative on the GMS board and will continue to work with OJP to identify needed enhancements to GMS.</p>
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Providing a Customer Service Center and GMS Support	<p><b>OJP Response:</b> Recipients of OJP funding can submit questions about payments or any other financial matters to the OCFO Customer Service Center through a toll-free phone number or by e-mail at ask.ocfo@usdoj.gov GMS maintains a dedicated toll-free line available to offer support on general requirements for receiving funds, assistance with GMS, and referrals to program offices regarding OJP grant programs.</p> <p><b>OVW Response:</b> While OVW does not have the staff capacity to provide a standalone Customer Service Center and GMS support, for a number of years, OVW has used the services of in-house contractors who provide direct GMS and other IT customer service to OVW grantees. OVW program specialists and managers provide grantees with programmatic customer service.</p>



7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Providing Programmatic Support E-mail Systems	<p><b>OJP Response:</b> OJP program offices encourage all users to send comments, suggestions, and information inquiries to e-mail accounts set up for this purpose. Users receive a response directly from program office staff, providing them with requested information or recommendations for other sources of information.</p> <p><b>OVW Response:</b> As described earlier, OVW has established program specific e-mail address for each of its grant programs which are typically used when solicitations are open to the public. Additionally, since FY 2008, grantees have been able to communicate with OVW through an "ask OVW" email box. Some OVW grant programs also use quarterly newsletters to enhance communication with grantees.</p>
7. Communications	7.1	Increase communication with grantees and new grantees in particular.	Conducting Webinars	<p><b>OJP Response:</b> OJP has recently started to implement the use of webinars to disseminate timely information and communicate directly to targeted communities, such as tribal entities, new grantees, or Recovery Act grantees.</p> <p><b>OVW Response:</b> OVW does provide opportunities for peer learning and information sharing. However, the methods, format and opportunities vary from program to program. Some of the grant programs maintain a dedicated list serve for grantees. Only a few of the grant programs have private log-in areas on a grant program-specific website for grantees. OVW will explore how the different grant programs are fostering communication, peer learning and information-sharing among the grantees. Once this information is obtained, OVW will determine the efficacy of creating standards of communication for all grant programs.</p>
7. Communications	7.2	Facilitate communication with and among grantees, using tools such as RSS	Communicating through Press Releases and Media Advisories	<p><b>OJP Response:</b> The OJP Office of Communications issues press releases announcing grant awards for significant grant programs. Announcements of grant awards are made available from the OJP web site as well. The OJP Office of Communications has recently set up an OJP RSS Feed for press releases and media advisories.</p> <p><b>COPS Office Response:</b> Please see response to 7.1. In addition to</p>

		feeds.		<p>the information provided above, COPS has scheduled a redesign of our Recovery Act page that includes an RSS feed. An RSS feed is also in place for our monthly COPS Office "Community Policing Dispatch" newsletter.</p> <p><b>OVW Response:</b> OVW communicates with grantees, potential grantees, and partners in the field on a monthly basis via the OVW Director's Message which addresses current news and upcoming events. When appropriate, OVW utilizes press releases as a communication vehicle. OVW also provides a Technical Assistance Calendar and Directory which provides OVW grantees with up-to-date information about technical assistance providers and upcoming training opportunities. DOJ has not approved the use of blogs, wikis, etc. on our public websites. All ARRA updates are published in RSS formats.</p>
7. Communications	7.3	Reach out to state audit agencies that provide coverage of grantee management and solicit coverage and feedback on grantees' use of funds.	Single Audit Coordination	<p><b>OJP Response:</b> OAAM provided a compliance supplement to OMB, for distribution to state audit agencies that is specific to Byrne/JAG. OAAM is considering creating additional compliance supplements for other, high-dollar value grant programs managed by OJP. In addition, OMB is considering a compliance supplement for state auditors to review Recovery Act grants. After reviewing this guidance, OAAM will determine whether additional compliance information should be provided to OMB specific to OJP's Recovery Act programs. OAAM is also responsible for resolving issues identified through grant Single Audits and maintains a database of these issues for analysis. OAAM continues to implement new methods of preventing recurring financial management issues identified in grantee organizations.</p> <p><b>COPS Office Response:</b> The COPS Office does not work directly with state or local audit agencies that provide coverage of grantee management. OJP serves as the liaison between grantees and auditors in the conduct of Single Audit Act audits.</p> <p><b>OVW Response:</b> OVW has a reimbursable agreement with OJP which includes financial monitoring services. OVW's Audit Liaison is responsible for office-wide coordination with OJP's OAAM and the OIG.</p>

<p>3. Financial Subsystems and Information Systems</p>	<p>3.1</p>	<p>OCIP's should consider the effect that new grants and grant spending programs will have on grant income routing methods.</p>	<p>Quarterly Grant Award Meetings</p>	<p><b>OCIP Response:</b> OCIP conducts all financial meeting of their system to discuss grant award methods and modify from award methods based on recipient need. For example, OCIP has made modifications to its award methods for Recovery Act, based on expected change in dependency and turnover patterns.</p> <p><b>OCIP Office Response:</b> The OCIP Office will consider the effect that new grants and spending programs will have on grant award routing method. OCIP plans to work with State Finance to discuss the grant award methodology and whether or not we will need to adjust the methodology for OCIP grants.</p> <p><b>DMW Response:</b> As stated earlier, DMW has recently established a Grant Financial Management Division which will coordinate with the DMW Program Division and Budget Office to assess the impact of new grants and grant spending programs. OCIP will also discuss with collaborating with OCIP and CUP re: appropriate solutions.</p>
<p>3. Financial Subsystems and Information Systems</p>	<p>3.1</p>	<p>Develop procedures to identify the state's information systems resulting from Recovery Act grants.</p>	<p>Enhancing Information</p>	<p><b>OCIP Response:</b> The Office of the Chief Information Officer is in the process of making significant investments in hardware and software to accommodate the increased use of the Grant Management System and the data contained therein. This includes additional servers and new software licenses to better support the system.</p> <p><b>OCIP Office Response:</b> The OCIP Office does not anticipate any state or use information systems resulting from Recovery Act grants.</p> <p><b>DMW Response:</b> DMW's memorandum agreement with OCIP includes DMW's use of the Grant Management System. DMW will also work with the Grant Management Division to determine if the additional grants from the act will be eligible on DMW's information system.</p>

SUBMISSIONS FOR THE RECORD  
Senate Judiciary Committee  
Hearing on "Oversight of the Department of Justice"  
Wednesday, April 14, 2010

**Statement of U.S. Senator Russell D. Feingold**

Mr. Attorney General, thank you for being here, and thank you for being so accessible to the Committee. And I want to thank Sen. Leahy for making sure that we have these opportunities for regular oversight of the Department.

As members of this committee are aware, I strongly support the decision to try Khalid Sheikh Mohammed and other 9/11 plotters in our federal criminal courts. We have a great track record of successfully trying and convicting terrorists in civilian courts. The military commission system is largely untested, and these cases could easily get bogged down in years of legal challenges. The best way to bring these terrorists to justice swiftly is through our civilian courts. It has been nine years since 9/11, and it is inexcusable that these men have not yet been brought to justice for what they did.

Whatever one might think of using the military commission system, it is simply not yet ready to start handling prosecutions. The Military Commissions Act requires that the Secretary of Defense issue rules to govern those proceedings, and that has not yet happened. It hardly seems possible to start using military commissions without the rule book. The military commission system is also the subject of a constitutional challenge in the D.C. Circuit that is at only the beginning stages of litigation, and anyone charged in a military commission prosecution could bring yet another legal challenge to the system itself before any trial begins. In fact, when a military commission defendant named Salim Ahmed Hamdan challenged a prior version of the military commission system, his case wound up in the Supreme Court after years of litigation. It strikes me as not only possible, but very likely, that the first few military commission trials will be subjected to legal challenges, and that any trials would not begin for several years.

The federal criminal system, on the other hand, is available now. It has been tested for literally hundreds of years, and we know it works because hundreds of people are sitting in federal prison today after being convicted of terrorism crimes in our federal courts. We know that our federal judges and prosecutors have the experience needed to take on these cases because they've done it, again and again. Indeed, the Department has achieved significant successes in the Zazi and Headley cases just in the past few months. Both were serious terrorism cases, and in both cases the Department used the criminal justice system to obtain intelligence and ultimately guilty pleas. So I support the Attorney General's decision and believe it is the best decision for the security of this country.

I am glad also to have the opportunity to raise several issues with you that are important to my constituents in Wisconsin. First, thank you for your work to reinvigorate the Antitrust Division after years of neglect. You and Assistant Attorney General Varney have made it clear that the nation's antitrust laws are going to be enforced, and this means improved competition and real protection for consumers. I am especially grateful for the focus on antitrust issues in agriculture and the partnership the Department has forged with USDA to hold workshops, including one focusing on the dairy industry planned for June in Wisconsin. Your department has returned the proper balance after too many years of looking the other way or misinterpreting the law to allow the biggest and most powerful entities in our economy to abuse their market power.

I also want to emphasize the importance of COPS Hiring Grants in the Recovery Act. I am a longtime supporter of COPS grants and am pleased that the Recovery Act allowed my state to hire or re-hire 58 officers. Each of these positions, though, were in city or tribal police departments. Sheriffs' departments in Wisconsin did not receive any COPS hiring dollars in the stimulus. While these jobs were certainly needed in the jurisdictions where funding was provided, it is important that the money be distributed fairly between cities and counties. I understand that the methodology used to distribute these grants is under review, which is a step in the right direction, and I will continue to press the Department of Justice on this issue.

I also want to take this opportunity to emphasize the importance of the John R. Justice Prosecutors and Defenders Incentive Act. Prosecutors and public defenders in Wisconsin have been telling me that they are having a harder and harder time attracting and retaining qualified attorneys in their offices. Many of these public servants have had to resort to taking a second job to pay their law school debt off, and I am told that many local prosecutor and public defender offices typically have attrition rates between 30 and 50 percent. This is a serious problem in our criminal justice system, and is one of many reasons that I cosponsored and voted for this bill, which was championed by Senator Durbin, in 2008. This bill creates a much-needed student loan repayment program for prosecutors and public defenders that would help reduce the enormous debt burden of many of these hard-working public servants. It concerns me, however, that the Department has not yet issued guidelines for this important program. I hope the Department will work quickly to ensure the speedy launch of this loan assistance program.

Finally, I would like to raise an issue that I believe is often unaddressed or ignored by our criminal justice system: mental illness. Our prisons were never intended and are not equipped to be treatment facilities for the mentally ill, but unfortunately, that is what they have become. Wisconsin has started taking a serious look at this issue, and recently convened a task force of law enforcement officers, corrections staff, district attorneys, state legislators, and social service providers with the goal of developing a strategic plan to improve Wisconsin's responses to people with mental illness in the criminal justice

system. This initiative was led by Chief Justice Shirley Abrahamson, who was able to obtain funding from the Council for State Governments (CSG) to organize this task force. CSG receives Department of Justice funding for this and other mental health initiatives as a result of the Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA). The Wisconsin task force could serve as a model for other states, and I hope the Department will take a look at what Wisconsin has been doing, and prioritize resources for mental health initiatives.

Statement of

**The Honorable Herb Kohl**United States Senator  
Wisconsin  
April 14, 2010

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Statement of US Senator Herb Kohl  
Judiciary Committee Hearing, Justice Department Oversight  
April 14, 2010

Attorney General Holder, it has been well over a year since you were confirmed, and this will be your third oversight hearing before this Committee. We welcome you and thank you for making yourself accessible so that we can engage in one of our most important responsibilities -- oversight of the Justice Department. It is a duty that we take seriously -- regardless of the party in the White House. Oversight should not be conducted for the sake of political gain, but it should be a meaningful discussion about the challenges facing the Justice Department and to provide a check on its actions and use of taxpayer dollars.

Over the past year, the Justice Department has done many good things that should be applauded. The Department has renewed its commitment to local law enforcement which has put more officers on the beat and made our neighborhoods safer, helping local communities attract business and economic development. It has stepped up enforcement on the Southwest border to turn the tide on the Mexican drug cartels that continue to funnel drugs and crime to cities throughout the country.

The Criminal Division has increased efforts to root out fraud operations that cost the federal government and Americans billions of dollars -- from financial and mortgage fraud to health care and Medicare fraud. And, as our economy rebounds, the Antitrust Division's revitalized enforcement has fostered a competitive marketplace that encourages innovation and economic development while ensuring consumers have access to high quality goods at the best prices.

The Justice Department's tireless fight against terrorism has yielded numerous interrupted plots and arrests, valuable intelligence information, and successful prosecutions. We were reminded of our constant struggle against those who wish to do us harm on Christmas Day when brave passengers stopped a would-be terrorist from taking down a full airplane with a home-made bomb, and when the FBI intercepted a sophisticated plan to attack the New York subway system.

Yet, there have been legitimate concerns raised-- by Democrats and Republicans alike -- about this administration's approach to terrorist investigations, detention and prosecution. Among the many issues you will need to address today include the long-overdue need to close the prison at Guantanamo Bay, where to hold trials for the five 9/11 plotters, and the process we use to detain and interrogate foreign terrorists, such as the Christmas Day bomber, that are captured in the

United States. Reasonable minds can differ on these issues, but we can all agree that the decisions you make will have a long-lasting and far-reaching impact on our fight against terrorism and our ability to keep Americans safe.

The Justice Department is charged with important duties in many areas of the law. We thank you and the thousands of employees who dedicate themselves each and every day to the independent and impartial enforcement of the law.



Statement of

**The Honorable Patrick Leahy**United States Senator  
Vermont  
April 14, 2010

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Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Hearing On Oversight Of The Department Of Justice  
April 14, 2010

Attorney General Holder appears before the Committee today for the fifth time in this Congress. I want to thank him for his continued responsiveness to oversight requests from the Committee; it has been a marked improvement from the previous administration. I also congratulate the Attorney General on his successful trip last week to Spain, an ally that has also suffered devastating terrorist attacks, where he finalized an extensive security agreement of cooperation against terrorists and organized crime.

Because we need a strong and effective national security policy, I hope that Attorney General Holder will honor my request to implement the increased oversight and accountability provisions of the USA PATRIOT Act Sunset Extension Act, which was reported by this Committee with bipartisan support. I am enthusiastic about working with the Attorney General to improve the implementation of the Freedom of Information Act (FOIA) to make our Government more transparent and accountable to the American people. I look forward to hearing from him this morning about the Department's efforts to increase antitrust enforcement, combat financial fraud and health care fraud, and renew our enforcement of core civil rights laws.

I commend his resolve to use every tool in our arsenal to combat terrorism around the world and keep America safe. Our system of justice is part of that arsenal. It reflects our strength, our values, and it helps keep us safe. The Obama administration's counterterrorism approach has led to many national security victories on the battlefield and in the courtroom. The professionals in our military, our intelligence agencies, and in law enforcement are doing their jobs and are essential partners in this effort.

In February, American forces captured the Taliban's second-in-command in Afghanistan. Messages intercepted from al Qaeda lieutenants show them in disarray, pleading with Osama bin Laden for help. In March, David Coleman Headley pleaded guilty in a Federal criminal court to helping plan the devastating November 2008 terror attacks in Mumbai, India, which claimed 160 lives, as well as another planned attack in Denmark. He is now cooperating and providing valuable intelligence to prevent other terror attacks.

The Headley guilty plea is no outlier — more than 400 terrorists have been convicted in Federal courts since September 11, 2001, according to Justice Department statistics. Last year, Najibullah Zazi was arrested and charged in Federal court for planning to detonate a bomb in New York City. With his arrest, the administration prevented what could have been the most serious terrorism act since September 11. Zazi pleaded guilty to terrorism charges in Federal court, faces life in prison, and is also providing intelligence.

The list of successes in Federal court goes on. Jose Padilla was transferred from military custody to the criminal justice system by the Bush administration, was convicted and is now one of the hundreds of terrorists serving time in Federal prison. Richard Reid, the attempted shoe bomber, who was read the Miranda warning multiple times before being prosecuted by the Bush Justice Department in Federal court and Zacarias Moussaoui, the purported 20th September 11 hijacker, are likewise convicted and in prison.

In February, Aafia Siddiqui, a Pakistani woman, described by FBI Director Robert Mueller as an "al Qaeda operative," was convicted for the attempted murder of U.S. service members. Last year, lengthy sentences were given to five individuals convicted of plotting to kill U.S. soldiers at Fort Dix and to Daniel Patrick Boyd for plotting an attack on U.S. military personnel. And as we learned in February, Umar Abdulmutallab, who attempted the Christmas Day bombing, is likewise cooperating, not because of brutal interrogations at Guantanamo but because expert FBI interrogators were able to get his family to talk to him and encourage him to do so as part of our justice system. Senator Feinstein discussed the effectiveness of the federal courts in a Wall Street Journal piece on March 31. I recommend that each member of the committee carefully read her excellent op-ed.

I am disappointed by the unfounded criticism from many partisans of the interrogation and charging decisions surrounding the Christmas Day bomber. Critics relentlessly restate the myth that the decision to read him Miranda rights caused him to stop talking. That is simply not true. He was interrogated by two highly experienced FBI agents. He provided valuable information. As Attorney General Holder and FBI Director Mueller have repeatedly stated, he is continuing to provide significant intelligence to the FBI. He will be prosecuted, and will face life in prison if convicted. Would the critics have denied him medical treatment for his wounds? It was that treatment that interrupted his interrogation and after which he stopped cooperating, not the reading of the Miranda warning.

In fact, Miranda warnings are nothing new for terrorism suspects. Critics did not attack the Bush administration when it gave multiple Miranda warnings to Richard Reid and convicted him and others in our Federal courts. Former Vice President Dick Cheney endorsed trying Zacharias Moussaoui in a Federal criminal court, not in a military tribunal. He said the trial could be conducted "without compromising sources or methods of intelligence." Critics have reflexively opposed virtually every national security decision made by this administration but ignore these successes. These critics have not explained their about-face.

In contrast to the 400 terrorists convicted since September 11, during the last eight years only three detainees have been convicted in military commissions. Two were sentenced to an additional five months or nine months in custody and are now back in their home countries

having been released while President Bush was still in office—including the Yemeni who worked as a driver for Osama bin Laden named Salim Hamdan. And Yaser Hamdi, the other famous long-time Guantanamo detainee who won his case before the Supreme Court is now free and in Saudi Arabia. The military commission system has more than once been rejected by the Supreme Court.

After the September 11 attacks, Democrats joined with Republicans to make sure our President had the tools he needed to protect this country. We did not play a blame game about who ignored intelligence or failed to prevent the attacks. We came together to ensure the President, law enforcement, and the intelligence communities had the authorities necessary to hunt down those responsible. It has been disheartening not to see that same spirit of unity and national purpose since the election of President Obama. Both parties should work together, rather than play politics with national security.

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# Department of Justice

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STATEMENT

OF

ERIC H. HOLDER, JR.  
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

HEARING ENTITLED

"OVERSIGHT OF THE U.S DEPARTMENT OF JUSTICE"

PRESENTED ON

MARCH 23, 2010

**TESTIMONY OF ATTORNEY GENERAL ERIC HOLDER**  
**BEFORE THE SENATE JUDICIARY COMMITTEE**  
**MARCH 23, 2010**

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

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

**FIGHTING TERRORISM**

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

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

As a counterterrorism tool, the criminal justice system has proven its great strength in both incapacitating terrorists and gathering valuable intelligence. The criminal justice system contains powerful incentives to induce pleas that yield long sentences and gain intelligence that can be used in the fight against al-Qaeda and other terrorist groups. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 2001. The cases include fourteen individuals indicted in Minnesota in connection with travel to Somalia to train or fight with the terrorist group al Shabaab; an individual indicted in Chicago who recently pleaded guilty in connection with a plot to bomb a Danish newspaper and for his involvement in the November 2008 terror attacks in Mumbai; seven individuals charged in North Carolina with providing material support to terrorism and conspiring to murder or injure persons abroad; and two individuals indicted in undercover operations in Texas and Illinois after they separately attempted to blow up an office building in Dallas and a federal courthouse in Springfield. More recently, Umar Farouk Abdulmutallab, was charged with federal crimes in connection with the attempted bombing of Northwest Airlines Flight 253 near Detroit on December 25, 2009. These cases are a sober reminder that we face aggressive and determined enemies. The Department has worked effectively to ensure that terrorists are brought to justice and can no longer threaten American lives. We will continue to use all available tools whenever possible against suspected terrorists.

A leading example of the effectiveness of the criminal justice system is the case of Najibullah Zazi. In February 2010, Zazi pleaded guilty in the Eastern District of New

York to a three-count superseding information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and providing material support to al-Qaeda. Zazi admitted that he brought explosives to New York on Sept. 10, 2009, as part of plan to attack the New York subway system. This was one of the most serious terrorist threats to our nation since September 11th, 2001, and, but for the combined efforts of the law enforcement and intelligence communities, it could have been devastating. On February 25, 2010, Zarein Ahmedzay and Adis Medunjanin, associates of Zazi, were charged in a five-count superseding indictment with conspiring to use weapons of mass destruction as part of the plan.

The Department's work against terrorism includes civil as well as criminal proceedings. In 2009, the Department litigated scores of habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defended our national security interests in a manner consistent with the rule of law. The Department also successfully defended the Treasury Department's designation and attendant asset freeze of the United States branch of the Al Haramain Islamic Foundation, Inc., a Saudi Arabia-based charity engaged in the widespread financial support of terrorist groups around the world, including al-Qaeda and Chechen mujahideen. We also obtained dismissal of over 40 nationwide class action lawsuits against numerous telecommunications companies that were alleged to have assisted the National Security Agency in post-September 11th surveillance activities.

In addition to these litigation matters, I am also pleased to report the completion of the work of three task forces established by the President by Executive Orders on

January 22, 2009: one on interrogation and transfer policy, one on Guantanamo detainees, and one on detention policy more generally.

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

The Guantanamo Review Task Force rigorously reviewed pertinent information regarding 240 Guantanamo detainees, determining their suitability for prosecution or for transfer to another country – or, if neither of those options is available, continued detention under the Authorization for the Use of Military Force, consistent with the rule of law. Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review – the Departments of Justice, Defense, State, Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff.

The Detention Policy Task Force developed recommendations for the President on bipartisan military commission reform legislation that was adopted as part of the 2010 National Defense Authorization Act. This legislation will help ensure that the commissions are fair, effective, and lawful. The Task Force also contributed to the formulation of a joint Department of Justice and Department of Defense protocol for determining whether detainees who had been referred by the Guantanamo Review Task



Force for possible prosecution should be prosecuted in federal court or in reformed military commissions. The Task Force also developed options for our future detention policies that remain under review.

### **CRIME AND FRAUD**

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

We have taken a variety of steps to eliminate the threat posed by Mexican drug cartels controlling the domestic drug market and plaguing our Southwest border. Through stepped up enforcement and a coordinated Southwest border strategy, including the Merida Initiative, we have made significant progress in addressing this serious threat. Also, the Department is deeply concerned that international organized crime has grown dramatically in scale and scope in the last 15 years and constitutes a national security threat to the United States. To counter this, the Department is implementing a comprehensive law enforcement strategy against international organized crime, which is being carried out with its other Federal law enforcement partners.

In addition to addressing the threat of violent crime, we are hunting down all those who commit serious frauds against the American people. In the wake of the economic crisis, pursuing financial fraud, mortgage fraud, health care fraud, and fraud in

government spending have been among the Department's top priorities. We are seeking prison time for fraud offenders, working tirelessly to recover assets and criminally derived proceeds, and striving to make whole the victims of such crimes.

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

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

We have a renewed commitment to fighting health care fraud as a Cabinet-level priority at both the Department of Justice and the Department of Health and Human Services. Through the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), a senior-level joint task force, we are marshaling the combined resources of both agencies in new ways to combat all facets of the problem. Our Medicare Fraud Strike Force prosecutors and agents are using billing data to target a

range of fraudulent health care schemes, deploying appropriate criminal and civil enforcement tools in hot spots around the country. Since it began operating in 2007, the Strike Force has charged more than 500 defendants in 250 cases totaling approximately \$1.1 billion in fraudulent billings to Medicare. All told to date, more than 280 defendants have been convicted, and nearly 205 have been sentenced to prison. Because this is a model that works, as part of the HEAT initiative, we have expanded Strike Force operations to seven metropolitan areas.

Finally, the Department has also brought successful civil enforcement actions to protect taxpayer dollars and the integrity of government programs from fraud. In Fiscal Year 2009, our recoveries under the False Claims Act topped \$2.4 billion – the eleventh time that our annual recoveries under the Act have exceeded \$1 billion. Since 1986, when the False Claims Act was substantially amended, the United States has recovered more than \$25 billion under the Act.

#### **ADVANCING CIVIL RIGHTS**

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

In the wake of the nationwide housing crisis and the resulting wave of foreclosures, the enforcement of fair housing and fair lending protections are among the most pressing civil rights needs facing Americans. During the Department's first year under my leadership, the Division's Housing and Civil Enforcement Section initiated 183

matters, filed 41 lawsuits, including 22 pattern or practice cases, and entered into 24 consent decrees. We also have reinvigorated the Department's critical relationship with HUD to expand our collaborative efforts and leverage each department's resources and tools. In keeping with the Administration's commitment to combating financial crime, and working with the Financial Fraud Enforcement Task Force, we have established a Fair Lending Unit in the Division and hired a Special Counsel for Fair Lending. We have begun to see the fruits of this labor. Earlier this month, we announced a more than \$6 million settlement with two subsidiaries of AIG to resolve allegations of discrimination against African-American borrowers by brokers with whom the subsidiaries contracted.

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

As President Obama mentioned during his State of the Union address, the Civil Rights Division is once again vigorously pursuing cases of employment discrimination. In the first year of the administration, the Division filed 29 employment-related lawsuits, the largest number ever filed by the Division in a single year. Of the 29 lawsuits, 19 were brought under the Uniformed Services Employment and Reemployment Rights Act, and

10 under Title VII. The Civil Rights Division has more than a dozen active pattern or practice investigations. In addition, in New Jersey, the Division is challenging examinations used by all of the municipalities in the state that are part of the civil service system for promotion to police sergeant, which we believe have had a disparate impact upon both African-Americans and Hispanics. The Department is also playing a leading role in the administration's Equal Pay Enforcement Task Force to ensure all applicable equal pay laws are enforced throughout the country.

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

In another important civil rights case, just last month, Agriculture Secretary Vilsack and I announced the resolution of the *Pigford II* case, which was brought by African-American farmers who allegedly suffered racial discrimination in USDA farm loan programs. The settlement, which is contingent upon a congressional appropriation,

will provide \$1.25 billion to eligible African-American farmers. The settlement establishes a non-judicial claims process through which individual farmers may demonstrate their entitlement to cash damages awards and debt relief.

#### **ASSISTANCE TO STATE AND LOCAL GOVERNMENTS**

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

Last year, OJP awarded \$5.6 billion to states, localities, tribal communities, and others to support the full range of justice system activities, from prevention and enforcement through corrections and reentry. This funding is being administered by OJP within a framework of accountability and transparency. All grant solicitations and awards are now posted on the OJP Web site, and OJP has strengthened internal control practices and procedures to ensure that the grants process is open and fair.

Of this \$5.6 billion, \$2.5 billion -- \$2 billion from Recovery Act funds and \$500 million from Fiscal Year '09 funds -- went to support front-line law enforcement operations under the Edward Byrne Memorial Justice Assistance Grants program, a vital source of funding for police departments and sheriffs' offices across the country. In addition, OJP administered more than \$200 million in other Recovery Act grants for a total of 3,800 Recovery Awards. These awards serve the dual purpose of creating and

preserving critical public safety jobs and fostering local innovation. For example, more than \$22 million went to help state and local law enforcement agencies hire civilian staff to serve as dispatchers, trainers, and intelligence analysts. These funds allow agencies not only to move toward smarter, data-driven methods of policing, but also to free up sworn personnel for street duty. We also awarded more than \$10 million dollars to state and local prosecutors' offices to combat mortgage fraud and crimes related to vacant properties. These grants are part of the Department's priority effort to fight financial fraud in all its forms. We will continue to help communities combat mortgage fraud through additional funding and by providing training and technical assistance to investigators and prosecutors.

OJP has also led the Department's efforts to encourage evidence-based practices. Innovations at the local level, such as mapping crime hot spots and using targeted enforcement to address drug and gang violence, are at least partly responsible for the recent drop in crime rates that we have seen in many cities. Research funded by our National Institute of Justice has shown that this is far from a groundless claim; place-based policing, drug market interventions, and other methods do, indeed, work in reducing crime. OJP has undertaken a comprehensive effort to integrate evidence-based approaches such as these into our program development and policymaking activities. The President's budget proposal for fiscal year 2011 includes a number of items intended to further those efforts, and we look forward to working with Congress to expand our knowledge base and to disseminate that knowledge to the field.

In addition to the assistance provided to our partners in state, local, and tribal law enforcement through OJP, the COPS Office last year awarded \$1.26 billion, including \$1

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

#### TRIBAL JUSTICE

In the past year, the Department has made significant strides in strengthening relationships between the United States government and tribal nations. Improving public safety and law enforcement in tribal communities remains a top priority for the Department of Justice. Earlier this year, I issued a directive to all United States Attorneys with federally recognized tribes in their districts to develop, after consultation with those tribes, operational plans for addressing public safety in Indian Country. This approach recognizes that the public safety challenges in Indian Country are not uniform and that the success of any intergovernmental relationship is based on consistent and effective communication.

In developing district-specific operational plans for public safety in tribal communities, I asked each of these United States Attorneys to pay particular attention to violence against women in Indian Country and to work closely with law enforcement to make those crimes a priority. To that end, and at the request of tribal leaders, the Department is creating a task force on prosecuting violent crimes against women in



Indian Country. In addition, I am creating a Tribal Nations Leadership Council to advise me on issues critical to Indian Country. The Council will be made up of one tribal leader from each of twelve B.I.A. tribal regions and will be selected by the tribes of that region. Constituting this landmark Council is an important step in the Department's efforts to improve communication and coordination with tribal nations.

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

#### **ENSURING COMPETITION**

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

focus on the international front as well, seeking to engage foreign enforcers on both policy and particular enforcement matters.

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

On the criminal side, our cartel enforcement has remained active. Over \$1 billion in criminal fines were obtained against Antitrust Division defendants in Fiscal Year 2009, and nearly a quarter of a billion so far in the current fiscal year. But fines are only one part of the story; individual accountability in terms of jail time is a major focus of our criminal antitrust program. In Fiscal Year 2009, the Antitrust Division obtained jail sentences against 80 percent of its defendants, amounting to 25,396 total jail days imposed in its sentencings. Ongoing investigations of price fixing in the liquid-crystal-display and cathode-ray-tube industries continue and anticompetitive conduct in the municipal bond industry has and will result in significant criminal fines and jail time.

The Department has also taken an active role advocating on behalf of competition and consumers, including providing comments to the Federal Communications Commission on broadband competition and embarking on an important series of joint workshops with the USDA to examine agricultural issues in greater depth. Through these efforts we are ensuring that American consumers have an ally in protecting their pocketbooks from illegal marketplace conduct.

#### **PROMOTING TRANSPARENCY**

The President has pledged to make this Administration the most open and transparent in history, and the Department is doing its part to make that pledge a reality. We have worked to implement the President's Memoranda on Transparency and the Freedom of Information Act, including by issuing the new guidelines I issued with respect to FOIA. Through outreach, education, and the review of cases in litigation, additional information was – and continues to be – disclosed to the public through careful application of the guidelines at the agency level.

The Department resolved a FOIA case in 2009 that further promoted the goals of transparency and openness. As part of the settlement in *National Security Archive, et al. v. Executive Office of the President, et al.*, a case involving millions of electronic messages in the Executive Office of the President ("EOP"), the plaintiff organizations were provided with thousands of records describing the archiving of EOP e-mail and with millions of restored e-mail. EOP also agreed to describe to plaintiffs how its current system effectively preserves and archives email. The Department will continue to advance the cause of transparency in the future.

**PROTECTING THE ENVIRONMENT**

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

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

The Environment Division also successfully brought criminal prosecutions against a number of companies and individuals who have intentionally discharged

pollutants from vessels en route to American ports, and it continued to work with the Environmental Protection Agency to obtain the cleanup of major river bodies in the United States, including the Fox River (Wisconsin), the Kalamazoo River (Michigan), and the Hudson River (New York). Protecting the environment will continue to be one of the Department's most important objectives.

#### **ENFORCING TAX LAWS**

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

negative impact on tax administration of tax haven jurisdictions and traditional notions of bank secrecy.

Unscrupulous lawyers, accountants, and tax return preparers present a serious tax administration and law enforcement problem. While some professionals dupe unwitting clients into filing false or fraudulent returns, others serve as willing “enablers,” often providing a veneer of legitimacy to otherwise illegitimate or illegal transactions. The Tax Division employs a range of civil and criminal enforcement tools to ensure that schemes are detected and shut down, and that the participants are held accountable either civilly or criminally.

#### **NOMINATIONS**

Mr. Chairman, I appreciate the hard work that you have undertaken to expeditiously confirm the President’s nominees to the federal bench. Many of these nominations are to courts in which judicial emergencies have been declared, as backlogs are high and judicial vacancies have existed for an extended period of time. I appreciate the confirmation hearings that you have held and the favorable reporting of nominees for the consideration of the entire Senate. I encourage all members to provide up or down votes on these nominees as rapidly as possible consistent with your constitutional duty to advise and consent. There are currently 105 vacancies on the federal courts. Yet the Senate has confirmed only 19 federal judges during the 14 months of this administration. That is less than 34% of the President’s judicial nominees and less than half the number confirmed during the same time period for Presidents Clinton and George W. Bush. I ask

that you do everything possible to move expeditiously to fill the vacancies on our federal courts.

In addition, it is critical to fill United States Attorney, United States Marshal, and other Department positions. Currently, there are 18 United States Attorney and 16 United States Marshal nominations awaiting Committee action, and I urge you to approve them without delay. I am pleased that in recent weeks the Committee has approved – for the second time, after they were renominated by the President – three nominees for Assistant Attorney General positions whose services I need at the Department of Justice: Dawn Johnsen for the Office of Legal Counsel, Christopher Schroeder for the Office of Legal Policy, and Mary Smith for the Tax Division.

#### **CONCLUSION**

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

