U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 5, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on March 6, 2013. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

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

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Committee on the Judiciary
United States Senate
March 6, 2013

Questions Posed by Senator Grassley

1. DOJ's Decision Not to Prosecute ITAR Case

We have received information from whistleblowers that Pete Worden, a high-ranking political appointee at NASA, was involved in a DOJ investigation into foreign nationals violating International Traffic in Arms Regulations (ITAR) on his watch. The State Department certified that the technology in question was sensitive. A two year federal investigation uncovered evidence that the technology was improperly transferred. Finally, an Assistant U.S. Attorney in the Northern District of California was assigned to the case and empaneled a grand jury. But, then suddenly the National Security Division allegedly recommended that the case be dropped.

The U.S. Attorney now claims that Main Justice never prevented her from prosecuting this case, but Chairman Wolf says that law enforcement sources told his office that wasn't true. Allegations that politics improperly influenced prosecutorial decisions are very serious and the factual disputes in this case are troubling.

A) Were you ever made aware of this case? If so, how and when?

B) Did you or any member of your staff at the time have any communications related to this case with any current or former U.S. Attorney's Office official? If so, who did you or your staff speak to and please describe the communication?

C) Did you or any member of your staff at the time have any communications related to this case with any current or former White House and/or Executive Office of the President official? If so, who did you or your staff speak to and please describe the communication?

D) Did you or any member of your staff at the time have any communications related to this case with any current or former NASA official? If so, who did you or your staff speak to and please describe the communication?

E) Did you or any member of your staff at the time have any communications related to this case with any employee, representative, attorney, or lobbyist of an organization or firm that has a contract with NASA headquarters or any NASA center? If so, who did you or your staff speak to and please describe the communication?

F) When would it be appropriate for the National Security Division to tell a U.S. Attorney not to prosecute ITAR violations?

Response to 1(A)-(F):

In response to an inquiry about allegations that the U.S. Attorney's Office sought approval to file charges in an investigation relating to NASA Ames Research Center and that its request was denied by the Department of Justice (DOJ) in Washington DC, U.S. Attorney Melinda L. Haag provided the following statement on February 12, 2013: "I am aware of allegations our office sought authority from DOJ in Washington, D.C. to bring charges in a particular matter and that our request was denied. Those allegations are untrue. No such request was made and no such denial was received." For additional information responsive to the questions, please refer to the Department response, dated July 17, 2013, which responds to earlier letters addressed to then Assistant Attorney General Lisa O. Monaco and U.S. Attorney Haag.

Section 2778 of Title 22, the Arms Export Control Act, provides the authority to control the export of defense articles, and charges the President to exercise this authority. Under EO 11958, this authority is delegated to the Secretary of State. The Executive Order, in turn, is implemented through the International Traffic in Arms Regulations (ITAR).

I am concerned that there are proposals under consideration that would transfer part of the authority under the AECA that is currently delegated to the Secretary of State to the Secretary of Commerce. In particular, there may be proposals to transfer such authority for what are denominated significant military equipment under the ITAR as Category I and III munitions, including various semi-automatic firearms and ammunition and ordnance for these weapons. In addition, the components, parts, and accessories of these weapons also fall within these categories.

G) Are there any efforts being considered or planned to shift authority that is currently being exercised by the Secretary of State under the Arms Export Control Act to the Secretary of Commerce?

Response:

The Department of Justice has been and continues to be involved with the President's Export Control (ECR) Initiative and has worked closely with the Departments of State and Commerce, among other agencies, in connection with ECR. The Department of Justice defers to those departments to describe their respective roles in ECR and their authorities.

H) If so, what is the position of the Department of Justice with respect to any such proposal?

Response:

The Department of Justice supports the goals of ECR to clarify the government's export control regulations and to focus export controls on sensitive items that pose a threat to U.S. national security.

I) If the Commerce Department were to receive authority to control export of weapons such as these, would the Commerce Department then also receive the authority to control the import of Category I and Category III munitions as well?

Response:

On March 8, 2013, President Obama signed Executive Order 13637 – Administration of Reformed Export Controls (AECA) – which reaffirmed and clarified the continuing delegation to the Attorney General of the authority under the AECA to control the permanent import of defense articles, which would include defense articles in Categories I, II, and III.

2. **Respect for Congress**

You were recently quoted as saying that you didn't have any respect for the people who voted to enforce the subpoenas in Fast and Furious. I was extremely disappointed to hear you talk that way about a bi-partisan majority of the House of Representatives which included 17 Democrats. I gave you the benefit of the doubt and supported your confirmation four years ago despite concerns about previous controversies in your record. But your recent comments suggest a level of partisanship and disregard for those with whom you disagree that is frankly shocking. After all other negotiations have failed, contempt of Congress is the mechanism we have to enforce Congress's oversight interests. Now the issue will be tied up in the courts for some time. They will have to settle it. But your open disrespect for those Republicans and Democrats who thought you had an obligation to turn over the documents is a sad commentary on our inability to disagree without being disagreeable in Washington.

When I asked you about your statement that you did not respect those in the House of Representatives who voted to enforce the House subpoena in Operation Fast and Furious, you stated:

> **"Well, history has shown us that in the past there had been a much greater period of time for those kinds of negotiations to occur. If you look at what happened with Harriet Miers and other people, Josh Bolton, as opposed to what happened to Eric Holder, you can see the period with which we were given to try to respond to and negotiate was much, much shorter. There was a desire to get to a certain point, and they got there."**

In fact, Miers was subpoenaed on June 13, 2007, and the full House voted her in contempt 247 days later on February 15, 2008. You were subpoenaed on October 12, 2011, and the full House voted you in contempt 260 days later, on June 28, 2012. Not only was there not a "much greater period of time" for negotiations in the Miers case than in yours, there was actually slightly more time in your case—13 days more. And this does not even take into account the fact that you were on notice of the document requests, which you could have complied with voluntarily, from the time I first raised the issue with you publicly in early 2011, eight months or more before the House issued a subpoena to you.

A) **In light of these facts, do you still insist that it is appropriate for you to explicitly disrespect those who voted to enforce the House subpoena?**

Response:

We have previously indicated that we believe that the vote to hold the Attorney General in contempt of Congress was influenced by politics, and we continue to believe that that is the case. For instance, in advance of the vote, that National Rifle Association explicitly warned Members of Congress that it would weigh whether they voted to hold the Attorney General in contempt in deciding whether to endorse them

in future elections. While we believe it is unfortunate that this matter had to go into litigation, we have continued our efforts to try to reach an accommodation.

B) In your remarks, do you intend to communicate that you also lack respect for the 17 Democrats who voted with the majority to enforce the House subpoena through the contempt process?

Response:

Please refer to the response to Question 2(A), above.

C) Given that the controversy had been brewing for 18 months, that the Department had ceased producing further documents and that it had indicated its intent to withhold an entire category of documents (those created after the February 4, 2011 false letter to me denying gunwalking, what would be the point of further negotiations other than to delay the ultimate resolution of the matter?

Response:

Please refer to the response to Question 2(A), above.

D) As you know, the Congress cannot seek a judicial resolution of the dispute between itself and the executive branch without first going through the contempt process. If you were a member of Congress and an Attorney General refused to comply with a valid Congressional subpoena without making a valid privilege claim, what would you do?

Response:

Please refer to the response to Question 2(A), above.

E) If it were clear that negotiations were not progressing, how long would you wait before taking action to enforce the subpoena?

Response:

Please refer to the response to Question 2(A), above.

F) Would you wait longer than 260 days from the date of the subpoena? How long would you wait and why?

Response:

Please refer to the response to Question 2(A), above.

3. Executive Travel on FBI Jets

According to the Government Accountability Office, the cost of flying senior leadership around on FBI aircraft for non-mission travel was $11.4 million over 4 years. That is just operation and maintenance. It doesn't even include the cost of jets themselves. Since the Justice Department had outlined the cuts it would have to make under sequestration, I was surprised the Department didn't bring these non-mission flights up for discussion as a possible area for savings.

A) I know certain officials are required by an Executive Order to take government aircraft, but shouldn't you try to limit that travel as much as possible, given it costs the taxpayers so much money?

Response:

The $11 million figure is for a period of over five years and includes costs for three Attorneys General and one Acting Attorney General. Attorney General Holder's travel on government aircraft is comparable to his predecessors or the heads of the Department of Defense, the Department of Homeland Security, the Department of State, and the Central Intelligence Agency. For reasons related to national security and the need for secure communications, the Attorney General is a "Required Use" traveler under Office of Management and Budget (OMB) and executive branch directives and threat assessments that date back to the 1990s. Under these rules, the Attorney General is required to use government aircraft for both official and personal travel. The Justice Department did not make these rules, which as noted apply also to other key executive branch officials beyond DOJ. Further, the focus on the term "non-mission" travel is easily misunderstood and actually includes official travel of senior executives under the definitions used in the OMB aircraft circular that dates back to 1993. "Mission travel" is defined as travel which in the use of the aircraft is part of the agency's mission itself (such as surveillance or the movement of prisoners), while "non-mission travel" includes all other official travel by senior executives. "Required use" travel is also a form of official travel, since it has been determined that a government aircraft is required for all travel by the covered officials – no matter the purpose of the travel – because of bonafide communications or security needs of the agency or exceptional scheduling requirements. Such travel is reviewed and approved in accordance with applicable regulations and policy.

B) The number of hours that government jets are used for personal travel isn't regularly disclosed. We have to rely on outside audits or investigative reporters for this information. Do you support a requirement to regularly disclose to the public how much is spent for personal travel on government jets? If not, why not?

Response:

The Department discloses such flight information under the FOIA, a process that enables the government to protect sensitive information while at the same time providing public disclosure.

C) Have you ever used FBI aircraft to make a one-day round trip flight for personal reasons?

Response:

Attorney General Holder took 23 one-day personal round trips as a Required Use traveler through December 31, 2012, and provided reimbursement in accordance with OMB Circular A-126 rules. Of the

personal trips cited in the recent Government Accountability Office (GAO) aircraft report, the current Attorney General used government aircraft approximately half as often as his predecessors.

D) In 2009, the FBI's budget justification stated that "increasing usage of the Gulfstream V ("five") has placed a strain on maintenance and fuel funds necessary to carry out crucial counterterrorism missions." So, the FBI paid for a second Gulfstream V in 2011. But, according to GAO, 60% of the travel on the Gulfstream jets was not for counterterrorism purposes, but for executive travel.

Why were these Gulfstream jets pitched to Congress as necessary for counterterrorism when the majority of the time they weren't being used for counterterrorism?

Response:

The first priority for all Gulfstream V (G-V) usage is operational missions. All executive travel requests are secondary to the Federal Bureau of Investigation's (FBI) investigative and operational needs, as well as required maintenance and pilot training missions. In a recent report, the GAO found that DOJ and FBI always adhere to these principles in scheduling the use of its aircraft.

The G-V owned by the FBI is more than 12 years old, has more miles than most other G-Vs of the same age and, therefore, is frequently out of service due to maintenance, thus necessitating the need for a second G-V. Operational requirements dictated the need for a second G-V, as the range and capacity of the G-Vs are necessary for the FBI's operational missions, which often include transporting personnel, evidence, or apprehended subjects over long distances and with short notice.

Rather than lease yet another plane with the secure communications equipment that the Attorney General and FBI Director are required to have access to when they travel – which would require additional expenditures for another lease, maintenance costs, and pilot staffing – the FBI uses the G-Vs for such executive travel when the planes are not operationally tasked. In addition, while executive travel is termed "non-mission" in the GAO report, much of that travel is official business travel by the Attorney General and FBI Director in furtherance of the Department's mission.

4. DOJ Hiring Despite Sequester

Last month, you wrote a letter to Chairwoman Mikulski and stated the sequestration would cut over "1.6 billion dollars from the Department's current funding level, which would have serious consequences for our communities across the nation." Specifically for the FBI, you wrote these cuts would force the Bureau to furlough 775 Special Agents, the most important asset to the mission.

But, the reality is, as of yesterday, the Department of Justice was advertising for many job openings on the government's website, for such positions as cook supervisor and dental hygienist. So, I am skeptical about your description of the "severe negative impacts" on the Department, including the estimated loss of federal agents fighting national security and violent crime when the government is still hiring non-mission critical staff.

A) How do you reconcile for the American people, the fact that the Department is actively hiring cooks and dental hygienists, but yet, you threaten to furlough 775 FBI agents?

Response:

In a February 1, 2013 letter to Chairwoman Mikulski, the Attorney General explained what would happen if the FBI had to absorb its sequestration cut without any mitigation effort. Sequestration was statutorily required to reduce all programs, projects and activities by the same percentage. Accordingly, over $550 million was cut from the FBI's budget. In April 2013, with the support of Congress, the Attorney General exercised a limited reprogramming authority to mitigate the furloughs for the FBI. Without this reprogramming, the FBI would have had to furlough over 35,000 employees, including over 13,000 agents. This would have the equivalent effect of cutting approximately 2,285 onboard employees, including 775 Special Agents.

The cook and dental hygienist advertisements referenced in your question are for the Federal Bureau of Prisons (BOP), not the FBI. These positions, while not as high profile as the position of FBI agent, are important functions within a prison. Every employee at the 119 federal prisons around the country is a federal law enforcement officer and serves as a correctional worker first. The BOP cooks and dental staff are trained in all aspects of correctional practices and each plays a critical role in institutional safety.

Finally, the Department, like other agencies, experiences ongoing retirements, resignations, and other job changes throughout the year – in fact, thousands of positions become vacant each year in the course of normal operations. As such, ongoing job advertisements are to be expected even during times of managed hiring, commonly referred to as a "hiring freeze."

In sum, the successful accomplishment of our national security and law enforcement missions is inextricably linked to our staff. DOJ cannot fulfill its mission responsibilities without its staff. Thankfully, in light of additional resources provided by Congress in Fiscal Year 2014, the Department has been able to fill critical vacancies, and resume the hiring process for federal agents, prosecutors, analysts, and other staff we need to fulfill our mission.

B) Have you furloughed any high ranking DOJ officials, most of whom also make many times more than lower ranking employees?

Response:

The Department was able to avoid furloughs in Fiscal Year 2013 because of additional funding received in the final Fiscal Year 2013 appropriations, the use of the Attorney General's limited authority to reprogram funds (with the support of our House and Senate appropriations subcommittees), and the Department's aggressive steps to generate savings through a "hiring freeze" and by cutting and/or delaying contracts, training, and other costs. Further, in light of the additional resources the Department has received in Fiscal Year 2014, the Department has resumed hiring and is not considering furloughing staff at this time.

5. Lack of Prosecution of Big Banks

Despite appropriating $165 million for the prosecution of entities and individuals whose actions resulted in the financial crisis, DOJ still has no high-profile financial crisis criminal convictions of either companies or individuals.

Assistant AG Breuer said that one reason why DOJ has not brought these prosecutions is that it reaches out to "experts" to see what effect a prosecutions would have on financial markets.

On January 29, Senator Brown and I requested details on who these so-called "experts" are. So far, we have not received any information on their identity.

A) Please provide the names of experts, even if they are government employees, DOJ consulted with as we requested on January 29, 2013?

Response:

In deciding whether to bring criminal charges against a business entity, long-standing Department of Justice policy requires prosecutors to consider a number of factors, including the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's timely and voluntary disclosure of wrongdoing; the existence and effectiveness of the corporation's pre-existing compliance program; the adequacy of remedies such as civil or regulatory enforcement actions; and the collateral consequences of prosecution. *See* U.S. Attorney's Manual (USAM) 9-28.300. In considering collateral consequences, prosecutors must determine whether there would be disproportionate harm to investors, pension holders, customers, employees, and others who were not personally culpable, as well as impact on the public arising from the prosecution. *See* USAM 9-28.300, 9-28.1000.

The Department does not consider potential collateral consequences in every case. As a threshold matter, federal prosecutors must determine that a business entity's conduct actually constitutes a federal crime. If prosecutors determine that the conduct does not constitute a federal crime, they need not even reach the question of assessing potential collateral consequences (including those affecting the public or the economy).

When we do consider potential collateral consequences, we may consult with experts outside the Justice Department – that is, with relevant domestic and foreign financial regulators. The Department has on occasion reached out to domestic and foreign governmental entities to better understand the regulatory consequences that might flow from an indictment or conviction. In some instances, regulators are able to provide the Department only with limited information, such as the regulatory process that would or could occur in response to a potential enforcement action. Other regulators may indicate that they are unable to provide any view on collateral consequences as part of our consultation. Some regulators, by contrast, have provided us with their views on issues such as potential collateral consequences that may affect innocent individuals, other institutions, and/or markets. Our discussions with regulators do not by themselves determine the outcome, but rather are among the mix of factors that we may consider in determining the appropriate resolution of a matter. We are not currently aware, based on the inquiries we have conducted, of any consultations with private, non-governmental third party entities on the potential collateral consequences of prosecutorial actions the Department might take with respect to any large, complex financial institution.

B) Why should DOJ take these so-called ripple effects into account when they are so speculative? Doesn't this also create moral hazard? And isn't your job just to enforce the law?

Response:

As explained in the USAM, the prosecution of corporate crime is a high priority for the Department. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. Federal prosecutions require the thoughtful analysis of all facts and circumstances presented in a given case. The consideration of the

factors listed above when determining whether to charge a corporation has been required by the USAM since 2008. But the basic principles underlying those USAM provisions have a much longer history at the Department. The first Department-wide memo on this subject was issued in 1999, and those basic principles have been reaffirmed multiple times since then.

The Department shares your concern that there must be accountability for corporate wrongdoing. None of the USAM factors acts as a bar to prosecution, or has prevented the Justice Department from aggressively pursuing investigations and seeking criminal penalties in cases involving large, complex financial institutions. In addition, we do not consider potential collateral consequences in deciding whether or not to charge individual executives and employees. We do consider them in connection with some charging decisions concerning business entities, including large, complex financial institutions, but not in every case. The Department has pursued financial crime with the same strong commitment with which we pursue other criminal matters of national and international significance. No individual or institution is immune from prosecution, and we intend to continue our aggressive pursuit of financial fraud. Indeed, where appropriate, we have filed criminal charges against, and obtained plea agreements from, financial institutions, and charged individual employees. For instance, on May 19, 2014, Credit Suisse AG pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service. Eight Credit Suisse executives have been charged in connection with that investigation since 2011. In another example, on June 30, 2014, BNP Paribas S.A. agreed to enter a guilty plea to conspiring to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act by processing billions of dollars of transactions through the U.S. financial system on behalf of entities subject to U.S. economic sanctions.

6. <u>The Justice Department's Analysis of the Constitutionality of the Assault Weapons Ban</u>

At two separate hearings on gun violence, two U.S. Attorneys testified that the Department supported assault weapons legislation. One argued the Department "would work hard to ensure that whatever comes out, if one comes out, is constitutional." However, when I asked the second U.S. attorney if such an analysis was done and available, he deflected and said that he thinks the legislation is "headed in the right direction" and that "the President would not sign a bill that he did not believe was in accordance with the Second Amendment."

Has the Department issued a formal legal opinion as to the constitutionality of Senator Feinstein's Assault Weapons ban in light of Heller? If not, why not?

<u>Response</u>:

The Department of Justice supports the concept of an assault weapons ban, but the Department has not issued any formal legal opinion on the constitutionality of Senator Feinstein's assault weapons ban.

7. <u>Position on Marijuana Legalization</u>

In October 2010 you sent a letter in response to former Administrators of the Drug Enforcement Administration concerning the Department of Justice's position on California's Proposition 19. This proposition was similar to ballot measures in Colorado and Washington state that legalize marijuana for recreational use.

Eight former Drug Enforcement Administrators sent you another letter this week asking you to act to nullify Colorado and Washington's laws that legalize marijuana before they can be fully implemented. These Administrators are concerned that a lack of action from the Department may cause a "domino effect" that will encourage other states to nullify federal drug laws.

In your original response, dated October 13, 2010 you state, "Let me state clearly that the Department of Justice strongly opposes Proposition 19. If passed, this legislation will greatly complicate federal drug enforcement efforts to the detriment of our citizens. Regardless of the passage of this or similar legislation, the Department of Justice will remain firmly committed to enforcing the Controlled Substances Act in all states. Prosecution of those who manufacture, distribute, or possess any illegal drugs- including marijuana- and the disruption of drug trafficking organizations is a core priority of the Department. Accordingly, we will vigorously enforce the Controlled Substances Act against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law." I ask Unanimous Consent to include the letters from the former Drug Enforcement Administrators and the Attorney General's response in the record.

A) Do you believe the legalization of marijuana is detrimental to our citizens?

Response:

Marijuana trafficking raises a number of public health and safety concerns. As we recently reiterated in a guidance memorandum issued by the Deputy Attorney General to all federal prosecutors, on August 29, 2013, the Department of Justice is committed to enforcing the Controlled Substances Act in all states. The Administration also remains committed to minimizing the public health and safety consequences of marijuana use, focusing on prevention, treatment, and support for recovery.

B) Do you support the legalization of marijuana for recreational or any other use?

Response:

The Administration does not support drug legalization. We are focused on making America healthier, safer, and more prepared to meet the challenges of the 21st Century.

C) Are the statements you made in the October 13, 2010 letter still the position of the Department of Justice? If not, why not? And if so, what will the Department of Justice do to "vigorously enforce" the Controlled Substances Act?

Response:

The Department's responsibility and commitment to enforcing the Controlled Substances Act is unchanged. On August 29, 2013, the Deputy Attorney General issued a memorandum to all United States Attorneys that applies to all federal enforcement activity concerning marijuana, including civil enforcement and criminal investigations and prosecutions, in all states. The memorandum directs our prosecutors to continue to fully investigate and prosecute marijuana cases that implicate any one of eight enumerated federal enforcement priorities. It also makes clear that states and local governments that have enacted laws authorizing marijuana-related conduct are expected to implement strong and effective regulatory and enforcement systems to protect against the harms addressed by those priorities.

8. **OPR Report for FY 2012**

Provide summaries of all Office of Professional Responsibility (OPR) matters at the Department of Justice and its components for fiscal year 2012. This information has been provided to Congress previously. Should the Department produce the documents with redactions, provide the citation to the statute that authorizes the redaction of information to Congress.

Response:

The Office of Professional Responsibility's (OPR) annual report for Fiscal Year 2012 is available at http://www.justice.gov/opr/annualreport2012.pdf. OPR's annual report for Fiscal Year 2013 is available at http://www.justice.gov/opr/annualreport2013.pdf.

9. **1996 Task Force on FBI Crime Lab**

On May 21, 2012, Chairman Leahy and I sent a letter to the Federal Bureau of Investigation (FBI) regarding the flawed forensic work of its crime lab. When we had not received a response seven weeks later, I sent a follow-up letter to the Department on July 16, 2012, with seventeen questions. The Department's December 3, 2012, response touched on some of the issues I raised in my letter, but left many of the questions unanswered.

A) **Did the prior task force only review the forensic work of one scientist, as was reported?**

Response:

No, the Department's 1996 Task Force looked at cases involving the work of 13 FBI laboratory examiners.

B) **Why did the task force notify only prosecutors regarding faulty forensic testing, and not defendants who could have benefited from this information?**

Response:

As you are aware, the task force was created more than 15 years ago. The memoranda relating to the task force's creation and functioning do not appear to explain why the decision was made to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

An April 27, 1998 Memorandum for the Attorney General from Acting Assistant Attorney General John C. Keeney, however, addressed a request by the National Association of Criminal Defense Lawyers (NACDL) "that the Criminal Division Task Force overseeing the review notify a defendant's last counsel of record (or the defendant) of any possible evidentiary problems and/or case referrals to prosecutors." Memorandum from Acting Assistant Attorney General John C. Keeney to the Attorney General (April 27, 1998) at 1. That memorandum stated:

> There are safeguards in place to ensure that the case reviews are conducted in a thoughtful and objective manner.

> If a prosecutor determines that the forensic work of a criticized laboratory examiner was not material to a conviction, the prosecutor must provide the Criminal Division Task Force with the reasons for this determination in writing. If a prosecutor's reasons are incomplete or appear to be cursory, the prosecutor will be required to provide a more complete and detailed justification for this decision.
>
> This review process is consistent with the Supreme Court's decision in Brady v. Maryland and its progeny. The Court recognized that prosecutors are in a unique position to evaluate the evidence before them for disclosure pursuant to the Constitution. In addition, under professional ethics rules, prosecutors are subject to a possible finding of misconduct if they attempt to conceal exculpatory information from a defendant.

Id. at 3-4. Similarly, an August 17, 1998, letter from Attorney General Janet Reno to Gerald Lefcourt, the President of NACDL, noted that:

> The Department, like the courts, depends on prosecutors in all cases to make important decisions concerning the disclosure of information, such as determining what evidence must be disclosed under Brady. Prosecutors have an obligation to reveal potentially exculpatory or impeachment information, not only during the pendency of a case, but after conviction, to insure that justice is done. The Department trusts them to carry out this obligation.

Letter from Attorney General Janet Reno to Gerald Lefcourt (Aug. 17, 1998) at 2.

C) What were the procedures for notification in cases where a problem with the forensic work was found by the task force?

Response:

A June 6, 1997 memorandum from Acting Assistant Attorney General John C. Keeney to the Department's prosecutors explained the notification procedures as follows:

> If you determine that the work and/or testimony of a laboratory examiner was material to the verdict, the FBI and Criminal Division will work with your office to arrange for an independent, complete review of the Laboratory's findings and any related testimony. The FBI is contracting with qualified forensic scientists to perform this work. . .
>
> Once the independent scientific review is completed, you will be so notified so that you can assess any Brady obligation to further disclose information to the defense.

Memorandum from Acting Assistant Attorney General John C. Keeney to All United States Attorneys (June 6, 1997) at 4.

Similarly, a July 23, 1997, letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman stated:

> 6. If after receiving the additional input requested, or after initial review of the case, the prosecutor determines that the Laboratory's work was material to the conviction, a scientist outside the FBI will conduct a complete review of the Laboratory's findings and any related testimony. The FBI will be contracting with qualified scientists for this

purpose; however, prosecutors may choose their own scientist to conduct the review, but must notify the Criminal Division Task Force of the name of the scientist or laboratory they plan to use.

7. As soon as the independent scientific review is completed, the FBI will furnish the results of that review to the Criminal Division Task Force, which will notify the prosecutor and obtain an assessment of any Brady obligation to further disclose the information to the defense.

[...]

The process outlined above should ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized Lab examiner.

Letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman (July 23, 1997) at 2-3 (footnote omitted).

While the specific details of the notification procedures appear to have changed over time in response to issues that arose as the task force performed its work, it does not appear that the Department revisited its decision to notify only prosecutors in cases in which it was determined that work by the Bureau's laboratory examiners was material to a defendant's conviction.

D) In how many cases did the task force find a problem with the forensic work? In how many of those cases is the defendant still incarcerated? In how many was the defendant executed?

Response:

The 1996 Task Force began its work in 1996 and ended its work in or around 2003. The Department takes seriously the concerns raised regarding the Task Force's work and is diligently working to address those concerns. As part of its response, the Department has commenced a review of certain work by the 1996 Task Force and among these things, is assessing cases involving defendants who are currently on death row. On September 27, 2013, representatives from the Department provided a briefing to Committee staff including an overview of the historical activities of the 1996 Task Force, explaining the process by which cases were evaluated and how the Task Force interacted with prosecuting authorities and the parameters that triggered independent scientific review of certain cases. Since that time, the Department has provided updates on the status of the current review of the 1996 Task Force files and ongoing efforts to ensure appropriate notification especially on capital cases and those previously deemed material.

E) Please list each convicted individual in which the task force found the lab's flawed forensic work was determined to be critical to the conviction.

Response:

Please see the response to Question 9(D), above.

F) Please name each prosecutor who was notified by the task force, as well as which conviction the notification was relevant to.

Response:

Please see the response to Question 9(D), above.

G) For each prosecutor who was notified, please indicate, according to the Department's best knowledge, whether or not the defendant was in turn notified.

Response:

Please see the response to Question 9(D), above.

H) For each case in which the Department notified the prosecutor but the defendant was never notified by the prosecutor, please provide the Department's understanding as to why the defendant was not notified.

Response:

Please see the response to Question 9(D), above.

Aside from the questions that were left unanswered in the December 3, 2012, response, the letter itself also raised new questions. When staff for Chairman Leahy and I requested a follow-up briefing in order to understand the Department's response, the Department indicated that it was unwilling to provide any further information at this time about the prior task force.

I) The Department's December 3, 2012, letter read: "The memoranda related to the creation and workings of the Task Force do not provide further details about findings or notifications in particular cases. Nor does the Task Force appear to have collected such information in a database or kept summary statistics. A methodical and labor-intensive review of thousands of paper files would thus be required to provide information about findings or notifications in particular cases." Does this mean that the Department does not intend to undertake a review of these records because it would be labor-intensive?

Response:

Please see the response to Question 9(D), above.

J) On January 30, 2013, a representative of the Department's Office of Legislative Affairs indicated that the Department was still considering what steps to take in order to ascertain the results of the 1996 Task Force. Why had the Department not begun any steps in May 2012, to identify the results of the Task Force, when Chairman Leahy and I first wrote to the FBI requesting this information?

Response:

The Department began its process of reviewing the work of the 1996 Task Force in May 2012. For details regarding the Department's limited review of the 1996 Task Force's work, please see the response to Question 9(D), above.

10. Current FBI Hair Comparison Analysis Review

I understand that the FBI is currently engaged in a review of microscopic hair comparison reports and testimony provided by FBI crime lab examiners prior to December 31, 1999. As of January 30, 2013, the FBI had identified one case where a conviction had been obtained and an FBI crime lab examiner either testified or provided a report about a hair sample. The case was a state death penalty case.

A) Has the convicted defendant that had been identified as of January 30, 2013, been notified yet by the Department that the FBI crime lab examiner in their case may have overstated the conclusions that may appropriately be drawn from a positive association between crime scene evidence and a known hair sample?

Response:

Yes. The Department of Justice notified the defense counsel and prosecutor of the results of the FBI review in September 2012.

B) How many other convicted defendants whose cases involved FBI hair analysis has the FBI identified since January 30, 2013? Please provide details about each case and whether they have yet been notified by the Department.

Response:

The FBI is in the process of reviewing more than 21,500 cases to which a qualified FBI hair examiner was assigned before December 31, 1999. As we review each case, we look first at whether the FBI determined that a positive association was made between a known hair sample and an evidentiary submission. When this has occurred, the FBI contacts the contributor of the evidence to obtain further information about the case, including whether the case was prosecuted and, if so, by what prosecutor's office. When that information is received from the contributor, the FBI contacts the prosecutor to obtain additional information, such as whether the case resulted in a conviction and, if so, whether an FBI laboratory report or testimony were used in the case. If FBI testimony was provided, the FBI asks the prosecutor to forward a transcript of the FBI testimony.

Through April 2014, the FBI had conducted initial review of more than 19,000 case files to determine whether hair evidence was analyzed and a positive association was identified. The FBI has contacted approximately 1,700 contributors of evidence and 1,900 prosecutors to request underlying case information and transcripts, and has received approximately 258 transcripts for review. Notification will be sent to prosecutors, defense counsel, and defendants when the FBI completes this review.

C) Once the Department completes this new review, will the Department commit to publicly releasing the results in detail? If not, why not?

Response:

The Department of Justice will provide general information regarding the results of the review once the review is completed.

11. ICE Agent Jaime Zapata Murder Weapons

Since March 4, 2011, I have been attempting to obtain information regarding individuals associated with the purchase of one of the weapons recovered at the murder scene of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata. Special Agent Zapata was murdered in Mexico on February 15, 2011. I wrote letters to the Department on this issue on March 4 and March 28, 2011, and also submitted Questions for the Record (QFRs) on May 11, 2011.

In response to the QFRs, the Department wrote on July 22, 2011: "The question seeks information regarding sensitive law enforcement operations. We are attempting to determine the extent to which, if any, information in response to this question can be provided consistent with the Department's law enforcement responsibilities." Later, in response to my letters, the Department wrote on October 11, 2011:

As you may know, Otilio Osorio, Ranferi Osorio, Kelvin Morrison and others have been charged with various federal offenses and are scheduled for trial in the near future. Our disclosure of additional information requested by your letters would be inconsistent with the Department's strong interest in successfully prosecuting this matter, as well as with our longstanding policy regarding the confidentiality of ongoing criminal investigations. We will continue to provide you and Chairman Leahy with other information responsive to your requests, as appropriate.

In a letter of February 1, 2012, the Department wrote: "Sentencing of the defendants in this matter is scheduled to occur in February and March of 2012." However, even after Morrison and the Osorio brothers were sentenced on May 7, 2012, the Department continued to rebuff requests for information about their history and their interactions with federal law enforcement. In response to Questions for the Record about why the Department failed to arrest the Osorio brothers in November 2010 when law enforcement observed them engaged in illegal activity, the Department's June 7, 2012 response ignored the question and changed the focus from the Osorio brothers over to the actual shooters of ICE Agent Jaime Zapata: "The investigation and prosecution of those responsible for Special Agent Jaime Zapata's murder are ongoing. For that reason, and because disclosure could compromise these efforts, the Department is not in a position to provide additional information at this time."

Notwithstanding the charges again Julian Zapata Espinoza for the murder of Special Agent Zapata and his upcoming trial, scheduled for June 3, 2013, the Department should be able to release information related to Otilio Osorio, Ranferi Osorio, and Kelvin Morrison now that they have been sentenced—particularly as it relates to incidents other than Otilio Osorio's October 10, 2010, purchase of the gun used in the murder of Special Agent Zapata.

Therefore, included below are past Questions for the Record regarding this matter that remain unanswered:

May 11, 2011: Murder Weapon of ICE Agent Jaime Zapata

According to a Justice Department press release from March 1, 2011, one of the firearms used in the February 15 murder of U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata was traced by the ATF to Otilio Osorio, a Dallas-area resident. Otilio Osorio and his brother Ranferi Osorio were arrested at their home, along with their neighbor Kelvin Morrison, on February 28. According to that same press release, the Osorio brothers and Morrison transferred 40 firearms to an ATF confidential informant in November 2010. Not only were these three individuals not arrested at that time, according to the press release their vehicle was later stopped by local police. Yet the criminal indictment in United States v. Osorio, filed March 23, 2011, is for straw purchases alone and references no activity on the part of the Osorio brothers or Morrison beyond November 2010.

A) Why did the ATF not arrest Otilio and Ranferi Osorio and their neighbor Kelvin Morrison in November?

Response:

As we have explained previously, the Department has an open criminal investigation into Special Agent Zapata's murder and this matter is ongoing. We are therefore not in a position to provide additional information about the allegations concerning the Osorios and Morrison, or about the investigation into Agent Zapata's murder. We also understand that on October 4, 2012, the Department's Office of the Inspector General (OIG) informed you that OIG is reviewing "what information ATF, DEA, and DOJ obtained about the Osorio brothers and Morrison prior to the death of Agent Zapata, including the conduct of those investigations."

B) Was any surveillance maintained on the Osorio brothers or Morrison between the November firearms transfer and their arrest in February?

Response:

Please refer to the response to Question 11(A), above.

C) Did any DOJ or component personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?

Response:

Please refer to the response to Question 11(A), above.

D) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico after the undercover transfer in November, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?

Response:

Please refer to the response to Question 11(A), above.

E) Why should we not believe that this incident constitutes a further example, outside of the Phoenix Field Office and unconnected to Operation Fast and Furious, of the ATF failing to make arrests until a dramatic event is linked to a purchase from one of their targets, even when those targets are ultimately only charged for the same offenses the ATF was aware of months prior to their arrest?

Response:

Please refer to the response to Question 11(A), above.

F) Do you believe that it was appropriate for the ATF to wait until Agent Zapata was shot before arresting these individuals on February 28?

Response:

Please refer to the response to Question 11(A), above.

Earlier Knowledge of Zapata Murder Weapon Traffickers

The DOJ press release alludes to an August 7, 2010, interdiction of firearms in which including a firearm purchased by Morrison. Further documents released by my office make clear that not only did Ranferi Osorio also have two firearms in that interdicted shipment, ATF officials received trace results on September 17, 2010 identifying these two individuals.

G) What efforts did the ATF take in September to further investigate the individuals whose guns had been interdicted, including Morrison and Osorio?

Response:

Please refer to the response to Question 11(A), above.

H) When did law enforcement officials first become aware that Otilio Osorio purchased a firearm on October 10, 2010?

Response:

Please refer to the response to Question 11(A), above.

I) Had the ATF placed surveillance on the Osorio home in September or arrested Ranferi Osorio and Kelvin Morrison, isn't it possible that the ATF might have prevented Otilio Osorio from purchasing a weapon on October 10 with the intent for it to be trafficked?

Response:

Please refer to the response to Question 11(A), above.

J) Does the ATF have policies about creating ROIs at the time that events take place?

Response:

Please refer to the response to Question 11(A), above.

Documents also indicate that ATF Dallas did not create a Report of Investigation (ROI) regarding the November 2010 transfer of firearms until February 25, 2011—the same day ATF received the report tracing the Zapata murder weapons back to the purchase by Otilio Osorio.

K) Does the ATF have policies about creating ROIs at the time that events take place?

Response:

Please refer to the response to Question 11(A), above.

L) Why was the ROI regarding events in November 2010 not created until immediately after the ATF received the trace results on the Zapata murder weapon?

Response:

Please refer to the response to Question 11(A), above.

M) Please provide all records related to the following:

i. When any component of the DOJ first became aware of the trafficking activities of Otilio and Ranferi Osorio and Kelvin Morrison;

ii. Surveillance that may have been conducted on the Osorio brothers or Morrison prior to the November 9 transfer of weapons;

iii. The November 9 transfer; and

iv. Any surveillance that any component of the DOJ continued to conduct on the Osorio brothers or Morrison between the November 9, 2010, transfer and their arrest on February 28, 2011.

Response:

Please refer to the response to Question 11(A), above.

15. Prosecutorial Misconduct

On April 19, 2012, the Department submitted testimony before the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security regarding the Prosecution of former Senator Ted Stevens. The Department's testimony acknowledged failures that occurred in the Senator Stevens case and put forth an argument to combat legislation being filed to alter the federal criminal discovery practice. The Department stated:

[T]he Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in Stevens, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

According to the Department's testimony in the Stevens hearing, Department regulations require Department attorneys to report any judicial findings of misconduct to OPR. According to the same testimony, Department regulations also require OPR to conduct computer searches to identify court opinions that reach findings of misconduct.

A) On what date was mandatory prosecutor refresher training on discovery initiated by the Department?

Response:

In August 2009, the Director of the Executive Office for United States Attorneys (EOUSA) sent a memorandum to all United States Attorneys, First Assistant U.S. Attorneys, Executive Assistant U.S. Attorneys, Criminal Chiefs, Civil Chiefs, and Senior Litigation Counsel, entitled "Mandatory Brady/Giglio and Discovery Training, Appointment of Discovery Trainer, and Creation of National Discovery and Brady/Giglio Coordinator Position." Among other things, the memorandum described that every Assistant U.S. Attorney (AUSA) would be required to complete mandatory half-day training concerning Brady/Giglio and criminal discovery by the end of 2009. Based on a train-the-trainer course held at the National Advocacy Center in October 2009, all AUSAs and prosecutors from Main Justice components – roughly 6,300 in all – were able to complete this training prior to the conclusion of 2009. Thereafter, in 2010, 2011, 2012, and 2013, all federal prosecutors completed at least two hours of annual criminal discovery refresher/update training, as mandated by the June 2010 amendment to Section 9-5.001 of the United States Attorney's Manual. And mandatory criminal discovery refresher/update training for 2014 is presently taking place.

B) Please define "judicial findings of misconduct."

Response:

A judicial finding of misconduct is a finding made by a judge that an attorney violated a rule or standard of conduct intentionally or in reckless disregard of the attorney's professional obligations. In addition, Department attorneys must report to OPR any non-frivolous allegation of serious misconduct by a judge of a Department attorney's conduct.

C) Does "judicial findings of misconduct" include judicial findings in which only the first two elements of a Brady violation exist, establishing that the evidence was exculpatory and that the prosecutor did suppress it, even if the suppression did not prejudice the defendant?

Response:

OPR initiates an inquiry or investigation whenever there is sufficient evidence to establish a reasonable probability that an attorney engaged in professional misconduct. Applied in a Brady context, OPR does not restrict its investigations to only those circumstances when an attorney has been found to have suppressed material and exculpatory evidence. Pursuant to U.S. Attorneys' Manual (USAM) Section 9-5.001(C)(2), for example, prosecutors are required to disclose information that casts substantial doubt upon the accuracy of any of its trial evidence, irrespective of materiality. Accordingly, OPR would initiate an inquiry or investigation if the judicial finding suggested that the prosecutor had violated the broader requirements of the USAM disclosure provisions, apart from whether the court found the suppressed, exculpatory information to be material.

D) Please provide the number of reported instances of misconduct annually since these regulations were put in place, as well as what actions were taken to rectify these situations.

Response:

The regulation requiring Department employees to report judicial findings of misconduct (as well as misconduct allegations of any type from any source), is not new and has existed for more than a decade. With respect to discovery and disclosure obligations, on January 4, 2010, former Deputy Attorney General David Odgen issued a memorandum (Ogden Memo) to all Department of Justice prosecutors that provided further guidance regarding criminal discovery obligations. Since the issuance of the Ogden Memo, OPR has initiated approximately 106 matters in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16. These include both inquiries and investigations based upon judicial findings of misconduct, referrals by DOJ components and employees, media reports, and complaints from private citizens (including defense attorneys and defendants in criminal cases). Accordingly, these include allegations of misconduct for which there may not be a factual basis to support a misconduct finding. Upon the conclusion of an inquiry, OPR either converts the matter to an investigation, closes the matter, or refers the matter to the litigating component to take management action. Of the 106 matters opened since January 4, 2010, in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16, 35 became investigations. Of those 35 investigations, OPR has closed four resulting in findings of professional misconduct in which at least one allegation of misconduct related to the government's alleged failure to comply with its obligations under Brady, Giglio, or Rule 16. As of September 30, 2014, 12 of the 35 investigations remained pending.

E) Who conducts the computer searches for misconduct-related opinions? How often do the searches occur? What safeguards are in place to ensure that no opinions are missed?

Response:

OPR initiates inquiries based on information from many sources. Department employees are required to report to OPR judicial findings of misconduct and any non-frivolous allegation of serious misconduct by a judge of a DOJ attorney's conduct. Any evidence, or non-frivolous allegation, of serious misconduct must be reported by DOJ employees to OPR as well. OPR receives information from many other sources, including judges, private attorneys, Congress, criminal defendants, concerned citizens, and the media. Searches of legal databases also are used to identify opinions containing judicial findings of misconduct or serious criticism. For the past ten years, working in conjunction with DOJ's law library and Westlaw, senior OPR attorneys have routinely reviewed, every two weeks, all published and unpublished opinions

issued by district and circuit courts that may contain judicial findings of misconduct or serious judicial criticism of a DOJ attorney's conduct. Utilizing broad search terms to identify these opinions, OPR uses the results of these computerized searches to ensure that all such opinions are identified and reviewed to determine whether they warrant further inquiry. Senior OPR attorneys carefully evaluate the opinions that contain the broad search terms to identify those opinions that may merit further inquiry, which then are reviewed by an OPR supervisor. Periodically, OPR reviews its search terms and process to assure that all relevant judicial opinions are analyzed. Likewise, if OPR becomes aware of an opinion that was missed in its electronic search, OPR determines why the opinion was missed and takes necessary corrective action.

F) What does OPR do when such searches identify problems?

Response:

Once OPR determines that a judicial opinion contains findings of misconduct or serious criticism of a DOJ attorney's conduct, OPR typically initiates an inquiry and alerts the component head and subject attorney of the court's opinion and OPR's inquiry. If the matter was not also referred to OPR by the component or subject attorney, OPR includes in its inquiry the component's failure to alert OPR of the judicial opinion.

G) Please list which United States Attorneys' Offices the National Criminal Discovery Coordinator has visited since the creation of the position in 2010 and what they have discovered.

Response:

The National Criminal Discovery Coordinator has conducted criminal discovery training at numerous United States Attorneys' Offices since his appointment in 2010. These sessions ranged between two and four hours, and covered the following topics: Brady/Giglio, Giglio for law enforcement agents, the Jencks Act, Fed. R. Crim. P. 16, and electronically stored information (ESI) in criminal cases. During 2010-14, he conducted (or is scheduled to conduct) this training at U.S. Attorney's Offices in numerous districts, including the following:

- D. Arizona
- C.D. California
- E.D. Virginia
- W.D. New York
- N.D. Alabama
- N.D. Ohio
- N.D. Illinois
- W.D. Missouri
- D. Kansas
- E.D. Louisiana
- W.D. Tennessee
- D. Minnesota
- E.D. Michigan
- W.D. Washington
- D. Oregon

- D. Columbia
- D. Massachusetts
- D. New Jersey
- D. Nevada
- S.D. California
- N.D. California
- N.D. Texas
- E.D. Texas
- D. New Hampshire
- D. Maryland
- M.D. Georgia
- M.D. Florida
- D. Maine
- M.D. Tennessee
- E.D. Pennsylvania
- D. Connecticut
- S.D. Florida
- N.D. New York
- E.D. North Carolina
- W.D. Virginia
- E.D. New York
- D. Vermont
- W.D. Lousiana
- D. South Carolina
- D. Hawaii

In addition, the National Criminal Discovery Coordinator has frequently conducted criminal discovery training for attorneys in Main Justice components, including the Criminal Division, the Tax Division, and the Office of Professional Responsibility. He has also regularly conducted criminal discovery training at a wide variety of training courses at the National Advocacy Center, including several specifically designed to provide training for newly-hired prosecutors, as required by Section 9-5.001 of the United States Attorneys' Manual. And he has been responsible since 2010 for creation of annual online criminal discovery refresher/update training via distance education for federal prosecutors.

16. <u>New Mexico USAO and Columbus Case</u>

As I wrote you on November 28, 2012, news reports indicate the husband of the head of the Criminal Division in the U.S. Attorney's Office for the District of New Mexico (USAONM) has been indicted in connection with a gun trafficking investigation that is related to Operation Fast and Furious. Danny Burnett is being charged in U.S. District Court for the District of New Mexico with leaking sealed federal wiretap information related to the gun trafficking investigation. Mr. Burnett's wife, Paula Burnett, is an Assistant U.S. Attorney (AUSA) for the USAONM and formerly served as the chief of the office's Criminal Division. Mr. Burnett's indictment states that he had "knowledge that a Federal investigative and law enforcement officer had been authorized... to intercept a wire, oral and electronic communication . . . ." The indictment does not explain how Mr. Burnett obtained this knowledge or whether his wife had any role in disclosing it to him. However, a news report states that Ms. Burnett has not been charged with any wrongdoing.

UPDATED INFORMATION: On September 27, 2013, a New Mexico jury found Danny Burnett guilty of two counts relating to disclosure of a court authorized wiretap. Count one was based on disclosing the presence of a wiretap on the phone of Angelo Vega to Vega, and count four was based on making a false statement to investigators wherein he denied disclosure. The jury found him not guilty of count two, which alleged disclosure of a wiretap on the phone of Blas Gutierrez. On January 14, 2014, Danny Burnett was sentenced to confinement of a year and a day, and one year of supervised release. Danny Burnett is currently serving his sentence at FCI Englewood.

A) How did the Department become aware of Danny Burnett's leaking of federal wiretap information? Please explain in detail.

Response:

The Department became aware of the leak when Angelo Vega, a longtime friend to former AUSA Burnett and her husband, Danny Burnett, disclosed to AUSAs during his debriefing that Danny Burnett told him about the wiretap on his phone.

B) Has an independent investigation been conducted into what role Paula Burnett played, if any, in her husband obtaining sealed federal wiretap information? If so, who conducted the investigation?

Response:

Yes. After a thorough investigation, on March 25, 2014, the Department of Justice Office of the Inspector General issued a report of investigation into the purported leak of law enforcement sensitive information by former AUSA Burnett. Ms. Burnett voluntarily retired from the federal service on November 30, 2013. The Department of Justice Office of Professional Responsibility also conducted an investigation and issued its report on July 29, 2014. OPR has referred Ms. Burnett to the State Bar of New Mexico.

C) What steps have you or others in the Department taken, if any, to ensure that a full and independent inquiry is conducted to determine all the facts and circumstances surrounding the leak of information about the wiretap to the criminal targets of that wiretap, including the possible involvement of any Department personnel?

Response:

Please refer to the response to Question 16(B), above.

D) When and how was this matter assigned to the U.S. Attorney's Office for the Western District of Texas?

Response:

On June 8, 2011, the Office of the Deputy Attorney General approved the recusal of the District of New Mexico from the investigation and prosecution related to Angelo Vega and any co-conspirators and the assignment of the matter to the Western District of Texas.

E) When precisely did Ms. Burnett resign as chief of the Criminal Division of the USAONM? What was the reason for her resignation?

Response:

On September 18, 2012, then-United States Attorney (USA) Gonzalez informed Ms. Burnett that because of the announcement of her husband's indictment, she would be demoted from her position as Criminal Chief. He gave her the option of choosing to go to an appellate or civil position in the office. On September 20, 2012, USA Gonzalez announced to the office that, effective that date and in light of the circumstances, Ms. Burnett had elected to step down from her position as Criminal Chief into a civil position.

F) Did Ms. Burnett retain her responsibilities as Chief of the Criminal Division of the USAONM while she was under any investigation?

Response:

Yes. Please refer to the responses to Questions 16(B) and (E), above.

17. New Mexico USAO and Reese Case

When Ms. Burnett stepped down as the Chief of the Criminal Division of the U.S. Attorney's Office for the District of New Mexico (USAONM), James Tierney was appointed as the new Chief of the Criminal Division. Mr. Tierney submitted an ex parte motion in the case United States v. Reese indicating that Luna County Deputy Sheriff Alan Batts, who had been a witness for the government in the case, had been under investigation by the FBI since 2003. Deputy Batts' file contains allegations he extorted assets from a drug dealer, assisted Mexican drug cartels, and assisted in alien smuggling. The investigation stretched over a period of several years, and Assistant U.S. Attorney (AUSA) Richard Williams became the primary contact for the matter in 2010.

According to a judicial opinion in the case, after AUSA Williams learned on July 31, 2012, that Deputy Batts had been called by the government as a witness at trial, he:

[I]mmediately requested information from the FBI about Deputy Batts' involvement and he received numerous print outs, dated August 1, 2012. In the print outs, Mr. Williams found an FBI report, dated May 5, 2008, of a telephone call from Deputy Batts to [FBI] Agent Brotan that indicated that Deputy Batts worried that his own credibility was at stake. AUSA Williams informed Branch Chief AUSA Perez and the information proceeded up through the chain of command through Criminal Chief Tierney, First Assistant Steven Yarbrough and AUSA Sasha Siemel, the ethics advisor, professional responsibility officer, and Giglio requesting official for the United States Attorney. There is no satisfactory explanation why the United States Attorney's Office waited an additional four months to file the ex parte motion.

The court noted that the lead trial counsel, Ms. Maria Armijo, "was also Branch Chief of the Law Cruces United States Attorney's Office from 2005 to 2008, a critical period in the Batts investigation." The court concluded: "[T]here is no doubt that the prosecution, intentionally or negligently, suppressed the evidence."

After the defendants filed a Motion for a New Trial, on January 28, 2013, the court held an evidentiary hearing and heard argument on the Motion for a New Trial. The subsequent February 1, 2013 opinion (quoted above) granted the Motion for a New Trial.

A) Has the above case been reported to OPR as a "judicial finding of misconduct," as per the new guidelines outlined in the Committee's Stevens hearing? If not, why not?

Response:

This matter was referred to OPR by the U.S. Attorney's Office for the District of New Mexico (USAO-NM), and OPR opened an inquiry on February 5, 2013. As indicated above, however, a DOJ employee's obligation to report judicial findings of misconduct has existed for more than a decade and is not part of any new guidelines. It should be noted that in March 2014, a unanimous panel of the Tenth Circuit Court of Appeals reversed the trial court's order granting a new trial, concluding "there is not a reasonable probability that the outcome of Defendants' trial would have been different had the government disclosed the Deputy Batts investigation." *United States v. Reese, et al.,* 745 F.3d 1075, 1091 (10th Cir. 2014).

B) Has an investigation been initiated into the individuals at fault, including Ms. Armijo?

Response:

Please refer to the response to Question 17(A), above.

C) Did AUSAs in the USAONM complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

Response:

All Assistant United States Attorneys complete mandatory discovery training as required by the Attorney General. Pursuant to the United States Attorney's Manual § 9-5.001, as amended in June 2010, all Federal prosecutors, within 12 months of their initial entry on duty and every year thereafter must complete at least two hours of criminal discovery training annually.

D) Some public reports suggested that the public corruption case referenced above had been assigned to Ms. Paula Burnett in 2002. Did Ms. Burnett ever have responsibility for the Southern New Mexico public corruption case involving Deputy Batts? If so, has an investigation been initiated into why Ms. Burnett did not flag the investigation into Deputy Batts earlier?

Response:

Please refer to the response to Question 17(A), above.

18. Officer Karl Thompson

On March 18, 2006, Officer Karl Thompson of the Spokane (Washington) Police Department responded to a reported robbery in which he attempted to apprehend a suspect, Otto Zehm, who

subsequently died. The death resulted from hypoxic encephalopathy due to cardiopulmonary arrest while restrained in a prone position for excited delirium following an altercation with Officer Thompson. Officer Thompson was subsequently investigated, prosecuted, and convicted by the Department for one count of willful use of excessive force and one count of false statements. Following the conviction, an expert witness specializing in video interpretation, Grant Fredericks, who was first used by Spokane in its County investigation that cleared Thompson and then later retained by the Department, filed an affidavit claiming that the prosecution inaccurately stated his opinion in their Rule 16a Disclosure document during trial. While the Court did not ultimately find that the prosecution committed a Brady violation since Officer Thompson suffered no prejudice, it found the first two elements of a Brady violation were present. Assistant U.S. Attorney (AUSA) Tim Durkin did suppress evidence that was favorable to Officer Thompson.

A) Has the Department been made aware of the judicial finding that there was a suppression of evidence in United States of America v. Karl F. Thompson, Jr.? If so, what actions have been taken?

Response:

The Department is aware of the court's order, which also was referred to OPR in January 2013. OPR determined, however, that, given the precise ruling by the court, the factual record, and surrounding circumstances, further inquiry was not warranted until after the matter was briefed and decided on appeal. Once Mr. Thompson has briefed the matter on appeal, that Department will review the matter and develop its response to the court's order.

B) Did AUSA Durkin complete the prosecutor refresher training on discovery mandated by the Department? If so, on what date? If not, why not?

Response:

AUSA Durkin has completed the prosecutor refresher training on discovery in 2010, 2011, and 2012.

19. Conflict Between USAO and ATF in Reno, Nevada

On September 17, 2012, I wrote to both the ATF and U.S. Attorney for the District of Nevada to inquire about a reported "breakdown" in relations between the ATF Field Office in Reno, Nevada (Reno ATF) and the U.S. Attorney's Office for the District of Nevada (USAONV). I subsequently wrote directly to the Department about the issue on September 27, 2012. The Department responded on October 10, 2012, purporting to respond to all three letters. However, the Department's response failed to substantively address a single question I had posed in any of the three letters.

While the Department subsequently responded to an October 10, 2012, letter from myself, Senator Dean Heller, and Representative Mark Amodei, I still have not received answers to the questions I sent you on September 27, 2012.

Attached to my September 17, 2012 letters was a copy of a letter sent from USAONV to Reno ATF on September 29, 2011 that read: "At this time, we are not accepting any cases submitted by your office. We are willing to consider your cases again when your management addresses and resolves the issues at hand." On October 13, 2012, Reno ATF notified the ATF Internal Affairs Division

that USAONV had alleged an agent in Reno ATF lied to the USAONV. On October 25, 2012, Reno ATF contacted the Department's Office of Professional Responsibility (OPR) to request that OPR investigate the USAONV for unethical conduct, conduct which apparently allegedly included making false claims about Reno ATF.

As attachments to my September 27, 2012 letter to you indicate, OPR ultimately declined to investigate, writing Reno ATF on December 12, 2011:

Assistant United States Attorneys are vested with broad discretion to determine whether and how to pursue criminal investigations. Absent specific evidence indicating that this discretion was corruptly or otherwise inappropriately exercised, OPR does not review the exercise of that authority. Based on a review of the information you provided, OPR concluded that your complaint concerns a management matter which can more appropriately be addressed by having ATF management raise your concerns with the United States Attorney for the District of Nevada.

An ATF Internal Affairs Division memorandum dated February 10, 2012, concluded that "no evidence was offered to substantiate the allegation of . . . lying to the U.S. Attorney's office . . . ." The memorandum reiterated that OPR had declined the investigation because OPR stated that the matter needed to be handled by management from the USAO and ATF.

A) **Why did Department management fail to intervene and mediate between ATF and the USAONV in 2011, when Reno ATF agents were flagging this issue with both ATF management and the Department's OPR?**

Response:

As you know, during a period of time between 2011 and 2012, a breakdown in the working relationship occurred between the Bureau of Alcohol, Tobacco and Firearms (ATF) and the U.S. Attorney's Office for the District of Nevada (USAO-NV). In early August 2011, the ATF San Francisco Field Division, which is responsible for the oversight of ATF's Reno office (ATF-Reno), learned of this situation and engaged with ATF-Reno and the USAO-NV in an effort to resolve it. ATF Headquarters became aware of the issues in November 2011. After further discussions in March 2012 involving Unites States Attorney for the District of Nevada Daniel Bogden, ATF Acting Director B. Todd Jones, and ATF Assistant Director Ronald Turk, it became apparent that the issues could not be readily resolved at that time in a manner that would allow ATF to best utilize its limited agent resources. ATF subsequently decided to reassign four special agents from ATF-Reno to duty posts with pressing needs for additional agents.

In August 2012, a new Special Agent in Charge (SAC) was selected to lead ATF's San Francisco Field Division. Within weeks of his arrival, the SAC met with USA Bogden in Las Vegas to discuss a mutually agreeable resolution to the outstanding issues between the two offices. Subsequently, at the direction of the Office of the Deputy Attorney General, a senior level Federal prosecutor and an ATF Supervisory Special Agent from outside the District of Nevada conducted a review of firearms cases that had been declined by the USAO-NV between February 2009 and October 2011. After the completion of this review, it was determined that a small number of these cases required additional investigation before prosecution decisions could be made. The SAC and USA Bogden worked together to determine the appropriate next steps for each case. Since some of the matters were referred to local law enforcement authorities, it would not be appropriate to comment further on them.
The USAO and ATF are working cooperatively in Reno and enforcing federal firearms laws, and the reporting relationship between the USAO and ATF has been reconfigured and involves different individuals at both entities. The ATF-Reno post of duty is now composed of two permanent Special Agents and an ATF Special Agent who began a detail on February 13, 2013, and will work as a Violent

Crime Coordinator and assist with the enhanced Project Safe Neighborhood Task Force. This enhanced task force, implemented and operational since June 2011, meets on a bi-weekly basis to review firearm and violent crime cases for federal or state prosecutions. In addition, in an effort to strengthen relationships in the region, the ATF SAC has personally met with other Federal, state, and local law enforcement agency heads with responsibilities in the Reno area. The ATF SAC will continue to monitor the situation and evaluate staffing needs of ATF-Reno.

B) If a U.S. Attorney's office has a problem with a component agency or vice versa, and the offending entity refuses to address the problem, who in the Department is responsible for providing oversight and mediating such a dispute?

Response:

The Deputy Attorney General supervises all of the Unites States Attorneys and all DOJ law enforcement components, including ATF.

C) Was anyone in the Executive Office of U.S. Attorneys (EOUSA) notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were individuals in EOUSA first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

EOUSA was not notified of this issue by the ATF or USAO-NV prior to your letter of September 17, 2012.

D) Was anyone in ODAG notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were individuals in ODAG first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

An attorney in the Office of the Deputy Attorney General (ODAG) was advised by ATF Headquarters in the spring of 2012 that there were issues in the working relationship between the USAO-NV and ATF-Reno, and that some agents based in Reno would be transferred to meet pressing ATF needs elsewhere. The full impact of these matters was not made clear to the attorney and, therefore, not further disseminated within leadership offices at the Department.

E) Was Deputy Attorney General Cole notified of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

F) Was anyone in the Office of the Attorney General notified in any way of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were they first notified?

ii. What actions did they take to inquire into the situation?

iii. What actions did they take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

G) Were you aware of these problems prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012?

i. If so, when were you first notified?

ii. What actions did you take to inquire into the situation?

iii. What actions did you take to address the situation?

Response:

Please refer to the response to Question 19(D), above.

H) Please provide the following documents:

i. All emails pertaining to anyone at Justice Department headquarters becoming aware of these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

ii. All emails pertaining to anyone at Justice Department headquarters responding to these issues prior to my letters to ATF and U.S. Attorney Bogden on September 17, 2012.

Response:

On April 23, 2013, The Department and ATF provided substantive written responses to Senator Grassley regarding the U.S. Attorney's Office for the District of Nevada and the Bureau of Alcohol, Tobacco, Firearms and Explosive in Reno, Nevada. In addition, Acting Director Jones responded to questions related to the matter at his nomination hearing before the Senate Judiciary Committee on June 11, 2013.

20. "Fearless Distributing" in Milwaukee

Recent news reports have highlighted an operation by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in Milwaukee. The operation involved an undercover storefront called "Fearless Distributing" that ATF opened to attract individuals wanting to sell firearms under the table.

Although in the end 30 individuals were charged, local residents complain that the ATF operation actually brought more crime into a neighborhood where crime had been on the decline. The operation seems to have been plagued with failures, including wrongly-charged defendants, $15,000 worth of damage being caused to the space ATF leased, and $35,000 worth of merchandise being stolen from ATF's storefront in a burglary. In a separate incident, thieves also broke into an ATF SUV parked at a coffee shop a half-mile away from the undercover storefront and stole three guns stored inside the car, including an M-4 .223-caliber fully automatic rifle.

On January 31, 2013, Chairman Darrell Issa, Chairman Robert Goodlatte, Chairman James Sensenbrenner, Jr. and I sent a letter to ATF Acting Director B. Todd Jones and copied the Department requesting information regarding "Fearless Distributing." As of today, we still have not received a response from the ATF or the Department.

A) When was the undercover operation involving Fearless Distributing initiated and terminated?

Response:

In response to your inquiry, the Department provided Committee staff with a briefing on ATF's Office of Professional Responsibility and Security Operations review of the Milwaukee matter on April 15, 2013, and provided further information and documents in a letter to you and Chairmen Goodlatte, Issa, and Sensenbrenner on April 30, 2013. ATF Director B. Todd Jones testified before the House Oversight and Government Reform Committee regarding ATF storefront operations on April 2, 2014. ATF Deputy Director Thomas E. Brandon testified before the House Committee on the Judiciary Crime, Terrorism, Homeland Security, and Investigations Subcommittee regarding ATF storefront operations on February 27, 2014. Additionally, ATF provided a detailed briefing on ATF storefront operations to House and Senate staff on May 16, 2014.

B) What were the names of the case agent and supervisory agent over the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

C) At what management level at the ATF was the undercover operation involving Fearless Distributing authorized? Please identify by name and position each individual involved in the authorization above the first-line supervisor.

Response:

Please refer to the response to Question 20(A), above.

D) What was the highest management level at the ATF that the operation involving Fearless Distributing was briefed? Did anyone at the ATF or DOJ ever call any aspects of this case into question? If so, please provide the Committee with that documentation.

Response:

Please refer to the response to Question 20(A), above.

E) What law enforcement partners, if any, did the ATF work with in the undercover operation involving Fearless Distributing? Please list them and the number of personnel assigned from each.

Response:

Please refer to the response to Question 20(A), above.

F) Did the United States Attorney for the District of Minnesota authorize the undercover operation involving Fearless Distributing? If not, who at the U.S. Attorney's Office authorized and managed this undercover operation?

Response:

Please refer to the response to Question 20(A), above.

G) What methodology was used to determine the placement of the undercover business, Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

H) What United States government property, including law enforcement sensitive paperwork, was left on the premises of Fearless Distributing once the undercover operation ended?

Response:

Please refer to the response to Question 20(A), above.

I) What methodology was used to determine the price to be paid for weapons or drugs bought in the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

J) What were the sources of cash for the undercover operation involving Fearless Distributing, including the breakdown between (a) funds provided by the ATF, (b) project generated income (PGI), and (c) interest income?

Response:

Please refer to the response to Question 20(A), above.

K) What were the operational costs for the undercover operation involving Fearless Distributing, including the breakdown between (a) total operational costs, (b) unused PGI remitted back to the Treasury, if any, and (c) interest income remitted?

Response:

Please refer to the response to Question 20(A), above.

L) What was the total cost of the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

M) How many indictments, leads, and arrests were garnered through the undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

N) What information, including reports of investigation, was used in obtaining probable cause for the arrest of Adrienne Jones, who was allegedly falsely accused?

Response:

Please refer to the response to Question 20(A), above.

O) How many civil claims were filed against ATF or employees of ATF relative to this undercover operation involving Fearless Distributing?

Response:

Please refer to the response to Question 20(A), above.

P) How many weapons were sold by the ATF during the undercover operation involving Fearless Distributing and what are the locations of those weapons now?

Response:

Please refer to the response to Question 20(A), above.

Q) If weapons were sold, who approved the plan to conduct these sales?

Response:

Please refer to the response to Question 20(A), above.

R) What steps, if any, were taken to retrieve the weapons and prevent their use in illegal activity or transmittal to prohibited purchasers, and how successful were those precautions?

Response:

Please refer to the response to Question 20(A), above.

S) List all property stolen from the unattended ATF vehicle and Fearless Distributing store during their respective burglaries. Was the agent whose car was broken into (and from which weapons were reportedly stolen) working on the undercover operation involving Fearless Distributing? What personnel action(s), if any, have been taken regarding this incident?

Response:

Please refer to the response to Question 20(A), above.

T) Were the weapons reportedly stolen from the unattended vehicle secured with any type of safety device/trigger lock?

Response:

Please refer to the response to Question 20(A), above.

U) What is the status of the reportedly stolen weapons/ammunition, including the M-4 automatic rifle?

Response:

Please refer to the response to Question 20(A), above.

V) How many storefront operations has ATF conducted in the U.S. each year from 2005 to 2012? For each year, please break down the number by state in which the operations were conducted.

Response:

Please refer to the response to Question 20(A), above.

W) Please detail all storefront operations that the ATF Phoenix Field Division conducted between 2008 to the present.

Response:

Please refer to the response to Question 20(A), above.

X) What steps has ATF taken, if any, to ensure that these storefront operations do not encourage the very criminal activity they are supposed to combat, as appears to have happened in Milwaukee?

Response:

Please refer to the response to Question 20(A), above.

Y) Please provide to the Committee the following documents:

i. All ATF Operational Plans (including ATF Form 3210.7) for the undercover operation involving Fearless Distributing.

ii. All reports of investigation (ROIs) relative to the undercover operation involving Fearless Distributing.

iii. Any documentation authorizing ATF to sell weapons as part of the undercover operation involving Fearless Distributing.

iv. The ATF policy for storage of firearms in unattended vehicles.
v. The ATF policy for conducting undercover operations out of store fronts.

Response:

The ATF policy for storage of firearms in unattended vehicles and the ATF policy for conducting undercover operations out of storefronts were provided to your office in a letter dated April 30, 2013. ATF is preparing and producing the remaining documents in response to a subpoena from Chairman Issa, Committee on Oversight and Government Reform.

21. ATF Monitored Case Program

On January 27, 2012, Deputy Attorney General James Cole wrote to update certain individuals on the Hill of developments within ATF in the wake of the investigation into Operation Fast and Furious. One of those included the establishment on July 19, 2011, of a new Monitored Case Program. Under it, certain cases would receive enhanced oversight from ATF headquarters. One criteria for participation is investigations in which more than 50 firearms have been straw purchased or trafficked.

A) What are the other criteria for receiving enhanced oversight from ATF headquarters as part of the Monitored Case Program?

Response:

The criteria for submission of an investigation or inspection for possible enhanced oversight under the provisions of the Monitored Case Program (MCP) continue to evolve. ATF's MCP currently requires that 18 broad categories of investigations / inspections be submitted to the Deputy Assistant Director - Field Operations (DAD-FO) or Deputy Assistant Director – Industry Operations (DAD-IO) for evaluation to determine if the investigation / inspection presents the potential for significant programmatic, intelligence or operational/policy risks to ATF or the public. These categories include:

- Investigations that have reached the incremental request to exceed $100,000 in funds used for investigative purposes.
- All ATF sponsored Organized Crime Drug Enforcement Task Force (OCDETF) investigations.
- All Department of Justice authorized churning investigations.
- Investigations that have any documented, verified international nexus.
- Investigations of an organization or individuals in which more than 50 firearms (of any type) or more than 5 National Firearms Act (NFA) weapons have been straw purchased or trafficked.
- Any investigation involving the trafficking of explosives.
- All Federal firearms licensee (FFL) investigations.
- ATF investigations applying for or using T-III electronic intercept authorization sponsored by any other agency (State, local or Federal) in which ATF personnel participate; or investigations for which an ATF special agent requests Title 21 cross designation to qualify to act as the affiant for a T-III court order.
- FFL thefts involving violence (e.g., armed robberies, physical harm, or death to the FFL, their employees, or patrons).
- All investigations requiring the approval of the ATF Undercover Review Committee including investigations that involve long-term undercover or storefront operations.
- Any investigations involving sensitive investigative techniques that require the approval and concurrence of the US Attorney's office.
- Investigations that are so sensitive that the Special Agent in Charge has determined that access to the investigation in the case management system (N-Force) must be restricted to a limited number of specified personnel with a need to know.
- Any investigation or inspection that may draw significant national public interest or media attention.
- Any inspection that results in a recommendation for revocation by the Director of Industry Operations (DIO) of an FFLor explosives license/permit, or the denial of a renewal of such a license/permit.
- All inspections of national manufacturers, importers, and wholesale distributors of firearms and explosives with adverse compliance histories.

- Inspections that disclose 50 or more unaccounted-for firearms (after reconciliation) that were received by the licensee in the two years prior to the inspection.
- Inspections that disclose more than 50 pounds of unaccounted-for high explosives or more than 200 pounds of low explosives or more than 500 pounds of blasting agents (after reconciliation) that were received by the licensee / permittee in the 2 years prior to the inspection.
- Any investigation the SAC or DIO submits for monitoring, and recognized by the DAD-FO or DAD-IO as a significant organizational risk or threat.

B) How many cases became a part of the Monitored Case Program in 2011? In 2012?

Response:

In Fiscal Year 2011, ATF evaluated 175 cases for inclusion in the MCP. Of those, 120 cases (100 criminal and 20 industry) were placed into a monitored status.

In Fiscal Year 2012, ATF evaluated 148 cases for inclusion in the MCP. Of those, 143 cases (109 criminal and 34 industry) were placed into a monitored status.

C) Was the Milwaukee "Fearless Distributing" case described above a part of the Monitored Case Program? If not, why not? Given that it involved the seizure of 145 guns, isn't a case like that precisely the type of case that requires enhanced oversight from ATF headquarters? Why was there no enhanced oversight?

Response:

The Milwaukee criminal investigation titled "Fearless Distributing" was evaluated and included in the initial MCP during its operational phase because it utilized a storefront operation as an investigative technique. The investigation was monitored and monitoring was terminated when the case progressed into the judicial phase. Subsequent to the Milwaukee investigation, the MCP was enhanced in May of 2013.

22. ATF Suspect Gun Database

A) What is the criteria for adding guns to the Suspect Gun Database?

Response:

Firearms may be entered into the Suspect Gun program if ATF Special Agents suspect them to be illegally trafficked or to have another connection with potential illegal activity ATF Special Agents are investigating (for example, firearms stolen from a federal firearms licensee).

B) How was the criteria established for adding guns to the Suspect Gun Database?

Response:

The Suspect Gun program was developed by the National Tracing Center as an investigative tool in the fight against illegal firearms trafficking and firearms violence. It serves as a complement to firearms

tracing allowing an agent engaged in a criminal investigation to have a firearm flagged when it is recovered or traced.

C) What is the procedure for individual agents to have a gun added to the Suspect Gun Database?

Response:

Suspect Guns can only be accepted from an ATF Office on a preformatted submission, ATF Form 3317.1. Requests may be faxed, mailed, or emailed, and must include an ATF investigation number, a complete firearm description (i.e., manufacturer, caliber, model and serial number), the agent's telephone number and fax number, and if known, purchaser information, purchase date, and federal firearms licensees.

D) What procedures exist, if any, for ensuring that guns entered into the suspect gun database incorrectly are purged from the database?

Response:

Periodic reviews are conducted to determine if investigations of guns submitted under the Suspect Gun program are still active. If not, appropriate administrative steps are taken to remove the information on the relevant guns from the program.

E) How does the use of the Suspect Gun Database comport with the statutory prohibitions against maintaining a national gun registry?

Response:

The Suspect Gun program is a table maintained within ATF's Firearms Tracing System (FTS), which has been utilized since 1992. This table contains information about "suspect guns" so that when a trace request is received, the firearm description submitted by the requesting law enforcement agency can automatically be checked against the table to determine if there are any matches. The table is populated by ATF Special Agents with information about firearms that have not yet been recovered by law enforcement but that may be involved in criminal activity. When a match occurs during the tracing process it allows that process to be completed more efficiently and effectively. The table is not used for any other purpose. Maintaining this table does not violate any of the laws that restrict ATF's ability to centralize or maintain firearm records. *See* U.S. Government Accountability Office Report "Federal Firearms Licensee Data: ATF's Compliance with Firearms Licensee Data Restrictions," September 11, 1996 (GAO/GGD 96-174). *See* also J&G Sales v. Truscott, 473 F.3d 1043 (9th Cir. 2007) and Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281 (4th Cir. 2004).

23. FBI NICS Tracking

During Operation Fast and Furious, ATF received automatic e-mail notification of purchases from the FBI's National Instant Criminal Background Check System (NICS) for certain purchasers. The e-mail notification would be roughly contemporaneous, such as the Monday after a Saturday purchase.

A) How long has this automatic notification system existed? Please describe its development.

Response:

Since the inception of the National Instant Criminal Background Check System (NICS) in 1998, 28 C.F.R. section 25.9(b)(2)(i) has afforded NICS the authority to retain certain information in the NICS Audit Log for designated purposes. Pursuant to this regulation, information not yet destroyed "that indicates, either on its face or in conjunction with other information, a violation or potential violation of law or regulation, may be shared with appropriate authorities responsible for investigating, prosecuting, and/or enforcing such law or regulation. . . ."

Based upon this authority, the Bureau of Alcohol, Tobacco, Firearms and Explosives occasionally requests that NICS monitor transaction information (typically for up to 90 days) on named individuals who are under investigation. These written requests include discussions of the facts and the law or regulation the individual is believed to have violated. NICS reviews each request to determine whether the justification indicates a violation (or potential violation) of law or regulation. If a request is denied, the requester may provide supplemental information. NICS grants or denies requests for monitoring based on their assessment of the adequacy of the justification provided. If NICS has granted the request for monitoring and the agency that requested it wants to terminate it, the agency notifies NICS in writing (this may be accomplished by email).

B) Why was it created?

Response:

Please refer to the response to Question 23(A), above.

C) Do any other agencies receive similar notifications of purchases?

Response:

Please refer to the response to Question 23(A), above.

D) What is the criteria for being flagged in the NICS system such that it generates e-mail notifications of purchases?

Response:

Please refer to the response to Question 23(A), above.

E) How was this criteria established?

Response:

Please refer to the response to Question 23(A), above.

F) What are the criteria and process for removing someone from the list?

Response:

Please refer to the response to Question 23(A), above.

24. Prosecutions of Lying on Background Checks

New York City Mayor Michael Bloomberg is quoted publicly as saying that in 2009, the Department prosecuted only 77 out of the more than 71,000 people who failed background checks due to fraudulent applications.

A) Is this number accurate?

Response:

Federal law requires licensed firearms dealers to ensure that they are not selling firearms to prohibited persons. Specifically, before an FFL can transfer a firearm to an unlicensed individual, the dealer must request a background check through the FBI's NICS to determine whether the prospective transfer would violate federal or state law. During the NICS check, personal information provided by the prospective firearms purchaser is used to search national databases containing criminal history and other relevant records to determine if the person is disqualified by law from receiving or possessing a firearm.

Neither the ATF Denial Enforcement and NICS Intelligence (DENI) Branch nor EOUSA specifically track data as to the number of cases emanating from NICS denials that are referred to United States Attorneys' Offices (USAOs) for prosecution. Therefore, we are unable to determine the precise number of prosecutions emanating from NICS denials.

However, EOUSA has compiled two tables, below, regarding prosecutions under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A), the statutes under which offenses for making misrepresentations during the background-check process, including on ATF Form 4473, are prosecuted. The tables indicate the number of cases filed (indicted), defendants filed (indicted), and convictions obtained under these statutes for fiscal years 2004 through 2012. To be clear, charges under these statutes may arise under circumstances other than NICS denials. In addition, investigations that begin with a focus on violations of these statutes, including investigations based on NICS denials, may not result in charges under these statutes, and may result in charges with steeper penalties than those provided under these statutes. (Note: EOUSA is unable to compile a break down by these statutes for data predating fiscal year 2004. Also, defendants found guilty in a fiscal year may have been indicted in a prior fiscal year.)

B) Please provide the corresponding numbers of individuals failing background checks and subsequent prosecutions for 2000 through 2012.

Response:

Based on the reports and statistics publicly available on the NICS website at www.fbi.gov/about-us/cjis/nics/nics, the following table shows the number of NICS denials, processed by the FBI NICS Section, for calendar years 2001 through 2012:

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
64,500	60,739	61,170	63,675	66,705	69,930	66,817	70,725	67,324	72,659	78,211	88, 479

(Note: These figures do not include Point of Contact (POC) state denials, which may be based purely on state law prohibitions, and may be prosecuted by state authorities.)

The following tables indicate the prosecution statistics under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A):

18 U.S.C. 922(a)(6)										
	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Cases Filed	325	313	291	253	224	180	183	191	175	165
Defendants Filed	383	382	362	322	296	213	250	246	234	204
Defendants Guilty	292	268	253	197	224	189	121	154	149	156

18 U.S.C. 924(a)(1)(A)										
	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Cases Filed	208	197	223	154	148	154	161	196	242	206
Defendants Filed	278	257	285	207	203	214	243	388	415	328
Defendants Guilty	179	165	160	155	139	165	169	191	282	282

By its intended function, NICS actually denies prohibited persons from purchasing firearms. When an FFL is notified of an immediate, "standard" NICS denial, the FFL does not allow a firearms purchase to proceed, and the system prevents the transaction. In instances where NICS notifies the FFL of a "delayed" transaction, an FFL must wait three business days before completing the transaction if it has not definitively heard from NICS whether the purchaser is a prohibited person. If the transaction is completed, and a definitive denial subsequently issues from NICS to ATF, the delayed denial results in referral to ATF for retrieval of the firearm from the prohibited recipient. At any rate, considering the USAOs' limited prosecutorial resources – and that it would be virtually impossible to prosecute each and every one of the tens of thousands of NICS denials that occur every year – prosecution priorities usually focus on cases in which individuals actually possessed or used firearms. These firearm-possession and violent-crime cases – which often involve serious assaults, murders, and complex gang and firearms-trafficking investigations, and often result in significant mandatory-minimum sentences -- receive a higher priority than the cases in which NICS denied individuals from obtaining firearms in the first place.

25. <u>General David Petraeus</u>

Nearly four months ago, I wrote you regarding the resignation of Director of Central Intelligence (DCI) David Petreaus and the involvement by the U.S. Department of Justice (Department), including the Federal Bureau of Investigation (FBI), in uncovering information that revealed an extramarital affair cited by General Petreaus as a reason for his resignation. My letter requested a briefing similar to the one provided to members of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and Chairman Leahy of the of the Senate Committee on the Judiciary at that time. My letter was never acknowledged nor was I ever offered a briefing.

A) Why did you provide a briefing to the Chairman of the Judiciary Committee while refusing to provide one to the Ranking Member?

Response:

Please refer to the Department's response dated June 6, 2013, responding to your November 15, 2012, letters concerning an FBI investigation into matters relating to former Central Intelligence Agency (CIA) Director Patraeus. Longstanding Department policy precludes discussion of ongoing law enforcement investigations. Inasmuch as this is an ongoing investigation and significant individual privacy interests are implicated, we are unable to provide a briefing or answer the questions set forth below.

B) Please provide:

i. A timeline of events from initial contact with FBI personnel through the close of the inquiry,

Response:

Please refer to the response to Question 25(A), above.

ii. an explanation of how and why the FBI opened the inquiry,

Response:

Please refer to the response to Question 25(A), above.

iii. a detailed list of personnel who signed off on the investigation,

Response:

Please refer to the response to Question 25(A), above.

iv. a detailed account of the legal authorities used to obtain each of the electronic communications of those involved, and the role, if any, of any U.S. Attorneys' Offices,

Response:

Please refer to the response to Question 25(A), above.

v. an explanation of the timing and circumstances of how you and the FBI Director first learned of this inquiry and when the White House was notified of the inquiry,

Response:

Please refer to the response to Question 25(A), above.

vi. a description of Department employees' contacts with Congress prior to the election and whether the Department considers those contacts protected whistleblower disclosures,

Response:

Please refer to the response to Question 25(A), above.

vii. an explanation of whether the FBI shared information regarding the investigation with investigators or protective security details from various military or criminal investigation organizations (including the CIA, Army Criminal Investigation Command (CID), Air Force Office of Special Investigations (OSI), or Navy Criminal Investigative Service (NCIS)) and when that information was shared,

Response:

Please refer to the response to Question 25(A), above.

viii. a description of the status of any related reviews being conducted by the FBI Inspections Division, the Office of Professional Responsibility, the Deputy Attorney General's Office, or the Office of Inspector General, including any related to public reports of alleged communications between an FBI agent and a witnesses that involved inappropriate photographs or text,

Response:

Please refer to the response to Question 25(A), above.

ix. an explanation of whether the extramarital affair was uncovered during the initial background investigation conducted by the FBI prior to General Petraeus' confirmation as DCI, and

Response:

Please refer to the response to Question 25(A), above.

x. an explanation of any legal analysis conducted by any component of the Department, including the FBI, regarding whether you or the FBI Director were obligated by law to report the investigation of DCI Petraeus to the President or any other government official.

Response:

Please refer to the response to Question 25(A), above.

26. FBI Undercover Operation Revenue

Earlier this year, the Federal Bureau of Investigation (FBI) provided the Committee with their Annual Report to Congress on Criminal Undercover Activity for Fiscal Year 2010. The report provides useful information on the scope and cost of the FBI's criminal undercover dealings but fails to address certain questions regarding the operations that generated revenue.

A) For each undercover operation with funds remitted to FBI Headquarters, did FBI comply with PL 104-132, SEC. 815(d), and deposit those funds as miscellaneous receipts in the Treasury of the United States? If so, how soon after each operation were the funds deposited?

Response:

Section 102 of the Department of Justice and Related Agencies Appropriations Act of 1993 (Pub. L. 102-395, 106 Stat. 1838-1841 (10/6/92) requires annual reports to Congress regarding undercover operations in which "(I) the gross receipts (excluding interest earned) exceed $50,000, or (II) expenditures (other than expenditures for salaries of employees) exceed $150,000." Section 102(b)(6)(C). The FBI reports undercover operations that meet these parameters and compiles with the requirement to remit certain funds to the U.S. Treasury. Interest income and "project-generated" income that is not necessary for the conduct of an operation are reported monthly and posted to Treasury Account Symbol 3220 (general funds), 1060 (abandonment), or 1435 (interest) as appropriate. In some cases there are "unused funds" that are not immediately remitted to the U.S. Treasury. These "unused funds" are single-year appropriations for undercover operations. The single-year, unused funds received for Fiscal Year (FY) 2010 for undercover operations are being held at FBI Headquarters for an additional four years until they are either canceled or they expire in Fiscal Year 2015.

B) For each undercover operation with funds generating interest, which financial institution(s) was (were) utilized to generate interest and how are the institutions chosen?

Response:

The choice of financial institution used to support an FBI undercover operation is not dictated by FBI Headquarters but is, instead, selected at the discretion of the field office with primary oversight of the operation. This field office role is helpful when the particular circumstances of an undercover operation necessitate the use of a particular financial institution or type of institution, such as when a national or regional financial institution must be used to support the backstopping requirements of a particular operation.

C) In only one undercover operation in 2010, Operation Periodic Table, was there a "refund remitted." What is the difference between the "refund remitted" and the other "unused funding returned?" For what was the $73.22 refund remitted?

Response:

The term "refund remitted" refers to a refund received for a payment made in a prior Fiscal Year. When an operation receives a refund from a prior Fiscal Year, that refund must be remitted to FBI Headquarters. This differs from the treatment of a refund received for a purchase made in the same fiscal year, which can be "re-used." In Periodic Table, $73.22 is considered a "refund remitted" because this November

2006 (Fiscal Year 2007) refund was generated by the overpayment of a prorated energy bill during Fiscal Year 2006.

The term "unused funding returned" refers to operational funds that were properly authorized and disbursed from FBI Headquarters to the field office throughout the life of the operation but were not actually expended by the time the operation was terminated. Such funds are returned to FBI Headquarters at the end of the operation.

D) In Operation Double Sessions, after eight years of investigation and with over $1.1 million dollars generated by the project, a total of $330 unused project generated income (PGI) was returned to FBI Headquarters. This amount is significantly below the PGI remittance level of all other undercover operations detailed in this report. Can FBI provide an itemized budget for this operation?

Response:

As of May 16, 2013, the budget for this operation was as follows:

FUNDING SOURCE	FUNDS
Appropriated Funds	$459,468.27
Project-Generated Income	$1,237,806.53
Interest Income	$15,191.53
TOTAL	**$1,612,466.33**
EXPENDITURES	**FUNDS**
Professional Services	$1,003,848.79
Insurance	$233,608.62
Bribe Payment	$66,450.00
Telephone Lease Lines	$57,126.85
Payroll	$51,000.00
Commercial Rent	$37,698.00
Travel	$30,410.93
Telephone Service	$22,519.09
Miscellaneous	$19,549.76
Money Laundering Fees	$18,000.00
Rental of Vehicles	$17,580.91
Fuel	$11,852.71
Equipment	$10,818.57
Vehicle Maintenance	$9,032.67
Food and Entertainment	$3,945.73
Utilities	$3,502.17
SUBTOTAL	**$1,596,944.80**
Unused Project-Generated Income	$330.00
Interest Income Remitted	$15,191.53
TOTAL	**$1,612,466.33**

27. Allegations of FBI Prostitution in Philippines

A motion filed in the U.S. District Court for the Central District of California in September 2012 alleges that an undercover FBI agent spent thousands of taxpayer dollars on prostitutes in the Philippines for himself and three other individuals cooperating with the FBI. The motion alleges that the undercover agent and another FBI agent, both based out of West Covina, California, were in the Philippines as part of a weapons-trafficking investigation. The undercover agent was reportedly posing as a weapons broker for Mexican drug cartels. According to the motion: "On several occasions, the undercover agent invited [the cooperating individuals] to . . . brothels in and around Manila in order to reward them for their efforts and encourage them to continue looking for weapons. [The undercover agent] ordered prostitutes, and paid for himself and others to have sex with the prostitutes." It is unclear whether the second FBI agent was ever also present.

The motion attaches a declaration from a federal public defender investigator, who traveled to the Philippines in May 2012 to interview witnesses. The motion also provides correspondence from Justice Department trial attorneys dated August 23, 2012, which confirms that the undercover FBI agent did indeed make "several requests for reimbursement . . . for the time period November 15, 2010 to September 27, 2011 that may relate to expenses incurred by the undercover agent at clubs in the Philippines" when the three individuals cooperating with the FBI were present. The requested reimbursements total $14,500.

The motion claims that many of the prostitutes at one of the brothels the FBI agent frequented were likely minors. It attaches documentation that on May 5, 2012, the Philippine government raided the brothel and rescued 60 victims of human trafficking, 20 of whom were minors. The aforementioned letter from Justice Department trial attorneys acknowledges that the undercover FBI agent submitted a request for reimbursement based on expenses at the brothel on September 26 and 27, 2011. The motion also identifies at least four other dates on which discovery produced by the government indicates the FBI agent visited the brothel.

A) Of the $14,500 requested by the undercover agent for reimbursement, how much was the agent actually reimbursed by the FBI?

Response:

Under longstanding Department of Justice policy, the FBI generally does not disclose nonpublic information about spending matters. Please refer to the response provided in a letter to Senator Grassley from Stephen D. Kelly, Assistant Director of the FBI's Office of Congressional Affairs, dated April 4, 2013.

B) Was the undercover FBI agent the case agent for this weapons-trafficking investigation? If not, did the case agent authorize the expenses at the brothels in this undercover operation?

Response:

Please refer to the response to Question 27(A), above.

C) Did any other U.S. law enforcement or embassy personnel visit these brothels with the undercover FBI agent? Please list each agency, the number of employees involved, each individual's role, and whether they were a recipient of the services for which reimbursement was requested of the FBI.

Response:

Please refer to the response to Question 27(A), above.

D) Was any of the activity for which reimbursement was requested recorded by wire or video surveillance? If so, which activity? Please provide all recordings.

Response:

Please refer to the response to Question 27(A), above.

E) What other U.S. law enforcement or embassy personnel participated in the Philippines in the overall weapons-trafficking investigation? Please list each agency, the number of employees involved, and their role.

Response:

Please refer to the response to Question 27(A), above.

F) Was the first-line supervisor of the undercover FBI agent and/or case agent aware of the undercover agent's visits to brothels? What other supervisors were informed?

Response:

Please refer to the response to Question 27(A), above.

G) When and how did FBI headquarters become aware of these allegations against this FBI agent working in the Philippines?

Response:

Please refer to the response to Question 27(A), above.

H) What actions were taken by FBI headquarters to investigate these allegations?

Response:

Please refer to the response to Question 27(A), above.

I) Has discipline been proposed for any FBI employees (agents or other personnel) in connection with this? If so, please describe the circumstances and procedural standing of the proposed discipline.

Response:

Please refer to the response to Question 27(A), above.

J) When did FBI supervisors become aware that minors may have been involved at these brothels?

Response:

Please refer to the response to Question 27(A), above.

K) Did the U.S. Attorney's Office (USAO) running the undercover operation receive notification of and/or authorize the undercover activity at the brothels?

Response:

Please refer to the response to Question 27(A), above.

L) Was the USAO running the undercover operation provided notes or other materials (e.g. 302's) regarding the events in question? If so, please provide these documents.

Response:

Please refer to the response to Question 27(A), above.

M) Is the FBI aware of any other instances of similar behavior occurring by other agents stationed around the world? If so, please describe them.

Response:

Please refer to the response to Question 27(A), above.

N) How many FBI employees (agents or other personnel) have been disciplined in the last eight years, including those terminated or voluntarily separated from the FBI, for soliciting, hiring, procuring the services of, or other inappropriate behavior involving prostitutes? Include all instances in which the FBI's Office of Professional Responsibility (OPR) reviewed allegations that FBI agents were involved with prostitutes, including a detailed summary of the allegations, the findings of investigation, the pay grade and rank of the employee, the proposed punishment (administrative or otherwise), the location where the incident(s) occurred, and whether the employee is still employed by the FBI.

Response:

Please refer to the response to Question 27(A), above.

O) How many FBI employees (agents or other personnel) have been terminated by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

Response:

Please refer to the response to Question 27(A), above.

P) How many FBI employees (agents or other personnel) remain employed by the FBI following an investigation or allegations of inappropriate involvement with prostitutes?

Response:

Please refer to the response to Question 27(A), above.

Q) Finally, please provide the following documents:

i. Any case notes or briefing plan regarding the undercover activity, including how the undercover activity was monitored or details on surveillance by agents in the brothels.

ii. All emails pertaining to FBI becoming aware of any of the above allegations.

iii. All emails demonstrating the FBI's response to the above allegations.

Response:

Please refer to the response to Question 27(A), above.

28. Office of Inspector General Report on the Operations of the Voting Rights Section of the Civil Division

On March 12, 2013, the Office of Inspector General submitted report on the operation of the Department's Voting Rights Section. This report was in response to several congressional requests including those made by Chairmen Wolf and Smith, as well as a request I made.

A) The report states that Deputy Assistant Attorney General (DAAG) Julie Fernandes attempted to remove a manager from DOJ's Honors Program Hiring Committee in part because of his "perceived conservative ideology." Is it acceptable for DOJ employees to use political ideology in making these types of decisions? If not, what consequence will Fernandes face for politicizing the DOJ Honors Program Hiring Committee process?

Response:

The OIG Report did not conclude that former Deputy Assistant Attorney General (DAAG) Julie Fernandes politicized the DOJ Honors Program Hiring Committee process; it instead concluded that one incident concerning the staffing of the hiring committee "demonstrated that problems of polarization ...continued after the change in administrations." Report at 148. The Department has disagreed with the part of this conclusion that related to the actions of former-DAAG Julie Fernandes, and believes that she acted appropriately in the incident described in your question.

Deciding to include or exclude an attorney from a hiring committee because he expressed particular political views is inconsistent with the Department's policies and could be a prohibited personnel practice under the Civil Service Reform Act. 5 U.S.C. § 2301(b)(2). In the incident you describe, however, former-DAAG Fernandes did not "use political ideology" in making any staffing decisions. As described in the Inspector General's report, former Voting Section Chief Chris Coates decided in September 2009 to assign a manager to a hiring committee because Coates perceived that manager to be conservative. Report at 144-45. The report concluded that Coates's decision to do so was inappropriate. Report at 148. Then-DAAG Fernandes received a complaint about Coates's staffing decision and investigated her options for addressing that complaint, but the manager was not ultimately removed. Report at 146-47. The Department believes that then-DAAG Fernandes's response – investigating the complaint she received, then making no further staffing changes after concluding the manager would serve effectively on the committee – was perfectly appropriate.

B) The Inspector General further reported that DAAG Fernandes said that the DOJ would prioritize "traditional civil rights enforcement."

i. What is meant by the term "traditional civil rights enforcement"?

Response:

The Office of Professional Responsibility (OPR) investigated complaints regarding former-DAAG Fernandes's use of the term "traditional civil rights cases" and concluded, in its report on the New Black Panther Party litigation (which has been made public), that she used the term "to mean that she did not want to politicize enforcement of the Voting Rights Act and did not want to bring cases to benefit any one constituency group." OPR Report at 75.

The Department's policy is to enforce civil rights statutes based on a fair and even-handed application of the facts to the law.

ii. What is non-traditional civil rights enforcement? If so, please describe examples of non-traditional civil rights enforcement.

Response:

Please refer to the response to Question 28(B)(i), above.

iii. Do you believe that DOJ should prioritize either traditional or non-traditional civil rights enforcement? If so, please explain why.

Response:

Please refer to the response to Question 28(B)(i), above.

C) The Inspector General found that DOJ hiring criteria for the Civil Rights Division produced an overwhelmingly liberal pool of applicants. Are you concerned that this policy is eliminating qualified conservative applicants from employment within the civil rights division? If so, what efforts is DOJ making to change this policy? If not, why not?

Response:

The OIG report confirmed that the Division advertised the positions publicly, that the voting litigation experience hiring criteria was both appropriate and lawful, and that the OIG's review "did not reveal that Civil Rights Division staff allowed political or ideological bias to influence their hiring decisions." Report at 214. It is incorrect to suggest that the hiring criteria eliminated comparatively qualified conservative applicants from the applicant pool. First, the OIG report found that only 2% of the Voting Section's applicant pool listed Republican or conservative affiliations on their applications, Report at 205; only one applicant with Republican or conservative affiliations was "highly qualified academically," Report at 213; and none of the conservative-affiliated applicants had voting rights litigation experience, Report at 208. Hiring applicants with voting rights litigation experience was a high priority given the needs of the Voting Section at the time. The report stated: "Our interviews with hiring committee members, review of contemporaneous notes taken during the hiring committee's deliberations, and assessment of its recommendations showed that litigation experience involving voting rights and the statutes that the Voting Section enforces were highly important to the hiring committee's review of applications." Report at 215. Indeed, the report found that "78 percent of the new hires (7 of 9) had 2 or more years of voting litigation experience compared to only 3 percent of all rejected applicants (15 of 473)." Report at 211. The OIG found that voting rights litigation experience was a "legitimate criterion, particularly in light of the Voting Section's stated need for experienced attorneys who would be ready to 'hit the ground running' by leading complex voting rights cases immediately." Report at 216. The report also stated: "Our review of the backgrounds of the Voting Section's new attorneys revealed a high degree of academic and professional achievement." Report at 204.

Furthermore, remedying any perceived political or ideological disparity in an application pool would require inquiry into and consideration of applicants' political affiliation. This practice is prohibited by federal law and Department policy. As the OIG Report discusses, the Civil Service Reform Act of 1978 "prohibits consideration of political affiliation in hiring for career positions." In addition, "[t]he use of political affiliation as a criterion for considering applicants for career attorney appointments may violate several prohibited personnel practices." Report at 182. Under the Attorney General's leadership, and the leadership of former Assistant Attorney General Tom Perez, the Civil Rights Division has made it a priority to restore merit-based, non-partisan hiring. The report stated: "The [current] hiring policy also emphasized that hiring in the Civil Rights Division is based on merit-based principles and should never involve discrimination based on race, age, political affiliation, or other prohibited factors. Members of the Civil Rights Division hiring committees are required to attend training on merit system principles, prohibited personnel practices, and hiring and interviewing policies, and must certify that they will comply with applicable requirements." Report at 192. The Department believes that the OIG Report vindicated the new policies and procedures that the Civil Rights Division put into place to ensure merit-based hiring.

D) The Inspector General found that in conversations with you, DAAG Hirsch misrepresented key facts in attempting to persuade you to remove Voting Section Chief Christopher Coates. What actions will you take to hold DAAG Hirsch accountable as a result of these facts?

Response:

The premise of your question is inaccurate. Mr. Hirsch did not misrepresent facts to the Department, and the Inspector General did not find that he did. In addition, Mr. Coates was not removed from the Voting Section; he requested a transfer and received one. Report at 174-175.

29. Louisiana

On December 6, 2012, the U.S. Attorney of the Eastern District of Louisiana (USAOELA), Jim Letten, stepped down from his position after a controversy involving illicit online commentary by two of his top staffers. Assistant U.S. Attorney (AUSA) Sal Perricone and then later AUSA Jan Mann, at the time the First Assistant U.S. Attorney, were accused of making disparaging comments on a newspaper website about suspects in federal crime targets. The comments were revealed by former AUSA Billy Gibbons, who represents both Fred Heebe, the subject of a four-year-long federal probe into his River Birch landfill (U.S. v. Fazzio et al.), as well as retired Sergeant Arthur "Archie" Kaufman, one of the New Orleand Police Department officers charged and convicted in the Danziger Bridge case (U.S. v. Bowen et al.). After Perricone's comments were revealed in March 2012, reports indicated that he was under investigation by the Department's Office of Professional Responsibility. Perricone subsequently resigned. When Mann's comments were revealed in October 2012, she was demoted from her position as First Assistant U.S. Attorney and head of the office's Criminal Division. She and her husband Jim Mann, supervisor of the USAOELA's Financial Crimes Unit, both retired in December 2012. Reportedly, Perricone and the Manns were both close associates of Letten's.

According to a November 26, 2012 opinion from U.S. District Court Judge Kurt Engelhardt, the judge in USA v. Fazzio, both Mann and Perricone lied to him regarding their online posting. Judge Engelhardt requested that a more extensive investigation of the leaks and online postings be conducted, and recommended that an independent counsel be appointed to conduct the investigation. Engelhardt wrote:

> **Although in the case of Perricone and now Mann, the usual DOJ protocol appears to require simply placing the matter in the hands of the DOJ's OPR, such a plan at this point seems useless. First of all, having the DOJ investigate itself will likely only yield a delayed yet unconvincing result in which no confidence can rest. If no wrongdoing is uncovered, it will come as a surprise to no one given the conflict of interest existing between the investigator and the investigated. Moreover, the Perricone matter has been under investigation for eight months (since March), and yet it comes as a complete surprise to everyone at DOJ and the U.S. Attorney's Office that another "poster" exists, especially one maintaining as high a position in the U.S. Attorney's Office. It is difficult to imagine how this could possibly have been missed by OPR, and surely raises concerns about the capabilities and adequacy of DOJ's investigatory techniques as exercised through OPR. In any event, the Court has little confidence that OPR will fully investigate and come to conclusions with anywhere near the efficiency and certainty offered by suitable court-approved independent counsel. The Court strongly urges DOJ to do so post haste. Should DOJ determine not to proceed accordingly, the Court is left to proceed as it sees fit.**

On December 6, 2012, you announced that the case would be investigated by AUSA John Horn, First Assistant U.S. Attorney in the Northern District of Georgia. Judge Engelhardt requested a report within a month and then later granted a one-month extension, meaning AUSA Horn's report should have been submitted by January 25, 2013.

On March 8, 2013, the USAOELA filed a motion to dismiss the case against the River Birch landfill operation, citing "evidentiary concerns" and "the interests of justice." The Department's Public Integrity Section had also been assisting USAOELA in the case.

A) What is the current status of the investigation into the online postings of these federal prosecutors?

Response:

The Office of Professional Responsibility (OPR) has completed its investigation of Perricone and Mann and has shared its findings with the Louisiana bar disciplinary authorities. Special Attorneys John Horn and Charysse Alexander submitted their report on January 25, 2013, as well as a number of supplemental reports in compliance with the Court's November 26, 2012 Order entered in *United States v. Bowen, et al.*

B) Has AUSA Horn submitted the findings of his investigation? When did he submit them? If he did not submit them by January 25, 2013, why not?

Response:

Please refer to the response to Question 29(A), above.

C) Why did the Department opt to appoint AUSA Horn and was his appointment pre-approved by Judge Englehardt?

Response:

AUSA Horn is an experienced, career prosecutor in an office with no interest or history in the Eastern District of Louisiana (EDLA) litigation. His appointment was not pre-approved by Judge Engelhardt.

D) What has the Department done to address the concerns expressed by Judge Englehardt about OPR?

Response:

OPR conducted a thorough investigation relating to the conduct of former AUSAs Perricone and Mann. As a general rule, OPR initiates and conducts investigations in response to specific misconduct allegations. While comments posted by Perricone were the initial focus of OPR's investigation, the investigation was broadened to include Mann as well. The Department is confident that OPR's work was extensive, objective, and unbiased, and that their investigative report appropriately analyzed all of the issues raised by this matter.

E) Did AUSA Horn's investigation include questioning the media recipients of leaked information, as Judge Englehardt recommended?

Response:

In compliance with DOJ policy, AUSA Horn questioned the reporters regarding their source(s) of information about the guilty plea of former New Orleans Police Department (NOPD) Officer Lohmann, and the reporters invoked a First Amendment privilege and refused to answer. As reported to Judge Engelhardt, DOJ approval is required to issue subpoenas to the reporters for this information, and DOJ determined that the regulations governing such requests were not satisfied in this circumstance.

F) Are criminal charges being considered against Perricone or Mann for lying to a federal judge?

Response:

It is DOJ policy not to confirm or deny the existence of a pending criminal investigation.

G) Have administrative charges been filed by DOJ with Perricone's and Mann's respective state Bar associations to rescind their licenses to practice law?

Response:

Judge Engelhardt referred Perricone's and Mann's conduct to the Louisiana State Bar's Attorney Disciplinary Board and the Eastern District of Louisiana Lawyers Disciplinary Enforcement Committee in his November 26, 2012, Order. It is the Department's understanding that an investigation is ongoing by the Louisiana State Bar's Attorney Disciplinary Board, and the Department has fully cooperated with that investigation. The Department also understands from published reports that Perricone and Mann voluntarily withdrew their membership from the bar of the District Court for the Eastern District of Louisiana.

H) To what extent, if any, was U.S. Attorney Letten aware of the online activities of Perricone and Mann? What actions were taken by Letten once the information was revealed that prosecutors in his office were anonymously disclosing information about current investigations and cases?

Response:

The Office of Professional Responsibility concluded that former U.S. Attorney Letten was unaware of the online activities of Perricone and Mann while they were going on. After the exposure of Perricone in March 2012 and Mann in November 2012, Letten removed Perricone from the cases on which he commented, and he also demoted Mann from her position as First Assistant United States Attorney (FAUSA) and Criminal Chief. Letten immediately referred the matters to the Office of Professional Responsibility. Letten also arranged to have Andrew Goldsmith deliver a presentation in November 2012 about DOJ's social media policy to the office.

I) Following the departures of Perricone, Letten, and Mann, what steps has the Department taken to ensure that current attorneys and employees do not disclose information received through their work?

Response:

The Department requires mandatory discovery training every year for all prosecutors. As a part of that training, attorneys are reminded that they have an ethical and legal obligation to maintain the secrecy of the Grand Jury process and the information they review as Department of Justice employees. This training requirement is addressed in the United States Attorney Manual (USAM § 9-5.001), which was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring and to require two hours of training on an annual basis for all other prosecutors. Earlier this year, the Deputy Attorney General issued guidance to all Department employees concerning the use of social media.

J) What impact did the postings of these prosecutors have on any other cases to which they were assigned? Is there a review being conducted of other cases prosecuted by these AUSAs?

Response:

OPR has not received complaints in other cases relating to postings by these prosecutors at this time.

K) Were there any complaints of prosecutorial misconduct filed in any other cases handled by these prosecutors? If so, what were the names of those cases and how were those complaints handled?

Response:

OPR has not received complaints in other cases relating to postings by these prosecutors at this time.

L) For what "evidentiary concerns" was U.S. v. Fazzio dropped?

Response:

The U.S. Attorney's Office for the Eastern District of Louisiana (USAO-EDLA) recused itself from the case of *United States of America v. Dominick Fazzio and Mark J. Titus*, 11-cr-159 (E.D. La.), in April of 2012, in light of the revelations that former Assistant U.S. Attorney Salvador Perricone was posting online comments. The Public Integrity Section (PIN) in the Criminal Division of the Department of Justice assumed sole responsibility for the case at that time. PIN thereafter moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

M) Are individuals in the USAOELA being investigated for possible misconduct related to those evidentiary concerns? If so, who is conducting the investigation?

Response:

The evidentiary concerns identified by PIN did not include misconduct allegations relating to the U.S. Attorney's Office for the Eastern District of Louisiana (USAO-EDLA). No individuals in the USAO-EDLA are being investigated for possible misconduct related to the evidentiary concerns identified by PIN.

N) When were the evidentiary problems in U.S. v. Fazzio discovered?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

O) Why did the Public Integrity Section, which had been involved since August 2012, wait until March 2013 to move to dismiss the case?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice. The evidentiary concerns included our assessment of the probable outcome of ongoing litigation.

P) Why was U.S. v. Fazzio dismissed with prejudice?

Response:

PIN assumed responsibility for the case in April 2012. Thereafter, following an in-depth review of the facts and circumstances of the case, PIN moved to dismiss the charges based upon evidentiary concerns and in the interests of justice, which required finality.

30. Chicago OIG

On March 5, 2013, U.S. District Court Judge Virginia Kendall dismissed an indictment of Deputy U.S. Marshal Stephen Linder for excessive force. The indictment had been brought by attorneys from the Department's Civil Rights Division. The dismissal was the result of the court holding that the Government had violated the defendant's Fifth and Sixth Amendment constitutional rights. However, separate from the treatment of the defendant, the opinion also indicated that witnesses in the investigation—not targets—testified that they were "bullied, threatened, and treated like perjurors." This conduct was allegedly by the two attorneys from the Civil Rights Division as well as by an investigator for the Department's Office of Inspector General.

Has an Office of Professional Responsibility investigation been conducted into the conduct of the attorneys who allegedly intimidated and threatened witnesses? If not, why not?

Response:

The Civil Rights Division referred this matter to the Office of Professional Responsibility, which initiated on March 12, 2013, an inquiry and later an investigation relating to the court's findings.

31. Refusal to Answer Previous Questions

In addition to the above questions, there are many outstanding matters to which you have not yet responded. At the oversight hearing, several senators commented that they are still very interesting in having you respond.

For example, Senator Grassley stated that there are "many outstanding letters and questions we have yet to receive from the department," including "questions for the record from the last oversight hearing held nine months ago," "questions for the record from department officials that testified at various hearings," and inquiry letters on the "impact of budget sequester," the "failure to prosecute individuals at HSBC for money-laundering," and a "request related to investigation

[into] Fast and Furious." Senator Whitehouse added that he would "love to get the response to the request for the record that was made last June...and which we still have no response to."

In accordance with these statements made during the hearing, Members are still interested in your answers to the following questions from your previous Hearing on "Oversight of the U.S. Department of Justice."

Response:

On May 7, 2013, the Department provided responses to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012. The Department continues to work to respond to any outstanding Questions for the Record arising from the appearances of various Department officials before the Committee.

32. National Security Leaks

Leaks of classified information continue to plague the Obama Administration. The list of notable national security leaks includes: (1) a report detailing U.S. involvement in Stuxnet, a perported cyber weapon, and the cyber-attacks against Iran's nuclear reactors dubbed "Olympic Games"; (2) a report that U.S. national security agencies thwarted another underwear bomber plot to be carried out on the anniversary of Osama bin Laden's death; (3) a report that the U.S. had planted a spy in al Qaeda in Yemen; (4) revelation that President Obama is personally involved in choosing the "kill list," which prioritizes U.S. terrorist killings; (5) revelation of the identity of the Pakistani doctor who aided the CIA in the capture of Osama bin Laden; (6) allegations that the Administration leaked sensitive information about the capture of Osama bin Laden to filmmakers making a movie about it.

In [May 2011], I asked you about prosecuting classified leaks and you said "there has to be a balancing that is done between what our national security interests are and what might be gained by prosecuting a particular individual." Unfortunately, based upon the evidence, it seems the balancing done here is often times whether the leaker was a Justice Department employee or not. If they are a Justice Department employee, prosecutions don't seem to follow. At the least, this was the case with DOJ employee Thomas Tamm and FBI employees who leaked information in the Anthrax case.

On [June 8, 2012], you announced that you were appointing Ronald C. Machen, Jr., the U.S. Attorney for the District of Columbia and Rod J. Rosenstein, the U.S. Attorney for the District of Maryland, to lead criminal investigations into recent instances of possible unauthorized disclosures of classified information. As part of this announcement you pledged to keep the Judiciary and Intelligence Committees apprised of the investigations, but provided no details on how these U.S. Attorneys would independently conduct the leak investigations without undue influence from the Administration. Further, you did not provide any detail as to what leaks were being investigated and by whom.

A) It has been reported that the National Security Division has been recused for at least one investigation stemming from these leaks. Is this correct, and if so, how is there not a conflict of interest on the part of the Justice Department?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012. One additional item is worth noting. As referenced in your question, on June 8, 2012, Ronald C. Machen, Jr., the U.S. Attorney for the District of Columbia, was appointed to lead a criminal investigation into the possible unauthorized disclosure of classified information related to an April 2012 disrupted suicide bomb plot by the terrorist group Al-Qaeda in the Arabian Peninsula ("AQAP") and the recovery of a bomb in connection with that plot. U.S. Attorney Machen and a team of prosecutors and FBI agents conducted a swift and exhaustive investigation. They interviewed well over 550 witnesses and reviewed tens of thousands of documents. Less than a year later, the investigative team was able to identify the source of the unauthorized disclosure, former FBI agent Donald John Sachtleben. Faced with the evidence developed against him, Sachtleben agreed to plead guilty to the unauthorized disclosure and serve a sentence of 43 months. On November 14, 2013, Sachtleben pled guilty and was sentenced accordingly. This was one of the largest investigations of its kind.

B) If the leak came from within the Justice Department, why should we have confidence that these leak investigations won't be dismissed without prosecution just like the Tamm case?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

C) In the Tamm case and the FBI anthrax leaks you and your Department relied upon the advice of career prosecutors to dismiss the cases. Here, you have instructed political appointees to do the work. Why did you assign political appointees as opposed to career prosecutors on this investigation breaking from past practice?

Response:

Please refer to the response to Question 32(B), above.

D) 28 U.S.C. 515 allows you to appoint special attorneys for criminal or civil investigations. Why did you choose to use existing U.S. Attorney's instead of a special attorney under this authority?

Response:

Please refer to the response to Question 32(B), above.

E) The Justice Department has had a number of high profile failures in prosecuting national security leaks. This includes the case against Thomas Drake and the ongoing prosecution of Jeffrey Sterling—which is currently on interlocutory appeal. Why is the Justice Department having trouble prosecuting national security leak cases and do we need to change the law to help bring these individuals to justice?

Response:

Please refer to the response to Question 32(B), above.

F) Would changes to the Classified Information Procedures Act (CIPA), as others in the legal community have called for, help the Department prosecute national security leak cases? If so, what types of reforms would be necessary to help?

Response:

Please refer to the response to Question 32(B), above.

33. Foreign Intelligence Surveillance Act Reauthorization

In a letter dated February 8, 2012, you joined Director of National Intelligence Clapper in requesting the reauthorization Title VII of the Foreign Intelligence Surveillance Act (FISA), known as the FISA Amendments Act of 2008.

I agree with you about the value of the FAA tools, and I support a clean reauthorization of FAA to 2017.

A) Do you support a clean reauthorization of the FISA amendments Act?

Response:

As the Department confirmed in its May 7, 2013, response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012, the Attorney General supported reauthorization of the Foreign Intelligence Surveillance Act (FISA) Amendments Act (FAA) in its current form to 2017, which Congress enacted during the last session.

The President stated the following in his January 17, 2014, speech at the Department of Justice: "[W]e will provide additional protections for activities conducted under Section 702, which allows the government to intercept the communications of foreign targets overseas who have information that's important for our national security. Specifically, I am asking the Attorney General and DNI to institute reforms that place additional restrictions on government's ability to retain, search, and use in criminal cases communications between Americans and foreign citizens incidentally collected under Section 702." The Department is working diligently to implement the President's directive so as to maintain this valuable program while doing more to ensure that the civil liberties of U.S. persons are not compromised.

B) Is there sufficient oversight and checks and balances to ensure that the rights of U.S. citizens are protected?

Response:

As the President has stated, and as the review conducted by the President's Civil Liberties Oversight Board (PCLOB) confirmed, section 702 of FISA, the central provision of the FAA, is a valuable program that allows the government to intercept the communications of foreign targets overseas who have information that's important to our national security. It is important to note that section 702 may only be

used to target non-U.S. persons located overseas to obtain foreign intelligence. Section 702 expressly prohibits the government from intentionally targeting the communications of U.S. citizens, lawful permanent residents, and all persons located in the United States. In addition, section 704 requires an order from the FISA Court (FISC) to conduct surveillance or physical search of U.S. persons located abroad—an additional protection for U.S. persons that did not exist prior to the FAA.

To promote compliance with these and other restrictions, the FAA established a robust framework of oversight by all three branches of government. First, the FISC plays a significant role in overseeing surveillance conducted under section 702. Under section 702, the FISC must approve annual certifications by the Attorney General and the Director of National Intelligence that identify categories of foreign intelligence targets and include certifications that the acquisitions comport with the statute, including prohibitions against intentionally targeting U.S. persons or any person known at the time of acquisition to be located inside the United States. In addition to the certifications, the FISC also must approve targeting and minimization procedures.

Targeting procedures are designed to ensure that the government only targets non-U.S. persons outside the United States and does not intentionally acquire wholly domestic communications. The minimization procedures protect the identities of U.S. persons and any nonpublic information concerning U.S. persons that may be incidentally acquired. The FISC reviews the targeting and minimization procedures for compliance with the requirements of both the statute and the Fourth Amendment. By approving the certifications, as well as the minimization and targeting procedures, the FISC plays a major role in ensuring that acquisitions under section 702 are conducted in a lawful and appropriate manner.

Second, the Executive Branch conducts extensive internal oversight. Oversight within the Executive Branch begins with the intelligence agencies. For example, the National Security Agency (NSA) trains its analysts on the applicable procedures, audits the databases they use, and spot checks their targeting decisions. In addition to these internal agency processes, the National Security Division (NSD) of the Justice Department and the Office of the Director of National Intelligence (ODNI) conduct robust oversight, communicating with the agencies on a near-daily basis regarding implementation of section 702. While NSA audits queries of its analysts and self identifies issues to NSD, NSD conducts its own audits of queries of U.S. citizens at all agencies involved in retaining the collection. This oversight includes onsite reviews conducted by a joint NSD and ODNI team of each agency's activities. These onsite reviews occur approximately every 60 days. The team evaluates and, where appropriate, investigates each potential incident of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions.

Finally, Congress plays a role in the oversight of surveillance under section 702. On a regular basis, the Executive Branch sends to the Judiciary and Intelligence Committees the multiple reports required by the FAA. In accordance with these requirements, the Executive Branch has informed the Judiciary and Intelligence Committees of acquisitions authorized under section 702; reported, in detail, on the results of the reviews and on compliance incidents and remedial efforts; made all written reports on these reviews available to the Committees; and provided summaries of significant interpretations of FISA, as well as copies of relevant judicial opinions and pleadings. The government has also provided the Judiciary and Intelligence Committees numerous briefings and participated in numerous hearings addressing the government's use of FAA authorities.

As stated earlier this year, the President believes that we can do more to ensure that the civil liberties of U.S. persons are not compromised in this program. As mentioned in the response to Question 33(A), above, to address incidental collection of communications between Americans and foreign citizens, the President has asked the Attorney General and Director of National Intelligence (DNI) to initiate reforms that place additional restrictions on the government's ability to retain, search, and use in criminal cases,

communications between Americans and foreign citizens incidentally collected under Section 702. The PCLOB has also suggested certain reforms. The Department is working diligently to implement the President's directive and is considering the PCLOB's recommendations.

C) Are any changes in the FAA needed, either to enhance intelligence gathering capabilities or to protect the rights of U.S. citizens?

Response:

Please refer to the response to Question 33(A), above.

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

On September 30, 2011, Anwar al-Awlaqi, a United States citizen, was killed in an operation conducted by the United States in Yemen. It was reported in the media that this targeted killing followed the issuance of a secret memorandum authored by the Justice Department's Office of Legal Counsel (OLC). On October 5, 2011, I sent a letter to you requesting a copy of any such memorandum, offering to make appropriate arrangements if the memo was classified. I have continually been told that the Justice Department will not confirm the existence of such a memorandum, notwithstanding the fact that the existence of such a memorandum was described to print media.

A) Given the Justice Department is not confirming the existence of the memorandum, is the Department investigating any national security leaks related to this story? If not, why not?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) If such a memorandum exists, why does the Department continue to refuse to provide it to the Judiciary Committee?

Response:

As a general matter, the Department of Justice does not disclose confidential legal advice that it has provided. However, as an extraordinary accommodation, the Administration in May 2014 provided all Senators, including members of this Committee, with access to classified Office of Legal Council (OLC) legal advice concerning a contemplated operation against al-Aulaqi. In addition, redacted copies of two OLC memoranda addressing the lawfulness of such an operation have now been publicly disclosed in connection with Freedom of Information Act requests.

35. Extradition of Ali Mussa Daqduq

Ali Mussa Daqduq is a Lebanese national and senior leader of Hezbollah captured in Iraq in 2007. Daqduq has been linked to the Iranian government and a brazen raid in which four American soldiers were abducted and killed in the Iraqi holy city of Karbala in 2007. Until recently, Daqduq was in U.S. custody in Iraq. Daqduq was among a few of the remaining U.S. prisoners who, under a 2008 agreement between Washington and Baghdad, were required to be transferred to Iraqi custody by the end of 2011. U.S. officials feared that if he was turned over to Iraq, he would simply walk free and resume his terrorist activities against the United States and its interests.

On May 16, 2011, five Republican members of the Judiciary Committee sent a letter to the Attorney General, expressing their concern with bringing Daqduq to the U.S., and requesting further information. Ron Weich responded on behalf of the Attorney General on August 8, 2011. He failed to answer the specific policy questions raised, merely stating that DOJ "remains committed to using all available tools to fight terrorism, including prosecution in military commissions or Article III courts, as appropriate."

On July 21, 2011, 20 Republican Senators sent a letter to Secretary of Defense Leon Panetta. Members urged the Administration to closely evaluate the legal authority available to bring DaqDuq's case before a military commission. On August 30, 2011, the Deputy Secretary of Defense responded on his behalf, merely stating that possible options are being examined

Despite vehement protests by Congress, Daqduq was transferred to Iraqi custody on December 17, 2011, pursuant to the aforementioned Status of Forces Agreement. While in Iraqi custody, U.S. military prosecutors charged Daqduq with murder, perfidy, terrorism and espionage, [and] other war crimes. At the time, a military spokesman stated that the U.S. government was "working with Iraq to affect Daqduq's transfer to a U.S. military commission consistent with U.S. and Iraqi law." However, on May 7, 2012, Daqduq was acquitted of any criminal charges under Iraqi law and the presiding Iraqi judge ordered his release.

On May 10th [2012], I sent a letter to you and Secretary of Defense Panetta requesting information about the Administration's plan for dealing with the Daqduq situation. He was on the verge of escaping justice after an Iraqi court cleared him of any criminal charges. Specifically, I asked whether any formal extradition request has been made for Daqduq On May 24th, Secretary Panetta sent me a personal letter acknowledging my concerns and stated he would get back to me in detail as soon as possible. I still have not heard back from you to even confirm the receipt of my letter. On June 1st, I read in the press) that the Administration has asked Iraq to extradite Daqduq.

A) Has the Justice Department been involved in negotiations seeking to extradite Daqduq?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) Can you confirm that a request has been made to extradite Daqduq?

Response:

Please refer to the response to Question 35(A), above.

C) If so, does the extradition request indicate which forum, military commission or civilian court, that Daqduq would be extradited to?

Response:

Please refer to the response to Question 35(A), above.

36. Use of Drones by Law Enforcement

Do any Justice Department entities use or plan to use drones for law enforcement purposes within the United States? Has the Office of Legal Counsel been asked to or issued any memoranda addressing the topic of use of drones by federal, state, local, or tribal domestic law enforcement, administrative, or regulatory agencies? If so, please provide a copy of any memoranda discussing this topic.

Response:

As of July 2014, within the Department of Justice, only the FBI currently uses Unmanned Aerial Systems (UAS) to support its mission. The Bureau of Alcohol, Tobacco, Firearms, and Explosives and the U.S. Marshals Service (USMS) obtained UAS for testing, but have no plans to deploy UAS operationally. The Drug Enforcement Administration (DEA) does not have any UAS in inventory, and has no plans to acquire them. Department components also routinely coordinate with other law enforcement agencies for investigative support. This has included support provided by U.S. Customs and Border Protection operating its UAS.

As a general matter, the Department of Justice does not disclose whether the Office of Legal Counsel has been asked to consider particular legal issues, nor does it disclose confidential legal advice provided by OLC. The Department is fully committed, however, to ensuring that any use of UAS by the Department's law enforcement agencies complies fully with all relevant constitutional and statutory requirements.

37. Ninth Circuit Deportation Cases

On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases fit into the administration's immigration enforcement priorities. In relevant part, the order in each case states:

In light of ICE Director John Morton's June 17, 2011 memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing.

On March 1, 2012, House Judiciary Committee Chairman Lamar Smith and I sent a letter to you and Secretary Janet Napolitano expressing concern about the Ninth Circuit's order. Moreover, the letter asked the Department of Justice and the Department of Homeland Security to respond to questions about how they were handling cases before immigration judges, the Board of Immigration Appeals (BIA) and the federal courts of appeals. In particular, our letter contained four specific questions or requests for information:

A) For each of the cases that is subject to the order(s) issued by the Ninth Circuit on February 6, 2012, identify the following: (a) the date the case was commenced before an immigration judge or trial judge, (b) the date the appeal to the Ninth Circuit was filed, (c) the date the government's merits brief in the Ninth Circuit was filed, (d) the status of the case in the Ninth Circuit, (e) whether the government has argued that the Ninth Circuit should affirm a removal order, (f) the number of hours worked on the case by government attorneys before the case reached the Ninth Circuit, (g) the number of hours worked on the case by government attorneys since the case was filed in the Ninth Circuit, (h) an estimate of the number of hours worked on the case by immigration judges, BIA judges and federal judges and (i) the amount of tax payer dollars spent on the case to date, including the portion of the salaries of the government attorneys, judges and court staff who have worked on the case.

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) Does the government seek to have immigration judges enter removal orders even though those orders may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the immigration judges presiding over the cases?

Response:

Please refer to the response to Question 37(A), above.

C) Does the government seek to have the BIA affirm removal orders even though the affirmances may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the BIA judges presiding over the cases?

Response:

Please refer to the response to Question 37(A), above.

D) Does the government seek to have federal courts of appeals affirm removal orders, even though those orders may subsequently be disregard pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the

time of the government attorneys working to achieve removal orders and the federal judges presiding over the cases?

Response:

Please refer to the response to Question 37(A), above.

38. According to some reports, there are at least 1.6 million immigration cases pending before immigration judges, the BIA and the federal courts of appeals. Also, according to reports, the DHS and/or DOJ are "reviewing" 300,000 or more cases under the so-called "prosecutorial discretion" initiative.

The DOJ and the DHS are supposed to be prosecuting these cases and seeking to have illegal aliens deported. As part of that effort, line attorneys from the DOJ and DHS spend thousands of hours working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend hundreds of hours adjudicating these cases. Tens of millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges and court staff.

The answer to the Ninth Circuit's question set forth in the government's pleadings was nonresponsive. The government's pleadings tell the Court that the government does not presently intend to use prosecutorial discretion with the cases, but that the matter is totally within the discretion of the Executive Branch. If the government decides to use prosecutorial discretion while any of the cases are pending, it will inform the Court. What is unwritten is that the Obama administration can still use prosecutorial discretion after a case is concluded, even if a Court has issued a deportation order and after all the time, effort and money has been expended.

The DHS responded to the March 1 letter with a one-page letter dated April 23, 2012 and signed by Nelson Peacock, the Assistant Secretary for Legislative Affairs. The April 23 letter does not answer the four specific questions or requests for information in the March 1 letter.

The DOJ responded to the March 1 letter with a two-page letter dated June 6, 2012 and signed by Acting Assistant Attorney General Judith Appelbaum. The letter also had a one-page attachment with some information about the five cases before the Ninth Circuit. The DOJ's June 6 letter partially answers questions 1(a)-(g) from the March 1 letter. It also states that it cannot provide an accurate estimate of the number of hours worked on the five cases by immigration judges and their staffs, which was asked about in question 1(h). The DOJ letter does not acknowledge, let alone answer, questions 1(i)-4.

A) Did you review the June 6 letter before it was sent?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) Did you authorize the June 6 letter?

Response:

Please refer to the response to Question 38(A), above.

C) Is the DOJ refusing to answer questions 1(i)-4 from the March 1 letter? If so, what is the legal authority for the DOJ's refusal? If the DOJ is not refusing to answer, how do you explain the June 6 letter's failure to answer the questions?

Response:

Please refer to the response to Question 38(A), above.

D) Provide complete and detailed answers to all of the questions and requests for information from the March 1 letter, which are quoted above.

Response:

Please refer to the response to Question 38(A), above.

39. Freedom of Information Act

On his first full day in office, President Obama declared openness and transparency to be touchstones of his administration, and ordered agencies to make it easier for the public to get information about the government. Specifically, he issued two memoranda purportedly designed to usher in a "new era of open government."

President Obama's memorandum on the Freedom of Information Act (FOIA) called on all government agencies to adopt a "presumption of disclosure" when administering the law. He directed agencies to be more proactive in their disclosure and to act cooperatively with the public. To further his goals, President Obama directed the Attorney General to issue new FOIA guidelines for agency heads.

Pursuant to the President's orders, you issued FOIA guidelines in a memorandum dated March 19, 2009. Your memorandum rescinded former Attorney General Ashcroft's 2001 pledge to defend agency FOIA withholdings "unless they lack[ed] a sound legal basis." Instead, you stated that the Department of Justice would now defend withholdings only if the law prohibited release of the information, or if the release would result in foreseeable harm to a government interest protected by one of the exemptions in the FOIA. Your memorandum extensively quoted the President's memoranda.

The Department of Justice is supposed to be overseeing the Executive Branch's compliance with the FOIA.

On March 30, 2011, the House Committee on Oversight and Government Reform released its 153-page report on its investigation of the DHS's political vetting of requests under the FOIA. The Committee reviewed thousands of pages of internal DHS e-mails and memoranda and conducted six transcribed witness interviews. It learned through the course of an eight-month investigation

that DHS political staff has exerted pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people.
The report by Chairman Issa's Committee reproduces and quotes e-mails from political staff at the DHS. The report also quotes the transcripts of witness interviews. The statements made by the political staff at the DHS are disturbing.

A) What is your response to each of the findings contained on pages 5-7 of the report?

Response:

This response was provided to the Committee on May 7, 2013, in the Department's response to the Questions for the Record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012.

B) What is your response to the disturbing statements made by DHS political staff, who are quoted in the report? In particular, what is your response to political appointees at the DHS referring to a career FOIA employee, who was attempting to organize a FOIA training session, as a "lunatic" and to attending the training session for the "comic relief"?

Response:

Please refer to the response to Question 39(A), above.

C) What actions, if any, have you personally taken in response to Chairman Issa's report?

Response:

Please refer to the response to Question 39(A), above.

D) What actions, if any, has the DOJ taken in response to Chairman Issa's report?

Response:

Please refer to the response to Question 39(A), above.

Chairman Issa's report and a report prepared by the Inspector General of the DHS find that political staff at the DHS lacks a fundamental understanding of FOIA.

E) What, if anything, have you personally done to address this situation? If you have not done anything personally, acknowledge that fact.

Response:

Please refer to the response to Question 39(A), above.

F) What, if anything, has the DOJ done to directly address this situation?

Response:

Please refer to the response to Question 39(A), above.

Questions from Senator Franken

40. The late Aaron Swartz's attorneys have alleged in legal filings that the federal government inappropriately withheld evidence during its prosecution against him.

A) Has the Department of Justice investigated these allegations?

Response:

Approximately three weeks after Mr. Swartz's death, one of Mr. Swartz's attorneys sent a letter to the Justice Department's Office of Professional Responsibility alleging that a prosecutor improperly withheld information that the attorney believed was relevant to a suppression hearing in the case. The information at issue had been disclosed to Mr. Swartz's attorney approximately six weeks prior to the date scheduled for the suppression hearing and a month prior to Mr. Swartz's death. The Office of Professional Responsibility initiated an investigation, which is ongoing.

B) If so, what is the Department's response to these allegations?

Response:

Please refer to the response to Question 40(A), above.

C) If not, why not?

Response:

Please refer to the response to Question 40(A), above.

41. The Department of Justice and the Federal Bureau of Investigation have two separate initiatives involving the use of facial recognition technology: the Next Generation Identification initiative's Facial Recognition Pilot Program, and Project Facemask. Both of these projects are in an expansion phase.

A) What states have formally enrolled in the Facial Recognition Pilot Program?

Response:

Maine, Maryland, Michigan, New Mexico, and Texas are currently connected to and participating in the Next Generation Identification (NGI) program's Interstate Photo System Facial Recognition Pilot (IPSFRP).

B) What states are in the process of enrolling in the Facial Recognition Pilot Program?

Response:

The District of Columbia Metropolitan Police, the U.S. Secret Service, Florida and Tennessee are currently establishing connectivity so they can participate in the NGI IPSFRP.

C) What states have expressed interest in enrolling in the Facial Recognition Pilot Program?

Response:

Alabama, Connecticut, Hawaii, Nebraska, New Jersey, Ohio, South Carolina, Washington, West Virginia, and Puerto Rico have expressed interest in participating in the NGI IPSFRP and have executed Memoranda of Understanding.

D) What states have formally enrolled in Project Facemask?

Response:

"Project Facemask" was initiated in 2007 as a collaborative effort by the FBI and the North Carolina (NC) Department of Motor Vehicles (DMV) to use the NC DMV's facial recognition program as a means of locating fugitives and missing persons. Upon the successful conclusion of this project in 2010, the capabilities were evaluated to assess the operational value of creating an FBI facial searching service. Based on this evaluation, the FBI created a Facial Analysis Comparison and Evaluation (FACE) Services Unit. Although the FACE Services Unit then began establishing Memoranda of Understanding (MOUs) with states willing to share DMV information for law enforcement purposes, as permitted by Federal law regarding the use of state motor vehicle records (18 U.S.C. §§ 2721-25), this work is not part of Project Facemask, which was terminated in 2010. These MOUs, which allow both state and federal law enforcement agencies to benefit from facial analysis and comparison, have been established with the states of Alabama, Arkansas, Delaware, Illinois, Iowa, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, South Carolina, Texas, Utah, and Vermont. State officials who do not anticipate an immediate need for facial analysis or comparison do not typically reach out to the FBI to seek participation in this program because the program demands state resources. Nonetheless, the FBI is proactively seeking the participation of states that have both facial recognition capabilities and laws that allow the sharing of DMV photos for law enforcement purposes.

E) What states are in the process of enrolling in Project Facemask?

Response:

Please refer to the response to Question 41(D), above.

F) What states have expressed interest in Project Facemask?

Response:

Please refer to the response to Question 41(D), above.

G) Has the DOJ or the FBI initiated any new efforts involving the use of facial recognition technology separate from the above-named programs?

Response:

The FBI is currently focused on developing facial recognition technologies through the NGI and FACE initiatives and applies facial recognition capabilities to support investigations at the local, state, and federal levels.