U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 22, 2010

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, which were posed to Attorney General Eric Holder following his appearance before the Committee at a hearing on November 18, 2009 entitled "Oversight of the Department of Justice."

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

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

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Senate Judiciary Committee
November 18, 2009

QUESTIONS POSED BY CHAIRMAN LEAHY

State Secrets:

1. On September 23, 2009 you announced new procedures and policies that will guide how and when the Justice Department may invoke the state secrets privilege. I was pleased to see that the administration adopted some of the elements of the State Secrets Protection Act that I introduced this Congress, including requiring that a standard of "significant harm" to national security be met before the privilege can be invoked. Nonetheless, I remain concerned about how these policies will be exercised and whether they will truly provide accountability for the use of this privilege. Last month you again invoked the state secrets privilege in *Shubert v. Obama*, a case involving the Bush administration's warrantless wiretapping program, and moved for summary judgment.

a. In how many cases have you invoked the state secrets privilege since you announced the new procedures? How have those new policies changed the practice of invoking the privilege?

Response: The Department of Justice has only invoked the state secrets privilege in one case -- *Shubert v. Obama* -- since the Department announced the new procedures. The Administration continues to assert the state secrets privilege in several other cases where the assertions pre-dated the policy (for example, *Jewel v. NSA*, *Al-Haramain Islamic Foundation v. Bush*, and *Mohamed et al. v. Jeppesen Dataplan, Inc.*). The new policy procedures have not been applied to these cases, but the Department has determined that the claims of state secrets in these cases are well justified.

The new policy establishes a formal internal Justice Department practice for asserting the state secrets privilege, which mandates full consideration by the Department's leadership; this new policy thus ensures, through a formal approval procedure, that there will be serious and personal consideration paid by the highest levels of the Department of Justice before any state secrets privilege claim can be made in litigation.

b. The new policies do not explicitly state a commitment by the government to ensure that a court will actually get to see the documents the government relies upon in order to claim the privilege. This was a key component of the state secrets litigation I introduced. Do you agree that the court should have the ability to review the materials the government relies upon to claim the privilege?

Response: The Justice Department fully embraces the Judiciary's essential independent role in evaluating assertions of the state secrets privilege. In practice, the Justice Department regularly provides Article III judges with access to all of the background material necessary to understand and justify the assertion of the privilege in litigation, even when that material is very sensitive. If an Article III judge in a particular case were to indicate that further explanation is required, the Justice Department would normally provide the necessary additional material. Nevertheless, there may be rare cases, as the Supreme Court noted in *United States v. Reynolds*, 345 U.S. 1 (1953), where it is possible to satisfy the court that the privilege is being properly invoked without making a robust evidentiary submission. As noted above, however, the Justice Department nonetheless typically has provided Article III judges with an expansive explanation of the necessary background factual material.

Material Witness:

2. **Thank you for the letter dated November 12, 2009, that responded to my questions about the Department's use of the material witness statute. You stated that the Department is reviewing its existing guidance for use of the statute and will consider whether new or additional policy is warranted. In this review, I urge you to consider the bill I introduced in 2005, S.1739, to strengthen procedural safeguards in the use of the material witness statute. Specifically, the bill would raise the standard that the government must meet to obtain a material witness warrant; requires that the witness be expeditiously brought before a court; and imposes reasonable limitations on the detention of the witness. Will you study S.1739 from the 109th Congress carefully as you review current guidance?**

Response: Yes, the Department will study S.1739 as part of its review of current guidance.

FBI Domestic Investigation and Operations Guide:

3. **I have requested an unredacted copy of the FBI's Domestic Investigation and Operations Guide, or "DIOG". Subsequently, staff members were briefed on the redacted portions of the DIOG, but due to time limitations in that briefing, were not able to closely study the unredacted DIOG in hard copy. Later, I learned that there is a classified annex to the DIOG, which, to the best of my knowledge, has not been transmitted to Congress. It is critical to the Judiciary Committee's oversight responsibilities that we review these documents in full, and so I reiterate my request that the full DIOG, including any classified portions of the DIOG, be transmitted to the committee for review by senators and cleared staff.**

Response: The FBI's Domestic Investigations and Operations Guide (DIOG) has been made available to the Committee and was released to the public in September 2009. Certain portions of the DIOG were redacted to prevent sensitive information from being released publicly, as releasing that information would cause significant harm to our national security and criminal investigation programs. The FBI has provided to Committee staff several briefings on the DIOG, including a briefing specifically regarding the redacted portions of the DIOG. Staff for

the Committee has also been afforded an opportunity to view the redacted portions of the DIOG, and we will continue to offer that access to Committee Members and staff in the future.

Hate Crimes Enforcement:

4. Last month, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act became law. You twice came before this Committee to push for this historic protection so it is clear you support the law's provisions designed to help the Justice Department and local law enforcement investigate and prosecute violence motivated by hate. Now that President Obama has signed the historic Hate Crimes Prevention Act into law, what is the Department of Justice doing to enforce it?

Response: The Department is actively involved in implementing and enforcing the new law. We already have several open ongoing investigations. We have been cooperating with state and local law enforcement authorities to support their hate crimes enforcement activities. In addition, following the enactment of the law, Assistant Attorney General Tom Perez sent a memo to all 93 U.S. Attorneys offering the support of Main Justice to the prosecutors in the field. The Attorney General has also issued guidance to the field regarding enforcement under the new law. Recently, the Attorney General's Advisory Committee approved a U.S. Attorney's Manual revision requiring that prosecutors apply neutral and objective criteria in bringing hate crimes prosecutions. The Community Relations Service is training all of its field-office staff on the new law. Finally, the Civil Rights Division has developed training videos and other materials, and will be conducting a training program at the National Advocacy Center in Columbia, South Carolina for federal prosecutors and law enforcement. The Division also is developing plans for joint training and outreach with the FBI, state and local law enforcement, and community stakeholders throughout the country.

The Justice Department's Role in Reforming Forensic Sciences:

5. In February, the National Academy of Sciences issued a comprehensive report on the urgent need to improve forensic sciences in the United States. Our criminal justice system frequently relies upon forensic science to ensure that we convict the guilty and exonerate the innocent. As a former prosecutor, I know that the evidence from forensic science used in court must be accurate, reliable, and reflect state-of-the-art technology and techniques. The two hearings held by this Committee on this important issue reinforced the fact that the forensic technology used in the criminal justice system is not yet infallible. We have seen a litany of cases in which faulty forensic evidence led to the wrong result, including a case in Texas in which an innocent man may have been executed.

The National Academy of Science report found that science needs to be the guiding principle in determining the standards and procedures for forensic science. The report called for the federal government to set national standards for accrediting forensic labs and for certifying forensic scientists. It also urged the federal government to facilitate significant new research into traditional forensic disciplines

in order to provide the validation and standards necessary to restore confidence in the forensic evidence so crucial to prosecuting serious crimes.

a. Do you agree that there should be a nationwide forensics reform effort including national standards to be set for accrediting forensic labs; certification of forensic scientists; and research leading to validation and standards for the forensic disciplines?

Response: Yes, we believe that there should be a nationwide forensics improvement effort. For some time, it has been clear that forensic science is in need of improvements. A 1999 report published by the Department's National Institute of Justice (NIJ) identified lapses in training, standardization, validation, and funding, and in 2004, responding to a Congressional directive, NIJ published a survey of forensic science organizations that emphasized the need for more basic research; personnel and equipment resources; education; professionalism through accreditation and certification; quality assurance; and enhanced coordination among Federal, State, and local stakeholders. An interagency committee of forensic experts from across the Executive Branch departments is examining how best to accomplish these goals, in line with the recommendations of the NAS report.

With regard to the specific issue of accreditation, much progress has already been made on this front. Most of the public forensic science laboratories are accredited, including virtually all of the U.S. federal government's labs. More should be done, however. For example, although more than a number of private labs have been accredited, accreditation of all private forensic science service providers is paramount. Furthermore, accreditation through the International Association for Standardization (ISO), the world's largest developer and publisher of international standards, should become the norm. ISO has developed standard 17025 (ISO 17025), based on the standard for the accreditation of calibration and testing laboratories, and it should become one of the cornerstones of a comprehensive forensic laboratory accreditation program.

Likewise, certification of individual forensic practitioners should be part of the effort to improve the forensic science community. Each forensic practitioner should be required to demonstrate that he or she possesses the knowledge, skills, and abilities to competently perform analysis in his or her individual discipline or sub-discipline. While many laboratories have their own internal training and certification processes, there is some inconsistency in how these voluntary certifying bodies develop and oversee their examination and certification processes and there are currently no requirements for the external certification of forensic practitioners. Although some external certification bodies have case work experience requirements, a blended, short-term approach for demonstrating competencies could include, but not be limited to, passage of proficiency tests, compliance with continuing education requirements, and adherence to a code of ethics.

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

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

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

The Department's National Institute of Justice (NIJ) has been on the forefront of funding efforts specifically targeted at issues identified in the National Academy of Sciences' (NAS) report "Strengthening Forensic Science in the United States: A Path Forward". In FY 2009, approximately $8M was awarded to 16 projects under NIJ's new "Fundamental Research to Improve Understanding of the Accuracy, Reliability, and Measurement Validity of Forensic Science Disciplines" solicitation. This program was created specifically to facilitate scientific research recommended in the NAS report. NIJ has been competitively funding other peer-reviewed research for forensic sciences since FY 2003. Since that time, NIJ has provided over $76M in grants to fund forensic science research and development projects. In FY 2009 alone, over $7M was awarded for 18 projects under the General Forensics program and over $6M was awarded to 18 DNA R&D projects. All of the topics under the research and development solicitation programs are guided by the needs of the forensic science community.

Training, which was also addressed in the NAS report, has been a topic for which NIJ developed a competitive solicitation in 2007. The goal of the program is to develop and/or deliver approved forensic science training to forensic science practitioners and other key personnel within the criminal justice community at no charge to the person or their agency. In FY09 awards were made totaling to more than $12M to continue offering the training needed to the criminal justice community.

Significant funding has gone towards the reduction of backlogs and capacity enhancement in State and Local crime laboratories. To date, NIJ has provided funds totaling over $389M to States, units of local governments and eligible fee-for-service laboratories for the reduction of backlogs of both forensic DNA casework evidence samples and DNA database samples (i.e. samples taken from convicted offenders and/or arrestees), as well as the capacity enhancement of state and local DNA laboratories. The Paul Coverdell Forensic Science Improvement Program continues to give both formula (75%) and competitive (25%) awards to state and local crime laboratories as well as to the medical examiner/coroner community. These awards are dedicated to enhancing the quality, timeliness, and credibility of forensic science services for criminal justice purposes for disciplines that are outside of DNA but still very vital to the investigation of crime. In FY09 over $23M was granted to 103 awardees. Since 2004 over $106M has been awarded under this program.

NIJ has funded numerous projects in other areas as well. Since 2005 over $50M has been awarded under the "Solving Cold Cases with DNA" program. From the 2005 awards alone, over 400 CODIS DNA matches have been made on cases that did not have DNA technology available

at the time they were originally investigated. In 2008 NIJ released the "Identifying the Missing Using DNA Technology" program to help address the growing number of missing and unidentified persons cases in the USA. In conjunction with this, NIJ also funds the National Missing and Unidentified Persons System (NamUs). This system is for use by the law enforcement, medical examiner/coroner, and forensic science community but is also for the general public. In 2009, the cross matching capability of the system became active. This allows the missing persons database to compare cases to the unidentified decedent database to allow for potential investigative leads for the criminal justice community to use. The system is currently managed by the National Forensic Science Technology Center (NFSTC) which, in 2007 won a competitive award to become NIJ's Forensic Science Technology Center of Excellence. This award will be recompeted in 2010. The Center is charged with numerous tasks including managing the Grant Progress Assessment program, hosting technology transfer workshops and evaluations, and partnering with other agencies and institutions for other purposes which serve the community. Finally, NIJ has awarded more than $10M in funding to 13 States to support their "Postconviction DNA Testing Assistance" program. Under this program states may apply for funding to review postconviction cases and pay for any DNA analysis deemed necessary in cases where this evidence may prove "actual innocence".

Pending FOIA litigation:

6. I commend you for releasing new Freedom of Information Act (FOIA) guidelines that restore the presumption of openness to our government. During the FOIA oversight hearing that this Committee held in September, I asked the Associate Attorney General about the impact of your new guidelines on pending FOIA cases. I was promised that the Department would provide the Committee with more information about these cases; but I have not yet received a response. This is an important issue to me and to many in the open government community who want to be sure that your new FOIA guidelines actually do result in more disclosures to the American people.

a. How many times has the Department released additional information in a pending FOIA case since your new guidelines went into effect?

b. Do you believe that your new FOIA guidelines have been successful in getting more government information to the American people, thus far?

Response to a-b: We believe that the FOIA guidelines have been successful in getting more information out to the American public. The Department has been actively engaged in educating and training agencies with respect to the new guidelines, and agencies are releasing information that may be technically exempt under FOIA, but which can nevertheless be disclosed as a matter of discretion. Pending FOIA cases have been reviewed to determine whether additional information can be released, and in many cases additional information has been released. It is not possible to provide a truly accurate count of the number of times information has been released in a pending case since the issuance of the guidelines because we do not maintain statistics of that kind for these types of cases that are litigated all around the country by various offices. The Department is proud to be effectively implementing one of the President's top priorities in making the government transparent and accountable to the American people.

Oversight:

7. The Senate and House Judiciary Committees have traditionally had oversight jurisdiction over all activities of the Department of Justice. In recent years, some have suggested that certain intelligence-related activities of the Department, particularly within the Federal Bureau of Investigation, are not within the Judiciary Committee's oversight purview. While I am happy to share oversight jurisdiction as appropriate, I believe strongly that the Judiciary Committees, with their long tradition of oversight of all aspects of Department work and their considerable expertise in these matters, should not be shut out of important Justice Department activities. I think that all members of this Committee, and our House counterparts, will agree. Do you agree with me that this Committee has oversight jurisdiction over the entire Department of Justice?

Response: Generally, we agree that the Committee has oversight jurisdiction over the Department although we note that certain activities of the FBI are scored to the National Intelligence Program, which we understand falls within the purview of the Intelligence Committees.

Consular Access for Criminal Defendants:

8. The Vienna Convention on Consular Rights requires that non-citizens charged in the criminal justice system under certain circumstances, particularly in capital cases, must be told of their rights of access to their consulate. In a number of cases, states failed to provide this notice. The International Court of Justice found in the *Avena* case that failure to provide such notification is a violation of the Convention's requirements. In the case of *Medellin v. Texas*, the U.S. Supreme Court held that only Congress can enforce these treaty obligations by enacting legislation. It is important for the protection of the rights of Americans abroad that we uphold our treaty obligations here at home. I joined four other Senators in writing to you earlier this fall to ask for your views about the appropriate next steps to resolve this situation. We have not yet received a response. Please share your thoughts about the appropriate steps Congress and the executive branch should take to address this issue.

Response: The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

QUESTIONS POSED BY SENATOR FEINSTEIN

Gun Trafficking Across the Southwest Border:

9. The June 2009 report by the Government Accountability Office found that the two agencies tasked with deterring arms smuggling along the Southwest border, the Bureau of Alcohol Tobacco and Firearms and the Department of Homeland Security's Immigration and Customs Enforcement, "do not consistently coordinate their efforts effectively." Also in June, you testified that additional ATF personnel would be deployed to the Southwest border as part of Project Gunrunner, and that you and Secretary Napolitano were working to increase coordination on matters related to the Southwest border.

a. Since June, how have the roles of the Bureau of Alcohol, Tobacco and Firearms and Immigration and Customs Enforcement been defined?

Response: ATF and ICE have long recognized that by working as partners they will be more successful in the fight against persons and organizations engaged in cross border firearms trafficking and related violent crime. Their mutual goal is to achieve a greater level of public safety by cooperating with regard to our respective jurisdictions, resources and investigative capabilities. In that regard, on June 30, 2009, ATF and ICE announced the execution of a new memorandum of understanding (MOU) regarding cooperative guidelines for the handing of firearms investigations. This MOU is a reflection of their respective commitments to these principles in areas of mutual interest, and should guide and help coordinate their respective investigative activities.

For example, the MOU provides guidance in those situations where the Agencies' respective mission efforts coincide and will serve to coordinate how both will pursue their investigations cooperatively to optimize the use of resources and minimize duplication of effort. The MOU also outlines the process by which each Agency will address intelligence and information sharing, provides general and specific investigative guidelines, outlines the acceptable use of sources of information and provides conflict resolution procedures.

ATF and ICE continue to work to improve interagency coordination and cooperation. The recently enacted MOU represents an important step toward this goal. In furtherance of this objective ATF and ICE organized two recent senior level conferences to discuss the MOU and cooperative enforcement strategies. The first was held in Albuquerque, NM, from June 29 to July 2, 2009, and in addition to ATF and ICE, also included DEA, FBI, CBP and representatives from the US Attorney community. The second conference was held in San Diego from November 2 through November 5, 2009. That conference was primarily organized by ICE, and in addition to ATF, included CBP.

Improved cooperation between ATF and ICE has resulted in the two agencies partnering for a number of successful joint investigations along the border. For instance, in June 2009, ATF and ICE agents received information regarding the recovery in Mexico of a firearm originally purchased by a Brownsville, Texas resident. The purchaser was interviewed and admitted to

being paid to buy two .223-caliber Bushmaster rifles for the ring leader, who was also in the Brownsville area. The joint investigation subsequently identified an additional straw purchaser. ATF and ICE agents interviewed this subject, who admitted to purchasing five firearms. Two of these firearms have been recovered in Mexico and Guatemala. This subject was arrested after the interview, subsequently indicted, and pled guilty in the U.S. District Court for the Southern District of Texas. He is awaiting sentencing. Defendants have admitted to purchasing a total of 29 firearms on behalf of the trafficking ring leader, nine of which have been recovered in Mexico and Guatemala.

Additionally, as noted above, all seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk which is staffed by ATF and DHS personnel. The agencies believe they are making progress and these efforts will continue at the national and local levels. Additionally, ATF and ICE are also working with several other partners, including the Government of Mexico, on a variety of issues pertaining to the investigation of cross border firearms trafficking and related violence.

b. How is data on weapons seizures at the ports of entries being coordinated and compiled among the two agencies?

Response: All seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk, which is staffed by ATF and DHS personnel. ATF works cooperatively with CBP and ICE to investigate the sources of firearms and firearms trafficking schemes when firearms are recovered at or between ports of entry. CBP and ICE also share seizure information with ATF for incorporation into ATF intelligence products and ATF has provided firearms trafficking data to CBP and ICE for their southwest border assessment products.

c. How is the Justice Department working with the Department of Homeland Security to recommend and update technology at the ports of entries in order to deter weapons smuggling?

Response: ATF supports DHS efforts to update and make better use of technology to detect and deter firearms trafficking along the U.S.-Mexico border. However, ATF does not maintain equipment nor have statutory responsibility to conduct inspections at ports of entry.

Investigations of Identity Theft and Data Breaches:

10. A recent survey by Unisys Security Index found that 65 percent of Americans are "extremely" or "very" concerned about the security of their private information, such as their social security numbers. In fact, the survey found that Americans are more concerned about identity theft than the H1N1 virus. Recent headlines give cause for concern. This month, four Russian and Eastern European men were indicted in the United States for hacking into an Atlanta-based payment processing center and using the information to steal more than $9 million from ATM machines around the world. And, in August, an American and two Russian accomplices were charged with masterminding a global scheme to steal more than 130 million credit and debit cards by hacking into American retail companies' computer systems.

a. What steps is the Department taking to make investigation and prosecution of data theft a priority?

Response: Over the last several years, the Department has implemented a number of important initiatives to combat this problem in a more aggressive fashion, both domestically and abroad. Recent cases, such as the indictment of an international hacking ring responsible for the theft and sale of more than 130 million credit and debit card numbers, provide excellent examples of how we have used our resources in a creative and coordinated manner. Recent cases also demonstrate that we have the ability to identity, charge and capture some of the most sophisticated online criminals. Success in this area requires well-trained law enforcement agents, well-trained prosecutors, and close working relationships with our foreign allies.

However, many cyber criminals rely upon online anonymity, encryption, and routing of their communications through foreign countries to commit online fraud. These are significant problems that have hampered, and continue to hamper, our success in fighting online crime in an large number of cases.

To respond to this threat, the Department has over 230 prosecutors in U.S. Attorneys' Offices who are part of a "CHIP" (Computer Hacking and Intellectual Property) network. These prosecutors are dedicated to pursuing, among other types of cybercrime, investigations and prosecutions related to data breaches and payment card fraud. In addition, the Computer Crime and Intellectual Property Section within the Criminal Division of the Department, a section with 40 prosecutors and 5 individuals comprising an in-house Cybercrime Lab, is similarly positioned to investigate and prosecute data breach cases. Finally, U.S. Attorney's Offices and the Criminal Division's Fraud Section, with more than 60 prosecutors, actively pursue and prosecute the resulting payment card fraud and identity theft from data breach compromises.

b. How is the Department cooperating with law enforcement in other countries to pursue foreign hackers who are targeting United States computer systems?

Response: We already have a number of established working relationships with multinational organizations that are focusing on broader identity theft issues, but which encompass compromises of computer systems and resulting fraud. The Council of Europe, for example, oversaw the development of the Convention on Cybercrime, which is an indispensable tool in improving cooperation in fighting computer crime, including data breaches and identity theft. The Convention encourages countries to pass adequate computer crime laws, as well as laws that provide the legal tools necessary to collect electronic evidence, thereby eliminating safe havens. We are actively engaged in encouraging other countries to accede to the Convention. The European Union also is taking an active interest in the specific topic of identity theft, and we are discussing with the European Union how to address the issue. Through its Legal Attaché offices, the FBI is also working globally to coordinate cybercrime investigations with, and to provide cyber training to, our international law enforcement partners. For example, over the past few months the FBI has worked closely with Egyptian authorities in the Phish Phry case and with Estonian authorities in the Royal Bank of Scotland Worldpay case. We also work closely with

Interpol and other international law enforcement organizations in pursuing these types of criminals.

In addition, the United States should continue to work closely with multilateral organizations to urge other countries to review their criminal codes and criminalize identity-related criminal activities where appropriate. This has historically proven effective. Earlier this year, for example, the G-8 Roma/Lyon Group approved for further dissemination a paper that examines the criminal misuse of identification information and identification documents within the G-8 States and proposes "essential elements" of criminal legislation to address identity-related crime.

The Identity Theft Task Force's Strategic Plan also directs the U.S. government to identify countries that are safe havens for identity thieves and to use appropriate diplomatic and enforcement mechanisms to encourage those countries to change their practices. The Department of Justice has begun this process, gathering information from a range of law enforcement authorities.

c. Is the Department of Justice working with the Federal Trade Commission and others to educate Americans about what steps they should be taking to protect their computers and their sensitive data from unauthorized access and misuse?

Response: Yes. The Federal Trade Commission's website on identity theft, http://www.ftc.gov/bcp/edu/microsites/idtheft/ , contains comprehensive information and guidance for the public in recognizing and dealing with identity theft. The Department of Justice frequently directs consumers concerned about identity theft to the FTC site, and provides hard copies of the FTC materials to consumers as well. In addition, a partnership of law enforcement and private-sector entities -- including the FBI, the United States Postal Inspection Service, the National White Collar Crime Center, Monster.com, Target, and members of the Merchants Risk Council -- developed and established LooksTooGoodToBeTrue.com, a website with consumer quizzes and other information to educate consumers about a wide variety of Internet fraud schemes and identity theft. That website can be found at: http://www.lookstoogoodtobetrue.com/ .

11. Data breaches were once considered solely a financial threat. We know now, however, that seemingly isolated breaches may be linked to larger threats against our electricity grid, our cyber-infrastructure, or our national security more broadly.

a. In April 2009, you asked the Deputy Attorney General to chair a working group on federal sentencing. Has this group reviewed sentences for identity theft and cyber-crimes? Are the criminal penalties currently in the United States Code sufficiently severe to deter, prevent, and eliminate these crimes?

Response: No. The Sentencing and Corrections Working Group has generally been focusing on structural issues surrounding federal sentencing rather than crime-specific sentencing policy. Among other issues, the Group has been examining the structure of federal sentencing following the Supreme Court's decisions rendering the sentencing guidelines advisory only; racial and

ethnic disparities in federal sentencing; internal Department of Justice charging and sentencing policies; and prisoner reentry issues.

With respect to criminal penalties, in the Identity Theft Enforcement and Restitution Act of 2008, Congress directed the Sentencing Commission to review the penalties for identity theft and computer intrusion offenses. In response, the Commission amended the U.S. Sentencing Guidelines. The Department believes that these amendments did not go far enough to address the threat of identity theft and to comply with Congress' explicit direction that penalties for such offenses be increased.

Apart from the Sentencing Guidelines, enhancing penalties for such computer crimes should be accomplished in other ways as well. Congress should consider raising the maximum penalties that apply to certain violations of 18 U.S.C. § 1030 to bring these penalties in line with similar crimes committed without the use of computers. The Department stands ready to work with Congress to propose specific amendments to address these shortcomings.

b. Is the Department of Justice, and particularly the Federal Bureau of Investigation, getting the information that it needs to thoroughly investigate cyber-threats?

Response: The Department of Justice, including the FBI, is working to identify and address potential information gaps that relate to cyber-threats. For example, for a variety of reasons, data breaches and other types of cyber-threats are significantly underreported, and as a result, law enforcement efforts to bring criminals to justice are significantly hampered. Immediate reporting of incidents to law enforcement is vital to law enforcement's ability to investigate large-scale data breaches. Payment card industry businesses are required by the credit card associations under their operating rules to report breaches to law enforcement. However, these private sector rules are neither universal nor consistently enforced across the various companies. In addition, only a few state notification laws require the victim to notify law enforcement.

c. Is the Department engaged in any public-private partnerships to identify and eliminate cyber-threats?

Response: The Department actively participates in several well-established public-private partnerships that are designed to share information related to cyber-threats. These include, for example, the FBI's InfraGard program and the National Cyber Forensics and Training Alliance. InfraGard, which the FBI established and leads, currently consists of more than 33,000 members spanning 87 cities nationwide and including representatives from federal, state, and local government, industry, and academia. InfraGard is the nation's largest government/private sector partnership focused on reducing physical and cyber threats against our critical infrastructure. The FBI also established a lead role in the development of the National Cyber Forensics and Training Alliance, a group committed to combining the resources of academia, law enforcement, and industry to identify major global cyber threats.

In partnership with the National White Collar Crime Center, the FBI also helped to establish the Internet Crime Complaint Center (IC3), which is the nation's premier web-based portal for receiving Internet-related criminal complaints and for researching, developing, and referring cybercrime complaints to Federal, state, local, or international law enforcement and/or regulatory agencies for appropriate action. The IC3 has received complaints relating to a broad spectrum of cyber crime matters, including intellectual property rights matters, computer intrusions (hacking), economic espionage (theft of trade secrets), online extortion, international money laundering, identity theft, and a growing number of Internet-facilitated crimes.

The Department is also an active participant in the U.S. Secret Service's Electronic Crime Task Forces, established to combine the resources of academia, private industry, and local, state, and federal law enforcement agencies to combat computer-based threats to our financial payment systems and critical infrastructures. The Department is a member of DHS' Joint Agency Cyber Knowledge Exchange (JACKE) program, a sharing platform between civilian Federal Government and the United States Computer Emergency Response Team (US-CERT) for the exchange of cyber threat information and mitigation techniques, including foreign nation/state cyber threats to U.S. Government networks.

In addition, the Office of the Chief Information Officer runs the day to day operations of the Justice Security Operations Center (JSOC). The JSOC teams with private companies to identify and eliminate cyber threats against the department. Currently, we are teaming with various companies to develop a methodology for early detection and mitigation of vulnerabilities in our infrastructure. We also work with technology partners to develop advanced detection and mitigation techniques, which are then adopted by the companies and offered to other agencies and private companies to improve their capabilities. The JSOC then shares the information with other government agencies (DISA, SSA, HHS, JTFGNO, USDA etc). We also post to the US-CERT Mercury portal, any new techniques, or information (including our custom developed block lists of known bad sites) that is shared with private organizations as well as U.S. government agencies. The JSOC also participates in a number of conferences and events that include both private and government agencies. The end goal of these events is to collaborate on and share detection strategies with other organizations to help them increase the security posture of their networks.

<u>Cooperation with Foreign Antitrust Authorities:</u>

12. In today's economy, it is more essential than ever that financial regulators cooperate with each other across borders. For many California companies with international reach, a merger or other business transaction must be reviewed not only by the United States Department of Justice or the Federal Trade Commission, but also by the European Commission and other foreign antitrust enforcement authorities. This can take time and unnecessary delays can lead to Americans' losing their jobs as companies falter.

What steps is the Department taking to cooperate with foreign antitrust authorities and to ensure that companies receive timely review of their business dealings and are not subject to unnecessary delays?

Response: The Department of Justice shares the concern that American companies be treated fairly abroad, and that foreign enforcers do not use antitrust law unfairly as a means to protect their local industries at the expense of American companies. To achieve these goals, the Department actively works to strengthen its relationships with foreign antitrust agencies. In order to minimize the risk of divergent outcomes in particular investigations, the Department's Antitrust Division engages on individual enforcement matters at all levels—staff attorneys, economists and Division leadership—with its counterparts in foreign agencies on both substance and procedure to pursue timely, accurate, and responsible enforcement decisions. The United States is party to eight bilateral cooperation agreements, with Australia, Brazil, Canada, the European Union (EU), Germany, Israel, Mexico, and Japan (copies of the agreements can be found at the following website: www.usdoj.gov/atr/public/international/int_arrangements.htm). Despite certain differences in our respective antitrust laws, the Department has almost always reached similar results as its counterparts when they have fully engaged with us on the analysis of a particular enforcement matter.

In addition, the Department promotes convergence at the bilateral level through consultations on a wide range of antitrust policy matters. The Department (together with the Federal Trade Commission) meets regularly with counterparts from the European Union, Canada, the United Kingdom, Japan, Mexico, and South Korea and has close informal ties with the antitrust authorities of many other countries, including China, India, and Russia. The Department has participated in informal working groups with foreign antitrust agencies on merger, unilateral conduct, and intellectual property matters. These working groups have held meetings and videoconferences to compare approaches and to bring our policies into greater conformity. Also, since the early 1990s the Department has worked bilaterally with new antitrust agencies around the world in the context of technical cooperation programs, in which we provide advice based on our own experience on issues ranging from standard antitrust analysis to agency administration and law enforcement investigative techniques.

The Department has worked for years to encourage other nations to base their antitrust enforcement on sound economic analysis and evenhandedness. To promote these principles and to strengthen its bilateral relationships with foreign antitrust authorities, the Department has been very active in two major international organizations, the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).

The ICN—which in eight years has grown from 15 founding members into a global network of 107 members from 96 jurisdictions—provides an opportunity for senior antitrust officials and non-governmental advisors from developed and developing countries to work together to achieve practical improvements in international antitrust enforcement. Through its Eight Guiding Principles and 13 Recommended Practices for Merger Notification and Review Procedures, the Merger Working Group, which is chaired by the Department of Justice, has brought much needed procedural coherence to multi-jurisdictional merger review. Scores of jurisdictions have made or proposed changes that would bring their merger regimes into closer conformity with the Recommended Practices. Under the Department's leadership, the ICN Merger Working Group has also negotiated, and the ICN has adopted, six Recommended Practices for Substantive Merger Review, which cover much of the basic analytical content of

merger review. These Recommended Practices are bringing increased coherence to merger analysis around the world.

The Department has also been active for many years in the OECD, which provides a setting where its members seek answers to common problems, identify best practices, and coordinate antitrust policies. The OECD's Competition Committee and the Committee's two working groups—one of which the Assistant Attorney General for Antitrust currently chairs—are important venues for promoting sound convergence with respect to both antitrust policy and process.

The Department continues to be a global leader in the pursuit of convergence in antitrust analysis and is actively working to ensure that American companies receive objective, principled, and timely review of the competitive implications of their business dealings and are not subject to unnecessary delays.

Assault Weapons:

13. Mandated by the Brady Handgun Violence Prevention Act of 1993 and launched by the FBI on November 30, 1998, the National Instant Criminal Background Check System (NICS) is used by Federal Firearms Licensees (FFLs) to instantly determine whether a prospective buyer is eligible to buy firearms or explosives. Before ringing up the sale, cashiers call in a check to the FBI to ensure that each customer does not have a criminal record or isn't otherwise ineligible to make a purchase. More than 100 million such checks have been made in the last decade, leading to more than 700,000 denials.

a. What additional resources would be needed by the DOJ and the NICS if Congress decided to re-regulate assault weapons? What impact would closing the gun-show loophole have on the number of checks done by the FBI and the NICS?

Response: Based on experience, if assault weapons are re-regulated, we would expect that the number of individuals attempting to acquire such firearms would likely increase significantly in the months before the legislation takes effect, creating a concomitant increase in the number of firearm background checks processed during that period. The extent and duration of the additional NICS workload will depend upon the nature of the regulation and the period of time over which it is phased in or otherwise implemented. Without knowing those variables, we cannot estimate the amount of additional resources NICS will require to ensure that firearm background checks continue to be processed within the required "three business day" time frame. It is fair to predict, however, that additional staffing requirements will be significant, if perhaps temporary.

The Department does not have access to reliable information concerning the number of firearms sold at gun shows by those who do not possess a Federal Firearms License. As a result, we cannot predict how many additional firearm background checks would be processed by NICS if the gun show loophole is closed. However, we believe there would be a noticeable increase, and unlike the increase associated with re-regulating assault weapons, it would not be temporary.

b. What regulatory or policy changes can be made to the NICS system, that would not require congressional action, that would ensure that someone like Major Nadal Hasan cannot purchase a firearm?

Response: The Federal criteria for prohibiting the possession or receipt of a firearm are established by statute (18 U.S.C. § 922(g) and (n)). Consequently, any changes to the criteria for denying a firearm purchase or transfer must be effected by legislation, not by policy or regulatory changes. A person who does not meet any of the Federal or State firearms disqualifying criteria would not be prohibited from receiving, purchasing, or possessing a firearm, and so far as we know, none of those criteria applied to Major Hasan.

c. How is information entered into the NICS system and how often is it audited to ensure its accuracy? If inaccuracies are found, how quickly is that information corrected and is it still possible to purchase a firearm if there are inaccuracies in the NICS system?

Response: The National Instant Criminal Background Check System (NICS) checks the records of three databases: the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. The records contained in these databases are entered by various Federal, state, local, and tribal departments and agencies. The frequency of record submissions varies from real-time to quarterly. The FBI's Criminal Justice Information Services (CJIS) Division serves as the custodian of the information submitted by these agencies.

The CJIS Division conducts a triennial review of the NCIC, the III, and the NICS Index, conducting random sampling of NICS Index submissions from outside entities during the other two years. As part of this review, CJIS conducts on-site audits at the states' central records repositories, examining data quality, policies, and procedures. When inaccuracies are found, CJIS asks the submitting agency to correct the information as soon as practicable; the time frame in which this correction is accomplished varies by agency (information submitted by the FBI can be corrected immediately because the FBI databases are housed in the CJIS Division).

In addition to FBI review, participating agencies are asked to conduct self audits, which the importance of accuracy and completeness is emphasized. For example, the III Standards For Participation and the National Fingerprint File Qualification requirements both advise that record accuracy and completeness are of primary importance and are to be maintained at the highest levels possible.

Persons who are denied the ability to purchase a firearm based upon what they believe to be inaccurate or incomplete records contained within one of the databases accessed by NICS are able to challenge that denial in accordance with procedures contained within 28 C.F.R. § 25.10. Those procedures are available to prospective purchasers at the point of sale and include multiple methods by which inaccurate or incomplete records can be corrected or completed so that the denied transaction and/or future transactions are not affected by the errors or omissions.

MAIG Blueprint Memo:

14. The Washington Post reported on October 2nd that the bi-partisan coalition of Mayors Against Illegal Guns sent a memorandum to the Obama Administration with 40 recommendations to better enforce existing gun laws. In addition, I sent you a letter on October 15th urging you to examine and adopt these recommendations. Among other things, these recommendations urge the federal government to share critical information with federal, state, and local law enforcement to prevent guns from ending up in the hands of terrorists and dangerous criminals.

The response to my October 15th letter was insufficient. Please describe how the Justice Department is reviewing the MAIG recommendations and which recommendations you expect will be adopted.

Response: The Mayors Against Illegal Guns publication is both thorough and thoughtful. It has been provided to policy-makers and other senior officials throughout the Department. In addition, our Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is in receipt of the recommendations. The Department is engaged in a comprehensive review of its firearms enforcement efforts and is taking into consideration a broad spectrum of ideas and recommendations, including those proposed by the Mayors. At this time, it is premature to comment on what recommendations may be adopted.

MATCH Act:

15. On September 17th, I along with Senator Boxer introduced The Matching Arson Through Criminal History (MATCH) Act. The bill would create a national arson registry, requiring convicted arsonists to report where they live, work, and go to school. It is the Senate companion to H.R. 1759, introduced in the House of Representatives by Representatives Mary Bono Mack (R-Palm Springs) and Adam Schiff (D-Pasadena).

It is my understanding that the Department of Justice has concerns with the bill, specifically how the FBI and ATF will work to implement the legislation. I have been told that the formal views on the legislation are forthcoming. Please describe those concerns in writing so that we might be able to make the necessary changes to the legislation and enact it into law.

Response: The Department is reviewing this legislation and would appreciate the opportunity to work with the Committee about any concerns we may have.

Miranda:

16. During your testimony, you explained that soldiers and Department of Justice employees are not regularly giving Miranda warnings to persons caught on the

battlefield; however, you acknowledged that any decision on administering such warnings would be made on a case-by-case basis.

a. Can you describe the criteria that are being used by the Department of Justice and how FBI agents are being instructed to proceed in the event that a high-value person is captured on the battlefield?

Response: The primary mission of our nation's military, in times of armed conflict, is to capture or engage the enemy; it is not evidence collection or law enforcement. *Miranda* warnings are never given by our soldiers on the battlefield or in any other circumstance where they would have an adverse impact on military or intelligence operations.

Section 1040 of the FY 2010 NDAA prohibits members of the U.S. Armed Forces, officials or employees of the Department of Defense or a component of the intelligence community, absent a court order requiring the reading of such statements, from reading *Miranda* warnings to foreign nationals who are captured or detained outside the United States as an enemy belligerent and are in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility. (This prohibition does not apply to officials or employees of the Department of Justice.) Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are only given in a very small number of cases overseas after an individual has been removed from the battlefield, and only when consistent with military and intelligence needs. It is a strategy that is consistent with longstanding practice under prior administrations to use all instruments of national power to defeat our adversaries. This includes the prosecution of some terrorists in Article III courts. U.S. law enforcement personnel have, in a small handful of situations, provided *Miranda* warnings prior to questioning detainees who were potential criminal defendants. The warnings are not authorized if providing them will hinder our counterterrorism efforts, or if doing so would violate the restrictions in section 1040 of the FY 2010 NDAA. Before warnings are given, an assessment is made based on numerous factors, including the effect the warnings could have on any ongoing or future intelligence interviews of the subject. This assessment is made on a case-by-case basis by experienced career professionals in consultation with military and intelligence officials.

b. In the 1% of cases where detainees have been "mirandized", can you describe the circumstances and what impact you believe it will have on the prosecution of those individuals?

Response: Over the course of the last two decades, a number of individuals who have been apprehended overseas and *Mirandized* have been successfully prosecuted for terrorism offenses. For example, *Mirandized* statements played a critical role in winning convictions and lengthy sentences in the 1993 World Trade Center bombing case and the plot to bomb U.S. airlines (Ramzi Ahmed Yousef sentenced to 240 years in prison, Abdul Hakim Murad and Wali Khan Amin Shah sentenced to life imprisonment); the 1998 East African embassy bombing case (Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-Owhali, Wadih EI-Hage and Khalfan Khamis Mohamed sentenced to life imprisonment); and the 1985 hijacking of Royal Jordanian Flight 402 (Fawaz Yunis sentenced to 30 years in prison). John Walker Lindh, a U.S. citizen who was captured in Afghanistan, interrogated by U.S. forces, and later *Mirandized* by the FBI,

was prosecuted in federal court and sentenced to 20 years in prison in connection with his support of the Taliban. There have also been numerous successful terrorism prosecutions of individuals apprehended in the United States who were *Mirandized* after they were arrested, such as Zacarias Moussaoui, who was sentenced to life imprisonment after pleading guilty for conspiring to commit terrorist attacks, and Ahmed Rassam, who was sentenced to 22 years for conspiring to bomb Los Angeles International Airport.

DEA Operations in Afghanistan:

17. As part of your testimony before the Committee on November 18, 2009 you said:

> **Three weeks ago, I had the honor of joining the President at Dover Air Force Base for the dignified transfer of the remains of eighteen Americans, including three DEA agents, who lost their lives to the war in Afghanistan. The brave soldiers and agents carried home on that plane gave their lives to defend this country and its values, and we owe it to them to do everything we can to carry on the work for which they sacrificed.**
>
> **I agree that we should do everything we can to carry on their work. Just five days prior to the agents and soldiers perishing in that counternarcotics mission in Afghanistan, on October 21, 2009, as the Chairman of the Senate Caucus on International Control I held a hearing entitled, "U.S. Counternarcotics Strategy in Afghanistan", co-chaired by Senator Charles Grassley. At the hearing we learned that additional resources are needed for the DOJ/DEA effort in Afghanistan. The specific recommendations made at the hearing by Michael Braun, retired DEA Chief of Operations, were as follows:**
>
> **The current number of Foreign-deployed Advisory and Support Teams (FASTs) dedicated to Afghanistan is three, which only allows for the deployment of one 11-man team at a time in Afghanistan. I believe that five to seven additional FASTs would provide the DEA with the flexibility and nimbleness needed to effectively conduct counter narco-terrorism operations throughout Afghanistan, and extend the Rule of Law to the farthest reaches of the country. Virtually all counter narco-terrorism operations are now conducted by the DEA jointly with the U.S. Military Special Forces, Afghan Army Commandos and the Counter Narcotics Police of Afghanistan; however, the DEA does not have enough FASTs to sustain the current and anticipated future operations tempo in Afghanistan.**
>
> **The DEA finds it extraordinarily difficult to travel to most areas of Afghanistan without the support of DOD and/or DOS helicopter assets. The Agency's counter narco-terrorism operations and vitally important intelligence gathering missions are routinely delayed, often for several days, because the DEA lacks its own organic helicopter assets in Afghanistan. UH-60 Blackhawk and CH-47 Chinook helicopters are the safest and most reliable airframes needed to transport DEA Special Agents, and their U.S.**

Special Forces and Afghan colleagues into the remote mountainous terrain where FASTs most often find themselves working. Accordingly, the DEA needs fifteen UH-60 Blackhawk and three CH-47 Chinook helicopters to support its operations in Afghanistan; however, the Agency sorely lacks the funding for such an acquisition. The DEA also requires the funding to hire and train the aircrews and mechanics, as well as the funding for operations and maintenance (O&M) and facilities for the airframes.
I believe that it is clear the Taliban is gaining strength and revenue through the narcotics trade in Afghanistan. Our resource allocation in Afghanistan should reflect a comprehensive approach to winning the fight and that cannot be done without providing the tools needed for successful counternarcotics operations.

a. Do you agree that there should be an increase in FASTs by five to seven teams?

Response: Yes, Mr. Braun testified that there were three FASTs dedicated to Afghanistan. In addition to those three teams, two additional FASTs were added for the transit and source zone Western hemisphere operations during FY 2009. While additional FASTs would always be a welcome addition, we believe DEA can be effective in Afghanistan with the resources we have. The most significant limiting factor we face in Afghanistan is helicopter lift. DEA must have adequate helicopter lift capability that is night capable and flown by veteran pilots.

b. Do you agree that DEA should be provided with 15 Blackhawk and 3 Chinook helicopters in order to effectively and safely carry out their mission in Afghanistan?

Response: While DEA still firmly believes that the Blackhawk helicopter is a suitable platform for operations in Afghanistan, a recent evaluation of operations in Afghanistan and current budgetary issues leads DEA and its Aviation Division to the conclusion that the development of a helicopter operation utilizing these assets is not feasible. Costs for the initial purchase of such assets and construction of an infrastructure would be extensive, and the ongoing costs to maintain such an operation are not likely to be sustainable. At present, DEA lacks the necessary personnel and resources to effectively build and manage such a program.

Despite these issues, helicopter support in Afghanistan is still a much needed commodity. There are organizations currently in Afghanistan, to include the United States military and the Department of State, who are willing and able to utilize airframes such as the Blackhawk in support of DEA operations. If provided with the necessary resources, this support could be provided to DEA on a reimbursable basis.

Narco-terrorism Prosecutions:

18. Under the federal narco-terrorism statute 21 U.S.C. § 960a, which was enacted in March of 2006, several high-value narco-terrorists have been removed from Afghanistan to face justice in the United States. This federal narco-terrorism statute has been tested and proven to be an effective tool in a court of law. What concerns me is that there are very limited resources

dedicated full time to the investigation of 21 U.S.C. § 960a narco-terrorism cases and extraterritorial narcotics cases under 21 U.S.C. § 959. While additional FAST personnel and equipment will provide the operational "end game" capability of arresting high value narcotics traffickers and narco-terrorists worldwide, there is an equally important need for agents dedicated full time to those complex investigations and subsequent preparation for trial in the United States of the violators charged with 21 USC 959 and 960a. This will provide for judicial "end game" capability.

a. Do you agree that additional personnel should be dedicated to these types of cases?

Response: The Drug Enforcement Administration has significant resources directed toward investigating high-level foreign-based drug traffickers and terrorists impacting the United States. Resource needs, to include personnel levels, are consistently evaluated, and any identified resource needs are submitted as part of the Administration's budget request.

The DEA Special Operations Division (SOD) has two domestic field enforcement groups with the mission of investigating high-level foreign-based drug traffickers and terrorists impacting the United States. The groups primarily conduct joint investigations with DEA Foreign Offices working towards U.S.-based prosecutions in coordination with SOD's Counter-Narcoterrorism Operations Center (CNTOC), DEA's central hub for addressing the increase in narco-terrorism related issues and investigations. The CNTOC's primary mission is to coordinate all DEA investigations and intelligence linked to counter-terrorism and narco-terrorism; targeting, investigating, and extraditing individuals who are involved with drug proceeds that finance terror; and coordinating terrorism-related information with the FBI and other relevant United States Government agencies as appropriate.

The Bilateral Investigations Unit (BIU) primarily pursues cases under 21 U.S.C. § 959, and has actively investigated major Mexican drug traffickers in cooperation with the DEA Mexico City Country Office and the Government of Mexico. Since its formation in 2002, the BIU has realized numerous successes including the indictments of Ismael Zambada-Garcia and two key lieutenants; Ignacio Coronel Villarreal; and the late Arturo Beltran Leyva and Hector Beltran Leyva. Additionally, the BIU indicted seventeen Gulf Cartel members under Operation Dos Equis.

In 2007, the DEA established the Terrorism Investigations Unit, a second enforcement group that works within SOD. Under the authority of 21 U.S.C. § 960a, this Unit investigates international criminal organizations that use illicit drug proceeds to promote and finance foreign terrorist organizations and acts of terror. These DEA agents have also produced impressive case results such as the arrest of alleged arms trafficker Viktor Bout and his associate Andrei Smulian; the arrest of arms trafficker and terrorist Monzer Al Kassar; the capture of Haji Bashir Noorzai, allegedly Afghanistan's biggest drug kingpin with ties to the Taliban and allegedly the leader of one of the largest drug trafficking organizations in the Central Asia region; and the capture of Haji Baz Mohammad, an Afghan heroin kingpin who was the first 21 U.S.C. § 960a defendant ever extradited to the United States from Afghanistan.

During December 2009, the investigative efforts of the Terrorism Investigations Unit resulted in Federal prosecutors charging three West Africans with plotting to transport tons of cocaine across Africa in concert with Al Qaeda, using 21 U.S.C. § 960a for the first time against that group. This investigation highlights the growing trend of ties between drug traffickers and Al Qaeda as the terrorist group seeks to finance its operations in Africa and elsewhere.

These two domestic DEA enforcement groups are comprised of twenty-six Special Agents. These groups, working in conjunction with the CNTOC, DEA Foreign Offices and foreign counterpart agencies, have a proven track record for consistently producing some of the most significant investigative results in law enforcement, effectively maximizing all resources provided.

QUESTIONS POSED BY SENATOR FEINGOLD

Patriot Act

19. Senator Wyden, Senator Durbin and I sent you a letter on November 17, 2009, reiterating our request that certain limited information about the implementation of Section 215 of the Patriot Act be declassified. That letter is attached. Please respond promptly, or indicate when we can expect a response.

Response: After extensive coordination with the Intelligence Community regarding the declassification requests contained in your letter of June 24, 2009 (co-signed by Senators Wyden, Whitehouse and Leahy) and reiterated in your November 17, 2009 letter (co-signed by Senators Wyden and Durbin), the Department of Justice and the Office of the Director of National Intelligence sent a response on January 5, 2010. We regret the delay in responding.

Office of Legal Counsel White Memos:

20. In your October 29, 2009, responses to Questions for the Record from the June 17, 2009, Department of Justice Oversight hearing, you stated that there was an ongoing review of whether to withdraw the January 2006 White Paper and other classified Office of Legal Counsel (OLC) memos providing legal justification for the NSA's warrantless wiretapping program. What is the current status of that review? When will it be complete? Has anyone at the Department made an affirmative decision to leave those opinions in effect?

Response: The Department is still conducting its review, and will work with you and your staff to provide a better sense of the timing of the completion of the review. No one in the Department has made any affirmative decision about the treatment of the OLC opinions.

Post-Conviction DNA Testing

21. Last month, you ordered a review of the Bush administration policy encouraging prosecutors to require federal criminal defendants to waive their right to post-conviction DNA testing when they entered a guilty plea. These waivers prevent federal defendants who have pleaded guilty from ever requesting DNA testing, even if new evidence emerges. Can you provide a status update on the review of this policy? Has it been completed, and if not when do you expect that it will be?

Response: The Department continues to examine its DNA waiver policy, but has not yet finished its review. We expect the review will be completed in 2010.

OLC Reporting Act

22. Last year I introduced the OLC Reporting Act, S. 3501 (110th Cong.), which would require DOJ to report to Congress when OLC issues an authoritative legal opinion concluding that the Executive Branch is not bound by a statute. The legislation has the support of former officials from both Democratic and Republican administrations.

a. On November 14, 2008, then-Attorney General Michael Mukasey sent a letter expressing concerns about the bill. Does that letter still represent the policy of the Department of Justice?

b. Will the Department support the legislation?

Response a-b: The Department shares the goal of promoting greater transparency in government. Consistent with that objective, in the past year we have released over forty OLC opinions and other memoranda. We are reviewing the OLC Reporting Act and look forward to working with the Committee further on that proposed legislation.

International Court of Justice

23. On October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent you and Secretary Clinton a letter seeking your recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input. Please respond to our letter (attached), or indicate when we can expect a response.

Response: The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

QUESTION POSED BY SENATOR SCHUMER

Guns and Fort Hood:

24. The Tiahrt Amendment 24-hour background check destruction rule prevented the FBI from keeping any record of Hasan's gun purchase for more than 24 hours. I asked about this issue at the hearing, and I hope that you can expand upon it.

a. Will the Department of Justice remove the Tiahrt Amendment 24-hour background check destruction requirement from its FY-2011 budget to allow the FBI to keep records of guns purchased by subjects of terrorist inquiries like Major Hasan?

Response: The Department is subject to a statutory requirement, 18 U.S.C. §922(t)(2), which requires the National Instant Criminal Background Check System (NICS) to "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer" for all transfers that would not violate 922(g), 922(n), or state law. In addition, the Firearms Owners' Protection Act prohibits use of the NICS to establish any system "for the registration of firearms, firearm owners, or firearms transactions or dispositions," except with respect to prohibited persons.

To ensure compliance with these statutory mandates, in 2004 the Department promulgated a regulation that requires destruction of certain information within 24 hours of approved, or "proceeded" transactions. *See* 69 Fed. Reg. 43892 (July 23, 2004) (reducing time period for information kept in NICS audit log for certain transactions from 90 days to 24 hours). That same year, Congress included an appropriations restriction that prohibited the Department from expending appropriated funds to establish a longer retention period. Similar restrictions have been kept in place for each succeeding fiscal year. In addition, 28 CFR §25.9(b)(2) imposes restrictions on the use of information concerning proceeded transactions that has yet to be destroyed. Such information can only be used for purposes related to NICS performance unless, on its face or in conjunction with other information, it demonstrates a violation or potential violation of law. The regulation does not permit routine dissemination of proceed information for law enforcement purposes. In short, even if the appropriations restriction was lifted, the FBI would continue to be constrained by the statutory requirements identified above. Additionally, if the retained information was intended to be available for law enforcement use, additional regulatory changes would be required.

That said, we note that the NICS searches several databases, one of which is the National Crime Information Center database, which includes the Known or Appropriately Suspected Terrorist (KST) file. If an individual included in the KST file attempts to receive a firearm from a Federal Firearms Licensee (FFL), a permanent record of the check is maintained by the FBI's Terrorist Screening Operations Unit and can be shared as appropriate. The attempted firearm purchase will not be placed in a "proceed" status until the NICS Section communicates with the FBI case agent to ensure that the case agent is not aware of factors that would prevent the KST from legally receiving a firearm.

QUESTIONS POSED BY SENATOR WHITEHOUSE

Electronic Prescriptions:

25. More than five years after the initial draft rule was proposed, I understand that a final rule permitting the electronic prescription of controlled substances, drafted by the Drug Enforcement and Administration and the Department of Health and Human Services, is under review at the Office of Management and Budget. When do you expect the final rule to be promulgated?

Response: The Drug Enforcement Administration's (DEA) final rule "Electronic Prescriptions for Controlled Substances" was accepted for review by the Office of Management and Budget on October 29, 2009. Pursuant to Executive Order 12866, OMB has 90 calendar days within which to notify DEA of its review of the rule, although the Executive Order permits an extension of that review period at the request of the agency head and written approval by the Director of OMB.

As part of its review, OMB circulated this rule to interested federal agencies. DEA has received comments from the Department of Health and Human Services, the Executive Office of the President, the Office of Management and Budget, and the Department of Veterans Affairs. DEA has reviewed and responded to all interagency comments as they were received.

While DEA cannot predict when this final rule will be published, please be assured that DEA will continue to work cooperatively with OMB, the Department of Health and Human Services, and other interested federal agencies to ensure that conclusion of OMB review occurs as quickly as possible. Once OMB concludes review of this rule, DEA anticipates that the rule would be published within a month.

Director for Executive Office for the U.S Trustee:

26. You have yet to appoint a Director for the Executive Office for U.S. Trustees. The U.S. Trustee Program is critical to the administration of bankruptcy cases nationwide, and the Director of the Executive Office yields considerable influence. It is my understanding that this position has historically been filled with a political appointee selected by the Attorney General. I am concerned that you have yet to replace Bush administration holdover Clifford J. White, III. Where are you in the process of selecting a new Director? Do you plan to make an appointment this year?

Response: There are no plans to replace to replace the current Director, Clifford J. White, III. As you know, the position of the Director of the Executive Office for U.S. Trustees is a General SES position that may be filled by a career or noncareer employee, at the discretion of the Attorney General. Mr. White has been in the Federal service for nearly 30 years and in the U.S. Trustees program since 1991, where he has served in both a field office and the main office, as Deputy Director, and as Director. He is a recipient of the Presidential Rank Award, and we have every confidence in his leadership.

Criminal Justice Reinvestment Act, S. 2772:

27. On November 16, I introduced the Criminal Justice Reinvestment Act, S. 2772, which will help state and local governments reduce spending on corrections, control growth in the prison and jail populations, and increase public safety. Most policymakers have limited access to detailed, data-driven explanations about changes in crime, arrests, convictions, and prison and jail population growth, and this legislation will provide them with the resources to undergo a thorough analysis of those issues, and to create and implement policy options to respond to them.

In your answer to a question by Senator Franken, you appeared to support this approach:

"I think we should ask ourselves – we should always be asking ourselves is the criminal justice system that we have in place truly effective and my thought is that we should have a data-driven analysis to see exactly who was in jail, are they in jail for appropriate amounts of time, is the – the amount of time they spend – spend in jail a deterrent, does it have an impact on the recidivism rate."

What do you believe is the benefit of analyzing data and creating policy based on analytical research? Will the Department of Justice support the Criminal Justice Reinvestment Act?

Response: This Administration has placed a very high value on evidence-based programming, and the Department is fully committed to advancing that cause. Evidence-based programs and practices are those that have demonstrated their effectiveness through rigorous evaluation. Our Office of Justice Programs (OJP) plays a key role in the Department's effort to better use evidence to drive programming, practices, and decision making in criminal and juvenile justice.

Under the leadership of Assistant Attorney General Laurie O. Robinson, OJP is improving the quantity and quality of evidence that is generated through OJP-sponsored activities. This includes generating evidence through the progression from innovative to evidence-based practices. It also includes a greater investment in highly rigorous research and evaluation.

OJP is improving the management of knowledge and integration of evidence to inform decisions within OJP and in the field. This will include the development of evidence integration teams that will draw together information, research, and expertise on specific topics to share internally and externally.

OJP is also improving the translation of evidence into practice through improved communication strategies and training. Even as organizations have identified evidence based practices and programs over the years, there are a number of hurdles to implementing such practices. Information about effective practices must be distilled, accessible, and comprehensible. This is one reason why OJP is developing a "what works" resource center.

Through the resource center, criminal justice practitioners will be able to learn about successful programs, including related research and evaluation results.

The Department is reviewing this legislation, but has not taken an official position on the bill. We would welcome the opportunity to work with the Committee on the legislation in the future.

QUESTIONS POSED BY SENATOR SESSIONS

Classified Information Protection Act (CIPA):

28. Under the Classified Information Protection Act (CIPA), the government may pursue an interlocutory appeal from orders "authorizing the disclosure of classified information . . . or refusing a protective order sought by the United States to prevent the disclosure of classified information." 18 U.S.C. App. § 7(a). In *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003), the Fourth Circuit held CIPA did not authorize interlocutory appeals from orders related to the "pretrial disclosure of classified information to the defendant or his attorneys." *Id*. at 514.

a. Do you agree that under the *Moussaoui* decision, the government may not seek immediate review of certain decisions authorizing the pretrial disclosure of classified information? If not, please explain your answer.

Response: In cases involving CIPA within the Fourth Circuit, under the *Moussaoui* decision, appellate courts lack jurisdiction under CIPA § 7 to entertain an interlocutory appeal by the United States of a district court order allowing a criminal defendant to depose a witness who may possess classified information.

b. Senator Kyl has offered legislation, including an amendment in Committee, to amend CIPA to address the deficiencies in CIPA. Given your decision to try Khalid Sheikh Mohammed and others in federal court, do you support legislation to address gaps in CIPA that could lead to disclosure of classified information?

Response: While CIPA has generally worked well in both protecting classified information and ensuring fair trials, there may be certain portions which could be usefully updated and clarified. The Administration has not yet taken a position on possible legislation to improve CIPA.

c. At the November 18, 2009 hearing, you stated that the "the standards recently adopted by the Congress to govern the use of classified information in military commissions are based on -- derived from the very CIPA rules that we would use in federal court." Do you agree that the classified information procedures recently enacted as part of the National Defense Authorization Act have procedural improvements beyond what is currently available in civilian criminal trials under CIPA?

d. For example, do you agree that the classified information procedures enacted as part of this year's National Defense Authorization Act, specifically those to be codified at 10 U.S.C. § 950d(c), contain what has been called for years a *Moussaoui*-fix to allow interlocutory appeals from ordinary discovery orders and other orders that could reveal classified information? For ease of reference, that language reads: *"(c) Scope of Appeal Right With Respect to*

Classified Information- The United States has the right to appeal under paragraph (4) of subsection (a) whenever the military judge enters an order or ruling that would require the disclosure of classified information, without regard to whether the order or ruling appealed from was entered under this chapter, another provision of law, a rule, or otherwise. Any such appeal may embrace any preceding order, ruling, or reasoning constituting the basis of the order or ruling that would authorize such disclosure."

e. Do you agree that CIPA lacks the *Moussaoui*-fix language that was recently enacted for military commission trials in 10 U.S.C. § 950d(c)?

Response to c-e: The classified information provisions of the Military Commissions Act of 2009 were based on CIPA, but with revisions to take into account lessons learned in terrorism cases in federal court. The following is a list of some of the key differences between the MCA of 2009 and CIPA:

- Ex Parte Pretrial Conference. The MCA includes an explicit provision allowing a military commissions judge to conduct an ex parte pretrial conference with either party to address potential classified information issues that may arise in connection with the case. Although federal judges applying CIPA routinely conduct such conferences, they are not expressly addressed in the statute.

- Protective Orders. The MCA requires a military commissions judge to issue an order to protect against the disclosure of classified information produced in discovery *or* otherwise provided to, or obtained by, any accused. This provides protection for classified material that the defense may have obtained outside the formal discovery process. While CIPA only requires the issuance of a protective order with respect to classified documents provided in discovery, some federal court judges have similarly issued protective orders covering the use at trial of classified information acquired by the defense outside the discovery process.

- Discovery. The MCA authorizes the military judge to order alternatives to full disclosure of *any* form of classified information. Although federal judges have crafted numerous ways to protect all types of classified information, CIPA only explicitly authorizes the judge to order alternatives to disclosure of classified *documents.* The bill also provides a clear standard ("non-cumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing") for determining whether defense access to classified information should be granted. This standard is drawn from case law addressing classified evidence issues but is not found in the text of CIPA itself.

- Declarations. Under the MCA, the prosecution must provide a declaration invoking a privilege to protect classified information and setting forth the damage to the national security that the disclosure or access to the classified information reasonably could be expected to cause when seeking an alternative to full disclosure. By comparison, CIPA does not specify what must be provided in

support of the government's request for relief from disclosure of classified information. This is consistent with CIPA practice -- in which the government regularly provides a declaration setting forth the possible damage to national security if disclosure is ordered -- but is not explicitly required by the CIPA statute.

- Use of Classified Information at Trial. The MCA bill provides explicit authority for the prosecution to protect the classified information it seeks to introduce at trial through the use of alternatives to full disclosure and protective orders. Although federal courts have routinely allowed the use of alternatives at trial, the CIPA statute does not provide the explicit authority to do so. The MCA also provides a standard for the judge in determining whether to order the disclosure of classified information for use at trial ("relevant and necessary to an element of the offense or a legally cognizable defense and . . . otherwise admissible in evidence"). This standard is drawn from case law addressing classified evidence issues but is not found in the text of CIPA itself.

- Interlocutory Appeal Right by U.S. The MCA provides the U.S. with authority to seek interlocutory appeal of any order or decision that forces the disclosure of classified information, regardless of whether the order appealed from was entered under a specific provision governing classified information, or any other rule or provision of law. By comparison, CIPA only provides for interlocutory appeal from certain decisions or orders issued pursuant to CIPA.

- Closure of the Courtroom. The MCA explicitly allows the judge to order closure of the courtroom to protect evidence "whose disclosure could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities." (§ 949d(a)(2)(c) of S. 1390.) Although CIPA does not contain a provision explicitly allowing such closures, the courtroom may be closed to protect classified information in federal court provided the relevant constitutional standard is met.

f. Were you aware of this difference (i.e., the *Moussaoui*-fix) between CIPA and the classified information protections recently enacted as to military commissions when you testified: "the standards recently adopted by the Congress to govern the use of classified information in military commissions are based on -- derived from the very CIPA rules that we would use in federal court[?]"

g. Do you believe classified information should receive greater protection in military commission trials through the safeguard of the *Moussaoui*-fix, or should the civilian CIPA be amended to provide those same greater procedural protections? As part of your answer, please explain which interlocutory appeals standard provides a greater safeguard in your opinion for classified information.

h. Do you agree that the *Moussaoui*-fix described above and incorporated into military commissions trials via 10 U.S.C. § 950d(c) could not have been derived from "the very CIPA rules that we would use in federal court" because the federal CIPA statute does not contain the same *Moussaoui*-fix language?

Response to f-h: The classified information provisions of the MCA were based on CIPA, but with revisions to reflect lessons learned in terrorism prosecutions in federal court. The Department of Justice made this clear in a July 23, 2009 letter to Senators Levin and McCain in connection with its efforts to work with the Senate to reform the military commissions. The Administration has not yet taken a position on possible legislation to improve CIPA. There are respects in which the classified information provisions of the MCA improve upon those in CIPA, as noted above, including with respect to the issue of interlocutory appeals.

Protocol to detain Osama bin Laden and Guantanamo Detainees:

29. Mr. Attorney General, during your testimony Senator Graham asked where Osama bin Laden would be tried if he were captured tomorrow. You stated: "Well, we'd go through our protocol. And we'd make the determination about where he should appropriately be tried." The protocol you referenced "applies to detainees held at Guantanamo Bay." Please answer each question separately.

a. Does the July 20, 2009 protocol govern the disposition of terrorists not yet captured?

Response: The protocol governs the forum decisions for prosecution of individuals who are currently detained at Guantanamo Bay.

b. If not, please explain why you told Senator Graham that if Osama bin Laden were captured you would "go through [your] protocol" to decide where to try him.

c. Under the protocol you referenced, "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court." Regardless of your answers to (a) and (b), will there be a presumption that Osama bin Laden will be tried in an Article III court?

Response: If Osama bin Laden were captured, a decision as to how to proceed would be made at that time in consultation with the President's full national security team.

Current # of convicted terrorists currently in BOP:

30. In your opening testimony, you stated that "there are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons custody." In response to my question, you stated without reservation that you would provide the details regarding these convictions.

Please provide the details regarding each of these convictions, including: (a) the names and dates of the individuals convicted; (b) the offense(s) with which they were charged; (c) the offense(s) for which they were convicted; (d) the sentences imposed; and (e) the year the criminal case was instituted via indictment.

Response: The Department is working to develop information responsive to this request and will advise the Committee when it becomes available.

Health Care Fraud Prevention and HEAT:

31. In your written testimony, you highlighted the Department's current efforts to combat healthcare fraud, including the creation of the Health Care Fraud Prevention and Enforcement Action Team ("HEAT"), announced in May.

a. You noted that Department's civil and criminal enforcement efforts "have returned more than $15 billion to the Federal government, of which $13.1 billion went back to the Medicare Trust Fund." Please provide the time period over which these funds were recovered.

b. Please specify the dollar amount of the recoveries cited in question (a) above that were recovered after the creation of HEAT?

c. You stated that between 1986 and 2008, the Department has recovered "more than $14.3 billion from fraud that had been committed against Federal health care programs, including Medicare." Does the $14.3 billion you referenced here include the $13.1 billion you referenced earlier in your testimony?

d. You also detailed the number of indictments filed, defendants charged, guilty pleas negotiated, and convictions won "in Strike Force cases alone since the HEAT initiative was announced in May." In how many of these cases did prosecutors initiate investigations after the HEAT initiative was announced in May?

Response to a-d: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established a national Health Care Fraud and Abuse Control Program (HCFAC or the Program) under the joint direction of the Attorney General and Secretary of the Department of Health and Human Services. Congress designed the HCFAC program to coordinate Federal, state and local law enforcement activities with respect to health care fraud and abuse. Over the twelve-year period of fiscal years 1997 through 2008, combined criminal, civil and administrative enforcement actions have returned more than $15 billion to the Federal government, of which $13.1 billion was transferred to the Medicare Trust Fund. Another $1.27 billion, representing the Federal share of Medicaid fraud recoveries, was transferred to the Centers for Medicare and Medicaid Services during this twelve-year period. These figures are published annually in the

HCFAC Program Report to Congress. HCFAC program accomplishments are not yet available for FY 2009.

The HCFAC program recoveries and transfers cited in question (a) include results from enforcement efforts from the inception of the program in 1997 through the end of fiscal year 2008. Since the HEAT Initiative was announced in May 2009, no recoveries and transfers from the cases indicted as part of the HEAT initiative are included in the overall HCFAC program results referenced in response to question (a). While several defendants indicted in cases filed as part of the HEAT Initiative have pleaded guilty since May 2009, courts have not sentenced any of these defendants as of the current date. Therefore, financial recoveries and transfers as a result of Strike Force cases filed as part of the HEAT initiative will not be included in HCFAC program results to be reported for fiscal year 2009, but instead will be included in HCFAC program results to be reported for fiscal year 2010. In civil cases, recoveries since May 2009 under the False Claims Act are at least $1.5 billion.

To be clear, the $13.1 billion transferred to the Medicare Trust Fund since the HCFAC program's inception in 1997 includes recoveries, fines and restitution that resulted from both civil and criminal matters. The civil recoveries included in the $13.1 billion are also included in the $14.3 billion in settlements and judgments reported by the Department in civil False Claims Act matters alleging health care fraud for the period FY 1986 through FY 2008. Since the Attorney General's testimony, the Department reported an additional $1.6 billion recovered in FY 2009 in False Claims Act matters alleging health care fraud, bringing the total civil FCA recoveries in these matters since FY 1986 to more than $15.9 billion.

The Department's Strike Force case tracking efforts begin with the indictment and/or unsealing of each new case, so we cannot provide specific information or statistical counts for the number of these investigations that were initiated before or after the May 21, 2009 announcement date. Generally, for most Strike Force cases, it has taken about three to four months, on average, from the initial stages of identifying potential targets, to conducting initial investigations, to preparing and presenting evidence to obtain grand jury indictments filed under seal, and to locating and arresting each suspect charged. The HEAT announcement in May included the announcement of Strike Force operations in Detroit and in Houston. Investigations in both cities began prior to the HEAT announcement. These investigations culminated in charges being unsealed in Detroit against 53 defendants in the seven indictments on June 24, and charges being unsealed in Houston against 32 defendants in the seven indictments on July 29. Continuing investigations in ongoing Strike Force cases following the HEAT announcement in both sites led to the filing of superseding indictments charging another defendant in Houston in August and charging three more defendants in Detroit in September. On October 21, the Department announced indictments of another twenty defendants, most of them residing in the Los Angeles area, who were charged in seven cases that had been initiated several months prior. Houston Strike Force prosecutors also unsealed an indictment, a superseding indictment, and a complaint charging six additional defendants in October. On December 15, the Department announced indictments of another 30 defendants in three cities (Brooklyn, NY; Detroit, MI; and Miami, FL) for their alleged roles in schemes to submit more than $61 million in false Medicare claims as part of the continuing operation of the Strike Force. To date, 60 defendants have pleaded guilty and another five defendants have been convicted in four jury trials since the

HEAT announcement. Two jury trials that were conducted last summer, which resulted in conviction of three defendants, involved Strike Force cases investigated and unsealed prior to the HEAT announcement. The two most recent jury trials involved Strike Force cases that were indicted following the HEAT announcement and resulted in jury convictions of a physician in Detroit and a retired nurse in Houston.

AAG for Office of Legal Counsel:

32. According to recent media reports, the President's nominee for Assistant Attorney General for the Office of Legal Counsel, Professor Dawn E. Johnson, has been involved in hiring decisions for the Office of Legal Counsel. Given that Professor Johnson has not been confirmed, it would be inappropriate for her to participate in hiring decisions. Please advise what role, if any, Professor Johnson has played in the hiring process for prospective nominees, including but not limited to whether she has been consulted in hiring decisions, reviewed resumes or other submissions, interviewed or recommended candidates, or otherwise participated in the process.

Response: The Attorney General (or the Acting Attorney General, before Attorney General Eric Holder was confirmed) has appointed all of the individuals for the political appointee positions in the Office of Legal Counsel, and the Acting Assistant Attorney General for OLC has made all decisions about who to hire for available civil service positions in that Office. Professor Johnsen's participation in this process has been appropriate and consistent with the past practice of presidential nominees of both parties. Like such other nominees, she was involved in the consideration of candidates for political appointments, such as those persons who would serve as her deputies should she be confirmed. By contrast, with respect to applicants for civil service positions, Professor Johnsen simply forwarded some resumes for attorney positions to the Acting Assistant Attorney General for OLC and occasionally offered her views as to some candidates for those positions who came to her attention and on general attorney staffing issues. Professor Johnsen did not participate in the interviews of any candidates for career positions, nor was she part of the final selection process for any such hires, all of which were made by the Acting Assistant Attorney General.

QUESTIONS POSED BY SENATOR HATCH

CIA Special Prosecutor:

33. In August, you appointed a Special Prosecutor to review actions of CIA contractors and employees. These cases had already been subjected to a two year review by DOJ career Attorneys working in the Eastern District of Virginia. These Assistant United States Attorneys (AUSA) were assigned to the Detainee Treatment Task Force and with the exception of one case, made determinations that these allegations did not merit federal prosecution for a wide array of reasons. After these decisions were made, the remaining cases were referred back to CIA and handled internally through administrative disciplinary action. This action ranged from demotion, transfer, suspension and termination. This procedure happens regularly in federal agencies when misconduct by government employees does not meet guidelines for federal prosecution but are clearly a violation of agency policy or procedures.

You may recall that in response to your announcement, I joined with several of my colleagues from both the Senate Judiciary Committee and the Senate Select Committee on Intelligence in sending a letter expressing our concerns on this matter. You promptly responded to that letter. In your response, you cited the central reason for initiating what you are calling a preliminary review was based on recommendations from the DOJ's Office of Professional Responsibility (OPR).

a. Was new evidence developed or provided to OPR that was not previously available to AUSAs assigned to the Detainee Treatment Task Force that supported OPR's recommendation for review?

Response: OPR reviewed no new evidence regarding potential criminal prosecution of individuals involved in interrogations of detainees.

b. If OPR investigates misconduct on the part of DOJ lawyers, under what authority does it have to make recommendations that justify reviewing the conduct and behavior of employees and contractors of the Central Intelligence Agency?

Response: OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR. In this matter, OPR recommended that the Department review the prosecutorial decisions of DOJ attorneys on certain cases involving Central Intelligence Agency employees and contractors relating to interrogations of detainees. OPR recommended that, due to significant developments in the law, the Department determine whether decisions based on certain prior assumptions about the law remained correct.

c. Was there any misconduct on the part of career DOJ prosecutors in the Eastern District of Virginia when they decided not to pursue all but one of these cases criminally?

Response: OPR did not make a finding of misconduct by the Department attorneys who declined prosecution on these cases. OPR recommended that, due to significant developments in the law, the Department determine whether prosecutorial decisions based on certain prior assumptions about the law remained correct.

34. During the over sight hearing, I asked you about the problems of disclosing sources and methods during the trial of Ramzi Yousef. Specifically, what I was discussing was testimony regarding the delivery of a cell phone battery and how it tipped off terrorists that their communications had been compromised. The end result was the disclosure of a source and method and the loss of useful intelligence.

You responded that this was "misinformation" and that it did not occur. Furthermore, you referenced testimony from the East Africa embassies bombing trial that included dates of disclosure of cell phone records during that trials discovery process. You insisted that this disclosure of cell phone records in December 1998 and testimony of these records in March 2001 had no impact on active sources and methods tracking Osama Bin Laden.

However, that is not what my question was asking. What I was referencing was the cell phone battery testimony in the Ramzi Yousef trial. In fact, testimony during this trial did compromise sources and methods and was not "misinformation."

a. Do you still stand by your answer?

Response: The Department has researched this issue. There were actually two trials of Ramzi Yousef. We are not aware of testimony about a cell phone battery at either trial. Likewise, we are not aware of any related compromise of sources and methods during those trials.

b. How do you intend to ensure that sensitive national security information does not end up in the hands of terrorists or their associates?

Response: During terrorism prosecutions, experienced prosecutors work closely and effectively with the intelligence community to safeguard national security information, using the Classified Information Procedures Act ("CIPA") or procedures such as protective orders. CIPA enables prosecutors to apply to the court to protect sensitive national security information and to prevent the public disclosure of the means, methods and sources through which it was obtained.

Moreover, an extensive analysis of terrorism prosecutions from 2001-2009 found that these procedures have been highly effective in protecting classified information in federal

trials.[1] The study did not find a single case in which a failure of CIPA procedures resulted in a serious security breach.

CIPA:

35. CIPA does not presently provide a standard for the protection of classified information. CIPA merely requires the defendant to give notice of the intent to introduce classified information into evidence. During the Zacarias Moussaoui case, the procedures of CIPA became problematic to prosecutors. CIPA authorizes an expedited interlocutory appeal of trial court orders authorizing the disclosure of classified information in a criminal case.

However, the U.S. Court of Appeals for the Fourth Circuit held than an order giving the defendant (Moussaoui), classified information was not an order of disclosure subject to interlocutory appeal. In its reasoning, the court explained that the interlocutory appeal provisions are concerned with the disclosure of classified information by the defendant at trial or pre-trial proceeding, not the pre-trial disclosure of classified information to the defendant or his attorneys. In my view this interpretation of CIPA should be corrected.

a. Would the Department of Justice support legislation that would overturn the Fourth Circuit's interpretation? Please state reasons why or why not?

Response: Please see the response to Question 28.

b. Do you believe that the Classified Information Procedures Act (CIPA) is sufficient to safeguard classified information if these detainees do not have counsel?

Response: While CIPA does not specifically address this point, federal courts have in the past implemented practices to safeguard classified information when the defendant has elected to proceed pro se – for example, through the appointment of cleared counsel to review the material in lieu of the defendant. Such procedures, which have been upheld on appeal, have served to safeguard classified information sufficiently while ensuring that the defendant has adequate access to the evidence against him even when the defendant is pro se.

Material Support of Terrorism As An Offense Prosecuted by Military Commission:

36. Article I of the Constitution grants Congress the authority to "define and punish offences against the law of nations." In the Military Commissions Act (MCA),

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[1] Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (analyzing data from Sept. 12, 2001 through Dec. 31, 2007); Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court, 2009 Update and Recent Developments* 9 (2009), *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf (analyzing data from Sept. 12, 2001 through June 2, 2009).

material support of terrorism is defined as an offense that can be prosecuted in a military commission. There have been several recent international agreements that condemn support of terrorism including the United Nations Security Council. The International Criminal Tribunals for Rwanda and Former Yugoslavia consider aiding and abetting acts, which the MCA defines as terrorism, to be a war crime. Does the Justice Department and the Administration believe that the crime of material support of terrorism can be prosecuted in a military commission?

Response: The Administration has expressed concerns about the historical basis for treating material support for terrorism or terrorist groups as a violation of the law of war, and the constitutional issues that thus may arise. The MCA of 2009, in section 950t(25), retains material support for terrorism as an offense triable by military commission, and section 950p of the MCA of 2009 declares that the offenses Congress included in the Act "have traditionally been triable under the law of war or otherwise triable by military commission." Under Article I, section 8 of the U.S. Constitution, Congress has the power to "define and punish … offenses against the law of nations," and the courts would likely pay some deference to Congress's exercise of that authority, subject to constitutional limits such as those imposed by the Ex Post Facto Clause.

Terrorism Convictions for Material Support:

37. What is the actual number of successful Justice Department prosecutions of persons convicted of providing material support to Al Qaeda since 9/11 (please provide a listing)? How many cases have been pursued since 9/11? How many of those defendants were investigated and captured on U.S. soil? In which federal correctional institutions are these persons currently detained (please provide a list)?

Response: The Department is working to develop information responsive to this request and will advise the Committee when it becomes available.

ACORN:

38. Several videos have surfaced that show alleged misconduct of ACORN employees in Washington, Baltimore, Philadelphia, New York and cities in California. This egregious behavior included providing advice on money laundering, organizing a prostitution ring and human trafficking of minors for sex slavery.

In September, I brought these videos to the attention of Director Mueller during an FBI over sight hearing. I asked Director Mueller if these alleged violations under the jurisdiction of the FBI and warranted further investigation by field offices of the FBI in cities where this misconduct occurred. In his response, Director Mueller stated that after consultation with the Department of Justice he would look into these allegations. Given that ACORN has been the recipient of OJP funding in the past, has the Department of Justice authorized the FBI field offices in these cities to conduct an investigation into the activities and conduct of ACORN offices? Please state reasons why or why not?

Response: It is the responsibility of the FBI to "[i]nvestigate violations of the laws . . . of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise exclusively assigned to another investigative agency." (28 C.F.R. § 0.85(a).) Longstanding Department of Justice (DOJ) policy generally precludes us from commenting on the existence or status of ongoing investigations.

Special Administrative Measures:

39. Within correctional institutions supervised by the Federal Bureau of Prisons (BOP), there is Special Administrative Measures (SAM) used to address security threats posed by prisoners. These include but are not limited to special housing measures or limited communication and correspondence. Previously released Department of Justice figures indicate that only 29 inmates incarcerated on terrorism-related charges are subject to SAMs at the moment. Recently, the convicted attempted shoe bomber Richard Reid was removed from Special Administrative Measures at the Federal Supermax in Florence, Colorado. What was the Department of Justice's basis for this decision?

Response: There are currently 25 inmates incarcerated or detained on terrorism related charges in BOP and USMS custody who are subject to SAMs.

As a general matter, the Attorney General may direct the Bureau of Prisons to implement SAMs on a particular inmate when there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons. SAMs must be reviewed annually to determine if they should be renewed. In advance of the potential renewal date, the U.S. Attorney's Office, in consultation with the FBI, and the National Security Division's Counterterrorism Section, determines whether continued imposition is warranted.

With respect to the SAMs placed on Reid, the convicted terrorist known as the "shoe bomber," it was the joint recommendation of the prosecuting U.S. Attorney's Office, the FBI, and the Counterterrorism Section that the SAMs not be renewed in June 2009. This recommendation was based on an assessment of the potential threat posed by Reid's communications and contacts.

Although the SAMs on Reid were not renewed, he remains incarcerated at the Administrative Maximum facility in Colorado where he is serving a life sentence for his terrorism conviction. His communications and contacts are limited and closely monitored. While he may send and receive mail to and from his family, per Bureau of Prison procedures, this correspondence is reviewed. He has limited visiting rights that are subject to Bureau of Prison restrictions and can receive news publications only after they are reviewed by authorities. SAMs can be reimposed on Richard Reid at any time if there is any indication that his communications or contacts warrant such action.

Homelessness & Recidivism:

40. As I am sure you are aware, roughly 500,000 people leave U.S. prisons annually. The Bureau of Justice Statistics estimates that 67 percent of those who are released from prisons are rearrested for a felony or serious misdemeanor within three years. Often, those released from prison have little or no money, no place to live, and no plan for successfully reentering society. In other words, ex-offenders frequently are left homeless and penniless with no viable employment options. Some have argued that increased private and non-profit job training and homeless prevention activities could help address recidivism. What are your thoughts on this issue? Is the Department working on any efforts in this regard? Please explain. Can you tell us about any inter-agency efforts the Department participates in to address the issues of homelessness and recidivism?

Response: The Department is committed to ensuring returning offenders have the tools they need to become contributing members of their communities, which includes adequate housing and community support. Our role is to facilitate partnerships between community groups, corrections and other justice system agencies to make sure services, such as housing, job training, substance abuse and mental health treatment, and employment assistance, are available beginning at an offender's incarceration and continuing after release.

At the Department's Office of Justice Programs (OJP), we are working toward this goal through our Second Chance Act Offender Reentry Initiative. In FY 2009, OJP's Bureau of Justice Assistance (BJA) and Office of Juvenile Justice and Delinquency Prevention (OJJDP) solicited applications under five grant programs: Second Chance Act Mentoring Grants to Nonprofit Organizations; Second Chance Act Prisoner Reentry Initiative Demonstration Grants; Second Chance Act National Adult and Juvenile Offender Reentry Resource Center; Second Chance Act Youth Offender Reentry Initiative; and Second Chance Juvenile Mentoring Initiative. These comprehensive programs are designed to assist individuals' transition from prison back into the community through a variety of services for adult and juvenile offenders such as housing, mentoring, literacy classes, job training, education programs, substance abuse, rehabilitation and mental health programs.

In October 2009, OJP announced more than $28 million in grant funding to states, local governments and non-profit organizations through these five initiatives, which support reentry programs throughout the United States. OJP also announced the creation of the National Adult and Juvenile Offender Reentry Resource Center with a national partner, the Council of State Governments (CSG) Justice Center. Through the Reentry Resource Center, OJP, the CSG Justice Center and many other national organizations will provide valuable training and technical assistance to states, localities and tribes to develop evidenced-based reentry programs that will help reduce the recidivism rate, while still protecting the communities they serve. Grants awarded under these five initiatives were based on a program's evidence-based process and the delivery of evidence-based services during and after confinement.

In addition to its own efforts, the Department is an active member of the Interagency Council on Homelessness (ICH) and is working closely with the new Executive Director of the Council, Barbara Poppe, to identify and coordinate DOJ reentry programs with efforts at the Department of Labor (DOL), the Department of Housing and Urban Development (HUD), the Department of Health and Human Services (HHS), and the Department of Veterans Affairs (VA). Potential areas of collaboration include linking incarcerated veterans with the myriad of services offered by the VA upon release; coordinating reentry job counseling services with Department of Labor One-Stop Career Centers; and addressing the housing needs of juveniles in the delinquency and dependency system who age out of the foster care system.

The Administration is committed to furthering the goals of the Second Chance Act and ensuring those who are released back into communities are not without a home. We appreciate Congress including in the FY 2010 budget $100 million for the Second Chance Act Offender Reentry Initiative. This funding level was part of the President's budget request and represents an increase of $75 million over the FY 2009 funding level. In addition, the budget proposed to set aside $10 million for research authorized under the Second Chance Act, furthering our goals in supporting evidence-based initiatives.

Crack Cocaine v. Powder Cocaine Disparity:

41. While I fully support efforts to address the crack cocaine sentencing disparity, I do not support raising the crack cocaine threshold up to the powder threshold under a 1:1 sentencing ratio. I have always held that the 100:1 sentencing ratio was not the correct approach. That is why I have supported an approach that balances proper punishment for the free-base form of this dangerous drug and is commensurate with the manner in which crack is sold and possessed.

As I understand it, under pending legislation, the 1:1 ratio would require possession of 500 grams of crack cocaine before an offender could face a five year federal prison term. I believe setting the 500 gram threshold as the starting point for a five year federal prison sentence will have dire unintended consequences on federal law enforcement and prosecutors. This approach fails to take into consideration the impact on Drug Enforcement Agency investigations and prosecutions pursued by Assistant United States Attorneys (AUSA). Furthermore, if the pending bills are passed, state laws will have more severe penalties than federal sentences.

For example, in Vermont, a defendant in possession of 500 grams of crack cocaine is currently subject to a maximum sentence of 10 years. In Illinois, a defendant convicted of possessing 500 grams of crack cocaine could face a sentence of 8-40 years in prison

Data from the United States Sentencing Commission (USSC) confirms that the average weight in federal crack cocaine prosecutions is 51 grams. In fiscal year 2008, USSC data indicated that there were 6,168 federal prosecutions of crack cocaine. In those prosecutions, 5,913 defendants qualified for sentencing under the

Sentencing Guidelines 2D1.1 as drug trafficking. Only 28 cases involved defendants sentenced for simple possession.

That equals out to less than 1% of federal cases involving prosecutions for simple possession. This data cannot be ignored and refutes the portrayals of Assistant United States Attorneys and federal agents as only pursuing the low level crack abuser who is apprehended with an "insignificant" amount of crack in their possession.

a. Does the Department of Justice support these proposed bills that set 500 grams of crack cocaine as the marker for a 5 year federal sentence?

b. Does the Department of Justice agree with raising crack up to powder in a 1:1 sentencing ratio?

Response to a-b: The President and the Attorney General support the elimination of the sentencing disparity between crack and powder cocaine offenses. We are committed to ensuring that our sentencing and corrections systems promote public safety, provide just punishment to offenders, avoid unwarranted sentencing disparities, and reduce recidivism. The bill recently passed by unanimous consent in the Senate, S. 1789, the Fair Sentencing Act, makes progress toward achieving a more just sentencing policy while maintaining the necessary law enforcement tools to appropriately punish violent and dangerous drug trafficking offenders. The Department supports S. 1789, and we look forward to the House approving this legislation quickly so that it can be signed into law.

Intellectual Property:

42. The Department of Justice has a nationwide network of over 230 Computer Hacking and Intellectual Property (CHIP) prosecutors. Last Congress, when my colleagues and I worked on the PRO-IP Act of 2008, I was particularly concerned about the role of Assistant United States Attorneys (AUSA) in the investigation of computer hacking and intellectual property crimes.

I have long been a supporter of the CHIP Unit concept. Building units of specialized prosecutors in such a complex and economically significant area of the law is, in my opinion, an effective law enforcement tool. At the same time, we have to admit that within those Units there are competing interests, including a host of complex computer intrusion and other high-tech crimes, in addition to intellectual property prosecutions.

The PRO-IP Act specifically provides that all CHIP units are to be assigned at least two AUSAs responsible for investigating and prosecuting computer hacking or intellectual property crimes.

Considering the seriousness of these crimes, I would have preferred dedicating a specific number of AUSAs to prosecuting criminal intellectual property crimes and having others focused on prosecuting and investigating computer hacking crimes.

a. Do you agree with this idea?

Response: Maintaining CHIP AUSAs' dual responsibilities over prosecuting both computer crime and IP offenses is an important and effective way to maximize their knowledge and expertise to the benefit of each of those areas. Since 1995, the CHIP Network has evolved into an effective group of prosecutors who specialize not only in prosecuting computer crime and IP offenses but who also have developed a unique expertise in the types of investigative tools and techniques necessary to prosecute these crimes. The tools used in obtaining electronic evidence, reviewing forensic analysis, and pursuing online investigations overlap for both the computer crime and IP areas. In addition, there are certain IP and computer crime offenses which occur during the same criminal act. For example, a criminal who misappropriates a trade secret often does so in violation of computer intrusion laws. In this regard, a prosecutor who pursues IP crimes will necessarily be more effective in prosecuting computer crimes. In addition to working on their own cases, the CHIP prosecutors are able to contribute their expertise in these areas as legal advisors to other prosecutors in the office confronting similar issues.

b. Can you give me an estimate of how much time CHIP prosecutors devote to cyber security related crimes compared to IP related crimes?

Response: The Department does not maintain data that describes the allocation of time each CHIP prosecutor spends on cyber security as compared to IP crimes. Nor can a general comparison be made as the focus of a particular CHIP unit will depend on the types of crimes that are more prevalent in that District.

Healthcare:

43. Does the Constitution provide a right to healthcare? If so, please explain the basis for your conclusion, including the provisions of the Constitution that form the basis of this right and any applicable Supreme Court precedents.

Does the Constitution allow Congress to require that individuals obtain health insurance? If so, please explain the basis for your conclusion, including the enumerated powers that form the basis of this requirement and any applicable Supreme Court precedents.

Response: Although the Constitution may limit the Government's ability to prohibit or regulate access to health care in certain circumstances--just as it may limit the Government's ability to prohibit or regulate access to other important social goods in certain circumstances--the Supreme Court has never addressed whether the Constitution affirmatively guarantees a right to health care for all citizens. Congress has the authority under the Commerce Clause, U.S. Const., Art. 1, sec. 8, cl. 3, the Power to Tax and Spend for the General Welfare, U.S. Const., Art. 1, sec. 8, cl. 1, and the Necessary and Proper Clause, U.S. Const., Art. 1, sec. 8, cl. 18, to enact the provision

in question. In particular, over 70 years of Supreme Court precedents have established that Congress can regulate activities that have a substantial effect on interstate commerce. A requirement that individuals obtain health insurance, included as part of health insurance reform legislation, fits comfortably within these precedents.

QUESTIONS POSED BY SENATOR GRASSLEY

Potential Conflicts of Interest in Detainee Transfers:

44. At the hearing I asked you to provide the Committee with the following information:

a. The names of political appointees in the Department who represented detainees, worked for organizations advocating on behalf of detainees, or worked for organizations advocating on terrorism or detainee policy;

b. The cases or projects that these appointees worked on with respect to detainees prior to joining the Justice Department;

c. The cases or projects relating to detainees that they have worked on since joining the Justice Department; and

d. A list of all political appointees who have been instructed to, or have voluntarily recused themselves from working on specific detainee cases, projects, or matters pending before the courts or at the Justice Department.

Response: The Department responded to these requests in a letter, dated February 18, 2010.

45. You responded that you would "consider" these requests. Following the hearing, six other members of the Judiciary Committee joined me in a letter to you dated November 23, 2009, requesting the aforementioned information along with the following additional requests:

a. Have any ethics waivers been granted to individuals working on terrorism or detainee issues pursuant to President Obama's Executive Order dated January 21, 2009, titled "Ethical Considerations for Executive Branch Employees?"

b. What are the Department's criteria for recusing an individual who previously lobbied on detainee issues, represented specific detainees, worked on terrorism or detainee policy for advocacy groups, or formulated terrorism or detainee policy?

c. What is the scope of recusal for each of the political appointees who have recused themselves from working on specific detainee cases, projects, or matters? (E.g. is an individual who previously represented a detainee recused only from matters related to that individual or from other detainees?) Please provide a detailed listing of the scope of each recusal.

Response: As noted in response to Question 44, the Department responded to these requests in a letter, dated February 18, 2010.

46. In the event you have not responded to the Committee by providing all the information requested at the November 18, 2009, hearing or in the November 24, 2009, letter prior to the submission of these questions for the record, please include this information as part of your official submission. If you have failed to provide this information prior to the submission of these responses provide a detailed response explaining the reason for the delay, any privileges cited for withholding information, and all relevant legal analysis citing authorities utilized for withholding the information. This analysis should include all relevant statues, case law, and any other legal authority the Department believes authorizes withholding the information from Congress.

Response: As noted in response to Question 44, the Department responded to these requests in a letter, dated February 18, 2010.

DOJ Role in the Termination of Inspector General Gerald Walpin:

47. In written follow-up questions to your testimony in June, I asked a twenty-four part question regarding the role of the Department in the termination of Inspector General Gerald Walpin. Your response failed to answer the specific questions so I'm going to ask that question now.

The acting United States Attorney for the Eastern District of California, Lawrence Brown, wrote to Kenneth Kaiser, the Chair of the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). Mr. Brown alleged that Inspector General Walpin of the Corporation for National and Community Service had committed misconduct in his investigation of Sacramento Mayor Kevin Johnson.

The Integrity Committee notified Walpin on October 9, 2009, of its conclusion that Mr. Brown's allegations were unfounded. Unfortunately, the President did not wait for Integrity Committee's decision and did not consider its views before removing Walpin as Inspector General.

Although Mr. Brown's referral was ultimately dismissed, it is similar to an ethics complaint against an attorney or judge that is involved in litigation with the Department. The U.S. Attorney's Manual, Section1-4.150 states that, "Allegations of misconduct by non-DOJ attorneys or judges shall be reported to OPR for a determination of whether to report the allegation to appropriate disciplinary officials."

a. Your written response to my questions said that Mr. Brown had "no outside contact" before the letter was sent. Does that mean that Mr. Brown did not provide his complaint against Walpin to OPR for approval before filing it with the Integrity Committee?

b. Since the Department requires U.S. Attorneys to contact OPR before referring complaints on judges or even non-Department attorneys, shouldn't Mr. Brown have sought approval from OPR before filing a complaint against an Inspector General? If not, why?

c. Why should complaints against Inspectors General be treated differently by the Department than those brought against opposing attorneys or Judges?

d. Should the Acting U.S. Attorney have checked with the Department before lodging such a serious complaint that was later determined to be unfounded?

e. Will you commit to revising the U.S. Attorneys manual to require Department approval before U.S. Attorneys lodge serious complaints against Inspectors General?

f. Seems to me that this would be something very easy to implement and that it would be consistent with the current policy for non-Department attorneys or judges. Why won't you commit today to doing this?

Response to a-f: Mr. Brown did not seek the approval of the Office of Professional Responsibility or any other office at Justice Department headquarters before sending his letter to the Integrity Committee. The U.S. Attorney's Manual provision that you cite is not applicable to such a letter because an Inspector General does not function as an attorney or a judge. For that reason, we do not believe revisions to the U.S. Attorneys Manual are warranted.

Fort Hood Tragedy:

48. The shooting at Fort Hood has raised serious questions about what the Federal Bureau of Investigation (FBI) knew, when they knew it, who the information was shared with, and what was done with that information. I don't want to hinder the ongoing criminal investigation. However, it appears that there was a possible breakdown in information sharing between the FBI and other agencies. I don't want to jump to any conclusions, but I think this Committee needs to exercise its oversight role and get to the bottom of what happened.

I'm particularly interested in a statement released by the FBI on November 9th that stated the investigators knew about communications between Major Hasan and the target of a terrorism investigation but determined, "that the content of those communications was consistent with research being conducted by Major Hasan in his position as a psychiatrist at the Walter Reed Medical Center." (Emphasis added).

a. I find it difficult to understand what type of communications with a possible extremist can be explained away as "consistent with research being

conducted" as part of his job duties. What type of communications would be acceptable between a terrorism suspect and an Army Psychiatrist?

Response: The response to this inquiry is classified and will, therefore, be provided separately.

b. It has been reported that FBI Director Mueller has instructed a FBI "Red Team" to investigate what the FBI knew about Hasan and how that information was handled. When do you anticipate the completion of the investigation by the FBI Red Team?

Response: Pursuant to the President's November 10, 2009, directive to the Intelligence Community, on November 30, 2009, the FBI completed an initial review of the FBI's actions as well as any relevant policies and procedures that may have impacted FBI efforts before the shootings. On December 8, 2009, Director Mueller asked Judge William H. Webster to conduct an independent review that will both look at the initial findings and allow for additional review as Judge Webster and his staff determine appropriate.

c. Will you pledge to cooperate fully with any congressional inquiries into what the FBI knew and when they knew it? Will you pledge to provide access, subject to proper classification procedures, to documents and witnesses requested by Congress?

Response: The FBI has and will continue to cooperate fully with the reviews of this matter consistent with our obligation to preserve the integrity of the criminal case, to maintain national security information, and to keep Congress appropriately informed. The FBI is working with the Department of Justice, the Department of Defense, and other affected agencies to ensure that all requests from Congress are reviewed and responded to consistent with these principles.

FBI/ATF Cooperation:

49. I have long been concerned about jurisdictional "turf wars" between our federal law enforcement agencies. These inter-agency battles are a disservice to taxpayers and more importantly to our public safety. The valuable time wasted on arguing who should be in charge of an investigation is better spent making sure the criminals responsible are arrested and prosecuted. This is especially true of explosives incident investigations between the FBI and ATF.

I have repeatedly asked both the Department and component agencies specific questions on this topic. In fact, one of my questions for the record at the September 17, 2008, FBI Oversight hearing dealt directly with this topic. Director Mueller responded to my question on March 25, 2009, stating "DOJ requested the opportunity to provide consolidated responses on behalf of all involved DOJ components. The FBI has provided its input to DOJ for the preparation of that consolidated response." However, DOJ has not yet responded. Both your staff and mine met on this outstanding response and, despite that meeting, I have received no indication when an official response will be provided.

a. What is the hold-up on this response?

b. What has DOJ done with the information that Director Mueller said was provided to DOJ for the consolidated response?

c. When DOJ received the response from FBI, did it also ask ATF for a response? If so, when was that response received by DOJ?

d. Why has it taken over a year to get an answer?

Response to a-d: The Department responded to a number of the written questions from the March 2008 hearing in September 2008 and is working to complete its review of the remainder of the responses to these questions. We regret the delay in completing that review and will provide a response to the Committee as soon as their review is complete.

With respect to the above-referenced consolidated response by the Department to a Question for the Record that arose from the September 17, 2008, Committee hearing regarding the relationship between the FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Department's Office of the Inspector General (OIG) completed an audit report regarding this relationship, "Explosives Investigation Coordination Between the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives," dated October 21, 2009. The OIG report includes a "Consolidated DOJ Response to Audit Report Recommendations" at Appendix VIII, which can be found here: http://www.justice.gov/oig/reports/plus/a1001.pdf.

FBI/ATF Cooperation:

50. On top of this outstanding request, last month the DOJ OIG issued a report addressing this very issue. I was stunned, but not surprised by DOJ OIG's findings that the AG's 2004 memo regarding coordination of explosives incidents was never implemented because that memo failed to properly define agency roles. The OIG also blamed the Justice Department for not providing clear and specific direction to the FBI and ATF to eliminate the ambiguities. Surveys of FBI and ATF bomb personnel also showed they really don't like to work with each other. Furthermore, bomb incident investigation disputes were not made any better by the 2008 MOU issued by DOJ.

In short, all of DOJ's previous guidance, memos and MOUs have fallen on deaf ears or worsened the already unstable relationship between the FBI and ATF. The FBI Director acknowledged that there are still issues to be resolved with the 2008 MOU at the September oversight hearing. Based on the OIG report and Director Mueller's answer, I am concerned about the Justice Department's current ability to appropriately respond to any type bombing incident.

a. Do you share my concerns about the cooperation between ATF and FBI?

Response: The Department of Justice recognizes the critical importance of a well-coordinated and effective response to explosives incidents. The Department, including the FBI and ATF, is dedicated to keeping our nation safe from those who seek to illegally use explosives to do us harm. We also recognize that it is equally important to adequately train our personnel and to ensure effective information sharing with all appropriate entities within the Federal Government and our State, local and tribal law enforcement partners.

b. What are you doing, personally, to fix this problem?

c. Have you or your Deputy discussed the findings of the OIG report with Directors of the FBI or ATF? If so, what was their response?

Response to b-c: As an indication of the seriousness with which the Department views the issues identified by the OIG audit and the recommendations made by the OIG, the Deputy Attorney General recently convened a meeting with senior leadership of FBI and ATF, including the Deputy Director at FBI and the Executive Assistant Director at ATF, to discuss the importance of, and establish an expedited process to resolve these issues permanently. The Department has created working groups of subject matter experts and leadership from both bureaus on each of the areas of recommendations from the OIG audit – jurisdiction, information sharing, training, and laboratories – to make proposals for resolving these issues. The Deputy Attorney General called on the participants in these groups and their leadership to move quickly to agree on specific timelines for resolving each of the recommendations in the OIG audit and to set benchmarks for success which will be monitored by the Office of the Deputy Attorney General.

d. When can we expect this problem to be resolved between the ATF and FBI? Can I have your guarantee that you will personally work to repair this relationship?

e. Six of the fifteen recommendations by the DOJ OIG were directed specifically at DOJ. They range from delineating new guidelines, coordinating labs to consolidating training and databases. In an October 9th response to the OIG, the Justice Department agreed "in concept" with all 15 recommendations. What is the status of the DOJ progress on this issue? Have you established a timeline for the issuance of a new MOU or AG memo to be issued? What are you doing in the interim to resolve these critical issues?

Response to d-e: We appreciate the constructive recommendations in the Office of the Inspector General audit, which documents the Department's challenges concerning the most efficient application and balance of its explosives enforcement assets and responsibilities and offers some remedies to those challenges. As your question notes, the Department agrees in concept with the recommendations contained in the OIG report on explosives. Because of the

audit findings, we have been engaged in a series of meetings designed to create efficiencies and clarity in the respective mission responsibilities of the ATF and FBI. Nonetheless, we are considering organizational and other changes that may modify how we go about implementing those recommendations in order to achieve the most successful and efficient outcome.

While the OIG audit did address the coordination challenges, it is also equally important to highlight some of the successes and joint efforts between the ATF and FBI. From 2003 through 2008, the ATF and FBI jointly investigated and recommended for prosecution 192 explosives related cases involving 397 defendants. In addition, prior to the audit period, the ATF recognized some of the highlighted issues and began a process to improve the use and function of the Bombing and Arson Tracking System (BATS). In the past year, over 3,000 bomb technician and investigators have received in-person BATS training, and the numbers of agencies and individual users registered in the BATS have increased significantly, facilitating greater information sharing.

It is also important to note that the Joint Program Office (JPO), which is comprised of both the ATF and FBI, has been successful in resolving the types of issues raised in this report. For example, the JPO coordinated the development of community-wide consensus standards for uniform training of explosive-detection canine teams, which will be published in a guidelines document for implementation nationwide. Another example of joint coordination is the Terrorist Explosives Device Analytical Center (TEDAC), which is co-managed by the FBI and ATF. Through TEDAC, the leadership of the FBI and ATF meet regularly to address inter-component issues. Although the FBI and ATF each use their own platforms to manage their forensic reports, intelligence reports and explosives reference material, the systems have been adapted so that both FBI and ATF information is available to TEDAC partners.

The challenges in aligning the explosives missions between ATF and the FBI predate the movement of ATF from the Department of Treasury into the Department of Justice. This issue is one that has evolved over a long period and we recognize that a successful solution will require careful attention by the Department and active monitoring of progress in resolving these issues by Department leadership. Despite the long-standing nature of the problem, the current leadership at the Department is confident that there is an effective way to move forward and bring resolution to the matter as recommended in the OIG report.

f. The problem between the FBI and ATF has always been centered on whether an explosives incident should be classified as terrorist- related or not. How do you propose to overcome this common investigative problem?

Response: As noted above, we have been engaged in a series of meetings designed to create efficiencies and clarity in the respective mission responsibilities of the ATF and FBI, to ensure that the role of each is clear, and the potential for misunderstandings regarding jurisdiction is minimized. Nonetheless, we are also considering organizational and other changes that may modify how we go about implementing those recommendations in order to achieve the most successful and efficient outcome. On December 14, 2009, we convened a meeting with senior leadership from the FBI and ATF to establish a process for moving forward to resolve the recommendations in the OIG Report. We directed the formation of four FBI/ATF working

groups, each focused on one of the four areas of recommendations in the Report: jurisdiction, information sharing, training, and laboratories. Each working group included subject matter experts and representatives of senior leadership from both ATF and the FBI as well as a representative from the Office of the Deputy Attorney General. We directed the working groups to provide concrete options for resolving the issues raised in the OIG report and a roadmap for the Department to decide those issues. This process is ongoing and the Department intends to resolve the jurisdictional issue as soon as possible.

The Department is dedicated to keeping our nation safe from those who seek to use explosives to do us harm. We recognize that it is critically important to define clear roles and responsibilities, to adequately train our personnel, and to ensure effective information sharing with all appropriate entities within the government and our State, local and tribal law enforcement partners. We recognize that a successful solution will require careful attention by the Department and active monitoring of progress in resolving these issues by Department leadership. Despite the long-standing nature of the problem, the leadership at the Department is confident that the steps outlined here provide a way forward that will bring resolution to the matter as recommended in the OIG report.

Grant Programs and Budget:

51. On November 13, 2009, the DOJ Inspector General released an updated list of Top Management and Performance Challenges for the Department of Justice last Friday. For the ninth straight year, Grant Management is listed as a "significant challenge for the Department." The Inspector General stated that this problem is, "particularly acute for the Department in 2009 because in addition to managing over $3 billion in grant funding from its regular fiscal year appropriation, the same grant administrators also must oversee…$4 billion in grants under the Recovery Act."

Year after year, we hear horror stories of DOJ grant programs gone wrong. Under the Recovery Act, DOJ's grant money has more than doubled increasing the probability of fraud and waste. The OIG has provided 43 specific recommendations for best practices in managing grants at the Department. As a simple solution, the OIG has recommended applying audit recommendations to all grants.

a. What is the status of implementing all 43 recommendations and examples of best practices issued by the Inspector General?

Response: The Department is committed to improving the grant management process. Each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 funding and Recovery Act grants. As the Inspector General noted in his November 13, 2009 report of the Department's Top Management and Performance Challenges, "[t]he Department has taken positive steps," and "is demonstrating a commitment to improving the grant management process."

b. Does the Department disagree with any of the 43 recommendations? If so, which ones and why does the Department disagree?

Response: No.

c. When will all the recommendations be implemented?

Response: Each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 and Recovery Act grants, and will continue to do so.

d. Will you support efforts to debar and remove grantees that commit fraud, waste, and abuse from Department sponsored grant programs? Why or why not?

Response: In appropriate cases, the Department's debarring official has proposed debarment and has debarred grantees when the OIG, a United States Attorney's Office, or a grant-making component has notified the debarring official of circumstances justifying such action. The Department's debarring official will continue to do so.

GAO Report on ATF/ICE Cooperation on Weapons Smuggling:

52. In June 2009, the Government Accountability Office (GAO) published a report regarding the U.S. efforts to combat arms trafficking to Mexico. The GAO report states, "ATF and ICE officials acknowledged they need to better coordinate their efforts to leverage their expertise and resources, and to ensure their strategies are mutually enforcing, particularly given the recent expanded level of effort to address arms trafficking." I've been informed of the updated MOU (Memorandum of Understanding) between ICE and ATF signed in June 2009 to improve de-confliction and coordination of firearms investigation.

The GAO also found that DOJ and DHS both need to do a better job of sharing data to better assess southbound weapons smuggling trends. To address this issue, the GAO's principal recommendation was that the "U.S. Attorney General prepare a report to Congress on approaches to address the challenges law enforcement officials raised in this report regarding the constraints on the collection of data that inhibit the ability of law enforcement to conduct timely investigations." Unfortunately, the Justice Department never provided any formal comment on the draft GAO report.

a. The firearms MOU between ICE and ATF has been in place for nearly five months. Has the new MOU improved cooperation and collaboration between these two agencies in the Southwest border region?

Response: ATF and ICE continue to work to improve interagency coordination and cooperation. In that regard, on June 30, 2009, ATF and ICE announced the execution of a new memorandum of understanding (MOU) regarding cooperative guidelines for the handing of firearms investigations. The recently enacted MOU represents an important step toward

the goal of improved interagency coordination and cooperation. In furtherance of this objective ATF and ICE organized two recent senior level conferences to discuss the MOU and cooperative enforcement strategies. The first was held in Albuquerque, NM, from June 29 to July 2, 2009, and in addition to ATF and ICE, also included DEA, FBI, CBP and representatives from the US Attorney community. The second conference was held in San Diego from November 2 through November 5, 2009. That conference was primarily organized by ICE, and in addition to ATF, included CBP.

Improved cooperation between ATF and ICE has resulted in the two agencies partnering for a number of successful joint investigations along the border. For instance, in June 2009, ATF and ICE agents received information regarding the recovery in Mexico of a firearm originally purchased by a Brownsville, Texas resident. The purchaser was interviewed and admitted to being paid to buy two .223-caliber Bushmaster rifles for the ring leader, who was also in the Brownsville area. The joint investigation subsequently identified an additional straw purchaser. ATF and ICE agents interviewed this subject, who admitted to purchasing five firearms. Two of these firearms have been recovered in Mexico and Guatemala. This subject was arrested after the interview, subsequently indicted, and pled guilty in the U.S. District Court for the Southern District of Texas. He is awaiting sentencing. Defendants have admitted to purchasing a total of 29 firearms on behalf of the trafficking ring leader, nine of which have been recovered in Mexico and Guatemala.

Additionally, all seizure information specific to firearms at ports of entry is shared through the El Paso Intelligence Center (EPIC) gun desk which is staffed by ATF and DHS personnel. The agencies believe they are making progress and these efforts will continue at the national and local levels. Additionally, ATF and ICE are also working with several other partners, including the Government of Mexico, on a variety of issues pertaining to the investigation of cross border firearms trafficking and related violence.

b. The GAO recommended you prepare a report to Congress. You never responded. Does your Department plan to prepare this report? If not, why not?

Response: The Department did respond to the GAO's recommendation that the Attorney General prepare a report. As required by law, 31 U.S.C. Section 720, the Department wrote to eight members of Congress and explained the Department's response to all of the recommendations in the Report the GAO issued. Please find attached a copy of one such letter from Lee Lofthus, the Assistant Attorney General for Administration, to Senator Joseph I. Lieberman, dated September 17, 2009 (Attachment 1). Also, the Department provided the GAO with a copy of the letter. For reasons the Department stated in that letter, it will not prepare the report.

c. How many times has GAO recommended the Department prepare a report to Congress and the Department failed to respond?

Response: The Department does not retain such information. The Department routinely responds to recommendations the GAO makes in its reports.

Money Laundering:

53. Illicit proceeds from the drug trade and other criminal enterprise continue to fuel the Drug Trafficking Organizations (DTOs) and terrorists operating around the globe. In the past couple of congresses I've introduced comprehensive money laundering legislation. At our private meeting prior to your confirmation, we discussed the importance of reforming our anti-money laundering laws. In your responses to questions at your confirmation, you pledged your full cooperation to help strengthen our anti-money laundering laws.

I plan to introduce my legislation in the near future. One provision of my comprehensive anti-money laundering legislation will address the Supreme Court decision in *Cuellar v. United States*. This 2008 decision held that the Government must prove a defendant charged with transporting drug proceeds across the border knew the purpose or plan behind the transportation. This creates a very tough hurdle for prosecutors to bring charges against bulk cash smugglers. My legislation fixes this language in the statute consistent with the recommendation of the Supreme Court. Further, witnesses from the Department have explicitly stated their support for this fix in previous testimony before this panel as part of the hearing on the Fraud Enforcement Recovery Act.

a. Will you continue your pledge to support efforts to reform our money laundering laws by ensuring a timely response from the Department to review and comment on this legislation?

b. My bill includes a number of other clarifications to our anti-money laundering laws—including reverse money laundering, blank checks in bearer form, bulk cash smuggling, commingled funds, structured transactions, charging money laundering as a course of conduct, and freezing bank accounts of those arrested for money laundering. Are there any additional concerns that should be addressed? If so, please provide a list of all areas of concern and any possible legislative solutions to correct these concerns.

Response to a-b: In addition to the areas covered in your bill, we recommend that legislation be enacted to make the international money laundering offense, section 1956(a)(2)(A) of Title 18, applicable to tax evasion. We also recommend amending the money laundering statutes to specify that they apply to stored value cards and other forms of e-currencies. We also recommend including additional provisions that were part of your 2007 bill, S. 473 (the Combating Money Laundering and Terrorist Financing Act of 2007). Those provisions address: issuing subpoenas in certain money laundering and forfeiture cases; illegal money transmitting businesses; defining specified unlawful activity to include all foreign and domestic felony offenses; amending the money laundering statute to make it clear that it does not require knowledge that property is the proceeds of a specific felony; and providing for extraterritorial jurisdiction for certain money laundering offenses. Possible legislative solutions relating to the above can be found in the attached testimony of Criminal Division former Acting Assistant

Attorney General Rita Glavin, which was presented to the Committee on February 11, 2009 (Attachment 2).

Mexican Drug Trafficking Organizations:

54. Mexico continues to pose a significant threat to our national security, especially along the Southwest Border. Major drug trafficking organizations are focusing their violence at rival cartels and at the Government of Mexico which is trying to bring an end to their illegal activities, including narcotics trafficking.

a. It is my understanding that corruption continues to plague the Government of Mexico's ability to combat the drug cartels. What is the status of the reform programs and how long do you believe it be for these reforms to take hold?

Response: The Government of Mexico is working to enhance its internal integrity systems and anti-corruption mechanisms to foster and ensure public confidence and trust. The Department of Justice is assisting Mexico's efforts through various programs.

For example, in response to the Calderon administration's desire to improve the operational integrity and administrative effectiveness of SIEDO (Subprocuraduria de Investigaciones Especializada en Delinquencia Organizada - Mexico's Office of Specialized Investigation Against Organized Crime), upon urgent request from then-Mexican Attorney General Eduardo Medina-Mora, the United States Drug Enforcement Administration (DEA) led a review team, consisting of DEA and Department of Justice experts in security, criminal investigation, intelligence, law, and internal affairs, to observe the policies and procedures at SIEDO and provide recommendations for their improvement. After several site visits and personnel interviews, the team prepared recommendations to improve security standards and operational abilities, all of which impact corruption at SIEDO.

On a broader basis, pending legislative reforms, including drafting of a new Criminal Procedure Code, will enhance Mexico's anti-corruption efforts. These reforms, in which Mexico's criminal justice system is expected to transition from an inquisitorial system to an accusatory system, will help ensure procedural fairness and judicial efficiency within Mexico's trial process.

The Government of Mexico has required that the Procedural Code Reform be completed by 2016. This serves as a reminder that the transition from an inquisitorial system to a more accusatory system is difficult, complex, and is a sometimes exceedingly slow process. We know from experience in countries throughout the world, including Colombia, that this process can take between five and ten years. And while we recognize fully the breadth and enormity of the challenge Mexico faces in transitioning to an adversarial system, we are committed to facing this challenge with them. We have also learned, through our assistance efforts in Colombia and elsewhere, that these reforms can and do work and will result in a better functioning criminal justice system. During this complex process, we will be steadfast in our commitment and support of our Mexican counterparts.

We also support the development of vetted law enforcement units, through which the most sensitive and complex investigations will be handled by investigators and prosecutors who have passed vigorous background and integrity checks. We are providing assistance to Mexico in developing and implementing sound vetting procedures, which, in the end, will help root out corruption and not let it halt progress in Mexico.

Effective anti-corruption efforts are cross cutting and require the political will of a country's leadership. The Government of Mexico has prioritized anti-corruption efforts. This is a critical mission and we applaud the commitment that the Government of Mexico has already made. This will be a lengthy process, but one that the Department of Justice will continue to support.

b. It is my understanding that the Obama Administration is already looking beyond the first Merida Initiative to provide additional training and assistance to Mexico. What counter-narcotics programs would DOJ want to see in a possible second Merida assistance package to Mexico and why?

Response: The Department of Justice will seek to build on gains made during the first Merida assistance package. We will continue to work together with our Mexican colleagues as Mexico continues to build the institutional capacity to effectively and efficiently investigate and prosecute criminal cases. In doing so, DOJ will continue to look to our interagency partners for their assistance and cooperation in helping advance the abilities and expertise of Mexican prosecutors and law enforcement in the pursuit of dismantling drug trafficking organizations.

A critical component of anti-cartel activities is the continued development and support of vetted units of Mexico law enforcement officials and prosecutors. Vetted units are staffed by police, investigators and prosecutors who have passed vigorous background and integrity checks – persons who can be trusted to handle the most sensitive and complex cases. Merida funding to support vetted unit development is imperative. As we work with our Mexican counterparts to enhance investigative and prosecutorial capabilities, we anticipate an increased training focus on the financial underpinnings of drug trafficking organizations, such as money laundering, bulk cash smuggling, and asset forfeiture efforts, as well as efforts against precursor chemical diversion and trafficking. We also foresee assisting in efforts to extend special investigative tools including undercover investigations.

We also support Mexico's efforts to further develop witness protection, courthouse security, and judicial security assistance programs.

Medical Marijuana Decriminalization:

55. The Administration's recent decision to drastically change counternarcotics enforcement policy and move toward decriminalization of marijuana in states that have state laws allowing medicinal use of marijuana is troubling. This sends the wrong message to kids, parents, and the drug cartels. Further, this decision to not enforce federal law in these states raises serious questions about how state and local

partners, particularly those jurisdictions that opt-out of state laws allowing medicinal marijuana, will interpret this decision. These jurisdictions that opt-out may now be left to combat illegal marijuana distributors and growers without the assistance of federal law enforcement. Will the Department, including component law enforcement agencies, provide investigative and prosecutorial support local law enforcement in jurisdictions that opt-out of state medicinal marijuana laws? If not, why?

Response: The Department and its component law enforcement agencies will continue to enforce federal laws throughout the country in accordance with the Controlled Substances Act. The Department is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. Accordingly, the DEA will continue to focus and direct its limited investigative resources toward international and domestic drug trafficking organizations involved with the manufacture and distribution of marijuana for profit.

Nor does the Department endorse purported "medical" uses of controlled substances, including marijuana, except as approved by the Food and Drug Administration. Medications should be evaluated by scientific standards as determined by the FDA, not by popular vote. This is how safe and effective medications have been approved for decades. Science, not the political process, should determine which medicines are safe, effective, and appropriate.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources are directed towards these objectives.

As a general matter, in pursuing these priorities, the Department and its law enforcement components do not focus their investigative and prosecutorial resources on sick and/or terminally ill patients who use marijuana as part of a recommended treatment regimen consistent with applicable state law. Such conduct has never been a focus of the Department's enforcement efforts.

The Department's enforcement guidance does not "legalize" marijuana. To the contrary, the guidance explicitly states that use or distribution of marijuana remains illegal under federal law. Drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask their activities will face federal prosecution. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority.

Moreover, the Department and its component agencies, particularly the DEA, are committed to providing continued investigative and prosecutorial support to state and local law enforcement in all jurisdictions, regardless of a state's medicinal marijuana laws.

Marijuana from Mexico:

56. Mexico is a major producer of marijuana grown for the U.S. market. I'm concerned that the current Administration's stance on marijuana at home could impact international policy on marijuana enforcement.

a. Given that Mexico is the primary foreign source of marijuana for the United States, what steps are being taken by the Department of Justice to address future increases in the flow of marijuana into the United States?

Response: Mexico has been the principal source area for U.S. destined foreign marijuana for decades. The prevalence of marijuana and the continuing high demand for it make marijuana one of the foremost drug threats in the U.S. The stable market for illicit marijuana often provides the financial wherewithal for drug traffickers to bankroll other criminal activity, including the production and/or distribution of other illicit drugs, like methamphetamine and cocaine. According to a 2008 interagency report, marijuana is the top revenue generator for Mexican drug trafficking organizations —a cash crop that finances corruption and the carnage of violence year after year. The profits derived from marijuana trafficking – an industry with minimal overhead costs, controlled entirely by the traffickers – are used not only to finance other drug enterprises by Mexico's polydrug cartels, but also to pay recurring "business" expenses, purchase weapons, and bribe corrupt officials. Though the Government of Mexico has a robust eradication program, many of the military personnel traditionally assigned to eradicate marijuana and opium poppies have recently been diverted to the offensive against the cartels.

As a result, the Department of Justice has long targeted marijuana trafficking organizations both domestically and in Mexico, for investigation and anticipated disruption and dismantlement, and will continue to do so. Just last month, the Department promulgated its Strategy for Combating the Mexican Cartels. Pursuant to that Strategy:

> It is a priority of the Department of Justice to disrupt and dismantle the Mexican drug cartels, bring to justice their leadership, and stem the growing violence and associated criminal activity perpetrated by the cartels, both along the Southwest Border and throughout the Nation. . . .
>
> The Department's Strategy will be executed through the proven mechanism of prosecutor-led, intelligence-driven multi-agency task forces, with the Organized Crime Drug Enforcement Task Forces (OCDETF) Program serving the primary coordinating function. . . .
>
> The Department has embraced a model to achieve these comprehensive goals that is proactive, in which we develop priority targets through the

extensive use of intelligence. . . . Sharing information, we build cases, coordinating long-term, extensive investigations to identify all the tentacles of a particular organization. Through sustained coordination of these operations, we are able to execute a coordinated enforcement action, arresting as many high-level members of the organization as possible, disrupting and dismantling the domestic transportation and distribution cells of the organization, and seizing as many of the organization's assets as possible, whether those assets be in the form of bank accounts, real property, cash, drugs, or weapons. Finally we prosecute the leaders of the cartels and their principal facilitators, locating, arresting, and extraditing them from abroad as necessary. In this effort, we coordinate closely with our Mexican counterparts to achieve the goal: destruction or weakening of the drug cartels to the point that they no longer pose a viable threat to U.S. interests and can be dealt with by Mexican law enforcement in conjunction with a strengthened judicial system and an improved legal framework for fighting organized crime.

b. Will the recent decision to abandon enforcement efforts in states that allow medicinal marijuana use impact the broader strategy against Mexican marijuana? If not, why not?

Response: The Department of Justice has not "abandoned" enforcement efforts on marijuana in any states. The Department and its component law enforcement agencies will continue to enforce federal laws throughout the country in accordance with the Controlled Substances Act. The Department is committed to the enforcement of the Controlled Substances Act in all States. The Department's recent guidance regarding effective use of limited investigative and prosecutorial resources will have no impact on our broader strategy against Mexican marijuana. The Department's guidance simply clarifies that our limited federal resources should be used to target major drug traffickers – precisely the kind of people who seek to illegally import Mexican marijuana into the United States. Moreover, the guidance makes clear that the Department will continue to investigate and prosecute people whose claims of compliance with State and local law conceal operations inconsistent with the terms, conditions, or purposes of those laws, which would certainly include anyone involved in illegal efforts to import or distribute Mexican marijuana in the United States.

Afghanistan Counternarcotics Strategy:

57. In Afghanistan, I believe we must use a comprehensive counter-narcotics approach that incorporates interdiction, alternative development and even eradication. The Obama Administration has shifted its counter-narcotics strategy to place a greater emphasis on interdiction which requires an increase in DEA manpower and assets. The Senate Drug Caucus recently held a hearing on Counternarcotics Operations in Afghanistan after which Michael Braun, the former DEA Chief of Operations, stated in a follow up question that he would recommend establishing 5 to 7 additional FAST teams to conduct operations in Afghanistan to fulfill their mission.

a. Do you believe we have enough FAST teams in place to ensure the success of the program? If not, how many additional FAST teams would you recommend establishing?

Response: Prior to FY 2009, there were three FASTs dedicated to Afghanistan. Two additional FASTs were added for the transit and source zone Western hemisphere operations during FY 2009. While additional FASTs would always be a welcome addition, we believe DEA can be effective in Afghanistan with the resources we have. The most significant limiting factor we face in Afghanistan is helicopter lift. DEA must have adequate helicopter lift capability that is night capable and flown by veteran pilots.

b. What efforts are being made to shut down the major opium trafficking routes, especially along the Afghan border?

Response: The DEA has a multi-objective approach to combating the trafficking of opium throughout Afghanistan and to restrict the movement of opium across Afghanistan's borders to neighboring countries. Specifically, in the last two years, DEA enforcement operations have targeted opium markets and bazaars close to the Afghanistan border in northern (Konduz), southern (Spin Boldak), eastern (Khowst) and western (Herat) provinces. These operations have resulted in record seizures of narcotics, to include 25 metric tons of opium and 53 metric tons of hashish in 2009.

The DEA supports the Afghan National Drug Control Strategy (NDCS) under the Law Enforcement and Interdiction Pillar; one of eight pillars of the NDCS. The DEA's lead role within the U.S. Government under the Interdiction Pillar strengthens the legitimacy of the Government of the Islamic Republic of Afghanistan (GIRoA) by enhancing its ability to conduct law enforcement operations and extend the Rule of Law to provinces where tribal law, corrupt officials, and insurgent forces operate at will. Lack of governance, corruption, and the nexus between drugs and the insurgency have seriously destabilized the GIRoA. By destroying drug organizations abroad, the DEA is able to deny a source of funding to terrorists and extremists, assist in stabilization efforts and ultimately protect the United States from terrorist activities.

In support of the NDCS Law Enforcement and Interdiction Pillar, DEA operations and programs in Afghanistan are aligned under two broad objectives. The first objective is synchronized with the primary objective of all DEA foreign offices: to work with its host-nation counterparts in order to identify, investigate, and dismantle the largest drug trafficking organizations (DTO). This will include the targeting of corruption that is made possible through the use of proceeds from drug trafficking. The DEA is unique in this regard, as its network of overseas offices and extensive relationships with host-nation counterparts facilitate the evolution of bilateral investigations of DTOs into transnational multi-lateral investigations. Within Afghanistan, the DEA's efforts are and will remain focused on investigating DTOs that have been identified as having ties to the insurgency. These DTOs are internally designated as Regional High Value Targets (RHVT), and those located in or exercising significant influence on Helmand Province will receive the bulk of our investigative resources during the next three to six

months. The DEA has spent decades developing ties to the nations bordering Afghanistan (with the exception of Iran). These relations allow the DEA to develop a regional strategy to deal with not only the production of illicit drugs in Helmand, but the customers receiving the drugs in bordering countries. The DEA will leverage those resources to mount a full scale attack on the DTOs in the targeted regions.

The DEA's second objective in Afghanistan is to develop the capacities of its host-nation counterparts; DEA capacity-building efforts are primarily focused on three specialized units of the Afghanistan Counter-Narcotics Police (CNP-A). The three specialized units include a Sensitive Investigative Unit, a Technical Investigations Unit, and a National Interdiction Unit. Excellent working relationships between the DEA, the Department of Defense (DoD), and the Department of State (DoS) have focused capacity building efforts on these three units, combining training, equipment, and infrastructure with mentoring and operational interaction with DEA enforcement groups, DEA training teams, and experienced mentor/advisors. These specialized units have developed to the point where they are operationally capable -- with limited support from coalition members -- and they are currently engaged with the DEA on a daily basis participating in joint operations and investigations.

At the request of the National Security Council (NSC) and in support of the Law Enforcement and Interdiction Pillar, the DEA initiated the U.S. Special Forces-trained Foreign-deployed Advisory and Support Teams (FAST). FAST's primary enforcement priority is to support the U.S. Government's foreign drug policy and enhance the U.S. Embassy Country Teams by strengthening the host nation counterparts capabilities and expertise. FAST personnel advise, train, and mentor host nation counterparts to build Host Nation capacity. FAST is a component of the DEA's operational campaign plan in Afghanistan and has taken the lead in synchronizing and integrating all operations with the U.S. Military targeting High Value Target Organizations (HVTs), networks affiliated with the insurgency, and terrorist organizations.

Illicit Currency Transfers in Afghanistan:

58. One tenet of President Obama's proposed Counternarcotics Strategy is a focus on stopping the flow of drug money to the insurgents who are using it to destabilize the country and support their terrorist activities. This may be difficult because much of the Afghanistan economy uses cash, trade and an elaborate system of hawaladars to move value.

a. It is my understanding that the Afghan Threat Finance Cell, which the DEA leads, is currently just assessing threat finance in the country but not actively conducting operations. When do you believe it will begin to conduct operations?

Response: The ATFC started to become operational in February 2009 following the January 28, 2009, delivery of its first shipment of equipment. It is currently staffed by 32 investigators and analysts from the U.S. military, U.S. law enforcement and intelligence agencies, with the majority of staff arriving in the last few months. Throughout 2009, ATFC staffing has been increasing towards the proposed staffing level of 49. In addition to the involvement of U.S.

agencies, the ATFC includes law enforcement officials from the United Kingdom and Australia and conducts many of its activities with Afghan officials. The ATFC primarily works with Afghan vetted units, and its current partners include the DEA's vetted Sensitive Investigative Unit (SIU), the National Directorate of Security, and the central bank's Financial Transactions and Reports Analysis Center for Afghanistan (FINTRACA).

Since its inception, the ATFC has identified a number of financial facilitators operating in Afghanistan with ties to insurgents, narcotics traffickers, criminal organizations and corrupt governmental officials. The ATFC developed target packages for these facilitators and is working with U.S./coalition law enforcement agencies, U.S./International Security Assistance Force (ISAF) military units, and Afghan authorities to disrupt and dismantle the financial organizations controlled by these facilitators. In order to incorporate the expertise of the various U.S. coalition and Afghan agencies involved in the ATFC, a majority of the ATFC operations and initiatives are conducted utilizing information obtained via judicially authorized telephone intercepts.

The ATFC works in conjunction with vetted members of the Afghan National Police, vetted prosecutors, and vetted members of the Afghan judiciary to obtain court orders to intercept telephonic communications between targets of their operations. The information developed as a result of these intercepts can be presented in Afghan and U.S. courts. The ATFC works closely with members of the U.S. Embassy interagency community, ISAF military units, and coalition and Afghan partners to focus their limited resources on high level financial targets who have a nexus to insurgent/terrorist groups operating in the region.

In an operation which was conducted in August 2009, members of the ATFC, in conjunction with Afghan authorities and members of ISAF, identified a Kabul-based hawaladar believed to be funneling funds from narcotics trafficking groups and a foreign government to the insurgency and corrupt government officials. Intelligence was developed indicating that a large amount of the funds were being used to purchase components to make improvised explosive devices. As a result of a joint investigation and operation conducted by the ATFC, ISAF, and Afghan officials, evidence was obtained which resulted in a raid on the hawaladar. Additional evidence, obtained as a result of this raid, led to the identification of a network of other hawaladars involved in the movement of funds from individuals affiliated with a foreign government to insurgent groups, the identification of a human trafficking group in Australia, several heroin and money laundering organizations operating in the United Kingdom, and a heroin/money laundering network in the Netherlands. These countries have taken ATFC provided information and are conducting investigations into the organizations identified as a result of the ATFC raid. Additionally, a large amount of documentary, computer and telephone information was obtained as a result of this raid, and this information was passed to members of the U.S. Intelligence Community for additional analysis and exploitation.

Since the ATFC began operations, it has stressed the importance of ensuring that information that has been collected and obtained is disseminated throughout the U.S. intelligence, law enforcement, ISAF, and Afghan communities in a timely and expedient manner. To date, the ATFC has generated over 70 Intelligence Information Reports (IIR's)

containing information on financial facilitators and networks. These IIR's are made available to a wide array of organizations throughout the U.S. Government.

b. What do you believe is the most significant financial threat to ISAF troops operating in the country?

Response: The ATFC was established to identify and disrupt the various sources of funding for insurgent and terrorist organizations operating in Afghanistan. These sources include funds from involvement in various stages of the narcotics trade, funds received from outside donors, funds received from other criminal activities (e.g., extortion, kidnapping), and funds received from insurgent groups operating businesses. However, members of the ATFC have indicated that the most serious threat they face is the public corruption that appears endemic throughout various levels of the Afghan government.

c. What additional recommendations would you make to improve our ability to stop the flow of drug money to the insurgents?

Response: The United Arab Emirates (UAE) serves as the hub for financial activity throughout the region. There continues to be concern among the international community that insurgent, terrorist, and criminal organizations may be using the UAE financial infrastructure to move funds throughout the region and the world. The United States and the UAE are working together to combat terror finance. UAE officials have assisted the ATFC in a limited capacity on several ongoing investigations and we look forward to continuing this cooperation.

FBI Whistleblower Retaliation:

59. On March 25, 2007, the DOJ OIG found that the FBI retaliated against Robert Kobus, a Senior Administrative Support Manager in the NY Field Office. The DOJ OIG found that the retaliation was in response to protected whistleblowing by Mr. Kobus. Why hasn't the FBI implemented the corrective action ordered by the DOJ OIG?

Response: On March 15, 2007, DOJ's Office of the Inspector General (OIG) recommended the following: "As corrective action we recommend that OARM [DOJ's Office of Attorney Recruitment and Management] direct the FBI to restore Kobus to the position of a senior administrative support manager in the New York Field Division, or an equivalent position." The FBI identified several open positions available to Mr. Kobus. After rejecting several offers, Mr. Kobus accepted and was placed directly into a newly created Administrative Officer position in approximately December 2007/January 2008, changing both his supervisor and work location.

FBI Whistleblower Retaliation:

60. The DOJ Office of Attorney Recruitment and Management (OARM) received an FBI appeal of the IG's findings in March of 2007, but still no hearing has been held and no resolution of Mr. Kobus's case has been issued by OARM more than 2.5

years after the appeal was filed. Why is the process taking so long? What is a reasonable amount of time in your view for a case such as this to be resolved?

Response: The time required for the Department's final resolution of FBI whistleblower cases depends on 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 deadlines for which are usually extended due to requests made by the parties); the voluminous nature of the case files and record evidence; the number and length of hearings (if requested and granted) and OARM's opinions (which typically range between 20-60 pages); a possible stay of OARM proceedings pending resolution of any concurrently filed federal court cases (involving Title VII/EEO claims); and the pendency of other cases before OARM.

OARM has been conducting appropriate and necessary proceedings regarding Mr. Kobus' Request for Corrective Action since it was filed in May 2006. Subject to a change in circumstances, a ruling could be issued by OARM within the next several months.

61. I understand that Mary Galligan, one of the FBI officials cited by the IG for retaliation against Mr. Kobus, has since been promoted to the position of Chief Inspector of the FBI at FBI Headquarters. What kind of message does this send to other employees that a supervisor who has been cited for whistleblower retaliation has been promoted to head of inspections at the FBI, while, at the same time, no decision has been made by the DOJ on the FBI's appeal of the IG's findings in favor of Mr. Kobus?

Response: Please see the response to Question 62, below.

62. Did Director Mueller, or other officials participating in the decision, know of the IG's findings of retaliation involving Ms. Galligan at the time she was promoted? If not, why not?

Response to 61 - 62: Prior to any executive promotion or selection within the FBI, the FBI conducts disciplinary reviews of the records of the FBI's OPR, Inspection Division, Office of Equal Employment Opportunity Affairs, and Security Division, and of DOJ's OIG, OPR, and Criminal Division, for all prospective candidates.

Internal disciplinary reviews, covering Mary Galligan's entire career, were conducted prior to her selection as Chief Inspector. DOJ records did not disclose any pending OIG investigation regarding Ms. Galligan and the FBI's OPR records revealed that an administrative inquiry involving Ms. Galligan had concluded that allegations that she had retaliated against an FBI employee (not identified) were unsubstantiated.

Following these checks, on June 30, 2009, the FBI Director selected Ms. Galligan for the position of Chief Inspector.

63. Mr. Kobus filed his complaint under 5 U.S.C. § 2303, which provides the statutory authority creating baseline whistleblower protections for FBI employees. Under that law, FBI employees are required to file their whistleblower retaliation complaint with the DOJ OIG or DOJ OPR, and in this case the OIG, make specific findings of retaliation after conducting a thorough investigation of Mr. Kobus's whistleblower complaint. As shown in this case, the OIG plays an important role in investigating whistle blower retaliation and produces significant information that an employee who alleges whistleblower retaliation would not otherwise have access to.

In a last minute amendment prior to the Homeland Security and Government Affairs Committee mark-up of the Whistleblower Protection Enhancement Act of 2009, S. 372, the Administration included a provision that would repeal section 2303 and eliminates the IG's role in FBI whistle blower cases. I asked Director Mueller about the origins of this provision at the last FBI oversight hearing and am still awaiting a response. However, I remain concerned about how and why this amendment came to be.

It appears to me that there is still hostility to whistleblowers at the FBI and the Department of Justice. You have publicly stated your support for whistleblowers. Do you support repealing 5 U.S.C. § 2303 and eliminating the OIG's role in FBI whistle blower cases? If so, please provide a detailed explanation as to how you reconcile previous statements supporting whistleblowers with repealing this important protection.

Response: The Department of Justice strongly supports protecting the rights of whistleblowers and recognizes the invaluable role that whistleblowers play in unearthing waste, fraud, and abuse. The Department does not support eliminating OIG's role in FBI whistleblower cases.

QUESTIONS POSED BY SENATOR KYL

Constitution's Naturalization Clause:

64. The Supreme Court repeatedly has held that the Congress has exclusive authority to determine who may enter the United States pursuant to the grant of authority in the Constitution's Naturalization Clause.[2] Congress has exercised that authority by enacting the Immigration and Nationality Act, which explicitly prohibits admission of aliens who have "engaged in terrorist activity," including those who are members of terrorist organizations, those who endorse or espouse terrorist activity, and those who have received military-type training on behalf of a terrorist organization.[3]

a. Have the detainees presently held at Guantanamo Bay been "engaged in terrorist activity," for purposes of the Immigration and Nationality Act?

Response: "Engaged in a terrorist activity" in the Immigration and Nationality Act (INA) both incorporates the phrase "terrorist activity," which is defined therein, and adds additional activities beyond those contained in the definition of "terrorist activity." Based on those definitions and the information we have about each of the detainees at Guantanamo, it is likely that many of the current GTMO detainees have engaged in activities that would make them ineligible for admission under the INA. Additionally, Congress in separate legislation has specifically prohibited both their release into the United States and the use of DHS funds to provide any immigration benefit to Guantanamo Bay detainees (other than parole into the U.S. for prosecution and related detention). Thus, there has been no occasion to make specific determinations regarding the application of the terrorist activity provisions of the INA in order to determine which of the detainees "engaged in terrorist activity" as that term is used in the INA, 8 U.S.C. § 1182(a)(3)(B).

b. Assuming *arguendo* that there were no Congressional restrictions on the use of appropriated funds for transfer of detainees, what affirmative statutory authorization do you have to admit Guantanamo Bay detainees into the United States for prosecution?

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[2] U.S. CONST. Art. I, § 8, cl. 4; *see, e.g.*, *Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954*); Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Fok Yung v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

[3] 8 U.S.C. § 1182(a)(3)(B).

Response: The Administration has no plans to "admit" any Guantanamo detainees into the United States. "Admission" is a term of art in the INA, and means with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

Following standard procedures regularly used by the Department of Homeland Security (DHS), detainees at Guantanamo Bay need not be admitted into the United States in order to be prosecuted here. They may be paroled into the United States under section 212(d)(5) of the INA. In immigration law, "parole" is a term of art, and section 212(d)(5) specifically provides that parole "shall not be regarded as an admission" into the country. Paroled individuals are treated as though they were still at the border applying for admission throughout their period in the country. Under section 552(f) of the DHS Appropriations Act, 2010, Pub. L. No. 111-83 (DHSAA), DHS funds may not be used to provide any immigration benefit to Guantanamo Bay detainees except for parole into the United States "for the purposes of prosecution and related detention." Such aliens would be paroled into the U.S. subject to appropriate conditions and not admitted into the U.S.

c. Assuming *arguendo* that there were no Congressional restrictions on the use of appropriated funds for transfer of detainees, what affirmative statutory authorization do you have to admit Guantanamo Bay detainees into the United States for detention not in conjunction with a prosecution?

Response: Please see response to Question 64b.

Although as a general matter parole may be granted in the Secretary's discretion for "urgent humanitarian reasons or significant public benefit," which could include purposes other than criminal prosecution, under current law, DHS funds may not be used to provide any immigration benefit to Guantanamo Bay detainees except for parole into the United States "for the purposes of prosecution and related detention."

Interagency Task Force on Detention Policy:

65. After you testified before the Committee on June 17, 2009, I asked you to identify the legal basis that the Department of Justice could invoke to prevent a Guantanamo Bay detainee from being released into the United States if found not guilty in a federal court. In your October 29 response, you did not identify any legal basis to continue to hold an acquitted detainee, but you did provide the following answer: "There are a number of tools at the government's disposal to ensure that no such detainee is released into the United States, all of which are currently being reviewed by the Special Interagency Task Force on Detention Policy that was created pursuant to Executive Order 13493."

a. Has the Special Interagency Task Force on Detention Policy finished its review of the government's options to prevent the release of an acquitted detainee, at least with respect to Khalid Sheikh Mohammed and the other 9/11 conspirators who you already have announced will be prosecuted in federal court?

Response: The Detention Policy Task Force established by Executive Order 13493 completed its work on January 22, 2010.

b. If so, please identify the legal basis that the Department of Justice could invoke to prevent these individuals from being released into the United States if one or more is found not guilty in a federal court.

Response: Current law bars release of any Guantanamo Bay detainee into the United States. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011(a) (2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Div. B of Pub. L. No. 111-117, § 532(a) (2009); Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 428(a) (2009); and Department of Homeland Security Appropriations Act (DHSAA), 2010, Pub. L. No. 111-83, § 552(a) (2009). Moreover, as a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the question of whether the government has authority to detain under the authority provided by Congress in the 2001 Authorization for Use of Military Force (AUMF), as informed by the law of war. This authority could be relied upon, where appropriate, to detain individuals after an acquittal, whether in a military commission or in federal court. The Administration may also choose to repatriate or resettle any such individuals where consistent with national security, as occurred during the last Administration with respect to two individuals who received only short sentences after military commission prosecutions. Finally, the authority to detain under immigration authorities pending removal from the United States is also a separate legal issue. Immigration authorities may be relied on to hold in immigration detention non-citizens who have been acquitted or who have completed their criminal sentence and who endanger the national security, pending their removal from the United States. We note, however, that normal operation of the immigration laws may be altered by the spending restrictions of the DHSAA.

Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond - witness Michael Edney:

66. In response to a written question following the July 28 hearing entitled "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond," witness Michael Edney said: "Relying on *Zadvydas*, a court may hold that a Guantanamo detainee—transferred to the United States and acquitted on U.S. soil—has a constitutional right to be released in the United States within six months if no foreign country can be found to take him. If kept at Guantanamo, detainees would not have such a right under the *Zadvydas* line of cases and the territorial distinction those cases draw."[4]

a. Is there any possibility that a court could, relying on the *Zadvydas* decision, conclude that a Guantanamo detainee acquitted on U.S. soil could not be held indefinitely?

Response: The Court's decision in *Zadvydas* ultimately was based on construction of a particular statute, rather than on any constitutional holding. Furthermore, in its discussion of possible constitutional limitations, the Court cautioned that it was not considering "terrorism or

[4] Written responses of Michael Edney to questions by Senator Kyl, Oct. 28, 2009, 7-8.

other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." As noted in the response to Question 65, the various statutory authorities under immigration law may provide one avenue to continue to detain Guantanamo detainees where necessary, even were they to be acquitted after a trial. Law of war detention under the 2001 AUMF is another basis for continued detention where appropriate. And current federal law expressly bars release of any Guantanamo Bay detainee into the United States.

b. If there is the possibility that a detainee could not be held indefinitely post-acquittal, has the Administration identified a foreign country that would be willing to accept transfer of Khalid Sheikh Mohammed and the other 9/11 conspirators who will be prosecuted in federal court, in the event that the government is unable to obtain a conviction?

Response: Please see the response to Question 66a.

c. In enacting the PATRIOT Act, Congress added a provision to the Immigration and Nationality Act authorizing continuing detention of aliens who are certified by the Attorney General to be terrorists.[5] Under the statute, the Attorney General may continue to hold a terrorist indefinitely, subject to periodic reviews of the detainee's certification as a terrorist. That authority, however, has never been tested in court. Is there a risk that the Supreme Court could conclude, drawing on the analysis set forth in *Zadvydas*, that this terrorist detention authority is unconstitutional?

Response: Please see the response to Question 66a.

d. This terrorist detention statute allows detained terrorists to bring habeas corpus actions in the federal district courts. Do you know what the government's burden will be to establish the continued dangerousness of a terrorist detainee who seeks release in federal court? How do you plan to meet that burden if the detainee has been tried but not convicted of terrorism-related criminal charges in civilian court?

Response: In order to certify an alien for detention under INA § 236A, the statute provides that the Attorney General must have "reasonable grounds to believe" the alien is either "described in" specific national security-related provisions of the INA, including but not limited to the "engaged in a terrorist activity" provisions of INA § 212(a)(3)(B), or "is engaged in any other activity that endangers the national security of the United States." This "reasonable grounds to believe" standard has historically been interpreted to mean evidence sufficient to meet a probable cause standard. That is substantially lower than the "beyond the reasonable doubt" standard required for a criminal conviction. Additionally, the "engaged in a terrorist activity" grounds in the INA includes significantly more conduct than that covered under the criminal provisions. Hence, a criminal acquittal should not adversely affect the certification legal standard under § 236A – which is essentially equivalent to that required to obtain a criminal search warrant.

[5] INA § 236A, 8 U.S.C. § 1226A.

Six months after the initial certification (and every six months thereafter), if the alien has not been removed and removal is "unlikely in the reasonably foreseeable future," in order to continue the alien's detention, the statute provides that the Attorney General must determine that "the release of the alien will threaten the national security of the United States or the safety of the community or any person." INA § 236A(a)(6). The re-certification and continued detention "will threaten" criterion differs from the initial certification standard; it is a predictive judgment of future threat to the national security – a discretionary determination to be made by the Secretary DHS/Attorney General.

Accordingly neither the initial certification nor subsequent re-certifications under § 236A would be controlled by criminal acquittal.

e. This statute also provides that the power to detain a terrorist "shall terminate" if "the alien is finally determined not to be removable." Do you have any reason to believe that the failure to make such a determination will not be subject to second-guessing in a federal court?

Response: We think it will rarely, if ever, be the case that a terrorist detainee could be found not to be removable under the INA.

Prosecution Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

67. In order to prosecute Khalid Sheikh Mohammed and other 9/11 conspirators in federal court, many U.S. citizens will be asked to serve as jurors.

a. Has the Department of Justice conducted a risk assessment of whether jurors and their families could become targets of violence from al Qaeda operatives or other terrorist sympathizers? If so, how did this consideration factor into the decision to prosecute some 9/11 terrorists in federal court?

Response: Ensuring the security of the public is one of the most important issues the Department considered in making this decision. While the U.S. Marshals Service has not conducted a specific risk assessment on the particular issue of prospective jurors and their families becoming targets, subject matter experts in the U.S. Marshals Service, with extensive experience in risk management, protective investigations and protective response, have conducted an overall risk analysis in connection with the decision to pursue this prosecution in federal court. Based on consultations with the U.S. Marshals and our review of other information concerning the security of conducting terrorism trials in the United States, as well as the long history of successful terrorism trials in our country, we are confident that holding and trying accused terrorists in federal courts can occur safely.

b. What are the range of protections that might be necessary to ensure the safety of jurors and their families both during trial and post-trial?

Response: The U.S. Marshals Service (USMS) has provided protection to jurors for many years. The USMS employs a robust behavioral-based methodology to investigate and mitigate threats and inappropriate communications directed to jurors and other USMS protectees. This investigation and mitigation is one part of the USMS protective response. The second part is the range of physical protection that the USMS can utilize to complement the protective investigation of threats or inappropriate communications.

The protective response is generally determined at in consultation with the trial judge and our partners in the Federal Bureau of Investigation. The FBI is responsible for the criminal investigation of threat activity while the USMS is responsible for threat mitigation via protective investigation and providing a protective response. There are several options for the physical protection of jurors, including: the seating of an anonymous jury, USMS transportation of jurors to and from the trial venue, partial sequestration of jurors, and full sequestration of jurors. These options are scalable and are dictated by current threat activity and consultation with our partners in the court and FBI.

Prosecution of Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

68. Now that the Administration has made a final decision to bring Khalid Sheikh Mohammed and other 9/11 conspirators to the United States for prosecution, please provide this Committee with any memoranda written by the Office of Legal Counsel articulating what additional constitutional and statutory rights detainees may receive by virtue of their presence in the United States that are not currently available to them at Guantanamo.

Response: Please find attached a memorandum concerning the application of the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

69. When you announced that you were authorizing prosecutor John Durham to investigate whether CIA employees violated the law in interrogations of overseas detainees, you issued a statement that your decision was made after you had "reviewed the [Office of Professional Responsibility] report in depth" and "closely examined . . . the 2004 CIA Inspector General's report, as well as other relevant information available to the Department." In contrast, it has been reported that you did not personally review the declination of prosecution memoranda by career prosecutors. For instance, on September 19, 2009, the *Washington Post* reported: "Before his decision to reopen the cases, Holder did not read detailed memos that prosecutors drafted and placed in files to explain their decision to decline prosecutions."

a. Prior to your decision to open the preliminary investigation, did you personally read all of the memoranda of career prosecutors that explained their decisions to decline prosecutions?

b. In announcing your decision to prosecute Khalid Sheikh Mohammed and other 9/11 conspirators in federal court, you stated that you "personally reviewed these cases." Why did you personally review the files of foreign al Qaeda terrorists before making a decision regarding their prosecution, but not review the memoranda written by career prosecutors explaining why U.S. citizens employed by the CIA should not be prosecuted?

Response to a-b: In both of these matters, the Attorney General reviewed materials relevant to his decisions but, consistent with long-standing confidentiality interests, the Department has not identified particular documents that the Attorney General reviewed in either case.

November 13, 2009 Washington Times News Article:

70. The November 13, 2009 Washington Times article, "Iran advocacy group said to skirt lobby rules" alleges that the National Iranian American Council (NIAC) may be operating as an undeclared lobby and may be guilty of violating tax laws, the Foreign Agents Registration Act, and lobbying disclosure laws.

a. Is DOJ investigating the allegations put forward in this article? If not, why?

b. Has DOJ found the allegations in this article to be true?

c. What is the proper recourse against a 501(c)(3) group that engages in lobbying activity on behalf of a foreign government without registering as a lobbyist or filing papers with DOJ indicating that the group is a local agent of a foreign government?

Response to a-c: The Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq. (FARA or the Act), requires an "agent of a foreign principal" to register when engaged within the United States in certain activities at the request of, or under the direction or control of, a foreign principal. Absent this agency relationship, registration under FARA is not required. If an agency relationship is found to exist, registration may not be required if the person qualifies for any of the exemptions in Section 3 of the Act, 22 U.S.C. § 613.

There are criminal penalties under Section 8 of the Act for any person who willfully violates any provision of the Act or any of its regulations, or for any person who willfully makes a false statement of a material fact or willfully omits any material fact required to be stated on any registration statement or supplement thereto or in any other document filed with or furnished to the Department under the provisions of the Act. In addition, the penalties are available for anyone who willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of the documents furnished not misleading.

Section 8 of the Act also provides that whenever in the judgment of the Attorney General any person is engaged in or about to engage in any acts that constitute or will constitute a violation of any provisions of the Act or its regulations, or whenever an agent fails to comply with the provisions of the Act or regulations, or otherwise is in violation of the Act, the Attorney

General may make application to the appropriate United States district court for an order enjoining such acts or enjoining such person from continuing to act as an agent of the foreign principal. The Attorney General can also apply for an order requiring compliance with any appropriate provision of the Act or regulations. The district court has the jurisdiction and authority to issue a temporary or permanent injunction, restraining order or such other that it may deem appropriate.

As you know, longstanding Department policy prohibits us from commenting on whether a matter is the subject of an ongoing investigation.

ALPACT and CAIR:

71. According to media reports, you were the keynote speaker at a November 19 event hosted by a coalition called the Advocates and Leaders for Police and Community Trust (ALPACT). It has also been reported that the Michigan chapter of the Council on American-Islamic Relations (CAIR) is a member of that coalition.

Earlier this year, there were reports that the FBI had suspended its liaison relationship with CAIR, based on the fact that CAIR was named as an unindicted co-conspirator in *United States v. Holy Land Foundation*[6] and evidence that demonstrated a relationship between CAIR, the Palestine Committee, and HAMAS. On February 24, 2009, Senators Coburn, Schumer, and I wrote to the FBI requesting more information.[7] The FBI responded that, in light of the *Holy Land* case and CAIR's potential connection with HAMAS, the FBI had "suspended all formal contacts between CAIR and the FBI." The letter noted that "until [it] can resolve whether there continues to be a connection between CAIR or its executives and HAMAS, the FBI does not view CAIR as an appropriate liaison partner."[8]

a. Were you aware of CAIR's participation in ALPACT when you accepted the invitation to speak?

b. Is there new evidence that exonerates CAIR from the allegations that it provides financial support to designated terrorist organizations?

Response to a-b: No.

c. Has the Department established a different policy with respect to CAIR than its FBI component? If so, why?

d. Please explain the considerations that led you to conclude that speaking to an organization with extremely questionable ties was an appropriate use of your time and the Department's resources.

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[6] Cr. No. 3:04-240-P (N.D. TX).

[7] Letter from Senators Kyl, Schumer, and Coburn to FBI Director Mueller, Feb. 24, 2009.

[8] Letter from FBI Assistant Director Richard Powers to Senator Kyl, April 28, 2009.

Response: Advocates and Leaders for Police and Community Trust (ALPACT) is a coalition of more than 100 law enforcement and civil rights and community leaders in Michigan who are dedicated to fostering collaboration between law enforcement agencies and the communities they serve.

Our law enforcement efforts will be more successful – and our communities will be safer – if we in law enforcement work closely with those we serve and if those communities cooperate with us. This speech, which was widely attended and open to the public, offered an important opportunity to encourage and support these types of partnerships. The speech in no way indicates a change in policy with respect to the Council on American-Islamic Relations.

QUESTIONS POSED BY SENATOR COBURN

# of Prisoners Serving Lengthy Sentences in Prison:

72. During your press conference you noted that a number of terrorists who are now serving lengthy sentences in our prisons.

a. How many of those convicted terrorists were picked up during fire fights in Pakistan or Afghanistan or elsewhere?

Response: While the Department of Justice does not keep statistics on this issue, at least one convicted terrorist was apprehended during military operations in Afghanistan and tried in U.S. courts: John Walker Lindh was captured by U.S. military personnel in Afghanistan and sentenced to 20 years of imprisonment by the U.S. District Court for the Eastern District of Virginia. In addition, there are other convicted terrorists who were apprehended in raids in Afghanistan or Pakistan. For example, the 1993 World Trade Center bomber Ramzi Yousef was captured in a raid on a guest house in Islamabad, Pakistan. Mir Aimal Kasi, who was responsible for the 1993 shootings at CIA headquarters, was captured in a raid on a hotel in Pakistan. These circumstances are similar to those in which, for example, alleged 9/11 mastermind Khalid Sheikh Mohammad was captured in Rawalpindi, Pakistan in a raid on a house. In addition, Aafia Siddiqui was recently convicted for attempting to murder U.S. military officers and personnel while she was in a police station in Afghanistan in the summer of 2008; she is now awaiting sentencing.

b. How many of them were held without being Mirandized?

Response: All of the individuals listed above were originally held and questioned by the capturing authorities without being *Mirandized* although they were later advised of their rights.

c. How many of them were interrogated by the CIA to gather intelligence about pending plots?

Response: Please consult the Department's Office of Legislative Affairs regarding this request. We may be able to arrange a classified briefing in response to this question.

Possible Prosecution of People Who Submitted Fraudulent Reports:

73. On October 30, 2009, the Recovery Accountability and Transparency Board issued a list of recipients of federal funds that submitted reports to the government that contained fraudulent information on stimulus jobs. I asked you whether the Department plans on prosecuting the people and organizations who submitted fraudulent reports on stimulus jobs and you responded that "One of the areas [you are] going to be focusing on is the misuse of Recovery Act funds, fraud connected to the Recovery Act funds. [And you will] be working with [y]our partners both at Treasury, SEC, other federal agencies, as well as our state and local counterparts." Can you provide me with more details about how you plan to pursue these prosecutions and how you will coordinate among the various agencies?

Response: On November 17, 2009, President Barack Obama established by Executive Order an interagency Financial Fraud Enforcement Task Force ("FFETF") to strengthen efforts to combat financial crime. The Department will lead the task force and the Department of Treasury, the Department of Housing and Urban Development, and the Securities and Exchange Commission will serve on the steering committee. The task force's leadership, along with representatives from a broad range of federal agencies, regulatory authorities, and inspectors general, will work with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets, and recover proceeds for victims.

The task force, which replaces the Corporate Fraud Task Force established in 2002, will build upon efforts already underway to combat mortgage, securities and corporate fraud, and fraud connected to Recovery Act funds, by increasing coordination among the participating agencies and fully utilizing the resources and expertise of the government's law enforcement and regulatory apparatus.

To address fraud connected to the Recovery Act, the FFETF includes a Recovery Act Fraud Working Group that will bring together federal and state prosecutors and investigators, including officials from the Recovery Accountability and Transparency Board, to enhance coordination and information sharing and develop prosecution and investigation strategies for addressing fraud associated with the Recovery Act.

Hate Crimes Law:

74. During the hearing, I asked you whether current hate crimes laws covered situations like the one in Arkansas where a Muslim gunman shot two military recruiters outside of an Army recruitment facility, killing one. As you may recall, the gunman described his actions as follows: "This was an act of retaliation. An act for the sake of God, for the sake of Allah, the lord of all the world, and also retaliation on the U.S. military." He added, "I do feel I'm not guilty. I don't think it was murder, because murder is when a person kills another person without justified reason." In response to my question, you said, "We now have … a hate crimes bill that in fact does say that such actions are potentially hate crimes. Again, there is, I believe, a mandatory minimum sentences that Senator Sessions introduced with regard to the -- the hate crimes bill that deals with -- that deals with the set of facts that you are -- that you're talking about." I believe this answer was a bit misleading. Is violence against a U.S. soldier, because he is a U.S. soldier, a hate crime under current law?

a. Does the new mandatory minimum provision referenced in your response make killing a soldier because he is a soldier a hate crime?

Response: Section 4712 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, enacted as Division E of the National Defense Authorization Act for Fiscal Year 2010, makes it a crime to knowingly assault a member of the U.S. Armed Services "on account of the military service of that serviceman or status of that individual as a United States serviceman." In

the case of a battery, or an assault resulting in bodily injury, the crime carries a mandatory minimum prison term of six months. That provision does not appear in the new section 249 of title 18, United States Code, entitled "Hate crime acts," but it does make it a federal offense to target violent conduct against a member of the Armed Services because of his or her status as a servicemember.

b. I disagree on principle with Hate Crimes legislation, but if we are going to have it, I believe it should include hate crimes perpetrated against our military. When I asked you previously about this matter you stated that you would "want to look and see what the statistics show, what the facts show." Have you had an opportunity to review those statistics and facts and do you now have an opinion on whether our military should be included as a protected class?

Response: As noted above, federal law now makes it a crime to knowingly assault a U.S. serviceman on account of the military service of that serviceman or status of that individual as a U.S. serviceman. In addition, Section 3A1.1 of the U.S. Sentencing Guidelines provides for enhanced penalties for assaults on servicemen and women, as well as other persons serving in their official capacities in this country. We support these provisions and the policies underlying them.

c. As a general principle, and particularly following the tragic events at Ft. Hood, doesn't it make sense to protect our military from crimes perpetrated on them simply because they are members of the military? Shouldn't they be offered the same protections as minorities who are targeted simply because they are minorities?

Response: Please see the responses to Questions 74 a-b.

d. Would you support legislation adding U.S. soldiers as a protected class, covered explicitly by the federal hate crimes statute? Please explain.

Response: We do not believe additional legislation is needed, especially in light of the recently enacted law criminalizing assaults on members of the Armed Services and the existing provision of the U.S. Sentencing Guidelines. See answers to questions a and b above. See also 18 U.S.C. § 111(a), which, even before enactment of the Matthew Shepard Act, made it a federal crime to assault an officer or employee of the United States, including a member of the uniformed services.

Kinston Voting Rights Case:

75. I also asked you about the Kinston voting rights case where the Department of Justice rejected a change to their election laws after the people of Kinston, N.C. voted by a 2-1 margin to remove party designations from their voter ballots. DOJ rejected the change in the law arguing that the effect of the change would be "strictly racial." This change would have brought the town in line with the vast majority of localities in North Carolina where only 9 out of 551 localities hold

partisan elections. The measure passed in seven of the nine black-majority precincts. On what basis did the Department of Justice decide to strike down Kinston's reasonable change to its election laws?

a. **How is removing partisan designations from a ballot a "strictly racial" change?**

b. **Isn't it true that black voters turned out in record numbers in Kinston in the 2008 election?**

c. **By preventing the implementation of this provision, isn't the Justice Department abrogating the will of the people, the majority of whom are black?**

d. **According to the Justice Department's letter to Kinston, "black persons comprise a majority of the city's registered voters" but "in three of the past four general municipal elections, African Americans comprised a minority of the electorate on Election Day" so "for that reason, they are viewed as a minority for analytical purposes." Can you explain to me why they are considered a minority when they are actually the *majority* of registered voters?**

e. **Doesn't this statement presume that the "candidate of choice" will always be a black Democrat?**

f. **Isn't this ruling actually attempting to ensure that the people who don't vote get what the Department believes is their "candidate of choice?"**

g. **Do you believe the Voting Rights Act guarantees that voters get to elect their "candidate of choice?"**

Response: When a jurisdiction subject to the provisions of Section 5 of the Voting Rights Act submits a voting change to the Department for review, the analysis focuses on "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting * * *." H.R. Rep. No. 94-196, p. 60. As the Supreme Court has noted, "the purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 125, 141 (1976). Likewise, the 2006 amendments to Section 5 prohibit voting changes that have the effect of diminishing the ability of citizens, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice. *See* Public Law 109-246, Section 5.

In making the requisite determination in this matter, the Department conducted an objective, fact-based analysis of electoral behavior in the city, with a particular emphasis on the prevailing voting patterns in municipal elections, and compared the voting patterns of African Americans voters in Kinston with those of white voters. The analysis established that, for most white voters in Kinston, not only does the race of candidates matter, but it trumps party affiliation.

For example, in election after election, white voters voted according to party affiliation when both candidates were white, and voted according to race when one of the candidates was African American. The election returns also showed that a small percentage of white voters did not let the racial identity of a candidate sway their decision and instead consistently voted according to party affiliation, regardless of candidates' race. Our analysis indicated that it was this small percentage of voters who provided the margin of victory for those African American candidates supported by the minority community who prevailed. Thus, while the change to non-partisan elections is not a "racial" change, it does have a "racial" effect that is retrogressive. The city was not able to establish that this margin of victory did not result from voters' ability to ascertain a candidate's partisan affiliation.

In addition, the issues raised in your questions are addressed in the Department's August 17, 2009, letter to the City of Kinston, which informed city officials of the decision to interpose an objection.

a. How is removing partisan designations from a ballot a "strictly racial" change?

Response: As described above, the Department concluded the change would have a racially discriminatory effect, *i.e.*, a retrogressive effect that is prohibited by Section 5.

b. Isn't it true that black voters turned out in record numbers in Kinston in the 2008 election?

Response: As described above, the Department's analysis focused on the actual voting patterns in elections for municipal office in Kinston.

c. By preventing the implementation of this provision, isn't the Justice Department abrogating the will of the people, the majority of whom are black?

Response: When a voting change is objected to under Section 5, it may not be implemented. Sometimes, this does prevent implementation of a change adopted by referendum or by an elected body.

d. According to the Justice Department's letter to Kinston, "black persons comprise a majority of the city's registered voters" but "in three of the past four general municipal elections, African Americans comprised a minority of the electorate on Election Day" so "for that reason, they are viewed as a minority for analytical purposes." Can you explain to me why they are considered a minority when they are actually the majority of registered voters?

Response: As described above, the Department's analysis focused on the actual voting patterns that occurred in elections for municipal office in Kinston.

e. Doesn't this statement presume that the "candidate of choice" will always be a black Democrat?

Response: The Department did not presume the facts, and instead reported what the analysis of actual voting patterns in elections for municipal office in Kinston revealed.

f. Isn't this ruling actually attempting to ensure that the people who don't vote get what the Department believes is their "candidate of choice?"

Response: No. As described above, the Department's analysis focused on actual voting patterns in elections for municipal office in Kinston.

g. Do you believe the Voting Rights Act guarantees that voters get to elect their "candidate of choice?"

Response: The Voting Rights Act does not guarantee any particular outcome in an election. As described above, however, one of the purposes of Section 5 has always been, and continues to be, to ensure that the ability of citizens to elect their candidates of choice is not diminished based on race, color, or membership in a language minority group.

Medical Marijuana:

76. I asked you about the memorandum issued on October 19, 2009, to U.S. Attorneys in states that have laws authorizing the use of medical marijuana directing prosecutors not to "focus federal resources" on individuals whose actions are in "clear and unambiguous compliance" with state law. You agreed that this was a "break" from the Bush administration policy, but argued that it was merely due to a limited amount of resources. Do you agree that this reallocation of resources will result in fewer prosecutions for marijuana crimes in the states with medical marijuana laws?

a. Do you agree that this directive could send a signal that this administration is not as concerned as prior administrations with the enforcement of our federal marijuana laws?

Response: No. The Administration firmly opposes the legalization of marijuana and all illegal drug use. The Department of Justice's primary aim is to utilize its limited resources effectively to prosecute and dismantle criminal organizations, violent actors, and significant drug traffickers. Drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask such activities will face federal prosecution. The departmental guidance simply articulated that, as a matter of resource allocation, the Department should focus its investigative and prosecutorial resources on significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks.

b. The new DOJ policy directs prosecutors not to investigate caregivers if they appear to be complying with state law. Distributor centers for medical marijuana and their staffs could be considered caregivers under this directive could they not?

Response: Laws authorizing the "medical" use of marijuana vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting states and often among local jurisdictions within those states. (For example, in November 2008, the California Supreme Court in *People v. Mentch*, 45 Cal. 4th 274, 195 P.3d 1061 (Cal., 2008), found that a primary caregiver cannot merely supply marijuana or counsel on its use under state law in California. The primary caregiver must provide consistent responsibility for the housing, health, and safety of that person, not merely just one single pharmaceutical need.) Rather than developing different guidelines for every possible variant of state and local law, the memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The departmental guidance is intended to focus the department's limited investigative and prosecutorial resources on significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks. As the departmental guidance memorandum makes clear, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority. Likewise, drug traffickers who attempt to hide behind claims of compliance with state "medical marijuana" laws to mask their activities will face federal prosecution. The Department will continue to target illegal drug traffickers vigorously, including those that use "dispensaries" as a front to conduct illegal drug trafficking.

c. Do you agree that including caregivers could cause serious problems for prosecutors and law enforcement trying to discern the difference between illicit dealers and distributors?

Response: No. United States Attorneys are vested with prosecutorial discretion based on the law, Department policies, and the facts and circumstances surrounding each case. The guidance does not provide any safe harbor from violations of federal law. Rather, it simply states that the prosecution of "those individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana . . . [are] unlikely to be an efficient use of limited federal resources." The decision to investigate or prosecute in any matter will necessarily be a fact intensive inquiry, based on the particular circumstances of the situation, and a variety of factors are weighed in determining what investigations and prosecutions the Department will pursue. The departmental guidance identifies a number of characteristics that may indicate illegal drug trafficking activity of potential federal interest, including evidence of violence; the unlawful use of firearms; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law; money laundering activity; excessive financial gains or amounts of cash; illegal possession or sales of other controlled substances; or ties to other criminal enterprises.

d. Do you agree that weakening federal drug enforcement efforts with regard to medical marijuana will result in more people abusing marijuana?

Response: The Department's guidance articulates the Department's balanced approach, which effectively focuses the Department's limited resources on serious drug traffickers while taking into account state and local laws. As a matter of resource allocation, the Department does not focus its investigative efforts on individuals with serious illness who are in clear and unambiguous compliance with applicable state "medical marijuana" laws. Such conduct has never been a focus of the Department's enforcement efforts. To be clear, the guidance does not legalize marijuana. To the contrary, it explicitly states that marijuana remains illegal under federal law. As the enforcement guidance makes clear, investigation and prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be a Departmental enforcement priority, including those who falsely claim to be in compliance with state law. Those that view "medical marijuana" as a code-word for de facto legalization, or who use or distribute marijuana for recreational purposes under the pretense of minor injuries or ailments, should not take comfort from this guidance. Enforcing federal law against those who traffic marijuana for recreational use remains a core Department of Justice priority.

The Administration strongly promotes efforts to reduce marijuana use, especially among young people – and will continue to do so. For example, the DEA has partnered with states, community groups and other organizations to aggressively promote demand reduction. DEA's personnel regularly speak with young people about the negative impact of drug use. Additionally, the Office of National Drug Control Policy supports multi-faceted prevention and treatment programs, and that support will continue.

Prosecution of Khalid Sheikh Mohammad (KSM):

77. When asked on one of the Sunday talk shows what would happen if the jury failed to convict Khalid Sheikh Mohammad (KSM) or one of the other 9/11 co-conspirators, Senator Reed responded that "under the basic principles of international law, as long as these individuals pose a threat, they can be detained, and they will."

a. You stated at your hearing that you plan to continue to detain these individuals if they are acquitted or released on a technicality. Can you please describe the legal basis on which you will base their continued detention?

b. What are your specific plans for these terrorists in the event that you are not successful in prosecuting them?

Response to a-b: As the Attorney General stated in his testimony, in the event that the accused 9/11 co-conspirators were acquitted, that would not mean that these individuals would be released into this country. As noted in the responses to Questions 65, as a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the question of whether the government has authority to detain under the 2001 AUMF, as informed by the law of war, which provides another legal basis for continued detention where appropriate. In addition, as noted in the responses to Questions 65 and 66, the authority to detain under immigration authorities pending removal from the United States also furnishes a separate legal basis for continued detention where appropriate. We cannot speculate on what might happen in the event that these individuals were acquitted.

c. Can you explain how your plan to detain these individuals regardless of the result of the trial in federal court "showcases" our justice system, as some proponents have stated?

Response: The purpose of any criminal trial, whether in federal court or in military commission, is not to "showcase" our system of justice. Rather, it is to hold accountable those who have committed serious crimes in a manner that is consistent with the rule of law. The fact that there may be independent bases for detention of individuals that are not based on criminal activity does not undermine that objective.

d. Section 1-7.550 of the Department of Justice's Manual for U.S. Attorney's states: "Because the release of certain types of information could tend to prejudice an adjudicative proceeding, Department personnel should refrain from making available the following: (A) Observations about a defendant's character; (B) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement; (C) Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic services, including DNA testing, or to the refusal by the defendant to submit to such tests or examinations; (D) Statements concerning the identity, testimony, or credibility of prospective witnesses; (E) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial; and (F) Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense."

How do you reconcile your ethical duty to not to prejudice a case according to this provision with your statements at the hearing calling those individuals being tried in federal court "terrorists" who "murdered" people and asserting that "failure is not an option"?

Response: The Attorney General's comments were meant to assure the public that civilian courts are able to handle the most serious of cases and to express his confidence that the evidence exists to so prove the case. We believe the Attorney General's comments are not in contradiction with the principle that the Government bears the burden of proving a defendant's guilt beyond a reasonable doubt in a court of law.

Campaign against Terrorism:

78. During your press conference you noted that a "sustained campaign against terrorism requires a combination of intelligence, law enforcement and military operations…" As a member of the Senate Intelligence Committee, I'm glad that you recognize the vital role our intelligence professionals play in protecting us from terrorism.

a. How soon before announcing this decision did you consult with the CIA Director and NCTC Director?

b. Did they outline any concerns about the potential exposure of sources and methods or the exposure of his officers during a lengthy public trial?

c. If not, did you consult with the DNI or any other IC leader?

d. Did you undertake any assessment of the potential damage to our intelligence sources and methods from the trials?

e. Does your assessment change in any way if a detainee represents himself and is given direct or indirect access to intelligence?

Response to a-e: Prior to making this decision, the Attorney General received extensive input from the Intelligence Community on classified information that might be relevant to this trial and how best to protect that information, as well as classified sources and methods and other information impacting security concerns. We recognize that intelligence collection is an essential part of a successful fight against al Qaeda and we are committed to ensuring that classified information, including sources and methods, are adequately protected in criminal trials, military commissions, and habeas corpus review of detention in federal court. Of course, there may be instances in which we do not use certain information in any of these fora if we believe it would have an adverse impact on intelligence equities.

Prosecution of Khalid Sheikh Mohammad (KSM):

79. When you bring Khalid Sheikh Mohammed to the United States, it seems quite clear you will give him and his fellow war criminals a whole host of Constitutional and statutory rights not currently available to them at Guantanamo. Will you share with this Committee any memos written by the Office of Legal Counsel articulating what additional Constitutional and statutory rights al Qaeda terrorists will receive by virtue of their presence in the United States when you unnecessarily bring them here voluntarily?

Response: Please find attached a memorandum concerning the application of the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

80. In making your announcement that Khalid Sheikh Mohammed and his co-conspirators will be moved to a federal criminal court, despite a revamped military commission system that President Obama just signed into law, you said that the Justice Department has, and I am quoting here, "a long and a successful history of prosecuting terrorists for their crimes." The 9/11 Commission has described how past public criminal trials of terrorists have compromised U.S. intelligence information on al Qaeda. Can you explain how giving intelligence information to the enemy can in any way be considered a success?

Response: We are not going to give intelligence information to the enemy. Regardless of whether suspected terrorists are prosecuted in military commissions or in civilian criminal courts, the government must always be careful to protect sensitive intelligence information about sources, methods and tactics. Since 2001, by using tools such as the Classified Information Procedures Act and other laws designed to protect sensitive information, the Department has successfully prosecuted dozens of terrorists in our criminal courts. Although the 9/11 Commission Report noted that prosecutions during the 1990s targeting the perpetrators of the first World Trade Center bombing "had the unintended consequence of alerting some al Qaeda members to the United States government's interest in them," the Department's record of success since the September 11 attacks demonstrates the great strides that the Intelligence Community and law enforcement community have made during the past nine years.

D.C Voting Rights Bill:

81. *The Washington Post* reported in April 2009 that you received a memo from the Office of Legal Counsel that declared unconstitutional the D.C. Voting Rights bill that is currently pending in the House. At that time, you refused to release the OLC memo despite requests from members of both the House and the Senate. You said the reason you were not releasing it because it reflected internal deliberations and was not a "final" or "formal" ruling, even though it had been signed by Deputy Assistant Attorney General David Barron, a political appointee who has served as the office's acting chief since January. On what basis did you withhold this memo?

a. Will you now agree to release it?

b. If not, please explain why not, especially given the Obama Administration's commitment to transparency, the lack of national security implications of this memo, and the logic that releasing the memo would benefit Congress by explaining why an independent review by the Executive Branch has determined that a law is unconstitutional.

Response to 81a-b: The Department has substantial confidentiality interests in documents that would reveal its internal deliberations in reaching its final decisions. We believe that this confidentiality is important to preserving the candid and robust debate within the Department, which is essential to sound decision-making. As the Department has previously indicated, after concluding that there are strong arguments on both sides of the issue, the Attorney General determined that fundamental constitutional principles favoring enfranchisement, together with the District Clause (which confers on the Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District ... as may ... become the Seat of Government of the United States," U.S. Const., art. I, s 8, cl. 17) , provides Congress with the authority to confer congressional representation on the District of Columbia.

c. Following receipt of the OLC memo, you contacted Deputy Solicitor General Neal K. Katyal to ask his opinion on whether the bill was constitutional and could be defended by the Office of the Solicitor General.

i. Why did you seek his counsel when you already had an opinion by the Office of Legal Counsel that it was unconstitutional?

Response: As indicated above, the Department has substantial confidentiality interests in the internal deliberations that lead to its final decisions.

ii. Do you believe the bill is constitutional?

Response: The Attorney General carefully considered the relevant legal arguments stemming from the District Clause, the Composition Clause, and fundamental constitutional principles. After concluding that there are strong arguments on both sides of the issue, the Attorney General determined that fundamental constitutional principles favoring enfranchisement, together with the District Clause, which confers on the Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District … as may .. become the Seat of the Government of the United States . . .," U.S. Const., art. I, section 8, cl. 17, provide sufficient authority to support the constitutionality of a statute conferring congressional representation on the District of Columbia.

iii. Did you seek Mr. Katyal's opinion because you wanted to find someone to support your position and override the determination of OLC?
iv. Why did you not issue your own detailed, signed opinion as to the legislation's constitutionality as prior Attorney General's have done?
v. Isn't overriding an OLC opinion without even following the proper procedures the same type of politicization of the Justice Department that the previous Administration was accused of doing?

Response to 81c.iii.- v: As indicated above, the Department has substantial confidentiality interests in the internal deliberations that lead to its final decisions. In this instance, the Department has disclosed the Attorney General's decision and reasons therefore.

d. As you know, following the Department of Justice's voluntary dismissal of the complaint against members of the New Black Panther Party, members of the House and Senate repeatedly requested information concerning the details of this decision. In addition, pursuant to its statutory mandate to properly investigate the enforcement of civil rights laws and deprivations of the right to vote, the U.S. Commission on Civil Rights requested similar information regarding the dismissal of this case. To date, the only responses Congress and the U.S. Commission on Civil Rights have received are largely nonresponsive letters that do not include the materials requested. Further, the Department of Justice's final response merely indicates that the matter has been referred to the Office of Professional Responsibility and it is conducting an inquiry. Hence, the Department's position is that no further information will be provided until OPR's inquiry is concluded.

i. Why has DOJ refused to provide information in response to these valid requests?

ii. Will you provide the information requested?

Response to 81d(i-ii): The Department seeks to be as responsive as possible to Congressional oversight and to requests from the U.S. Commission on Civil Rights. The Department has responded to each of the requests from Members of Congress and from the U.S. Commission on Civil Rights about this litigation and has provided information about the Department's decisions in the case. Among other things, on January 11, 2010 and February 26, 2010, consistent with the Department's ongoing practice of cooperation with the U.S. Commission on Civil Rights, the Department provided the Commission responses to its requests for information, including approximately 2,000 pages of documents. We also have made this same information available to Senator Sessions and Representatives Conyers, Smith and Wolf. We continue to evaluate whether we can provide further information to the Commission consistent with confidentiality concerns.

iii. Do you believe that an OPR investigation supersedes Congress' legitimate oversight functions?

Response: No. The Department seeks to accommodate legitimate congressional oversight requests to the extent possible, consistent with the integrity of OPR's process and individual privacy interests that are necessarily implicated by OPR investigations and the confidentiality concerns that the Department routinely protects in litigation matters. As noted above, on January 11, 2010 and February 26, 2010, consistent with the Department's ongoing practice of cooperation with the U.S. Commission on Civil Rights, the Department responded to the Commission's requests for information**.** In so doing, the Department did not provide documents prepared by or for OPR only insofar as such information was privileged or Privacy Act protected. In addition, as noted, the Department has made the same information available to Senator Sessions and Representatives Conyers, Smith and Wolf.

iv. It has been reported that the U.S. Commission on Civil Rights has issued subpoenas to employees of the Justice Department and has scheduled depositions in the coming weeks as part of its investigation into the Civil Rights Division's dismissal this case.[i] Will you provide USCCR with the DOJ witnesses and materials they request?

Response: The depositions to which you refer did not go forward. Rather, since the time of your question, the United States Commission on Civil Rights sent a request to the Department of Justice for documents and other information in connection with the Commission's planned enforcement report. As noted above, consistent with its ongoing practice of cooperation with the Commission, on January 11, 2010 and February 26, 2010, the Department provided the Commission responses to its requests for information, including approximately 2,000 pages of documents.

In addition, the Department is carefully considering a more recent request from the Commission that career Department employees provide hearing testimony about information gained in the course of their official duties. The Department is evaluating that request in light of its ongoing cooperation with the Commission and the confidentiality and other institutional

interests the Department routinely protects, and will respond as soon as possible in order to facilitate the Commission's planning for the hearing.

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[i] Ryan J. Reilly, *U.S. Commission on Civil Rights Issues Subpoenas to DOJ*, MAINJUSTICE, Nov. 24, 2009, at http://www.mainjustice.com/2009/11/24/u-s-commission-on-civil-rights-issues-subpoenas-to-doj/.

Attachment 1

U.S. Department of Justice

SEP 17 2009

Washington, D.C. 20530

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Lieberman:

Pursuant to the requirements of 31 U.S.C. § 720, the U.S. Department of Justice (the Department) hereby responds to recommendations contained in the Government Accountability Office's (GAO) final report 09-709, dated June 18, 2009, entitled "FIREARMS TRAFFICKING: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges". The report contained six recommendations for the Attorney General which are addressed below.

GAO Recommendation Number 1: The U.S. Attorney General should prepare a report to Congress on approaches to address the challenges law enforcement officials raised in this report regarding the constraints on the collection of data that inhibit the ability of law enforcement to conduct timely investigations.

The Department's response: For the reasons outlined below, the Department does not believe that a report along the lines recommended is warranted and thus does not concur in this recommendation.

The existing constraints on the collection of data relevant to firearms trafficking are well known. The Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is prohibited through an annual appropriations restriction from centralizing or consolidating information relating to firearms purchases from Federal firearms licensees (Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524.575). As a result, completing a firearm trace can take a considerable amount of time. The lack of background checks for private firearms sales can also hinder the tracing process because ATF often cannot trace a firearm beyond its first retail sale. Also, while the multiple sales reporting requirement for handguns is a useful law enforcement tool, the fact that it does not apply to all firearms purchases means that ATF does not have such information for certain types of firearms that may be involved in trafficking. In any event, while ATF could conduct more timely investigations if the constraints on the collection of data were lifted, ATF works hard to efficiently and effectively combat violent crime and firearms trafficking within the existing framework of the law.

GAO Recommendation Number 2: To further enhance interagency collaboration in combating arms trafficking to Mexico and to help ensure integrated policy and program direction, the U.S. Attorney General and the Secretary of Homeland Security should finalize the Memorandum of Understanding (MOU) between ATF and U.S. Immigration and Customs Enforcement (ICE) and develop processes for periodically monitoring its implementation and making any needed adjustments.

The Department's response: The Department agrees with this recommendation.

Notably, ATF and ICE have finalized the MOU, which was signed on June 30, 2009. As noted below in response to Recommendation 4, ATF is committed to working effectively with ICE in combating arms trafficking by ensuring that there is a high level of coordination, collaboration, and cooperation between the two agencies. Officials from ATF and ICE continue to meet periodically to discuss ongoing issues relating to the MOU and interagency law enforcement efforts aimed at combating firearms trafficking.

GAO Recommendation Number 3: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General should direct the ATF Director to regularly update ATF's reporting on aggregate firearms trafficking data and trends.

The Department's response: The Department agrees with this recommendation. The AG has directed the ATF Director to begin publishing certain aggregate-level firearms trace data and studies. However, the publishing of any trace data or studies will be subject to resource and appropriations limitations.

The specific rationale provided for in this GAO recommendation is that such reporting will assist with identifying where efforts should be targeted to combat illicit arms trafficking to Mexico. ATF has historically produced a variety of documents/publications designed to address firearms-related issues including data pertaining to firearms trafficking and trends. Importantly, however, these publications were primarily designed to provide a general understanding of these issues with respect to domestic firearms trafficking. The reports ATF used to publish did not directly address firearms trafficking along the southwest border, and going back to publishing certain aggregate studies will not necessarily provide the type of information needed to combat illicit arms trafficking to Mexico. Many of these publications have been discontinued due primarily to competing demands and a lack of resources essential to their development and continued publication. Nevertheless, despite the discontinuance of some publications depicting general aggregate-level firearms trafficking data and trends, ATF has produced other (law enforcement sensitive) publications that address firearms trafficking trends and trace statistical data specifically related to firearms trafficking to Mexico and ATF's efforts along the southwest border. Further, ATF already provides trace data and other relevant strategic and tactical information to the Government of Mexico and other law enforcement partners. ATF also has been a significant contributor to publications developed and distributed by other agencies that address similar issues

such as the National Gang Intelligence Center's 2009 National Gang Threat Assessment. While ATF relies on a variety of management tools in making decisions regarding investigative priorities and the deployment of resources in support of our enforcement responsibilities, these discontinued resources nevertheless have been of some use internally. Therefore, ATF will publish certain aggregate-level firearms trace data and studies as resources allow.

GAO Recommendation Number 4: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General and the Secretary of Homeland Security should, in light of Department of Homeland Security's (DHS) recent efforts to assess southbound weapons smuggling trends, direct ATF and ICE to ensure they share comprehensive data and leverage each other's expertise and analysis on future assessments relevant to the issue.

The Department's response: The Department agrees with this recommendation.

The Department is committed to ensuring that tactical, operational, and strategic intelligence and investigative information is efficiently and effectively shared among our law enforcement partners. To that end, on August 13, 2009, the Department signed a letter of intent with DHS and the Mexican Attorney General to develop a coordinated and intelligence-driven response to the threat of cross border smuggling and trafficking of weapons and ammunition. Further, we note that both ICE and U.S. Customs and Border Patrol (CBP) provide analysts who serve at the "Gun Desk" at the El Paso Intelligence Center (EPIC), a multi-agency intelligence center that provides tactical and operational support in targeting narcotics- and firearms-trafficking and violence related to the Mexican cartels. The "Gun Desk" at EPIC serves as a central repository for all intelligence related to firearms along the Southwest Border.

In addition, on June 30, 2009, ATF and ICE updated a MOU that addresses how the two agencies will work together on investigations of international firearms trafficking and possession of firearms by illegal aliens. This MOU provides a framework for both agencies to share intelligence and conduct investigations and will help ensure that the resources of both agencies are utilized in a more efficient, coordinated manner.

Similarly, on June 18, 2009, DEA and ICE entered into an MOU that memorializes both agencies' commitment to information sharing. Under this MOU, ICE will participate fully in both the Organized Crime Drug Enforcement Task Force (OCDETF) Fusion Center (OFC) and the Special Operations Division (SOD), sharing all investigative reports, records, and subject indexing records from open and closed investigations, including those related to weapons. OFC is a comprehensive data center containing data from, and providing intelligence and investigative support to, ATF, DEA, Federal Bureau of Investigation, Internal Revenue Service, and EPIC, among others. In addition, under the terms of this MOU, ICE will provide access to data related to all seizures of money, drugs, and firearms at EPIC.

These two MOUs reflect the commitment of the Department and DHS to greater coordination of resources in combating firearms trafficking in the Southwest Border region and represent significant steps toward achieving that goal.

GAO Recommendation Number 5: To help identify where efforts should be targeted to combat illicit arms trafficking to Mexico, and to improve the gathering and reporting of data related to such efforts, the U.S. Attorney General and the Secretary of Homeland Security should ensure the systematic gathering and reporting of data related to results of these efforts, including firearms seizures, investigations, and prosecutions.

The Department's response: The Department agrees with this recommendation and refers to its response to Recommendation 4, *supra*.

GAO Recommendation Number 6: To improve the scope and completeness of data on firearms trafficked to Mexico and to facilitate investigations to disrupt illicit arms trafficking networks, the U.S. Attorney General and the Secretary of State should work with the Government of Mexico to expedite the dissemination of eTrace in Spanish across Mexico to the relevant Government of Mexico officials, provide these officials the proper training on the use of eTrace, and ensure more complete input of information on seized arms into eTrace.

The Department's response: The Department agrees with this recommendation and will take the following action.

ATF expects to complete the Spanish version of e-trace in or about December 2009. In the meantime, ATF will work with the Government of Mexico to develop an effective training plan for the proper implementation and use of Spanish e-trace. Once Spanish e-trace is fully disseminated and implemented, ATF should realize an increase in both the number and quality of firearm trace submissions which should increase the number and scope of firearms trafficking investigations and aid in the reporting of information back to the Government of Mexico.

Should you or members of your staff have any questions, please contact Richard P. Theis, the Department Audit Liaison, on 202-514-0469.

Sincerely,

Lee J. Lofthus
Assistant Attorney General
for Administration

Copies furnished:

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Subcommittee on the Western Hemisphere
Committee on Foreign Affairs
House of Representatives
Washington, DC 20515

The Honorable Connie Mack, IV
Ranking Member
Subcommittee on the Western Hemisphere
Committee on Foreign Affairs
House of Representatives
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The Honorable Dan Burton
The Honorable William Delahunt
The Honorable Gabrielle Giffords
The Honorable Albio Sires
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Richard P. Theis
Department Audit Liaison
Audit Liaison Group
Department of Justice

Attachment 2

Department of Justice

STATEMENT OF

RITA GLAVIN
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ENTITLED

"THE NEED FOR INCREASED FRAUD ENFORCEMENT IN THE WAKE OF THE ECONOMIC DOWNTURN"

PRESENTED

FEBRUARY 11, 2009

Good morning, Mr. Chairman, Senator Specter, and members of the Committee. Thank you for your invitation to address the Committee. The Department of Justice (Department or DOJ) welcomes this opportunity to testify on fraud enforcement in the wake of the economic downturn and in support of the Fraud Enforcement and Recovery Act of 2009 (FERA or the Act).

Introduction

I am privileged to be serving the Department of Justice as the Acting Assistant Attorney General for the Criminal Division. Although I am new to this position, I am not new to the Department. I have been a prosecutor with the Department for more than 10 years, and have served the Department in many different capacities, including as Acting Principal Deputy Assistant Attorney General of the Criminal Division, Assistant United States Attorney in the Southern District of New York, and trial attorney with the Public Integrity Section of the Criminal Division. During my long tenure with the Department, I have personally prosecuted and have supervised complex, financial crime cases. As a result, I am well-versed in the tools the Department has at its disposal to address the Nation's current economic crisis.

The Nation's current economic crisis has had devastating effects on mortgage markets, credit markets, commodities and securities markets, and the banking system. The financial crisis demands an aggressive and comprehensive law enforcement response, including vigorous fraud investigations and prosecutions of securities and commodities firms, banks, and individuals that have defrauded their customers and the American taxpayer and otherwise placed billions of

dollars of private and public money at risk. Furthermore, a strategic and proactive approach for detecting and preventing fraud is needed to detect and deter fraud in the future.

The Department, through its Criminal Division, the Federal Bureau of Investigation (FBI), the U.S. Attorney community, and other components, has been investigating and prosecuting financial crimes aggressively. But, we believe more can and should be done. As the Attorney General has stated, we must reinvigorate the traditional missions of the Department and we must embrace the Department's historic role in fighting crime and ensuring fairness in the marketplace.

The proposed FERA legislation gives us some of the tools we need to aggressively fight fraud in the current economic climate. The legislation will provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable. FERA will also provide needed resources to investigate and prosecute those responsible for such misdeeds.

Mortgage Fraud

Along with widespread mortgage delinquencies and foreclosures, lender failures, massive losses by investors in mortgage-backed securities, and turbulence in the credit markets, there has been an alarming increase in mortgage fraud. Whether measured by Suspicious Activity Report (SAR) data, or by the rapid expansion of the FBI's nationwide inventory of mortgage fraud cases, fraud has infected a significant segment of mortgage lending over the past five or more

years. During that period, for example, the FBI's inventory of mortgage fraud cases has more than tripled, and SARs of mortgage fraud have increased almost four-fold.

Even before this current crisis, the Department responded to these alarming numbers. For years, we have been waging an aggressive campaign against mortgage fraudsters through vigorous investigation and prosecution. We deployed a broad array of enforcement strategies that ensured optimal use of our investigative and prosecutorial resources to maximize deterrence and remediation. We have conducted nationwide sweeps in mortgage fraud cases, formed local and regional task forces and working groups, and engaged in major undercover operations. We are also working to uncover rescue scams that target desperate homeowners trying to avoid foreclosure.

For example, in partnership with the FBI, the Department has conducted three nationwide mortgage fraud and other banking crime sweeps. Operation "Malicious Mortgage", conducted last year, resulted in charges against more than 400 defendants across the nation brought by many of the local and regional task forces and working groups currently targeting mortgage fraud. By fully utilizing these task forces and working groups, we have leveraged our limited resources by joining forces with federal, State, and local law enforcement and regulatory partners and have ensured a coordinated and comprehensive response to mortgage fraud and related crimes. Operation "Malicious Mortgage" was the most recent coordinated sweep in an ongoing law enforcement effort to combat mortgage fraud, which also included Operation "Quick Flip" in 2005 and Operation "Continued Action" in 2004.

On another front, the FBI has established a National Mortgage Fraud Team at FBI Headquarters. This unit, working closely with the DOJ Criminal Division, U.S. Attorneys' Offices and other law enforcement partners, encourages proactive investigations of mortgage fraud and related crimes and employs an intelligence-driven case targeting system to promote real-time enforcement operations. The Deputy Director of the FBI will describe this program in further detail.

Another example of our ongoing efforts to prosecute mortgage fraud is Operation "Homewrecker," a case brought last year by the United States Attorney's Office for the Eastern District of California and investigated by the FBI and the Internal Revenue Service Criminal Investigation Division, which resulted in the indictment of 19 individuals on mortgage fraud-related charges stemming from a scheme that targeted homeowners in dire financial straits, fraudulently obtaining title to more than 100 homes and stealing millions of dollars through fraudulently obtained loans and mortgages. *See United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Feb. 2, 2008); *United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Mar. 13, 2008).

The Department, joining forces with the financial regulatory community, including the Securities and Exchange Commission, has also successfully identified and prosecuted fraud associated with securitization of mortgage-backed securities. For example, as part of Operation "Malicious Mortgage," the United States Attorney's Office for the Eastern District of New York charged a securitization fraud scheme in which investors were victimized when risky subprime mortgage-backed securities were substituted for safer and more conservative investments.

Because of the complexity and creativity of these criminal schemes, the Department has embraced a collaborative approach – working closely with many different law enforcement agencies – to bring these prosecutions. For example, in a case investigated by the Secret Service and the FBI and prosecuted by the U.S. Attorney's Office for the Northern District of Georgia, a defendant agreed to purchase properties from true owners, assumed their identities, obtained multiple further mortgages on the properties, then used the identities of the homeowners and others to purchase vehicles, open bank accounts and obtain passports which he then used to travel to Jamaica, Italy, Greece while a federal fugitive. His crimes resulted in clouded property titles in several states, a trail of more than 100 victims, and millions of dollars in losses. The defendant was sentenced to 26 years in prison and ordered to pay restitution of almost $6 million. The government also obtained a forfeiture judgment of $6 million, access to the defendant's book and movie rights, and the right to sell the defendant's paintings on eBay in order to restore money to victims.

At the same time, the Department has addressed mortgage fraud through vigorous civil enforcement, including under the False Claims Act (FCA). The Department's recoveries under the FCA, with the assistance of private whistleblowers, have reached record levels. In eight of the last nine years, the Department's recoveries have exceeded $1 billion. Moreover, since 1986, the Department, working with government agencies, and private citizens, has returned more than $21 billion in public monies to Government programs and the Treasury. During the past year, the Department also recovered funds on its own behalf, as well as on behalf of the Departments of Defense, Homeland Security, and Education, and the General Services Administration, to name just a few of the agencies.

The Department has used the FCA to protect a broad range of government programs and contracts. Health care fraud cases are currently the largest source of the Department's recoveries, but the Department has also relied on the FCA to combat mortgage and other fraud on the Department of Housing and Urban Development (HUD). The Department's recent recoveries include a $10.7 million settlement with RBC Mortgage Company to resolve allegations that it sought FHA insurance for hundreds of ineligible loans. Additionally, the Department obtained two recent judgments, totaling $7.2 million, against a California real estate investor and a Chicago-based mortgage company, for defrauding HUD's direct endorsement program. The Department will continue to vigorously utilize the FCA to hold accountable those who engage in all types of housing related fraud.

Financial Fraud

In addition to mortgage fraud, the Department has had tremendous success in identifying, investigating, and prosecuting massive financial fraud schemes, including securities and commodities market manipulation and Ponzi schemes. Just last week, the Criminal Division and U.S. Attorney's Office in Minnesota charged and arrested an individual who is alleged to have engaged in a large Ponzi scheme operation involving commodities. *See United States v. Charles Hays*, 09-mj-36 (D. Minn. Feb. 4, 2009). The defendant allegedly told investors that their money had been invested in a pooled commodities trading account, but his company had no such account; instead, he used this investor money for his own personal expenses, including a $3 million yacht. This criminal case was brought in parallel with a civil enforcement action and

restraining order freezing assets by the Commodity Futures Trading Commission (CFTC). The case was also worked jointly with U.S. Postal Inspection Service.

In addition, last year, the Department secured the convictions of five former executives, including the owner and president of National Century Financial Enterprises, one of the largest health care finance companies in the United States until its 2002 bankruptcy, on charges stemming from an investment fraud scheme resulting in $2.3 billion in investor losses. In addition, in a case investigated by the United States Postal Inspection Service, the U.S. Attorneys' Offices in Connecticut and the Eastern District of Virginia, working with the Criminal Division's Fraud Section, obtained convictions of four executives who engaged in corporate fraud by executing two false reinsurance transactions to conceal a $59 million decrease in the loss reserves of AIG. The Court found that the transactions caused a loss to AIG shareholders of between $544 and $597 million. Just two weeks ago, an AIG vice president was sentenced to serve four years in federal prison.

Oversight of Economic Stimulus Funding

In addition to continuing our efforts to prosecute the types of fraudulent conduct described above, we must ensure that the funds that Congress authorizes to rejuvenate and stimulate the economy are used as intended. Where these taxpayer funds are not used appropriately or where misrepresentations are made in order to obtain such funds, we are committed to investigating and prosecuting the wrongdoers.

The Department has always been committed to fighting fraud and, as the nation suffers through the current economic crisis, we are committed to redoubling our efforts. We are determined to move decisively to uncover abuses involving financial fraud schemes, mortgage lending and securitization frauds, foreclosure rescue scams, government program fraud, bankruptcy schemes, and securities and commodities fraud. Much remains to be done and this bill is an important and timely step in the process. It arises at a critical juncture to provide enhanced tools and critically-needed resources that will advance our work in protecting the public, our markets and institutions from fraud and related abuses.

Criminal Statutory Revisions

Let me now turn to specific comments on the legislation. First, I would like to address the proposed changes in various provisions of Title 18 of the United States Code. These changes would enhance our ability to investigate and prosecute mortgage fraud and other types of investment fraud. We support these changes, and would like to take a moment to explain why:

Expanding the scope of financial institution frauds.

First, section 2(a) of the bill would amend the definition of "financial institution" in section 20 of Title 18, United States Code, to include both mortgage lending businesses and any person or entity that makes in whole or in part a federally-related mortgage loan. Subsection 2(b) would introduce a definition of "mortgage lending business" as a new section 27 of Title 18 and would define that term to mean any organization that finances or refinances any debt secured

by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.

The new definitions for "financial institution" and "mortgage lending business" will ensure that private mortgage brokers and companies are both protected by, and held fully accountable under, federal fraud laws, particularly where they are dealing in federally-regulated or federally-insured mortgages. For example, the bank fraud statute, 18 U.S.C. § 1344, prohibits defrauding "a financial institution," and the amendment to this definition would extend the bank fraud statute beyond traditional banks and financial institutions to private mortgage companies. This definition of "financial institution" would also apply to the following criminal provisions: 18 U.S.C. § 215 (financial institution bribery); 18 U.S.C. § 225 (continuing financial crimes enterprise); and 18 U.S.C. § 1005 (false statement/entry/record for financial institution). The new provision would also create enhanced penalties for mail and wire fraud affecting a financial institution, including a mortgage lending business, pursuant to 18 U.S.C. §§ 1341 and 1343. Additionally, expanding the term "financial institution" to include mortgage lending businesses will strengthen penalties for mortgage frauds and would extend the statute of limitations in mortgage fraud cases.

According to the Wall Street Journal, more than 50 percent of sub-prime mortgages made in this country in 2005 were made by institutions that do not currently fall under the bank fraud criminal statute. Changing the definition of "financial institution" to include non-bank lenders will enhance our ability to prosecute criminals under the bank fraud statute who commit fraud involving loans from those companies.

The nation's current financial crisis has demonstrated how bad mortgages can affect the health of the banking system and the overall economy. Mortgage lending businesses should be held accountable in the same way as traditional financial institutions, given the impact of their businesses on federally-insured and federally-regulated institutions. These provisions will help do that.

Criminalizing false statements to mortgage lending businesses.

Second, subsection 2(c) would expand the prohibition regarding false statements to financial institutions, section 1014 of Title 18, United States Code, to cover false statements made to mortgage lending businesses. Currently, section 1014 applies only to federal agencies, banks, and credit associations and does not extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. This new provision would ensure that private mortgage brokers and companies are held fully accountable under this federal fraud provision by providing prosecutors with an important tool to charge those who engage in false appraisals.

Amending the Major Fraud statute to include activities relating to TARP funds.

Third, subsection 2(d) of the Act would amend the major fraud statute, section 1031 of Title 18, United States Code, to make explicit that transactions and activities that fall under the Troubled Assets Relief Program (TARP) and the stimulus packages fall within the scope of that provision. The proposed amendment would define the scope of the existing law to criminalize the execution of any fraud scheme with the intent to obtain any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of federal assistance. This would include the

TARP funds, an economic stimulus, recovery or relief plan provided by the Government, or the Government's purchase of any preferred stock in a company. This amendment would ensure that federal prosecutors are able to use one of our most potent fraud statutes to protect government assistance provided during this economic crisis. We look forward to working with the Special Inspector General for TARP to ensure the integrity of the TARP funds and other economic stimulus and rescue packages.

Amending the securities fraud statutes to include commodities options and futures trading.

Fourth, subsection 2(e) of the Act would amend the securities fraud statute by extending its reach to commodities. Among other things, the amendment would ensure that prosecutions could be brought against anyone engaging in a scheme or artifice to defraud, or to obtain money or property by false or fraudulent pretenses, in connection with a commodity for future delivery, or option on a commodity for future delivery. Currently, the securities fraud statute does not reach frauds involving options or futures, which include some of the derivatives and other financial products that were part of the financial collapse. This amendment helps to fill in an existing gap in the tools available to prosecutors and agents.

Amending the Money Laundering statute to define the "proceeds" of illegal activity.

Fifth, subsection 2(f) of the Act would amend the definition of the term "proceeds" in the money laundering statute to make clear that the proceeds of specified unlawful activity includes the gross receipts of the illegal activity, not just the profits of the activity. The money laundering statutes make it illegal to conduct a financial transaction involving the "proceeds" of a crime; however, the term "proceeds" is not defined. As a result, the courts have been left to define the

term. For more than 20 years, courts had almost uniformly construed the term "proceeds" to mean "gross receipts" and not "net receipts."

In *United States v. Santos*, 128 S. Ct. 2020 (2008), the Supreme Court ruled that the term "proceeds," as used in the money laundering statute, was ambiguous, and that the rule of lenity required them to define the term as "net profits" rather than "gross receipts." The Court's decision effectively limited the money laundering statute to profitable crimes. Prior to *Santos*, a mortgage fraudster's kickback to a corrupt appraiser for inflating the value of a home could be charged as a money laundering transaction and could provide a legal basis for seizing the transferred money and eventually returning it to the fraud victims. Under *Santos,* a court could conclude that the payment constituted an expense of the fraud scheme and that it therefore could not be charged as "money laundering."

The result is contrary to Congress' intent to target money laundering as envisioned when the statute was enacted more than two decades ago. The proposed legislation would eliminate the uncertainty that has followed *Santos* and would restore a valuable tool to federal prosecutors. Although the Department supports the Act, the Department respectfully submits additional modifications to further strengthen the proposed amendments. The proposed modifications to the Act pertaining to the money laundering statutes are attached as Appendix A.

Amending the Money Laundering statute to apply to tax evasion.

Sixth, subsection 2(g) of the Act would add a new provision to the international money laundering offense, section 1956(a)(2)(A) of Title 18, United States Code, to make it applicable

to tax evasion. Due to the rapid globalization of the financial system in the last two decades and the development of offshore banking centers, we have seen the development of a troubling growth of income tax evasion that exploits the international funds transfer mechanisms and these offshore centers. In many cases, these tax evasion schemes utilize the same methods and mechanisms as money laundering schemes which involve criminal proceeds. In some, but not all cases, the offshore movement of funds for the purpose of evading income taxes can contribute to the development of offshore centers, and businesses operated by international criminal organizations, that facilitate the laundering of proceeds of drug trafficking and other serious offenses. These activities represent a threat to our financial system beyond the evasion of income taxes.

The proposed amendment to section 1956(a)(2)(A) will address this threat by criminalizing the transfer of funds into or out of the United States with the intent to engage in conduct constituting a violation of our income tax laws. The amendment will not only allow the government to bring civil forfeiture actions against tax evasion funds sent abroad, but will also help U.S. prosecutors enforce forfeiture orders for foreign tax offenses.

Clarifying the Civil False Claims Act

In addition to these revisions to federal criminal statutes, the Act also would add language to section 3729 of Title 31, United States Code, to clarify the scope of liability for civil false claims under the False Claims Act (FCA), which is one of the primary tools used by the Civil Division, along with the U.S. Attorneys' Offices around the country, to deter and recover from those who seek to defraud the Government.

As the Department's continuing experience reflects, every government agency and program is susceptible to potential fraud, and is therefore in need of the protections afforded by the FCA. The Department therefore supports changes to the FCA designed to eliminate any presentment or federal funds requirements and also recommends that the Committee consider additional modifications to redress the impact of the Supreme Court's recent decision in *U.S. ex rel. Sanders v. Allison Engine*, 128 S. Ct. 2123 (2008). The Department would be happy to discuss with staff these additional modifications. The Department has concerns with some aspects of the Act, however, and would also welcome the opportunity to discuss them with staff.

Additional Resources

Our Nation faces an unprecedented financial crisis. The crisis requires a strategic response to prosecute those responsible for abusing the financial markets, to deter future similar conduct, and to prevent fraud and abuse relating to funds that have been and will be disbursed to help improve the current situation. The Department of Justice has a critical role to play. Federal prosecutors, including those in U.S. Attorneys' Offices around the country, and in the Criminal, Tax, and Civil Divisions of the Department will undoubtedly face an unprecedented demand on their prosecutorial resources through referrals from the FBI, the U.S. Postal Inspection Service, the Special Inspector General for the Troubled Assets Relief Program, and other investigative agencies. To meet these imminent demands and to effectively prosecute the crimes that have come to light as a result of to the current crisis, the Department requires a concomitant increase in resources. The Department has a successful track record in leading groundbreaking nationwide initiatives to target specific criminal activities and, ultimately, the Department's past experience reveals that an investment in a coordinated response and appropriate resources help

ensure justice is served. Further, such an investment allows the government to recover funds that otherwise may be lost to criminals who may go unpunished. Accordingly, the Department supports the Act's allocation of additional resources for the Department.

Conclusion

We applaud the leadership of this Committee in proposing this Act. It provides important enhancements to key statutes that the Department uses to combat fraud. Additionally, FERA adds crucial reinforcements to strained law enforcement resources that would enable the Department and its partners to advance the pace and reach of the enforcement response. With the tools that the Act provides, the Department will be better equipped to address the challenges that face this Nation in these difficult times and to do its part to help our Nation respond to this challenge.

I would be happy to answer any questions from the Committee.

Appendix A

1. Proposed Change to section sections 2(e)(1)(B) and 2(e)(1)(C).

At Section 2(e)(1)(B): The language "or a commodity" should be deleted so that the bill reads "by inserting 'any commodity for future delivery, or any option on a commodity for future delivery, or' after 'any person in connection with'"; and

At Section 2(e)(1)(C): The language "or a commodity" should be deleted so that the bill reads "by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or' after 'in connection with the purchase or sale of'".

2. Proposed Change to section 2(f).

We suggest slightly revising the *Santos* fix, at section 2(f), to read as follows:

Section 1956(c) of title 18, United States Code, is amended –

(1) by striking the period at the end of paragraph (8) and inserting "; and"

(2) by adding at the end the following:

"(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."

The purpose of the change (from "property derived from . . . **commission of a specified unlawful** activity" to "property derived from . . . **some form of** unlawful activity") is to avoid confusion where "proceeds" is used elsewhere in the statute to describe the knowledge component of the crime (see section 1956(c)(1)). The statute currently requires knowledge that property involved in a transaction represents proceeds of "some form of unlawful activity." The

requested change does not expand the scope of the statute, because paragraph (a)(1) makes it clear that it applies only to transactions involving proceeds of specified unlawful activity.

3. Proposed Change to section 2(h).

In order to make it clear that "proceeds" has the same meaning in section 1956 and section 1957, we suggest adding the following section 2(h) to the bill:

Section 1957(f) of title 18, United States Code, is amended –

(1) by deleting "and" from the end of paragraph (2);

(2) by striking the period at the end of paragraph (3) and inserting "; and"

(3) by adding at the end the following:

"(4) the term "proceeds" has the meaning given that term in section 1956 of this title."

4. Proposed Change to 2(i).

On the same day it issued *U.S. v Santos,* the Supreme Court issued another decision that has adversely affected federal money laundering prosecutions. In *Cuellar v. United States,* 128 S.Ct. 1994 (2008), the unanimous Court held that certain language in section 1956 –"knowing that the transaction is designed in whole or in part" – requires the Government to prove that a defendant charged with transporting drug proceeds across the border knew the purpose or plan behind the transportation. As the Court stated in the opinion, it is not enough to show how the defendant moved the money, the Government must also prove why he moved it.

The *Cuellar* Court also suggested that Congress could correct this situation by deleting the words "designed in whole or in part" from the statute. We therefore propose that 18 U.S.C.

§§ 1956(a)(1)(B) and (a)(2)(B) be amended to correct the ambiguous language cited by the Court in *Cuellar*. The following language, which could be added to the bill as section 2(i), would help eliminate ambiguity in international money laundering prosecutions.

Section 1956(a)(1)(B) of title 18, United States Code, is amended to read as follows:

"(B) knowing that the transaction –

"(i) conceals or disguises, or is intended to conceal or disguise, the nature, source, location, ownership or control of the proceeds of specified unlawful activity; or

"(ii) avoids, or is intended to avoid, a transaction reporting requirement under state or federal law,"

Section 1956(a)(2)(B) of title 18, United States Code, is amended to read as follows:

"(B) knowing that the monetary instrument or funds involved in the transportation, transmission or transfer represent the proceeds of some form of unlawful activity, and knowing that such transportation, transmission, or transfer --

"(i) conceals or disguises, or is intended to conceal or disguise, the nature, source, location, ownership or control of the proceeds of specified unlawful activity; or

"(ii) avoids, or is intended to avoid, a transaction reporting requirement under state or federal law,"

After careful consideration and legal review, the Administration has concluded that, whether military commissions are convened in the United States or at Guantánamo, there is a significant risk courts will apply a baseline of due process protection in commission proceedings. We do not believe this means courts will provide commission defendants with the same array of constitutional rights that defendants receive in article III criminal trials. We do believe, however, there is a significant risk courts would afford commission defendants with those due process protections that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In particular, we have concluded that there is a substantial risk courts would hold the Constitution requires application of a due process voluntariness test for admission of statements of the accused, although we do not believe courts would apply the *Miranda* rules prohibiting admission of unwarned statements. In light of these risks, the Administration urges Congress to design a commissions system that will satisfy constitutional due process standards whether the proceedings are conducted in the United States or at Guantánamo. If the recent Senate Armed Services Committee draft amendment of the Military Commissions Act were modified along the lines the Administration has suggested, we believe the bill would satisfy those constitutional standards, no matter where the commissions are convened.

As the Assistant Attorney General for the National Security Division testified before the Senate Armed Services Committee, the Administration has concluded that if commissions are convened in the United States, there is a significant risk courts would afford the accused with baseline constitutional protections under the Fifth Amendment's Due Process Clause. The Supreme Court has held that this Clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). We recognize that there are contrary arguments based on Supreme Court precedents concerning World War II-era commissions conducted in U.S. territories. But, in light of intervening developments, there are reasons to doubt that these precedents would be applied to preclude recognition of any due process rights for detainees being tried before military commissions in the United States.

We also believe that even if the commissions were convened at Guantánamo, there is a significant risk the courts would apply a baseline of due process protections in commissions proceedings. Senator Graham touched on this concern at the recent Armed Services hearing, remarking that "just the location [of the commission] alone is not going to change the dynamic the court would apply in a dramatic way." To be sure, certain older Supreme Court precedents, especially *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were often read to suggest that aliens detained overseas have no constitutional protections at all. In its recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), however, the Court rejected the notion that, as a categorical matter, the Constitution provides no protection to aliens outside the *de jure* sovereignty of the United States. The Court instead held that the Guantánamo detainees are entitled to the guarantee, implicit in the Suspension Clause, of the right to petition for the writ of habeas corpus challenging the legality of their detention.

In reaching this conclusion, the Court recognized a "common thread uniting" its former cases dealing with the extraterritorial application of the Constitution—namely, "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258. The Court then emphasized the unique attributes of the detention facilities at Guantánamo, given that the United States exercises an unusual degree and exclusivity of control over the Naval Base there.

The decision in *Boumediene* concerned the writ of habeas corpus, but we believe there is a significant risk the Court could further hold that baseline due process protections would apply to the Guantánamo detainees, as well. Writing for the Court in *Boumediene*, Justice Kennedy explained that in determining whether habeas applies outside the United States, a court should look, in particular, to whether such a result would be "'impracticable and anomalous.'" *Id.* at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957)). Justice Kennedy also relied in part on the *Insular Cases*, *see id.* at 2253-55, which held that residents of U.S. territories have certain individual constitutional rights that are deemed "fundamental." To be sure, the *Insular Cases* can be distinguished on the ground that they involved the government of a general civilian population in U.S. territories, not the specific context of alleged enemy aliens detained and prosecuted by a military commission on a U.S. military base in a foreign country, where application of the Bill of Rights would perhaps be more "impracticable and anomalous." But in light of the Supreme Court's extension of the writ of habeas corpus under the Suspension Clause to detainees at Guantánamo, along with the Court's discussion of the *Insular Cases*, there is a significant risk the Court would conclude that not only the writ of habeas corpus, but also certain due process protections, would apply at Guantánamo.

We emphasize that even if the courts hold that the Due Process Clause "applies" to aliens detained at Guantánamo, that conclusion would not mean the Clause would apply in the same way that it applies to U.S. citizens, or even to aliens, in the United States. "As Justice Harlan put it, 'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75). Thus, whether commissions are convened inside the United States or at Guantánamo, we do not believe courts would afford aliens tried in such commissions with the entire panoply of constitutional rights that defendants in article III courts enjoy. In particular, we believe the Supreme Court is likely to reaffirm its precedents that defendants in such commissions are not entitled to a grand jury indictment or a jury trial. We also do not believe courts would hold that defendants in commission proceedings are entitled to all of the Fifth and Sixth Amendments procedural trial rights for criminal defendants that apply in article III courts.

Instead, we think it likely the courts would rely upon a balancing test to determine which fundamental procedural safeguards would be constitutionally required in commissions as a matter of due process, and how those fundamental protections should be applied given the particular context of these trials. Courts would be most likely to

afford commission defendants with those due process protections that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Although we do not express an independent position on the question here, we do think that under this approach there is a significant risk courts would afford Guantánamo detainees with certain fundamental due process trial protections, even for commissions conducted at Guantánamo. *Cf. Weiss v. United States*, 510 U.S. 163, 178 (1994) (noting that in the context of both the criminal and military justice systems, "[i]t is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[*] We also believe there is a substantial risk the courts would hold that one such fundamental protection is the prohibition on the use in military commissions of coerced statements by the accused, even if the coercion did not rise to the level of torture or cruel, inhuman or degrading treatment. As we have explained, we do not believe this approach would lead courts to conclude that the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding unwarned statements) would apply. It also does not mean that legal forms of interrogation could not be used to obtain valuable intelligence from captured unprivileged belligerents. It would mean instead that courts would not allow evidence to be used as the basis for convicting persons in commission proceedings without showing it satisfies a due process voluntariness inquiry.

Because of the substantial risk that courts will require baseline due process protections in military commissions, whether in the U.S. or at Guantánamo, and in light of the Supreme Court's recent rejections of detention and commissions policies at Guantánamo, we think it would be unwise to risk another confrontation between the Court and the political branches—one that could result in another derailing of the commissions process many years after the accused were apprehended. The Administration therefore strongly believes Congress should take the more secure path,

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[*] The United States has recently argued in *Rasul* v. *Myers*, on behalf of officers sued in their individual capacities for damages arising out of alleged torture and other abuse at Guantánamo, that the Due Process Clause does not protect Guantánamo detainees as a matter of *stare decisis* in the U.S. Court of Appeals for the District of Columbia Circuit. In a decision issued February 18, 2009 (*Kiyemba v. Obama*), the Court of Appeals had concluded that *Boumediene* did not affect the court of appeals' earlier decisions holding that aliens detained overseas have no constitutional due process rights, and that therefore detainees at Guantánamo who were entitled to release from detention on habeas do not have a right under the Due Process Clause (or the Suspension Clause) to be brought to the United States. In *Rasul v. Myers*, which was briefed in March of this year, the Department of Justice argued that even though "plaintiffs argue that *Kiyemba* was wrongly decided, that ruling is binding Circuit precedent." The Department did not further address the merits of the due process question. The court of appeals in *Rasul* ultimately ruled for the individual defendants based on qualified immunity and special factors weighing against recognition of a cause of action under *Bivens* in that setting, without resting its decision on whether the Due Process Clause applied to the detainees at Guantanamo. 563 F.3d 527, 532-533 (2009). Meanwhile, the detainees' petition for a for a writ of certiorari seeking review of the D.C. Circuit's decision in the *Kiyemba* case is pending before the Supreme Court. The Government's brief opposing certiorari states with respect to the question of due process at Guantánamo that "[f]or purposes of this case . . ., the dispositive question is not whether petitioners have any due process rights, but instead whether they have a due process right to enter the United States from abroad. As the court of appeals explained, it has long been established that aliens have no constitutionally protected interest in coming to the United States from abroad.

and design a commissions system that will satisfy the constitutional standards there is a significant risk the Court will insist upon. In our view, the recent Senate Armed Services Committee draft amendment of the Military Commissions Act, if it is modified by the Administration's proposals, would satisfy those constitutional standards, no matter where the commissions are convened.