



Department of Justice

STATEMENT

OF

**TONY WEST
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE**

BEFORE THE

**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE**

PRESENTED ON

JUNE 24, 2010

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Chairman Cohen, Congressman Franks, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division. I appreciate the opportunity to discuss the work of the Civil Division of the Department of Justice and our budget and resource needs for Fiscal Year 2011.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Its litigation reflects the diversity of government activities, involving, for example, the defense of challenges to Presidential actions; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, patents, fraud, and debt collection; all manner of accident and liability claims; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division is made up of approximately 1,400 permanent employees, nearly 1,000 of whom are attorneys. Each year, Division attorneys handle thousands of cases that collectively involve billions of dollars in claims and recoveries. The Division confronts

significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various Federal programs and actions. The priorities of the Division include protecting the nation, protecting taxpayers, and protecting consumers.

NATIONAL SECURITY

Defending the nation remains the Department's highest priority. The Civil Division currently is defending approximately 140 habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defend our national security interests in a manner consistent with the rule of law. The Civil Division also successfully defended against extending habeas corpus rights to detainees held in Afghanistan, a theatre of war where detainees are provided robust Department of Defense review.

The Division defends in the federal courts every removal order involving terrorist and other national-security-risk aliens and litigates detention, benefits denials, and naturalization and denaturalization cases involving these aliens. Since 1997, the Division has successfully defended the State Department's and Treasury Department's designations of terrorist organizations. For instance, on June 21, 2010, the Supreme Court, in *Holder v. Humanitarian Law Project v. Holder*, voted 6-3 to reject a free-speech challenge from humanitarian aid groups to the law that bars "material support" – everything from money to technical know-how – to foreign terrorist organizations. We also obtained dismissal of over 40 nationwide class action suits against numerous telecommunications companies that allegedly assisted the National Security Agency in post-September 11th surveillance activities. The Division's national security successes continued in the federal appellate courts around the country. In 2009, the Division

prevailed in cases involving photographs of alleged abuse of detainees in Iraq and Afghanistan, records regarding the NSA's "Terrorist Surveillance Program," a challenge to the Foreign Intelligence Surveillance Act, and individuals held as part of the investigation into the terrorist attacks of September 11th.

Since September 2009, the Department has used new policies and procedures regarding the invocation of the state secrets privilege that provide greater accountability and reliability. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. Under the new procedures there is a State Secrets Review Committee, consisting of senior Department officials, which evaluates the recommendation to invoke the privilege.

PROTECTING THE PUBLIC FISC

The Department takes seriously its obligation to guard the public fisc. Over the last year, the Department has made significant strides in protecting taxpayer dollars – as well as the integrity of government programs that depend on those dollars – through aggressive civil enforcement actions aimed at rooting out waste, fraud, and abuse. One of the most potent weapons we have at our disposal is the False Claims Act. Since January 2009, the government has recovered \$3.99 billion in civil fraud cases.

HEALTH CARE FRAUD

Fighting health care fraud is a priority for the Division. The evils of health care fraud are many – it undermines the judgment of health care professionals, deprives people of the treatment

that they need, and, in many cases, can put patients' health and safety at risk. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of a new interagency task force, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the Department has recovered over \$3 billion in health care funds lost to fraud since January 2009.

A significant component of the Department's health care fraud caseload consists of cases alleging misconduct by manufacturers of pharmaceutical and device products. For example, 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. Last fall, the Department announced the largest health care fraud settlement in its history in a case involving Pfizer, which paid \$2.3 billion in combined criminal and civil penalties (of which \$1 billion was a civil fraud recovery), and pled guilty for illegal marketing of the painkiller Bextra.

Health care fraud that affects the health, safety, and well-being of Medicare and Medicaid beneficiaries is of paramount concern to the Department. In January of this year, the Department negotiated a \$24 million settlement to resolve allegations that a national chain of Small Smiles dental clinics was providing unnecessary dental services to children on Medicaid in order to maximize the company's Medicaid reimbursements. The services included unnecessary tooth

extractions that resulted in healthy teeth being pulled and needless crowns and excessive baby root canals.

The Department also leads an Elder Justice and Nursing Home Working Group, which focuses on health care fraud involving elderly patients, such as when a skilled nursing facility bills Medicare or Medicaid for services so deficient as to be effectively worthless. Such conduct not only wastes taxpayer dollars, but also threatens the health of some of our most vulnerable citizens.

FINANCIAL FRAUD/MORTGAGE FRAUD

As millions of Americans continue to try and cope with the fallout of the housing crisis, the Department has made protecting America's consumers against mortgage fraud a top priority. The Department is devoting increased resources to better detect, deter, prosecute, and punish mortgage fraud. The President created the Financial Fraud Enforcement Task Force to bring together a coalition of federal agencies and regulators, along with state and local partners, to provide a broad enforcement effort to combat financial fraud. I co-chair the Task Force's Mortgage Fraud Working Group. In that capacity, the Civil Division coordinates with other state and federal officials to marshal the civil and criminal capabilities of the state and federal governments to combat the mortgage fraud that has proliferated as a result of the current financial crisis and help homeowners who have suffered from mortgage fraud. The increased enforcement efforts aimed at addressing fraud in the housing and mortgage industries have increased recoveries in this area from \$15 million in 2008 to \$52 million in 2009 and the first half of 2010.

On June 17, 2010, the Attorney General, along with other members of the Financial Fraud Enforcement Task Force, announced the results of a nationwide takedown, Operation Stolen Dreams, which targeted mortgage fraudsters throughout the country. Starting on March 1, 2010, through the date of the announcement, Operation Stolen Dreams has involved 1,215 criminal defendants nationwide, including 485 arrests, who are allegedly responsible for more than \$2.3 billion in losses. Additionally, the operation has resulted in 191 civil enforcement actions which have resulted in the recovery of more than \$147 million.

One of the Mortgage Fraud Working Group's most important initiatives is to hold fact-finding summits in cities across the country that have been hardest hit by mortgage fraud. Thus far, it has held summits in Miami, Florida; Phoenix, Arizona; Detroit, Michigan; and Columbus, Ohio. At these meetings, the Working Group makes its presence felt in communities deeply affected by mortgage fraud while working with our partners at the state and local levels to better understand the mortgage fraud crisis and become increasingly effective in combating the problem.

PROCUREMENT FRAUD

Ensuring that our military and procurement systems are protected from fraud is vitally important. Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. Thus far, we have reached settlements in cases involving goods and services provided in connection with the war effort amounting to \$77 million, and since January 2009, procurement fraud cases have accounted for approximately

\$645 million in recoveries – more than the Department’s procurement fraud recoveries in 2007 and 2008 combined.

The Department has intervened in a case against Public Warehousing Company, a multi-billion dollar defense contractor that is alleged to have engaged in war profiteering on three prime vendor contracts (valued at \$7 billion) with the Defense Logistics Agency to supply food to U.S. troops in Kuwait, Jordan, and Iraq. At home, the Department is leading an investigation into companies, as well as individual executives, who manufacture and sell defective Zylon fabric used as the key ballistic material in bulletproof vests sold to the United States for use by federal, state, local, and tribal law enforcement agencies. Our investigation has revealed that, in some cases, the companies were aware that the Zylon fabric degraded quickly, but took no action to inform the government. Thus far, the Department has obtained more than \$58 million in this effort, and our investigation continues today.

CONSUMER PROTECTION

The Civil Division is at the forefront of efforts to protect consumers through vigorous civil and criminal enforcement of federal consumer protection laws. Between January 2009 and June 1, 2010, the Office of Consumer Litigation has obtained convictions of 51 defendants and courts have imposed criminal penalties exceeding \$2 billion for illegal activities in connection with defrauding consumers. During this same time period, 27 defendants were sentenced to some form of incarceration, receiving a total of more than 92 years.

The Department also successfully defended critical consumer protection initiatives. In *United States v. Philip Morris*, the D.C. Circuit unanimously affirmed a landmark decision holding that cigarette manufacturers had deceived consumers as to health risks and nicotine addiction through a complex web of organizations over a period of nearly five decades. The court sustained injunctive relief that, among other things, requires manufacturers to cease making deceptive health claims for so-called “light” cigarettes and requires them to issue corrective public statements on the health effects and addictiveness of cigarettes. In a related matter, the Department is currently defending the Food and Drug Administration’s (FDA) recently adopted tobacco control regulations in federal court in Kentucky.

HEALTH CARE REFORM LITIGATION

The Civil Division is vigorously defending the Affordable Care Act health care reform statute against multiple lawsuits brought on constitutional and other grounds. These suits have been filed across the country in at least a dozen different locations, including Michigan, Florida, Virginia, and Mississippi. The Division has assembled a strong team to defend the law. We are confident that this statute is constitutional and that we will prevail in court.

DEEPWATER HORIZON OIL SPILL

As you know, the Justice Department has opened criminal and civil investigations into the oil spill in the Gulf of Mexico. As the Attorney General made clear, the Department will ensure that every cent of taxpayer money owed will be repaid; damages to the environment and wildlife will be reimbursed; those responsible for the mess will clean it up; and that anyone who has violated the law will be prosecuted to the full extent of the law.

The Civil Division is actively supporting other federal agencies in the ongoing, coordinated response efforts to mitigate the impact of the oil spill in the Gulf of Mexico. While the federal government is focused on providing a robust response to the oil spill, complex legal questions arise in the course of such federal efforts. The Civil Division, in close collaboration with the Environment and Natural Resources Division (ENRD), has been providing critical legal advice and guidance to agencies involved in the response, so that they can proceed as quickly, efficiently, and effectively as possible. In May, Assistant Attorney General Ignacia Moreno of ENRD and I led a team of Department attorneys who traveled to Louisiana to meet with our federal and state partners to monitor the situation. Though the federal government's immediate priority is controlling the source of the oil and cleaning up the spill, the Civil Division stands ready to ensure that all applicable laws are enforced and that those responsible for the explosion and fire on the Deepwater Horizon and the subsequent oil spill will be held accountable. The Civil Division will take the lead in pursuing a complete recovery of all relevant costs from parties responsible for the oil spill.

KATRINA LITIGATION

The Civil Division's Torts Branch is defending against more than 400 tort suits for flood damage in New Orleans as a result of Hurricane Katrina. The suits are consolidated in the Eastern District of Louisiana under the caption *In re Katrina Canal Breaches Consolidated Litigation*. The suits, which include putative class actions, allege that the Army Corps of Engineers negligently designed, constructed, and maintained the levees and floodwalls that failed during the hurricane. They also allege that the Corps negligently designed, constructed, and

maintained a navigation channel that caused the hurricane-protection defenses to fail. This latter claim was sustained in part in a test case tried to the court in 2009.

TRANSPARENCY AND OPENNESS/ FREEDOM OF INFORMATION ACT (FOIA)

The President has pledged to make this Administration the most open and transparent in history, and the Department is doing its part to make that pledge a reality. We have worked to implement the President's Executive Memorandum on Transparency, including the Attorney General's Guidelines with respect to FOIA. Through outreach, education, and the review of cases in litigation, additional information was – and continues to be – disclosed to the public through careful application of the Guidelines at the agency level. The Division has resolved FOIA cases so as to promote these goals of transparency and openness.

NATIVE AMERICAN ISSUES

In the past year, the Department has made some significant strides in improving the relationship between the United States government and tribal nations. On December 7, 2009, the Department reached a settlement in the extraordinarily lengthy and contentious case of *Cobell v. Salazar*, a class-action involving the government's handling of over 300,000 individual Indian trust accounts. The agreement, which is contingent upon legislation and a district court fairness determination, provides for approximately \$1.4 billion to be distributed to class members and another \$2 billion to fund a buy-back program to address the continuing "fractionation" problem caused by land interests being repeatedly divided as they pass through succeeding generations.

The Department administers the Radiation Exposure Compensation Act Program, which provides payments to those who contracted certain cancers and other serious diseases after being exposed to radiation through nuclear weapons tests or in the uranium mining industry during the 1940s, 1950s, and 1960s. In March 2010, the Civil Division launched a new internship program through which approximately 30 Native American students will complete a two-week training program in Washington, D.C. and then be employed in the Four Corners region of New Mexico, Colorado, Arizona, and Utah to conduct intensive outreach efforts in tribal communities. The goal of the program is to address the special concerns and difficulties faced by Native American populations in the claims process.

FARMERS' ALLEGED DISCRIMINATION LITIGATION

In February 2010, the Civil Division resolved the long-standing *Pigford II* case, which was brought by African-American farmers who allegedly suffered racial discrimination in the administration of U.S. Department of Agriculture (USDA) farm loan programs. The settlement, which is contingent upon a congressional appropriation, will provide \$1.25 billion to eligible African-American farmers. The settlement establishes a non-judicial claims process through which individual farmers may demonstrate their entitlement to cash damages and, in most cases, tax relief and debt forgiveness.

The Division is also handling *Keepseagle v. Vilsack*, a class action brought on behalf of Native American farmers who claim that they suffered discrimination in connection with their attempts to obtain farm loans. The plaintiffs in the case seek both injunctive and monetary relief. In December 2009, following the close of discovery, the matter was stayed pending

settlement discussions between the parties. The stay has been extended several times as negotiations have proceeded. The current stay expires on July 29, 2010.

Finally, the Division is defending lawsuits brought by Hispanic farmers, *Guadalupe L. Garcia Jr. v. Vilsack*, and by female farmers, *Rosemary Love v. Thomas Vilsack*, who allege that USDA discriminated against them in the awarding of government loans and other assistance. The Department is actively working to resolve those cases with affected farmers.

IMMIGRATION MATTERS

The Civil Division defends and prosecutes the nation's most complex civil immigration matters in federal court. In 2009, the Civil Division's Office of Immigration Litigation (OIL) prevailed in more than 90 percent of its cases in the trial and appellate courts, while increasing its district court case load by more than 60 percent. Through regular meetings with stakeholders, OIL has helped to resolve policy issues that have arisen in litigation. One example is the "widow's fix" a statute that eliminated the requirement that a couple be married for two years prior to the U.S. citizen spouse's death for the alien widow or widower to qualify as an "immediate relative" and remain in the United States. A second example is the Office's ongoing efforts at greater collaboration with the Department's Criminal Division to ensure greater consistency in matters of overlap between criminal prosecutions and removal of dangerous criminal aliens.

MISCELLANEOUS DEFENSIVE LITIGATION

The Division continues to protect taxpayer dollars by vigorously defending the government in civil litigation, and limiting monetary judgments entered against the United States to just pennies for each dollar sought. For example, the Department has brought near to a close the 18-year-long saga of litigation involving the A-12 stealth fighter by defeating the contractors' billion dollar claims; virtually finished resolving the massive *Winstar* claims that resulted from the savings and loan crisis of the 1980s, with recoveries averaging only six cents on each dollar claimed; and continued to defend the Treasury against the multi-billion dollar claims advanced by the nuclear power industry over the government's delay in taking possession of spent nuclear fuel.

ALTERNATIVES TO LITIGATION

The Division also currently helps administer the Vaccine Injury Compensation Program (VICP). The VICP was created in 1986 by the National Childhood Vaccine Injury Act to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. The most important and controversial litigation ongoing in the program concerns the issue of whether there is a causal connection between childhood vaccines and the development of autism. The Civil Division recently succeeded in several important test cases in the Omnibus Autism Litigation, involving nearly 5,000 claims, in convincing the court that the prevailing scientific evidence strongly demonstrates no causal connection between the measles, mumps and rubella (MMR) vaccine combined with other vaccines containing thimerosal and the development of autism spectrum disorders. The opinions in those test cases were widely praised by experts in the public health community as critical to addressing growing

misconceptions about vaccines and maintaining public confidence in the safety and efficacy of the nation's vaccine program.

PRESIDENT'S BUDGET REQUEST

The President's FY 2011 request seeks 1,500 positions (1,072 attorneys), 1,469 FTE and \$334,944,000. Included in this request are the base resources required to maintain the superior legal representation services that have yielded such tremendous success and additional funds to provide adequate defense for cases involving the government's responsibilities for storing spent nuclear fuel and cases involving the government's response to the Nation's financial crisis. Additional resources are also being sought to implement the Department's Electronic Discovery initiative.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.