U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUN 06 2012

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

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on November 8, 2011.

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,

Judith C. Appelbaum
Acting Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Committee on the Judiciary
United States Senate
November 8, 2011

QUESTIONS POSED BY SENATOR WHITEHOUSE

1. **Too many Americans have lost their homes as a result of mortgage servicers using robo-signing and other unfair and illegal foreclosure practices. News reports have indicated that the Justice Department, federal regulators, and several state Attorneys General are negotiating a global settlement with large mortgage servicers related to those illegal foreclosure practices.**

   A. **Will you provide me an update on the Department's investigations into illegal foreclosure practices?**

Response:

While we cannot discuss ongoing pending investigations, we can tell you that on February 9, 2012 the Department announced that a settlement in negotiations with the nation's top five mortgage servicers. This agreement is the product of extensive investigations conducted by a variety of federal agencies and state attorneys general, including those carried out by the U.S. Trustees Program on bankruptcy claims, by the Department of Housing and Urban Development Office of the Inspector General on claims made to the Federal Housing Administration, and various U.S. Attorney's Offices. State and federal agencies entered into information-sharing agreements and shared evidence concerning servicing abuses.

As a result, this landmark agreement holds the banks accountable for "robo-signing" (the practice of submitting foreclosure documents that were not properly reviewed or notarized) and other mortgage servicing abuses through substantial financial payments and extensive consumer relief. The settlement, the largest joint federal-state settlement ever obtained, will require a commitment from the nation's five largest mortgage servicers – Bank of America Corporation, JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc. (formerly GMAC) – of at least $25 billion. They will pay billions of dollars to the states and the federal government and, importantly, commit billions more to consumers.

The banks will be required to spend $20 billion on various forms of financial relief for homeowners. That relief includes reducing the principal on many of the banks' loans to allow homeowners to keep their homes. They will also refinance loans for "underwater" borrowers who have been unable to refinance due to negative equity. The settlement also requires the mortgage servicers to implement unprecedented changes in how they service mortgage loans, handle foreclosures, and ensure the accuracy of information provided in federal bankruptcy

court. The new servicing standards will prevent foreclosure abuses of the past and will create dozens of new consumer protections.

The banks will be subject to a federal court order enforceable by a federal judge. In addition, a special independent monitor will have the authority to oversee the banks and monitor their compliance. Federal agencies and state attorneys general can enforce compliance if there are violations.

B. Will you work to ensure that any settlement with the servicers would fully hold the banks and servicers accountable for their wrongful conduct; make sure that those home-owners in Rhode Island and elsewhere who were wronged receive full and fair compensation; make certain that banks discontinue illegal foreclosures; and ensure that banks are not given immunity against investigations and criminal and civil liability for a broader set of conduct, including the securitization and lending practices that contributed to the financial crisis?

Response:

While the settlement agreement resolves certain civil claims based on mortgage loan servicing activities, it preserves a wide variety of other potential claims. For example, it does not preclude state and federal authorities from pursuing criminal enforcement actions, and does not prevent any claims by any individual borrowers who wish to bring their own lawsuits. Thus, the settlement does not grant blanket immunity for potential wrongdoing related to illegal mortgage and foreclosure practices. In addition, on January 27, 2012, the Department of Justice along with several federal and state partners announced the creation of a joint federal-state Residential Mortgage Backed Securities (RMBS) Working Group to investigate wrongdoing in this market under the auspices of the President's Financial Fraud Enforcement Task Force. Similar to the criminal and individual claims described above, the claims that will be the focus of this Group's work are not precluded by the settlement. The RMBS Working Group will concentrate on the investigation of fraud in the packaging and sale of RMBS offerings – essentially securitizers - as distinct from-mortgage-servicing procedures.

2. In recent years, a number of individuals alleging that they have been harmed by illegal or wrongful government actions have been unable to obtain redress in the courts because government lawyers have invoked the state secrets privilege. The privilege plays an important role in protecting information that could harm national security if it were disclosed. But that protection should not come at the expense of investigating and ensuring accountability for government wrongdoing. You issued a memorandum in September 2009 ("Policies and Procedures Governing Invocation of the State Secrets Privilege"), which provides that a case will be referred to the relevant Inspector General's office if there are credible allegations of government misconduct and the case is not able to be litigated because of the state secrets privilege.

A. Have any such cases been referred to an Inspector General, or any other form of independent review?

Response:

As your question recognizes, the state secrets privilege does play an important role in protecting information that could harm the national security if disclosed. As the Attorney General made clear, however, the Department of Justice will not defend an invocation of the privilege in order to (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information which would not reasonably be expected to cause significant harm to national security. If the Attorney General concludes that it would be proper to defend invocation of the privilege in a particular case, and that invocation of the privilege would preclude adjudication of particular claims, but the case raises credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General (IG) of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.

The Department's policy is not to disclose the existence of pending IG investigations. Consistent with that policy, we could not provide the number of cases, if any, that may have been referred to an IG pursuant to the Department policy on state secrets privilege. However, to the extent IG investigations are undertaken, the Government has typically released public versions of final IG reports.

B. What safeguards exist to ensure that such referrals will be made in appropriate circumstances?

Response:

Consistent with the policies and procedures governing invocation of the state secrets privilege issued on September 23, 2009, the Department refers allegations of government wrongdoing to an Inspector General where, in the Attorney General's judgment, the case raises credible allegations of government wrongdoing.

3. Last month, the SEC reached a settlement with Pipeline Trading Systems and two of its executives for violations of federal securities laws. According to the Settlement Order, the Commission found that Pipeline operated a private stock-trading platform, or "dark pool," but did not disclose to its customers that the majority of shares traded on this platform were bought or sold by its own wholly owned subsidiary. Many investors use "dark pools" to avoid moving the price of a stock merely by placing an order to buy or sell it. Because traditional trading venues, such as stock exchanges, typically post information about available orders, when information about a large order becomes known by other market participants, an opportunistic firm using sophisticated algorithms can trade in front of that order to

the detriment of the firm that placed it. According to the SEC Settlement Order, Pipeline gave its own subsidiary its customers' order and trade data, and superior electronic access to its trading platform, which allowed the subsidiary to act in a predatory fashion. The subsidiary was able to anticipate market movements, trading in front of Pipeline's customers' orders – to the benefit of Pipeline and the possible detriment of its customers.

The SEC has indicated that approximately 30 percent of the trading volume in U.S.-listed equities is now executed in dark pools and similar venues. As the Pipeline case demonstrates, the rise of trading in dark pools creates new opportunities for perpetrating securities frauds, and may place ordinary investors at a significant disadvantage.

A. With that in mind, has the Department coordinated with the SEC to investigate possible criminal securities fraud in dark pools and similar alternate trading venues?

Response:

Through the dedicated leadership of the co-chairs and members of the Securities and Commodities Fraud Working Group of the President's Financial Fraud Enforcement Task Force, the Department of Justice is in constant communication with the Securities and Exchange Commission (SEC) and other law enforcement and regulatory agencies about new and emerging trends in fraud schemes throughout the country. We will continue to be vigilant in investigating and prosecuting financial fraud where we see it, including in dark pools and similar alternate trading venues.

B. Does the Department need additional tools or resources to deter and punish high-frequency trading conduct that is intended to manipulate markets or that takes advantage of inside information?

Response:

The Department is prepared to investigate any matter involving dark pool or other high frequency manipulative trading that the SEC or the Commodity Futures Trading Commission refers to the Department. Such cases often require significant attorney and agent resources, and also require the assistance of sophisticated analysts to investigate numerous trades, sophisticated trading activity, and brokerage account activity. Consistent with the President's Budget, we will work closely with Congress regarding any additional tools or resources that could be used to hold security fraudsters accountable.

4. As you know, I believe that the Margolis decision memorandum on the OPR Report about attorney misconduct in the Office of Legal Counsel (OLC) during the previous Administration misconstrued the duty of candor to which OLC attorneys should be held. Because the protections of adversarial

advocacy and judicial review are not available to OLC, the duty of candor for OLC attorneys should be higher than – or at least equal to – the duty of candor that attorneys owe to a court under the Rules of Professional Conduct (RPC).

I was pleased to hear from you, in response to a previous question for the record, that "[a]s standard practice" OLC strives to provide a balanced presentation of arguments, including relevant precedents, that "well exceeds the minimum standards" in the RPC. A rule adopting this practice would clarify the responsibilities of OLC attorneys. To that end, has the Department adopted a binding policy or rule reflecting that OLC attorneys should meet the standards you have described? Absent a different rule, is not the "Margolis policy" the effective rule?

Response:

As the question indicates, attorneys in the Office of Legal Counsel (OLC) are subject to the governing rules of professional responsibility; but OLC has also published a memorandum dated July 16, 2010, identifying and describing in detail the "best practices" that govern the work of attorneys providing legal advice on behalf of the Office (available at http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf) ("OLC Best Practices Memo"). That memorandum sets forth the "guiding principles" of the Office which require that OLC "provide advice based on its best understanding of what the law requires" and specifically state that, "in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives." *See* OLC Best Practices Memo at 1. Moreover, the memorandum makes clear that "regardless of the Office's ultimate legal conclusions, it should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question," *id.* at 2, and that opinions prepared by the Office should provide "a balanced presentation of arguments on each side of an issue," *id.* at 4. The memorandum also lays out the rigorous process that the Office follows in reaching its legal conclusions. OLC relies on the guiding principles set forth in the July 16, 2010 memorandum, and the Department endorses the memorandum.

QUESTIONS POSED BY SENATOR KLOBUCHAR

5. The Senate recently approved an amendment, which I supported, to prohibit gun-walking operations, but that provision is not yet law. Will you commit to prohibiting the Department of Justice and its subsidiary agencies from using the gun-walking tactics employed in Operation Fast and Furious?

Response:

The Attorney General has already prohibited the Department of Justice and its component agencies from using the inappropriate tactics employed in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez and Medrano. In early March 2011, the Attorney General instructed the Deputy Attorney General to issue a directive making clear that such tactics should not be used again. In a letter to Chairman Leahy and other members dated January 27, 2012, Deputy Attorney General James M. Cole outlined reforms adopted by the Department, including ATF, to ensure that such inappropriate tactics are not employed in future investigations.

6. Based on what has occurred with Fast and Furious, do you think any changes are needed in the approval process for proposed operations and tactics at ATF or at the Department of Justice generally? Is this an issue you plan to review?

Response:

Operation Fast and Furious and the similar operations in the prior Administration like Wide Receiver, Hernandez and Medrano, demonstrated the need to strengthen ATF and Department policies and procedures to ensure that the inappropriate tactics used in those investigations are not used again. To that end, ATF, which since August 30, 2011 has been under the leadership of Acting Director B. Todd Jones, has clarified its firearms transfer policy, implemented a new monitored case program, and revised its policies regarding the use of confidential informants and undercover operations. These reforms, as well as others, are described more fully in Deputy Attorney General James M. Cole's January 27, 2012 letter to Chairman Leahy and other members.

QUESTIONS POSED BY SENATOR FRANKEN

7. **Last November, the Equal Employment Opportunity Commission (EEOC) issued a report in which it concluded that Bureau of Prisons (BOP) employees "have an unusually heightened fear of retaliation." See United States Equal Employment Opportunity Commission Final Program Evaluation Report: Federal Bureau of Prisons at p. 3 (Nov. 24, 2010). The EEOC found that the "vast majority of BOP non-supervisory employees interviewed reported an atmosphere of overall retaliation by management" and that BOP employees often "do not report discrimination, harassment, and retaliation because they believe they involuntarily will be transferred." Id. at pp. 12, 16. The EEOC also found that BOP's equal employment opportunity program "has several deficiencies that might adversely affect its employees' perception of it." Id. at pp. 3-4.**

What is BOP doing to address the problems outlined in the EEOC report? In answering this question, please specify (a) whether BOP has made any changes to its equal employment opportunity program, and, if so, please provide the current status of those changes; (b) whether and to what extent BOP has engaged with union representatives about issues of retaliation, harassment, and discrimination; and (c) whether and to what extent BOP has provided guidance or training to its supervisory employees in response to the EEOC report.

Response:

We are committed to equal employment opportunity and to ensuring a workplace free of discrimination and retaliation. The Bureau of Prisons (Bureau) has taken many significant steps to modify its Equal Employment Opportunity (EEO) program and implement the recommendations in the Equal Employment Opportunity Commission (EEOC) report.

A. On October 21, 2010, the EEO Office was moved from the Office of General Counsel to the Program Review Division (PRD), which is the independent audit arm of the Bureau of Prisons (BOP). In addition, the PRD Assistant Director was designated as the EEO Director, reporting directly to the Bureau Director.

The BOP hired 13 additional full time EEO counselors. Now, with the exception of the staff located in the Bureau facilities in Puerto Rico and Hawaii (due to their locations, these two facilities are serviced by BOP staff who serve as EEO Counselors in addition to their full-time BOP assignment), all facilities are serviced by full time EEO counselors (18 in total).

B. The BOP EEO Officer, who has day-to-day supervision of the EEO Office and its functions, has met with the union to discuss issues of retaliation, harassment, and discrimination. BOP EEO management and union representatives have worked jointly to draft an anti-harassment policy that is almost complete. This workgroup is also collaborating to update the EEO complaints processing policy.

C. Since the report, the BOP EEO Officer has provided live training on two occasions to all BOP wardens. The first training focused on retaliation and the second on more general EEO issues. In addition, the EEO Officer provided video-conference training to all Bureau supervisors on two occasions. The first training focused on the EEO process generally, and the second focused on the full-time EEO Counselor program and confidentiality within the EEO process. All supervisors were also required to review an online training on retaliation developed by the EEO Officer.

All BOP staff received EEO training, to include training on the mediation process, during the agency's mandatory 2011 Annual Training. Finally, the BOP has been in compliance with the No FEAR Act of 2002 training requirements for all staff since its implementation.

8. The media recently reported that the FBI will soon roll out a "facial recognition" identification service in four states: Michigan, Washington, Florida, and North Carolina. This service will allow federal and state law enforcement officers to identify a suspect on the street by taking his or her picture and running it past a federal database of faces. Since then, civil liberties advocates from the Electronic Frontier Foundation to the Cato Institute cautioned that this database would allow the uploading of photos of innocent people that had never been convicted of a crime.

A. What legal or procedural restrictions are there on the type or source of photos that can be submitted?

Response:

The FBI's Next Generation Identification (NGI) program is in the early stages, with preparations currently underway to deploy the Interstate Photo System Facial Recognition Pilot (hereafter Pilot). State participation in the Pilot has not yet been established. We anticipate that full facial recognition services may be deployed in 2014.

The Pilot Repository will contain only photos provided by authorized criminal justice agencies for criminal justice purposes and associated with fingerprints from a criminal arrest or booking. Participating agencies will be required to comply with appropriate quality assurance procedures to ensure that only complete, accurate, and valid information is maintained in the Pilot Repository. Photos will be searched against those in the Repository only when the photos are obtained from authorized criminal justice agencies, only for criminal justice purposes, and only when consistent with parameters established in a memorandum of understanding (MOU) with criminal justice agencies. These parameters will address purpose, authority, scope, disclosure, use, and security. The information derived from Pilot searches will be used only as investigative leads and will not be considered positive identifications.

B. Will the FBI allow the photos of citizens who have never been convicted of a crime to be included in its facial recognition database?

Response:

As noted above, the Pilot Repository will contain only facial images associated with fingerprints from a criminal arrest or booking.

The FBI's collection and retention of identifying information is governed by statute: 28 U.S.C. § 534(a) requires that the "Attorney General shall - (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records." As interpreted by federal case law, the word "shall" not only provides authorization, it also provides imperative direction, requiring that identification materials and records be acquired and preserved. (United States v. Rosen, 343 F. Supp. 804, 806 (S.D.N.Y. 1972). "[E]ven in the situation where a person has been acquitted of charges against him, the arrest records and other materials of identification . . . may be retained *unless*: (1) there is a statute that directs return of such arrest records; (2) the arrest was unlawful; or (3) the record of the arrest is the 'fruit' of an illegal seizure." (Rosen at 808 (emphasis in original).) The retention of identification records has been addressed by the federal courts in other contexts, including in a 1976 case in which the court found that the maintenance and dissemination of arrest records of persons never convicted of a criminal charge arising from the conduct for which they were arrested does not violate constitutional due process protections or the constitutional right to privacy. (*See* Hammons v. Scott, 423 F. Supp. 625, 628 (N.D. Cal. 1976).)

C. Will private citizens be able to correct any inaccurate information in the FBI's database?

Response:

The FBI is primarily the custodian of criminal history information submitted by federal, state, and local criminal justice agencies. To assist in ensuring the integrity of information housed in the Pilot Repository, the FBI will require that retainable photo data be accompanied by fingerprints to verify the individual's identity, unless the MOU between the FBI and the contributor memorializes that identification will be confirmed by the state agency. Authorized criminal justice agencies may amend, modify, or delete their photo information should errors or court-ordered expungements require it.

As with all identification information, the subject of photo information may obtain a copy of the record by submitting a written request to the FBI (see the Guide for Obtaining Your FBI Identification Record on www.fbi.gov). If, after reviewing the identification record, the subject believes that it is incorrect or incomplete and wishes to change, correct, or update the record, the subject should apply directly to the agency that contributed the challenged information. If the subject of a record submits the challenge directly to the FBI, we will forward the challenge to the contributing agency, asking that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the contributing agency, the FBI will make any necessary changes to the record.

D. Can photos be submitted that are obtained from commercial social networking sites or similar sites?

Response:

As noted above, the Pilot Repository will contain only photos provided by authorized criminal justice agencies for criminal justice purposes and associated with fingerprints from a criminal arrest or booking. Only photos obtained from authorized criminal justice agencies will be searched against those in the Repository. Authorized criminal justice agencies may submit photos obtained from commercial social networking sites so they may be searched against the Pilot Repository for criminal justice purposes.

E. What entities (local, state, national, international) can add photos to the database?

Response:

As noted above, the Pilot Repository will contain only photos provided by authorized criminal justice agencies for criminal justice purposes and associated with fingerprints from a criminal arrest or booking.

F. What entities (local, state, national, international) can search the database?

Response:

Search of the Pilot Repository will be restricted to authorized criminal justice agencies for criminal justice purposes.

G. What safeguards are in place to prevent authorized users from searching outside of the authorized scope of use?

Response:

Searches of the Pilot Repository will be subject to the same security and privacy protocols that apply to searches of other FBI information systems and are articulated in established FBI Security Policy. The dissemination of any information obtained from these systems is also restricted; this information will be treated as "law enforcement sensitive" and protected from unauthorized disclosure in accordance with the Privacy Act of 1974 and the "Disclosure and Use of Information" section of the MOU. 28 U.S. C. § 534 and 28 C.F.R. §§ 20.33 and 50.12 require that disseminated records be used only for authorized purposes and provide that a user's access will be subject to cancellation if shared information is further shared improperly.

H. What other protections will the FBI take to safeguard civil liberties?

Response:

NGI program managers have worked closely with privacy and civil liberties attorneys in the FBI's Office of the General Counsel (OGC), as well as with Department of Justice (DOJ) attorneys, and have briefed privacy advocacy groups regarding the privacy and civil liberties considerations and planned safeguards. These considerations have been addressed in the FBI Security Policy. In addition, an Interstate Photo System Privacy Impact Assessment (PIA) has been completed and approved. A Privacy Threshold Analysis will be conducted to update the PIA as part of the ordinary process and in support of the full facial recognition service.

To ensure full implementation of the security policies and to prevent the misuse of data, all federal, state, and local users are subject to periodic audits conducted by both an FBI Audit Unit and appropriate state auditors. Access to an FBI information system may be terminated or restricted in response to improper access, use, or dissemination of the system's records.

9. **Under the Debbie Smith Act (DSA), Congress has appropriated to NIJ more than $700 million for use in eliminating rape kit backlogs. However, only a fraction of those funds actually have been spent on direct backlog reduction. Please (a) provide data on the percentage of DSA funds that have been used for direct support to crime laboratories and law enforcement agencies to reduce rape kit backlogs; (b) provide data on the percentage of DSA funds that have been used for other purposes, identifying what those purposes are; and (c) explain why NIJ believes that its existing funding breakdown is appropriate in light of persistently large rape kit backlogs.**

Response:

NIJ's principal forensics-related appropriations in Fiscal Year 2012, under the Department of Justice Appropriations Act, 2012 provides "$117,000,000 for a DNA analysis and capacity enhancement program and for other local, State, and Federal forensic activities, including the purposes authorized under section 2 of the DNA Analysis Backlog Elimination Act of 2000 (the Debbie Smith DNA Backlog Grant Program)." Previous years' appropriations (referred to hereafter as the "DNA and other forensics" appropriation) have had similar language.

In Fiscal Year (FY) 2011, NIJ awarded $88.7 million – over 70% of all funds received by NIJ from the FY 2011 "DNA and other forensics" appropriation – directly to states and units of local government under the FY 2011 DNA Backlog Reduction Program. One of the major purposes of that program was to cover costs of laboratory analysis of forensic DNA casework samples, a category that includes samples from rape kits or other sexual assault evidence.

Remaining funds from the FY 2011 "DNA and other forensics" appropriations were used to support basic and applied research to find faster and more efficient methods for analyzing DNA and other forensic evidence; assist with solving cold cases with DNA; perform social

science research (e.g., to identify best practices for addressing untested sexual assault kits); and provide training and technical assistance in the areas of DNA and other forensic sciences.

Although the FY 2012 appropriation for DNA and other forensics is lower than in FY 2011, NIJ will continue to use a similarly high-percentage of that appropriation exclusively for the FY 2012 DNA Backlog Reduction Program. As in FY 2011, funds awarded under the FY 2012 DNA Backlog Reduction Program will be available, among other things, to cover costs of laboratory analysis of forensic DNA casework samples, a category that includes samples from rape kits or other sexual assault evidence. While making funds available to state and local crime laboratories for analysis of forensic DNA casework samples is a top priority, NIJ also believes that other DNA- and forensics-related programs and activities are important in reaching the same goal of reducing backlogs, albeit indirectly, by enhancing capacity within crime laboratories, training personnel, solving "cold" cases, and developing modern methods to analyze evidence.

10. The National Institute of Justice (NIJ) defines a backlogged rape kit as one that has not been tested 30 days after it was submitted to a laboratory. This definition excludes rape kits held in police storage facilities. Why does NIJ define backlogs in this manner, and what is being done to account for and reduce the backlog of rape kits in law enforcement custody?

Response:

The NIJ definition of backlogs is designed as a measure of timeliness specifically for forensic evidence that has been submitted to a crime laboratory for analysis. It does not include forensic evidence that has not been submitted to a crime laboratory for testing.

NIJ refers to evidence in law enforcement custody that has not been submitted to a crime laboratory as untested evidence. Untested sexual assault kits (SAK), previously referred to as rape kits, can be stored in a number of places: police department evidence rooms, crime labs, hospitals, clinics, rape-crisis centers. It is unknown how many unanalyzed SAKs there are nationwide. There are many reasons for this, but one of the primary reasons is that tracking and counting SAKs is an antiquated process in many U.S. jurisdictions. A recent NIJ study found that 43 percent of the nation's law enforcement agencies do not have a computerized system for tracking forensic evidence, either in their inventory or after it is sent to the crime lab.

There may be legitimate reasons that SAKs are not sent to a lab. Not all evidence collected in an alleged sexual assault is going to be probative. In cases where consent is an issue (the suspect admits sexual contact, but maintains it was consensual), detectives may consider that the SAK does not add any important information to the investigation. Also, evidence may not be sent to a lab for analysis if charges against the alleged perpetrator have been dropped or the suspect has pled guilty.

NIJ has invested funds in a comprehensive study of the outcomes of the testing of over 10,000 previously untested SAKs in Los Angeles and is assisting the New Orleans Police Department in dealing with their untested SAK issues. NIJ is currently studying the SAK

backlogs and untested sexual assault evidence that has not been sent to a crime lab for testing in Detroit, Michigan and Houston, Texas. The purpose of this project is to help the nation move beyond the DNA backlog crisis management of the moment — to the adoption of systematic practices, procedures, and protocols that will prevent the accumulation of untested SAKs in police departments from ever happening again.

11. The Department has issued almost double the number of National Security Letters (NSLs) involving different U.S. persons in 2010 as it did in 2008 or 2009. In your November 2, 2011 response to a question for the record regarding NSLs, you explained that "[t]o the extent these numbers may indicate an upward trend, we are unable to explain the increase because we do not collect statistics or other information that would enable us to discern the reason for the increase." This is unacceptable, especially given the previous Inspector General reports that have demonstrated widespread and systematic abuse of NSLs. Please explain how the Department exercises oversight over the issuance of NSLs, and what steps the Department plans to implement to better track how and why these NSLs are issued.

Response:

An increase, even a significant one, in the number of National Security Letters (NSLs) is not necessarily a sign of NSL misuse or abuse, as opposed to effective and productive intelligence gathering to protect the nation. The FBI has in place robust rules, policies, procedures, and training to ensure that NSL issuance and use are appropriate. In addition, the FBI and DOJ exert significant oversight of NSLs.

As indicated in the Department's response to Questions for the Record arising from the May 4, 2011, Senate Judiciary Committee hearing regarding "Oversight of the U.S. Department of Justice," changes in the numbers of NSLs issued from year to year may be based on the types of threats being investigated or the locations of the threats (in the United States versus outside the United States). These variables affect the way we gather information and what information we need to address the threat. For example, if more threats involving U.S. persons arise because known U.S. persons become radicalized, the FBI will investigate those threats. Such investigations may include issuing NSLs to help determine whether a U.S. person poses a terrorism threat.

The question indicates that DOJ's Inspector General (IG) reported "widespread and systematic abuse" of NSLs. The conduct addressed in the IG's March 2007 report entitled, "A Review of the Federal Bureau of Investigation's Use of National Security Letters" occurred between 2003 and 2005 and, although serious, was not pervasive. Importantly, the IG found that FBI agents had not intentionally sought to misuse NSLs, but that the errors were the product of a lack of adequate guidance and oversight. Both issues were immediately addressed and are continually assessed by both the FBI and DOJ. Indeed, in its March 2008 review of the FBI's use of NSLs, the IG found that the FBI and DOJ had made significant progress in implementing its recommendations and in adopting other corrective actions to address problems in the use of NSLs.

As has been briefed to Congress, mandatory use of the FBI's automated NSL creation system, mandatory legal review of each NSL, and clear and widely distributed policy guidance regarding NSL usage have prevented most of the errors identified in the 2007 IG report. In addition, audits and reviews of FBI NSL usage by DOJ's National Security Division, the FBI's Inspection Division, and the FBI's OGC have shown that the errors identified in the 2007 IG report have been reduced dramatically. These results demonstrate that the policies, procedures, training, and oversight mechanisms that are in place are working effectively to reduce the risk that this tool is being misused or abused, and to ensure that NSLs are issued in accordance with the law.

12. **The GAO recently published a report on suspension and debarment programs in the federal government. GAO found that the Department of Justice had relatively few suspensions and debarments, and it recommended several steps DOJ should take to improve its suspension and debarment program. Please indicate the status of the Department's efforts to implement these recommendations. In addition to the steps recommended by GAO, will the Department take steps to improve and promote inter-agency communication and case referrals, especially when the Department is investigating a government contractor in a civil or criminal matter and has relevant information as to the responsibility of that contractor?**

Response:

In its report, *Suspension and Debarment: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could be Improved*, GAO-12-270T (Oct. 6, 2011) (Report), the Government Accountability Office (GAO) recommended that agencies conform their suspension and debarment programs to those programs at agencies that engage in a large number of suspensions and debarments. GAO issued three recommendations to various agencies, including the Departments of Justice, Commerce, Health and Human Services, and Treasury. Specifically, the report recommended that agencies: (1) promote the case referral process; (2) assign dedicated full-time staff to its suspension and debarment program; and (3) develop and implement additional policies and procedures to supplement the guidance contained in the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 9.4. The recommendations are based on GAO's review of the "shared traits" of the four agencies with the largest total number of suspension and debarment cases for Fiscal Years 2006 to 2010, as identified in the General Service Administration's (GSA) Excluded Parties List System (EPLS). The Report neither addresses in detail the policies and practices of the other federal agencies, nor considers certain factors that may impact the number of suspension and debarment cases, including, for example, the total number of contractors and grantees conducting business with an agency, or the types of products or services being acquired by an agency. Importantly, GAO recognized that, because each agency's fundamental mission and organizational structure is unique, each agency must determine for itself whether, and to what extent, it can benefit from conforming its suspension and debarment programs to those agencies' programs.

As the Department informed GAO in its July 20, 2011, response to the draft Report, DOJ concurs with much of the Report's findings and conclusions, and in particular with the Report's emphasis on the need for agencies to devote sufficient attention to suspension and debarment to ensure that the government conducts business only with responsible parties. DOJ also agrees that suspension and debarment are powerful administrative tools available to federal agencies and, when used appropriately, help protect the government's interests. DOJ fully and actively supports the use of suspension and debarment.

In order to ensure that DOJ continues to protect the integrity of federal programs by conducting business with responsible parties, the Department has implemented a number of measures consistent with the recommendations of GAO, as well as those contained in the recent report of DOJ's Office of the Inspector General (OIG), *Audit of Administrative Suspension, Debarment, and Other Internal Remedies Within the Department of Justice*, Audit Report 12-01 (Oct. 2011). Among these measures, the Attorney General recently issued a memorandum to all U.S. Attorneys, Assistant U.S. Attorneys, DOJ litigating divisions and Trial Attorneys, and the Director of the Federal Bureau of Investigation, titled *Coordination of Parallel Criminal, Civil, and Administrative Proceedings* (Jan. 30, 2012) (Memorandum), promoting the case referral process, including suspension and debarment. The Memorandum reiterates that DOJ has placed a high priority on combating white--collar crime, including fighting against fraud, waste, and abuse, whether in connection with healthcare, procurement, or other financial fraud. The Memorandum also reiterates DOJ's longstanding policy that criminal prosecutors, civil trial counsel, and investigators timely communicate, coordinate, and cooperate with one another and with agency attorneys inside and outside DOJ to the fullest extent appropriate and permissible whenever an alleged offense or violation of federal law gives rise to the potential for parallel (whether simultaneous or successive) criminal, civil, regulatory, and/or administrative proceedings. The Memorandum also emphasizes the need for litigating and investigating activities to have in place policies and procedures for early coordination of parallel proceedings, and the need for these policies and procedures to stress effective, timely, and regular communication between criminal, civil, and agency attorneys. The Memorandum underscores that, at every point throughout the process -- from case intake and investigation to final case resolution -- DOJ attorneys and investigators need to assess the potential impact of any action on potential criminal, civil, regulatory, and administrative proceedings to the extent possible and permissible. The Memorandum also directs DOJ's Office of Legal Education, in consultation with the United States Attorney's Offices, the Civil Division, the Criminal Division, and other DOJ litigating divisions, to facilitate the provision of instruction and training materials on parallel proceedings, including suspension and debarment.

Additionally, DOJ's Senior Procurement Executive (SPE) recently issued a Procurement Guidance Document (PGD), PGD 12-08 (Feb. 1, 2012), directed to all Bureau Procurement Chiefs (BPCs) and contracting officers, emphasizing the FAR and Justice Acquisition Regulation (JAR) requirement that DOJ solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. The PGD reiterates the importance of the FAR requirement that contracting officers review the EPLS both after opening bids or receipt of proposals and immediately prior to contract award to ensure that no award is made, option exercised, or order issued to a contractor listed on the EPLS. The PGD also reminds contracting officers that agencies may not solicit offers from, award contracts and orders to, or consent to subcontracts

with a contractor suspended, proposed for debarment, or debarred, unless the head of the agency (or his or her delegate) determines in writing that there is a compelling reason to do so. The PGD also directs contracting officers to consider termination of any existing contract or order with a contractor if, during performance of the contract or order, the contracting officer learns that the contractor is suspended, proposed for debarment, or debarred. The PGD explains that, in accordance with the procedures in the FAR and the JAR, prior to making a decision to terminate an existing contract or order, the contracting activity should consult with both the program office and the activity's legal counsel.

DOJ also has implemented an electronic suspension and debarment case tracking system. The system is accessible to those persons within DOJ with responsibility for the suspension and debarment program, including the suspending and debarring official (SDO), the SDO's legal counsel, and those responsible for entering information into the EPLS. The system will help ensure that suspension and debarment case referrals are acted upon in a timely manner, thereby providing an additional level of protection for DOJ and other Executive Branch agencies from conducting business with persons and organizations who have demonstrated fraudulent behavior or a pattern of poor performance. The system also will help ensure that persons and organizations referred for suspension and debarment are provided due process.

DOJ also participates in the activities of the Interagency Suspension and Debarment Committee (ISDC) -- a government-wide organization created to monitor and coordinate suspension and debarment activities. DOJ participates with the ISDC on an on-going basis regarding, among other things, the facilitation of lead agency coordination of prospective suspension and debarment cases and the development of a unified Federal policy as it relates to suspension and debarment. On February 8, 2012 an Assistant Director within the Civil Division's Commercial Litigation Branch (Fraud Section), provided a presentation to the ISDC, discussing DOJ's longstanding policy outlined in the Attorney General's January 30, 2012 Memorandum, emphasizing DOJ's commitment to engaging in effective, early, and regular communication during the investigation and litigation processes with agency attorneys, to ensure that the Government makes use of all available remedies in its fight against fraud, waste and abuse, including administrative remedies such as suspension and debarment.

DOJ considered carefully GAO's view that some agencies will benefit from the implementation of additional policies and procedures, but has concluded that additional policies and procedures are not necessary at this time. As explained in DOJ's letter to GAO, DOJ already relies upon a number of policies, procedures, and guidelines in its suspension and debarment program, including the FAR, JAR, OMB's guidelines related to non-procurement suspension and debarment, and DOJ's regulations related to non-procurement suspension and debarment at 2 C.F.R. § 2867. The JAR specifically outlines DOJ's internal processes when a possible cause for suspension or debarment arises, including directing the contracting activity to actively seek review by the activity's legal counsel and the BPC. Additionally, the Attorney General's Memorandum, as well as the United States Attorney's Manual (USAM) and the Environmental Crimes Manual (ECM), inform litigating and investigating activities of DOJ's longstanding policy requiring coordination of criminal, civil, and administrative actions -- including emphasizing the need for timely and effective communication with agencies' suspension and debarment authorities. Likewise, DOJ does not believe that it is either necessary

or practical at this time to assign dedicated full-time staff to its suspension and debarment program.

DOJ believes that the measures described above, coupled with those measures already in place -- including close cooperation with the OIG -- will improve DOJ's suspension and debarment program and demonstrate, both within and outside the agency, that DOJ is serious about holding entities with which it does business accountable. DOJ also believes that these measures will help ensure that DOJ continues to protect the integrity of Federal programs by conducting business with responsible parties only.

13. **As you said in your testimony, the recently disclosed anti-Muslim statements in FBI training materials are inconsistent with the views of the Department of Justice and the FBI and have set back your substantial outreach efforts with Muslim and other minority communities around the country. These communities can and should be important partners in our counterterrorism efforts. The Department is undertaking a comprehensive review of its counterterrorism training and reference materials. What will the Department do beyond removing existing problematic statements in training materials to ensure that the FBI's efforts to communicate and work with Muslim and other minority communities around the country are not undermined by such bias in the future?**

Response:

Since September 2011, when several articles were published regarding the FBI's counter-terrorism training materials, senior FBI officials have held more than 100 meetings with community advocates and leaders from the Muslim, Arab, Sikh, South Asian, and interfaith communities to discuss these training materials. These meetings have been held at FBI Headquarters and all 56 FBI field offices to discuss the training issue, explain how these events came to pass, and identify the corrective actions being taken moving forward. These efforts continue. As recently as February 8, 2012 FBI Director Mueller met with many of these groups to continue this dialogue. Among other things, they discussed in detail the FBI's review of its training materials, which was conducted by a team of 25 FBI inspectors with training and assistance provided by a five-person team of subject matter experts (SMEs). The SME team included both FBI and non-FBI personnel with academic backgrounds in Islamic studies and Arab history from prestigious institutions.

The review has included approximately 160,000 pages of counterterrorism training materials, more than 4,500 presentations, and more than 1,000 minutes of video.

The materials were measured against the following requirements:

- Training must be consistent with both Constitutional principles and the FBI's core values. (The FBI's core values are available on its website, www.fbi.gov, and include respect for the dignity of all those we protect, compassion, and fairness.)
- Training must be tailored, focused, and supported with appropriate course materials.

- Training must be properly reviewed and trainers must know their subject areas.
- Training must facilitate further learning and professional development.

The review team authored concrete enterprise-wide guidelines regarding training related to counterterrorism and countering violent extremism, to be used both to evaluate current training and as the basis of future curriculum development. While the vast majority of the reviewed training materials met these high standards, some did not. Fewer than one percent of the documents were determined to have factual or other problems and were removed from FBI training curricula. The review revealed that the problems with the FBI's training materials were related to the absence of a centralized process to ensure that all training is reviewed, validated, standardized, and mapped to appropriate learning objectives. Moving forward, all training materials produced or used by the FBI will be subject to such a process.

QUESTIONS POSED BY SENATOR GRASSLEY

Memos to Attorney General

14. **In your October 7, 2011, letter to Congress, you wrote: "On a weekly basis, my office typically receives over a hundred pages of so-called 'weekly reports' that, while addressed to me, actually are provided to and reviewed by members of my staff and the staff of the Office of the Deputy Attorney General. The weekly reports contain short summaries of matters that the agencies deem of interest that week."**

In 2010, who in the Attorney General's office was responsible for reading memos to the Attorney General's office from Assistant Attorney General Lanny Breuer?

Response:

Responsibility for reading memos to the Office of the Attorney General from the heads of Department components typically depends on the subject matter of the memos and the make-up of the Attorney General's staff at any particular time. We understand that the Committee has had the opportunity to interview current and former members of the staff of the Office of the Attorney General about responsibilities within that office in 2010.

A. Was this same individual responsible for handling the entire portfolio of the Criminal Division withio the Office of the Attorney General?

Response:

Please see response to question 14, above.

B. In 2010, who in the Attorney General's office was responsible for reading memos to the Attorney General's office from National Drug Intelligence Center Director Michael Walther?

Response:

Please see response to question 14, above.

C. In 2010, who in the Attorney General's office was responsible for reading memos to the Attorney General's office from ATF Acting Director Kenneth Melson?

Response:

Please see response to question 14, above.

D. At any time during 2010, did Monty Wilkinson have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson, either in Wilkinson's role as Counselor to the Attorney General or as Deputy Chief of Staff and Counselor?

Response:

Please see response to question 14, above.

E. At any time during 2010, did then-Deputy Chief of Staff and Counselor James Garland have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson?

Response:

Please see response to question 14, above.

F. At any time during 2010, did Monty Wilkinson have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson, either in Wilkinson's role as Counselor to the Attorney General or as Deputy Chief of Staff and Counselor?

Response:

Please see response to question 14, above.

G. At any time during 2010, did then-Counselor to the Attorney General Molly Moran have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson?

Response:

Please see response to question 14, above.

H. At any time during 2010, did then-Counselor to the Attorney General John Bies have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson?

Response:

Please see response to question 14, above.

I. At any time during 2010, did Counsel Aaron Lewis have responsibility for reading memos to the Attorney General's office from Assistant Attorney General Breuer, Director Walther, or Acting Director Melson?

Response:

Please see response to question 14, above.

Communication Between Wilkinson and Burke

15. On December 14, 2010, your Deputy Chief of Staff Monty Wilkinson emailed U.S. Attorney Dennis Burke asking if he was available for a call that day. At 2 am the next morning of December 15, 2010, Burke said that he would call that day to explain in detail what was clearly a reference to Operation Fast and Furious.

You said in response to a question about this at the hearing:

The conversations that they had were about a variety of things. I've looked at the emails. Now the possibility of me coming out to at some point talk about being engaged in a press conference, other matters, but there was no discussion between them of the tactics that are of concern with regard to Fast and Furious and as a result of that, Mr. Wilkinson did not share information with me about his contacts with former U.S. Attorney Burke.

A. Did that phone call between Wilkinson and Burke take place on December 15, 2010?

Response:

The Attorney General has no personal knowledge of whether a call between Mr. Wilkinson and Mr. Burke took place on December 15, 2010. As the Department has previously explained, the e-mail you have paraphrased does not refer to Operation Fast and Furious by name and does not discuss the inappropriate tactics that were used in that operation. Moreover, the Department has advised the Committee that neither Mr. Wilkinson nor Mr. Burke has any recollection of speaking with the Attorney General about Operation Fast and Furious in December 2010, and the Attorney General similarly has no recollection of speaking with either of them about it. *See Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa at 3 (Oct. 31, 2011)*; *Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa at 2 (Jan. 27, 2012)*.

B. If the phone call did take place, what specific topics were discussed?

Response:

Please see response to question 15(A), above.

C. When did Mr. Wilkinson learn of the connection between an ATF operation and the guns recovered at the Terry murder scene? How did [he] learn about it?

Response:

The Attorney General has no personal knowledge of when or how Mr. Wilkinson learned of the connection between an ATF operation and the guns recovered at the scene of Agent Terry's tragic murder. The Department has produced to Congress an e-mail on this subject from then-U.S. Attorney Dennis Burke to Mr. Wilkinson, and the Committee has had the opportunity to interview Mr. Wilkinson and question him about this e-mail.

D. What other emails exist between Mr. Wilkinson and U.S. Attorney Dennis Burke on the issue of your participation in a press conference? Please provide copies of these emails to the Committee.

Response:

The Department has produced to Congress e-mails between Mr. Wilkinson and Mr. Burke relating to Mr. Burke's interest in having the Attorney General participate in the January 2011 press conference announcing the Fast and Furious indictments. As the Department has previously explained, the Attorney General did not attend the press conference announcing the Fast and Furious indictments, and neither Mr. Wilkinson nor Mr. Burke has a recollection of speaking to the Attorney General about whether he would attend. The Attorney General similarly does not have a recollection of discussing the subject with either Mr. Wilkinson or Mr. Burke. *See Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa at 3 (Oct. 31, 2011); Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa at 2 (Jan. 27, 2012).*

E. Did you see these emails contemporaneously, or did you review them later (either as part of the investigation into Fast and Furious or in preparation for the oversight hearing)?

Response:

The Attorney General does not recall seeing the e-mails referenced in the responses to questions 15(C) or 15(D) at or near the time they were sent. The Attorney General does not recall when he first saw those e-mails, but it would have been well after the allegations of inappropriate tactics in Operation Fast and Furious were made public.

F. Why did you ultimately opt not to participate in such a press conference?

Response:

The Attorney General does not recall being consulted about participating in the January 2011 press conference announcing the indictments in Operation Fast and Furious.

ATF's Denial of Gun Walking Allegations

16. You said in the hearing that you "received things as late as March of 2011 from people at ATF, who assured [you] that gun walking did not occur."

A. What "things" did you receive?

Response:

In the period after allegations of inappropriate tactics in Operation Fast and Furious were made public, the leadership of ATF provided assurances to the Department that the allegations were untrue. Notwithstanding these assurances, in February 2011, the Attorney General requested that the Department's Office of the Inspector General conduct a review and, in early March 2011, the Attorney General instructed the Deputy Attorney General to issue a directive that the tactics used in Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez and Medrano, should not be used.

B. Who at ATF made these representations to you?

Response:

Please see response to question 16(A), above.

C. Do you consider these documents to be responsive to the House Oversight and Government Reform Committee subpoena of October 12, 2011?

Response:

The Department has made clear that materials responsive to the House Oversight and Government Reform Committee's October 11, 2011 subpoena have been provided consistent with the Department's practices in this area across Administrations of both political parties. *See Letter from Deputy Attorney General James M. Cole to Hon. Darrell E. Issa (May 15, 2012).*

1. If so, please identify when the Department is planning on producing these documents pursuant to the House Oversight and Government Reform Committee subpoena.

Response:

Please see response to question 16(C), above.

2. If not, please produce these documents to this Committee.

Response:

Please see response to question 16(C), above.

Refusal to Allow Witnesses to Testify

17. **We have tried to schedule transcribed interviews with 12 Justice Department witnesses. The only one you have made available is the now-former U.S. Attorney Dennis Burke. Your department is refusing to schedule the other 11. For 3 of the witnesses, your staff cited the so-called "line attorney policy" as the reason for your refusal.**

    A. Why is the Department refusing to schedule the other 8 witnesses?

Response:

The Department's position regarding witness interviews was set forth in a letter to Chairman Issa and Senator Grassley dated December 6, 2011. As the letter explains in greater detail, Administrations of both political parties have agreed that it is the Department's supervisory personnel, not line employees, who make policy decisions that are properly the subject of Congressional review, and therefore those supervisory personnel should be the ones to explain their decisions if called upon to do so. Requiring line attorneys to respond to congressional inquiries threatens to chill the objective exercise of their prosecutorial discretion and creates the impermissible appearance of political influence on prosecutorial decisions. Furthermore, in an ongoing criminal investigation such as this, testimony by line attorneys could significantly complicate the government's ability to bring dangerous individuals to justice.

Consistent with Department policy, since our December 6, 2011 letter was sent, the Committee has requested to interview, and has interviewed, Gary Grindler, the former Acting Deputy Attorney General and now the Attorney General's Chief of Staff; Monty Wilkinson, the Attorney General's former Deputy Chief of Staff; Jason Weinstein, Deputy Assistant Attorney General for the Criminal Division; and Edward Siskel, former Associate Deputy Attorney General.

    B. It looks like a game of delay to get past the December 8th hearing in the House. Will you commit to setting dates for the other 8 witnesses by the end of this week and cooperating with staff on the order and timing—yes or no? And, if not, why not?

Response:

Please see response to question 17(A), above.

C. The line attorney on the anthrax investigation appeared recently on *PBS Frontline*. How is it appropriate to grant full access to a line attorney for the press while you're denying a Congressional request?

Response:

The attorney you reference is an Executive Assistant United States Attorney who was made available for press inquiries to discuss public aspects about the long closed anthrax investigation. That is very different from making a line attorney available for a congressional interview, particularly with respect to open investigations and prosecutions.

D. The line attorney policy is merely an arbitrary policy. It is not a legal privilege, so if the House subpoenas their testimony, it will not be a defense. Why is the Department so determined to prevent their testimony that you are willing to push the envelope and force these witnesses into a choice between contempt of Congress and following orders?

Response:

Please see response to question 17(A), above.

E. Congress has prohibited the use of appropriated funds to pay the salary of anyone who tries to prevent federal employees from communicating with Congress. How can you refuse to schedule an interview with someone willing to speak to us without violating that provision of the law?

Response:

The Executive Branch's interpretation of the statutory provisions to which you refer is set forth in a May 21, 2004 opinion of Assistant Attorney General Jack L. Goldsmith, III. *See Authority of Agency Officials to Prohibit employees from Providing Information to Congress* (May 21, 2004), *available at* http://www.justice.gov/olc/crsmemoresponsese.htm. That opinion fully supports the Department's position in this matter.

Additional Gun Recoveries

18. In the DOJ's August 31, 2011 response to previous QFR's, it stated "ATF is aware of only one instance where a firearm associated with Operation Fast and Furious was...recovered in connection with a crime of violence in the United States." The weapons recovered in the death of Agent Terry were excluded from this calculation.

A. Since the time of that letter, have there been any other instances of firearms associated with Operation Fast and Furious being recovered within the United States in connection to a crime of violence?

Response:

ATF has advised the Department that, as of May 1, 2012, it is not aware of additional instances in which a firearm associated with Operation Fast and Furious was traced and coded as recovered in connection with a crime of violence in the United States.

1. **If so, how many additional guns have been recovered? How many crimes have these guns been connected to? How many violent crimes, as designated in FBI crime statistics, have these guns been connected to?**

Response:

Please see response to question 18(A), above.

U.S.-Sourced Guns

19. **You said in your statement, "[O]f the nearly 94,000 guns that have been recovered and traced in Mexico in recent years, over 64,000 were sourced to the United States."**

   A. **What definition of "sourced" does this statement rely on?**

Response:

A firearm sourced to the United States is one that was determined through the firearms tracing process to have been manufactured by or imported into the United States by a federally licensed firearms dealer.

   B. **If "sourced" were instead defined as "traceable to an identifiable U.S. gun store," how would the figure of 64,000 change?**

Response:

ATF cannot reliably trace a firearm "to an identifiable U.S. gun store" because, under ATF's regulatory structure, several different types of federal firearms licensees (FFLs) may possess the same type of license, making it impossible in the tracing process to distinguish between a retailer—commonly thought of as a "gun store"—and a wholesaler.

   C. **Of the guns submitted by Mexico for tracing in 2009 and 2010, respectively, how many are traceable to an identifiable U.S. gun store?**

Response:

Please see responses to questions 19(A) and (B), above.

Long Gun Reporting

20. On July 12, 2011, Chairman Issa and I sent you a letter regarding the Department's decision to require Federal Firearms Licensees (FFLs) on the Southwest border to report multiple sales of long guns. That letter provides multiple examples of officials looking for ways to use Fast and Furious to justify the long-gun reporting requirement. In addition to emails between senior ATF officials contemplating using Operation Fast and Furious to push for a reporting requirement, we have now learned that your then-acting Deputy Attorney General and current Chief of Staff Gary Grindler was briefed on the subject on March 12, 2010. During that briefing, his handwritten notes indicate that the topic of long gun reporting was discussed within the context of Operation Fast and Furious.

A. Why has the Department failed to respond to my July 12, 2011, letter?

Response:

The Department has responded to your letter. *See Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa and Senator Charles E. Grassley (Dec. 13, 2011).*

B. As Chairman Issa and I asked in that letter, is there any other evidence suggesting that ATF or DOJ officials discussed how Operation Fast and Furious could be used to justify additional regulatory authorities for the ATF? If so, please provide such evidence to the Committee.

Response:

The Department's response to your letter attached documents reflecting ATF's concerns regarding multiple sales of long guns. As you know, earlier this year a federal district judge upheld ATF's authority to require federal firearms licensees in the four Southwest Border states to report multiple sales of certain long guns.

1. Are there any such indications prior to the March 12, 2010, briefing?

Response:

Please see response to question 20(B), above.

a. Rather than collecting additional information on law-abiding gun owners, what steps have you taken to ensure that the ATF is better able to act on the information it already possesses to interdict the flow of firearms to criminals?

Response:

ATF has clarified its firearms transfer policy, implemented a new monitored case program, and revised its policies regarding the use of confidential informants and undercover operations. These reforms, as well as others, are described more fully in Deputy Attorney General James M. Cole's January 27, 2012 letter to Chairman Leahy and other members. In addition, as the Attorney General has previously testified, and as ATF witnesses appearing before the House Committee on Oversight and Government Reform have testified, ATF's ability to stem the illegal flow of weapons to Mexico would be enhanced if Congress provided additional tools necessary for ATF to carry out its mission more effectively. These tools include additional funding so that ATF can increase the number of agents along the Southwest Border; confirmation of the President's nominee to be Director of ATF; and enactment of a federal firearms trafficking statute with more stringent penalties for straw purchasers.

21. **Fraud Cases**

Questions:

A. **Please provide an annual breakdown of the number of health care fraud cases initiated Department-wide from 2001 to the present, including the number of cases to date in 2011.**

Response:

Department of Justice attorneys in the Civil and Criminal Divisions and the United States Attorney's Offices, working with the FBI and the HHS-OIG and other investigative partners, investigate and prosecute numerous health care fraud matters every year. Although the Department does not use the terminology "cases initiated," we report below on cases in which criminal charges were filed in court. It is not unusual for more than one defendant to be charged in a criminal case so the number of individuals who were charged with criminal offenses may be higher.

In addition, we report below on civil cases which were filed in court by the United States or qui tam relators which were settled or resolved by a court judgment, as well as matters which were initiated by the Department but were resolved by a settlement without any court filing. These matters are listed in the fiscal year in which they were finally resolved (*e.g.*, a case including multiple settlements over several years is listed only in the fiscal year of the final settlement).

Criminal Cases Filed		Civil Cases (Settlement or Court Judgment)
FY 2001:	445	259
FY 2002:	361	237
FY 2003:	362	298
FY 2004:	395	215

FY 2005:	382	187
FY 2006:	355	187
FY 2007:	434	208
FY 2008:	502	254
FY 2009:	481	225
FY 2010:	488	263
FY 2011:	489	242

B. Please provide an annual breakdown of the revenue generated from any health care fraud cases Department-wide from 2001 to the present, including the revenue to date in 2011.

Response:

Revenue generated from health care fraud cases is recorded in the Department's Consolidated Debt Collection System (CDCS). The "Collections" reported below are actual moneys paid to the Government pursuant to litigation and enforced collection by the Department as reported in CDCS. It does not include civil or administrative penalties imposed and collected by other agencies such as HHS. The collections are reported according to the year in which they were collected which may differ from the year the settlement agreement was reached or the court judgment was imposed.

CDCS is the Department of Justice's Department-wide financial litigation and collection system. It supports the collection efforts of the US Attorney's Offices, the Department's Litigating Divisions, and Private Counsel under contract with the Department to litigate and collect on behalf of the United States. The CDCS was fully deployed at the beginning of Fiscal Year (FY) 2008 in all judicial districts across the country and its territories. Prior to FY 2008, there was no centralized DOJ collection system and each component within the Department maintained its own system. Although each component may have recorded information differently prior to FY 2008 depending on its own requirements, historical data was collected from these systems and entered into CDCS and is reported below.

Collections in Health Care Fraud Cases

FY 2001	$519 M
FY 2002	$1.5 B
FY 2003	$900 M
FY 2004	$ 1.4 B
FY 2005	$ 786 M
FY 2006	$ 1.7 B
FY 2007	$1.6 B
FY 2008	$1.1 B
FY 2009	$2.2 B
FY 2010	$3.2 B
FY 2011	$ 2.9 B

C. Please provide an annual breakdown of the number of mortgage fraud cases initiated Department-wide from 2001 to the present, including the number of cases to date in 2011.

Response:

Department of Justice attorneys in the Civil and Criminal Divisions and the United States Attorney's Offices, working with the FBI and other investigative partners, investigate and prosecute numerous mortgage fraud matters every year. Although the Department does not use the terminology "cases initiated," we report below on cases in which criminal charges were filed in court. It is not unusual for more than one defendant to be charged in a criminal case so the number of individuals who were charged with criminal offenses may be higher. The Department's case management systems did not differentiate mortgage fraud cases from other types of fraud cases prior to 2008, so the report below reflects data from 2008 through 2011 only. In addition, the Department is unable to provide a reliable number of civil mortgage fraud cases because the case management system used by the United States Attorney's Offices does not track civil mortgage fraud cases.

Criminal Mortgage Fraud Cases Filed

FY 2008	88
FY 2009	248
FY 2010	656
FY 2011	523

D. Please provide an annual breakdown of the revenue generated from any mortgage fraud cases Department-wide from 2001 to the present, including the revenue to date in 2011.

Response:

Revenue generated from mortgage fraud cases is recorded in the Department's Consolidated Debt Collection System (CDCS), which is used by all Department components involved in the federal debt collection process. Mortgage fraud collections were not tracked apart from other types of fraud causes until fiscal year 2009.

The "Collections" reported below are actual moneys paid to the Government pursuant to litigation and enforced collection by the Department as reported in CDCS. It does not include civil or administrative penalties imposed and collected by other agencies. The collections are reported according to the year in which they were collected which may differ from the year the settlement agreement was reached or the court judgment was imposed.

Collections in Mortgage Fraud Cases

FY 2009	$1.2 M
FY 2010	$2 M

FY 2011 $7.1 M

E. Please provide an annual breakdown of the number of procurement fraud cases initiated Department-wide from 2001 to the present, including the number of cases to date in 2011.

Response:

Department of Justice attorneys in the Civil and Criminal Divisions and the United States Attorney's Offices, working with the FBI and other investigative partners, investigate and prosecute numerous procurement fraud (PF) matters every year. Although the Department does not use the terminology "cases initiated," we report below on cases in which criminal charges were filed in court. It is not unusual for more than one defendant to be charged in a criminal case, so the number of individuals who were charged with criminal offenses may be higher.

In addition, we report below on civil cases, which were filed in court by the United States or qui tam relators, which were settled or resolved by a court judgment, as well as matters which were initiated by the Department but were resolved by a settlement without any court filing. These matters are listed in the fiscal year in which they were finally resolved (*e.g.*, a case including multiple settlements over several years is listed only in the fiscal year of the final settlement).

	Criminal PF Cases Filed	Civil PF Cases (Settlement or Court Judgment)
FY 2001	131	21
FY 2002	116	22
FY 2003	113	25
FY 2004	104	19
FY 2005	85	22
FY 2006	103	22
FY 2007	108	27
FY 2008	105	29
FY 2009	100	18
FY 2010	109	26
FY 2011	121	25

F. Please provide an annual breakdown of the revenue generated from any procurement fraud cases Department-wide from 2001 to the present, including the revenue to date in 2011.

Response:

Revenue generated from procurement fraud cases is recorded in the Department's Consolidated Debt Collection System (CDCS). The "Collections" reported below are actual moneys paid to the Government pursuant to litigation and enforced collection by the Department as reported in CDCS. It does not include civil or administrative penalties imposed and collected

by other agencies. The collections are reported according to the year in which they were collected which may differ from the year the settlement agreement was reached or the court judgment was imposed.

CDCS is the Department of Justice's Department-wide financial litigation and collection system. It supports the collection efforts of the US Attorney's Offices, the Department's Litigating Divisions, and Private Counsel under contract with the Department to litigate and collect on behalf of the United States. The CDCS was fully deployed at the beginning of Fiscal Year (FY) 2008 in all judicial districts across the country and its territories. Prior to FY 2008, there was no centralized DOJ collection system and each component within the Department maintained its own system. Although each component may have recorded information differently prior to FY 2008 depending on its own requirements, historical data was collected from these systems and entered into CDCS and is reported below.

Collections in Procurement Fraud Cases

FY 2001	$ 19M
FY 2002	$ 33 M
FY 2003	$ 51M
FY 2004	$ 27 M
FY 2005	$ 13 M
FY 2006	$ 603 M
FY 2007	$ 24 M
FY 2008	$ 87 M
FY 2009	$53 M
FY 2010	$ 29 M
FY 2011	$ 57M

22. Housing Testing Program in the Civil Rights Division's Housing and Civil Enforcement Section

Questions:

A. What criteria must an individual meet in order to be a tester in the Housing Testing Program?

Response:

The Fair Housing Testing Program accepts recruit forms from all non-attorney Department of Justice employees who are interested in assisting with fair housing and other civil rights investigations by serving as testers in these investigations. Interested employees are invited to attend a three-hour tester training session once prior approval has been obtained from their supervisors. The tester training sessions are led by Test Coordinators who work for the Fair Housing Testing Program. Each prospective tester completes a Tester Application Form and is interviewed individually by a Test Coordinator. Department employees who are selected to

participate as testers must also complete a "practice" test as part of their training. Once trained, Department employees are selected to assist in a testing investigation based on whether they have the specific characteristics relevant to the investigation. In addition, selection is always contingent upon receiving prior approval from a supervisor releasing the employee from his or her regular duties for the time required to participate in a testing investigation.

When the Department uses a local contractor to facilitate a testing investigation, all testers recruited by the contractor must attend a three-hour tester training session led by Test Coordinators who work for the Fair Housing Testing Program. Each prospective contract tester completes a Tester Application Form and is interviewed individually by a Test Coordinator. Prospective contract testers who are selected to participate as testers must also complete a "practice" test as part of their training. Once trained, contract testers are selected to participate in a testing investigation based on whether they possess the specific characteristics relevant to the investigation.

B. At what level within the Housing and Civil Enforcement Section must individuals be approved in order to become testers for the Housing Testing Program?

Response:

Test Coordinators who work for the Fair Housing Testing Program approve all DOJ and contract testers.

C. What is the process for individuals becoming approved to be testers for the Housing Testing Program?

Response:

Please see responses to questions 22(A) and (B), above.

D. At what level within the Housing and Civil Enforcement Section must contractors be approved for the Housing Testing Program?

Response:

The Director of the Fair Housing Testing Program identifies potential contractors if and when a contractor is needed to facilitate a testing investigation. The Deputy Chief who oversees the Fair Housing Testing Program and the Section Chief both must give their approval before the Director of the Fair Housing Testing Program may send a potential contractor a Statement of Work, describing the work to be performed. If the Director of the Fair Housing Testing Program sends a Statement of Work to a potential contractor and receives an appropriate proposal in return, the Director of the Fair Housing Testing Program submits the Statement of Work and Proposal to the Civil Rights Division's Comptroller for consideration and approval.

E. What is the process for contractors being approved for the Housing Testing Program?

Response:

Please see response to question 22(D), above.

F. What safeguards exist to ensure that travel in the Housing Testing Program is limited to the dates on which testing is conducted?

Response:

The Fair Housing Testing Program has protocols in place to ensure that travel related to the Testing Program is limited to what is needed to accomplish the work required in each investigative trip. The Director of the Fair Housing Testing Program reviews and the Deputy Chief who oversees the Fair Housing Testing Program approves all travel authorizations for Test Coordinators and Testers. Following travel, the Director of the Fair Housing Testing Program reviews the Test Coordinator and Tester travel vouchers to ensure that they are consistent with what was authorized.

G. What was the contractor budget for the Housing Testing Program for fiscal years 2010 and 2011?

Response:

The Fair Housing Testing Program operates within the Housing and Civil Enforcement Section and does not have a separate budget. The Civil Rights Division, however, is able to capture all contractor costs associated with the program. The amounts listed below represent actual contractor expenditures.

FY 2010- $98,196
FY 2011- $89,103

H. What is the proposed contractor budget for the Housing Testing Program for fiscal year 2012?

Response:

The Fair Housing Testing Program operates within the Housing and Civil Enforcement Section and does not have a separate budget. The Civil Rights Division, however, is able to capture all contractor costs associated with the program. In FY 12, the program projects spending $70,000; however no contracts have been received as of yet, except those that carry over from FY 2011.

I. **For each fiscal year from 2005 to 2011, what was the overall budget of the Housing Testing Program, including the travel budget for Department employees?**

Response:

The Fair Housing Testing Program operates within the Housing and Civil Enforcement Section and does not have a separate budget. As such, the amounts listed below represent actual expenditures related to the program. The Civil Rights Division is able to capture all non-personnel costs associated with the program. These amounts include costs related to travel, contractors, and equipment as well as items such as voicemail, printing, and supplies. The Division, however, does not capture or track its personnel costs down to the level of detail for a specific program within a Section. Therefore, the Division is not able to provide personnel costs.

FY 2005 – $275,964
FY 2006 – $315,844
FY 2007 – $445,333
FY 2008 – $442,335
FY 2009 – $423,598
FY 2010 – $387,375
FY2011 – $340,889

J. **For each fiscal year from 2005 to 2010, what were the actual overall expenditures in the Housing Testing Program, including the expenditures by Department employees?**

Response:

Please see responses to question 22(I), above.

23. Misuse of Department Funds

Questions:

A. **When OIG finds Department employees guilty of using official funds for personal purposes, is there any internal mechanism for recovering those funds from the employee if the U.S. Attorney declines to prosecute the case?**

Response:

Yes, it is the Department's policy to recoup money where it has determined that the use of funds was improper.

B. Are employees typically required to repay taxpayer funds when the OIG finds them guilty of using official funds for personal purposes?

Response:

The Department does not tolerate misuse of official funds. It is Department policy to recoup money where it has determined that the use of funds was improper.

Politicized Hiring in the Civil Rights Division

24. In response to my letter regarding reports of politicized hiring within the Department of Justice Civil Rights Division, your Assistant Attorney General responded that "[t]he examples of prior employment cited in these blog posts and your letter noting, for example, that numerous new hires for the Civil Rights Division had previously worked for civil rights organizations - reflect nothing more than that," and further dismisses any claim that Civil Rights Division uses the affiliation of candidates with liberal organizations to determine their political party and hire them on that basis. However, you yourself have been reported as having said to a convention of the American Constitution Society (ACS), prior to taking office, "we are going to be looking for people who share our values" and a "substantial number of those people" would probably be "members of the ACS." Assistant Attorney General Perez took this a step further, saying, "I am going to be calling each and every one of you to recruit you, because we've got 102 new positions in our budget . . . ."

A. Beginning January 1, 2009, has the Civil Rights Division hired a single person affiliated with institutions that might be considered conservative? If so, please identify the number of individuals and the name of the institution each was affiliated with.

Response:

As described in the Department's September 8, 2009, letter to you, the Department has taken significant steps to ensure that hiring of career employees is based on each individual's qualifications for the job, divorced from political considerations. The Division has instituted new policies that are founded on the fundamental principle that merit, not political affiliation or ideology, must guide hiring decisions for career positions.

The Division's merit-based hiring policy expressly precludes consideration of ideology or political affiliation in hiring. As would any responsible employer, the Division places a high value on an individual's relevant experience in the field, as well as a demonstrated commitment to full and fair enforcement of civil rights laws when making hiring decisions. To that end, the Division has hired people from a variety of legal backgrounds – from large and small law firms; lawyers with experience working at civil rights organizations as well as the Judge Advocate General (JAG) Corps; individuals who have worked as prosecutors and others who have worked

as criminal defense lawyers; and lawyers who have clerked or externed for judges appointed by every president since President Carter.

Because the Division does not inquire about the ideological or political affiliation of these applicants, but inquires instead into whether they are the best-qualified applicants for the position, we are not in a position to answer your question about our employees' political or ideological affiliations. Not only do the Division's policies prohibit consideration of an individual's organizational affiliations in hiring, but the Division also does not know the organizational affiliations of candidates beyond what is disclosed by the candidates themselves, for example, on their resumes, because the Division's current policy expressly prohibits conducting any internet searches on applicants' backgrounds. For additional information on the Division's hiring process, please see the attached letter to Chairman Smith, dated December 5, 2011. (See attachment A.)

B. Beginning January 1, 2009, how many individuals affiliated with institutions widely considered as liberal or progressive has the Civil Rights Division hired?

Response:

Please see the answer and attachment provided in response to question 24(A), above. The Division's revised hiring process expressly rejects the kind of assessment that underlies this question.

C. Beginning January 1, 2009, how many individuals affiliated specifically with ACS has the Civil Rights Division hired?

Response:

Please see the answer and attachment provided in response to question 24(A), above.

D. Beginning January 1, 2009, how many individuals who made contributions to the election campaign of President Obama has the Civil Rights Division hired?

Response:

Please see the answer and attachment provided in response to Question 24(A), above, and the attached letter to Chairman Smith. It is against the Division's policies to obtain or consider such information as a part of the hiring process described in the above response and in detail in the attached letter.

E. If politicized hiring has not been occurring, how does the Department account for the fact that every single one of the new attorneys hired in the Civil Rights Division in the first two years of this Administration has had liberal or progressive credentials?

Response:

The Department respectfully disagrees with the premise of this question. Please see response to question 24(A), above, and the attached letter to Chairman Smith.

F. According to the New York Times, 60 percent of the Civil Rights Division's hires in the first two years of this Administration had ideological credentials, more than double the proportion in the Bush Administration, during which the New York Times indicated the number was under 25 percent. Are the New York Times' numbers accurate? If not, please provide accurate numbers.

Response:

With respect to the current Administration, please see the answer to Question 24(A), above, and the attached letter to Chairman Smith. With respect to the previous Administration, a report from OIG and OPR entitled "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division," (July 2, 2008) (Released Publicly January 13, 2009) (OIG/OPR Report), found that between 2003 and 2006, Bradley Schlozman, who was a Deputy and later a Principal Deputy and Acting Assistant Attorney General within the Civil Rights Division, considered political and ideological affiliations in making personnel decisions, in violation of Department policy and federal law. The report noted that several other political appointees had knowledge or some indication of Mr. Schlozman's improper consideration of political and ideological affiliations and failed to take action to ensure that hiring decisions were consistent with federal law and Department policy. Of the 13 hires (out of 112) during the period in question that were not attributed to Mr. Schlozman, four were identified in the OIG/OPR report as conservative, three as liberal, and six as unknown.

G. How do these numbers not indicate the presence of a double standard given the criticism leveled at the Bush administration's Civil Rights Division?

Response:

Please see responses to questions 24(A)-(F), above.

H. What steps are currently being taken by the Department to attract an ideologically diverse applicant pool to the Civil Rights Division?

Response:

The Civil Rights Division has taken a number of steps during Assistant Attorney General Perez's tenure to ensure a broad-based, qualified applicant pool. The Division now requires that all attorney vacancies: 1) be publicly advertised on the websites of the Office of Personnel Management (www.usajobs.gov), the Department of Justice, and the Division. The Division also now affirmatively apprises all Division employees of job vacancies and invites all

employees to notify organizations of these openings. In addition, the Division's public website invites interested organizations to receive vacancy announcements, stating:

> Announcements are also distributed by the Office of Attorney Recruitment and Management and/or by the Division's Human Resources Office to a broad and diverse array of organizations, including but not limited to bar associations, law schools and professional organizations. Sections may also distribute announcements to additional organizations who may know of qualified candidates for a particular vacancy announcement. To expand our recruitment efforts, the Civil Rights Division is developing an outreach list of organizations to receive Civil Rights Division-specific attorney job announcements. Organizations that might be interested in receiving these announcements may e-mail CRT.SpecProgVacancies@usdoj.gov.

http://www.justice.gov/crt/employment/.

Assistant Attorney General Perez and other Department officials have visited and addressed law schools and legal organizations across the country to recruit for the Division and to ensure a large pool of well-qualified applicants. In addition, the job announcements that were developed and sent out pursuant to the Division's new hiring policies were, at Mr. Perez's direction, widely disseminated without regard to the ideology or political affiliation of the recipients of the announcements.

Conference Expenditures

25. **The Department's inspector recently issued a report on the tremendous increase in expenditures for conferences that has occurred at the Department on your watch, from $47.8 million in 2008 to $91.5 million in taxpayer dollars in 2010, the most recent available year. This is nearly a doubling of conference expenditures in the past two years. This level of growth is astonishing given our nation's current fiscal crisis and the $14 trillion national debt.**

    A. **Why have conference expenditures at the Department doubled in the last two years?**

Response:

This question is addressed in our March 2, 2012 response to your letter to the Attorney General dated December 20, 2011. (See attachment B.)

    B. **How can you explain this increase in conference expenditures given the tremendous budget crisis the government is now facing?**

Response:

Please see our March 2, 2012 response to your letter to the Attorney General dated December 20, 2011.

C. How much money did the Department spend on conferences in FY2011?

Response:

In our March 2, 2012 response to your letter to the Attorney General dated December 20, 2011, based upon information available at the time, we had determined that the Department had spent $64.5 million on conferences in FY 2011, which would have been a reduction of $27.1 million or 30%, from FY 2010. Updated information reflects that we reduced spending by $26 million from FY 2010 to FY 2011, a reduction of 29%.

D. How much money does the Department anticipate spending on conferences for FY2012?

Response:

Please see our March 2, 2012 response to your letter to the Attorney General dated December 20, 2011.

E. What are you doing to reduce these expenditures?

Response:

Please see our March 2, 2012 response to your letter to the Attorney General dated December 20, 2011.

F. In FY 2008 Department of Justice conference expenditures were nearly $48 million. It appears the FBI alone spent nearly $47 million on conferences in FY2010. Why has the FBI increased conference expenditures to a level equal to that of the entire Department in FY 2008?

Response:

Under the applicable federal regulations (41 C.F.R. § 300-3.1 and 5 C.F.R. § 410.404), conferences include training activities designed to improve individual and/or organizational performance. Conferences are a vital aspect of developing and maintaining a responsive and well-trained law enforcement workforce, and a well-coordinated federal, state, local, and tribal criminal justice system. The majority of the FBI's "conferences" are operational training events for our law enforcement staff – essential training such as money laundering prevention, firearms qualification, DNA forensic examination, defensive tactics, surveillance, narcotics investigation, telecommunication exploitation, and other training designed to improve operational performance. This type of conference-related expenditure is critical to the FBI's mission.

Lawsuits Against States with Pro-Enforcement Laws

26. Your department has filed suit against the states of Arizona, Alabama and South Carolina for their immigration enforcement laws. It's reported that your department is considering challenges against Utah, Indiana and Georgia. Meanwhile, some cities and local jurisdictions are enacting policies and practices that expressly prohibit law enforcement from cooperating with the federal government when it comes to undocumented immigrants. Cook County, Illinois, for example, is ignoring ICE requests to hold individuals, letting criminals back into society and posing a threat to public safety.

A. Would you agree that Cook County's policy to ignore federal immigration detainers is a threat to national security?

Response:

Under the Immigration and Nationality Act and its implementing regulations, the Department of Homeland Security is responsible for determining how and under what circumstances it will use detainers as part of its immigration enforcement regime. It is in the best position to determine whether Cook County's policy regarding detainers conflicts with existing law and its practice with respect to detainers in Cook County or elsewhere.

B. What steps has your Department taken to encourage Cook County to reverse its ordinance? If none – will you get involved?

Response:

Please see response to Question 26 (A), above. The Department of Justice is aware of ongoing communications between DHS and Cook County regarding detainers. The Department of Justice is not directly involved in those communications.

C. Would you instruct your Department to withhold funding for localities, like Cook County, who defy immigration law and willfully not cooperate with the federal government when it comes to immigration enforcement?

Response:

We cannot speculate about what action, if any, we would take in this particular context. As we have noted elsewhere, however, it is imperative that state and local governments cooperate with the federal government with respect to immigration enforcement. The state laws that we have challenged are clearly preempted by federal law.

Costs of Litigation Against States

27. **According to a Quinnipiac poll released yesterday, 61 percent of American's support Arizona's immigration law that your Department is asking the courts to nullify, and 59 percent of Americans want an Arizona-style law in their own state. I believe those numbers are an indictment of this administration's refusal to enforce our immigration laws. Nevertheless, on October 31st, the Justice Department announced that it plans to sue the State of South Carolina to enjoin its immigration law.**

A. How much has the Department spent in litigating against the State of Arizona?

Response:

The Department has spent roughly $385,020 in litigation against the State of Arizona. The U.S. Attorney's Office for the District of Arizona participated in this litigation with the other components of the Department; however, the U.S. Attorney's Offices do not record the costs of litigating individual cases.

B. How much has the Department spent in litigating against the State of Alabama?

Response:

The Department has spent roughly $159,000 in litigation against the State of Alabama. The U.S. Attorney's Office for the Northern District of Alabama participated in this litigation; however, the U.S. Attorney's Offices do not record the costs of litigating individual cases.

C. How much has the Department spent in litigating against the State of South Carolina?

Response:

The Department has spent roughly $34,357 in litigation against the State of South Carolina. The U.S. Attorney's Office for the District of South Carolina participated in this litigation; however, the U.S. Attorney's Offices do not record the costs of litigating individual cases.

Ensuring Schools Educate Undocumented Students

28. **Very recently, the Civil Rights Division sent a letter to Alabama school districts about their obligation to give equal access to public education to children who are**

here illegally. The letter to Alabama Superintendents requested names of all students, including those who had unexplained absences and those who were "English Language Learners."

A. Is your Department targeting Alabama because they have a stricter state law that deals with illegal immigrants? Were there reports of wrongdoing?

Response:

The Civil Rights Division has the obligation to enforce laws that prohibit discrimination against public school students on the basis of, among other things, race, color, and national origin, *see* 42 U.S.C. § 2000c-6 (Title IV), and that require school districts to take appropriate action to overcome the language barriers of English Language Learner (ELL) students. *See* 20 U.S.C § 1703 (Equal Educational Opportunities Act). As the Division's October 31, 2011 letter to Alabama school districts noted, we have received information raising concerns that H.B. 56 may be preventing or discouraging students from participating in public education programs based on their or their parents' race, national origin, or actual or perceived immigration status. The Division contacted school districts and requested information based on those concerns and in furtherance of the Division's obligation to investigate potential violations of Federal civil rights laws.

B. What does your Department plan to do with the names and the data provided by the Alabama schools, if they choose to comply with your request?

Response:

We cannot comment on an open and ongoing investigation. The Department requested the information to assist in determining what further action, if any, is warranted under the civil rights laws we enforce. Where violations are found, the Department will act vigorously to enforce Federal statutory and constitutional law guaranteeing all students equal access to public education.

The Department will maintain the confidentiality of any private student information received. The United States is authorized to receive documents containing private student information pursuant to the federal law enforcement exception to the privacy requirements in Family Educational Rights and Privacy Act (FERPA). *See* 20 U.S.C. § 1232g (b)(1)(C)(ii).

C. Will you commit to making sure school districts that don't comply with your request are not punished or singled out?

Response:

The Department does not punitively single out school districts. The Department will continue to act vigorously and appropriately in carrying out its obligation to investigate potential violations of Federal civil rights law.

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

29. **Eliminating a terrorist threat certainly helps to ensure the safety of the American people. Engaging those threats on the battlefield is a byproduct of our continued war on terrorism. However, I want to confirm that when we encounter an American terrorist overseas, we have the legal authority to conduct operations that specifically target American citizens even when they are engaged in terrorist activity. I understand there is an obvious balance between fighting the war on terrorism and protecting the Constitutional rights of American citizens. Therefore, I want to understand the legal rationale behind the Department of Justice's opinion that essentially authorized the U.S. military to target an American citizen.**

I recently wrote to you regarding Anwar al-Awlaqi, an American born citizen, a senior leader, recruiter, and motivator with the Islamist militant group al-Qaeda. I asked for a copy of the secret memorandum issued by Department's Office of Legal Counsel (OLC) that allegedly authorized the operation which resulted in the death of Anwar al-Awlaqi. I also offered to make appropriate arrangements if the memo was classified.

Will you commit today to providing me and this committee a copy of the OLC Memo that addressed the operation targeting Anwar al-Awlaqi? If not, why not?

Response:

The Department, when responding to requests on this topic, has not addressed the question whether there is an Office of Legal Counsel opinion in this area. The Department understands the Committee's interest in the legal issues, and will, to the extent possible, work with the Committee to assist in the process of answering questions that its members have in an appropriate setting.

Transfer of a Terrorist into the U.S.

30. **Ali Mussa DaqDuq is an enemy combatant captured overseas. He has played a prominent role in terrorist activities against the United States as a senior Hezbollah commander. Suffice it to say, bringing him to the United States to stand before an Article III court defies common sense. This individual does not deserve the rights afforded to American citizens. The American people do not want you bringing in terrorists, who will then potentially be released into American society if they're not convicted. And you of course cannot guarantee a guilty verdict or lifetime sentence. Thus, if ever someone deserved to be tried before a military commission, it would be this terrorist. Furthermore, delaying this decision could result in DaqDuq's release to Iraq which could have grave consequences as he could simply walk free and resume his terrorist activities against the United States.**

On May 16, 2011, I – along with 5 other Senators - wrote to you and expressed my concerns with bringing DaqDuq to the United States. The response sent back by your office was essentially a non-answer. The letter merely stated that you "remain committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate."

A. The fact is, if you won't consider Guantanamo Bay, then you're really not considering all available tools, are you?

Response:

Ali Mussa Daqduq is no longer in U.S. custody and is currently being held by the Government of Iraq. The Iraqis have an ongoing investigation into Daqduq's criminal activities committed on Iraqi soil. The United States has delivered an extradition request to the Government of Iraq, which is making its way through the Iraqi legal process.

The President has determined that it is in the national security interests of the United States to close the detention facility at Guantanamo Bay. This position, which has been supported by our military leadership and many in both political parties, is based on the judgment that maintaining the Guantanamo Bay facility and sending additional detainees to it would undermine international counterterrorism cooperation and continue to be used by extremists to justify terrorist acts.

B. Do you believe enemy combatants captured overseas should be afforded the same rights as American citizens? If so, do you believe that extends to granting them asylum if they're found not guilty in an Article III court proceeding?

Response:

The legal protections that must be afforded to captured terrorists vary depending on the authority under which they are held and where they are held. For example, those held as detainees under the law of war at Guantanamo Bay have the right to petition for habeas corpus, and the U.S. Government must prove that such individuals are part of or substantially supporting al Qaeda, the Taliban or associated forces. The courts have developed evidentiary and other procedural rules for habeas proceedings involving Guantanamo Bay detainees that afford the detainees certain legal protections. Such individuals must also be released when hostilities end, unless the United States decides to prosecute them for war crimes or other crimes triable by military commission. Those tried by military commission must be afforded the legal protections established by Congress in the Military Commissions Act of 2009, including, among other protections, the right to counsel; the presumption of innocence; the right against self-incrimination; the right to present evidence, cross-examine the government's witnesses and compel the attendance of witnesses in their defense; the right to exculpatory evidence; the right to suppression of evidence that is not probative or that will result in unfair prejudice; protection against double jeopardy; and the right to an appeal. Those tried in federal court must be afforded

similar rights, many of which are secured by the Constitution in that context, but there are some rules, such as the requirement for a unanimous jury verdict and the rules for admission of custodial statements of the accused, that are different.

Since 2001, we have successfully prosecuted hundreds of individuals in terrorism-related cases in our federal courts, including many who were first apprehended overseas. Many of the convictions have resulted in long sentences, including life sentences for the most serious cases. Those convicted are held safely and securely in our federal prisons. In the event an alien terrorism defendant were brought to the United States to stand trial and were acquitted, the Department of Homeland Security would detain him and begin the process of removing him from the country. Non-citizens brought to the United States for trial are paroled into the country solely for that purpose. When that purpose no longer exists, their authority to remain in the United States ends as well.

FBI Whistleblowers

31. **As you are well aware, I am a long-standing advocate for whistleblower rights. Whistleblowers point out fraud, waste, and abuse when no one else will, and they do so while risking their professional careers. Retaliation against whistleblowers should never be tolerated.**

Agent Jane Turner was a career FBI agent with an outstanding record for conducting investigations involving missing and exploited children. She filed a whistleblower complaint with the Department's Office of the Inspector General (OIG), in 2002 when she discovered that FBI agents removed items from Ground Zero following the terrorist attacks of 9/11.

Robert Kobus is a 30 year non-agent employee of the FBI who disclosed time and attendance fraud by FBI agents. The OIG also conducted an investigation into his allegations and substantiated that he was retaliated against for protected whistleblowing. The FBI management not only demoted Mr. Kobus to a non-supervisory position, but they even moved him to a cubicle on the vacant 24th floor of the FBI's office building.

Agent Turner and Mr. Kobus have cumulatively seen their investigations take 13 years to complete. Unfortunately, a final judgment has not been issued for either case. These excessive delays indicate that the process of adjudicating whistleblower claims at the Department of Justice is broken.

A. **In your opinion, what is an appropriate amount of time to conduct a whistleblower complaint investigation?**

Response:

Under the FBI whistleblower regulations, the investigating office is required to determine within 240 days whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, unless the complainant agrees to an extension. It is difficult to specify a generally appropriate time to conduct an investigation because particular investigations vary greatly in their degrees of difficulty and complexity, and the extent to which the investigating entity encounters cooperation or obstacles.

B. Would you agree that 9 years is an excessive amount of time to conduct such an investigation? What about 4 years?

Response:

See response to 31(A), above. The Department is unaware of any investigation that by itself took the amount of time cited. However, an investigation is only the first step in the whistleblower process. Seeking corrective action for a reprisal then requires filing with the adjudicative office. These are adversarial proceedings, and varying circumstances and complexities of a case can affect the time for final resolution of a matter.

C. Is 9 years an excessive amount of time to determine if a whistleblower has suffered reprisal as a result of their allegations? What about 4 years?

Response:

It depends on the facts and circumstances of each individual case.

D. Could you explain why it has taken 9 years to resolve Agent Turner's whistleblower complaint?

Response:

The case processing time for a particular 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; the number and procedural posture of cases pending on the docket at one time; whether the parties proceed to a hearing before the Director of the Office of Attorney Recruitment and Management (OARM), where the parties have the opportunity to call and cross-examine witnesses; and the time required for the Department to prepare and issue written decisions.

Another important factor causing delay occurs when an employee/complainant seeks to stay proceedings in a whistleblower matter pending resolution of claims concurrently filed in alternate legal or administrative forums (e.g., Title VII and EEO claims). Extensions of deadlines for discovery and submissions of pleadings by the parties also add time to the process.

Recognizing the importance of whistleblower claims, the Department has tried to give every procedural leeway to employee/complainants to vindicate their rights. At the same time, we recognize the importance of timely resolution of such claims. Therefore, the Department recently adopted a number of changes designed to decrease case processing time. These changes are described in F below.

E. Can you explain why Mr. Kobus' case has now languished in bureaucratic red tape for approximately 4 years?

Response:

Please see response to 31(D), above.

F. Will you commit to reviewing the aforementioned matters and ensure that the Office of Attorney Recruitment and Management (OARM) and the Deputy Attorney General conduct their respective reviews of whistleblower complaints in a more transparent and expeditious manner?

Response:

As indicated in the Department's response to your November 14, 2011 letter to the Attorney General (see attachment C) the Department has recently implemented several changes to improve the effective and efficient adjudication of FBI whistleblower cases. In addition to procedural changes designed to shorten resolution time, the Department has added a detailee to the adjudicating office who has extensive whistleblower adjudication experience. The Department will closely monitor the effect of these changes and is committed to making every effort to improve the efficiency of the Department's adjudication of FBI whistleblower cases.

Office of Legal Policy

32. The last time that you appeared before the Committee, I asked you questions concerning the operation of the Office of Legal Policy (OLP). I do not consider your answers to my previous questions to be responsive. I hope that you will be more responsive on this occasion.

A. Despite a Department-wide freeze, OLP sought an exemption, and it received your permission to hire an additional four attorneys. These staffing levels are not appropriate in light of underutilized attorneys under the prior authorization levels.

1. Please provide a copy of the materials that OLP submitted to the Justice Management Division (JMD) in support of its exemption request.

Response:

OLP sought an exemption from the hiring freeze, pursuant to established procedures, in light of its significant responsibilities and workload, combined with the fact that it had five vacancies among its relatively small number of attorney positions.

As the Department informed you in its letter of September 8, 2011, though we were pleased to provide you with a full list of case-by-case exception requests and decision outcomes, we are unable to provide the internal documents relating to those matters. The Department has certain confidentiality interests in the underlying documents because they set forth advice and recommendations to the Deputy Attorney General and, in some instances, implicate the confidentiality interests of employees.

2. **Please provide a copy of materials surrounding JMD's review and approval of OLP's request.**

Response:

Please see the response to 32(A)(1), above.

3. **Please provide a copy of materials surrounding the Office of the Attorney General's review and approval of OLP's request.**

Response:

Please see response to 32(A)(1), above.

B. **The Assistant Attorney General for OLP, Mr. Schroeder, while a nominee for that position, insisted on the appointment of a particular appointee, who to the knowledge of the career employees, produced no work. He did not come to work two days per week at a time when OLP had no policy concerning telecommuting. In the entire month of December, 2009, this employee did not spend a single day at his OLP office. The OLP career attorneys allowed him to do so if he complied with various requirements that documented the work he produced. He did not do so. After one year of producing no work at OLP, this employee left the Department of Justice for a position in private life, whereupon AAG Schroeder sought to provide this individual with a consulting contract.**

1. **Has anyone at the Department of Justice undertaken any investigation into these facts?**

Response:

The preface to the question is not factually accurate. The employee in question performed valuable work during his time at the Office of Legal Policy, including judicial nominations vetting work and assignments involving policy issues related to international law

and affairs. The employee performed that work regularly and pursuant to accepted office procedures. Accordingly, an investigation has not been initiated.

2. If so, what were the findings of the investigation?

Response:

Please see response to 32(B)(1), above.

3. Was any follow up undertaken? If so, what actions were recommended and carried out?

Response:

Please see response to 32(B)(1), above.

4. Do you believe that an OIG or OPR investigation is warranted into these facts?

Response:

For the reasons given in response to question 32(B)(1), above, the Department has not initiated an investigation.

33. Travel Card Use in the Department

Questions:

A. Does the Department have any written policies on the issuance and/or use of travel cards? If so, please provide copies of such written policies.

Response:

The Department has the following written policies on the issuance and use of the travel cards; these documents have been submitted for the record (see attachment D).

1. Department of Justice Charge Card Management Plan
2. Department of Justice Travel Charge Card Program Guide
3. Department of Justice Travel Charge Card Reference Guide for Cardholders
4. GSA Travel Card Training at https://smartpay.gsa.gov/cardholders/training
5. GSA Travel Card Holder Helpful Hints

B. What is the criteria used in issuing Department travel cards to employees?

Response:

Any employee of the Department who is required to perform official travel may be issued a travel card if approved by the appropriate authorizing official.

C. Please provide a breakdown by Division of the number of Department travel cards currently possessed by Main Justice employees (i.e. not including agency components).

Response:

The number of travel cards issued in the Offices, Boards, and Divisions is 18,146.

This number excludes the following Department components: Federal Bureau of Investigation; Drug Enforcement Administration; United States Marshals Service; Bureau of Alcohol, Tobacco, Firearms and Explosives; Office of Justice Programs; Bureau of Prisons; and Federal Prison Industries. Overall, however, the Department has approximately 90,000 travel cardholders

D. What is the Department's official disciplinary policy for individuals found to have misused government travel cards?

Response:

The Department holds employees accountable if they are found to have misused their government travel card. Intentional misuse of the travel card, regardless of the dollar amount, must be reported to the Office of the Inspector General. A management official is responsible for determining the appropriate disciplinary action to take with sanctions for misuse ranging from reprimand to removal.

E. If a copy of this disciplinary policy regularly provided to Department employees? Please provide a copy of such policy as issued to Department employees.

Response:

Employees are made aware of the policies regarding proper use of the travel card and possible disciplinary action through the policies listed in 33(A) above.

F. Does the Department generally control merchant codes to prevent travel cards from being used at certain categories of merchants?

Response:

The Department restricts the use of certain merchant category codes to ensure the government-issued travel cards can be used only with merchants whose business is related to

travel (e.g., gas stations, airlines, restaurants). If an employee attempts to use the travel card at a clothing store, for example, the merchant would decline the travel card and the purchase would not occur. The appropriate discipline is determined based on an analysis of the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

G. Does the Department deactivate travel cards when employees are not on official travel?

Response:

Each component of the Department may deactivate travel cards when employees are not on official travel at its discretion. The Department does not mandate this. The Department has approximately 90,000 travel cardholders and the administrative cost of activating and deactivating cards each time a person travels would be prohibitive for the value.

Civil Rights of Institutionalized Persons

34. The Attorney General is obligated to provide written notice under the Civil Rights of Institutionalized Persons Act before proceeding with litigation to enforce the law's provisions.

Please provide a copy of all letters that you have written to state or local officials concerning conditions at jails, prisons, other correctional facilities, or pretrial detention facilities pursuant to your obligation under 42 U.S.C. 1997B(a) since January 20, 2009, and continuing througb the date that your response to this question is provided to me.

Response:

A CD containing notice letters issued since January 20, 2009, is attached.

Olympic Games Security

35. The Olympic Games will soon take place in London. As usual, the United States will participate, by sending athletes. We all recognize an event of this magnitude will draw spectators as well. Media reports indicate that the United States is concerned that inadequate security is being provided at these Games. In fact, reports indicate that the U.S. is "preparing to send up to 1,000 of its agents, including 500 from the FBI, to provide protection for America's contestants and diplomats." At the same time, reports include statements from British officials and anti-terrorism officials raising concerns that the U.S. is meddling, being overly demanding, and adding unnecessary friction and pressure on the London Organizing Committee.

A. Have you spoken with anyone about the possibility of sending federal agents to the London Olympic Games? If so, please state how recently, with whom, and the content of the conversations.

Response:

The U.S. Department of State (DOS) is the lead agency for U.S. Government (USG) support to international special events. The DOS-sponsored International Security Event Group (ISEG), chaired by the DOS Diplomatic Security Service (DSS), meets monthly to address USG support to foreign governments during international events, and the discussions of the London Olympic Games have included the FBI's role in, for example, responding to incidents over which the U.S. exercises extraterritorial jurisdiction. The possibility of such an incident is increased by the anticipated U.S. presence during the London Olympics, which will be extensive, including U.S. athletes, spectators, corporate sponsors, press, and dignitaries. Because of this possibility, one or more Department of Justice attorneys will staff the Joint Operations Center to ensure that U.S. authorities have immediate access to an experienced counterterrorism prosecutor in the event of an act of terrorism involving American citizens or interests. In support of both the country DOJ attaché and the FBI legal attaché, DOJ has sent at least one such attorney to each Olympic Games for at least the past decade.

The FBI enjoys a strong relationship with its law enforcement and intelligence community counterparts in the United Kingdom (UK), and in other countries, as part of a coordinated international effort to proactively address global terrorist threats. Various FBI programs and their British counterparts are regularly coordinated through collaborative research, intelligence and information exchanges, and exercises that integrate tactics, techniques, and practices to jointly address these global threats. Providing FBI resources in support of the 2012 London Olympics is a logical extension of the FBI's continued collaboration with its UK counterparts and speaks to the high quality of this key international relationship.

In May 2009 and November 2010, the FBI traveled to London with other members of the ISEG to provide to Olympic planners briefings on the ISEG and background on individual USG agency roles, responsibilities, and capabilities. In September 2011, the FBI deployed an FBI Olympic Facilitator (FBI-OF) to London. The FBI-OF is responsible for conducting liaison with the DOS Senior Olympic Security Coordinator, relevant USG law enforcement agencies, and host nation Olympic planners. The FBI-OF is also tasked with developing and coordinating the FBI's crisis management and operational plans and will remain on-site through the conclusion of the Games. The FBI-OF has discussed FBI support to the Olympic Games with his UK planning counterparts, including London's Metropolitan Police Department and others. In addition to the FBI-OF, in October 2011, FBI working-level planners met with UK Olympic planners in London on several occasions to address financial and logistical matters regarding Olympic support.

There have also been several executive-level meetings with UK representatives that involved discussions related to the 2012 London Games. These meetings include the following:

- In October 2010, two Assistant Commissioners from London's Metropolitan Police Department traveled to Washington, D.C., to provide briefings on Olympic planning to the

ISEG, the Assistant Directors (ADs) of the FBI's International Operations Division and Critical Incident Response Group (CIRG), and others.

- During September 13-16, 2011, the AD of the FBI's CIRG met in London with executives of the Metropolitan Police regarding preparations for the Olympics Games.

- On September 15, 2011, the FBI Director met with the UK Home Secretary at FBI Headquarters to discuss numerous topics, including potential FBI support for the London Games.

- On September 20 and October 6, 2011, UK law enforcement executives met in Washington, D.C., with FBI Executive Assistant Directors (EADs) and ADs to discuss potential FBI support to the London Games.

- During the week of November 7, 2011, the EAD of the FBI's National Security Branch traveled to London, where he discussed the London Olympics with UK officials.

- During November 14-17, 2011, UK executives involved in Olympic planning (including two Assistant Commissioners from the Metropolitan Police and the Director of Olympic Security, Olympic Security Directorate, Home Office) met in Washington, D.C., to update the ISEG on preparations for the London Olympic Games. Various meetings during this period included the EAD of the FBI's Criminal, Cyber, Response and Services Branch, the Acting AD of the FBI's Counterterrorism Division, and the AD of the FBI's CIRG.

- On February 16, 2012, the FBI Director toured London's Olympic Park and met with the President of the UK Association of Chief Police Officers, the Commissioner of the Metropolitan Police Service (MPS), an MPS Assistant Commissioner who is the National Olympic Coordinator, and the UK Home Secretary regarding Park security, counterterrorism measures, and staffing.

B. Is the U.S. sending federal agents for security purposes to the London Olympic Games? If so, please provide the details, such as how many, from what agencies, their expected work schedule, how long they will be needed before and after the games in that country, etc.

Response:

Although recent media reports have indicated that the FBI will be sending 500 federal agents to the London Olympics to provide protection and/or security for the event, these reports are erroneous. The FBI will not provide security, nor will it provide protection for U.S. Olympic athletes or diplomats. The FBI will also not provide the reported 500 agents, though the exact number has not yet been established and will not be provided in an open forum for security reasons when it is established.

For the operational period of the Olympic Games (July 18 through August 13, 2012), the FBI will support USG Olympic operations by staffing the USG Joint Operations Center at the

U.S. Embassy in London. Drawn from various technical and investigative disciplines, these FBI personnel will be available in the event of a critical incident, including in support of investigative or intelligence efforts related to acts of terrorism or other criminal acts directed at U.S. citizens.

C. Please define the "security" that agents would be providing.

Response:

As noted above, FBI personnel assigned to the London Olympic Games will provide neither security nor protection for this event.

DOS has "lead agency" status for USG support to the London Olympic Games. FBI personnel will act as planners, liaison personnel, subject matter experts, and advisors to FBI executives, DOS, the U.S. Embassy in London, and the host government, should they request such support.

D. Please describe the circumstances surrounding the event that requires, or would require, the U.S. to send federal agents to provide protection at the London Olympic Games?

Response:

The FBI will not provide "protection" during the London Olympic Games. If the President or other U.S. dignitaries attend the Games, questions regarding their protection would best be directed to the U.S. Secret Service and the DOS DSS.

The FBI's deployment to the UK for the Olympic Games will be in support of DOS and with the concurrence of the British Government. In the event of a critical incident, any FBI response will be in support of those entities and at their request.

E. Please provide an estimate of the cost associated with sending 500 federal agents to London to provide security, including salaries, per diem costs, travel expenses, new gear or equipment, etc.

Response:

As noted above, the FBI will not be sending 500 agents to London for the Olympic Games and any agents who are present will not be there to provide security.

Currently, the total costs associated with FBI support for USG Olympic operations at the London Games and incurred over Fiscal Years (FY) 2010, 2011, and 2012 are estimated at $1,883,700. This includes travel, per diem, and costs associated with the USG interagency deployment to the games such as space rental and the build out of office space. Salaries are not included because the FBI would incur salary costs regardless of our provision of support to the Olympics.

F. If money is spent to send federal agents to provide security at the London Olympic Games, then which budget will absorb the cost? How much is this cost in relation to the agencies overall budget?

Response:

The FBI does not receive funding specifically to support major special events, domestically or internationally. The FBI's support for the USG's involvement in the Olympics is funded through the FBI's CIRG budget. Because the planning cycle for each Olympic Games ranges from two to six years, the cost of the FBI's support cannot be tied to one fiscal year. Costs to support USG Olympic operations at the London Olympic Games will be incurred in FYs 2010, 2011, and 2012. The FBI's overall budgets for those years were $7,658,622,000 in FY 2010, $7,818,953,000 in FY 2011, and $8,036,991,000 in FY 2012.

G. Has the U.S. ever sent federal agents for security purposes to an Olympic Games in the past? If so, please describe the situation, which Games it was, how many agents were sent, and the total cost.

Response:

In addition to the support routinely provided by the FBI to Olympic Games that take place in the United States, the FBI has deployed personnel in a liaison capacity to every Olympic Games occurring outside the United States beginning with the 1988 Summer Olympic Games in Seoul, Republic of Korea. The degrees of support and costs have varied widely and have depended on several factors, including the nature and number of any threats associated with the games, the degree of USG interagency participation, whether we have received requests for support from the host government, and the capabilities of the host government. Costs have also varied depending on the host nation's economy, lodging prices as influenced by hotel availability, and the currency exchange rate at the time the costs were incurred.

The estimated costs of FBI support to the most recent Olympic Games are approximately $1,382,900 for the 2008 Summer Olympic Games in Beijing, China, and $1,181,700 for the 2010 Winter Olympic Games in Vancouver, British Columbia, Canada. These costs include travel, per diem, and costs associated with the USG interagency deployment to the games such as space rental and the build out of office space. Costs associated with the Vancouver Games also include the cost of support to Olympic activities in the State of Washington, which were declared a Special Events Assessment Rating Level I domestic special event by the Department of Homeland Security. Salaries are not included in the estimated costs because the FBI would incur salary costs regardless of our provision of support to the Olympics.

With one unique exception, the FBI has not provided agents for "security" purposes for any Olympic Games. Although we cannot identify the event in this forum for security reasons, the exception occurred when, in addition to FBI personnel deployed to the Games in other capacities, the FBI augmented the DSS security efforts by pre-staging ten FBI Agents at the venue where all U.S. Olympic athletes were in-processed and conducted their daily training

routines in preparation for their events. In this extremely unusual situation, the decision to deploy FBI Agents in this "security" capacity was based on the threat posture at the time and was made with the concurrence of the host government. The estimated cost for this contingent was $52,900.

H. If federal agents are sent to provide protection at an Olympic Games, do you believe this sets a precedent that must be followed for future Olympic Games? What about other international sporting competitions, such as the Pan American Games?

Response:

As indicated in the response to subpart D, above, the FBI does not provide "protection" at Olympic Games. The FBI does, though, participate in the USG decision-making process regarding the provision of support to international special events. Events considered for ISEG support are not restricted to "sporting events," but may also include such events as international summits, World's Fairs, and industrial/trade fairs. Even when other ISEG members have decided to support a given event, this does not obligate the FBI to participate. The decisions to provide FBI support to international special events are made on a case-by-case basis, taking into consideration the nature and number of any threats associated with the event, the degree of USG interagency participation, whether we have received requests for support from the host government, and the capabilities of the host government.

Based on these considerations, the FBI participated in the USG interagency support for the Pan Am Games in both Rio de Janeiro, Brazil, in 2007 and Guadalajara, Mexico, in 2011, as well as for the 2010 World Cup in Pretoria, South Africa. Planning is currently underway to provide support for the 2014 Winter Olympics in Sochi, Russia, the 2014 World Cup in several Brazilian cities, and the 2016 Summer Olympics in Rio de Janeiro, Brazil.

36. Muslim Chaplains

Questions:

A. At the present time, what entity is responsible for accrediting Muslim chaplains that serve in the Bureau of Prisons?

Response:

All Chaplains in the Bureau are accredited in the same manner to avoid discrimination based upon race, religion, creed or ethnicity. The Bureau Central Staffing Unit (CSU) in Grand Prairie, Texas, ensures each chaplaincy applicant meets all the required standards set forth in Program Statement 3939.07, Chaplains Employment, Responsibilities, and Endorsements. Applications for Chaplain vacancies must be submitted through www.usajobs.gov. After the CSU has collected all essential applicant information, the files are sent to the Bureau's Central Office (headquarters) Religious Services Branch in Washington, D.C. for final review.

Our current Muslim chaplains are endorsed by their mosques or national organizations. The Religious Services Branch has designated a subject matter expert for the Islamic faith. Subject matter experts are responsible for verifying appropriateness of applicants, educational credentials, endorsement organizations, and ministry experience.

Foreign Corrupt Practices Act Guidance

37. **Assistant Attorney General Lanny Breuer recently announced in a public speech that the Department is preparing, "detailed new guidance on the [Foreign Corrupt Practice Act's] criminal and civil enforcement provisions" to be released next year. At a hearing on the FCPA hack in November 2010, many Senators expressed their concerns with the Department's enforcement of the statute. Specifically, members raised concerns with the fact that the law includes broad language that is not well defined, and that a lack of clear guidance from the Department in the form of advisory opinions has created an air of uncertainty in how U.S. corporations do business abroad. I welcome this call for new guidance to help ensure that businesses that want to do the right thing, know what the right thing is in the eyes of the Justice Department.**

    A. **When will the guidance be published?**

Response:

For more than a decade, the Department has made available to the public the Lay Person's Guide to the Foreign Corrupt Practices Act (FCPA). The Department is currently working to update that Guide. It is anticipated that the new Guide will include the following topics, among others:

1. U.S. interagency and international cooperation in global anti-corruption efforts;
2. The civil and criminal provisions of the FCPA, including the criminal intent requirement, the definitions of a "foreign official" and facilitation payments, and issues such as conspiracy law and aiding and abetting in the FCPA context;
3. FCPA penalties, sentencing and enforcement, including examples of civil and criminal penalties, different types of negotiated resolutions (plea agreements, deferred prosecution agreements and non-prosecution agreements), and the guiding principles of FCPA enforcement, such as the *Principles of Federal Prosecution* and the *Principles of Federal Prosecution of Business Organizations*; and
4. Corporate compliance programs, including discussion of successor liability and due diligence, and guidance regarding the benefits of effective compliance programs.

We believe the new Guide will provide a more comprehensive and user-friendly reference source for business managers, compliance officers and practitioners.

The exact form of the Guide is still being considered. It is being drafted in the first instance by the Fraud Section, which, pursuant to the U.S. Attorney's Manual (USAM 9-47.110),

has principal criminal enforcement authority for the FCPA, one benefit of which is uniform FCPA enforcement nationally. The Guide is being – and will be – reviewed by and/or discussed with officials in government agencies outside the Department, including the SEC. That process is currently underway.

With respect to input from interested outside parties, the Department is already in communication with outside groups regarding many of the issues that the Guide will address. For example, in coordination with the Commerce Department and the SEC, the Department met with numerous interested parties, such as business groups from a variety of industries, including small, medium and large enterprises. During these meetings, the Department discussed, among other things, the FCPA's definition of foreign official and facilitation payments, the benefits of self-disclosure, successor liability, and compliance programs and their importance in FCPA matters. The Department will continue to meet with interested parties.

B. What form will the guidance take and what steps will be taken to ensure that it is implemented nationally and uniformly? Will the guidance be incorporated into the U.S. Attorneys' Manual?

Response:

Please see response to QFR 37(A), above.

C. Does the Department intend to solicit the views of interested outside parties as it prepares the guidance, particularly the regulated business community? If so, how?

Response:

Please see response to QFR 37(A), above.

D. Who at the Department will be primarily responsible for drafting the guidance?

Response:

Please see response to QFR 37(A), above.

E. What will be the Securities and Exchange Commission's (SEC) role in formulating the guidance? Will the SEC be bound by the guidance? Will the Department enter into a Memorandum of Understanding with the SEC regarding the guidance?

Response:

Please see response to QFR 37(A), above.

F. AAG Breuer's remarks indicate that the guidance addresses the FCPA's "enforcement provisions." Will the guidance offer only the Department's interpretation of the Act's enforcement provisions or will the guidance set forth the Department's enforcement policies?

Response:

Please see response to QFR 37(**A**), above.

1. Will the guidance include the Department's interpretations of ambiguous statutory terms such as "foreign official" and "government instrumentality"?

Response:

Please see response to QFR 37(A), above.

2. Will the guidance clarify when a company may be held liable for the actions of an independent subsidiary?

Response:

Please see response to QFR 37(A), above.

3. Will the guidance clarify the extent to which one company may be held liable the pre-acquisition or pre-merger conduct of another?

Response:

Please see response to QFR 37(A), above.

4. Will the guidance include an enforcement safe harbor for gifts and hospitality of a de minimis value provided to foreign officials?

Response:

Please see response to QFR 37(A), above.

G. Other Department guidelines, including the Corporate Charging Guidelines, indicate that they may not be relied up on by defendants and do not limit the Department's litigation prerogatives. Will the same be true of the forthcoming FCPA guidance, or will defendants be able to rely upon this guidance in litigation?

Response:

Please see response to QFR 37(A), above.

Christine Varney

38. On July 6, 2011, representatives of Cravath, Swaine & Moore LLP confirmed that Assistant Attorney General for Antitrust Christine Varney would be joining their firm, which only has offices in New York City and London. Just three months later, on October 4, 2011, the Department submitted to Congress a plan for reorganization of the Antitrust Division. The plan would close various field offices and increase the amount of antitrust work in the New York City field office.

A. When did the Department begin formulating plans to reorganize the Antitrust Division?

Response:

In February 2011, the Deputy Attorney General issued a memorandum to Department component heads to seek operational and programmatic efficiencies, to realign functions in various offices, to lower lease costs by consolidating office space, and to seek ways to more effectively utilize the Department's resources. In addition to the Antitrust Division's response to this call, several Department components, including the U.S. Attorneys, the U.S. Trustees, and the Federal Bureau of Investigation, have proposed consolidations of field office and sub-regional office space, of which Congress has also been notified. The Department made the realignment submission to Congress in October, after former Assistant Attorney General Christine Varney had left the Division.

B. Were these changes to the structure of the Antitrust Division being considered while Ms. Varney was negotiating an employment contract with Cravath, Swaine & Moore LLP?

Response:

The Division's realignment was in response to the Department's call for cost-cutting measures in February 2011, and the Department's decision to realign the Antitrust Division field offices was made in October, after former Assistant Attorney General Christine Varney's departure from the Division on August 4, 2011.

QUESTIONS POSED BY SENATOR HATCH

39. **With respect to intellectual property theft, I am concerned that countries like China are trying to gain a competitive advantage over the United States by stealing our software. In 2010 alone, it is estimated that the commercial value of software piracy worldwide was nearly $60 billion – with China accounting for approximately $8 billion of this number.**

It is my understanding that the Department of Justice is actively engaged with Chinese officials to combat software piracy in China.

A. What challenges do DOJ officials encounter in their intellectual property infringement investigations in China?

Response:

Although many Department of Justice's intellectual property ("IP") investigations have some nexus to China, the Department itself does not conduct investigations in China. Rather, the Department has prioritized developing critical and strong relationships with Chinese law enforcement to work with them in cases with a connection to China.

For example, since 2006, the Department's Criminal Division and the Chinese Ministry of Public Security ("MPS") have co-chaired the Intellectual Property Criminal Enforcement Working Group ("IPCEWG") of the U.S.-China Joint Liaison Group for Law Enforcement Cooperation ("JLG"), which has resulted in an open dialogue on intellectual property enforcement, the sharing of information on selected investigations, and a number of successful joint intellectual property operations. The IPCEWG last met in October of 2011. The meeting resulted in an agreement to continue to increase cooperation and information sharing in cases involving intellectual property crime with a connection to China.

However, even with the emphasis the Department has placed on strengthening its law enforcement relationships and cooperative efforts, the Department still faces a range of challenges in cases related to China. For instance, the sheer volume of counterfeit and pirated products imported into the United States from China presents a daunting hurdle. Customs and Border Protection ("CBP") estimates that 61% of its seizures of infringing goods originated from China in 2010. In addition to the sheer volume, traffickers in counterfeit products originating from China often seek to avoid detection by using multiple transshipment points as a means to disguise the true origin of the counterfeit goods. For example, they may ship their illegal cargo through multiple ports in different continents before the goods arrive in lucrative markets in the U.S., Europe, and elsewhere. This use of transshipment points increases the complexity of detecting the actual source of the goods.

Through the Department's Intellectual Property Task Force, the Department has identified four enforcement priorities for IP investigations and prosecutions, including offenses that involve (1) health and safety, (2) links to organized criminal networks, (3) large scale

commercial counterfeiting and online commercial piracy, and (4) trade secret theft or economic espionage. Similarly, the IPCEWG focuses on selected priority investigations for joint cooperation and effort. The Department's enforcement efforts in China would be further enhanced by the deployment of an experienced prosecutor to the region to focus on intellectual property and related issues as part of the Department's ICHIP program (discussed in response to Question 40, below), for which the President's FY 2013 budget provides funding.

B. How do these challenges compare to other developing countries?

Response:

Many of the challenges the Department faces regarding China apply to other countries as well. There are the general challenges for any international effort, including language barriers, time differences, diplomatic considerations, and the time and expense of travel. Additionally, legal and procedural hurdles exist relating to the sharing of case information and evidence across borders and to addressing inconsistent laws and enforcement priorities across countries.

In addition, the method described above of using transshipment points to mask the true origin of counterfeit goods is not unique to China or to developing countries generally. Traffickers in counterfeit products from a variety of countries may ship their illicit goods through multiple countries en route to entry into the United States or other markets. Moreover, the availability of broadband Internet access and inexpensive computers allows criminals to cheaply and widely distribute software, movie, or music from and to almost anywhere in the world. The Internet also permits trade secret thieves to engage in corporate espionage in another country from the comfort of their own offices or homes. These advances in technology, broader Internet access, and improvements in manufacturing, transportation, and shipping present a range of challenges in transnational IP criminal enforcement.

The Department confronts a variety of additional hurdles in working with developing countries to combat IP crime. For example, some countries may lack adequate resources or training on basic IP enforcement or technology issues. In other countries, there may be a lack of political will or priority on criminal IP enforcement. In still others, there may be a lack of cooperation between the agencies responsible for enforcing IP laws. Finally, many countries where counterfeiting and piracy are especially prevalent also face high levels of public corruption. Trafficking in counterfeit goods can be a very profitable enterprise; and, because convictions for IP offenses often result in low penalties, authorities in some countries may perceive IP crime as, at most, a minor infraction. In turn, IP criminals, by offering substantial financial rewards with little accompanying risks, often succeed in bribing police and public officials.

C. In addition to your Intellectual Property Law Enforcement Coordinators, what other initiatives has the DOJ undertaken to shutdown foreign entities that are stealing U.S. intellectual property?

Response:

In addition to the efforts of the Department's IP Law Enforcement Coordinator ("IPLEC") program and the IPCEWG explained above, the Department works with a multitude of other countries to address the myriad of issues arising in international IP enforcement. International outreach and training exist as critical components of such an effort because they enhance international cooperation and strengthen our law enforcement relationships with our foreign counterparts. Outreach is accomplished by direct work on specific cases; through extensive cooperation with the State Department and other U.S. agencies to provide targeted training and capacity building; through engagement in multi-lateral bodies such as the Asia-Pacific Economic Cooperation and the Justice Department-led IP Crimes Enforcement Network ("IPCEN") in Asia; and with international law enforcement groups such as the World Customs Organization and INTERPOL.

Over the past five years, Department attorneys have provided training and education on intellectual enforcement to over 10,000 prosecutors, police, judicial officers, and other government officials from over 100 countries. Examples of recent successful programs include several border enforcement trainings in Mexico, South Africa and Nigeria, and a pilot program in Ghana to set up an interagency enforcement task force. These international training programs have resulted in positive, measurable results, including seizures of large quantities of counterfeit pharmaceuticals and consumer products and millions of dollars in pirated computer software and counterfeit hardware, much of it intended for distribution in the United States. Improved coordination with foreign law enforcement has led to the successful prosecution of criminal organizations that distribute these items and, in some instances, has helped to shut down the factories and computer servers in foreign jurisdictions from which the counterfeit and pirated goods originated.

40. We all know that resources are tight during these difficult budgetary times, but what can we in Congress do to help you increase your enforcement efforts to curb intellectual property theft?

Response:

The President's FY 2013 Budget increases funding for international investigation and deterrence of intellectual property crime by $5 million, which brings the Department's investment to nearly $40 million annually to combat online piracy and otherwise protect our nation's intellectual capital and maintain our competitive edge in developing American ideas and technologies to better compete in the global marketplace.

In March 2011, the Office of the Intellectual Property Enforcement Coordinator transmitted to Congress a white paper identifying a number of recommended changes to federal laws and regulations designed to improve the U.S. Government's ability to address developing challenges in combating IP crime. Among the recommendations were a number of important criminal law proposals, including increasing penalties associated with certain types of intellectual property crimes, creating a felony offense for streaming copyrighted works, and

obtaining wiretap authority for criminal copyright and trademark offenses. Congress has introduced legislation addressing many of these issues. The Department looks forward to working with Congress as it continues to consider some of these proposals.

A key component of the Department's international enforcement efforts has been the Department's Intellectual Property Law Enforcement Coordinator ("IPLEC") program, first established in 2006, through a partnership between the Office of Overseas Prosecutorial Development ("OPDAT") and the Computer Crime and Intellectual Property Section ("CCIPS"). Through this program, the Department has deployed experienced prosecutors to U.S. embassies in regions particularly critical to IP enforcement. The President's FY 2013 budget includes additional funding to continue and to expand this program, now known as the International Computer Hacking and Intellectual Property ("ICHIP") program, to deploy experienced prosecutors in other regions critical to IP enforcement, and to better integrate them with the Department's existing network of experienced IP prosecutors (known as CHIP attorneys) in United States Attorney's Offices throughout the United States.

QUESTIONS POSED BY SENATOR KYL

Immigration Detainers

Background information:

In recent months, the Justice Department has sued the states of Arizona, Alabama, and South Carolina over new laws that, for the most part, prescribe enforcement policies for illegal aliens who have committed crimes in these states. The department, it is also believed, is considering similar lawsuits against Utah, Indiana, and Georgia.

On the other hand, the Justice Department has remained largely silent about the policies some jurisdictions (such as Cook County, Illinois) have enacted that prohibit or hinder compliance with federally directed detainers for these same types of individuals.

In recent press articles, Cook County cites comments from a federal judge who recently issued an injunction against a new state law in neighboring Indiana (*Buquer v. City of Indianapolis*, No. 1:11–cv–708–SEB–MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011)) as its justification for refusing to hold already locally detained individuals – individuals who were requested by DHS officials — for the customary 48 hours prior to their release to federal immigration officials. The judge's comments are below:
"A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency 'advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.' Id. § 287.7(a)."

There are several problems with this. First, the statement cited by Cook County is actually not at the heart of the *Buquer* decision, and the context in which it was made is not readily applicable to the county's decision. In *Buquer*, the court dealt with a state statute that permitted state law enforcement to *arrest* a person for whom a detainer had been issued by DHS or ICE. The Cook County situation is different, as the county is refusing to enforce the detainers for illegal aliens who are already in prison. Thus, while Indiana is authorizing officers to make arrests based on detainers, Cook County is refusing to even hold prisoners for the customary 48-hour federally directed detainer period.

Moreover, it also seems that the ruling issued by the judge in *Buquer* is simply erroneous. The judge notes that ICE detainers are a "voluntary request." However, this statement directly contradicts federal regulation, which quite clearly does not identify detainers issued by DHS as "voluntary requests," as the judge in *Buquer* ruled. The pertinent federal regulation reads in part:

"Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody

of the alien for a period not to exceed 48 hours . . . in order to permit assumption of custody by the Department." 8 CFR 287.7(d) (emphasis added).

It would seem, then, that Cook County's reliance on the recent injunction is flawed for two reasons: (1) the two situations are not analogous – one deals with granting arrest authority, while the other deals with detaining those already in jail or prison for 48 hours at the request of immigration officials; and (2) the statement made by the judge in *Buquer* seems to directly contradict federal regulation.

41. What is your position on ordinances that allow localities to ignore detainers issued by federal immigration enforcement entities?

Response:

Under the Immigration and Nationality Act and its implementing regulations, the Department of Homeland Security is responsible for determining how and under what circumstances it will use detainers as part of its immigration enforcement regime. It is in the best position to determine whether an ordinance regarding detainers conflicts with existing law and its practice with respect to detainers.

42. Why is your department using its resources to sue states that have passed laws that, for the most part, deal with individuals who have committed crimes and also are illegally in the U.S., while you simultaneously remain almost entirely silent on the circumvention of federal detainers issued by federal immigration officials that we all know is occurring?

Response:

We do not accept the premise of your question. The Department is suing states that have passed laws that conflict with federal law and the federal government's preeminent role in immigration matters, that create a patchwork of state immigration schemes that interfere with federal law and federal law enforcement objectives, and that burden lawfully present immigrants and United States citizens. As for detainers, please see our response to Question 41.

43. Some of the localities say that they cannot detain individuals for 48 hours because they do not have the money to continue to hold them. Programs such as the State Criminal Alien Program (SCAAP), additional ICE personnel, adequate federal detention trustee (through the Justice Department) funding, and adequate U.S. Marshals Service funding would help in this regard. Have you spoken to DHS Secretary Janet Napolitano about these issues facing counties? If so, what is your plan to provide additional resources?

Response:

We are in regular contact with DHS about how to allocate resources to maximize law enforcement objectives.

44. Regarding Operation Streamline, which is tangentially related to this issue, I have asked you numerous times to take the lead with Secretary Napolitano to double or triple the number of Streamline cases heard in the Tucson area. Yet, despite my staff being told by Customs and Border Protection officials that Streamline is one of the most cost-effective ways to reduce repeat illegal crossings at the border, you haven't pushed for adequate funding for this program. Why is it that you and Secretary Napolitano won't take the lead to double or triple the number of prosecutions in Tucson (through Operation Streamline)?

Response:

The Department of Justice supports the Operation Streamline program. However, the Department's ability to prosecute those individuals apprehended by CBP agents in areas where Operation Streamline and similar efforts have been implemented is limited by the current capacity of the criminal justice infrastructure in those areas.

The Department continues to focus its resources on its felony prosecutions. For example, in FY 2011, the District of Arizona increased its felony prosecutions of border-related offenses by filing an additional 1,681 new cases from FY 2010 for a total of 7,033 felony cases filed. In fact, the District of Arizona had the second-highest number of felony case filings in the nation.

Currently, the Tucson sector has a daily limit of 70 Operation Streamline misdemeanor defendants. This is due in very large part to courtroom and cellblock capacity. Significant expansion of capacity would be needed if Operation Streamline were to double or triple the number of misdemeanor defendants processed per day.

45. Do you believe DoJ has all of the resources it needs to fulfill its responsibilities related to illegal immigration and border security? If not, where would you apply additional resources?

Response:

The Department of Justice is very appreciative of Congress' efforts to fund and bolster border security efforts along the Southwest Border over the last five years. The Department would like to convey our gratitude to Congress for funding the President's request to dedicate law enforcement and prosecutor resources in the 2010 Emergency Border Security Supplemental Appropriations Act.

The President's 2013 Budget request includes a total program increase of $1,963,000 to expand the highly successful Legal Orientation Program of the Executive Office for Immigration

Review (EOIR). The program educates detained aliens about EOIR immigration proceedings, allowing them to make more informed decisions earlier in the adjudication process, thereby increasing efficiencies for both EOIR courts and DHS detention programs. The request will add six additional sites to the 26 currently operating, 24 of which are in detention settings, and responds to increasing demand, as well as the expansion goals articulated by DHS, the Administration, and many Members of Congress.

EOIR could benefit from additional funding for full-time employees, including immigration judges and the necessary support staff. Prior to the FY 2011 targeted hiring freeze, EOIR was engaged in a critical hiring effort, strongly supported by the Department, the Administration and Congress. The imposition of the 2011 hiring freeze has resulted in EOIR struggling to maintain its corps of immigration judges and associated staff, as EOIR's caseload continues to rise to record levels.

Crime Victims' Rights Act

46. On June 6, 2011, I sent you a letter asking why you were taking out of context remarks that I made during the legislative process that led to approval of the Crime Victims' Rights Act. I explained quite clearly to you that the intention of Congress was to give rights to crime victims *throughout* the criminal justice process, even before the technical filing of criminal charges.

In a response sent almost five months later (November 3, 2011), Assistant Attorney General Ron Weich wrote that the Department has concluded that the CVRA is "best read" as applying only *after* the formal filing of criminal charges, an opinion at odds with the intent of the CVRA's authors. The Department has failed to convince any appellate or district court to agree with its position in a published opinion. To the contrary, the Fifth Circuit and District Courts in the Eastern District of New York, Southern District of Texas, Eastern District of Virginia, Northern District of Indiana, and Southern District of Florida have all published opinions rejecting the Department's position and agreeing with me that Congress extended rights to victims in the investigative phase of a criminal prosecution.

In light of this legal authority, how can the Department continue to persist in the view that the CVRA is "best read" to deprive victims of rights before the technical filing of criminal charges?

Response:

The Department of Justice is firmly committed to respecting the rights of crime victims during all phases of the criminal justice process, from the time they are first identified during a law enforcement investigation, up through and including the resolution of any federal charges that might be brought. The nature and extent of those rights are described in a number of federal statutes, including the Victim's Rights and Restitution Act (VRRA) and the Crime Victims Rights Act (CVRA).

The manner in which department personnel are expected to interact with crime victims is addressed in the Attorney General's Guidelines for Victim and Witness Assistance (the AG Guidelines). The AG Guidelines were completely revised in 2011, and training on the revised guidelines (which took effect on October 1, 2011) has been ongoing for months. The AG Guidelines are extensive, and make two points very clearly. First, all department personnel are expected to treat crime victims with dignity, respect, and fairness at all times, whether required by a statute or not. In that vein, the guidelines encourage department employees to provide services and assistance to crime victims above and beyond those required by the VRRA and CVRA. Second, however, CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment.

This latter position was adopted only after due deliberation. In fact, as part of the guidelines revision process, the department's Office of Legal Counsel (OLC) was asked to consider the question of when CVRA rights attach. OLC issued its formal opinion on December 17, 2010, which opinion is available at http://www.justice.gov/olc/2010/availability-crime-victims-rights.pdf. OLC concluded that the CVRA is "best read as providing that the rights identified in [the CVRA] are guaranteed from the time that criminal proceedings are initiated . . ." In reaching its conclusion, OLC was aware of and considered both the full legislative history of the CVRA and the extant judicial decisions which addressed this question, both published and unpublished. Some of those judicial decisions agreed with OLC, some did not, but OLC's opinion is binding upon the Executive Branch.

47. As you know, the circuits are split about whether the Crime Victims' Rights Act gives crime victims the right to the same kinds of ordinary appellate protections that other litigants receive. Four circuits have taken what is in my view the correct view on this issue — that Congress intended to extend to crime victims the same kinds of appellate protections other litigants receive. Four circuits have, however, disagreed. In view of this clear division of opinion on an extremely important question of implementing the CVRA, it would clearly seem to be appropriate for the U.S. Supreme Court to resolve the circuit split. But the Justice Department has opposed Supreme Court review, contending that "the disagreement among the courts of appeals is also of little practical importance."

How can the Justice Department claim to be working to protect the rights of crime victims while at the same time telling the Supreme Court that whether crime victims are able to obtain appellate protection of their rights is "of little practical importance"?

Response:

The Department remains firmly committed to ensuring that the Crime Victims' Rights Act of 2004 (CVRA) is implemented and administered in a manner that fully protects and respects the rights of crime victims. Among the rights provided by the Act is the right of a crime victim, who is not a party to a criminal case, to seek judicial review, in their own name, of a district court order denying them their statutory rights by filing a "petition ... for a writ of

mandamus." 18 U.S.C. § 3771(d)(3). By its terms, the statute thus authorizes victims to seek one specific form of judicial review – mandamus review – while reserving to the government alone the prerogative to seek a different form of review – appellate review. See 18 U.S.C. § 3771(d)(4) ("In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In post-CVRA litigation, some victims' rights advocates have argued that, even though the statute explicitly authorizes victims to seek "mandamus" review, the courts of appeals should review a victim's CVRA petition for a writ of mandamus as if it were an ordinary appeal and should therefore not apply the standards that courts traditionally apply in reviewing extraordinary petitions for writs of mandamus. Some courts of appeals have agreed with victims and applied ordinary appellate standards of review, while other courts of appeals have determined that the statutory term "mandamus" carries with it an intent to have courts apply traditional mandamus standards of review.

Recently, one crime victim presented this disagreement to the Supreme Court, and the government, in its filing, asserted that the Court should not grant review in that particular case to resolve the disagreement because there was no reason to believe that, in any of the CVRA mandamus cases before the courts of appeals, the result would have been different had the lower courts applied the ordinary standards of appellate review urged by the victim. *See* In re: Fisher, No. 10-1518. cert. denied, 2011 WL 5902485 (Nov. 28, 2011). The Department routinely files briefs advising the Supreme Court that a particular case does not merit the Court's review where the resolution of the question would not alter the result, and our invocation of that principle in this case reflects that precept. That position should not be understood to evince a departure from our strong commitment to protecting victim's rights.

QUESTIONS POSED BY SENATOR SESSIONS

48. At the hearing, you were asked whether the Department of Justice planned to comply with the House Judiciary Committee's letter asking for any documents related to Justice Kagan's involvement in the health care legislation and related litigation during her tenure as Solicitor General. You testified that you were not aware of the request, but that you recalled instances in which your staff would "physically, literally move [then-Solicitor General Kagan] out of the room whenever a conversation came up about the health care reform legislation." However, during her confirmation hearing, Justice Kagan herself testified that she "attended at least one meeting where the existence of the litigation [in *State of Florida v. U.S. Dep't of Health and Human Services*] was briefly mentioned." In addition, emails that the Department of Justice was compelled to release in response to lawsuits under the Freedom of Information Act the day after your appearance before the Judiciary Committee and earlier this year seem to contradict your purported lack of cognizance of the House Judiciary Committee's request and your assertion that at all times in this matter Solicitor General Kagan was excluded from discussions and/or deliberations regarding these matters. I am deeply disturbed by these developments and believe that the Justice Department should have provided these documents to the Senate Judiciary Committee during Justice Kagan's confirmation hearing. The Department's failure to provide this information to Congress and to comply with FOIA requests, as well as your apparent inattention to these matters, is unacceptable. I have set forth the substance of the aforementioned emails below. Please review them and provide answers to the questions that follow.

According to an email dated October 13, 2009 – well before March 5, 2010, the date Justice Kagan stated that she was aware she was being considered as a potential Supreme Court nominee – her top Deputy, Neal Katyal, informed her "we got [Senator Olympia] Snowe on health care."

According to a January 8, 2010 email chain – two weeks after the Senate passed the health care legislation – Brian Hauck, senior counsel to Associate Attorney General Tom Perrelli, emailed General Kagan's principal deputy, Neal Katyal, to tell him that Perrelli wanted "to put together a group to get thinking about how to defend against the inevitable challenges to the health care proposals that are pending." Katyal instantly replied: "Absolutely right on. Let's crush them. I'll speak to [Solicitor General] Elena [Kagan] and designate someone." At 10:57 a.m., Katyal forwarded Hauck's email to General Kagan and said: "I am happy to do this if you are ok with it," to which General Kagan responded four minutes later: "You should do it." Approximately two hours later that day, Katyal emailed again to Hauck informing him of General Kagan's determinations: "Brian, Elena would definitely like OSG [Office of the Solicitor General] to be involved in this set of issues. I will handle this myself, along with an Assistant from my office [REDACTED] and will bring in Elena as needed."

A March 16, 2010 email from General Kagan asks then-Acting Assistant Attorney General for the Office of Legal Counsel David Barron whether he has seen former Judge Michael McConnell's "piece in the wsj," referring to a March 15th op-ed in the *Wall Street Journal* in which Judge McConnell discussed House Democrats' proposal to circumvent a potential Senate filibuster of the health care bill. Barron responds: "YES – HE IS GETTING THIS GOING."

In a March 18, 2010 email, Katyal wrote to Perrelli and copied General Kagan, discussing in detail a draft complaint by the Landmark Legal Foundation and strategy regarding the potential litigation:

> **"Tom, I was just looking at the draft complaint by Landmark Legal Foundation. It is clearly written to be filed when the House approves the reconciliation bill and before the President signs it. See paras 15-17. http://www.landmarklegal.org/uploads/Landmark%20Complaint%20(00013086-2).pdf**
>
> **Also para 27 says the action is being brought before it is signed by President so that no expectations of regularity can be asserted, etc. As such, we could be in court very soon.**
>
> **In light of this, for what it is worth, my advice (I haven't discussed this with Elena, but am cc'ing her here) would be that we start assembling a response, [REDACTION] so that we have it ready to go. They obviously have their piece ready to go, and I think it'd be great if we are ahead of the ball game here."**

Then, on March 21, 2010 – the date the House of Representatives passed the Patient Protection and Affordable Care Act – General Kagan wrote to Justice Department adviser Laurence Tribe regarding the health care legislation: "I hear they have the votes, Larry!! Simply amazing." The subject line of that email chain, which was initiated by Tribe, states "fingers and toes crossed today!" in an apparent reference to the vote. Tribe responded: "So health care is basically done! Remarkable. And with the Stupak group accepting the magic of what amounts to a signing statement on steroids!" – an apparent reference to the group of House Democrat congressmen who had indicated they would not vote for the legislation if it permitted federal funds for abortions and later acquiesced when the President agreed to sign an executive order preventing federal funding for abortions.

At 6:11 p.m. that same day, General Kagan had an email exchange with her deputy, Neal Katyal. This email chain – titled "Health care litigation meeting" – was initiated when Associate Attorney General Tom Perrelli emailed a group of Justice Department lawyers, including Katyal, notifying them that there was going to be a meeting the next day to plan for the litigation expected to challenge the health care legislation. At 6:18 p.m., Katyal forwarded this email chain to General Kagan, stating: "This is the first I've heard of this. I think you should go, no? I will,

regardless, but feel like this is litigation of singular importance." At 6:19 p.m., General Kagan replied: "What's your phone number?"

A. Are you aware of any instances during Justice Kagan's tenure as Solicitor General of the United States in which she was present in any meeting or conversation in which the Patient Protection and Affordable Care Act and/or litigation related thereto was discussed?

Response:

Please see the attached letter sent to Senator Sessions on February 24, 2012. (See attachment E.)

B. Are you aware of any instances during Justice Kagan's tenure as Solicitor General of the United States in which she was asked for her opinion or otherwise consulted, in her capacity as Solicitor General or otherwise, regarding the Patient Protection and Affordable Care Act and/or litigation related thereto?

Response:

Please see the response to 48(A), above.

C. Are you aware of any instances during Justice Kagan's tenure as Solicitor General of the United States in which she offered any views or comments in her capacity as Solicitor General or otherwise regarding the Patient Protection and Affordable Care Act and/or litigation related thereto?

Response:

Please see the response to 48(A), above.

D. Are you aware of any instances during Justice Kagan's tenure as Solicitor General of the United States in which she reviewed any documents in her capacity as Solicitor General or otherwise related to the Patient Protection and Affordable Care Act and/or litigation related thereto?

Response:

Please see the response to 48(A), above.

E. Are you aware of any instances during Justice Kagan's tenure as Solicitor General of the United States in which information related to the Patient Protection and Affordable Care Act and/or litigation related thereto was relayed or provided to her?

Response:

Please see the response to 48(A), above.

F. When did your staff begin "removing" Solicitor General Kagan from meetings on this matter? On what basis did you take this action? In what other matters was such action taken?

Response:

Please see the response to 48(A), above.

G. As noted above, in a January 8, 2010 email, Deputy Solicitor General Neal Katyal wrote that "Elena would definitely like OSG to be involved in this set of issues." Katyal later wrote that he wanted the Solicitor General's office to be "heavily involved even in the dct [district court]." Are you aware of any conversation or meeting in which Justice Kagan approved the involvement of the Solicitor General's office as described in this email, i.e., "in the [district court]," or the basis on which she justified that involvement?

Response:

Please see the response to 48(A), above.

H. Did you ever have a conversation with Justice Kagan regarding her recusal from matters before the Supreme Court related to the Patient Protection and Affordable Care Act? If so, please describe the circumstances and substance of those conversations.

Response:

Please see the response to 48(A), above.

49. As you know, Assistant Attorney General for the Civil Rights Division Tom Perez – who has not appeared as counsel in your Department's lawsuit against Alabama with respect to H.B. 56 – has sent letters to the superintendent of every school district in Alabama demanding information related to the pending litigation without setting forth any legal authority that would compel its production. Although Mr. Perez referred to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, and the Equal Educational Opportunities Act, 20 U.S.C § 1703, neither of those statutes gives the Attorney General the authority to compel the requested information unless the Department of Justice has received written complaints, determined that the complaints are meritorious, and determined that the complainants are unable to bring a suit on their own. If all of those conditions are satisfied, then the Department of Justice may initiate a civil action on behalf of the complainants and

presumably seek the requested information through the discovery process. Please provide the legal basis upon which this request was made.

Response:

On October 31, 2011, the Civil Rights Division sent information requests to 39 school districts in Alabama, or about one-third of the total school districts in the state. The legal basis for these requests was the Department's express authority to investigate and enforce Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, and the Equal Educational Opportunities Act, 20 U.S.C § 1703. We requested that Alabama school districts provide student enrollment, attendance, and withdrawal data to assist us as we review of compliance with those statutes.

As you have noted, Title IV of the Civil Rights Act requires that certain conditions are met before I may authorize initiating suit. At this time, the Department has not filed an action under Title IV, and so no certification under Title IV has been made or is required. Accordingly, the October 31 information request to school districts expressly noted that the Civil Rights Division's pending inquiry was "preliminary in nature."

50. **It is my understanding that the Office of the Attorney General of Alabama has requested that the Justice Department share any information regarding any alleged complaints with respect to H.B. 56, as the State of Alabama is determined to see that school children are protected from any alleged unlawful activity. Please provide my office and the Office of the Attorney General of Alabama with copies of any written complaints received with respect to the alleged discrimination against school children in Alabama. If the Department has received complaints through the hotline that it set up, please provide a description of those complaints to my office and to the Office of the Attorney General of Alabama.**

Response:

As you know, the Department cannot disclose information from confidential law enforcement files pertaining to an open and ongoing investigation. As we noted in our November 4, 2011 letter to the Attorney General of Alabama, the complaints we have reviewed may implicate non-discrimination statutes related to education that the Department has express authority to investigate and enforce.

51. **In his November 1, 2011 letter to the Alabama school superintendents, Assistant Attorney General Perez expressed the Department of Justice's concern "that the requirements of Alabama's H.B. 56 may chill or discourage student participation in, or lead to the exclusion of school-age children from, public education programs based on their or their parents' race, national origin, or actual or perceived immigration status." Meanwhile, the Superintendent of the Alabama Department of Education has made "clear that no child will be denied an education based on unlawful status or on a failure to provide the requested documentation." Is it the**

Department of Justice's position that, in addition to prohibiting a state from "deny[ing] a discrete group of innocent children the free public education that it offers to other children residing within its borders . . . [absent] a showing that it furthers some substantial state interest,"[1] the Equal Protection Clause further prohibits states from implementing policies that might have a "chilling effect" on the enrollment of children of illegal aliens? Please explain your answer.

Response:

As the Supreme Court stated in *Plyler v. Doe*, "denial of education to some isolated group of children poses an affront to one of the goals of the *Equal Protection Clause*: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. 202, 221-222 (1982) (emphasis in original). In addition to the protections the Court set forth in *Plyler*, the Department also enforces or coordinates the enforcement of multiple statutes that protect students' equal rights to access educational opportunities and prohibit discrimination in public education. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, prohibits discrimination in public schools on the basis of race, color, and national origin. Title VI prohibits discrimination on these same bases by recipients of Federal financial assistance, and Title VI's implementing regulations, 28 C.F.R. § 42.104(b)(2) and 24 C.F.R. § 100.3(b)(2), prohibit schools from adopting or using criteria or methods which have the effect of discriminating on these bases. Accordingly, under Federal law, states cannot adopt policies or practices that prevent, discourage, or lead to the exclusion of students from public education based on their or their parents' actual or perceived immigration status. Policies that have a chilling effect on enrollment may impermissibly prevent students from accessing the educational opportunities to which they have equal rights.

52. **According to 8 U.S.C. § 1373, U.S. Immigration and Customs Enforcement is required to respond to inquiries by state and local law enforcement officers about the immigration status of detained individuals. However, Secretary Napolitano has stated that the Department of Homeland Security will not cooperate with the State of Alabama in this regard, but will cooperate with the Department of Justice in its effort to enjoin state laws such as Alabama's H.B. 56.**

    A. **Have you advised DHS and/or ICE that there is a clear congressional directive to cooperate with state and local law enforcement officers seeking information about immigration status?**

Response:

In its litigation against Alabama's H.B. 56, the federal government did not state that it would not respond to inquiries under 8 U.S.C. § 1373; rather, the federal government argued that a mandatory state verification scheme of the type enacted in H.B. 56 would hinder the Department of Homeland Security's ability to effectively respond to various high priority immigration verification and enforcement matters. For further details on this issue, we refer you to the brief filed by the Department in *United States v. Alabama*, N.D. Ala., No. 11-J-2746,

[1] *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

available at http://www.justice.gov/opa/documents/motion-preliminary-injunction.pdf, as well as the Department of Homeland Security's "Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters," available at http://www.dhs.gov/files/resources/guidance-state-local-assistance-immigration-enforcement.shtm.

B. Why is the executive branch unwilling to respond to inquiries from local authorities when they have arrested someone who appears to be unlawfully present in the U.S.?

Response:

The federal government is willing to respond to such inquiries, and this question should be directed to the U.S. Department of Homeland Security.

53. Please provide the amounts expended by the Department in its litigation against (a) the State of Arizona; (b) the State of Alabama; and (c) the State of South Carolina.

Response:

The Department has spent roughly (a) $385,020 in litigation against the State of Arizona; (b) $159,000 in litigation against the State of Alabama; and (c) $34,357 in litigation against the State of South Carolina. The U.S. Attorney's Offices for the District of Arizona, the Northern District of Alabama, and the District of South Carolina participated in this litigation with the other components of the Department, however, the U.S. Attorney's Offices do not record the costs of litigating individual cases.

54. According to 8 U.S.C. § 1373(a), Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

a. Cook County, Illinois, recently passed an ordinance prohibiting local law enforcement from cooperating with ICE detainers, ostensibly in direct violation of this statute. Does the Department plan to take any action against Cook County, Illinois? If not, why?

Response:

As we have stated previously, under the Immigration and Nationality Act and its implementing regulations, the Department of Homeland Security is responsible for determining how and under what circumstances it will use detainers as part of its immigration enforcement

regime. It is in the best position to determine whether Cook County's policy regarding detainers conflicts with existing law and its practice with respect to detainers in Cook County.

b. Does the Department plan to take any action against other jurisdictions, such as Santa Clara and San Francisco counties in California and Washington, D.C., which have a *de facto* policy of refusing to comply with federal immigration law enforcement? If not, why?

Response:

Please see the response to Question 54(A), above. We cannot speculate as to any action we might or might not take against any jurisdiction.

55. Congress has passed several laws that require states to play an important role in enforcing federal immigration laws, including statutes that require states to provide information about persons they come across that are unlawfully present in the U.S. In addition, Congress has expressly required federal agencies to cooperate with the states and provide information about immigration status in response to their inquiries.

a. Is it the Department's position that, notwithstanding those Congressional directives, local law enforcement officials do not have the authority to verify a person's immigration status once that person is lawfully stopped or arrested?

Response:

The Department's position has been that state laws that mandate that local law enforcement officials verify a person's immigration status conflict with federal law, because they prevent local law enforcement officers from tailoring their assistance to federal enforcement priorities – priorities which Congress has tasked DHS with establishing. Such laws, particularly when considered in the aggregate, will divert federal attention away from truly exigent circumstances, including high priority criminal aliens who may otherwise be released; and interfere with other objectives of the immigration system.

b. Is it the Department's position that federal executive agency policy alone can preempt valid state laws? If so, what happens when that policy is contrary to federal statutes?

Response:

The Department's position is not that federal agency policy preempts state immigration schemes. Rather, it is our position that federal law preempts these schemes. As the Supreme Court has long recognized, immigration is such "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."

Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950). Thus, where a state attempts to remove or undermine the Executive's ability to exercise congressionally delegated authority, the state law cannot stand.

c. You testified that "the Department has challenged immigration related laws in several states that directly conflict with the enforcement of federal immigration policies." How does Alabama's H.B. 56 "directly conflict with the enforcement of federal immigration policies"?

Response:

Alabama's H.B. 56 was designed to affect virtually every aspect of an unauthorized alien's daily life, including housing, transportation, school, and the ability to enter into contracts for even basic human necessities. Because Alabama's H.B. 56 involved several immigration provisions that are invalid for a number of distinct reasons, I refer you to the brief filed by the Department in *United States v. Alabama*, N.D. Ala., No. 11-J-2746, available at http://www.justice.gov/opa/documents/motion-preliminary-injunction.pdf, which details how each of the challenged provisions conflicts with federal immigration law.

56. On November 1st, Assistant Attorney General for the Criminal Division, Lanny Breuer, testified before this Committee that although he and/or his top deputies approved several ATF wiretap applications for Operation Fast and Furious, Main Justice has "only one" role in reviewing wiretap applications: "to ensure that there is legal sufficiency to make an application" to intercept communications – to ensure that the government's petition to the federal judge is, in his words, a "credible request." He further testified that it is the job of the district offices actually carrying out the investigation "to determine that the tactics that are used are appropriate" and that Main Justice has to rely on those prosecutors in the field and not second-guess them.

In response to questions about Mr. Breuer's testimony, you stated: "I don't have any information that indicates that those wiretap applications had anything in them that talked about the tactics that have made this such a bone of contention . . . ." You added, "I'd be surprised if the tactics themselves about gun walking were actually contained in those applications."

A. Can the Department of Justice certify to a court that a wiretap application has what Mr. Breuer called "legal sufficiency" if Main Justice has not evaluated the tactics being used in the underlying operation?

Response:

Sections 2510 *et seq.* of Title 18 of the U.S. Code ("Title III") set forth the findings a court must make before authorizing a wiretap. These findings include whether there is probable cause for the requested intercept and whether necessity for it exists. Following a process that has

been in place at the Department for decades, the Department's Office of Enforcement Operations (OEO) reviews wiretap applications submitted by an Assistant United States Attorney or other federal prosecutor to ensure that the application complies with the statutory requirements set forth in Title III. OEO then prepares an analysis of whether the application satisfies both Title III's legal requirements and Department policy. Once OEO's analysis is complete, a packet containing OEO's analysis and the wiretap application is sent to a Deputy Assistant Attorney General (DAAG) in the Criminal Division for his or her review. If the reviewing DAAG is satisfied that the application meets the necessary legal requirements, then he or she will authorize the prosecutor to seek court approval for the wiretap.

B. 18 U.S.C. § 2510 et seq. expressly direct that before a wiretap may be authorized, the application must set forth "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Can the Department of Justice certify to a court that alternative investigative techniques have been tried and failed if Main Justice does not review the alternative investigative techniques before submitting the application to the court?

Response:

Please see the response to question 56(A), above.

C. How can Department of Justice perform their role to ensure that there is legal sufficiency for a wiretap if, as you testified, there was no "information that indicates that those wiretap applications had anything in them that talked about the tactics that have made this such a bone of contention"?

Response:

Please see the response to question 56(A), above.

D. Even if Deputy Assistant Attorneys General are provided with a "summary" memorandum from the Electronic Surveillance Unit, the affidavits submitted in support of wiretap applications are very detailed and must set forth the "facts of the investigation that establish the basis for those probable cause and other statements required by Title III to be included in the application." Investigative techniques such as "gun-walking" tactics are precisely the type of facts called for in these affidavits. ATF Assistant Special Agent in Charge George Thomas Gillett told Committee staff that "while the Department of Justice wouldn't authorize the day-to-day surveillance operations of an investigative criminal enforcement group for ATF on the street level, it would, or should at least, be aware those investigative techniques were employed, had been used, and were a foundation of the Title III affidavit being sent up for approval at the highest levels of the Department of Justice."

1. **Who in the Department of Justice is responsible for reviewing affidavits in support of wiretap applications to ensure that all other investigative tactics have either failed or are impracticable?**

Response:

Please see the response to question 56(A), above.

2. **Were any of those officials made aware of the gun-walking tactics employed in Operation Fast & Furious or any similar investigations? If so, who were they?**

Response:

The Department understands that the Committee has obtained testimony from the former leaders of both ATF and the U.S. Attorney's Office in Arizona that they were unaware of the inappropriate tactics used in Operation Fast and Furious until allegations about those tactics became public. As a result, prior to that time, they did not advise Department officials in Washington of those tactics. Other operations, like Wide Receiver and Hernandez in the prior Administration, used similar tactics and the Department has produced documents to the Committee that identify those who received information about the tactics used in those matters.

57. **Senator Grassley asked why you would risk contempt of Congress by refusing to acknowledge who in the Department of Justice reviewed and prepared drafts of the Department's February 4th letter assuring Congress that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transport into Mexico." You responded that you would "act in a manner that's consistent with the history and tradition of the department." Is there a Department of Justice policy "consistent with the history and tradition of the department" that would prohibit the Attorney General from responding to Congressional inquiries concerning the identities of Department of Justice officials who participated in preparing a materially false letter in response to a Congressional inquiry? Please explain your answer.**

Response:

Last year the Department took the extraordinary step of providing the Committee with 1,364 pages of highly deliberative material that shows how inaccurate information came to be included in the Department's February 4, 2011 letter. The production of these documents represented an exception to the position to which Administrations of both political parties have adhered regarding such deliberative material. The documents provided reflect the identities of those who participated in the drafting of the Department's letter.

58. In a December 2010 letter to the Senate Majority and Minority Leaders, you wrote to express your opposition to Congress' decision to prohibit the use of funds to transfer detainees from GITMO to the United States for any purpose because "[i]n order to protect the American people as effectively as possible, we must be in a position to use every lawful instrument of national power to ensure that terrorists are brought to justice and can no longer threaten American lives."

A. Do you support or oppose President Obama's issuance of executive orders to end the CIA's detention program and to terminate the CIA's use of enhanced interrogation techniques?

Response:

The Department supports President Obama's issuance of Executive Order 13491. President Obama issued Executive Order 13491, Ensuring Lawful Interrogations, in order to improve the effectiveness of human intelligence-gathering; to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts; and to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and domestic law.

With respect to interrogation practices, the Executive Order directed that a Task Force study and evaluate "whether the interrogation practices and techniques in Army Field Manual 2-22.3, when employed by departments and agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies." A Task Force was assembled consisting of representatives from the relevant national security agencies, including representatives of the relevant components of the Intelligence Community responsible for interrogating terrorist detainees.

After extensively consulting with representatives of the Armed Forces, the relevant agencies in the Intelligence Community, and some of the nation's most experienced and skilled interrogators, the Task Force concluded that the Army Field Manual provides appropriate guidance on interrogation for military interrogators and that no additional or different guidance was necessary for other agencies. These conclusions rested on the Task Force's unanimous assessment, including that of the Intelligence Community, that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations.

B. Do you support or oppose President Obama's decision to halt all proceedings before military commissions?

Response:

The halt on military commission proceedings has been rescinded, and I agree that military commissions, as reformed by the Military Commissions Act of 2009 and other reforms, be allowed to resume. It is essential that the government have the ability to use both military

commissions and federal courts as tools to keep this country safe. As you know, in November 2009, after consulting with the Secretary of Defense, the Attorney General referred a number of cases of detainees held at Guantanamo Bay for prosecution in military commissions.

Both systems – federal courts and our reformed military commissions – can be effective tools to disrupt terrorist plots and activities, gather intelligence through cooperation by the accused, and incapacitate terrorists through prosecution and conviction. When determining which system to use to prosecute any particular individual, we remain relentlessly practical - focusing exclusively on which option will produce a result that best serves our national security interests in the unique facts and circumstances of that case.

C. Do you support or oppose the closure of GITMO without conducting any study concerning what to do with the detainees once the facility is closed?

Response:

The President remains committed to closing the detention facility at Guantanamo Bay and to maintaining a lawful, sustainable, and principled regime for the handling of detainees, regardless of the place of detention, consistent with the full range of U.S. national security interests. The Department supports that policy.

59. After President Obama ordered the halt of all proceedings before military commissions on his second full day in office, the chief military judge at GITMO, Army Colonel James Pohl, denied the administration's request to delay the arraignment of Abd al-Rahim al-Nashiri, who is accused of masterminding the attack on the USS Cole in October 2000. Judge Pohl said that he found the administration's arguments "unpersuasive," that delaying the case "[did] not serve the interest[s] of justice," and that "the public interest in a speedy trial [would] be harmed by the delay in the arraignment." Since the judge refused to delay the case, the administration withdrew the charges without prejudice, further delaying justice for the families of the 17 Naval officers killed in the attack on the USS Cole. As of President Obama's March 7, 2011 order, proceedings before the military commissions at GITMO have resumed, and the arraignment of Abd al-Rahim al-Nashiri finally took place on November 9th. Do you believe that the procedures and policies in place for al-Nashiri's trial before a military commission at GITMO meet constitutional standards?

Response:

Yes. The Administration, working on a bipartisan basis with members of Congress, has successfully enacted key reforms to the military commission process in the Military Commissions Act of 2009. These reforms included a ban on the use of statements obtained as a result of cruel, inhuman, or degrading treatment, and a better system for handling classified information, among others. As a result of these reforms, the Department believes the military commissions can deliver fair trials and just verdicts and will meet constitutional standards.

60. In a speech in June of this year, you said that when it comes to the decision whether to try terrorists before military commissions or in federal courts, "politics has no place – no place – in the impartial and effective administration of justice." But in a speech before the European Parliament in September, you reaffirmed your commitment to closing GITMO "as quickly as possible, recognizing that we will face substantial pressure." And you testified before this Committee on November 8th that "the administration['s] policy is to try to close Guantanamo[;] it would be an appropriate thing to do for a whole variety of reasons."

A. If politics has no place in determining whether to try terrorists before military commissions or in civilian courts, why is it acceptable to bow to what you perceive as the "substantial pressure" from the international community to close GITMO?

Response:

Please see response to question 30(A), above.

B. You testified that "the men and women [at GITMO] conduct themselves in an appropriate way and that prisoners are treated in a humane fashion;" you agreed that every detainee at Guantanamo Bay has the opportunity to file a *habeas* petition in federal court to test the legality of his detention; you acknowledged that many such cases are now ongoing; and you conceded that any conviction by military commission is automatically appealed to an Article III court. Aside from international and domestic politics, which you insist have no place in deciding where and how to try terrorist suspects, what other reasons are there to close GITMO?

Response:

Please see response to question 30(A), above.

61. Do you stand by the administration's commitment to close GITMO even though we know that according to the Director of National Intelligence, as of September 2011 over a quarter of former GITMO detainees — 161 out of nearly 600 — are either confirmed or are suspected to have returned to the battlefield?

Response:

Please see Response to question 30(a), above. We will continue to work to close the detention facility at Guantanamo Bay because that will ultimately make the Nation safer. We take any incidence of recidivism extremely seriously and that is why all of this Administration's transfer decisions have been based upon comprehensive reviews of intelligence and threat

information. No detainee has been transferred during this Administration absent a court order unless there was unanimous consent by all agencies on the Guantanamo Task Force, based on both an assessment of the detainee's threat level and assessment of the recipient government's ability to mitigate that threat. Since August 2009, no detainee has been transferred without Congress having been given 15 days' advance notice, and no objections have been received. To date, the recidivism rate of the detainees this Administration has transferred is much lower than that of detainees transferred by the prior administration. It is also important to note that nearly half of confirmed or suspected recidivists have been neutralized by being either captured or killed. In sum, we are working across the government and with partner governments to minimize risk and keep the American people safe.

62. On March 26, 2010, Assistant Attorney General Ron Weich provided to the Senate Judiciary Committee a chart of international terrorism and terrorism-related prosecutions since September 11, 2001, as maintained by the Counterterrorism Section of the National Security Division. Mr. Weich stated that the chart is "regularly updated on a rolling basis by career federal prosecutors." Please provide to the Committee the most recently updated chart.

Response:

An updated chart reflecting public convictions through December 31, 2011 will be provided to the Committee as soon as it is available.

63. It is my understanding that the Voting Section of the Civil Rights Division was alerted in October 2010 about non-citizens registered to vote as well as duplicate voter registrations in Harris County, Texas.

A. What actions did the Voting Section take as a result of this report?

Response:

Because these alleged violations of the federal criminal laws fall within the jurisdiction of the Public Integrity Section of the Criminal Division of the Department of Justice, these allegations were referred to the Public Integrity Section.

B. Did the Voting Section initiate an investigation? If not, why?

Response:

Because these alleged violations of the federal criminal laws fall within the jurisdiction of the Public Integrity Section of the Criminal Division of the Department of Justice, these allegations were referred to the Public Integrity Section.

64. A recent report by the U.S. Election Assistance Commission showed that several states have more registered voters than citizens recorded in the most recent census and that other states, like Colorado, have noncitizens registered to vote. Christopher Coates, former Chief of the Voting Section, testified before the U.S. Commission on Civil Rights on September 24, 2011 that the U.S. Election Assistance Commission reported in 2009 that eight states were severely out of compliance with Section 8 of the Motor Voter Act.

A. What actions have you taken to ensure that these states come into compliance with the Motor Voter Act?

Response:

The Department of Justice has initiated investigations of a number of states to determine whether they are in compliance with the requirements of Section 8 of the NVRA. The Department continues to review NVRA compliance around the country, including consideration of the Election Assistance Commission's nationwide NVRA data issued this year. Last year, for the first time ever, the Department published on its website a document providing comprehensive guidance to state and local officials and the public concerning implementation of all of the requirements the NVRA. The feedback that the Department has received has indicated that many have found this guidance to be helpful.

B. How many Section 8 cases has the Voting Section brought under the Motor Voter Act since 2009?

Response:

While the Department of Justice has initiated a number of new investigations under Section 8 of the NVRA since 2009, it has not brought any new cases under Section 8 since 2009.

65. Coates also testified that that Loretta King, the former Assistant Deputy Attorney General of the Civil Rights Division, expressed to Coates that she was opposed to race neutral enforcement of the Voting Rights Act. Coates further testified that this view has been adopted by the administration.

A. Are you opposed to race neutral enforcement of the Voting Rights Act?

Response:

The Department of Justice is committed to vigorous enforcement of all federal civil rights laws it is charged with enforcing, including the Voting Rights Act, and will pursue civil rights violations regardless of the race of either the victims or the perpetrators.

B. Section 2 of the Voting Rights Act states, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color..." Do you agree that this section applies to all U.S. citizens?

Response:

Yes.

QUESTIONS POSED BY SENATOR CORNYN

66. The National Trails System Act allows inactive railways to be converted into public recreational trails. The Department of Justice is currently grappling with thousands of takings claims related to the conversion of privately held railroad corridors, including cases affecting South Carolina landowners.

A. Please provide a general update on the status of these takings cases, the number of pending cases, and the progress in resolving them.

Response:

The Department presently is defending approximately 60 Fifth Amendment takings cases involving the National Trails System Act ("Trails Act"). Virtually all of these cases are pending in the United States Court of Federal Claims, with a few pending in some federal district courts. The cases seek just compensation for the alleged taking by the United States of easements from landowners along railroad corridors located throughout the United States. Railroad corridors in approximately 30 states presently are being litigated, requiring the application of statutory and court-issued law for each state. The cases vary in size, with the smallest involving a single plaintiff and the largest involving approximately 2500 claims. Approximately half of the cases have been certified by the courts as opt-in class actions, which adds procedural complexity. The cases involve resolution of questions about the meaning and scope of a wide variety of 19th Century property transfers through written deeds, direct condemnations, federal land grants, and adverse possession.

The pending cases are in different stages of proceedings, with some only recently filed and others at various stages of resolution. Depending on the nature of plaintiffs' property interests and the applicable state law, various legal issues may require resolution by the court. Where appropriate, the Department of Justice seeks to resolve issues through negotiation with the opposing party, including the determination of compensation.

B. Please describe what policies or practices the Department of Justice has implemented since the 2002 hearing in which Assistant Attorney General Sansonetti testified that the Department would work to more promptly and cost-effectively resolve this litigation.[2]

Response:

In his 2002 testimony, Assistant Attorney General Sansonetti emphasized the Department's efforts in resolving Trails Act takings cases promptly and cost-effectively, including through the use of Alternative Dispute Resolution (ADR) techniques. ADR – particularly in the form of direct negotiation between the parties – has proven successful in many

[2] *See Litigation and its Effects on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 107th Cong. 2 (2002) (Statement of Thomas L. Sansonetti, Asst. Att'y General, Environment and Natural Resources Division, U.S. Dept. of Justice).

of our Trails Act cases. Although it can take many different forms, ADR in these cases often includes streamlining techniques to reduce the burden of title analysis, including categorization of conveyances into groups of similar instruments and the use of stipulations on those categories that are to be evaluated by well-settled state law. Streamlining techniques also are applied to reduce appraisal costs and expedite valuation determinations, including the grouping of properties based on current use and physical location and the use of representative-parcel valuations to achieve global monetary settlements. This latter process has proven especially effective once the court has resolved certain threshold issues that can significantly influence an appraiser's determination of a property's value. Approximately 40 Trails Act cases have been fully resolved since 2002, and dozens more have been significantly advanced during that time-period.

AAG Sansonetti also testified that ADR "is not a panacea. For ADR to be successful, both sides . . . must want to make it work. And also, the parties must have sufficient information about the factual and legal merits of their claims to be able to appropriately evaluate them." This latter point cannot be overstated. The federal courts have emphasized that liability determinations in Trails Act cases requires an examination of each conveyance document against the law of the state where the property is located. This analysis has resulted in the dismissal of claims by hundreds of plaintiffs who, after careful review by the court, were found to not own the property interests they contended was taken. In other instances, claims were dismissed when courts determined that interim trail use and railbanking were within the scope of the easements conveyed to the railroad. While this process is often burdensome, it cannot be circumvented without it resulting in the improper payment of millions of dollars to countless individuals who have suffered no harm under the law.

C. What additional policies or practices will the Department of Justice adopt to more fairly, promptly, and cost effectively resolve pending and future National Trails System Act takings claims?

Response:

The Department endeavors to resolve these cases fairly, promptly, and cost effectively, as the very large number of pending Trails Act cases places a substantial burden on the limited resources of the Department. As to currently pending cases, longstanding Department policy prohibits me from discussing the specifics of matters in litigation. Future cases will benefit from precedent established through resolution of the current cases, which should help to facilitate a narrowing of issues by the courts. Among the issues that we will seek to resolve is the proper means of determining attorneys' fees to be awarded to plaintiffs' counsel. These class-action attorneys frequently seek payment by the United States of attorneys' fees that significantly exceed the amount of compensation awarded to their clients, thus complicating the Department's ability to settle cases or bring court-resolved cases to a prompt conclusion.

67. Houston-based firearms dealer Carter's Country has publicly alleged that, between 2006 and 2010, ATF agents repeatedly directed their store clerks to go through with the sale of firearms to suspicious purchasers who may have been working on behalf

of Mexican drug cartels. The Attorney for Carter's Country has publicly confirmed that, in many instances, ATF did not show up to interdict the weapons that they directed store clerks to transfer to suspected drug cartel straw purchasers.

Additionally, congressional investigations have revealed that one of the weapons used in the February 15, 2011 murder of one of my constituents—U.S. ICE agent Jaime Zapata— was purchased by Otilio Osorio, a firearms trafficker that ATF may have had under surveillance at least 23 days prior to the date on which he was allowed to purchase this murder weapon. Our investigations have also revealed that, on November 10, 2010, Mr. Osorio and two co-conspirators illegally transferred 40 weapons with obliterated serial numbers to an ATF informant as part of an investigation of the Los Zetas drug cartel.

This evidence raises serious concerns that ATF may have used "gun-walking" tactics in Texas under your watch. On August 11, 2011, I sent you a letter asking that you promptly disclose the details of any past or present Texas-based "gun-walking" program operated by your department. As of the date these questions were sent to you, your department has failed to provide an answer to my letter.

A. Can you assure my constituents that ATF has not used "gun-walking" tactics in Texas under your watch?

Response:

Following the public revelation of inappropriate tactics used in Fast and Furious, the Department endeavored to identify ATF operations in which similar tactics were used. The Department thereafter notified the Committee of the additional operations it had identified, including some that occurred during the prior Administration. As we have noted, after the Attorney General learned of the inappropriate tactics used in Operation Fast and Furious, he instructed the Deputy Attorney General to issue a directive that those tactics not be used anywhere in the country, including in Texas.

B. Why did your department fail to arrest Otilio Osorio and his two co-conspirators immediately after they illegally transferred 40 weapons with obliterated serial numbers to an ATF informant?

Response:

The investigation and prosecution of those responsible for Special Agent Zapata's murder are ongoing. For that reason, and because disclosure could compromise these efforts, the Department is not in a position to provide additional information at this time.

C. Was the weapon purchased by Otilio Osorio and subsequently used to murder agent Zapata trafficked to Mexico after November 8, 2010—the date on which ATF could have arrested Mr. Osorio for illegally transferring 40 weapons with an obliterated serial number to an ATF informant?

Response:

Please see the response to question 67(B), above.

D. Can you assure the family of Agent Zapata that your department had no reason to believe that Otilio Osorio was involved in weapons trafficking either on or prior to October 10, 2010—the date on which he purchased one of the weapons used to murder agent Zapata?

Response:

Department officials have been in direct contact with Special Agent Zapata's family about this matter.

E. If you are unwilling to answer my questions, when can I expect a response to my August 11 letter that asked you to promptly disclose the details of any past or present Texas-based "gun-walking" program operated by the ATF?

Response:

Please see the response to question 67(A), above.

68. According to data published by the U.S. Attorney's Office for the District of Arizona, Operation Fast and Furious has had significant spillover effects in the State of Texas. ***See:*** ***http://www.justice.gov/usao/az/press_releases/2011/Fast_Furious_Map_ATF.pdf*** **. For instance, at least 119 firearms "walked" by your department as a part of Operation Fast and Furious have been recovered in my home state.**

a. Please give an account of every Operation Fast and Furious firearm recovery in the State of Texas, including: (1) a description of the weapon; (2) the name of the purchaser of the weapon, if known; (3) the name of the person who possessed the weapon at the time of the recovery; (4) the purchase date of the weapon; (5) the particular purchase location of the weapon; (6) the particular recovery location of the weapon; (7) the name of the law enforcement agency that recovered the weapon; and (8) a description of the circumstances that led to the recovery of the weapon.

Response:

Documents provided to the Committee have contained information about firearms associated with Operation Fast and Furious that were recovered in the State of Texas.

b. If you are unwilling to give an account of every Operation Fast and Furious firearm recovery in the State of Texas, as requested above, then please provide some detail about the 57 Operation Fast and Furious weapons that have been recovered in San Antonio.

Response:

The 57 weapons referenced in the website link above pertain to firearms that ATF believes were purchased by individuals who have been indicted in connection with Operation Fast and Furious. Since the prosecution of those individuals remains pending, we are not in a position to disclose additional information about those weapons at this time.

69. Beginning as early as July 5, 2010, your office received a series of at least 14 memos addressed to you that discussed the details of "Operation Fast and Furious." In a July 5th memo addressed to you, National Drug Intelligence Center Director Michael Walther wrote that:

> **"From July 6 through July 9, the National Drug Intelligence Center Document and Media Exploitation Team at the Phoenix Organized Crime Drug Enforcement Task Force (OCTDETF) Strike Force will support the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Phoenix Field Division with its investigation of Manuel Celis-Acosta as part of OCDETF Operation Fast and Furious. This investigation, initiated in September 2009 in conjunction with the Drug Enforcement Administration, Immigration and Customs Enforcement, and the Phoenix Police Department, involves a Phoenix-based firearms trafficking ring headed by Manual Celis-Acosta. Celis-Acosta and [redacted] straw purchasers are responsible for the purchase of 1,500 firearms that were then supplied to Mexican drug trafficking cartels. They also have direct ties to the Sinaloa Cartel which is suspected of providing $1 million for the purchase of firearms in the greater Phoenix area."**

Additionally, in a November 1st, 2010 memo addressed to you, entitled "SIGNIFICANT UPCOMING EVENTS," Assistant Attorney General Lanny Breuer, one of your chief deputies, wrote that:

> **"On October 27, the organized Crime and Gang Section (OCGS) indicted eight individuals under seal relating to the trafficking of 228 firearms to Mexico. The sealing will likely last until another investigation, Phoenix-based "Operation Fast and Furious," is ready for takedown."**

These memos deal with highly controversial and sensitive subject matter, namely the trafficking of firearms that were supplied to Mexican drug cartels. Taken at face value, these memos raise concerns that should have reasonably been further

investigated by the chief law enforcement officer of the United States. I would like to ask you a series of questions about these memos.

A. At the Senate Judiciary Committee oversight hearing on November 8, you unequivocally told me that you had not ever "received" these memos. Can you assure me that these memos were never placed on your desk or in your constructive possession?

Response:

As the Attorney General testified, these weekly reports, which contain brief, high-level summaries of a number of matters, were provided to members of his staff and the information about which you have asked was not brought to his attention. These brief summaries did not say anything about the inappropriate tactics used in Operation Fast and Furious; as a result, it is not surprising that the Attorney General's staff did not bring the weekly reports to his attention.

B. At the Senate Judiciary Committee oversight hearing on November 8, in reference to these memos, you told me that: "there was no need for them [your staff] to bring to my attention the reports."

1. Do you still believe that there is no need for your staff to bring to your attention a memo that details the transfer of "1,500 firearms" to straw purchasers who then "supplied" these firearms to "Mexican drug trafficking cartels"—especially where nearly identical language was written to your personal attention on at least six separate occasions?

Response:

Please see the response to question 69(A), above.

2. Shouldn't our nation's chief law enforcement officer have notice of an operation involving some of the sensitive and controversial considerations detailed in these memos?

Response:

Please see the response to question 69(A), above.

C. Do you think it was acceptable for you to not be given the November 1, 2010 memo that discussed "the trafficking of 228 firearms to Mexico"—especially where the memo was personally addressed to you, from your chief deputy, and written under the heading of "SIGNIFICANT RECENT EVENTS?"

1. Wouldn't all of this, on its face, suggest to a reasonable person that the memo was relatively important?

Response:

Please see the response to Question 69(A). In addition, we note that the November 1, 2010, memorandum – and the reference to 228 firearms – concerned the second indictment obtained by the Criminal Division's Gang Unit in *Operation Wide Receiver*, which, as you know, was investigated by ATF during the prior Administration.

2. Wouldn't it also suggest that the nation's chief law enforcement officer should be at least somewhat familiar with the details of the investigation described in the memo?

Response:

Please see the responses to questions 69(A) and 69(C)(1), above.

D. Has anyone been held accountable for failing to bring to your attention any of the memos addressed to you that discussed Operation Fast and Furious before you have testified that you became aware of that program?

Response:

Please see the response to question 69, above.

E. Do you believe that anyone should be held accountable for failing to bring these memos to your attention?

Response:

Please see the response to question 69(A), above.

70. On January 30, 2011 Senator Grassley handed you two letters outlining his questions and concerns regarding Operation Fast and Furious. At the November 8, 2011 Senate Judiciary Committee oversight hearing, you responded to my question about this letter by saying that "I did" investigate the allegations contained in the letter after receiving it. On February 4, 2011, however, [Assistant] Attorney General Ron Weich sent a letter to Senator Grassley stating that "the allegation described in your January 27 letter—that ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them to Mexico—is false." We have now learned that Assistant Attorney General Lanny Breuer had knowledge of ATF "gun-walking" tactics as early as April 2010.

A. When you "investigated" the allegations in Senator Grassley's January 30, 2011 letter, did you consult with Assistant Attorney General Lanny Breuer?

Response:

Last year the Department took the extraordinary step of providing the Committee with 1,364 pages of highly deliberative material that shows how inaccurate information came to be included in the Department's February 4, 2011 letter. The production of these documents represented an exception to the position to which Administrations of both political parties have adhered regarding such deliberative material. The documents provided reflect the identities of those who participated in the drafting of the Department's letter.

B. If not, given the extremely serious allegations in Senator Grassley's letter, why did you fail to consult with your chief deputy who is directly charged with oversight of the ATF?

Response:

Please see the response to question 70(A), above. In addition, we note that Assistant Attorney General Breuer is the head of the Department's Criminal Division; his duties do not include "oversight of the ATF."

C. Why did you fail to share the information contained in Senator Grassley's January 30, 2011 letter with [Assistant] Attorney General Ron Weich, and instead allow him to submit a letter to Congress containing materially false information?

Response:

Please see the response to question 70(A), above.

D. Did Assistant Attorney General Breuer view [Assistant] Attorney General Weich's February 4, 2011 letter prior to its submission to Senator Grassley?

Response:

Assistant Attorney General Breuer answered this question during his appearance before the Committee on November 1, 2011 and in his responses to questions for the record arising from that appearance.

1. If so, why did Assistant Attorney General Breuer fail to correct the letter?

Response:

Please see the response to question 70(D), above.

2. If not, given the serious nature of the allegations involved, why did [Assistant] Attorney General Weich fail to consult with the Assistant

Attorney General—the Department of Justice official directly charged with oversight of the ATF?

Response:

Please see the responses to questions 70(A) and 70(B), above.

E. Do you think it is ever excusable for the Department of Justice to send a letter containing false or inaccurate information to Congress where you and/or one of your chief deputies has knowledge or reason to believe that the information contained in the letter is false or inaccurate?

Response:

The Department takes seriously its obligation to provide Congress with accurate information. After it became clear that the Department's February 4, 2011 letter to Senator Grassley contained inaccurate information, the Department appropriately withdrew that letter. Further, the Department provided the Committee with 1,364 pages of highly deliberative material in order to accommodate the Committee's interest in understanding how the inaccurate information came to be included in the February 4, 2011 letter. This extraordinary accommodation represented an exception to the Department's longstanding position across Administrations of both political parties with respect to deliberative material generated in the course of responding to congressional oversight. Finally, as detailed in a letter to the Committee from Deputy Attorney General Cole dated January 27, 2012, the Department has taken additional steps to ensure that Congress receives accurate information in response to its requests.

F. If not, has anyone been held accountable for the February 4th, 2011 letter from Deputy Attorney General Ron Weich to Senator Grassley which contained false information?

Response:

Please see the response to question 70(E), above.

71. **In your testimony before the House Judiciary Committee on May 3, 2011, you told Representative Issa that you were not sure of the exact date you learned about Operation Fast and Furious, but that it was "probably. . .over the last few weeks." We now know that this statement was false. During my questions at the November 8, 2011 Senate Judiciary Committee oversight hearing, you told me that a better way to have expressed the date on which you learned about Operation Fast and Furious would have been "over the last couple of months." However, at that same hearing, you also admitted that you were familiar with the contents of two letters that Senator Grassley personally handed to you on January 30, 2011 outlining his questions and concerns regarding Operation Fast and Furious.**

a. It seems to me that more than a "couple of months" separate January 30, 2011 from May 3, 2011, when you told the House Judiciary Committee that you had learned about Operation Fast and Furious "over the last few weeks." Please take this opportunity to clarify your statements and estimate the exact date on which you learned about Operation Fast and Furious.

Response:

As the Attorney General has testified previously, his first recollection of Operation Fast and Furious dates to early 2011, when the allegations of inappropriate tactics used in that operation became public.

72. In your testimony before the Senate Judiciary Committee at your confirmation hearing in January 2009, you said "we will carry out our constitutional duties within the framework set forth by the Founders, and with the humility to recognize that congressional oversight and judicial review are necessary; they are beneficial attributes of our system and of our Government." During my questions, I asked you if "you would work with us to open up the government, to make it more transparent and accountable." In response to my question, you said "yes, exactly right." Similarly, during Senator Grassley's questions at that same hearing you pledged "to be responsive to all congressional requests for information and provide this information to Congress in a timely manner."

Your conduct throughout the congressional investigation into ATF "gun-walking" schemes has, however, spectacularly failed to meet the standard of transparency that you promised, under oath, to uphold during your confirmation proceedings. As a point of reference, this investigation would not have existed but for ATF whistleblowers coming to Congress and asking us to investigate. To this day, your department's failure to comply with congressional requests forces us to rely on whistleblowers to answer our questions. For example, it took your department nearly three months to acknowledge and expressly refuse to answer a letter I sent to you on August 11, 2011 asking that you promptly disclose the details of any past or present Texas-based "gun-walking" program.

A. Do you believe this is a legitimate congressional investigation?

Response:

Congress has raised legitimate questions about the inappropriate tactics used in Operation Fast and Furious. The Department has worked diligently to provide answers to those questions and to questions about similar operations in the prior Administration such as Wide Receiver, Hernandez, and Medrano. The Department has responded to more than three dozen letters from Members of Congress; facilitated numerous witness interviews; and provided to Congress over 7,000 pages of documents, including virtually unprecedented access to 1,364 pages of highly deliberative material showing how inaccurate information came to be included in the

Department's February 4, 2011 letter. The Department is committed to working with Congress to address the public safety and national security crisis along the Southwest Border.

B. Why did we have to rely on whistleblowers to begin this investigation?

Response:

As the Attorney General has said, he was unaware of the allegations of inappropriate tactics in Operation Fast and Furious until they were made public in early 2011.

C. Have you commended the whistleblowers who risked their careers to come forth and expose the ill-advised "gun-walking" tactics used by ATF under your watch?

Response:

In the Attorney General's opening remarks before this Committee, he said that "we have a responsibility to act" to stop the flow of illegal guns to Mexico, and we "can start by listening to the agents, the very agents who serve on the front lines of the battle and who testified here in Congress." As the Attorney General noted, "[n]ot only did they bring the inappropriate and misguided tactics of Operation Fast and Furious to light[,] [t]hey also sounded the alarm to Congress that they need our help. ATF agents who testified before a House committee [last] summer explained that the agency's ability to stem the flow of guns from the United States into Mexico suffers from a lack of effective enforcement tools."

The Attorney General likewise commended these ATF agents during his testimony before the House Judiciary Committee in December 2011.

D. Why does your department continue to withhold documents and witnesses so that we have to rely on whistleblowers to answer our questions?

Response:

As the Department has made clear, materials responsive to the House Oversight and Government Reform Committee's October 11, 2011 subpoena, and witnesses requested by the Committee for transcribed interviews, have been made available to the Committee consistent with the Department's practices in this area across Administrations of both political parties. *See Letter from Deputy Attorney General James M. Cole to Hon. Darrell E. Issa at 4 (Feb. 1, 2012); Letter from Assistant Attorney General Ronald Weich to Hon. Darrell E. Issa (Dec. 6, 2011).*

E. Will you assure the members of this committee that our future requests for information will be promptly and fully complied with?

Response:

Please see the response to question 72(D), above.

73. **Mexico is currently embroiled in a fight for its life against international drug cartels. Additionally, on October 31, 2011, news reports confirmed that some cartel-related violence spilled over into the United States in Hidalgo, Texas. In 2008 the United States entered into a security cooperation agreement, known as the Merida Initiative, in order to combat the threats of drug trafficking and transnational organized crime. However, at least 195 firearms "walked" by your department as a part of Operation Fast and Furious have been recovered at crime scenes in Mexico—many of which were committed by the agents of drug cartels.**

A. Have you spoken with Mexican officials about the tragic consequences of your Department's "gun-walking" operations?

Response:

The details of conversations between the Attorney General and his counterparts in the Mexican government are not appropriate for public discussion. However, the cooperative relationship between the Justice Department and the Mexican government in combating drug cartels has been – and continues to be – unprecedented. The collaboration between the two countries has included the extradition of large numbers of defendants from Mexico to the United States; the sharing of intelligence between U.S. and Mexican law enforcement; our work with vetted law enforcement units in Mexico; and the creation of joint task forces with our Mexican partners.

B. If so, please detail all communications you have had with Mexican official's regarding your Department's "gun-walking" operations.

Response:

Please see the response to question 73(A), above.

C. As of the date on which these questions were sent to you, there are still have more than 1,000 unrecovered weapons from Operation Fast and Furious, most of which are likely in Mexico. What are you doing each and every day to ensure that these weapons are recovered before they end up at crime scenes?

Response:

The details of ongoing law enforcement investigations are not appropriate for public discussion. However, as the Attorney General said in his opening statement before this Committee on November 8, 2011, Operation Fast and Furious was flawed in its concept and flawed in its execution. He acknowledged that the effects of these mistakes will be felt for years to come as guns that were lost during this operation continue to show up at crime scenes both here and in Mexico.

D. Do you believe that your department's tactics have caused irreparable damage to the United States' relationship with Mexico?

Response:

The Department's cooperation with the Mexican government in combating drug cartels has been – and continues to be – unprecedented. The collaboration between the two countries has included the extradition of large numbers of defendants from Mexico to the United States; the sharing of intelligence between U.S. and Mexican law enforcement; our work with vetted law enforcement units in Mexico; and the creation of joint task forces with our Mexican partners. That said, the inappropriate tactics employed in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez, and Medrano, should never have been used. That is why, in February 2011, the Attorney General requested that the Department's Office of the Inspector General conduct a review; and why, in early March 2011, the Attorney General instructed the Deputy Attorney General to issue a directive making clear that such tactics should not be used.

74. As you know, on October 18, 2011, I offered an amendment to the CJS appropriations bill that would cut off all funding for the Department of Justice to conduct "gun-walking" programs similar to Operation Fast and Furious. That amendment passed the Senate with unanimous, bipartisan support.

A. Do you personally support this amendment?

Response:

This amendment is consistent with Department policy and is therefore unnecessary, but the Department does not object to its adoption.

B. What do you say to the 99 members of the United States Senate who could not trust you to end the ill-advised practice of "gun-walking" on your own?

Response:

Any suggestion that the Attorney General did not act swiftly to end the use of these inappropriate tactics after learning of them is wrong. Shortly after the allegations of inappropriate tactics in Operation Fast and Furious were made public, the Attorney General took decisive action to ensure that the tactics employed in Operation Fast and Furious and in operations in the prior Administration like Wide Receiver, Hernandez, and Medrano, were not used again. The Attorney General asked the Department's Office of the Inspector General to conduct a review and he instructed the Deputy Attorney General to issue a directive making clear that such tactics should not be used.

C. Can you assure the American people that "gun-walking" programs like Operation Fast and Furious are not currently being administered by your department, and that they will never again occur under your watch?

Response:

The Attorney General has made clear that the inappropriate tactics used in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez, and Medrano are inconsistent with Department policy and he instructed the Deputy Attorney General to issue a directive that these tactics should not be used.

D. What specific steps have you taken to ensure that "gun-walking" programs like Operation Fast and Furious are not currently being administered by your department, and that they will never again occur under your watch?

Response:

In a letter to Chairman Leahy and other members dated January 27, 2012, Deputy Attorney General James Cole described the reforms the Department has instituted to ensure that the inappropriate tactics used in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez, and Medrano are not used again. The Attorney General also requested a review of these issues by the Department's Office of the Inspector General and instructed the Deputy Attorney General to issue a directive indicating that these tactics should not be used.

75. Throughout your career, you have supported strict gun control regulations—including long-gun registration requirements and bans on certain automatic weapons. Additionally, in 2007, you signed on to an amicus brief in the *Heller* case which argued that the right to bear arms was not an individual right. On November 1, 2010, Assistant Attorney General Lanny Breuer told National Public Radio: "if any good can come of this horrific, terrible tragedy [Operation Fast and Furious], it should be that America has a serious and real conversation about our gun laws today."

A. Do you agree with Assistant Attorney General Breuer's statement, even though Operation Fast and Furious involved federally-licensed firearms dealers who affirmatively raised red flags about the weapons purchases in question—and were nonetheless directed by ATF to go through with the sale of these weapons? It seems to me that Operation Fast and Furious has actually shown us that legitimate American firearms dealers are very careful about the persons to whom they sell weapons.

Response:

Operation Fast and Furious was a fundamentally flawed operation that employed inappropriate tactics. The same whistleblowers who alerted Congress to the inappropriate tactics used in Fast and Furious have also called on Congress to give ATF more effective tools to combat gun trafficking and improve public safety.

B. Do you agree that the most important conversation that the American people should be having as a result of Operation Fast and Furious is how we will ensure that your Department never again engages in the practice of "gun-walking?"

Response:

The Department has a responsibility to ensure that the inappropriate tactics used in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez, and Medrano, are not used again. At the same time, Congress must provide law enforcement with the tools needed to prevent the acquisition of weapons by people who are not permitted to possess them, as well as the trafficking of those weapons across our border with Mexico.

C. What do you say to the multiple firearms dealers who assisted the ATF in Operation Fast and Furious under the express understanding that the weapons involved would be interdicted by your Department prior to the termination of direct surveillance?

Response:

The Department is grateful for the cooperation that FFLs provide to law enforcement every day to ensure that weapons are kept out of the hands of those not legally entitled to possess them. As the Attorney General has said repeatedly, the tactics used in Operation Fast and Furious and in similar operations in the prior Administration like Wide Receiver, Hernandez, and Medrano, were inappropriate and should not be used again.

76. In your November 8, 2011 testimony to the Senate Judiciary Committee, you referred to Operation Fast and Furious as a "local law enforcement operation." During my questions at that hearing, you re-characterized this testimony—referring to Operation Fast and Furious as "a federal law enforcement operation. . . that was of local concern."

Given the international ramifications of Operation Fast and Furious, coupled with the distinctly national concern of drug cartel violence, do you stand by your characterization of Operation Fast and Furious as an operation of "local concern?"

Response:

Operation Fast and Furious was an investigation conducted by ATF's Phoenix Field Division. The Attorney General's comments were intended to reflect that fact.

77. **International parental child abductions represent a growing threat to American children. Even more troubling, virtually none of the kidnapped children who are taken to non-Hague Treaty signatory countries are returned to their lawful homes in the United States.**

A. What measures could the Department of Justice take to aid the enforcement of family court orders intended to prevent the abduction of a child whose custody is properly under the jurisdiction of a US court?

Response:

There are a host of measures law enforcement can take to prevent international parental child abductions. The Department of Justice's Office of Juvenile Justice and Delinquency Prevention has published "A Family Resource Guide on International Parental Kidnapping," last updated in 2007 and available at https://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf, that sets out how families and enforcement officials can marshal an effective response to this problem, including preventing abductions from happening in the first place. It offers descriptions and realistic assessments of available civil and criminal remedies, explains applicable laws, identifies private and public resources, and much more. It specifically includes chapters on preventing international parental kidnapping and stopping an abduction in progress. These chapters describe the mechanism for enforcing court orders intended to prevent international parental kidnapping as well as assistance that Department components, primarily the FBI, can provide in such cases. Parents who are concerned that their children may be abducted may contact the FBI's Crimes Against Children coordinator in their local FBI office to request such assistance.

B. What measures could the Department of Justice take to investigate international child abductors and their accomplices, and to aid Department of State officials and the families of the children to obtain their safe and timely return?

Response:

The Department of Justice, as well as our law enforcement partners at the state and local levels, have a variety of tools at their disposal to investigate international child abductors and their accomplices. Appropriate investigative steps in international parental kidnapping cases, however, vary widely depending on the particular facts and circumstances of each case. The FBI must take into account a variety of factors in determining how aggressively to pursue, and what steps to take in pursuing, a criminal investigation in an international parental kidnapping case, including the available options for return of the child and the steps other investigators, prosecutors, the Department of State, and the left-behind parent are taking to obtain the return of

the abducted child. Typically, the State Department's Office of Children's Issues will first explore issues relating to the nature of any existing custody order, the laws of the country to which the child was taken, whether that country is a Hague signatory or not, and the availability of local counsel, with family members and/or local law enforcement, with the primary goal of obtaining the return of the child. The FBI and federal prosecutors will then explore whether criminal charges in a particular case might be appropriate, and will do so in a manner that does not interfere with any attempts to obtain the child's return. Typically, the criminal process would not be pursued if the circumstances indicate it would jeopardize an active Hague Convention civil process seeking the return of the child.

C. What is the Department of Justice response protocol for children who are abducted to non-Hague Treaty signatory countries?

Response:

The Department's response to international parental kidnapping cases involving a non-Hague country depends very much on the facts and circumstances of each case. In some cases, the facts support pursuing criminal charges against the abducting parent despite the reality that it will be difficult or impossible to obtain the extradition of the abducting parent. The FBI may, for example, engage INTERPOL Washington to obtain international lookout/advisory notices to assist law enforcement authorities in INTERPOL's member countries in finding abducting parents and abducted children if they travel internationally. This can result in a child being returned to the left-behind parent. Additionally, INTERPOL Washington works with state and local law enforcement to issue notices for abducted children to limit the ability of the taking parent to travel undetected between Hague and non-Hague Treaty countries. In all cases, though, including those involving non-Hague Treaty countries, the Department first refers left-behind parents to the State Department's Office of Children's Issues, which provides initial advice on how to respond immediately – including through diplomatic channels – to best improve the chances to recover the child (see http://travel.state.gov/abduction/abduction_580).

D. Would your department be willing to provide a report on the recent successes and failures in returning domestically abducted children to their lawful home, and the recent successes and failures in returning internationally abducted children to their lawful home— including a discussion of arrests, prosecutions, and convictions for international child abduction?

Response:

The Department of Justice maintains data on federal investigations and prosecutions of international parental kidnapping cases. According to the Executive Office for United States Attorneys, the number of international parental kidnapping cases (18 U.S.C. § 1204) filed each year since FY 2007 is as follows: FY 2007 – 19; FY 2008 – 16; FY 2009 – 19; FY 2010 – 13; and FY 2011 – 13. FBI records indicate that children were located in the following numbers of cases for this period: FY 2007 – 18; FY 2008 – 5; FY 2009 – 5; FY 2010 – 10; and FY 2011 – 7. (We realize that the numbers of children located are lower than the numbers of prosecutions.

The International Parental Kidnapping statute concerns the prosecution of the abductor (parent), not the return of the child. Although every attempt is made during FBI investigations to locate and recover the child victim, some abductors are prosecuted without the return of the child.) These numbers do not include comprehensive information on children abducted internationally who are returned to their homes. Likewise, we do not maintain data on domestic parental abduction cases. The State Department's Office of Children's Issues or the National Center for Missing & Exploited Children may be able to provide you with additional information about on whether other sources of such data exist.

E. How can the Department of Justice aid the Department of State in charging and prosecuting travel document frauds committed during the course of international child abductions?

Response:

If the evidence in an international parental kidnapping case supported a charge for travel document fraud, the Department of Justice could charge that offense. In some cases, charging a travel document fraud case could provide better avenues for extradition, as our extradition treaties with many countries require dual criminality of the offense (meaning that the extraditable conduct must be a crime in both countries), and dual criminality may be more likely to exist with a travel document fraud charge than an international parental kidnapping charge. Additionally, a travel document fraud charge provides a good basis to request that INTERPOL Washington generate an international lookout/advisory notice, which can help locate the abducting parent and the abducted child if they travel internationally. If the Department charges a travel document fraud case, it can convey the charging document and arrest warrant to the State Department, which may in turn, pursuant to its regulations, explore whether a U.S. passport of the person charged (in this instance, the abducting parent) could be revoked. Revocation of a U.S. passport may assist in securing the return of the abducting parent with the child to the United States.

F. Could United States family court orders be used to prevent international child abductions by making them accessible and available to Department of Homeland Security officials at airports?

Response:

The Department of Justice defers to the Department of Homeland Security on this matter.

QUESTIONS POSED BY SENATOR LEE

78. **On October 28, 2011, the Chairman of the House Judiciary Committee, Representative Lamar Smith, sent you a letter reiterating a prior request, on behalf of 49 members of Congress, that the Department produce certain documents and make available certain witnesses related to work Supreme Court Justice Elena Kagan may have been involved in with respect to the legal defense of the Patient Protection and Affordable Care Act ("PPACA"). (See attached letters from Rep. Smith). At the Oversight Hearing, I asked whether the Department intended to comply with that request. You stated that you were not familiar with the request. In light of the information in the attached letters, does the Department now intend to comply with this request?**

Response:

Please see the response to 48(A), above.

79. **With respect to Justice Kagan's involvement in discussions related to PPACA, you stated that then-Solicitor General Kagan was physically moved out of the room whenever a conversation came up about that legislation.**

   A. **PPACA was signed into law on March 23, 2010. Justice Kagan was nominated to the Supreme Court on May 10, 2010. For discussions regarding PPACA that occurred before and after its enactment, but before then-Solicitor General Kagan was nominated to the Supreme Court, why did you feel the need to remove her from the room?**

Response:

Please see the response to 48(A), above.

   B. **Was then-Solicitor General Kagan removed from the room for all discussions and meetings related to PPACA?**

Response:

Please see the response to 48(A), above.

   C. **For which discussions or meetings was then-Solicitor General Kagan not removed from the room?**

Response:

Please see the response to 48(A), above.

D. I understand that you have not previously asserted or identified any legal privilege with respect to the requested documents and witnesses. In light of that fact, as well the care you assert was taken with respect to then-Solicitor General Kagan's involvement in discussions regarding PPACA, why would the Department not comply with Representative Smith's request?

Response:

Please see the response to 48(A), above.

80. To obtain authorization to conduct a wiretap, Federal law requires that an application be submitted to the Department of Justice for review and approval before that application is submitted to a court of competent jurisdiction for an order authorizing the interception. At the Oversight Hearing, I asked you about statements made by the Assistant Attorney General for the Criminal Division, Lanny Breuer, at a November 1, 2011 hearing before the Senate Judiciary Committee. With respect to the Department's role in reviewing and approving wiretap applications, Mr. Br[e]uer stated: "The role of the reviewers and the role of the deputy in reviewing Title III applications is only one: it is to ensure there is legal sufficiency to make an application to go up on a wire and legal sufficiency to petition a federal judge somewhere in the United States that we believe it is a credible request."

A. Do you agree that the Justice Department's only duty in reviewing and approving an application for a wiretap is to "ensure there is legal sufficiency" and that it is "a credible request"?

Response:

Please see the response to question 56(A), above.

B. What is the Justice Department's proper role in reviewing such applications?

Response:

Please see the response to question 56(A), above.

C. Mr. Br[e]uer has been the Assistant Attorney General for the Criminal Division since April 20, 2009. If you disagree with his statements regarding the role of the Department with respect to wiretap applications, what steps will you take to remedy problems created by the deficient review of wiretap applications that may have resulted from the inadequate policy implemented

by Mr. Br[e]uer? What policies will you put in place to ensure that the proper standard is implemented going forward?

Response:

Please see the responses to question 56(A), above.

81. As part of Operation Fast & Furious, the Department of Justice reviewed several wiretap applications. At the Oversight Hearing, you stated that Mr. Br[e]uer's deputies, who report directly to him, would have reviewed these applications. I asked why, after reviewing these applications, Mr. Br[e]uer's deputies did not notify him of the problematic tactics being used. You responded that you did not know the contents of the wiretap applications and therefore could not conclude that the deputies would have been put on notice of the problematic tactics.

A. Did the wiretap applications submitted as part of Operation Fast & Furious provide any information that would have led a reasonable person to conclude that gun-walking was occurring?

Response:

The wiretap applications submitted in connection with Operation Fast and Furious are sealed pursuant to court order and the contents of those materials are statutorily prohibited from disclosure. For those reasons, and because disclosure of information contained in such applications would adversely affect ongoing prosecutions, it would be inappropriate to respond to this question.

B. What are the dates of the wiretap applications that provided notice of gun-walking?

Response:

Please see the response to question 81(A), above.

82. The federal wiretap statutes provide that a wiretap application must set forth "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c).

A. If the wiretap applications did not provide a full and complete statement as to the investigative procedures that had been tried, why were these applications approved by the Department of Justice for submission to a court?

Response:

Please see the response to question 81(A), above.

B. If the wiretap applications did provide a full and complete statement as the investigative procedures that had been tried, did that statement provide information on the tactics used in Operation Fast & Furious?

Response:

Please see the response to question 81(A), above.

C. If your answer to question 5(b) is that the applications did not provide information on the tactics used, how is it possible to provide "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" without providing any information on a chief, and highly controversial, tactic being used as part of the operation?

Response:

Please see the response to question 81(A), above.

D. If your answer to question 5(b) is that the applications did not provide information on the tactics used, doesn't the absence of any mention in the wiretap applications of a chief, and highly controversial, tactic raise serious questions about the procedures being used to submit and approve wiretap applications? What will your Department do to ensure that the wiretap application process is brought into accordance with the letter and spirit of the wiretap statutes?

Response:

Please see the response to question 81(A), above.

QUESTIONS POSED BY SENATOR COBURN

83. Shortly after your confirmation, you made a series of speeches stating the Justice Department should make changes to the criminal justice system that are "smart on crime." As a result, in the spring of 2009, you formed a Sentencing and Corrections Working Group within the Department to review federal sentencing and incarceration policies.

In December 2010, Assistant Attorney General for the Criminal Division, Lanny Breuer, wrote a progress report for that working group. You referenced this in your response to Senator Schumer's question on this topic in written questions following your last appearance before this committee. I read with interest your response, as well as Mr. Breuer's report.

I agree that there is much to be done at the federal level to address issues affecting the federal Bureau of Prisons (BOP), its employees and inmates, but it must be done in a fiscally responsible manner.

A. I recognize that there are certain congressional policies that weigh into the cost of the federal prison system; however, I cannot believe there are absolutely no other types of cost-savings to be achieved in the BOP that do not compromise the safety of BOP employees and inmates. Other than policy-related matters, are there any programs, offices, or expenditures at the BOP you believe could be consolidated or eliminated to reduce the burgeoning $6 billion BOP budget without compromising the obvious need for the safety of prison personnel and inmates?

If so, what do you recommend? If not, then can I assume the BOP does not waste a single penny in its yearly operations?

Response:

I have worked closely with all Department of Justice (Department) agencies and components to identify programs, offices, and expenditures where costs could be cut without sacrificing public safety. I have pressed BOP to be especially diligent. Beginning in June of 2011, we have been working with BOP leadership to identify any additional program and policy changes that would yield cost savings. Based on this ongoing work, BOP is making all reasonable operational changes to reduce costs that can be made without sacrificing the safety and security of BOP staff, federal inmates, and the public.

As the federal inmate population is projected to continue to increase, BOP requires sufficient resources to keep pace in providing the safe and secure housing of inmates, as well as the safety of BOP staff. Nevertheless, BOP has made great strides in past years in streamlining and consolidating functions and operations. BOP has co-located institutions; de-layered management positions; closed four stand-alone minimum-security prisons; and consolidated

procurement, sentence computation, inmate designation, human resources, and other administrative functions. At the same time, the agency has managed more inmates with relatively fewer staff, as compared to the size of the inmate population, primarily by taking advantage of improved security technologies and improved architectural designs in our newer facilities, and by enhancing population management and inmate supervision strategies. Overall, BOP has streamlined operations, improved program efficiencies, and implemented inmate management tools to function efficiently and economically even as its workload increases every year.

In FY 2011, the BOP inmate population increased by 7,541 net new inmates to a total population of 217,768 and system-wide crowding was at 39 percent over-rated capacity, with 55 percent and 51 percent at high and medium security institutions respectively. Even with changes to the U.S. Sentencing Guidelines, which were made applicable retroactively, providing some crack cocaine offenders sentence reductions, BOP projects an additional 11,500 inmates by the end of FY 2013. While some of these inmates will be housed in contract facilities, crowding and inmate to staff ratios are likely to increase.

The FY 2013 President's Budget request includes program increases for BOP totaling $81.4 million. These additional resources will help ensure the continued secure incarceration of the growing federal inmate population. Increases include $55.5 million to begin activation of two prisons, the high-security U.S. Penitentiary in Yazoo City, MS (1,216 beds), and the medium-security FCI facility in Hazelton, WV (1,280 beds). Construction of these facilities will be completed in the fall of 2012. The request also includes $25.8 million to procure 1,000 new contract beds. The new contract beds and the activations of newly constructed prisons will provide additional capacity to help mitigate the impacts of the growing Federal prison population.

As a result of our additional work on this issue, the President's FY 2013 Budget Request also proposes offsets of $58 million for:

- Good Conduct Time Proposed Legislation Change ($41 million): The Administration has proposed legislation to amend Federal inmate good conduct time credit to provide inmates incentives that encourage positive behavior. The proposed legislation would continue to provide inmates with incentives for good behavior as well as participation in programming that is proven to reduce the likelihood of recidivism. The proposed sentencing reforms include (1) an increase in the amount of credit an inmate can earn for good behavior, and (2) a new sentence reduction credit, which inmates can earn for participation in education and vocational programming proven to reduce recidivism. These proposals if enacted before FY 2013 could result in significant cost avoidance, potentially up to $41 million in FY 2013, by slowing the rate of the federal inmate prison population growth.

- Compassionate Release Program ($3.2 million): Under current law, BOP may exercise its authority to pursue a reduction in sentence through the sentencing court for inmates who are terminally ill or otherwise eligible for early release due to "extraordinary or compelling circumstances." Criteria for release under these circumstances are

established both in law and administratively determined policy. By reexamining current practice, the BOP could pursue a reduction in sentence for more inmates in FY 2013.

- Information Technology Savings ($2.8 million): As part of its effort to increase IT management efficiency and comply with OMB's direction to reform IT management activities, the Department is implementing a cost-saving initiative as well as IT transformation projects. This offset represents savings that will be generated through greater inter-component collaboration in IT contracting. Funds will be redirected to support the Department's Cyber-security and IT transformation efforts as well as other high priority requests.

- Realign Regional Office and Administrative Operations ($11 million): BOP intends to continue its efforts to streamline its business process by reducing or realigning its regional office operations. The BOP is undergoing a review to determine how to best consolidate its regional functions and/or locations and non-institution based staff for this realignment.

B. Also, following the last hearing, Senator Schumer asked you whether the Department had implemented any of the working group's recommendations, but your response was not clear to me on exactly what had or had not been implemented as a result of the working group's efforts. Could you please detail, based on each of the 6 teams within the working group, what recommendations were made, which of those have been implemented, and explain the reasoning behind each?

Response:

The Department created the Sentencing and Corrections Working Group to undertake a thorough review of federal sentencing and corrections policies, with an eye toward possible reform. The Working Group examined, among other issues, the structure of federal sentencing, prisoner reentry and alternatives to incarceration, internal Department sentencing policies, federal cocaine sentencing policy, other racial and ethnic disparities in sentencing, and the federal death penalty protocol. The Working Group issue teams assigned to each of these areas examined available research and data surrounding each team's issues and developed reform options. The issue teams did not make formal recommendations, but provided analysis on each option for reform. These reform options were later considered across the Department and a variety or reform steps were taken.

For example, while Congress and the Department had been working on reentry issues and improving reentry at the state and federal level long before the Working Group was begun, the Working Group efforts revealed that at the federal level, much more could be done. The passage of the Second Chance Act was an important step and helped to shape prisoner reentry as a national priority. The Working Group concluded, though, that offender reentry strategies had the potential to reduce crime substantially and to control criminal justice costs. Focusing on those reentry programs and practices that have the potential not only to reduce the recidivism rate but

also to improve public safety and reduce total criminal justice spending, the Working Group developed options for reform.

As a result, on October 8, 2010, the Department launched Project Reentry, which is an internal DOJ working group chaired by the Deputy Attorney General. Project Reentry focuses federal resources on increasing public safety and maximizing the efficient use of public safety dollars to reduce reoffending of released offenders. Modeled on Project Safe Neighborhoods, Project Reentry has three major components: (a) coordination and planning; (b) data generation and evidence analysis; and (c) policy change. Project Reentry efforts include:

- Seeking legislation to ensure that the full 54 days of sentence credit authorized for federal inmate good conduct is available for each year of the sentence imposed upon the inmate;

- Seeking legislative expansion of sentence credit – currently provided only for successful completion of the Residential Drug Abuse Program (RDAP) – to participation in other recidivism-reducing programs such as Federal Prison Industries, vocational training, and adult education. Despite the fact that many of the Bureau of Prisons' major inmate programs have been shown to reduce recidivism, currently only RDAP offers inmates the opportunity to earn a sentence reduction; research suggests that sentence reduction opportunities via recidivism-reducing programs is a cost-effective way of increasing public safety. To ensure that truth-in-sentencing principles are not eroded, we will also insist that regardless of any changes to good conduct time and credits for participating in recidivism-reducing programs, there remains a requirement that offenders serve at least two-thirds of any imposed sentence;

- Supporting ongoing efforts by federal courts around the country to experiment with reentry courts and other mechanisms to improve prisoner reentry. In this regard, the Department has developed and issued a comprehensive U.S. Attorney toolkit focused on reentry for nationwide distribution;

- The Reentry Council adopting a mission statement and goals that the federal departments and agencies represented on the Council are working to implement; and

- DOJ staff meeting with staff from the Administrative Office of the U.S. Courts and the U.S. Sentencing Commission to improve coordination on reentry-related issues.

With respect to coordination, the Department has convened an interagency Reentry Council to improve coordination among the myriad federal departments and subcomponents focused on state, local, tribal, and federal reentry issues. This Council tracks developing reentry-related research and legislation and helps to ensure that resources devoted to reentry are used wisely and efficiently.

The Sentencing and Corrections Working Group took on many other issues beyond prisoner reentry. You can find a full summary of these issues and the progress of the Working Group in a recent article authored by Assistant Attorney General Lanny Breuer in the Federal

Sentencing Reporter, "The Attorney General's Sentencing and Corrections Working Group: A Progress Report," *Federal Sentencing Reporter*, Vol. 23, No. 2, pp.110-114.

The reform efforts already implemented include:

- The passage of the Fair Sentencing Act to reform federal cocaine sentencing policy (the reasoning behind this reform included ensuring just punishment for all offenders, eliminating unwarranted sentencing disparities, and promoting greater trust and confidence in the federal criminal justice system);

- A new internal Department of Justice charging and sentencing policy (the reasoning for the new policy is explained in the memorandum creating the policy, which can be found at: http://www.fd.org/pdf_lib/holdermemo.pdf) ;

- A new policy on the structure of federal sentencing and mandatory minimum sentencing statutes, which was discussed in detail in testimony by U.S. Attorney Sally Q. Yates before the U.S. Sentencing Commission and which can be found at: http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Yates_DOJ.pdf;

- Changes to the federal death penalty protocol to improve the effectiveness of the Department's death penalty review process (the changes are detailed in a memorandum from the Attorney General that also lays out the reasoning behind the changes and which can be found at: http://www.justice.gov/oip/docs/death-penalty-protocol.pdf); and

- The creation of a review team to ensure that unwarranted racial and ethnic disparities are identified and addressed.

The Department has also been working with the U.S. Sentencing Commission to review and revise the federal sentencing guidelines to strengthen law enforcement in several key areas, including child pornography, fraud, and gun trafficking.

84. The GAO recently issued a report to Congress entitled "Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, GAO-11-819. In that report, it noted the lack of transparency in the operation of 524(g) trusts, including that most (65%) of the 524(g) trusts will not release information on exposure history because their internal operating guidelines prohibit such disclosure. The current lack of transparency and oversight has promoted a system where claimants could file inconsistent claims among the numerous trusts (there are over 50 separate trusts with more to come). In fact, the RAND Corporation recently observed that 524(g) trusts do not "link payments across trusts to the same individual." In other words, a single asbestos claimant could secure compensation from each of the numerous existing trusts with no centralized scrutiny as to whether that claimant is making consistent claims and/or whether that claimant is recovering twice for the same injury.

The Department of Justice oversees the Executive Office for U.S. Trustees. What steps can and will the Department of Justice take to ensure that claims data, including exposure history, is available to stakeholders in the bankruptcy system as well as to the tort system to prevent the sort of fraud uncovered in some court decisions[3]?

Response:

In nearly all asbestos bankruptcy cases, asbestos personal injury claims are administered, evaluated, and paid through trusts created by the debtor's plan of reorganization. While specific arrangements vary from case to case, in most instances the trusts operate according to the terms of a trust agreement (TA) and a set of trust distribution procedures (TDP), which are negotiated by the various constituencies in the bankruptcy case. Both the TA and the TDP are submitted to creditors and the bankruptcy court for approval in conjunction with confirmation of the debtor's reorganization plan.

Although the United States Bankruptcy Code requires that the debtor implement a claims trust in order to resolve unknown asbestos claims, *see* 11 U.S.C. § 524(g)(2)(B), it grants the proponent of the bankruptcy plan broad flexibility in determining how the trust will operate. 11 U.S.C. § 524(g)(2)(B)(ii)(V). As a result, TA and TDP provisions regarding trust oversight, disclosure, and anti-fraud measures are not dictated by statute, but rather are contractual terms negotiated between the plan proponent (usually the debtor) and the beneficiaries of the proposed trust, and which are approved by the court as part of plan confirmation.

United States Trustees do not generally have the legal authority to compel parties to include specific provisions in reorganization plans, TAs, or TDPs. United States Trustees are not authorized to propose reorganization plans, *see* 11 U.S.C. § 307, and the Bankruptcy Code provides few substantive requirements on how 524(g) trusts must operate. As a result, so long as the plan has been properly solicited, approved by a vote of creditors, and otherwise complies with the Bankruptcy Code, the United States Trustee's practical ability to challenge particular provisions of a proposed 524(g) trust is limited.

Further, as discussed in the GAO Report, the United States Trustee does not have any statutory authority to oversee the operations of debtors after they have exited bankruptcy, and the bankruptcy court itself maintains only a limited jurisdiction over the case once the plan has been confirmed and consummated. *See* U.S. Gov't Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts, at 15 (2011). Finally, asbestos TAs and TDPs historically have not assigned any continuing oversight role to the United States Trustee after confirmation, and it is unclear whether the United States Trustee would have the statutory authorization to accept such a role even if such a provision were included.

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[3] See, e.g., *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007).