



U.S. Department of Justice

Office of Legislative Affairs

QUESTIONS AND ANSWERS

Office of the Assistant Attorney General

Washington, D.C. 20530

December 10, 2010

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

Dear Chairman Leahy:

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

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

Sincerely,

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

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Member

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

QUESTIONS POSED BY CHAIRMAN LEAHY

Benefit of Federal Criminal Courts vs. Military Commissions

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

Response:

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

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

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

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

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

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

Response:

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

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

Response:

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

The Department of Justice's Interrogation Procedures

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

Response:

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

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

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

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

Outstanding OLC Index

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

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

Response:

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

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

Patriot Act Implementation

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

Response:

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

State Secrets

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

Response:

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

Faster FOIA Act of 2010

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

Response:

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

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

Children Exposed to Violence Initiative

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

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

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

Response:

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

The Children Exposed to Violence (CEV) Initiative represents a Department-wide effort, led by the Office of Justice Programs, the Office on Violence Against Women, and the Office of Community Oriented Policing Services. In FY 2010, Phase I of the CEV Initiative will begin with a planning stage for identifying up to eight localities as demonstration sites to develop collaborative strategies, protocols, and procedures for addressing children's exposure to violence. The announcement of the selected sites is planned for the Fall of 2010.¹ Phase I will then develop parameters for evaluating the

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

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

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

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

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

Response:

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

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

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

Crime Reduction Strategies

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

Response:

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

Fraud

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

Response:

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

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

Specific highlights of Strike Force accomplishments since November 2009 follow:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS POSED BY SENATOR FEINSTEIN

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

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

Response:

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

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

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

Response:

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

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

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

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

U.S. Consulate Murders in Ciudad Juarez

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

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

Response:

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

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

Response:

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

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

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

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

Politicization of Immigration Courts

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

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

Response:

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

Selection & Training

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

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

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

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

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

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

Resources

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

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

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

Accountability

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

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

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

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

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

Response:

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

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

Passport Fraud

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

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

Response:

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

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

Response:

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

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

Border Tunnels

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

Response:

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

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

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

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

Indefinite Detention

15. The Immigration and Nationality Act and the PATRIOT Act both allow different types of indefinite detention under narrow circumstances. It is important that the Executive strikes the right balance between preserving the rule of law and releasing individuals who we know are determined to harm our nation.

- a. Mr. Holder, in your opinion, in what narrow circumstances can the Executive branch hold detainees who continue to pose a security threat but cannot be prosecuted for past crimes?**

Response:

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

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

Response:

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

State Secrets

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

Response:

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

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

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

Salcedo Murder Investigation

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

Response:

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

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

Gun Show Loophole

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

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

Response:

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

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

Response:

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

QUESTIONS POSED BY SENATOR FEINGOLD**COPS**

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

Response:

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

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

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

Incentives for Public Attorneys

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

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

Response:

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

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

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

Review of Classified Materials

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

Response:

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

Military Commissions Act

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

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

Response:

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

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

Response:

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

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

Response:

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

QUESTIONS POSED BY SENATOR SCHUMERBureau of Prisons Staffing Concerns

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

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

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

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

QUESTIONS POSED BY SENATOR CARDIN**Human Trafficking**

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

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

Response:

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

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

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

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

Response:

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

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

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

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

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

Trafficking Victims Protection Reauthorization Act

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

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

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

Response:

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

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

Response:

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

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

a. How is this retraining proceeding?

Response:

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

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

Response:

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

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

QUESTIONS POSED BY SENATOR WHITEHOUSE

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

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

Response:

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

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

Response:

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

QUESTIONS POSED BY SENATOR SESSIONS

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

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

Response:

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

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

Response:

Please see the response to 29a.

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

Please see the response to 29d.

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

Response:

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

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

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

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

Response:

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

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

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

Response:

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

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

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

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

Response:

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

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

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

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

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

Padilla Amicus Brief and Military Detention

35. **You responded to me via letter on February 3, 2010 regarding your decision to prosecute Abdul-Mutallab in an Article III court. You stated that Jose Padilla's law of war custody "raised serious statutory and constitutional**

questions in the courts concerning the lawfulness of the government's actions.”

You support that statement by citing the Second Circuit's decision which held that the President did not have the authority to detain Padilla under the law of war. However, the Second Circuit's opinion was vacated by the Supreme Court. The Fourth Circuit was given the case by the Supreme Court and they found that the President did have the authority to detain pursuant to the Authorization to Use Military Force (AUMF).

Recently, the Senate Judiciary Committee learned that you filed an *Amicus* brief in the Jose Padilla case as a private citizen. In that brief you took the position that the court should deny to the Executive, the authority to detain Padilla in military custody. Your brief also argued that additional authority would be required to detain citizens in the United States and that if that authority were necessary it should come through congressional action.

When I take your argument in the Padilla Amicus brief and juxtapose it to the Abdul-Mutallab case, it concerns me that your default position as a private citizen and now as Attorney General has been to never even consider military commissions as a viable option for terror trials.

- a. Can you tell me if you were aware of the Fourth Circuit's decision in Padilla and did you factor that precedent into your analysis of the Abdul-Mutallab case?

Response:

Yes, the Department is aware of the Fourth Circuit's decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Yes, the Department considered that opinion, along with a number of other legal and practical considerations, in determining that the criminal justice system was the most appropriate and best-suited option for obtaining intelligence from Abdulmutallab and ensuring his long-term incapacitation. Moreover, as noted in response to question 29a, no Executive Branch agency has objected to that determination or proposed an alternative.

- b. Do you as Attorney General recognize, as did the Fourth Circuit, that the AUMF authorizes the President to detain enemy combatants?

Response:

The Attorney General has consistently stated that, where appropriate, law of war detention under the 2001 AUMF is a basis for detaining al Qaeda operatives during the U.S. armed conflict with al Qaeda.

Miranda of Enemy Combatants

36. Last month, before the House Appropriations Subcommittee, you made reference to the “reality” that any *Miranda* rights read to Osama bin Laden will be in fact recited to a corpse.

When you discussed the hypothetical capture of Osama Bin Laden, dead or alive, your first reaction was to bring up *Miranda* rights that would in fact be administered in a combat theatre. The administration and the department have denied any instance of requiring that *Miranda* be given to enemy combatants upon capture on the battlefield. However, I am troubled that your immediate response to the hypothetical posed by the Congressman was to in fact discuss *Miranda* for Bin Laden.

- a. Knowing that Osama Bin Laden and Ayman Al Zawahiri are under indictment for the 1998 East African Embassies bombings, is it your position that upon live capture they should be *Mirandized* first in order to preserve the possibility of criminal prosecution in that case?

Response:

No. The first priority in questioning any overseas detainee who might have timely and actionable intelligence overseas is to obtain that intelligence in order to protect our troops and further our national security. *Miranda* warnings are never given to such detainees if the national security professionals on the ground conclude that doing so will hinder our counterterrorism efforts. In addition, as you know, section 1040 of the FY 2010 National Defense Authorization Act prohibits members of the U.S. Armed Forces, officials or employees of the Department of Defense or a component of the intelligence community (other than the Department of Justice), absent a court order to the contrary, from reading *Miranda* warnings to foreign nationals who are captured or detained outside the United States as enemy belligerents and are in the custody or under the effective control of the Department of Defense. Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are given only in a very small number of cases overseas and only when consistent with military and intelligence needs.

- b. Do you consider either of these men enemy combatants for their involvement in the attacks of 9/11?

Response:

Both men committed acts of war. They also committed criminal offenses.

Guantanamo Detention

37. In looking at what is supposedly a group of more than 300 terrorists currently imprisoned domestically, it is clear that the vast majority are not held in circumstances that would seem to befit the threat level of Al Qaida terrorists. Only 33 international terrorists are held at the nation's only Supermax facility in Florence, Colorado.

- a. Can you give me an explanation as to why you believe the group of 300 is comparable to the likes of foreign fighters captured on the battlefield?**

Response:

The U.S. Bureau of Prisons safely and securely incarcerates in U.S. prisons more than 300 individuals with a history of or nexus to terrorism. Those who pose the greatest threat are held in the U. S. Penitentiary-Administrative Maximum Security facility in Florence, Colorado. Others are held in less restrictive conditions, consistent with the threat that they pose. These same security-threat assessments are implemented at the Guantanamo Bay Detention Center where certain detainees are held in maximum-security units while others are held in much less restrictive conditions.

- b. Since January 2009, how many terrorists successfully prosecuted by the department have been sentenced to institutions comparable in security level to the Supermax in Florence, Colorado or the maximum security camp located at Guantanamo?**

Response:

Of those prosecuted since 2009, 11 have been sentenced and designated to a permanent BOP facility. Of the eleven, one has been sentenced to the U. S. Penitentiary-Administrative Maximum Security in Florence and the other ten are currently imprisoned in facilities consistent with the threat level they pose. As stated above, these same security threat assessments are implemented at the Guantanamo Bay Detention Center where detainees are held in a range of facilities with varied security measures based on the threat that they pose.

- c. How many successfully prosecuted terrorists are currently detained by the Bureau of Prisons under Special Administrative Measures (SAM) or special confinement conditions?**

Response:

There are 24 terrorism inmates in BOP custody under Special Administrative Measures (SAMs). Of those inmates, 22 have been found guilty and sentenced; the

remaining 2 have pled guilty and are awaiting sentencing.

MLAT Cooperation in Cybercrime Investigations

38. Recently, I introduced the International Cybercrime Reporting and Cooperation Act. One of the key components of this legislation is to develop action plans for countries that are considered a country of cyber concern. A country could be classified a cyber concern if that nation continuously fails to investigate or prosecute persons who carry out cyber related violations like network intrusion, data breach, identity theft, wire fraud and money laundering. Often these violations are investigated by the United States Secret Service or the FBI. Both of these agencies have a strong presence internationally in countries that seem to be the point of origin for cybercrime and the aforementioned violations.

- a. Is the department continuing to monitor international cybercrime trends so that Mutual Legal Assistance Treaties are evolving and expanding to meet the needs of criminal investigators pursuing the perpetrators of these crimes when they are located outside the United States?**

Response:

The Department continually monitors international cybercrime trends so that it can adapt accordingly. Generally, modern Mutual Legal Assistance Treaties (MLATs) are negotiated to cover the broadest spectrum of criminal conduct. Except in very limited circumstances, assistance available pursuant to MLATs is not restricted to specified offenses. Consequently, every effort is made during negotiations to ensure that all manner of assistance contemplated by the treaty will be available to investigations and prosecutions involving cybercrime as well as all other types of serious crimes. Our modern MLATs, and even our oldest MLATs, have proven effective in securing assistance in support of cybercrime investigations.

- b. What is the status of MLAT treaties with Russia and China regarding cybercrime investigations?**

Response:

The provisions of the U.S./Russia MLAT allow for assistance in cybercrime investigations. The United States and China exchange mutual legal assistance pursuant to an executive agreement (the U.S./China Mutual Legal Assistance Agreement (MLAA)). The provisions of the MLAA would not preclude assistance in cybercrime matters.

- c. **What is the level of cooperation with the department's counterparts in Russia and China with respect to cybercrime violations and money laundering?**

Response:

The cooperation between the Department and its Russian counterparts on specific cybercrime matters has varied. For example, in 2008, in response to an MLAT request, Russian authorities executed 12 search warrants and opened their own investigation into computer intrusions into New York City financial institutions that were conducted from Russia. Six persons were charged and are currently being prosecuted in St. Petersburg for offenses related to the activity in the United States. Russia has also facilitated the repatriation of modest amounts of money to victim banks in two cases. Ultimately, Russian cooperation is typically offered on a case by case basis on those matters that Russian authorities deem to be significant. The Department continues to search for opportunities to develop more systematic cooperation.

The Department and its Chinese counterpart, the Ministry of Public Safety (MPS), continue to develop cooperative avenues. Information sharing on investigative referrals remains low. As part of our efforts to improve sharing, the FBI recently was invited to China to discuss areas for future law enforcement cyber cooperation, which the FBI already has followed up on. In addition, U.S. law enforcement authorities continue to work with the MPS to combat the manufacture and export of counterfeit network hardware from China. This ongoing work is being facilitated by the IP Criminal Enforcement Working Group of the U.S. - China Joint Liaison Group for law enforcement, which is co-chaired by the Criminal Division and the MPS. The Working Group is dedicated to increasing cooperation in intellectual property enforcement efforts and pursuing more joint IP criminal investigations with China. The success of this cooperation can be demonstrated by Operation Network Raider, a domestic and international enforcement initiative targeting the illegal distribution of counterfeit network hardware manufactured in China, which resulted in 30 felony convictions and more than 700 seizures of counterfeit Cisco Systems, Inc. network hardware and labels with an estimated retail value of more than \$143 million.

Money laundering. The U.S. has partnered with Russia in at least two significant money laundering investigations that have yielded substantial cooperation that is ongoing under the MLAT. Recent cooperation from Russian authorities in obtaining financial records may signal increased opportunities for cooperation from Russia in the future. The United States also has assisted in a substantial number of Russian requests involving money laundering related to fraud offenses.

Cooperation from China historically has not been strong in money laundering cases, although China provided strong support for a money laundering prosecution in the United States related to offenses committed by managers of the Bank of China. Continued engagement with China in on-going matters may encourage greater cooperation on money laundering and forfeiture matters.

ATF National Integrated Ballistics Information Network

39. In 1999, ATF established and began administration of the National Integrated Ballistic Information Network (NIBIN). In this program, ATF administers automated ballistic imaging technology for NIBIN Partners. These partners are Federal, State and local law enforcement, forensic science, and attorney agencies in the United States that have entered into a formal agreement with ATF to enter ballistic information into NIBIN. Partners use Integrated Ballistic Identification Systems (IBIS) machines to acquire digital images of the markings made on spent ammunition recovered from a crime scene or a crime gun test fire and then compare those images (in a matter of hours) against earlier NIBIN entries via electronic image comparison.

I am aware that there are 209 IBIS machines deployed nationwide. Out of this 209 number, 180 need to be refreshed. ATF's limited budget for this program has been directed towards refreshing and replacing machines already deployed before placing new machines in jurisdictions that are in desperate need of one. Since 2005, funding has been sought to refresh the existing machines. However, OMB has continuously cut this item from ATF's budget.

Recently, ATF received 3.2 million in asset forfeiture funds which was used to refresh the service network, for a software upgrade and one new international server located in Mexico. ATF also received \$4 million in the President's Supplemental Budget which will be used to refresh machines located along the Southwest border.

When will DOJ properly fund this program to a level in which agencies located outside the Southwest border can receive these machines?

Response:

The Department has been very supportive of the NIBIN Program. Without the Department's support, NIBIN would not have received the above-referenced \$7.2 million in additional funds in FY 2009. Moreover, the replacement of the correlation servers was a critical first step to upgrading the equipment at the NIBIN partner sites.

As recently as the FY 2011 budget request, and in an FY 2010 supplemental request, the Department included a significant infusion of funds for refreshing NIBIN equipment. Be assured that the NIBIN program has developed an equipment replacement plan to be implemented in phases as additional funding becomes available.

QUESTIONS POSED BY SENATOR CHARLES GRASSLEY**Department of Justice Management of Potential Conflicts of Interest**

40. In a November 24, 2009, letter to you, I asked for a list of Department attorneys who had been recused from working on certain issues. Assistant Attorney General Ron Weich responded on your behalf on February 18, 2010, and stated, "the Department does not maintain comprehensive records of such information." Based upon this answer, it appears that attorneys at the Department are left to police themselves to ensure that there are no actual or perceived conflicts of interest and that they recuse themselves when necessary. This is contrary to the way many large law firms operate.

At the hearing, I asked you why the Department did not keep a centralized database of conflicts similar to that of a large law firm. You said it was a "legitimate concern" and was "worthy of consideration." I believe a Department-wide database to manage conflicts and recusal is long overdue.

- a. Are employees at the Department notified when an employee is recused from working on certain matters? If so, how? If not, why not?

Response:

The Department has over 110,000 employees, including over 10,000 attorneys, spread across numerous offices, divisions, and other components, including 93 U.S. Attorneys' Offices, seven litigating divisions, and five law enforcement bureaus.

Given the size of the Department and the number of attorneys in the Department, it is not practical and would not be useful to notify all employees of conflicts. In general, notice of recusals is provided only with regard to specific pending matters, such as when a lawyer who would ordinarily work on a case, or who is asked to do so, is unable to due to a conflict. Senior Department officials disseminate their recusal list proactively as necessary. For example, the Office of the Attorney General disseminates the Attorney General's recusal list to its staff, to officials in the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the litigating divisions and the major components.

- b. If an attorney sought to determine which Department employees are recused on a certain manner, how would they obtain that information?

Response:

An individual case file does not identify all persons who potentially may be recused from a matter. Most employees in an office will not be assigned to work on any given matter, so the focus is to take steps to ensure that anyone who does work on a matter has no conflicts. To the extent an attorney working on a case seeks to discuss the matter with a recused attorney, it is standard practice for the latter to provide notice of his or her recusal.

c. Will you commit to implementing such a system during your time as Attorney General? Why or why not?

Response:

The Department has given consideration to the viability of such a system. After reviewing the issue, the Department does not believe that such a system is warranted. The Department is not aware of any reason to question the diligence of Department attorneys in adhering to applicable rules governing recusals and conflicts of interest. Accordingly, the Department does not believe that the significant investment in resources that would be required to design and monitor such a system is necessary or advisable.

In addition, we believe that the comparison of the Department to private law firms is misplaced. Large private firms have a central conflicts check system for many reasons that do not apply to government practice. Specifically, an attorney who is a member of, or associated with, a private firm may have formerly represented clients who are adverse in a matter to proposed new clients or new representations of the law firm. When one law firm attorney has such a conflict of interest, it is imputed to all other attorneys in the law firm. Imputation of conflicts exists in private law firms in part because the firm is considered to be one unit, sharing financial risks and benefits..

Id. § 14.3. Thus, if one attorney in the law firm is prohibited by a prior representation from undertaking a new representation, under most circumstances, no other attorney in the law firm could undertake the representation. Undertaking such representation despite the imputed conflict of interest subjects the law firm to disqualification and possible claims of malpractice. To manage this risk of disqualification and malpractice, law firms institute sometimes elaborate conflicts of interest checks and consult the system before agreeing to represent new clients or hire new attorneys. (Of course, this is not to say that such systems, even when elaborate, catch all conflicts that might otherwise be apparent at the inception of a representation or that may develop as a representation unfolds.)

By contrast, although screening of a disqualified government attorney is usually prudent, conflicts of interest are generally not imputed within government law offices. See ABA Model Rule 1.11 cmt. [2] (“Because of the special problems raised by imputation within a government agency, [the Rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.”). The distinction between private firms and government offices has been drawn

for several reasons, including the fact that government lawyers do not have the same financial stake in the outcome of cases as do members of a firm; and that disqualifying an entire office of government lawyers deprives the office of its ability to carry out its statutory functions and could constitute a violation of constitutional separation of powers. (The Department is aware of two states where non-binding precedent is conflicting or ambiguous on this point, but the Department believes that the better reading of those states' rules is that, as in other jurisdictions, conflicts are not imputed within government law offices.)

Because it is extremely unlikely that the Department of Justice would ever be disqualified from representing the United States in a matter simply because of a former client conflict of a Department attorney, there is no need for the Department to emulate those large law firms that use an organization-wide system. Rather, it is appropriate under the rules of professional conduct for offices to develop their own reasonable systems to address the former client conflicts of new hires. And, it is equally appropriate to rely upon government lawyers to notify supervisors if they are assigned to matters that raise conflict of interest concerns.

d. Will you support legislation in Congress requiring the Department to implement such a system? Why or why not?

Response:

As discussed above, the Department believes that such a system is not necessary to check for potential conflicts. Accordingly, the Department believes that the expense of implementing such a system would not be a prudent use of taxpayer dollars.

Freedom of Information Act

41. At the hearing I asked you about the alarming increase in the use of exemptions to block access to information and records sought under the Freedom of Information Act (FOIA). Specifically, I pointed out statistics from the Associated Press regarding the increase use of exemptions. The analysis from the Associated Press found that in FY 2009, government agencies cited FOIA exemptions 468,872 times compared to 312,683 times in FY2008. One exemption, (b)(5), was used 70,779 times in FY2009 compared to 47,395 times in FY2008 and all this occurred despite a total decrease in FOIA requests for FY2009. These numbers are shocking.

On January 21, 2009, President Obama issued a Presidential Memorandum to the heads of all executive departments and agencies regarding the Freedom of Information Act (FOIA). That memorandum stated, "all agencies should adopt a presumption in favor of disclosure," and directed you to issue new FOIA guidelines, which you issued on March 19, 2009.

You agreed that these statistics were "troubling" and that you weren't

“exactly sure what the reason is.” You also stated that this matter warrants further examination to ensure that “those making FOIA decisions are doing so in a way that’s consistent with the desires of the President and the directions [you] have issued.”

- a. When will you begin this review of FOIA policies?**
- b. How will you conduct this review?**
- c. How long to you believe it will take to conduct this review?**
- d. Will you pledge to share the results of this review with the Judiciary Committee? If not, why not?**
- e. What is the reason for the substantial increase in use of FOIA exemptions by this Administration?**
- f. If the use of exemptions continues to increase in FY2010, what will you do personally to ensure that agencies are more transparent and responsive to the public’s right to know?**

Response to a-f:

The Department has completed its review of this matter. As an initial matter, the Department has concluded that the invocation of exemptions, without any correlation to the amount of material withheld pursuant to the exemptions, is not an accurate metric of agency transparency. Invoking an exemption simply means that an agency referred to an exemption; it does not reflect how much, or how little, material was withheld. For example, an agency might withhold a single paragraph in a one-hundred page document by invoking three different exemptions. Conversely, the agency could withhold the entire one-hundred page document citing just one exemption. Thus, the number of times exemptions are used does not necessarily correlate to the amount of material that is withheld.

Our review confirms that an increase in the number of times exemptions are asserted is related to the number of times that an agency partially releases documents in response to a request. That is, generally speaking, agencies that saw significant increases in partial releases also saw significant increases in the number of exemptions they invoked. Similarly, agencies that saw slight decreases in the number of partial releases generally also saw slight decreases in the number of exemptions they invoked. As agencies identified more and more documents that they could partially release rather than withholding them entirely—as my FOIA Guidelines directed them to do—their invocations of exemptions to cover the exempt portions of those additional releases increased proportionally.

When looking at data from twenty-five key agencies, the number of FOIA responses resulting in a full or partial release of documents increased during the past fiscal year. These increases demonstrate greater transparency.

AIG Bonuses

- 42. Months after the taxpayer bailout in 2009, AIG paid \$165 million in bonuses to employees of the AIG financial products unit that nearly destroyed AIG and nearly caused an economic depression.**

At the time, President Obama said that he wanted to pursue every legal means possible to recover the money. You were quoted at the time saying that your department was working with Treasury to determine what could be done.

We now know that another \$198 million in bonuses was paid this year. According to Treasury, approximately \$40 million was voluntarily returned from the 2009 payments or deducted from the even larger 2010 payments. But a \$40 million refund is not much considering that \$263 million of taxpayer dollars went out the door to these AIG employees. This is especially troubling given that Congress required Treasury to ensure that AIG and other bailed out companies meet "appropriate standards" for executive compensation.

- a. What exactly did your Justice Department do to recover these bonuses, and please be specific?**

Response:

Early last year, the Department consulted extensively with the Department of the Treasury regarding the legal, regulatory and legislative avenues available for recovering the bonus payments AIG made in 2009. Kenneth R. Feinberg was appointed as the Special Master for TARP Executive Compensation at the Department of the Treasury in June 2009 and, thereafter, assumed responsibility for addressing TARP-related executive compensation issues. In that capacity, Mr. Feinberg negotiated reductions in the 2010 AIG bonus payments and obtained assurances that the full amount of the \$45 million in bonus payments which employees agreed to refund last year will indeed be returned. We defer to him for further information regarding the execution of his compensation review responsibilities.

- b. The requirement in the Recovery Act that AIG meet appropriate standards for executive compensation was not subject to the grandfather provision. So the only legal reason to leave the bonuses in place was if they were considered "appropriate." Do you think that**

over \$220 million in bonuses for AIG employees was appropriate? If not, why didn't you do anything?

Response:

As stated above, Kenneth R. Feinberg was appointed as the Special Master for TARP Executive Compensation at the Department of the Treasury in June 2009. He is responsible for making determinations regarding executive compensation paid by certain TARP recipients including AIG. Mr. Feinberg has identified the criteria he utilizes in making his determinations. *E.g.*, October 28, 2009 Testimony of Kenneth Feinberg before the House Committee on Oversight and Government Reform; http://www.ustreas.gov/press/releases/tg334.htm#_ftnref1. We defer to him on this subject.

Southwest Border Prosecution Initiative

43. Since 2001 Congress has provided over \$200 million in funding for the Southwest Border Prosecution Initiative (SWBPI), an initiative that the Office of Justice Programs (OJP) monitors. The intent of the SWBPI is to reimburse the states of Arizona, California, New Mexico, and Texas, for prosecuting cases that were either declined by the United States Attorney's office or initiated by a federal law enforcement agency. Congress intended the program to assist those counties along the Mexican border that had a high incidence of crime and where the federal government did not have the resources to prosecute all the federal crimes. In a March 2010 Audit Report by the U.S. Department of Justice, Office of the Inspector General Audit Division, of all nine California counties audited, between fiscal years 2002 and 2007, 85% of the money the OJP reimbursed to these counties was unallowable and unsupported. In dollar terms, OJP paid out \$12.2 million to counties for cases that did not qualify.

- a. What mechanism was in place by OJP, to review and approve the applications submitted by the counties who claimed SWBPI reimbursements?**

Response:

Prior to FY 2008 third and fourth quarter applications, SWBPI applicants were not required to provide documentation supporting reimbursement requests. Upon receipt of an application and a certification from the applicant regarding compliance with SWBPI requirements, the requests were funded by the Department's Bureau of Justice Assistance (BJA). Jurisdictions were only required to enter the number of federally declined cases that they prosecuted during the reporting period, and were reimbursed based on the length of time the case was open.

OJP acknowledges that past reviews of SWBPI applications were not adequate. In response to the audit findings and recommendations identified in the March 2008 OIG audit report, as well as changes in program implementation, BJA has now aggressively taken action, specifically in the form of programmatic guidance, to improve the application and review process. These changes, identified below, have improved the accountability of the SWBPI Program and will reduce the potential for future issues:

A. Added a New Certification to be Acknowledged by the Chief Executive of the Requesting Entity

In FY 2009, BJA provided a certification for SWBPI applicants to acknowledge that they accepted the terms and conditions of the program and that their request was accurate. This certification, which was not in place at the time of the audit, reads as follows: "As the chief executive officer of this jurisdiction, my submission of this application for funding under the Southwest Border Prosecution Initiative represents my legally binding acceptance of the terms set forth on this form, my statement as to the truthfulness and accuracy of representations made on this form, and my acceptance of the program's terms and conditions."

B. Expanded Data Collection for SWBPI Reimbursement Requests

Prior to reimbursement, BJA now requires SWBPI applicants to provide the following information for each case: case number, defendant name, arrest date, disposition date, and referring federal agency. Additionally, for pre-trial detention reimbursements, case data must include the defendant booking date, release date, and daily per diem rate of the corrections facility. The collection of this data enables BJA to conduct more thorough and detailed reviews of applicant reimbursement requests to ensure allowability.

C. Implemented Additional Fiscal Controls

BJA is in the process of changing the application period from quarterly to annually. This procedural change will provide BJA with more time to review case data and other documentation submitted by applicants, as well as to request additional documentation from grantees in an effort to verify the eligibility of the cases. The FY 2010 applications were based on case data from FY 2009.

The change to an annual application period also will reduce the risk of jurisdictions submitting eligible cases for reimbursement in the wrong quarter -- one of the audit findings identified by the OIG for multiple jurisdictions, including Alameda County, California; Brooks County, Texas; and Yuma County, Arizona.

D. Modified the SWBPI Award Calculation Methodology

Beginning with FY 2009, BJA began basing the award calculation process on the actual costs incurred by a jurisdiction, rather than the length of time a case remained open, which was the previous criterion. Additionally, BJA has been working with prosecutors in the Southwest border states to create an award calculation methodology that more accurately captures actual costs. For the FY 2010 applications, BJA used the percentage of federally declined cases of a jurisdiction's total case load to create a percentage reimbursement rate. This rate will be applied to the reported salaries of judges, prosecutors, and public defenders to determine the award amounts.

E. Enhanced Monitoring and Review Efforts

BJA has taken a number of steps to enhance monitoring and review efforts. A summary of the efforts are described below.

- Beginning in FY 2009, BJA began reviewing the average prosecutor salary of each jurisdiction and comparing it to the salaries claimed on SWBPI applications to identify anomalies. Additionally, BJA began examining the case data for duplicate records and similar names to avoid the potential for duplicative payments. As appropriate, BJA conducts outreach to jurisdictions where high salary rates or similar case data need to be explained, changed, or omitted.
- In FY 2009, OJP's Office of the Chief Financial Officer (OCFO), with BJA's programmatic assistance, conducted on-site visits of two SWBPI recipients to review eight SWBPI awards. BJA and OCFO will continue these joint financial-programmatic site visits in the future.
- In FY 2010, BJA established a payment analysis and review unit that will conduct both random and targeted reviews of payment requests and disbursements to ensure the necessary documentation is in place and that the payments are justified. These reviews will take place in the form of pre-award verification and post-award monitoring.
- BJA leadership also has proactively discussed the SWBPI Program with OIG senior staff, and has requested their support in strengthening the program structure. Specifically, BJA, OJP, and the OIG have agreed to work together to prevent and detect fraudulent and erroneous reimbursement requests and resulting payments.

In February 2009, OJP successfully closed the 13 OIG audit recommendations and will continue to identify ways to further strengthen internal controls for the program. Finally, BJA has committed to increasing staff support to conduct recurring reviews and analyses of SWBPI submissions.

- b. Since the inception of the initiative, how many applications, by year, have been denied?**

Response:

BJA has never denied any SWBPI applications which were submitted on time and in accordance with program guidelines. However, BJA has not approved requests by some jurisdictions for extensions of the application period.

- c. **Why did the OJP provide funding for 85% of unallowable or unsupported activities?**

Response:

The claims submitted by these jurisdictions were unsubstantiated; however, as acknowledged above and cited in the OIG audit, OJP's internal management and oversight procedures were improved as a result.

- d. **This audit was for only nine California counties, how much unallowable or unsupported funding was provided to the remainder of the California counties as well as the counties in Arizona, New Mexico and Texas?**

Response:

The OIG found that five counties in Arizona, New Mexico, and Texas received \$7.4 million in unallowable or unsupported funding for SWBPI cases. However, funds have been returned or costs supported for four of the five counties totaling \$5.5 million. DOJ expects to collect the remaining \$1.9 million from the other county in 2010.

- e. **What measures are in place to assure the U.S. Taxpayer that all funding is now appropriate?**

Response:

In response to the audit findings and recommendations identified in the March 2008 OIG audit report, as well as changes in program implementation, BJA has now aggressively taken action, specifically in the form of programmatic guidance, to improve the application and review process. These changes have substantially improved the accountability of the SWBPI Program, and will reduce the potential for future issues. To summarize, BJA: (1) added a new certification to be acknowledged by the Chief Executive of the Requesting Entity; (2) expanded data collection for SWBPI reimbursement requests; (3) implemented additional fiscal controls; (4) modified the SWBPI award calculation methodology; and (5) enhanced monitoring and review efforts.

The United States Attorney's offices for the Northern and Eastern Districts of California pursued civil recoveries for the unallowable SWBPI reimbursements for seven California counties. Settlement agreements were

reached totaling \$11.03 million with recoveries totaling \$9.17 million. OJP has stated it will pursue remedies of the unallowable reimbursements for the remaining two counties.

f. When will the remainder of the \$11.03 million be collected?

Response:

The remainder of the \$11.03 million will be collected from the California counties in annual installments over the next four years. The annual installments were negotiated by the U.S. Attorney's Offices for the Northern and Eastern Districts of California.

g. Why were 100% of the unallowable reimbursements not recovered?

Response:

The reimbursements were not 100% recovered because the United States Attorney's Offices for the Northern and Eastern Districts of California negotiated a settlement agreement with the counties for reimbursement of the questioned costs, which include interest payments. These negotiated settlements avoided the additional cost and allocation of resources associated with protracted litigation.

h. How much did it cost the Department of Justice to go forward with this suit to collect the money?

Response:

We do not know how much it cost the Department of Justice to negotiate the settlement agreements with the counties.

i. Where did the \$9.17 million recovered end up?

Response:

The \$9.17 million was deposited in the SWBPI account.

j. Has OJP begun to pursue remedies for the remaining two California counties?

Response:

The remaining two California counties, Siskiyou County and Mendocino County, negotiated a settlement agreement with the United States Attorney's Offices for the Northern and Eastern Districts of California, and will be submitting annual installments over the next 4 years.

San Francisco County, which is over 500 miles from Mexico, was audited in 2007 and counseled about improperly claiming SWBPI reimbursements. Yet, San Francisco County continued to submit unqualified SWBPI claims and continued receiving money from OJP.

- k. **The 2007 audit of San Francisco County made it clear that past applications did not qualify for SWBPI reimbursements, why did OJP continue to approve unqualified San Francisco Counties SWBPI applications?**

Response:

As an initial matter, the authorizing language in the appropriation provides funding "for the Southwest Border Prosecutor Initiative to reimburse State, county, parish, tribal, or municipal governments for costs associated with the prosecution of criminal cases declined by local offices of the United States Attorneys." OJP's guidance limits funding to the four southwest states with a border contiguous to Mexico, but notes that the law itself does not limit eligible jurisdictions within those states.

The only SWBPI reimbursement paid to San Francisco County after the audit findings was for the application it submitted in the first quarter of FY 2007. This award, which covered federally initiated cases between October and December 2006, was released to San Francisco County on November 8, 2007 in the amount of \$336,254. At the time of the payment, BJA believed that the costs were allowable. As such, BJA proceeded with releasing payment to San Francisco County. In a September 2008 audit, the OIG questioned all of the costs paid in November 2007 and added these costs to the total unallowable SWBPI reimbursements.

- l. **Has a San Francisco County application ever been denied?**

Response:

BJA has never denied any SWBPI applications which were submitted on time and in accordance with program guidelines.

Not only did OJP authorize millions of dollars of unallowable payments, the Department of Justice had to initiate legal proceedings and incur additional expenses to ensure that a portion of the money was returned.

- m. **What is the Department Of Justice doing to prevent the waste, fraud and abuse that is taking place within the OJP and this program, the SWBPI?**

Response:

OJP has implemented a series of grant management policies, procedures, and practices to prevent waste, fraud, and abuse in its grant programs. A summary of those efforts include:

- Financial and Programmatic Monitoring. OJP conducts site visits and desk reviews of a sample of active awards throughout the year to ensure that grantees are in compliance with award terms and conditions, and grantee expenditures are properly supported and in accordance with grant program guidelines.
- Resolution of OIG and Single Audit Reports. OJP works with grantee personnel and OIG officials to ensure that corrective actions are implemented to improve grantee internal controls and accounting practices, to address compliance issues and to promptly resolve and correct deficiencies cited in external audit reports.
- Coordination with OIG Investigations Office. OJP is in regular contact, and meets quarterly, with the OIG's Fraud Detection Office to share information regarding OJP grantees under investigation (or being considered for investigation).
- Maintenance of High-Risk Policy. OJP maintains a process for designating non-compliant or unresponsive grantees as high-risk, which includes imposing special conditions and other restrictions on new awards, as appropriate to protect the Department's grant funds.
- Internal Control Reviews. OJP's Office of Audit, Assessment, and Management (OAAM) reviews and assesses key financial, programmatic, and operational controls, and makes recommendations for improvement, as needed, to evaluate OJP's internal control process as part of the annual Office of Management and Budget Circular A-123 Reviews.
- Over the past two years, OJP has also implemented a number of changes to improve oversight and accountability over the SWBPI Program, many of which were in response to the March 2008 OIG audit report. Many of the improvements are described in response to question 43a.

n. What steps are being taken to assure this does not reoccur within the SWBPI or any other program monitored by the OJP?

Response:

OJP's grant monitoring and oversight is an integrated process of programmatic, financial, and administrative management that occurs throughout the grant lifecycle from the award through the closeout of the grant. Since FY 2008, OJP's Office of Audit Assessment and Management (OAAM) has been providing monitoring oversight by

tracking the progress of monitoring efforts to ensure that OJP's bureaus and program offices monitor at least 10 percent of their open award funds annually, as set forth in Public Law 109-162, "Violence Against Women and Department of Justice Reauthorization Act of 2005."

Programmatic monitoring of the content and substance of grant programs is accomplished by conducting desk reviews and on-site visits and engaging in substantive grantee interaction. Each year, OJP bureaus and program offices assess risk and performance factors associated with their grant programs to determine which grants are most in need of on-site monitoring and plan on-site visit activities accordingly. Throughout the year, OJP grant managers conduct on-site monitoring visits to assess grantee performance and compliance with programmatic and Federal grant administration requirements. In addition to on-site monitoring, OJP policy recommends that grant managers conduct desk reviews of each open and active award every six months, but not less than once annually.

In addition to programmatic monitoring, OJP's Office of the Chief Financial Officer (OCFO) conducts financial monitoring of OJP awards, and grants issued by the Department's Office of Community Oriented Policing Services (COPS) and Office on Violence Against Women (OVW). The objectives of these financial monitoring reviews are to ensure grantee compliance with financial guidelines and general accounting practices, and to ensure proper fiscal management of grant expenditures.

- o. **What other programs does OJP monitor and how much money is involved with each program? Please provide a listing for fiscal years, 2007 through 2010.**

Response:

OJP's grant monitoring and oversight is an integrated process of programmatic, financial, and administrative management that occurs throughout the grant lifecycle from the award through the closeout of the grant. Programmatic monitoring of the content and substance of grant programs is accomplished by conducting desk reviews and on-site visits, and engaging in substantive grantee interaction. Each year, OJP bureaus and program offices assess risk and performance factors associated with their grant programs, to determine which grants are most in need of on-site monitoring and plan on-site visit activities accordingly. Throughout the year, OJP grant managers conduct on-site monitoring visits to assess grantee performance and compliance with programmatic and federal grant administration requirements. In addition to on-site monitoring, OJP policy recommends that grant managers conduct desk reviews of each open and active award every six months, but not less than once annually.

Since FY 2008, OAAM has been providing monitoring oversight by tracking the progress of monitoring efforts to ensure that OJP's bureaus and program offices perform on-site monitoring of at least 10 percent of their open award funds annually, as set forth

in Public Law 109-162, "Violence Against Women and Department of Justice Reauthorization Act of 2005."

Since OAAM began tracking on-site monitoring activity in FY 2008, OJP has programmatically monitored approximately 3,014 awards totaling \$5.6 billion. See Table 1 below.

Table 1. FY 2008 - FY 2010 Programmatic On-Site Monitoring Completed by Total Award Amount and Number of Grants

	Grant Award Amount Monitored (In Millions)		Number of Grants Monitored	
	Total Award Amount of Open Grants at the Start of the Fiscal Year	Award Amount Monitored	Total Number of Open Grants at the Start of the Fiscal Year	Number of Grants Monitored
OJP Total - FY 2008	\$ 7,261	\$2,461	8,969	1,236
OJP Total - FY 2009	\$ 6,715	\$1,397	9,693	1,031
OJP Total - FY 2010 (as of June 30, 2010)	\$ 8,379	\$ 1,740	12,394	747
Total	\$22,355	\$5,598	31,056	3,014

Source: OJP Office of Audit, Assessment, and Management

In addition to programmatic monitoring, OJP's OCFO conducts financial monitoring of OJP awards and grants issued by the Department's COPS Office and OVW. The objectives of these financial monitoring reviews are to ensure grantee compliance with financial guidelines and general accounting practices, and to ensure proper fiscal management of grant expenditures.

Since FY 2007, the OCFO has conducted financial monitoring of OJP grantees, through desk reviews and on-site monitoring visits of approximately 2,400 awards totaling \$5.9 billion (see Table 2 below).

Table 2. FY 2007 - FY 2010 Financial Monitoring Conducted by OCFO Staff

	Number of Grants Monitored by OCFO Staff	Award Amount Monitored by OCFO Staff (in Millions)
OJP Total - FY 2007	919	\$2,265
OJP Total - FY 2008	957	\$1,841
OJP Total - FY 2009	961	\$937
OJP Total - FY 2010 (as of March 31, 2010)	975	\$2,600
Total	3,812	\$7,643

Source: OJP Office of the Chief Financial Officer

As discussed earlier, OJP will continue its efforts to improve oversight and accountability of the SWBPI program.

Thomson Illinois Prison Purchase

44. The 2011 Budget the President submitted to Congress includes \$237 million to purchase a state prison in Thomson, Illinois. This purchase is designed to create more bed space for the Federal Bureau of Prisons, with part of this facility to be utilized to house detainees currently held at Guantanamo Bay.

I agree that the Thomson, IL prison should be purchased and brought online as a federal prison to reduce prison overcrowding in the federal system. However, I strongly disagree with the idea that this facility should be used to house terrorist detainees relocated from Guantanamo Bay to U.S. soil.

Purchasing state prisons that are not being utilized as opposed to wasting taxpayer dollars on new construction can be a cost effective way of addressing the increased federal prison population. However, have some concerns about this deal. I'm concerned that it appears we're paying top dollar and giving the state of Illinois a sweetheart deal for the prison equivalent of a foreclosure.

- a. Has the Department reached an agreement with the State of Illinois to purchase the Thomson facility?

Response:

The FY 2011 President's Budget Request includes \$170 million for the acquisition and renovation of the Thomson Correctional Facility in the BOP's Buildings and Facilities account. The request also includes proposed funding of \$66.879 million in Salaries and Expenses to begin the activation process, which is not part of the estimated

purchase cost. Activation funding is for staffing, operations, and initial equipment and supplies.

The acquisition process is by no means complete, and negotiations on price have yet to begin. According to federal procurement rules, negotiations may not commence until a formal appraisal is conducted. In addition, the State of Illinois has a series of requirements it must comply with before it enters into negotiations. Throughout this process, BOP will fully comply with all applicable rules and regulations. Currently, the BOP is in the process of completing several necessary steps which include an Environmental Assessment, appraisals, surveys, and title work.

b. If yes, what is the final negotiated price of the facility?

Response:

Negotiations on price have yet to begin.

c. What is the anticipated cost to renovate the facility?

Response:

The renovations in the request for BOP are estimated to be approximately \$15 million.

d. How much of the anticipated renovation cost is attributed to retrofitting the prison for federal use?

Response:

All BOP anticipated renovations are expected to be for federal prison use. Some renovations, such as security enhancements, are necessary to bring the institution in compliance with federal prison standards.

e. How much of the anticipated renovation cost is attributed to retrofitting a portion of the facility for use as a military detention facility to house terrorist detainees currently held at Guantanamo Bay?

Response:

None of the funding proposed in the FY 2011 President's Request for BOP is expected to be used for renovations to house detainees currently held at Guantanamo Bay. As stated in the response to question 44d, all renovations are expected to be for federal prison use. Some renovations, such as security enhancements, are necessary to bring the institution in compliance with federal prison standards.

- f. **The Thomson facility cost \$140 million when it was completed. The FY2011 Budget request the President submitted is asking taxpayers to pay \$237 million for it, despite the fact it has sat vacant for nearly 10 years. Even if that cost includes \$100 million for renovations, taxpayers are still being asked to essentially pay fair market failure for a foreclosure. Why are we paying market price for the prison in the worst real estate market in decades?**

Response:

The FY 2011 President's Budget Request includes \$170 million for the acquisition and renovation of Thomson in the BOP's Buildings and Facilities account. The request also includes proposed funding of \$66.879 million in Salaries and Expenses to begin the activation process, which is not part of the estimated purchase cost. Activation funding is for staffing, operations, training, supplies, and initial equipping of the facility.

The negotiations and establishment of a purchase price will not occur until the BOP completes the necessary Environmental Assessment, appraisals, surveys, and title work.

- g. **It seems to me this is a pretty good deal for the state of Illinois, but a bad deal for the American taxpayer. Will you provide Congress with documents that support the price the American taxpayers are being asked to pay? If not, why not?**

Response:

The BOP is in the process of completing several necessary steps to include an Environmental Assessment, appraisals, surveys, and title work. The acquisition process is by no means complete, and negotiations on price have yet to begin. According to federal procurement rules, negotiations may not commence until a formal appraisal is conducted. In addition, the State of Illinois has a series of requirements it must comply with before it enters into negotiations. Throughout this process, BOP will fully comply with all applicable rules and regulations.

Responsiveness to Inquiries

- 45. The Department of Justice continues to frustrate Congressional oversight efforts. This ranges from late and incomplete responses to refusals to provide information to Congress based upon no actual privilege. In some cases, there is not even a privilege that would apply to support efforts to withhold information.**

Recently, the Department addressed your failure to provide relevant

documents to the Committee prior to your confirmation. That response stated that it was an accidental omission but that it really didn't matter because the documents were publicly available. Curiously, this same rationale was applied to the Department's response to my inquiry regarding political appointee recusals.

Based upon these statements, it appears the Department, under your leadership, is arguing that withholding requested information from Congress is okay if it is information that is publicly available in some form.

- a. These responses indicate that the Department believes that Congress should do a better job of hunting down publicly available information. In fact, the Office of Legislative Affairs refuses to provide this information. In light of this position, why should Congress honor your latest budget request for \$305,000 to fund three attorneys in the Department's Office of Legislative Affairs?**

Response:

We regret any misunderstanding, and wish to clarify that we believe it is important to make our best efforts to respond to Committee requests for information about Department activities in a timely fashion. If the Department does not maintain the requested information in searchable systems of records, it may be more readily available through public sources and, under those circumstances we would be remiss if we failed to point that out in responding to Committee requests. Decisions about how best to respond to Committee requests are made through a deliberative process involving the relevant Department components. The Office of Legislative Affairs is charged with coordinating that process for accommodating the Committee's information needs and communicating with the Committee on behalf of the Department. In this respect, the provision of additional attorneys would enhance the Office's ability to fulfill that mission in a more timely fashion, which is a goal we all share.

- b. You promised this Committee you would do better, why have you failed to live up to that promise?**

Response:

As indicated above, we believe it is important to make our best efforts to respond to Committee requests in a timely fashion. Sometimes, the nature and volume of the requested information does not permit us to respond as quickly as you or we would like, but we remain committed to working with you to reach acceptable accommodations wherever possible.

FBI Whistleblowers and OARM Review

46. On March 15, 2007 the Department of Justice Office of Inspector General (OIG) found that whistleblower Robert Kobus was retaliated against for pointing out fraudulent activities within the FBI. It has been over three years since these findings were completed by the OIG and referred to the Office of Attorney Recruitment and Management (OARM), yet there has still been no action on the appeal.

- a. Do you believe three years is a reasonable time for the OARM to wait to proceed with an FBI appeal?**

Response:

The time required for OARM's final resolution of an FBI whistleblower case is dependent upon a number of factors, including the complexity of the legal and factual issues presented; the time for and extent of discovery, as well as the time for the parties' respective briefs on the issues (for which deadlines are usually extended due to requests made by the parties); any stays of proceedings before OARM pending resolution of concurrent legal/administrative actions (e.g., while awaiting a verdict in a Title VII case in Federal Court or the completion of investigative procedures and findings by the Conducting Office); the voluminous nature of the case files and record evidence; and the number and length of status conferences/hearings and OARM's opinions and orders (which can range between 20 and 60 pages in length). These are examples of some of the factors that may affect the time to adjudicate cases. Under the requirements of the Privacy Act the Department cannot discuss the specific details of this matter.

- b. Of the past 10 FBI appeals heard by the OARM; what was the average length of time between the filing of the appeal and the first hearing?**

Response:

Not all FBI whistleblower cases proceed to a substantive hearing on the merits before the Director of OARM, as some cases are submitted for adjudication on the written record alone. A hearing on the merits before the Director is equivalent to an administrative trial, involving the presentation of witness testimony, examination/cross examination of witnesses, evidentiary rulings on the admissibility of testimony and exhibits, and a court transcriber to record the proceedings. A merits hearing before the Director of OARM is generally not "the first hearing" in a case, as OARM routinely holds other (typically telephonic) hearings and status conferences with the parties throughout the course of proceedings (on issues of jurisdiction, discovery, briefing schedules, etc.).

Only two cases have proceeded to a merits hearing before OARM. In the first case, the merits hearing was held approximately four years after OARM's receipt of the

complainant's request for corrective action. There, the complainant's request for corrective action was supplemented more than one year after OARM's receipt of the complainant's initial request; the parties engaged in discovery for approximately thirteen months after OARM's receipt of complainant's supplemental request for corrective action; after numerous requests by the parties for extensions of time to file their briefs on the merits, briefing concluded more than three years after complainant's initial request for corrective action to OARM was filed; within four months of receiving the parties' final merits briefs, OARM issued a decision finding that the complainant had prevailed on her burden of proof, but that a hearing was required for OARM's assessment of the evidence in support of the FBI's burden of proof; and OARM held a week-long merits hearing with the parties approximately eight months after issuance of its written decision on the merits on complainant's burden of proof.

In the second case, the merits hearing was held approximately sixteen months after OARM's receipt of the Conducting Office's report of investigation on complainant's reprisal claims. During the time between OARM's receipt of the Conducting Office's report and the merits hearing before the Director, the parties were afforded 30 days to comment on the Conducting Office's report, OARM considered its jurisdiction over additional claims raised by the complainant and her specific request for corrective action, and the parties engaged in discovery and submitted their respective pre-hearing merits briefs for OARM's consideration of the issues.

The length of time between a complainant's request for corrective action and a hearing on the merits before the Director of OARM, like OARM's final written determination in a case, is dependent upon the circumstances of the case and OARM's docket at the time.

- c. **Examining FBI appeals heard by the OARM in the last 8 years, how many times has the Director determined that the FBI retaliated against a whistleblower? For each instance listed in this response, please provide a statement describing the retaliation found and all the corrective actions have taken on behalf of the whistleblower, including the reimbursements for costs, back pay and benefits, and other consequential damages authorized.**

Response:

In the last eight years, OARM has found in favor of four complainants, as follows:

- (1) OARM concluded that the FBI retroactively charged the complainant with four hours of Absence Without Leave (AWOL) in reprisal for his protected disclosure. As corrective relief, OARM ordered the FBI to pay \$13,422.50 in reasonable attorneys fees and costs, as well as four hours of regular pay for the date complainant was charged AWOL.

(2) OARM concluded that the FBI issued the complainant a "Does Not Meet Expectations" performance appraisal report (PAR) in reprisal for her protected disclosure. As corrective relief, OARM directed the FBI to remove complainant's Does Not Meet Expectations PAR for the applicable rating period from the system and replace it with a corrected PAR reflecting a "Meets Expectations" rating; and to pay attorneys fees, taxes, and expenses in the amount of \$65,216.51 to complainant's counsel.

(3) OARM concluded that the FBI decided not to select complainant for an Assistant Legal Attaché (ALAT) Rome position in reprisal for his protected disclosure. As corrective relief, OARM ordered that the FBI: (1) effect complainant's retroactive promotion; (2) pay complainant back pay, plus interest, in the amount of \$65,481.70, plus an additional amount of back pay plus interest to be calculated by the FBI from the date of the last calculation by the FBI submitted to OARM, up to the date on which Complainant's adjusted salary at the GS-14, Step 8 level commences; (3) reimburse complainant for lost FERS contributions to his retirement account totaling \$12,926.88, plus an additional amount of lost FERS contributions to his retirement account to be calculated by the FBI for the period from the date of the last calculations by the FBI submitted to OARM, up to the date on which his adjusted salary at the GS-14, Step 8 level commences; (4) reimburse complainant \$132,990.00, which is equal to the value of the tax-free Department of State's maximum housing allowance for the ALAT Rome position for the period of the non-selection; (5) pay \$11,571.94 to compensate complainant for the transportation benefit he would have received for his two children to and from the American Overseas School in Rome, had he been selected for and served in the ALAT Rome position; and (6) restore 16 hours of annual leave to the complainant's annual leave balance.

(4) OARM concluded that the FBI issued complainant a negative PAR and proposed her removal from service in reprisal for her protected disclosure. As corrective relief, OARM directed the FBI to remove from the system and complainant's official personnel file the negative PAR, the notice of proposed removal, and any personnel documents referring to the PAR at issue or the proposal notice. OARM additionally found the complainant was entitled to reasonable attorneys fees and costs, any reasonable costs complainant personally incurred in pursuit of her request for corrective action before OARM, back pay, interest on the back pay, and related benefits covering the period from the date of complainant's involuntary retirement to the date on what would have been her mandatory retirement date on her 57th birthday. OARM's Final Corrective Action Order specifying the exact amounts of the attorney's fees and reasonable costs incurred by complainant is pending, as OARM is awaiting receipt of complainant's fee request and itemized list of other reasonable costs she incurred in pursuit of her request for corrective action.

- d. In the last 8 years, how many appeals filed with OARM have been dismissed upon failures to follow the procedures outlined by OARM for filing an appeal?**

Response:

In the last eight years, OARM has dismissed without prejudice to refiling five cases involving a complainant's failure to exhaust his/her administrative remedies with the Conducting Office. To date, none of those complainants have refiled their requests for corrective action with OARM.

- e. **In the history of the OARM review of FBI whistleblower appeals, how many times has either party appealed a final determination by the Director to the Deputy Attorney General for review? Please provide a list of all appeals indicating which party filed the appeal and the final determination by the Deputy Attorney General.**

Response:

In the history of OARM's adjudication of FBI whistleblower cases, there have been three appeals to the DAG, as follows:

- (1) Complainant appealed to the Office of the Deputy Attorney General (ODAG) OARM's Final Determination denying complainant's request for corrective action. OARM's Final Determination was affirmed.
- (2) Complainant appealed to the ODAG OARM's Final Determination which granted complainant's request for corrective action based on one claim (complainant's AWOL reprisal claim), but concluded that complainant had failed to prevail on the merits of several other reprisal claims. OARM's Final Determination was affirmed.
- (3) Complainant and the FBI separately appealed various portions of OARM's Final Corrective Action to the ODAG, and OARM's Final Corrective Action Order was affirmed.

QUESTIONS POSED BY SENATOR KYL

- 47. On February 26, 2010, the House passed the Intelligence Authorization Act for Fiscal Year 2010. Right before it passed the bill, the House stripped a provision that would have made intelligence officials subject to a prison sentence of up to 15 years if found guilty of participating in a “cruel, inhuman, and degrading” interrogation.**

At the hearing, I asked you whether the administration supports adding such a provision to the criminal code. You said that you were unfamiliar with the provision, but you agreed to assess it and provide me with a written response.

Please provide a written response explaining whether the Department of Justice supports criminalizing “cruel, inhuman, and degrading” interrogations.

Response:

Section 1003 of the Detainee Treatment Act (DTA) of 2005, 42 U.S.C. § 2000dd, provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” Consistent with the DTA, the Convention Against Torture, and Common Article 3 of the Geneva Conventions, Executive Order 13,491 also prohibits “cruel treatment” and “humiliating and degrading treatment” of individuals detained in any armed conflict, when such individuals are in the custody or under the effective control of the U.S. Government or detained in a facility owned, operated, or controlled by the U.S. Government. Any interrogations by U.S. government personnel of such individuals must comport with these standards. In addition, there are various federal criminal statutes that can be used, depending on the context, to punish abusive conduct by government personnel toward detainees in their custody. The Administration has not proposed new legislation on this issue, and the Department did not have an opportunity to review the provision in the House bill before it was withdrawn from consideration. As a matter of practice, the Department does not take positions on legislation that is no longer pending before Congress.

- 48. On March 16, 2010, you testified before the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies. In response to a question about what would happen to KSM if he were acquitted or otherwise ordered released by a court, you said, “It’s not going to happen. But if that were to be the case, he would not be released.”**

A frequently cited justification for using civilian courts to try individuals who could be tried in military commissions is that civilian courts better represent American values of fairness and due process to the rest of the world.

Won't any relative perception advantage that civilian courts have *vis-à-vis* military commissions be undermined or negated by your acknowledgment that KSM would never be released, even if he were acquitted in a civilian trial?

Response:

As a matter of legal authority, the question of guilt or innocence in a criminal prosecution (whether by military commission or civilian court) is separate from the question of whether the government has authority to detain under the authority provided by Congress in the 2001 Authorization for Use of Military Force (AUMF), as informed by the law of war. This authority could be relied upon, where appropriate, to detain individuals after an acquittal, whether in a military commission or in federal court. In addition, immigration authorities may be relied on to hold in immigration detention non-citizens who have been acquitted or who have completed their criminal sentence and who endanger the national security, pending their removal from the United States.

49. When you and I met in 2009 prior to your nomination hearing, and at your nomination hearing on January 15 of 2009, I asked you about Operation Streamline funding. To remind you about the program, as I explained back in January 2009, Operation Streamline is a program currently used very successfully in a few Border Patrol sectors, including in the Yuma, Arizona sector, that charges most illegal border crossers with a misdemeanor and requires them to spend between 15 and 60 days in jail.

It has had a great deterrent effect. In the Yuma Border Patrol sector, the program is so successful that illegal crossings are a mere fraction of what they were in Yuma just two years ago.

Unfortunately, though, the program has not been fully deployed in the Tucson Sector. As we discussed in January 2009, there is a clear Justice Department component to the program. I asked in our meeting before your nomination hearing and at your hearing what resources are needed to effectively continue this high-deterrence program in existing Streamline sectors (including Del Rio, Texas) and what resources are needed to expand the program to other Border Patrol sectors. I asked what resources, among others, would be needed for the United States Marshals Service (including number of additional Deputy U.S. Marshals), courthouse renovation, administrative increases (that is, criminal clerks for each District to process additional cases), additional judges, additional detention space that would fall under Justice jurisdiction, and other costs.

After asking you and Department of Homeland Security Secretary Janet Napolitano to provide details and to budget for the costs without answer, I attached an amendment to the FY 2010 Department of Homeland Security Appropriations bill that requires, collaboratively, that DHS and DoJ provide

a report to Congress on the resources needed to effectively manage existing Streamline programs and to expand Operation Streamline to other sectors.

That report was due from you and Secretary Napolitano on December 27, 2009. In a response to me in March 2010 about the report (from questions I submitted on December 9, 2009), Secretary Napolitano wrote that “the report is in the final stages of the review process and we anticipate Congress will receive it in the near future.” I still have not received the report.

- a. It is my understanding that the Department of Justice has not fully cooperated in completing its part of the report. If true, why hasn't your agency responded in full?**

Response:

The Department has submitted the information requested by DHS to complete its report.

- b. When will you complete the report?**

Response:

As noted above, the Department has submitted the information requested by DHS to complete its report, and DHS submitted the report dated August 13, 2010 to Congress.

- c. Do you support robust funding and an expansion of Operation Streamline?**

Response:

Border security and immigration policy continue to be important issues for the Department and the Administration. For that reason, we are pleased that Congress answered the President's call to bolster the essential work of federal law enforcement officials along the Southwest Border through the passage of the Border Security Enforcement Act of 2010, which provides the Department of Justice with \$196 million toward Southwest border enforcement and infrastructure.

As representatives of the Department have expressed previously, we support the concept of Operation Streamline, but we have also noted the enormous downstream effect of any “Streamline” type immigration enforcement initiative. Among one of my principal concerns is the downstream impact in terms of detention capacity. System capacity presents very real constraints that need to be addressed before Operation Streamline can be expanded beyond where it is today. Court space and the number of judges limit the number of detainees that can be processed. Detention bed space along the Southwest Border and within a reasonable distance is also a physical constraint on the number of people the system can handle. This burden will be eased, in part, by the

Border Security Enforcement Act through which the Department will receive funds for expanding detention space and the courthouse infrastructure in the Yuma sector of Arizona. This will allow for some increase in Operation Streamline; however, there are significant capacity constraints on expanding it further.

In addition, there are certain critical impediments that would arise if Operation Streamline were implemented across the Southwest Border. These impediments include the physical constraints of courthouses along the border, including the number of defendants that can be processed in a given day and existing cell block space; the number of judges, magistrates, and other judicial personnel; and the number of detention beds located in reasonable proximity to the given courthouse where defendants can be housed. Presently, the court house structures are inadequate to process large numbers of additional defendants. The U.S. Marshals Service and U.S. Attorneys would have to waive a number of their internal requirements in order to process the increase in defendants. Even increasing the daily shift in operations within the court houses, particularly in Tucson and San Diego, would be insufficient to process the increase in number of defendants.

Also, an increase in enforcement activity along the Southwest Border would affect the workload and funding needs of the rest of the entire criminal justice system. For example, felony drug arrests and subsequent additional investigations would likely increase, resulting in the need for additional Drug Enforcement Administration agents and support staff, and the need for additional attorney and intelligence analyst personnel deployed as part of the Organized Crime Drug Enforcement Task Forces (OCDETF) Program. Further, additional Bureau of Alcohol, Tobacco, Firearms and Explosives personnel would be needed to address gun trafficking arrests and investigations. In addition, Operation Streamline would increase the fugitive warrant workload, which in turn further impacts the U.S. Marshals Service. The workload of other parts of the system, including the Executive Office for Immigration Review and the Civil Division's Office of Immigration Litigation, would also increase. These related costs were not included in the estimates previously calculated.

In total, the FY 2011 Budget requests \$3.49 billion for the Department of Justice's Immigration and Southwest Border related activities. This represents an increase of \$228 million (7 percent) from the FY 2010 enacted level. This funding will allow us to expand our investigations and prosecutions as well as alleviate some of the fiscal stresses related to downstream immigration enforcement initiatives.

QUESTIONS POSED BY SENATOR GRAHAM

50. I am interested in the recent activity of the Department of Justice and Department of Agriculture in agricultural antitrust issues. I note the series of public hearings you are holding to examine these issues in a number of different segments, including poultry and fruits and vegetables, two commodities that are important to South Carolina.

As you move ahead in this endeavor, I am interested in your response to the following questions:

- a. What are your intentions regarding the information that you collect in this process? Please provide specific details about the anticipated use and what role you see Congress will play in this activity.**

Response:

The Department of Justice has heard concerns from Congress, farmers, and consumers about changes in the agricultural marketplace, including increasing concentration and vertical integration. Through these joint workshops we have started to examine the dynamics of competition in agriculture markets, review the state of the law and current economic learning, and provide an opportunity for farmers, ranchers, consumer groups, processors, the agribusinesses, and other interested parties to provide examples of potentially anticompetitive conduct.

The goals of the workshops are to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues, as well as to listen to and learn from parties with real-world experience in the agriculture sector. Members of Congress took an active role in the first of these workshops, in Ankeny, Iowa, on March 12, 2010, and in Normal, Alabama, on May 21, 2010, contributing their perspective and listening to the participants. We expect active participation from members of Congress in the coming workshops as well. Through the dialogue established in these workshops, the Department and USDA hope to be able to learn how we can ensure that antitrust enforcement and regulatory actions are as effective as possible.

- b. How do you intend to balance any actions taken to address antitrust issues with the need to maintain a business-friendly climate in which agriculture will continue to grow here in South Carolina and the rest of the United States— and not move overseas?**

Response:

The Department of Agriculture and the Department of Justice both feel that it is important to have a fair and competitive marketplace that benefits agriculture, our nation's rural economies and consumers. Proper enforcement of the antitrust laws, in

conjunction with USDA's regulatory role, ensure that farmers and processors can participate in a competitive environment free from improper manipulation, coercion, or exclusion, and can strive to give consumers better products at fairer prices. We believe these workshops will be important in helping us ensure this nation maintains a vibrant and globally competitive agriculture industry.

51. Organized retail crime is a growing problem. Gangs of criminals steal large amounts of goods like baby formula and resell them to the public. Please answer the following questions about the Department of Justice's response to organized retail crime:

- a. Based on the crimes that the Justice Department has investigated, where to you think all this ill-gotten money is going?**

Response:

In numerous cases of organized retail crime prosecuted across the country, the Department's experience is that the criminal proceeds of these crimes flow predominantly to the organizers and ringleaders of the schemes, who typically use the proceeds to support lavish lifestyles and purchases of expensive items (e.g., cars and homes). For their role in the schemes, lower-level participants typically receive substantially smaller amounts of money. The Department has not seen evidence supporting a trend of retail-theft or fencing organizations laundering their criminal proceeds through foreign financial institutions or systems, or sharing their proceeds with other criminal organizations.

- b. Has the Department seen patterns of this money being used to support terrorist activities abroad?**

Response:

The Department has not seen any such patterns. While the Department is fully aware of the possibility that organized retail theft could develop into another means of financial support for terrorist groups or activities, there is no evidence that such a trend has developed.

QUESTIONS POSED BY SENATOR COBURN

52. In response to written questions following the November Department of Justice oversight hearing, you confirmed that Ms. Johnsen has been involved in hiring attorneys for OLC. You stated:

Professor Johnsen's participation in this process has been appropriate and consistent with the past practice of presidential nominees of both parties. Like such other nominees, she was involved in the consideration of candidates for political appointments, such as those persons who would serve as her deputies should she be confirmed. By contrast, with respect to applicants for civil service positions, Professor Johnsen simply forwarded some resumes for attorney positions to the Acting Assistant Attorney General for OLC and occasionally offered her views as to some candidates for those positions who came to her attention and on general attorney staffing issues.

- a. Can you explain to which "past practices of presidential nominees of both parties" you were referring? Did those nominees have bipartisan opposition?**

Response:

My answer referred to the past practice of nominees to head Department components. The Department does not have records indicating who opposed the prior nominees to head OLC.

- b. Which other unconfirmed nominees are similarly participating in the hiring process? Was Chris Schroeder participating in the hiring process for the Office of Legal Policy prior to his confirmation?**

Response:

Chris Schroeder did not participate in the hiring process for career employees in OLP while his nomination was pending. He neither consulted on hiring decisions for such positions, nor forwarded resumes or recommendations for candidates for such positions. Consistent with the past practice of presidential nominees of both parties, he was involved in the consideration of candidates for political appointments, including one deputy and one senior counsel.

53. You and I have had a number of exchanges about whether — especially in light of the shootings at an Army recruitment center in Little Rock and the tragic attack at Ft. Hood — U.S. soldiers should be protected as a class by federal hate crimes laws. In written responses you submitted four months

after receiving the questions, you indicated that you “do not believe additional legislation is needed, especially in light of the recently enacted law criminalizing assaults on members of the Armed Services.”

- a. **Notwithstanding the fact that every other class you endorsed for such protection was also already covered by existing criminal law, is it still your position that violent crimes committed against U.S. soldiers, because they are U.S. soldiers, should not be covered by the hate crimes statute?**

Response:

The mass murder committed at Ft. Hood in November 2009, as well as the murder of Army Private Long and the wounding of Private Quinton I. Ezeagwula at a Little Rock Armed Forces recruiting center, are reprehensible crimes of violence. Acts such as these are criminalized by several federal laws.

Violent assaults of United States military members may be prosecutable under 18 U.S.C. § 1389, which was added to the criminal code by the Matthew Shepard James Byrd Jr. Hate Crimes Prevention Act. *See* 18 U.S.C. § 1389. Section 1389 makes it a crime to assault or batter a service member or to assault or batter a family member of a service member or to destroy their property, when such acts are committed “on account of” the service member’s military status or service. It also makes it a crime to attempt or to conspire to do so.

In addition, 18 U.S.C. § 111(a)(1), which pre-dated enactment of Shepard-Byrd Act, prohibits forcible assault of military personnel on account of the officer’s performance of his or her duty, and 18 U.S.C. § 1114 prohibits the killing or attempted killing of such an officer.

Significantly, these federal laws cover violent actions in a way that protects service members as well as other kinds of victims, and target violent acts motivated by a victim’s military status or service. In this way, these statutes protecting service men and women are similar to the “hate crimes” that were criminalized under 18 U.S.C. § 249 which prohibits acts of violence undertaken “because of” bias or prejudice based upon the characteristics identified in the statute.

Prior to passage of Section 249, many of the groups now protected under the Shepard-Byrd Act were left unprotected by federal law. Specifically, there were no federal laws that criminalized violent acts undertaken because the victim, or someone associated with the victim, was lesbian, gay, bisexual or transgender. Furthermore, only the Housing Laws protected persons in the disabled community who were attacked because of their disability.

- b. **The federal hate crimes law requires you or your designee to issue guidelines that shall establish “neutral and objective criteria for**

Response:

These guidelines have been promulgated and added to the United States Attorneys Manual as required by Congress. The guidelines, which were added to Chapter 8 of the Manual, state, in full:

8-3.300**Neutral and Objective Criteria for Guiding Prosecutorial Discretion**

Government Attorneys shall enforce 18 U.S.C. § 249 in a neutral and objective manner. All prosecutions shall comport with the Principles of Federal Prosecution set forth in USAM Chapter 9-27.000. Attorneys for the government are particularly instructed to follow the dictates of USAM 9-27.260, which prohibits attorneys for the government from being influenced in making prosecution decisions by any subject's race, religion, sex, national origin, or political association, activities or beliefs. In addition, government attorneys should not be influenced by a subject, victim, or witness's sexual orientation, gender identity, or disability, except to the extent such characteristic is relevant to a determination whether the statute has been violated.

Section 249 requires that attorneys for the government consider whether evidence is sufficient to prove that a criminal act identified by the statute occurred because of the actual or perceived race, religion, gender, national origin, sexual orientation, gender identity, or disability of any person. In no case, however, shall the government attorney be influenced by his or her own personal feelings concerning the subject or the subject's associates; the victim or the victim's associates; or a witness or a witness's associates. Nor shall the attorney for the government be influenced by the effect the decision to prosecute (or not to prosecute) may have on the attorney's own professional or personal circumstances. *See USAM 9-27.260*. No attorney for the government may make prosecution or declination decisions based solely upon the speech or expressive conduct of a subject, victim, or witness. Nor shall any attorney for the government make such prosecution or declination decisions based solely upon a such person's [sic] affiliation with any group advocating for or against rights of persons with the characteristic identified by statute. Such factors may be considered only to the extent that they inform a reasoned, neutral decision about whether § 249—or any other criminal statute—has been violated.

In choosing to pursue a prosecution under this statute, the primary responsibility of Government attorneys shall be to seek justice. A government attorney shall file only those charges which he or she reasonably believes can be substantiated at trial through admissible evidence. Charging and declination decisions should be made based upon the facts and totality of the circumstances in each individual case.

- c. **What *specific* steps have you taken to ensure that the new hate crimes law is enforced in a way that does not infringe upon an individual's rights to free speech or the free exercise of religion, as the law directs?**

Response:

In addition to promulgating the guidelines, set forth above, the Department has developed several trainings for federal prosecutors. These trainings review the elements of the statute and discuss how to determine evidentiary sufficiency. In addition, these trainings explain and outline First Amendment law and restrictions on prosecutions.

- d. **What actions have you taken to communicate to other federal officials and prosecutors the importance of enforcing the law in such a manner?**

Response:

Trainings designed specifically for law enforcement have been provided to FBI agents, and federal and state law enforcement agents have been invited to numerous trainings, which are being conducted throughout the country.

54. Please provide the Department of Justice's annual year-end balance for its Working Capital Fund for fiscal years 2006 through 2009.

Response:

The Department's year-end balance for the Working Capital Fund for fiscal years 2006 through 2009 is as follows:

(dollars in thousands)

	FY 2006	FY 2007	FY 2008	FY 2009
Ending Balance	\$76,528	\$65,469	\$51,825	\$28,354

- a. **Also, please provide projected balances within this same account for fiscal years 2010 and 2011.**

Response:

The FY 2010 Working Capital Fund balance is \$25,336,000. The Department does not project year-end balances for the current or future fiscal years for the Working Capital Fund.

55. Please provide the Department of Justice's annual year-end total of unobligated balances for fiscal years 2006 through 2009.

The amount of year-end, discretionary unobligated balances for the Department of Justice for fiscal years 2006 through 2009 is as follows:

(dollars in thousands)

	FY 2006	FY 2007	FY 2008	FY 2009
Unobligated Balances	\$357,815	\$409,318	\$141,014	\$129,154

- a. **Additionally, please provide the projected unobligated balance totals for fiscal years 2010 and 2011.**

Response:

The FY 2010 unobligated balance for our annual accounts is \$130,135,000. The Department does not project future year unobligated balances.

- 56. Please provide the annual amount of expired unobligated balances transferred into the Working Capital Fund for fiscal years 2006 through 2009. Please note that this is different from your Working Capital Fund totals.**

Response:

The annual amount of expired unobligated balances that have been transferred into the Working Capital Fund for fiscal years 2006 through 2009 is as follows:

(dollars in thousands)

	FY 2006	FY 2007	FY 2008	FY 2009
Transfers In of Expired Balances	\$122,653	\$60,871	\$182,671 ¹	\$90,529

¹ Of this amount, \$99 million was annual FBI CJIS user fees allotted for Congressionally-directed projects.

- 57. At the June 2009 Justice Department oversight hearing, I asked how the Justice Department was adhering to your confirmation acknowledgement that grant management be treated as a “consistent priority” to prevent problems. In response to my written questions, you stated that “all three grantmaking components have embraced the recommendations in the OIG report. Each of the Department’s grant-making components has implemented the OIG’s recommendations...” Furthermore, at the November 2009 Justice Department oversight hearing, Senator Grassley asked you about the status of the 43 recommendations the OIG made in its November 2009 report which highlight grant management as, for the 9th straight year, a top 10 management challenge.**

- a. **Your response to Senator Grassley's question, received the day before your March 2010 hearing, stated, "each of the Department's grant-making components began implementing the OIG's recommendations with their FY 2009 funding and Recovery Act grants." I am concerned with your response because, not only did it not specifically answer Senator Grassley's inquiry as to compliance with each individual recommendation, it is also inconsistent with findings of the OIG noted in a December 2009 review of Recovery Act awards under the Byrne program.**
- i. **Please list the 43 specific OIG recommendations referenced in the November 13, 2009 OIG Report on Top Management and Performance Challenges of the Department of Justice, and how each of DOJ's grantmaking components is responding or has responded to such recommendations.**

Response:

Please see attached report, which lists the 43 specific OIG recommendations referenced in the November 13, 2009 OIG Report on Top Management and Performance Challenges of the Department of Justice, and how each of the Department's grant-making components is responding or has responded to the recommendations.

- ii. **While the December 2009 OIG report on the Byrne grant awards in the Recovery Act noted the grants were awarded in a prompt, fair and reasonable manner, the report notes that many applications were incomplete, resulting in awards to applicants who had not provided the required information.² That report also noted that grantees did not provide evidence that they could "accurately track Recovery Act funds separately from other federal funds."³ In additional, the report notes that, although the application requires each grantee to develop performance measures and include that on its application, the Bureau of Justice Assistance (BJA) did not require that from every grantee.⁴ Please list each of these concerns, as well as any others mentioned in the December 2009 report, and provide details regarding how the Department has remedied each.**

Response:

Concern #1: While the December 2009 OIG report on the Byrne grant awards in the Recovery Act noted the grants were awarded in a prompt, fair and reasonable

² Office of the Inspector General, Review of the Edward Byrne Memorial Justice Assistance Grant Program, Recovery Act Formula Awards Administered by the Department of Justice's Office of Justice Programs, December 2009, at p. 2.

³ *Id.* at 5-6.

⁴ *Id.* at 6.

manner, the report notes that many applications were incomplete, resulting in awards to applicants who had not provided the required information.^[1]

BJA is carefully reviewing all of its FY 2010 funding solicitations for formula grants to describe material as “required” only when that is the case. When required materials are not submitted with the application package, BJA now places a special condition on the award preventing the recipient from obligating, expending, or drawing down funds until the required materials have been submitted. During FY 2009, some information (such as a project abstract) which was not essential to the grant application process was mistakenly listed as required in the grant solicitation. However, in FY 2010, applicants may be “requested” to provide additional, non-essential information (such as project abstracts), but will not be “required” to do so.

Concern #2: That report also noted that grantees did not provide evidence that they could “accurately track Recovery Act funds separately from other federal funds.”^[2]

The OJP Financial Guide, which must be followed by all OJP grant recipients as specified in the award special conditions, requires that “each award must be accounted for separately. Recipients and subrecipients are prohibited from commingling funds on either a program-by-program basis or project-by-project basis. Funds specifically budgeted and/or received for one project may not be used to support another. Where a recipient’s or subrecipient’s accounting system cannot comply with this requirement, the recipient or subrecipient shall establish a system to provide adequate fund accountability for each project it has been awarded.”

Additionally, part of the review process in the Office of the Chief Financial Officer’s financial monitoring site visits includes verifying that a separate account is established for each individual award (both Recovery Act and non-Recovery Act) within the grantee’s accounting system; and that the expenditures recorded in each account support the amounts reported on the grant’s Financial Status Report. Further, as part of their programmatic monitoring efforts, OJP program offices (including BJA) confirm that grantee funds are not commingled.

Concern #3: In addition, the report notes that, although the application requires each grantee to develop performance measures and include that on its application, the Bureau of Justice Assistance (BJA) did not require that from every grantee.^[3]

Each Recovery Act State and local Justice Assistance Grant (JAG) award included a special condition requiring the grantees to report performance measures in the Performance Measurement Tool (PMT) maintained by OJP. OJP provided outreach and training to all grantees through regional trainings, webinars, and conference calls, and continues to monitor compliance with the reporting of performance measures.

^[1] Office of the Inspector General, Review of the Edward Byrne Memorial Justice Assistance Grant Program, Recovery Act Formula Awards Administered by the Department of Justice’s Office of Justice Programs, December 2009, at p. 2.

^[2] *Id.* at 5-6.

^[3] *Id.* at 6.

For FY 2010, all JAG grantees will be required to report on standard performance measures listed in the PMT, but will not be required to include any additional performance measures. If FY 2010 JAG recipients do not timely report data for the required performance measures, they may be subject to remedial action, such as withholding of grant funds, non-certification of new awards, or designation as high risk.

- b. **In reference to COPS grants, the Office of the Inspector General's April 1, 2009 – September 30, 2009 Semiannual Report also noted, “we continued to find the use of grant funds that were not supported by documentation or were unallowable based on the terms and conditions of the grant. In addition, we continued to find use of grant funds that were not related to grant expenditures.”⁵ Specifically, how has the Justice Department complied with this recommendation? Please provide examples of specific improvements in grant awards as a result of this recommendation.**

Response:

The April 1, 2009 – September 30, 2009 Semiannual Report referenced an audit of Team Focus, Inc. (TFI), which identified \$718,443 in questioned costs (of which \$87,795 were related to COPS grants). The COPS Office agreed with the findings and the audit for the COPS Office issue was closed in November of 2009.

Specific actions taken by COPS and TFI to close the audit include:

- TFI updated their Financial Controls and Operating Procedures Manual to properly delineate financial roles and responsibilities;
- TFI submitted additional documentation for draw downs on its COPS grant funding; and
- COPS requested, and TFI repaid \$59,694 in unsupported other direct costs in September 2009.

The COPS Office has a distinguished record of rigorous review and enforcement of its grant terms and conditions. When issues are identified, the COPS Office moves swiftly to remedy them.

58. Following the June 2009 oversight hearing, you stated in response to my written question regarding President Obama's promise to conduct “an immediate and periodic public inventory of administrative offices and functions and require agency leaders to work together to root out redundancy” that “the Department is committed to identifying savings and efficiencies...Senior leadership of the Department is considering proposals for organizational change that will reduce costs and improve operational effectiveness.” That hearing took place in June 2009, and your responses came in October 2009.

⁵ Office of the Inspector General, Semiannual Report to Congress, April 1, 2009 – September 30, 2009, at p. 13.

- a. **While I am encouraged to know that senior leadership is considering proposals, I want to know what proposals for organizational change were examined. Was a particular proposal ultimately adopted? If so, how have you implemented any proposals for cost-savings and efficiencies in the Department?**

Response:

In June 2009, the Attorney General reached out to the Department for ideas to reduce costs and improve efficiency, and the Department's employees responded with many ideas for how the Department could save money and operate better. Twelve savings and efficiency initiatives were identified for immediate implementation and four initiatives required additional review before being phased in during FY 2010. The annual recurring cost savings, once all initiatives are fully implemented, is estimated to be over \$32million. In FY 2010, the Department of Justice has recorded total savings of \$35 million, exceeding its target. The initiatives are predominately in the area of finance and contracts, e.g., consolidating wireless and information technology (IT) contracts; consolidating IT security; and reducing paper consumption.

To institutionalize these efforts, the Department established an Advisory Council for Savings and Efficiencies (SAVE Council) in June 2010. The SAVE Council is comprised of departmental component representatives who direct and oversee an ongoing Departmental effort to work smarter and more efficiently, share good business practices, and save resources including time and taxpayer dollars. The Council will ensure accountability for performance improvements resulting in cost savings, cost avoidance, and streamlined processes across the Department.

- b. **Did any such proposals call for an in-depth review of current grant programs and their effectiveness? Were those results communicated to Congress? If not, why not?**

Response:

Not at this time. With the establishment of the Council, this is a potential program area that can be examined.

- c. **Did the Department identify any grant programs that were poorly managed or duplicative and thus in need of elimination? If so, please provide specific examples of such programs. If not, why were none identified?**

Response:

No. With the establishment of the Council, this is a potential program area that can be examined.

59. The President's proposed FY 2011 Budget for the Department of Justice requests \$6.8 billion to activate new prisons and increase correctional staff, a 10% increase from FY 2010. The Budget specifically provides for the activation of 2 new prisons— Berlin, New Hampshire and Thomson, Illinois. Berlin was listed on the Bureau of Prisons' (BOP) construction priority list in its budget justification and was recently completed for activation; however, the Thomson facility is an existing state facility purchased by the BOP and will be upgraded for federal use.

- a. Considering that significant funds are set aside in each appropriations cycle for every proposed new facility, and the BOP maintains a detailed construction and modernization/repair schedule, can you explain why both the Berlin facility and the Thomson facility took priority over other facilities listed in the BOP's budget justification?**

Response:

The FY 2011 President's Budget Request for the BOP's Salaries and Expenses (S&E operating funds) appropriation is \$6.5 billion. Included in this amount is \$66.879 million to begin activation of USP Thomson, IL; \$28.5 million to begin activation of FCI Berlin, NH; and \$59 million to increase current staffing levels. Activation funding is for staffing, operations, training, supplies, and equipping of a new facility.

The BOP's Buildings and Facilities (B&F) appropriation is a construction account providing for only new construction/acquisition and modernization/repair. Of the \$269.7 million in the FY 2011 President's Budget Request for B&F, \$170 million is for the acquisition and renovation of the Thomson facility. No additional funding for acquisition or new prison construction is requested for any other proposed new facility.

In reviewing the BOP Status of Construction report, Exhibit O in the B&F Congressional justifications, the construction completion date for FCI Berlin is September 2010. FCI McDowell and FCI Mendota have already begun the activation process this year, FY 2010. FCI Berlin is next to be completed; therefore, it is the next project in need of activation funding (S&E operating funds) in FY 2011. Regarding the Thomson facility, since it is an acquisition and renovation versus construction, it can be ready to begin activation in the year of purchase, planned for FY 2011.

The next new construction projects to be completed are the Secure Female FCI Aliceville in September 2011, and USP Yazoo City and FCI Hazelton in the summer or fall of 2012. S&E activation funding will be needed in future years to staff, equip, and operate these facilities. All additional projects listed on the Status of Construction which are not fully funded are listed in priority order, and construction contracts cannot be awarded until B&F new construction funding is provided in future enacted appropriations.

- b. **Were there any other state facilities considered for acquisition? Why or why not? If so, why was Thomson chosen above other facilities available for purchase and upgrade?**

Response:

When considering options to expand inmate bed capacity, the BOP's Capacity Planning Committee regularly considers existing state facilities that are available to ensure that the most cost-effective options for capacity expansion are chosen. In earlier years, the only state prisons offered to the BOP for purchase were being excessed by the states because they were old and obsolete, and the states were moving to newly constructed modern prisons and abandoning the old facilities. In the case of Thomson Correctional Center (TCC), the BOP determined that TCC was suitable to meet the special administrative high security needs of the BOP. The TCC is a modern (constructed in 2001), never-utilized facility, built specifically to house maximum security inmates.

Per OMB's Capital Programming Guide (OMB Circular No. A-11, Part 7), the BOP completed a 300 Capital Asset Plan and Business Case Summary for the Thomson facility. The benefits of acquiring (within one year) and modifying a never-utilized, solidly-built, 1,600 cell high security facility in Thomson, Illinois, for approximately \$170 million outweighed the benefits of constructing a new high security facility for between \$220 and \$300 million in the current market over approximately 3 to 4 years.

- c. **Please provide the details of the cost to acquire the Thomson facility versus the cost of new construction of similar facilities already listed in the BOP's budget justification as at or near completion.**

Response:

In reviewing the BOP Status of Construction report, Exhibit O in the B&F Congressional justifications, the cost estimates for all fully funded new construction projects (FCI McDowell, FCI Mendota, FCI Berlin, Secure Female FCI Aliceville, USP Yazoo City, and FCI Hazelton) range from \$215 million to \$276 million. Also, these facilities currently under construction are all smaller and less secure than the Thomson facility and will provide less bed space, so building something similar to the size of Thomson would cost more.