

Williams, Elliot (OLA)

From: Williams, Elliot (OLA)
Sent: Wednesday, April 8, 2015 11:00 PM
To: Yates, Sally (ODAG)
Cc: Kadzik, Peter J (OLA); Wade Tyson, Jill C (OLA); Goldberg, Daniel L. (OLA); Bruck, Andrew J. (ODAG); Childs, Heather G. (ODAG); Axelrod, Matthew (ODAG)
Subject: QFRs
Attachments: Sessions QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Tillis QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Durbin QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Feinstein QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Franken QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Grassley QFRs for Yates - 4 8 2015 for WH and DAG review.docx; Perdue QFRs for Yates - 4 8 2015 for WH and DAG review.docx

Sally – hope all is well. Attached please find cleared drafts of your QFRs for your review. Many thanks to Andrew and the rest of the folks on your team for getting these cleared efficiently. Please let us know if you have any questions or concerns. We'll be sending these to the White House for their review momentarily. Thanks.

Senator David Perdue
Questions for the Record
On the Nomination of Sally Quillian Yates
To be Deputy Attorney General of the United States
March 31, 2015

1. As a former federal prosecutor, I know you are familiar with the concept of prosecutorial discretion. What, if any, are the limits of the President's discretion to enforce federal law?

RESPONSE (b) (5)

[REDACTED]

2. In his Memorandum Opinion and Order in *Texas v. United States*, B-14-254 (S.D. Tex. Feb. 16, 2015), Judge Hanen enjoined the implementation of President Obama's Deferred Action for Parental Accountability Program ("DAPA") and of the "three expansions/additions to the [Deferred Action for Childhood Arrivals Program, hereinafter "DACA"]," finding that the government had "clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act." *Mem. Op.* at 123. Do you agree that in promulgating and implementing DAPA and the DACA expansions, the government acted unlawfully?

RESPONSE (b) (5)

[REDACTED]

3. According to press reports, at a recent hearing on the injunction in the *Texas* case, Judge Hanen told the government that "I was made to look like an idiot. I believed your word that nothing would happen." The judge was referring to the more than 100,000 three-year DACA renewals the government processed in the weeks following issuance of the injunction. Is it the Justice Department's position that the government is authorized to continue processing of DACA renewals during the pendency of the *Texas* injunction? If so, please explain the legal basis for your answer.

RESPONSE (b) (5)

[REDACTED]

4. With respect to the President's executive actions on immigration implemented through the DACA and DAPA programs, please explain whether you share the view of Attorney General nominee Loretta Lynch that the Office of Legal Counsel memorandum setting forth the argument for the President's actions are constitutional and "reasonable."

RESPONSE: (b) (5)

[REDACTED]

5. Please explain your view on how, or whether, the President's executive action on immigration implemented through the DACA and DAPA programs comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.

RESPONSE: (b) (5)

[REDACTED]

6. It's now indisputable that the Internal Revenue Service ("IRS") targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice ("DOJ" or "Department") responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama's campaign in 2012. Little, if any, progress has been made in that investigation thus far.

- a. With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, do you believe that reassignment of the DOJ's investigation to a special prosecutor is appropriate?

RESPONSE: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

- b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign?

RESPONSE (b) (5) [REDACTED]

(b) (5) [REDACTED]

- c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?

RESPONSE (b) (5) [REDACTED]

(b) (5) [REDACTED]

- d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?

RESPONSE: (b) (5)

[REDACTED]

7. National security is always of paramount importance for the Justice Department. The January 2015 Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called “lone wolf” attacks.

a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 (“FISA”)?

RESPONSE: (b) (5)

[REDACTED]

b. Do you believe that the current “bulk collection” regime under FISA Section 215 is lawful?

RESPONSE (b) (5)

[REDACTED]

c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

d. President Obama has indicated that he supports a legislative reform of Section 215's bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE (b) (5)

e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and "lone wolves"?

RESPONSE: (b) (5)

8. Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests for information from Congress about outstanding issues related to Operation Fast and Furious?

RESPONSE (b) (5)

(b) (5)

9. Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?

RESPONSE: (b) (5)

(b) (5)

10. In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the State provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly, now Louisiana has to provide data for the upcoming school year and for every school year as long as the program is in place.

- a. Do you agree with the DOJ's decision to intervene in this case?
- b. If confirmed, will you use Justice Department resources to obstruct, monitor, or regulate school-choice programs?
- d. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE (b) (5)

11. A 2013 report by the DOJ's Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE (b) (5)

12. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: (b) (5)

13. As the former U.S. Attorney for the Northern District of Georgia and the former Vice Chair of the Attorney General's Advisory Committee, you are no doubt familiar with the DOJ's recent "Smart on Crime" Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

- a. What are your views on those DOJ initiatives and proposals?**
- b. Do they make the work of federal prosecutors harder?**
- c. Do they make the American People safer?**
- d. Are you going to continue them if you are confirmed as Deputy Attorney General?**

RESPONSE to a-d (b) (5)

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of their sentences?
- f. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for offenders who have received so-called “stacked” or consecutive mandatory minimum sentences under 18 U.S.C. § 924 or other provisions of federal law?

RESPONSE to e-f: (b) (5)

[REDACTED]

(b) (5)

14. The 2013 Cole Memorandum explains the DOJ's priorities on enforcement of federal law regarding marijuana offenses. Several jurisdictions have recently legalized cultivation and distribution of marijuana for personal use, in effect, initiating a series of state regulatory regimes that contravene federal drug laws.

- a. Do you agree with the current DOJ enforcement policies and priorities outlined in the Cole Memorandum?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE (b) (5)

[REDACTED]

- c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: (b) (5)

[REDACTED]

(b) (5)

15. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion that, if it does, it is a minor problem with no real effect on the integrity of elections.

a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE (b) (5)

b. Do you think that voter fraud is a *bona fide* issue that states should be entitled to address with voter ID laws?

RESPONSE (b) (5)

(b) (5)

16. First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of Fox News reporter James Rosen – the Department claimed that Rosen was a potential co- conspirator with a State Department contractor in violation of the Espionage Act. Since then, the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain

that notice of a subpoena may be withheld only if notifying the journalist would present a “clear and substantial threat” to an investigation or to national security.

- a. Do you agree that the Department’s treatment of journalists has been heavyhanded and that reform of DOJ practices was necessary?

RESPONSE (b) (5)

[REDACTED]

- b. Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?

RESPONSE (b) (5)

[REDACTED]

- c. Do you support the new guidelines?

RESPONSE (b) (5)

[REDACTED]

- d. As a former federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE (b) (5)

[REDACTED]

- e. Going forward, how should the Justice Department distinguish itself from

the Holder Justice Department when it comes to investigation of journalists?

RESPONSE: (b) (5)

[REDACTED]

17. There have been significant developments recently at the DOJ regarding policies on civil asset forfeiture in response to abuses by U.S. Attorney's Offices and federal and state agencies. Attorney General Holder recently announced that the DOJ will end the Equitable Sharing Program, which essentially apportions billions of dollars in seized assets between federal, state, and local authorities – a huge pool of money that clearly created a risk of encouraging aggressive, if not unlawful, seizures from individuals who are not charged with a crime, have not been indicted, and have not enjoyed any due process whatsoever.

- a. Do you believe that there have been inappropriate or excessive seizures by your office or by the DOJ with respect to civil asset forfeitures, adoptive seizures, and equitable sharing practices?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- b. What steps do you plan to take, if confirmed as Deputy Attorney General, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE (b) (5)

[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Childs, Heather G. (ODAG)

From: Childs, Heather G. (ODAG)
Sent: Thursday, April 9, 2015 1:55 PM
To: Gamble, Nathaniel (ODAG)
Subject: Fwd: Updated Perdue
Attachments: Perdue QFRs for Yates - 4 9 2015 update CLEAN.docx; ATT00001.htm

Begin forwarded message:

From: "Bruck, Andrew J. (ODAG)" (b) (6) >
Date: April 9, 2015 at 1:25:47 PM EDT
To: "Dix, Melanie (ODAG)" (b) (6) >, "Childs, Heather G. (ODAG)" (b) (6) >
Cc: "Axelrod, Matthew (ODAG)" (b) (6) >
Subject: RE: Updated Perdue

[Use this copy instead. Sally's previous edits are highlighted.](#)

From: Dix, Melanie (ODAG)
Sent: Thursday, April 09, 2015 1:20 PM
To: Bruck, Andrew J. (ODAG); Childs, Heather G. (ODAG)
Cc: Axelrod, Matthew (ODAG)
Subject: RE: Updated Perdue

[Thanks, Andrew](#)

From: Bruck, Andrew J. (ODAG)
Sent: Thursday, April 09, 2015 1:11 PM
To: Dix, Melanie (ODAG); Childs, Heather G. (ODAG)
Cc: Axelrod, Matthew (ODAG)
Subject: FW: Updated Perdue

[Don't provide her with this copy—I'm going to prepare a separate version that highlights her previous edits.](#)

From: Williams, Elliot (OLA)
Sent: Thursday, April 09, 2015 1:10 PM
To: Bruck, Andrew J. (ODAG)

Cc: Dix, Melanie (ODAG); Childs, Heather G. (ODAG); Axelrod, Matthew (ODAG); Goldberg, Daniel L. (OLA); Wade Tyson, Jill C (OLA)
Subject: Updated Perdue

Andrew – here is a revised version of the Perdue QFRs. She should review these, and please disregard those sent last night. Let me know if you need anything else.

<< File: Perdue QFRs for Yates - 4 9 2015 update CLEAN.docx >>

Elliot Williams
Deputy Assistant Attorney General for Legislative Affairs
U.S. Department of Justice

**Senator David Perdue
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On the Nomination of Sally Quillian Yates
To be Deputy Attorney General of the United States
March 31, 2015**

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RESPONSE (b) (5)

[REDACTED]

2. In his Memorandum Opinion and Order in *Texas v. United States*, B-14-254 (S.D. Tex. Feb. 16, 2015), Judge Hanen enjoined the implementation of President Obama's Deferred Action for Parental Accountability Program ("DAPA") and of the "three expansions/additions to the [Deferred Action for Childhood Arrivals Program, hereinafter "DACA"]," finding that the government had "clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act." *Mem. Op.* at 123. Do you agree that in promulgating and implementing DAPA and the DACA expansions, the government acted unlawfully?

RESPONSE (b) (5)

[REDACTED]

3. According to press reports, at a recent hearing on the injunction in the *Texas* case, Judge Hanen told the government that "I was made to look like an idiot. I believed your word that nothing would happen." The judge was referring to the more than 100,000 three-year DACA renewals the government processed in the weeks following issuance of the injunction. Is it the Justice Department's position that the government is authorized to continue processing of DACA renewals during the pendency of the *Texas* injunction? If so, please explain the legal basis for your answer.

RESPONSE (b) (5)

[REDACTED]

4. With respect to the President's executive actions on immigration implemented through the DACA and DAPA programs, please explain whether you share the view of Attorney General nominee Loretta Lynch that the Office of Legal Counsel memorandum setting forth the argument for the President's actions are constitutional and "reasonable."

RESPONSE (b) (5)

[REDACTED]

5. Please explain your view on how, or whether, the President's executive action on immigration implemented through the DACA and DAPA programs comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.

RESPONSE: (b) (5)

[REDACTED]

6. It's now indisputable that the Internal Revenue Service ("IRS") targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice ("DOJ" or "Department") responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama's campaign in 2012. Little, if any, progress has been made in that investigation thus far.

- a. With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, do you believe that reassignment of the DOJ's investigation to a special prosecutor is appropriate?

RESPONSE: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign?

RESPONSE (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

- c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?

RESPONSE: (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?

RESPONSE (b) (5) [REDACTED]
[REDACTED]
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7. National security is always of paramount importance for the Justice Department. The January 2015 Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called "lone wolf" attacks.

- a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?

RESPONSE (b) (5) [REDACTED]
[REDACTED]

(b) (5)

[REDACTED]

b. Do you believe that the current “bulk collection” regime under FISA Section 215 is lawful?

RESPONSE (b) (5)

[REDACTED]

c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE: (b) (5)

[REDACTED]

d. President Obama has indicated that he supports a legislative reform of Section 215’s bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE (b) (5)

[REDACTED]

e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and “lone wolves”?

RESPONSE (b) (5)

[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]

8. Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests for information from Congress about outstanding issues related to Operation Fast and Furious?

RESPONSE (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]

9. Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?

RESPONSE: (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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10. In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the State provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly, now Louisiana has to provide data for the upcoming school year and for every school year as long as the

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- b. If confirmed, will you use Justice Department resources to obstruct, monitor, or regulate school-choice programs?
- d. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE (b) (5)

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11. A 2013 report by the DOJ's Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE (b) (5)

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12. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: (b) (5)

[REDACTED]

(b) (5)

13. As the former U.S. Attorney for the Northern District of Georgia and the former Vice Chair of the Attorney General's Advisory Committee, you are no doubt familiar with the DOJ's recent "Smart on Crime" Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

- a. What are your views on those DOJ initiatives and proposals?
- b. Do they make the work of federal prosecutors harder?
- c. Do they make the American People safer?
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RESPONSE to a-d (b) (5)

[Redacted response text]

(b) (5)

[Redacted response text]

(b) (5) [REDACTED]

- e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of their sentences?
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RESPONSE to e-f (b) (5) [REDACTED]

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- a. Do you agree with the current DOJ enforcement policies and priorities outlined in the Cole Memorandum?

RESPONSE (b) (5) [REDACTED]

(b) (5) [REDACTED]

- b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE: (b) (5) [REDACTED]

- c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: (b) (5) [REDACTED]

15. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion that, if it does, it is a minor problem with no real effect on the integrity of elections.

- a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE (b) (5) [REDACTED]

- b. Do you think that voter fraud is a *bona fide* issue that states should be entitled to address with voter ID laws?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

16. First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of Fox News reporter James Rosen – the Department claimed that Rosen was a potential co-conspirator with a State Department contractor in violation of the Espionage Act. Since then, the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain that notice of a subpoena may be withheld only if notifying the journalist would present a "clear and substantial threat" to an investigation or to national security.

- a. Do you agree that the Department's treatment of journalists has been heavyhanded and that reform of DOJ practices was necessary?

RESPONSE (b) (5)

[REDACTED]

- b. Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

c. Do you support the new guidelines?

RESPONSE (b) (5)

d. As a former federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE (b) (5)

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RESPONSE (b) (5)

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process whatsoever.

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RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- b. What steps do you plan to take, if confirmed as Deputy Attorney General, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

Bruck, Andrew J. (ODAG)

From: Bruck, Andrew J. (ODAG)
Sent: Monday, April 13, 2015 8:28 AM
To: Dix, Melanie (ODAG)
Subject: Fwd: WH edits
Attachments: Grassley QFRs for Yates - 4 12 2015 SQY Edits CLEAN.docx; ATT00001.htm; Perdue QFRs for Yates - 4 10 2015 SQY Edits CLEAN.docx; ATT00002.htm; Sessions QFRs for Yates - 4 12 2015 SQY Edits CLEAN.docx; ATT00003.htm

Can you print Perdue and sessions-- not Grassley

Begin forwarded message:

From: "Williams, Elliot (OLA)" (b) (6) >
Date: April 12, 2015 at 11:16:27 PM EDT
To: "Bruck, Andrew J. (ODAG)" (b) (6) >
Cc: "Goldberg, Daniel L. (OLA)" (b) (6) >, "Wade Tyson, Jill C (OLA)" (b) (6) >
Subject: WH edits

Andrew – here is a clean draft with Sally’s edits, with the White House’s edits and comments in redline. Take a look and let us know what you think. We may still need to work wit (b) (5) [REDACTED], per Peter’s comment. Again, let’s sort all of this out first thing in the morning. Thanks again.

Updated 4/9/2015

Senator David Perdue
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To be Deputy Attorney General of the United States
March 31, 2015

1. As a former federal prosecutor, I know you are familiar with the concept of prosecutorial discretion. What, if any, are the limits of the President's discretion to enforce federal law?

RESPONSE: (b) (5)

[REDACTED]

2. In his Memorandum Opinion and Order in *Texas v. United States*, B-14-254 (S.D. Tex. Feb. 16, 2015), Judge Hanen enjoined the implementation of President Obama's Deferred Action for Parental Accountability Program ("DAPA") and of the "three expansions/additions to the [Deferred Action for Childhood Arrivals Program, hereinafter "DACA"]," finding that the government had "clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act." *Mem. Op.* at 123. Do you agree that in promulgating and implementing DAPA and the DACA expansions, the government acted unlawfully?

RESPONSE (b) (5)

[REDACTED]

3. According to press reports, at a recent hearing on the injunction in the *Texas* case, Judge Hanen told the government that "I was made to look like an idiot. I believed your word that nothing would happen." The judge was referring to the more than 100,000 three-year DACA renewals the government processed in the weeks following issuance of the injunction. Is it the Justice Department's position that the government is authorized to continue processing of DACA renewals during the pendency of the *Texas* injunction? If so, please explain the legal basis for your answer.

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RESPONSE: (b) (5)

4. With respect to the President's executive actions on immigration implemented through the DACA and DAPA programs, please explain whether you share the view of Attorney General nominee Loretta Lynch that the Office of Legal Counsel memorandum setting forth the argument for the President's actions are constitutional and "reasonable."

RESPONSE: (b) (5)

5. Please explain your view on how, or whether, the President's executive action on immigration implemented through the DACA and DAPA programs comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.

RESPONSE: (b) (5)

6. It's now indisputable that the Internal Revenue Service ("IRS") targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice ("DOJ" or "Department") responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama's campaign in 2012. Little, if any, progress has been made in that investigation thus far.

- a. With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, do you believe that reassignment of the DOJ's investigation to a special prosecutor is appropriate?

RESPONSE: (b) (5)

Updated 4/9/2015

(b) (5)

- b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign?

RESPONSE: (b) (5)

- c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?

RESPONSE: (b) (5)

- d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?

RESPONSE: (b) (5)

7. National security is always of paramount importance for the Justice Department. The January 2015 Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called "lone wolf" attacks.

- a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?

RESPONSE (b) (5)

(b) (5)

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(b) (5) [REDACTED]

b. Do you believe that the current “bulk collection” regime under FISA Section 215 is lawful?

RESPONSE (b) (5) [REDACTED]

c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE: (b) (5) [REDACTED]

d. President Obama has indicated that he supports a legislative reform of Section 215’s bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE (b) (5) [REDACTED]

e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and “lone wolves”?

RESPONSE: (b) (5) [REDACTED]

Updated 4/9/2015

(b) (5)

8. Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests for information from Congress about outstanding issues related to Operation Fast and Furious?

RESPONSE: (b) (5)

As you are aware, there is ongoing litigation related to your question, and I understand that the Department has produced documents consistent with the district court's order in that litigation.

9. Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?

RESPONSE: (b) (5)

10. In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the State provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly, now Louisiana has to provide data for the upcoming school year and for every school year as long as the

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program is in place.

- a. Do you agree with the DOJ's decision to intervene in this case?
- b. If confirmed, will you use Justice Department resources to obstruct, monitor, or regulate school-choice programs?
- d. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE: (b) (5)

11. A 2013 report by the DOJ's Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE: (b) (5)

12. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: (b) (5)

(b) (5)

13. As the former U.S. Attorney for the Northern District of Georgia and the former Vice Chair of the Attorney General's Advisory Committee, you are no doubt familiar with the DOJ's recent "Smart on Crime" Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

- a. What are your views on those DOJ initiatives and proposals?
- b. Do they make the work of federal prosecutors harder?
- c. Do they make the American People safer?
- d. Are you going to continue them if you are confirmed as Deputy Attorney General?

RESPONSE to a-d: (b) (5)

[REDACTED]

[REDACTED]

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(b) (5)

- e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of their sentences?
- f. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for offenders who have received so-called “stacked” or consecutive mandatory minimum sentences under 18 U.S.C. § 924 or other provisions of federal law?

RESPONSE to e-f: (b) (5)

14. The 2013 Cole Memorandum explains the DOJ’s priorities on enforcement of federal law regarding marijuana offenses. Several jurisdictions have recently legalized cultivation and distribution of marijuana for personal use, in effect, initiating a series of state regulatory regimes that contravene federal drug laws.

- a. Do you agree with the current DOJ enforcement policies and priorities outlined in the Cole Memorandum?

RESPONS

(b) (5)

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(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion that, if it does, it is a minor problem with no real effect on the integrity of elections.

- a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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- b. Do you think that voter fraud is a *bona fide* issue that states should be entitled to address with voter ID laws?

RESPONSE: (b) (5)

[REDACTED]

[REDACTED]

16. First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of Fox News reporter James Rosen – the Department claimed that Rosen was a potential co- conspirator with a State Department contractor in violation of the Espionage Act. Since then, the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain that notice of a subpoena may be withheld only if notifying the journalist would present a "clear and substantial threat" to an investigation or to national security.

- a. Do you agree that the Department's treatment of journalists has been heavyhanded and that reform of DOJ practices was necessary?

RESPONSE: (b) (5)

[REDACTED]

- b. Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?

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RESPONSE: (b) (5)

[REDACTED]

c. Do you support the new guidelines?

RESPONSE: (b) (5)

[REDACTED]

d. As a former federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE: (b) (5)

[REDACTED]

e. Going forward, how should the Justice Department distinguish itself from the Holder Justice Department when it comes to investigation of journalists?

RESPONSE: (b) (5)

[REDACTED]

17. There have been significant developments recently at the DOJ regarding policies on civil asset forfeiture in response to abuses by U.S. Attorney's Offices and federal and state agencies. Attorney General Holder recently announced that the DOJ will end the Equitable Sharing Program, which essentially apportions billions of dollars in seized assets between federal, state, and local authorities – a huge pool of money that clearly created a risk of encouraging aggressive, if not unlawful, seizures from individuals who

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are not charged with a crime, have not been indicted, and have not enjoyed any due process whatsoever.

- a. Do you believe that there have been inappropriate or excessive seizures by your office or by the DOJ with respect to civil asset forfeitures, adoptive seizures, and equitable sharing practices?

RESPONSE: (b) (5)

[REDACTED]

[REDACTED]

- b. What steps do you plan to take, if confirmed as Deputy Attorney General, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE (b) (5)

[REDACTED]

[REDACTED]

Bruck, Andrew J. (ODAG)

From: Bruck, Andrew J. (ODAG)
Sent: Monday, April 13, 2015 4:53 PM
To: Uriarte, Carlos (ODAG) (b) (6)
Subject: FW: Sessions, Tillis, Durbin, Feinstein, Franken
Attachments: Grassley QFRs for Yates -FINAL.docx; Perdue QFRs for Yates - FINAL.docx

Grassley

From: Williams, Elliot (OLA)
Sent: Monday, April 13, 2015 4:10 PM
To: Axelrod, Matthew (ODAG)
Cc: Goldberg, Daniel L. (OLA); Bruck, Andrew J. (ODAG)
Subject: RE: Sessions, Tillis, Durbin, Feinstein, Franken

And here are Perdue and Grassley with a caveat – we are still waiting on (b) (5) from the White House. Spoke to them in person about it around 3, and then again emailed not long ago. So we should expect it shortly.

<<Grassley QFRs for Yates -FINAL.docx>> <<Perdue QFRs for Yates - FINAL.docx>>

From: Williams, Elliot (OLA)
Sent: Monday, April 13, 2015 3:42 PM
To: Axelrod, Matthew (ODAG)
Cc: Goldberg, Daniel L. (OLA); Bruck, Andrew J. (ODAG)
Subject: Sessions, Tillis, Durbin, Feinstein, Franken
Importance: High

Matt – these five are done. The remaining two should be coming in momentarily. We would like to hit send on them to Congress at 4:30.

<< File: Durbin QFRs for Yates - FINAL.docx >> << File: Feinstein QFRs for Yates - FINAL.docx >> << File: Franken QFRs for Yates - FINAL.docx >> << File: Sessions QFRs for Yates - FINAL.docx >> << File: Tillis QFRs for Yates - FINAL.docx >>

Elliot Williams

Deputy Assistant Attorney General for Legislative Affairs

U.S. Department of Justice

Senator David Perdue
Questions for the Record
On the Nomination of Sally Quillian Yates
To be Deputy Attorney General of the United States
March 31, 2015

1. As a former federal prosecutor, I know you are familiar with the concept of prosecutorial discretion. What, if any, are the limits of the President's discretion to enforce federal law?

RESPONSE (b) (5)

[REDACTED]

2. In his Memorandum Opinion and Order in *Texas v. United States*, B-14-254 (S.D. Tex. Feb. 16, 2015), Judge Hanen enjoined the implementation of President Obama's Deferred Action for Parental Accountability Program ("DAPA") and of the "three expansions/additions to the [Deferred Action for Childhood Arrivals Program, hereinafter "DACA"]," finding that the government had "clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act." *Mem. Op.* at 123. Do you agree that in promulgating and implementing DAPA and the DACA expansions, the government acted unlawfully?

RESPONSE (b) (5)

[REDACTED]

3. According to press reports, at a recent hearing on the injunction in the *Texas* case, Judge Hanen told the government that "I was made to look like an idiot. I believed your word that nothing would happen." The judge was referring to the more than 100,000 three-year DACA renewals the government processed in the weeks following issuance of the injunction. Is it the Justice Department's position that the government is authorized to continue processing of DACA renewals during the pendency of the *Texas* injunction? If so, please explain the legal basis for your answer.

RESPONSE: (b) (5)

[REDACTED]

4. With respect to the President's executive actions on immigration implemented through the DACA and DAPA programs, please explain whether you share the view of Attorney General nominee Loretta Lynch that the Office of Legal Counsel memorandum setting forth the argument for the President's actions are constitutional and "reasonable."

RESPONSE (b) (5)

[REDACTED]

5. Please explain your view on how, or whether, the President's executive action on immigration implemented through the DACA and DAPA programs comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.

RESPONSE (b) (5)

[REDACTED]

6. It's now indisputable that the Internal Revenue Service ("IRS") targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice ("DOJ" or "Department") responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama's campaign in 2012. Little, if any, progress has been made in that investigation thus far.

- a. With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, do you believe that reassignment of the DOJ's investigation to a special prosecutor is appropriate?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President

Obama's campaign?

RESPONSE (b) (5)

- c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?**

RESPONSE (b) (5)

- d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?**

RESPONSE (b) (5)

7. National security is always of paramount importance for the Justice Department. The January 2015 Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called "lone wolf" attacks.

- a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?**

RESPONSE: (b) (5)

- b. Do you believe that the current "bulk collection" regime under FISA Section 215 is lawful?**

RESPONSE (b) (5) [REDACTED]

c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE (b) (5) [REDACTED]

d. President Obama has indicated that he supports a legislative reform of Section 215's bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE (b) (5) [REDACTED]

e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and "lone wolves"?

RESPONSE: (b) (5) [REDACTED]

8. Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests for information from Congress about outstanding issues related to Operation Fast and Furious?

RESPONSE (b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5)

9. Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?

RESPONSE: (b) (5)

(b) (5)

10. In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the State provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly, now Louisiana has to provide data for the upcoming school year and for every school year as long as the program is in place.

- a. Do you agree with the DOJ's decision to intervene in this case?
- b. If confirmed, will you use Justice Department resources to obstruct, monitor, or regulate school-choice programs?
- c. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE (b) (5)

11. A 2013 report by the DOJ’s Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ’s Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE (b) (5)

12. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: (b) (5)

13. As the former U.S. Attorney for the Northern District of Georgia and the former Vice Chair of the Attorney General’s Advisory Committee, you are no doubt familiar with the DOJ’s recent “Smart on Crime” Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

- a. What are your views on those DOJ initiatives and proposals?**
- b. Do they make the work of federal prosecutors harder?**
- c. Do they make the American People safer?**
- d. Are you going to continue them if you are confirmed as Deputy Attorney General?**

RESPONSE to a-d: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of their sentences?
- f. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for offenders who have received so-called “stacked” or consecutive mandatory minimum sentences under 18 U.S.C. § 924 or other provisions of federal law?

RESPONSE to e-f: (b) (5)

[REDACTED]

(b) (5)

14. The 2013 Cole Memorandum explains the DOJ's priorities on enforcement of federal law regarding marijuana offenses. Several jurisdictions have recently legalized cultivation and distribution of marijuana for personal use, in effect, initiating a series of state regulatory regimes that contravene federal drug laws.

- a. Do you agree with the current DOJ enforcement policies and priorities outlined in the Cole Memorandum?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE: (b) (5)

[REDACTED]

- c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: (b) (5)

[REDACTED]

(b) (5)

15. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion that, if it does, it is a minor problem with no real effect on the integrity of elections.

a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE (b) (5)

b. Do you think that voter fraud is a *bona fide* issue that states should be entitled to address with voter ID laws?

RESPONSE (b) (5)

(b) (5)

16. First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of Fox News reporter James Rosen – the Department claimed that Rosen was a potential co- conspirator with a State Department contractor in violation of the Espionage Act. Since then, the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain that notice of a subpoena may be withheld only if notifying the journalist would present a "clear and substantial threat" to an investigation or to national security.

- a. Do you agree that the Department's treatment of journalists has been heavyhanded and that reform of DOJ practices was necessary?

RESPONSE (b) (5)

[REDACTED]

- b. Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?

RESPONSE (b) (5)

[REDACTED]

- c. Do you support the new guidelines?

RESPONSE (b) (5)

[REDACTED]

- d. As a former federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE (b) (5)

[REDACTED]

- e. Going forward, how should the Justice Department distinguish itself from the Holder Justice Department when it comes to investigation of journalists?

RESPONSE (b) (5)

[REDACTED]

(b) (5)

17. There have been significant developments recently at the DOJ regarding policies on civil asset forfeiture in response to abuses by U.S. Attorney's Offices and federal and state agencies. Attorney General Holder recently announced that the DOJ will end the Equitable Sharing Program, which essentially apportions billions of dollars in seized assets between federal, state, and local authorities – a huge pool of money that clearly created a risk of encouraging aggressive, if not unlawful, seizures from individuals who are not charged with a crime, have not been indicted, and have not enjoyed any due process whatsoever.

- a. Do you believe that there have been inappropriate or excessive seizures by your office or by the DOJ with respect to civil asset forfeitures, adoptive seizures, and equitable sharing practices?

RESPONSE (b) (5)

(b) (5)

- b. What steps do you plan to take, if confirmed as Deputy Attorney General, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE: (b) (5)

(b) (5)

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Gaston, Molly (OAG)

From: Gaston, Molly (OAG)
Sent: Tuesday, May 5, 2015 4:31 PM
To: Washington, Tracy T (OAG)
Cc: Pokorny, Carolyn (OAG)
Subject: Binder
Attachments: TOC.docx; 11-Clemency and Pardons-b.docx; 12-Community Police Relations-a.docx; 12-Community Police Relations-b.docx; 13-Conference Approval and Reporting.docx; 14-Congressional Oversight.docx; 15-Cuba.docx; 16-Cyber Crime and Data Breaches-a.docx; 16-Cyber Crime and Data Breaches-b.docx; 17-DEA Cannabidiol (CBD).docx; 17-DEA DaTscan.docx; 18-DEA Heroin Crisis-a.docx; 19-DEA Heroin Crisis-b.docx; 20-DEA OIG Report.docx; 21-DEA Regulatory Authorities.docx; 22-Deepwater Horizon Oil Spill.docx; 23-Disparate Impact.docx; 24-DOMA and Windsor.docx; 25-Domestic Radicalization-a.docx; 25-Domestic Radicalization-b.docx; 26-Electronic Surveillance ECPA.docx; 27-Electronic Surveillance Location Information.docx; 28-FBI Whistleblower Rights.docx; 29-Ferguson.docx; 30-Financial and Mortgage Fraud.docx; 31-Firearms and Terrorist Watchlist.docx; 32-Firearms Safety Budget.docx; 33-FISA Derived Information.docx; 34-FISA Reform.docx; 35-Section 215 Litigation.docx; 36-Forensics FBI Hair Review.docx; 37-Grants Funding.docx; 38-Grants Program Elimination.docx; 39-GTMO.docx; 40-Hate Crime Enforcement.docx; 41-Health Care Fraud-a.docx; 41-Health Care Fraud-b.docx; 42-HSBC.docx; 43-Human Trafficking-a.doc; 43-Human Trafficking-b.docx; 44-Immigration EOIR Caseload.docx; 45-Inspector General Access.docx; 46-IRS Investigation.docx; 47-Louisiana School Voucher Program.doc; 48-Marijuana Enforcement-a.docx; 48-Marijuana Enforcement-b.docx; 49-Media Investigations and Media Shield.docx; 50-National Security Letters.docx; 51-OJJDP.docx; 52-Online Gambling.docx; 53-Pattern or Practice Investigations.docx; 54-PREA.doc; 55-Priorities FY 2016.docx; 56-RMBS.docx; 57-Rule of Law-Selective Enforcement.docx; 58-Sentencing Reform-a.docx; 58-Sentencing Reform-b.docx; 59-Sequestration.docx; 60-State Department Emails.docx; 61-SSCI Report.docx; 62-Targeted killings.docx; 63-Transparency - executive orders.docx; 64-Transparency FISC Opinions.docx; 65-Transparency -national security.docx; 66-UAS.doc; 67-Voting Rights - Voter ID.docx; 68-Walter Scott.docx; 1-Asset Forfeiture-a.docx; 1-Asset Forfeiture-b.docx; 2-ATF Armor Piercing Ammunition.docx; 3-ATF Fast and Furious.docx; 4-AUMF-ISIL.docx; 5-Benghazi.docx; 6-Boston Marathon Bombings.docx; 7-CALEA - Going Dark.docx; 8-Cell-site technology.docx; 9-Chokepoint.docx; 10-Civilian Trials of Terrorist Suspects-a.docx; 10-Civilian Trials of Terrorist Suspects-b.docx; 11-Clemency and Pardons-a.docx

Tracy, sorry to ask you to do this, but could you please make the AG a new prep binder that combines the budget and oversight matters? Enclosed please find the Table of Contents and all of the papers. When there are two papers with the same tab number, can be put a blue sheet of paper between them? Thank you!!!

Molly Gaston
Office of the Attorney General
Office (b) (6) | Cell (b) (6)

Axelrod, Matthew (ODAG)

From: Axelrod, Matthew (ODAG)
Sent: Saturday, May 16, 2015 7:51 AM
To: Yates, Sally (ODAG)
Cc: Childs, Heather G. (ODAG)
Subject: Fwd: USA FREEDOM Talkers/Qand A
Attachments: USA FREEDOM Q and A.docx; ATT00001.htm; USA FREEDOM Act Talking Points.docx; ATT00002.htm

Sally, here are general background points on USA Freedom. OLA will use them to craft specific talkers for a call with Cornyn which they'll try to schedule for early next week.

Begin forwarded message:

From: "Wiegmann, Brad (NSD)" (b) (6) >
Date: May 15, 2015 at 7:29:02 PM EDT
To: "Axelrod, Matthew (ODAG)" (b) (6) >
Cc: "Carlin, John (NSD)" (b) (6) >, "Evans, Stuart (NSD)" (b) (6) >, "Gauhar, Tashina (ODAG)" (b) (6) >
Subject: USA FREEDOM Talkers/Qand A

Hi Matt – As discussed, here are some quick talkers for Sally to use in any calls on USA FREEDOM, plus a q and a document that we did for John for his all member briefing earlier this week. (It includes a q and a on “why not a short/straight reauth,” “what about the issue of data retention,” as discussed, plus some others on the 2d Circuit ruling.) Hope this is helpful, and let me know what else you need.
Thanks.

Axelrod, Matthew (ODAG)

From: Axelrod, Matthew (ODAG)
Sent: Monday, May 18, 2015 10:15 AM
To: Yates, Sally (ODAG)
Cc: Childs, Heather G. (ODAG)
Subject: FW: USA FREEDOM Talkers/Qand A
Attachments: USA FREEDOM Act Talking Points.docx; USA FREEDOM Q and A (EL - Clean).docx; USA FREEDOM Q and A (EL).docx

Here are the TPs for your calls. Eric will work with Melanie to schedule.

From: Losick, Eric P. (OLA)
Sent: Monday, May 18, 2015 9:17 AM
To: Axelrod, Matthew (ODAG)
Cc: Kadzik, Peter J (OLA); Childs, Heather G. (ODAG); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG)
Subject: USA FREEDOM Talkers/Qand A

Matt,

Please find attached some suggested updates to the Q&A NSD provided for the DAG's use in making calls to Senators Cornyn, Isakson, and Perdue. I've attached both clean and redline versions so that NSD can review the modifications.

I made an effort to tailor the Q&A to questions the DAG is likely to face from these particular Senators.

There are a few classified issues (not reflected in the Q&A) that Cornyn and others should not bring up on an open line but may be at the forefront of their minds. I can alert the DAG to these issues prior to the call and she can redirect to a classified channel if need be.

I did not make any edits to the Talking Points NSD provided, which are attached here again for completeness.

Absent an objection or other concerns, I'll begin setting up the calls today.

Eric P. Losick
Deputy Assistant Attorney General
Office of Legislative Affairs
United States Department of Justice

(b) (6)

(b) (6)

Axelrod, Matthew (ODAG)

From: Axelrod, Matthew (ODAG)
Sent: Wednesday, May 20, 2015 7:28 AM
To: Yates, Sally (ODAG)
Subject: Fwd: Sunset Points AND Press Points
Attachments: Effect of Sunset (Clean Final).docx; ATT00001.htm

Sally, some additional background for your calls today.

Begin forwarded message:

From: "Gauhar, Tashina (ODAG)" (b) (6) >
Date: May 20, 2015 at 12:07:22 AM EDT
To: "Axelrod, Matthew (ODAG)" (b) (6) >
Subject: Fwd: Sunset Points AND Press Points

Another paper put together today explaining that the sunset provision means that the three provisions (215, roving, and lone wolf) will expire at midnight on May 31.

Begin forwarded message:

From: "Losick, Eric P. (OLA)" (b) (6) >
Date: May 19, 2015 at 10:13:57 PM EDT
To: "Fonzone, Christopher" (b)(6) per NSC >, "Evans, Stuart (NSD)" (b) (6) (b)(3), (b)(6) (b)(6), (7)(C), (7)(E) per FBI (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI (b)(3) per NSA, Robert Li (b)(3), (b)(6) per ODNI, Deirdre M Wals (b)(3), (b)(6) per ODNI, "Wiegmann, Brad (NSD)" (b) (6) >, "Boyer, Robert (NSD)" (b) (6) >, "Fisher, Janet C. (OLA)" (b) (6) >, "Gauhar, Tashina (ODAG)" (b) (6) (b)(3) per NSA (b)(3) per NSA, "Anthony, Teisha (b)(3) per NSA (b)(3) per NSA (b)(3) per NSA, "Sayre, Valerie" (b)(3) per NSA, "Bauman, Ethan (b)(3) per NSA, "Kelly, Stephen D. (DO) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Baker, James A. (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI (b)(6), (7)(C), (7)(E) per FBI (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI (b)(3), (b)(6) (b)(3), (b)(6) (b)(3), (b)(6) (b)(6) per Treasury @treasury.gov"

(b)(6) per Treasury <Paul.Ahern@treasury.gov>, "<Paul.Ahern@treasury.gov>, "<Bradley.Smith2@treasury.gov>
<Bradley.Smith2@treasury.gov>
Cc: "Ratner, Jeffrey" (b)(6) per NSC >, "Pollack, Joshua"
(b)(6) per NSC >, "Tess, Caroline"
(b)(6) per NSC >, "Egan, Brian J." (b)(6) per NSC >,
"Heinzelman, Kate" (b)(6) per NSC >, "Price, Ned"
(b)(6) per NSC >
Subject: Re: Sunset Points AND Press Points

A clean, final is attached, which accepts all edits from the draft Chris circulated earlier. This is the document we will deploy tomorrow.

Effect of Sunset on Expiring Authorities

Although there is some ambiguity in the language, we think the better, and more prudent, view is that Section 215 of the USA PATRIOT Act, as well as FISA's "lone wolf" and "roving wiretap" provisions, sunset at midnight on Sunday, May 31, 2015 (or, more technically, at the very first moment of the day on Monday, June 1).

If Congress does not act to reauthorize these provisions prior to that time the "business records" authority contained in Title V of the Foreign Intelligence Surveillance Act will revert to its form on October 25, 2001, and the "lone wolf" and "roving wiretap" provisions, codified at 50 U.S.C. §1801(b)(1)(C) and 1805(c)(2)(B), respectively, will sunset entirely.

After midnight on Sunday, May 31, 2015, the expiring authorities will be unavailable for use by the government with respect to any foreign intelligence investigation beginning after that date, until such time as legislation is enacted to reauthorize those authorities in some form.

Legislation enacted after midnight on Sunday, May 31, 2015, that seeks to reauthorize the authorities by amending the dates that appear in Section 102(b)(1) of the USA PATRIOT Improvements and Reauthorization Act of 2005 and Section 6001(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, we believe, would be effective in making the authorities operative again, but may expose the government to some litigation risk in the event of legal challenge. To the extent Congress would want to make its intent even clearer, however, we believe that could be done with relatively simple language; it would not require reenacting the lapsed provisions in their entirety.

After May 22, 2015, the National Security Agency will need to begin taking steps to wind down the bulk telephone metadata program in anticipation of a possible sunset in order to ensure that it does not engage in any unauthorized collection or use of the metadata. NSA will attempt to ensure that any shutdown of the program occurs as close in time as possible to the expiration of the authority, assuming the program has not been reauthorized in some form prior to the scheduled sunset of Section 215. In the event of a lapse in authority and subsequent reauthorization, there will necessarily be some time needed to restart the program.

Further, the February 26, 2015 Court order renewing the authority for the NSA's bulk telephone metadata program, which expires at 5:00 pm on June 1, 2015, directs the government to file any proposed renewal application no later than Friday, May 22, 2015, if the government seeks to renew the authorities granted in the order prior to their expiration under the order.

For these reasons, after May 22, 2015, it will become increasingly difficult for the government to avoid a lapse in the current NSA program of at least some duration.

Wiegmann, Brad (NSD)

From: Wiegmann, Brad (NSD)
Sent: Friday, May 22, 2015 11:41 AM
To: Losick, Eric P. (OLA); Cheung, Denise (OAG); Werner, Sharon (OAG)
Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG)
Subject: RE: DOJ/NSA Calls
Attachments: USA FREEDOM Act Talking Points.docx

Also adding the TPs NSD prepared for the DAG.

From: Losick, Eric P. (OLA)
Sent: Friday, May 22, 2015 11:06 AM
To: Cheung, Denise (OAG); Werner, Sharon (OAG)
Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG)
Subject: RE: DOJ/NSA Calls

I took the liberty of making a few refinements to the TPs the NSC provided. They are attached along with the larger Q&A document that the AG, DAG, and AAG having been using for Hill engagements.

From: Cheung, Denise (OAG)
Sent: Friday, May 22, 2015 10:50 AM
To: Werner, Sharon (OAG); Losick, Eric P. (OLA)
Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG)
Subject: RE: DOJ/NSA Calls

Do we have any updated talking points for the AG to use?

From: Cheung, Denise (OAG)
Sent: Friday, May 22, 2015 10:26 AM
To: Werner, Sharon (OAG); Losick, Eric P. (OLA)
Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG); Schedule, AG (SMO)
Subject: RE: DOJ/NSA Calls

Have we reached out to (b) (5) office yet? The AG is leaving early today and has a pretty packed schedule today. Thanks.

From: Werner, Sharon (OAG)
Sent: Thursday, May 21, 2015 3:14 PM
To: Losick, Eric P. (OLA); Cheung, Denise (OAG); Axelrod, Matthew (ODAG)
Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG);

Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG); Schedule, AG (SMO)

Subject: RE: DOJ/NSA Calls

Happy to have the AG a (b) (5) tomorrow. Adding Theresa to reach out to their office.

From: Losick, Eric P. (OLA)

Sent: Thursday, May 21, 2015 2:16 PM

To: Cheung, Denise (OAG); Axelrod, Matthew (ODAG)

Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG); Werner, Sharon (OAG)

Subject: RE: DOJ/NSA Calls

Sharon, Nathaniel,

Do you need OLA to assist with POCs and scheduling?

From: Cheung, Denise (OAG)

Sent: Thursday, May 21, 2015 1:54 PM

To: Axelrod, Matthew (ODAG); Losick, Eric P. (OLA)

Cc: Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG); Werner, Sharon (OAG)

Subject: RE: DOJ/NSA Calls

Adding Sharon.

From: Axelrod, Matthew (ODAG)

Sent: Thursday, May 21, 2015 1:52 PM

To: Losick, Eric P. (OLA)

Cc: Cheung, Denise (OAG); Kadzik, Peter J (OLA); Singh, Anita (NSD); Wiegmann, Brad (NSD); Evans, Stuart (NSD); Gauhar, Tashina (ODAG); Gaston, Molly (OAG); Fisher, Janet C. (OLA); Gamble, Nathaniel (ODAG)

Subject: Re: DOJ/NSA Calls

Yes, I'm sure that the DAG would be happy to make the calls. Adding Nathaniel for scheduling purposes.

On May 21, 2015, at 1:48 PM, Losick, Eric P. (OLA) (b) (6) > wrote:

Denise, Matt,

(b)(5) per NSC DOJ could make calls to the members listed below in support of USA FREEDOM. A cloture vote is now scheduled for Saturday on the bill and the result is expected to be very close.

My recommendation, based on confirmation votes, would be t (b) (5)
(b) (5) Would the AG and the DAG be willing to make these calls?

(b) (5)

Eric

Portman

Enzi

Moran
Toomey
Rounds
Sullivan

From: Ratner, Jeffrey [[mailto:](#)(b)(6) per NSC]
Sent: Thursday, May 21, 2015 12:57 PM
To: 'Bauman, Ethan'; Sayre, Valerie; Losick, Eric P. (OLA); Fisher, Janet C. (OLA)
Cc: Holmgren, Brett; Brookie, Graham; Tess, Caroline; Pollack, Joshua; Kreikemeier, Chad; Perkins, Nate; Rudman, Amanda
Subject: DOJ/NSA Calls
Importance: High

Thank you all for your help at today's session, it was tremendously useful (b)(5) per
(b)(5) per NSC
(b)(5) per NSC
(b)(5) per NSC

Thank you!

Jeff

Calls for May 21

NSA
King
Nelson
Collins
Hoeven
Sasse
Scott
Risch
Ernst
Lankford

DOJ

Portman

Enzi

Moran

Toomey

Rounds

Sullivan

Wiegmann, Brad (NSD)

From: Wiegmann, Brad (NSD)
Sent: Thursday, May 28, 2015 10:37 AM
To: Carlin, John (NSD); Werner, Sharon (OAG); Cheung, Denise (OAG)
Cc: Evans, Stuart (NSD); McCord, Mary (NSD); Axelrod, Matthew (ODAG); Gauhar, Tashina (ODAG)
Subject: RE: Letter to Senate on FISA
Attachments: IC-Law Enforcement Letter to the Senate on FISA (3).docx

I think we should consider addin (b) (5)

From: Carlin, John (NSD)
Sent: Thursday, May 28, 2015 10:11 AM
To: Werner, Sharon (OAG); Cheung, Denise (OAG)
Cc: Evans, Stuart (NSD); McCord, Mary (NSD); Axelrod, Matthew (ODAG); Gauhar, Tashina (ODAG); Wiegmann, Brad (NSD)
Subject: FW: Letter to Senate on FISA
Importance: High

Fyi, incoming. Stu lead review of the language for NSD.

From: Holmgren, Brett [[mailto:](#) (b)(6) per NSC]
Sent: Thursday, May 28, 2015 10:09 AM
To: Carlin, John (NSD); Evans, Stuart (NSD)
Subject: FW: Letter to Senate on FISA
Importance: High

Gentleman,

Here's the joint letter to the Senate on FISA (b) (5) Plan is to release this publicly later this afternoon.

Thanks,
Brett

From: Holmgren, Brett
Sent: Thursday, May 28, 2015 10:03 AM
To: Rybicki, James E. (DO) (OGA (b)(6), (7)(C) per FBI) (DO) (FBI)
Subject: Letter to Senate on FISA
Importance: High

Jim,

Lisa spoke to the Director this morning about (b)(5) per FBI

DOJ/AG's office is reviewing concurrently. Intent is to release the

letter publicly later today.

Can you please share with the Director for his feedback/edits? Once all principals are comfortable with the language, I understand that DNI Legislative Affairs will send around a cleaned up version for actual signatures (or autopen). Let me know if there are any questions or concerns.

Thanks,
Brett

Brett Holmgren
Senior Policy Advisor to the Assistant to the President
for Homeland Security and Counterterrorism
National Security Council
Office (b)(6) per NSC
Secur (b)(6) per NSC
NIPRNE (b)(6) per NSC
SIPRNET (b)(6) per NSC
JWICS (b)(6) per NSC

Evans, Stuart (NSD)

From: Evans, Stuart (NSD)
Sent: Thursday, May 28, 2015 10:48 AM
To: Wiegmann, Brad (NSD); Carlin, John (NSD); Werner, Sharon (OAG); Cheung, Denise (OAG)
Cc: McCord, Mary (NSD); Axelrod, Matthew (ODAG); Gauhar, Tashina (ODAG)
Subject: RE: Letter to Senate on FISA
Attachments: IC-Law Enforcement Letter to the Senate on FISA (nsd 2).docx

A few additional thoughts attached (including whether we should (b) (5))

From: Wiegmann, Brad (NSD)
Sent: Thursday, May 28, 2015 10:37 AM
To: Carlin, John (NSD); Werner, Sharon (OAG); Cheung, Denise (OAG)
Cc: Evans, Stuart (NSD); McCord, Mary (NSD); Axelrod, Matthew (ODAG); Gauhar, Tashina (ODAG)
Subject: RE: Letter to Senate on FISA

Duplicative Information - See Document ID 0.7.10663.31506

Cheung, Denise (OAG)

From: Cheung, Denise (OAG)
Sent: Thursday, May 28, 2015 10:56 AM
To: Werner, Sharon (OAG)
Subject: FW: Letter to Senate on FISA
Attachments: IC-Law Enforcement Letter to the Senate on FISA (nsd 2).docx

We'll need to bring this up with her ASAP – WH is pushing on getting this out as soon as possible. The only caveat is there are still proposed changes floating around.

From: Evans, Stuart (NSD)
Sent: Thursday, May 28, 2015 10:48 AM
To: Wiegmann, Brad (NSD); Carlin, John (NSD); Werner, Sharon (OAG); Cheung, Denise (OAG)
Cc: McCord, Mary (NSD); Axelrod, Matthew (ODAG); Gauhar, Tashina (ODAG)
Subject: RE: Letter to Senate on FISA

Duplicative Information - See Document ID 0.7.10663.31514

Cheung, Denise (OAG)

From: Cheung, Denise (OAG)
Sent: Thursday, May 28, 2015 11:24 AM
To: Rybicki, James E. (DO) (FBI); Werner, Sharon (OAG)
Subject: RE: Letter to Senate on FISA
Attachments: IC-Law Enforcement Letter to the Senate on FISA (3).docx

Jim:

NSD has proposed the following change to the proposed letter that addresses operational issues.

Denise

From: Rybicki, James E. (DO) (FBI) (b)(7)(E) per FBI
Sent: Thursday, May 28, 2015 11:20 AM
To: Werner, Sharon (OAG); Cheung, Denise (OAG)
Subject: FW: Letter to Senate on FISA
Importance: High

Sharon and Denise-

I just spoke to Brett Holmgren in Lisa Monaco's office (b)(5) per FBI

[REDACTED]

[REDACTED]

[REDACTED]

I'll keep you posted on our discussions over here.

Jim

From: Holmgren, Brett [[mailto:](#) (b)(6) per NSC]
Sent: Thursday, May 28, 2015 10:03 AM
To: Rybicki, James E. (DO) (FBI) (b)(6), (7)(C) per FBI (DO) (FBI)
Subject: Letter to Senate on FISA
Importance: High

Jim,

Lisa spoke to the Director this morning about (b)(5) per FBI

[REDACTED]

[REDACTED] DOJ/AG's office is reviewing concurrently. Intent is to release the

letter publicly later today.

Can you please share with the Director for his feedback/edits? Once all principals are comfortable with the language, I understand that DNI Legislative Affairs will send around a cleaned up version for actual signatures (or autopen). Let me know if there are any questions or concerns.

Thanks,
Brett

Brett Holmgren
Senior Policy Advisor to the Assistant to the President
for Homeland Security and Counterterrorism
National Security Council
Office (b)(6) per NSC
Secur (b)(6) per NSC
NIPRNE (b)(6) per NSC
SIPRNET (b)(6) per NSC
JWICS (b)(6) per NSC

Pierce, Emily (OPA)

From: Pierce, Emily (OPA)
Sent: Thursday, May 28, 2015 3:23 PM
To: Yates, Sally (ODAG)
Cc: Axelrod, Matthew (ODAG); Childs, Heather G. (ODAG)
Subject: for tomorrow's interview ...
Attachments: HOT TOPICS 5 27 15.docx

In case you get off topic questions

Cheung, Denise (OAG)

From: Cheung, Denise (OAG)
Sent: Thursday, May 28, 2015 3:26 PM
To: Carlisle, Elizabeth
Cc: Werner, Sharon (OAG)
Subject: FW: Letter to Senate on FISA
Attachments: IC-Law Enforcement Letter to the Senate on FISA (nsd 4).dc.docx

Attached is the final draft that has gone up to the NSC for final clearance. The letter will most likely be co-signed by the DNI and you.

Freeman, Andria D (OLA)

From: Freeman, Andria D (OLA)
Sent: Tuesday, June 9, 2015 11:41 AM
To: Allen, Michael (JMD); Atwell, Tonya M (JMD); Cantilena, Jennifer (JMD); Cvrkel, Marny (JMD); Deeley, Kevin (JMD); Faulkner, Lila (JMD); Foltz, Robin (JMD); Gary, Arthur (JMD); Klimavicz, Joseph (JMD); Lauria-Sullens, Jolene (JMD); Lofthus, Lee J (JMD); Long, Mariana (JMD); Miguel, Amy (JMD); Plante, Jeanette (JMD); Rodgers, Janice (JMD); Schwartz, Christine (JMD); Sims, Steven (JMD); Snell, Scott (JMD); Sutton, Jeffrey (JMD); Ward, Lisa (JMD (b)(6) per NSD (NSD (b)(6) per NSD (NSD); NSD LRM Mailbox (NSD (b)(6) per NSD (NSD); Boynton, Brian (OLC); Datla, Kirti (OLC); Forrester, Nate (OLC); Heim, Laura; McKenzie, Troy (OLC); Nitze, Jane (OLC); Coombes, William B. (CIV); Farley, Farrah (CIV); Libutti, Timothy A. (CIV); USAEO-Legislative (USA (b)(6), (b)(7)(C) per FBI (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI); Kelly, Stephen D. (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI); Oconnell, Sasha C. (DO) (FBI (b)(6), (b)(7)(C) per FBI (DO) (FBI)
Cc: Silas, Adrien (OLA); Fisher, Janet C. (OLA); Losick, Eric P. (OLA); Johnson, Joanne E. (OLA); Bruck, Andrew J. (ODAG); Jain, Samir (ODAG); Tomney, Brian (ODAG); Foster, Lisa (A2J); Katzman, Jenni (A2J)
Subject: (OLA WF11329) FW: TIME SENSITIVE: LRM [WT-114-108] ODNI Letter on HR2578 CJS Appropriations, FY 2016 (Massie Amendment) #874152225#
Attachments: CLEANED-Poe-Massie Amendment Letter to HACD 2015-06-08.docx; DNI_Letter_Massie_Amendment.pdf; POE 035.pdf; 111329CONTROL.doc

Please provide comments to Adrien Silas, OLA, no later than 3PM 6/9/15.

From: Justice Lrm (SMO)
Sent: Tuesday, June 09, 2015 11:13 AM
To: Freeman, Andria D (OLA); Johnson, Maida P. (OLA)
Subject: FW: TIME SENSITIVE: LRM [WT-114-108] ODNI Letter on HR2578 CJS Appropriations, FY 2016 (Massie Amendment) #874152225#

The letter responds to the attached amendment text and not the text pasted below. I apologize for the mix-up.
Thanks.

From: Thomas, Will
Sent: Tuesday, June 09, 2015 11:12:45 AM (UTC-05:00) Eastern Time (US & Canada)
To: DEFENSE; DHS; DL-NSS-LRM; COMMERCE; Justice Lrm (SMO); PCLOB
Cc: Sandy, Mark; Hire, Andrew D.; Horn, Shannon C.; O'Kane, Matt; Kilbride, Paul E.; Wu, William; Nelson, Kimberly P.; Hunt, Alex; Washington, Geovette; Simpkins, John; Carney, Matt; Menter, Jessica; Neill, Allie; Fucile, Tamara; Ophaso, Farouk; DL-WHO-WHGC-LRM; DL-NSS-INTEL; DL-NSS-LEGAL; DL-NSS-LEGISLATIVE; DL-NSS-CYBER; Edelman, R. David; Haun, David J.; DL-OVP-LRM; DL-WHO-DPC-Justice-LRM; Marcus, Robert; Perkins, Nate; Kreikemeier, Chad; #DISCLOSURES; Heinzelman, Kate; Bosworth, Michael; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J.; Ratner, Jeffrey; Lachman, Jonathan S.; Matthew C. Webb; ODNI (b)(3) per ODNI (b)(3) per ODNI; LaPlaca, Dan; Heins, Margie
Subject: TIME SENSITIVE: LRM [WT-114-108] ODNI Letter on HR2578 CJS Appropriations, FY 2016 (Massie Amendment) #874152225#

TIME SENSITIVE DEADLINE: 4:00 PM Tuesday, June 09, 2015

Please find attached the ODNI views letter on the Poe-Massie Amendment for H.R. 2578, the CJS Appropriations bill for FY16. The amendment text is pasted below for your reference. Provide your comments/edits/clearance on the ODNI letter by the deadline above. We apologize for the short turnaround. Thanks.

NOTE: ODNI submitted a similar letter to the Hill on a similar amendment (section 10029 of H.R. 4870, the Department of Defense Appropriations Act for FY15) during the 113th Congress. The previously cleared/submitted letter is attached as a pdf for your reference.

TEXT FOR AMENDMENT TO H.R. 2578 (CJS Appropriations):

At the end of the bill (before the short title), insert the following:

SEC. ll. (a) Except as provided by subsection (b), none of the funds made available by this Act for the Department of Justice or the Federal Bureau of Investigation may be used to mandate or request that a person (as defined in section 101(m) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(m)) alter the product or service of the person to permit the electronic surveillance (as defined in section 101(f) of such Act (50 U.S.C. 1801(f)) of any user of such product or service.

(b) Subsection (a) shall not apply with respect to mandates or requests authorized under the Communications Assistance for Law Enforcement Act (47 U.S.C. 1001 et seq.).

LRM ID: WT-114-108

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

LEGISLATIVE REFERRAL MEMORANDUM

Tuesday, June 09, 2015

TO: Legislative Liaison Officer - See Distribution

FROM: Burnim, John (for) Assistant Director for Legislative Reference

SUBJECT: LRM [WT-114-108] ODNI Letter on HR2578 CJS Appropriations, FY 2016 (Massie Amendment)

OMB CONTACT: **Thomas, Will**

E-Mai (b)(6) per OMB

PHONE (b)(6) per OMB

FAX (b)(6) per OMB

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. By the deadline above, please reply by e-mail or telephone, using the OMB Contact information above.

Please advise us if this item will affect direct spending or receipts for the purposes of the Statutory Pay-as-You-Go Act of 2010.

Thank you.

Pierce, Emily (OPA)

From: Pierce, Emily (OPA)
Sent: Wednesday, June 17, 2015 5:55 PM
To: Carlisle, Elizabeth
Cc: Meadows, Bessie L (OAG); Werner, Sharon (OAG)
Subject: Hot topics for tomorrow's presser
Attachments: HOT TOPICS 6 18 15 (final).docx

Good evening ma'am, I've attached the hot topics document for you review and we've scheduled a short prep for you in the morning as well.

I think at this point I'd say most likely questions will be o (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

Mogil, Joshua (ODAG)

From: Mogil, Joshua (ODAG)
Sent: Monday, February 1, 2016 4:30 PM
To: Childs, Heather G. (ODAG)
Subject: FW (b) (5)
Attachments: (b) (5)
(b) (5)
(b) (5)
(b) (5)

Sorry- thought I included you but I did not. A SOC from today.

From: Mogil, Joshua (ODAG)
Sent: Monday, February 01, 2016 4:28 PM
To: Swartz, Bruce (b)(6) Tashina Gauhar; Doumas, Alexandra (ODAG); Gamble, Nathaniel (ODAG); Axelrod, Matthew (ODAG); NSD AAG Coordination; Wiegmann, Brad (NSD); Brown Lee, Erika (ODAG); Gamble, Nathaniel (ODAG)
Subject: FW (b) (5)

FYI- SOC from today' (b) (5)

From: FN-WHO-NEC_Policy [mailto:(b) (6)]
Sent: Monday, February 01, 2016 4:24 PM
To: Edelman, R. David
Cc: Greenstein, Alex; FN-WHO-NEC_Tech
Subject: SOC (b) (5)

(b) (5)

- (b) (5)
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- (b) (5)
- (b) (5)
- (b) (5)

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dix, Melanie (ODAG)

From: Dix, Melanie (ODAG)
Sent: Tuesday, February 9, 2016 1:45 PM
To: Gauhar, Tashina (ODAG); Doumas, Alexandra (ODAG)
Cc: Childs, Heather G. (ODAG)
Subject: FW: AG briefing paper for review - quick turnaround needed
Attachments: FISA Section 702.docx
Importance: High

Hi Tash and Alex,

I know Alex has cleared this paper. Tash, do you have anything to add or may I let OLA know we're all set?

Thanks,

Melanie

From: Dix, Melanie (ODAG)
Sent: Friday, February 05, 2016 10:26 AM
To: Gauhar, Tashina (ODAG); Doumas, Alexandra (ODAG); Moran, Molly (OAAG)
Cc: Childs, Heather G. (ODAG); Cox, James C. (OAAG)
Subject: AG briefing paper for review - quick turnaround needed
Importance: High

Good morning,

In preparation for upcoming AG testimony on the Hill, OLA has provided the attached document for our review. Please feel free to forward if I have missed anyone who should be reviewing.

Please send me your revisions (or clearance) and I will convey to OLA. We need to finalize our edits by Monday, February 8.

Thanks!

<<FISA Section 702.docx>>

Melanie L. Dix

Special Assistant/Paralegal

Office of the Deputy Attorney General of the United States

(b) (6)

(b) (6)

Cox, James C. (OAAG)

From: Cox, James C. (OAAG)
Sent: Friday, March 11, 2016 5:59 PM
To: Werner, Sharon (OAG); Pokorny, Carolyn (OAG); Axelrod, Matthew (ODAG); Childs, Heather G. (ODAG); Moran, Molly (OAAG)
Subject: FW: Background Papers
Attachments: Background Papers.zip

Papers done! [Here is what I just sent to Boz after we talked.](#)

From: Cox, James C. (OAAG)
Sent: Friday, March 11, 2016 5:58 PM
To: 'Bosworth, Michael'
Subject: Background Papers

Michael,
I've attached a zip file containing a set of background papers. Please call if there is anything else we can do.
Best regards,
Jay

James C. (Jay) Cox
Chief of Staff and Deputy Associate Attorney General
Office of the Associate Attorney General
U.S. Department of Justice
(b) (6)

Washington, Tracy T (OAG)

From: Washington, Tracy T (OAG)
Sent: Tuesday, August 30, 2016 12:12 PM
To: Pokorny, Carolyn (OAG); Bosworth, Michael S. EOP/WHO
Cc: Kilaru, Rakesh N. EOP/WHO; Bennett, Catherine T (OAG); Franklin, Shirlethia (OAG)
Subject: RE: AG Confirmation Hearing Transcript
Attachments: CQ-AG Confirmation Hearing Transcript.pdf

PDF of AG's confirmation hearing transcript is attached.

--Tracy

Tracy T. Washington
Staff Assistant
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(b) (6)

-----Original Message-----

From: Pokorny, Carolyn (OAG)
Sent: Tuesday, August 30, 2016 12:04 PM
To: Bosworth, Michael S. EOP/WHO
Cc: Kilaru, Rakesh N. EOP/WHO; Washington, Tracy T (OAG); Bennett, Catherine T (OAG); Franklin, Shirlethia (OAG)
Subject: Re: AG Confirmation Hearing Transcript

Dear Tracy/Cathy:

Would you please ask Alicia O'Brien or Dan Goldberg in OLA for the PDF of the AG's confirmation hearing transcript, and forward it to Michael and Rakesh, cc'd?

(OLA sent it to me once already, but my email is archived so I cannot forward it.) Thanks, CP

Senate Judiciary Committee Holds Confirmation Hearing on the Nomination of Loretta Lynch for U.S. Attorney General, Day 1, Panel 1, Morning Session

LIST OF PANEL MEMBERS AND WITNESSES

GRASSLEY:

Good morning.

I welcome everyone to this very, very important hearing.

Before we start, I'd like to state a few things. These are some ground rules, pretty much the same as what former chairman and my friend Senator Leahy and others have done -- stated in the past.

I want everyone to be able to watch the hearing without obstruction. If people stand up and block the view of those behind them, or speak out of turn, it's not fair or considerate to others. So officers would then remove those individuals.

I know that there's a lot to protest regarding this administration's policies, but this isn't the time or place to do it.

Before I turn to our opening statements, I wanted to go over a couple of housekeeping items, and explain how we're going to proceed. Senator Leahy and I will give our opening statements. Then I will call on Senators Schumer and Gillibrand to introduce the nominee.

GRASSLEY:

Following Ms. Lynch's opening remarks, we'll begin with the first round of questions, in which each senator will have 10 minutes. After the first round, we're going to do eight minute rounds of questions.

I want everyone to know that I'm prepared to stay here as long as members have questions that they'd like to ask. I think this is a most fair way to proceed, both to the responsibilities of the Senate and senators, and, most importantly, to the nominee who has to sit here through all of this and answer our questions.

And I think we all know that this is a very important position in the Cabinet, and we should do what we can to move it along within our rules. We have a lot of ground that we want to cover in live questioning.

One final note on scheduling. I would like to take a short break of maybe 45 minutes sometime around 12:30 or 1:00. And I know that we have a series of stacked votes this afternoon, and in regard to, I think, 18 amendments we have to vote on, the plan right now is to keep this hearing going, even though it may be a very chaotic way to do things, and maybe not as respectful to the position of attorney general as it ought to be, but I don't know how else to get through the process, to get every question asked that wants to be asked.

So I would ask that all of my colleagues remain very flexible and keep it going. And that means some accommodation by members on my side of the aisle to chair when I can't be here, over there voting.

With that, I'm going to turn to my opening statement, then immediately go to Senator Leahy.

Ms. Lynch, I've had a chance to talk to you privately on two occasions. I welcome you to the Senate Judiciary Committee.

It's a very big day for you, and especially for family and friends that are proud of you.

7/25/16, 7:21 PM

Congratulate you on your nomination. You've already been confirmed by the Senate as U.S. attorney. But the process involved to serve as the 83rd attorney general is a bit more rigorous. For one thing, U.S. attorneys don't even have hearings, let alone one like this.

So I'm -- my hope is that we discuss some of the most important matters facing our nation, and in the process of doing that, then we'll get to know you a bit better.

The fact of the matter is, this nomination comes at a pivotal time for the Department of Justice and for our country. And as I discuss some of those things, those are probably things you have had nothing to do with. But you have an opportunity to make some changes.

The next attorney general will face some very difficult challenges, from combating cyber crime to protecting our children from exploitation, to helping fight the war on terror.

But I'm not just concerned about the tough decisions that come with the office, there are challenges facing the Department of Justice that go to the heart of our system of government. How about restoring faith in the bedrock principles like respect for the rule of law and the fair and even-handed application of those laws? How about restoring respect for the three equal branches of government? How about taking care that the law is faithfully executed and not rewritten?

How about the Department of Justice honoring, once again, its long-standing duty to vigorously defend our nation's laws, even when political appointees disagree with the policy?

Then there is the Office of Legal Counsel. I'm interested in returning that office to its rightful place as the impartial crown jewel of the Justice Department. Its opinion should be firmly rooted in the Constitution's text, neutral interpretation of statutes, and sound judicial precedent.

They shouldn't be transparently self-serving attempts to justify whatever the president or an attorney general wants to do for political reasons.

And let me say it right here: The Office of Legal Counsel should be sharing with the American public the opinions it's providing to the president, especially when they supposedly sanction the unprecedented authority that the president claims to possess.

And I'm going to work to see that it does. The public's business ought to be public. Transparency, I believe, and in fact does bring accountability. These ideals and principles are foundational to the republic.

GRASSLEY:

But ideals and principles aren't simply academic. And they don't exist in a vacuum.

Over the last few years, public confidence in the department's ability to do its job without regard to politics has been shaken with good reason. It's not just Republicans who see the problem or who recognize it as a real-world affects on our own fellow Americans. The department's own inspector general listed as one of its top management challenges, quote, "restoring confidence in the integrity, fairness and accountability of the department," end of quote.

The I.G. cited several examples, including the department's falsely denying basic facts in the "Fast and Furious" controversy. The inspector general concluded this, quote, "resulted in an erosion of trust in the department," end of quote.

In that fiasco, our government knowingly allowed firearms to fall into the hands of international gun traffickers, and it led to the death of patrol agent -- patrol agent Brian Terry.

And then, after Congress called on the leadership of the department to account for this foolish operation, what did they do? Did they apologize to the family and rush to uncover the truth? Quite the opposite. They denied, spun and hid the facts from Congress and the American people. They bullied and intimidated whistle-blowers, members of the press, and anyone who had audacity to investigate and to uncover the truth.

The department has also failed to hold another government agency accountable, the Internal Revenue Service. We watched with dismay as that powerful agency was weaponized and turned against individual citizens. And why? What exactly did these fellow citizens do to make their government target them? They had the courage to get engaged and speak out in defense of faith, freedom and Our constitution, and for what? They then were targeted by the IRS.

What was the Justice Department's reaction to the targeting of citizens based on political beliefs? Well, they appointed a campaign donor to lead an investigation that hasn't gone anywhere and call it then a day. That simply isn't good enough.

Meanwhile, the department's top litigator, the nation's solicitor general is arguing in case after case for breathtaking expansion of federal power.

I'd like to have you consider this. Had the department prevailed in just some of the arguments that it pressed before the Supreme Court in the last several years, there would be essentially no limit on what the federal government could order states to do as a condition for receiving federal money.

Another case, the Environmental Protection Agency could be fining a homeowner \$75,000 a day for not complying with an order, and then turn around and deny that homeowner any right to challenge the order or those fines in court when the order is issued.

The federal government could review decisions by religious organizations regarding who can serve as a minister. The federal government could ban books that expressly advocate for the election or defeat of political candidates.

And the Fourth Amendment wouldn't have anything to say about a police attaching a GPS device to a citizen's car without a warrant and constantly tracking their every movement for years -- or for months and years.

These positions aren't mainstream, in my judgment. At the end of the day, the common thread that binds all these challenges together in my judgment is a Department of Justice that is very deeply politicized. But that's what happens when an attorney general of the United States views himself, and these are his own words, as the president's wingman.

I don't expect Ms. Lynch and I will agree on every issue, but I, for one, need to be persuaded that she will be an independent attorney general, and I have no reason to believe at this point she won't be. The attorney general's job is to represent the American people. Not just the president and not just the executive branch.

So today we will hear from Ms. Lynch. As far as I know, Ms. Lynch has nothing to do with the Department of Justice problems that I just outlined. But as new attorney general, she can fix them.

Tomorrow we'll hear from a second panel of witnesses, many of whom will speak directly to the many challenges facing the Justice Department. As I listen to both panels I'll be considering whether Ms. Lynch has what it takes to fix the Obama Justice Department. We need to get back then to first principles, and that starts with the depoliticizing the Department of Justice. Because the American people deserve better.

So I hope, Ms. Lynch can fix these flaws.

Thank you. I won't speak as long, because I just want to focus on Loretta Lynch, and not on all the problems that some may see in this country.

It is a pleasure to welcome her to this committee. She's smart, she's tough, she's hard-working, independent. She's a prosecutor's prosecutor. And her qualifications with beyond reproach. She's been unanimously confirmed by the Senate twice before to serve as the top federal prosecutor based in Brooklyn, New York. And I hope we have another swift confirmation for Ms. Lynch.

As U.S. attorney for the Eastern District of New York, she's brought terrorists and cyber criminals to justice. She's obtained convictions against corrupt public officials from both political parties. She's fought tirelessly against violent crime and financial fraud. She's remained determined to protect the rights of victims.

Ms. Lynch has worked hard to improve the relationships between law enforcement and the communities they serve. And probably that's one of the reasons why her -- her nomination enjoys strong support from both.

She has prosecuted those who have committed crimes against police officers, as well as police officers who committed crime.

Her record shows that as attorney general Ms. Lynch will effectively, fairly and independently enforce the law. I hope we all remember that she is the nomination for attorney general, and that's why I'm focusing on her.

She was born in North Carolina, the daughter of a Baptist preacher and a school librarian. And we're honored to have members of her family here with us today.

And I know you'll be introducing them later.

She grew up hearing her family speak about living in the Jim Crow South, but she never lost faith that the way to obtain justice is through our legal system.

And her nomination is historic. When she's confirmed as the 83rd attorney general of the United States, she'll be the first African- American woman to lead the Department of Justice. Really, I can't think of anyone more deserving of that honor.

She's going to lead a Justice Department that faces complex challenges. Nearly one-third of its budget goes to the Bureau of Prisons, and that drains vital resources from nearly all other public safety priorities. Think of that: A third of the budget goes to prisons.

And a significant factor leading to this budget imbalance is the unnecessary creation of more and more mandatory minimum sentences. Passing new mandatory minimum laws has become a convenient way for lawmakers to claim they're tough on crime, even when there's no evidence that these sentences keep us safer.

That's one of the reasons why we have the largest prison population in the world. That's why I oppose mandatory minimums. I hope we can find a way to face this mass incarceration problem.

And the Justice Department needs strong leadership to keep up with the rapid development of technology. We must stay ahead of the curve to prevent and fight threats of cyber-security and data privacy. Think what it would have been like the last few days in the Northeast if a cyber terrorist could have closed down all our electrical grids.

The growing threat of cyber crime is very real, but also the specter of unchecked government intrusion in our private lives, particularly dragnet surveillance programs directed at American citizens.

The intelligence community faces a critical deadline this June. Three sections of the Foreign Intelligence Surveillance Act are set to expire. I believe we have to protect our national security, but we also have to protect our civil liberties which make us unique as a country. So we have to reform our nation's surveillance laws so we can realize both goals.

And the next attorney general is going to play a central role in protecting all Americans. All Americans.

The president's selection for attorney general, no matter who the president is, deserves to be considered swiftly, fairly and on the nominee's own record.

I believe Americans realize that a role this important cannot be used just as just one more sound bite Washington political football. I'm confident that if we stay focused on Ms. Lynch's impeccable qualifications and fierce independence, she's going to be confirmed quickly by the Senate.

LEAHY:
She deserves a fair, thoughtful and respectful confirmation process. And the American people deserve an attorney general like Ms. Lynch. So I thank you for your years of public service. I look forward to your testimony.

GRASSLEY:
For those of you who are new to our hearing, it's tradition that senators from home state introduce nominees from their state. So I'm now going to call on Senator Schumer and then Senator Gillibrand, senators from New York, to do that.

And since we're under such a tight schedule, if I could ask you to keep it to five minutes, it would be very nice. Thank you.

SCHUMER:
Thank you, Mr. Chairman. I want to thank you and Ranking Member Leahy and the members of the committee. It's my great privilege to introduce Loretta Lynch, a proud New Yorker and the nominee to be the next attorney general of the United States.

Born in North Carolina, her father was a fourth generation Baptist minister, a man who grew up in the segregated South. And her mother picked cotton when she was a girl so her daughter would never have to.

Well, their daughter grew up to be one of the keenest legal minds that our country has to offer, someone who has excelled at every stage of her education and her career, while cultivating a reputation as someone who was level-headed, fair, judicious and eminently likable. If there's an American dream story, Ms. Lynch is it.

And adding to the American dream story, Ms. Lynch's late brother, Lorenzo, was a Navy SEAL.

Still, despite her intellectual and career achievements, Ms. Lynch has always been a nose-to-the-grindstone type, rarely seeking acclaim, only a job well done. She has earned a reputation for keeping her head down and avoiding the spotlight, just like me.

(LAUGHTER)

At just over 5 foot and with her consistent understated approach to the public spotlight, some might underestimate Ms. Lynch. But as hundreds of criminals have learned the hard way, looks can be deceiving and Ms. Lynch packs a powerful punch.

When you look at the breadth and depth of the cases she's handled, it's clear Loretta Lynch is law enforcement's Renaissance woman. One I would mention, the Abner Louima case, where she convicted police officers who horribly abused the Haitian immigrant. As we have seen, these types of cases can create great tension between the police and the community.

But despite the high-riding emotions that accompanied this notorious case, Ms. Lynch was praised by lawyers on both sides, as well as community leaders and police officials, for her judicious, balanced and careful approach.

Mr. Chairman, members of this committee, in this age of global terrorism, the A.G.'s role in national security has never been more important. It makes apparent that the confirmation of a new attorney general cannot and should not be delayed any longer.

Today we've already heard and will hear a lot more, about issues completely unrelated to Ms. Lynch's experience and her qualifications. If anything, that just goes to show how qualified she is. No one can assail Loretta Lynch and no one has, who she is, what she has done and how good an attorney general she would be.

So instead, some are trying to drag extraneous issues -- executive orders on immigration, the IRS -- into the fray to challenge her nomination because they can't find anything in her record to point to.

Let me be clear, attempts to politicize this nomination, to turn this exceptional nominee into a political point-scoring exercise are a disservice to the qualified candidate we have before us today.

I originally recommended Loretta Lynch for the position of U.S. attorney in 1999 because I thought she was excellent. Sure enough, she was. When President Bush took office, she went to the private sector to earn some money.

But when I had the opportunity to recommend a candidate to President Obama I was certain I wanted Ms. Lynch to serve again. So I called her on a Friday afternoon.

She was happy with her life in the law firm. But I was confident that with the weekend to think it over she'd be drawn to answer the call to public service. And sure enough, her commitment to public service was so strong that she called me back on Monday to say yes.

She passed unanimously out of the Senate twice already.

Wouldn't it be nice if we could pass her unanimously out of the Senate a third time?

Based on her record, we should.

Mr. President, if we can't confirm Loretta Lynch, then I don't believe we can confirm anyone.

And I would like to remind my colleagues that the president's immigration policies are not seeking confirmation today; Loretta Lynch is. When we move to vote, hopefully sooner rather than later, you won't be voting for or against the president's policies, you'll be voting on this eminently qualified law enforcement professional, first-rate legal mind and someone who is committed in her bones to the equal application of justice for all people.

Thank you, Mr. Chairman.

GRASSLEY:
Senator Gillibrand.

GILLIBRAND:
Thank you, Mr. Chairman and Ranking Member Leahy. I am honored to be here today with Senator Schumer to introduce United States Attorney for the Eastern District of New York Loretta Lynch as President Obama's nominee to serve as the next attorney general for the United States.

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7/25/16, 7:21 PM

To serve as United States attorney general requires deep experience in the field of law. It also requires a brilliant intellect and

it requires a steady moral compass. I have met with Ms. Lynch two months ago and I can tell you, she meets all of those... all of those criteria. She is strong, tough, independent and fearless.

And as one of our country's most accomplished and distinguished women serving in law enforcement, I urge my colleagues to support her nomination. She is an outstanding candidate for this job.

Ms. Lynch began her service as the U.S. Attorney for the Eastern District of New York in 1990, where she rose quickly to serve as chief of the Long Island office and then deputy chief of General Crimes and chief of Intake and Arraignments. For 15 years she has been a prosecutor in the U.S. Attorney's office for the Eastern District of New York and since 2010 she has served admirably as United States attorney for the Eastern District of New York.

In that position she has demonstrated a superior sense of judgment and remarkable legal expertise.

Ms. Lynch has dealt with an impressive array of cases on subjects ranging from civil rights to organized crime to terrorism. These are each issues that our new attorney general will have to engage with constantly from day one of her tenure.

Ms. Lynch's experience as a federal prosecutor in New York will undoubtedly serve her exceptionally well in Washington. She is extraordinarily well qualified and I believe she deserves a quick confirmation process.

Thank you, Mr. Chairman.

GRASSLEY:

Thank you, Senator Gillibrand.

It's now, just as soon as the table is cleared, it's going to give Ms. Lynch an opportunity to come.

And before...

(OFF-MIKE)

Before you seat yourself, would you take an oath, please?

Would you raise your hand? And I'll give the oath.

Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth and nothing but the truth, so help you God?

LYNCH:

I do.

GRASSLEY:

Thank you.

The committee welcomes you and I know that it's an honor for all of us to have you before us. But it's also an honor for you to be selected by the president and it's quite an honor for your family.

So I would ask if, before you make your statement, if you would like to introduce anybody to the committee and speak about them any way you want to.

And then if there's people that aren't introduced by you that you would like to have their name in the record and you'd submit their names, I'd be glad to include that in the record.

7/25/16, 7:21 PM

So would you proceed as you choose?

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

LYNCH:
(inaudible)...

(CROSSTALK)

GRASSLEY:
Yes, I think the microphone is not automatic.

LYNCH:
Thank you, Senator. Let me introduce, for the record, I'm delighted to welcome numerous family and friends here with me today.

I'd like to introduce first and foremost my father, the source of my inspiration in so many ways. He's to my immediate left, the Reverend Lorenzo Lynch.

(UNKNOWN)
Thank you.

LYNCH:
Immediately to his left is my husband, Stephen Hargrove, who has supported me in all of my endeavors, no matter how poor they make us.

(LAUGHTER)

Immediately to his left is my younger brother, the Reverend Leonzo Lynch, who is the fifth generation of ministers in a direct line in my family, and my sister-in-law Nicole Lynch (ph).

I'm also here with several other family members and friends whom I would love to introduce, but I am informed that you have a schedule for the afternoon. So I will keep to that.

But let me say to all of them how tremendously gratified I am for their support, not just today, but over the years.

Chairman Grassley, Senator Leahy, distinguished members of this committee, I'm honored to appear before you in this historic chamber among so many dedicated public servants. I want to thank you for your time this morning, and I also want to thank President Obama for the trust he has placed in me by nominating me to serve as attorney general of the United States.

It's a particular privilege to be joined here today by the members of my family that I've introduced, as well as the other numerous family and friends who have come to support me and of whose travel and service I am so appreciative.

Mr. Chairman, one of the privileges, and in fact one of my favorite things in my position as United States attorney for the Eastern District of New York is welcoming new attorneys into my office and administering to them the oath of office. It is a transformative moment in the life of a young prosecutor, and one that I actually remember well.

And as they stand before me, prepared to pledge their honor and their integrity, I remind them that they are making their oath not to me, not to the office, not even to the attorney general, but to our Constitution, the fundamental foundation for all that we do.

It is to that document and the ideals embodied therein that I have devoted my professional life. And, Senators, if confirmed, as attorney general, I pledge to you today, and to the American people, that the Constitution, the bedrock of our system of

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I owe so much to those who have worked to make the promise of that document real for all Americans, beginning with my own family. All of them and so many others have supported me on the path that has brought me to this moment. Not only through their unwavering love and support which is so beautifully on display today, but through their examples and the values that have shaped my upbringing.

My mother, Loreen (ph), who was unable to travel here today, is a retired English teacher and librarian for whom education was the key to a better life. She still recalls people in her rural North Carolina community pressing a dime or a quarter into her hands to help support her college education. As a young woman, she refused to use segregated rest rooms, because they did not represent the America in which she believed. She instilled in me an abiding love of literature and learning, and taught me the value of hard work and sacrifice.

My father, Lorenzo, who is here with me today, is a fourth generation Baptist preacher who in the early 1960s opened his Greensboro church to those planning sit-ins and marches, standing with them while carrying me on his shoulders.

He has always matched his principles with his actions, encouraging me to think for myself, but reminding me that we all gain the most when we act in service to others.

It was the values my parents instilled in me that led me to the Eastern District of New York. And from my parents, I gained the tenacity and the resolve to take on violent criminals, to confront political corruption and to disrupt organized crime. They also gave me the insight and the compassion to sit with the victims of crime and share their loss.

Their values have sustained me, as I have twice had the privilege, indeed the honor, of serving as United States attorney, leading an exceptional office, staffed by outstanding public servants. And their values guide and motivate me even today.

Senators, should I be confirmed as attorney general, my highest priorities will continue to be to ensure the safety of all of our citizens, to protect the most vulnerable among us from crime and abuse, and to strengthen the vital relationships between America's brave law enforcement officers and the communities they are entrusted to serve.

In a world of complex and evolving threats, protecting the American people from terrorism must remain the primary mission of today's Department of Justice. If confirmed, I will work with colleagues across the executive branch to use every available tool to continue disrupting the catastrophic attacks planned against our homeland, and to bring terrorists to justice.

I will draw upon my extensive experience in the Eastern District of New York, which has tried more terrorism cases since 9/11 than any other office. We have investigated and prosecuted terrorist individuals and groups that threaten our nation and its people, including those who have plotted to attack New York City's subway system, John F. Kennedy airport, the Federal Reserve Bank of New York and U.S. troops stationed abroad, as well as those who have provided material support to foreign terrorist organizations.

And I pledge to discharge my duties always mindful of the need to protect not just American citizens, but American values.

If confirmed, I intend to expand and enhance our capabilities in order to effectively prevent ever-evolving attacks in cyberspace, to expose the wrongdoers and bring those perpetrators to justice, as well.

In my current position, I'm proud to lead an office that has significant experience prosecuting complex international cyber crime, including high-tech intrusions at key financial and public sector institutions.

Department of Criminal Justice and National Security Divisions, and the United States attorney community to defeat and to hold accountable those who would imperil the safety and security of our citizens through cyber crime.

I will also do everything I can to ensure that we are safeguarding the most vulnerable among us. During my tenure as U.S. attorney, the Eastern District of New York has led the prosecution against financial fraudsters who have callously targeted hard-working Americans, including the deaf, the elderly, and stolen not just their trust but their hard-earned savings.

We have taken action against abusers in over 100 child exploitation and child pornography cases. And we have prosecuted brutal international human trafficking rings that have sold -- sold -- victims as young as 14 and 15 into sexual slavery.

If confirmed as attorney general, I will continue to build upon the department's record of vigorously prosecuting those who prey on those most in need of our protection. And I will continue to provide strong and effective assistance to survivors who we must both support and empower.

Senators, throughout my career as a prosecutor, it has been my signal honor to work hand in hand with dedicated law enforcement officers and agents who risk their lives every day in the protection of the communities we all serve. I have served with them. I have learned from them. I am a better prosecutor because of them.

Few things have pained me more than the recent reports of tension and division between law enforcement and the communities we serve. If confirmed as attorney general, one of my key priorities would be to work to strengthen the vital relationships between our courageous law enforcement personnel and all of the communities we serve.

In my career, I have seen this relationship flourish. I have seen law enforcement forge unbreakable bonds with community residents. And I have seen violence-ravaged communities come together to honor officers who have risked all to protect them. And as attorney general I will draw all voices into this important discussion.

In that same spirit, I look forward to fostering a new and improved relationship with this committee, the United States Senate and the entire United States Congress, a relationship based on mutual respect and constitutional balance.

Ultimately, I know we all share the same goal and commitment to protect and to serve the American people.

Now I recognize that we face many challenges in the years ahead. But I have seen in my own life and in my own family how dedicated men and women can answer the call to achieve great things for themselves, for their country, and for generations to come.

My father, that young minister who carried me on his shoulders, has answered that call, as has my mother, that courageous young teacher who refused to let Jim Crow define her. Standing with them are my uncles and cousins who served in Vietnam, one of whom is here to support me today. And my older brother, a Navy SEAL, all of whom answered that call with their service to our country.

LYNCH:

Senators, as I come before you today in this historic chamber, I still stand on my father's shoulders as well as on the shoulders of all of those who have gone before me and who dreamed of making the promise of America a reality for all, and worked to achieve that goal.

I believe in the promise of America, because I have lived the promise of America. And if confirmed to be attorney general of the United States, I pledge to all of you and the American people that I will fulfill my responsibilities with integrity and independence. I will never forget that I serve the American people from all walks of life, who continue to make our nation great, as well as the legacy of all of those whose sacrifices have made us free.

And I will always strive to uphold the trust that has been placed in me to protect and defend our Constitution, to safeguard... our people and to stand as the leader and public servant that they deserve.

Thank you all, once again, for your time and your consideration. I greatly appreciate this opportunity to speak with you today. I look forward to your questions and to all that we may accomplish in the days ahead, together, in the spirit of cooperation, shared responsibility and justice. Thank you for your time today.

GRASSLEY:

And thank you, Ms. Lynch, for that statement.

Before my 10 minutes starts for the first round, I'd like to talk to my colleagues just a minute, because of the 18 votes that are coming up this afternoon and because of a chaotic situation and the most important thing is getting this hearing over in one sitting, in one day, even if it goes into the evening.

I hope my colleagues will be cognizant of what we normally do between Senator Leahy and I; we're fairly liberal on letting people go over and whether we have five-, seven- or 10-minute rounds, in any hearing, my practice is generally if you got one second left, you can ask a question and -- but this time I would prefer that you kind of stick to the 10 minutes.

And I'm not very good at gaveling people down, so take care of my timidity, will you please?

Now again, before the first 10 minutes starts, I'd like to make something clear just for myself. I can't speak for my colleagues. And it takes off on two things: one, what you said about you wanted to improve relationships with the committee and with Congress.

I -- we welcome that very much and that will be very, very helpful, particularly in regard to our responsibilities of oversight.

Secondly, taking off on something Senator Schumer said and just speaking for myself, if I use this subject or that subject or another as at -- as a basis of maybe questioning what the president or an attorney general has done, I want it clear that that's not the issue for me now. The issue is whether or not the Constitution or the laws have been violated or whether the Justice Department has acted in an appropriate way.

So now I would start with my questions.

On November the 20th last year, President Obama announced that he would defer deportation of millions of individuals in the country undocumented. Not only is this action contrary to our laws, it's a dangerous abuse of executive authority.

If you're confirmed as the next attorney general, before you take office, you will take a oath. You will raise your right hand and swear, quote, "support and defend the Constitution of the United States and to bear true and false faith -- true faith and allegiance to the same," end of quote.

Your duty as attorney general is not to defend the president and his policies. Your duty is your oath to defend the Constitution.

So my first question, with that oath in mind, I ask you, do you believe that the president has the legal authority to unilaterally deford (ph) deportations in a blanket manner for millions of individuals in the country illegally and grant them permits and other benefits, regardless of what the U.S. Constitution or imitation law -- immigration laws say?

LYNCH:

Thank you for the question, Senator. And you raise a very important issue of how we manage the issue of undocumented immigrants here in our country while still welcoming those who bring such great value to our shores, to our business

Certainly I was not involved in the decisions that led to the executive actions that you reference. And I am not aware of, at this point, how the Department of Homeland Security has set forth regulations to actually implement that. So I can't comment on the particulars of what will happen.

I have had occasion to look at the Office of Legal Counsel Opinion through which the Department of Homeland Security sought legal guidance there, as well as some of the letters from constitutional scholars, who've looked at the similar issue.

And certainly it seems to be a reasonable discussion of legal precedent, the relevant statute, congressional actions, along with the enforcement discretion of the -- of the agency.

And I don't see any reason to doubt the reasonableness of those views. I do think, however, that the ultimate responsibility of the Department of Justice is to always, when presented with issues by the White House or any agency, to review those issues carefully, to apply the relevant law and make a determination as to whether or not there's a legal framework that supports the requested action.

And I found it interesting, as I was reading the legal counsel opinion, that some of the proposals that were -- that were set forth and asked about, the Office of Legal Counsel opined did not, in fact, have a legal framework. And I don't believe that those were actually implemented.

So I do think it is very important that, as the Department of Justice, through any of its agencies, be it the Office of Legal Counsel or in a direct conversation with the president or any other member of Cabinet, always ensure that they are operating from a position of whether or not there's a legal framework that supports the requested action.

And the advice provided must be thorough, it must be objective and it must be completely independent.

GRASSLEY:

Let me take off on one word you used: discretion. And I presume that may have applied to prosecutorial discretion that was part of the president's rationale.

If this is lawfully exercised on an individual basis, depending on the facts of a specific case, it is, in fact, case by case. So this is not so much a philosophical question as a practical thing.

What it doesn't allow anybody to do is tell whole categories of people that the law won't apply to them going forward. No one seriously disputes these broad principles. Even the Office of Legal Counsel Opinion on the president's executive action accepts them.

So let me ask you this.

What are the outer limits of the doctrine of prosecutorial discretion?

And why don't the president's actions exceed those boundaries when we're talking about millions of people?

How does this action realistically allow for a case-by-case exercise of discretion?

LYNCH:

Senator, as I reviewed the opinion and looked at the issues presented therein, from the perspective of my career as a prosecutor and as a United States attorney and applying those principles of the exercise of discretion, I viewed it as a way in which the Department of Homeland Security was seeking legal guidance on the most effective way to prioritize the removal of large numbers of individual -- individuals, given that their resources would not permit removal of everyone who fell within

And that certainly was the framework from which I viewed that. In looking at it from that perspective, the Department of Homeland Security's request and suggestion that they, in fact, prioritize the removal of the most dangerous of the undocumented immigrants among us, those who have criminal records, those who are involved in national security and terrorism, those who are involved in gang activity, violent crime, along with, I believe, people who have recently entered and could pose a threat to our system, seem to be a reasonable way to marshal limited resources to deal with the problem.

As a prosecutor, however, I've had experience obviously in doing similar things, in finding the best way to attack a serious problem with limited resources.

But as a prosecutor, I always want the ability to still take some sort of action against those who may not be in my initial category as the most serious threat. And I didn't see anything in the opinion that prevented action being taken from individuals who might otherwise qualify for the deferral.

Again, I'm not aware of how the department will actually go forward and implement by regulation this matter. I haven't had the occasion to study that. And I don't know if, in fact, if those are out.

Certainly, if I'm confirmed as attorney general, I look forward to learning more about that process and making sure that we're using all of our resources to protect the American people, particularly against the dangerous offenders who rightfully stand at the top of the removal list.

GRASSLEY:

Yes. Well, I think you're telling me that you can do it for a few thousand or a few tens of thousands of people, that maybe have committed a crime or something, but it seems to me to be common sense would dictate that it's -- that it's impossible to do prosecutorial discretion the way it's traditionally been done on an individual basis for the millions that are left over.

GRASSLEY:

Let's move on. I'd like to move away from the president's refusal to enforce the law and talk a little bit about this administration's failure to apply the law in an even-handed way.

According to the -- this goes to the IRS -- according to the Treasury Department inspector general -- now, that's not me, the inspector general -- the IRS used inappropriate criteria to deny tax- exempt status to predominantly conservative organizations, ask unnecessary questions and lastly, slowed approval of their application.

Initially, President Obama remarked that any IRS actions to -- to target conservatives would be, quote unquote, "outrageous." Then last February, the president said there wasn't, quote, "even a smidgen of corruption in what occurred at the IRS -- a smidgen of corruption," unquote.

Yet a few months later, in June, the director of the FBI, Director Comey, testified before the House Judiciary Committee that there was a, quote, "very active," unquote, ongoing criminal investigation into the matter.

So this brings me to these questions. I'd like to know how to reconcile these two statements.

If what the president said was accurate, then why in the world would the FBI be conducting an ongoing criminal investigation? A rhetorical question: Would the investigation be just for show?

I'd like -- I'm going to take the director at his word. So if there is an ongoing criminal investigation at the FBI, then how could it be possible -- be appropriate for the president to reach the conclusion about the facts before Director Comey?

LYNCH:

And let me state at the outset that with regards to the actions of any of the agencies of our government, there is certainly no place for bias or favoritism or anything other than the even-handed application of the relevant laws and regulations. And certainly, that has always been my goal as a prosecutor and would be my continued goal should I be confirmed.

With the respect to the IRS investigation, I am generally aware that there is an investigation going on, but it's not a matter that is either being conducted by my office or that I've been briefed on as United States attorney. So I'm not able to comment on the status now except to state that I...

GRASSLEY:

Based on what you just said then, I can shorten this up by asking you this question.

You spent a career in law enforcement. When would it ever be appropriate for any president to know the results of a criminal investigation and then comment on it publicly while the investigation is still ongoing?

LYNCH:

Senator, it -- with respect to this investigation or any other, I'm not aware of the context or the basis for the president's remarks, so I'm not able to determine whether or not they were, in fact, done after any evaluation of the investigation or whether they were a matter of opinion. So I'm not able to comment on that specific remark.

Certainly, as part of the Department of Justice exercise of its powers, whether at the U.S. attorney level or here in Washington, investigations are handled independently and without provision of materials or information about them before their conclusions to others in the executive branch or other agencies.

GRASSLEY:

Senator Leahy, thank you very much.

LEAHY:

Thank you, Mr. Chairman.

I've been fortunate that my native state of Vermont has allowed me to serve here for four decades.

I've listened in several different committees I've been on to a lot of statements by nominees. I cannot think of one that is so moving as your statement, and I -- and I intend to make sure I have -- send copies to all members...

(AUDIO GAP)

LYNCH:

Yes. Thank you, Senator.

I think you've raised one of the most important issues facing our country today, which is the need to resolve the tensions that appear to be discussed and appear to be rising between law enforcement and the communities that we serve.

In my experience as a prosecutor and United States attorney, these tensions are best dealt with by having discussions between all parties so that everyone feels that their voice has been heard.

With respect to our brave law enforcement officers, we ask so much of them. We ask them to keep us safe. We ask them to protect us literally from ourselves, and we ask them to do it often without the resources that they need to be safe and secure themselves. Yet they still stand up every day and risk their lives for us.

When they interact with law enforcement, transfer that feeling to them as well, even if someone is there to help.

What I have found most effective is getting people together and simply listening to their concerns, being open, helping them see that, in fact, we are all in this together and that the concerns of law enforcement, a safe society, a free society are the exact same concerns of every resident of every community there.

LEAHY:

And would you agree that that's something that has to be considered by not only federal law enforcement but by state and local law enforcement and that the federal government can help the state and local law enforcement in that respect?

LYNCH:

Absolutely, Senator.

One of the most important roles that the Department of Justice plays is not necessarily its most visible role, but it is the support that we provide to state and local law enforcement partners through our grant program and through our training program. We try our best to provide them with the resources that they need to carry out their jobs safely and effectively.

LEAHY:

We all know that no prosecutor's office has the resources to prosecute every single crime before it, and you have to decide which ones have priority.

Let me take -- let me talk about one.

In state court, there was a case where a child rapist received two years. You obviously disagreed with that, you brought federal charges, and I think Bill O'Riley on -- on Fox called you a hero and said, quote, "You should be respected by all Americans for standing up to gross injustice," and I agree -- I agree with Bill O'Riley on that.

How do you make -- well, let me back up. More and more, the Justice Department's budget, as I said earlier, is going now into our federal prison system, so you have limited resources.

How do you make these kind of judgments? How do you determine which cases are the important ones you have to go and -- also the very difficult thing, realizing if you go after certain cases, it means you don't have the resources to go after others.

LYNCH:

Certainly, Senator.

One of the privileges of being the U.S. attorney for the Eastern District of New York has been the ability to work with so many of my United States attorney colleagues across the country.

All of us engage in this process every day, and we start with a full and frank evaluation with our law enforcement partners of the crime issues facing our particular districts. We try and determine what are the greatest threats to the people that we have sworn to serve. And that is what I do in the Eastern District of New York every day.

We then look at our resources and set priorities and goals to achieve the safest communities that we can.

But Senator, we do have to always -- always maintain the flexibility to look at specific cases, such as the Goodman case, and determine if a federal interest exists and if, in fact, a victim has not been protected and has not been heard and use federal resources there as well.

LEAHY:

Well, let me -- let me go into one that takes resources, but we've had some people say that, actually, again, terrorists, lock them up in Guantanamo, even though we know what that has cost American people, both in respect abroad and in dollars.

You successfully prosecuted a number of terrorism cases in the Eastern District of New York, cases against individuals that you said plotting against John F. Kennedy Airport, Federal Reserve Bank and so on. Just this month, you charged two Al Qaida members for attacking American troops in Afghanistan and Iraq.

LEAHY:

I've been impressed not only in your district but other parts of the country who have actually brought these terrorists to trial in our federal courts. We've shown the rest of the world we can do it. There's been convictions of some, Bin Laden's son-in-law being one. And then they've been locked up.

Now, do you find the criminal justice system -- I think I know your answer -- an important counter (inaudible).

LYNCH:

Senator, it is certainly an important counterterrorism tool in the arsenal of tools that we have to deal with this ever- growing and ever-evolving threat.

Let me say at the outset, my view is that if terrorists threaten American citizens here or abroad, they will face American justice. We work with our counterparts throughout the executive branch to determine based on every case the most appropriate venue for bringing terrorists to justice, as our primary goal is to incapacitate them and prevent further destruction.

Certainly, within my own career as U.S. attorney, when cases -- when the decision has been made that the case should be handled by a U.S. attorney's office, we proceed in that fashion. We also work closely, however, with the Office of Military Commissions and consult with them and share information to make those decisions as to how -- what is, in fact, the best way to manage every case.

LEAHY:

The -- and then, as these cases come to you, I want to ask you a question I asked each of the recent attorney general nominees. And I say this because of I think of the tremendous effort of the senator from California, Senator Feinstein, who's sitting here, her tremendous efforts to confront acts of torture carried out in our country's name.

Do you agree that waterboarding is torture and that it's illegal?

LYNCH:

Waterboarding is torture, Senator.

LEAHY:

And thus illegal?

LYNCH:

And thus illegal.

LEAHY:

Thank you. And I know you're gonna be asked a lot about immigration. Well, it's -- it makes me think we should be focusing on your qualifications for this job. It might even -- asking those questions might speak also to some of the qualifications of Congress.

We worked for months in this committee, night and day, hundreds of hours, hearings, markups, debate, and we passed by a strong bipartisan majority an immigration bill that referenced so many of these things that we now hear discussed.

In my opinion, there were votes enough to pass it in the House of Representatives, but their leadership decided not to bring it up. I think that was a mistake.

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So now we deal with the question of executive action. You didn't write the executive action. You weren't consulted about it, were you?

LYNCH:

No, I was not aware of it until it was rendered.

LEAHY:

And would you say if you've got millions of people in this country who may not be in a valid or legal status, it would perhaps strain our resources to think about how we would deport 10 million to 12 million people. Would that be a fair statement?

LYNCH:

I believe that statement is fair, sir.

LEAHY:

Thank you.

Thank you, Mr. Chairman.

GRASSLEY:

Senator Hatch is the next one. But I wanted to inform all the committee members that since everybody on the committee was here at the fall of the gavel, it will be done on a seniority basis as opposed to first come, first serve basis.

Senator Hatch is next.

HATCH:

Well, thank you, Mr. Chairman. I appreciate it.

Ms. Lynch, welcome to the Judiciary Committee.

LYNCH:

Thank you.

HATCH:

Appreciate the service you've given in this country. I'm impressed with your qualifications, and I hope I can support your nomination. It's important to hear what you understand your role and duty will be.

Do you agree that when the constitutionality of a law is challenged the attorney general has a duty to defend that law if reasonable arguments can be made?

LYNCH:

Senator, I believe that one of the first and foremost duties of the Department of Justice is to defend the law as it's passed by this body.

HATCH:

OK. Now, I'd like you to answer these questions. I'm trying to get through a number of them. I think you can answer most of them yes or no, if you can.

If you are confirmed will you commit to enforce and defend the laws and the Constitution of the United States regardless of your personal and philosophical views on them -- on any matter?

LYNCH:

Absolutely, sir.

HATCH:

Thank you. I'm glad you said that. Attorney General Holder answered that same question in the same way.

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The Justice Department had made reasonable arguments that the Defense of Marriage Act is constitutional, but then the attorney general chose to stop making those arguments because of his personal views. And by breaking his promise, he cast doubt about others who make the same commitment as you did today.

Now, I don't doubt your sincerity. We've met together, and I have a high opinion of you. But is there any more assurance that you can give us on something like that?

LYNCH:

Senator, it's my view that when it comes to the position of the attorney general and the role of the Department of Justice in defending the statutes as passed by this Congress, the issue is not my personal view or any issue of bias or policy even, but it is the duty and responsibility of the Department of Justice to defend those statutes.

Certainly, as we've seen, there may be rare instances where, and again I was not involved in those -- in that analysis, but there may be certain circumstances where careful legal analysis raises constitutional issues...

HATCH:

But that would be rare.

LYNCH:

... but I anticipate those would be few and far between. I also think should we reach that point, if there is a matter, it's a matter that I would prefer to have discussion about.

HATCH:

OK. I appreciate that answer.

I'm concerned that the administration has exceeded its lawful authority in several ways in an effort to avoid working with us up here in Congress -- now, I understand why they might not want to work with Congress from time to time, but unfortunately the Constitution requires us to work together -- and that the Justice Department has actually facilitated this pattern of behavior, some people believe.

The department has done so in a number of ways, in exceeding and even contravening lawful authority in the programs it helps administer, such as with the latest executive actions on immigration, in purporting to provide legal justification for other agencies to ignore the law, as apparently occurred with the transfer of Taliban terrorists out of Guantanamo without notifying Congress, which is an obligation, and in taking some extreme litigation positions, which by my count, the Supreme Court has unanimously rebuked a record 20 times.

Now, given these disturbing pattern, how can you assure us that you'll be independent, that you'll say no to the White House or other executive branch agencies when they wish to act beyond the law as it's written?

LYNCH:

Senator, I think one of the most important functions of the Department of Justice is to provide a legal framework, if it exists, when questions are raised.

HATCH:

Right.

LYNCH:

But consistent with that, every good lawyer knows you must also provide the information that indicates that the legal framework may not exist for certain actions that someone may want to take. Every lawyer has to be independent. The attorney general even more so. And I pledge to you that I -- that I -- I take that independence very seriously.

HATCH:

Well, you did that in my office, and I appreciate that because I think you'll be a great attorney general if you'll ever do... that.

Last August you gave a speech in Switzerland in which you praised Attorney General Holder's initiative to limit mandatory minimum sentences only to some of the criminals who Congress said should receive them. But prosecutors, including even the attorney general, do not have authority to decide that entire categories of defendants will not receive a sentence that the Congress has mandated.

Isn't that another example of using prosecutorial discretion to really, in effect, change the law without Congress?

LYNCH:

Senator, with respect to the material that you're referring to when I did give that speech, I was referring to the department's Smart on Crime initiative, which seeks to manage another intractable problem of the large number of narcotics defendants and the limited resources that we have to handle those defendants and prosecute them.

HATCH:

I want to help you with that.

LYNCH:

Sir?

HATCH:

I want to help you with that.

LYNCH:

Yes. And prosecute them effectively.

In fact, in my own experience, both as an assistant United States attorney and United States attorney, we've had to deal with similar issues in the Eastern District of New York. We've had tremendous issues with narcotics importations over the years. And we have had to work out ways of resolving those cases.

Many of them go to trial, but we also have had to prioritize the cases that we will seek mandatory minimums for and those which will we seek guidelines sentences for.

But, importantly, with respect to the Smart on Crime initiative, as pushed out and has been implemented in the field, every prosecutor, from the United States attorney on down to line assistants, are encouraged to still consider cases that might fall into a category where initially you would not seek a mandatory minimum, but consider whether they would be appropriate. And those cases have occurred, and they will continue to occur.

HATCH:

OK. I understand.

As currently written, the Electronic Communications Privacy Act, or ECPA, requires only a subpoena for law enforcement to access e-mail that has been opened, even though a search warrant would be required for a printout of the same communication sitting on a desk. To make matters more complicated, ECPA is silent on the privacy standard for accessing data stored abroad. Without an actual legal framework in place, this puts the privacy of American citizens at risk for intrusion by foreign governments.

In the coming days, I intend to reintroduce the LEADS Act, which will promote international comity and law enforcement cooperation.

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Will you commit to working with me on this important subject, because it's important we solve these problems?

Senator, the subject of electronic privacy is central to so many of our freedoms. And as you point out, in an era of ever-changing technology, we have to be vigilant to make sure that we are not only providing law enforcement the tools it needs, but protecting our citizens' privacy. And I certainly commit to you to working with you on this important legislation and all the issues that will flow from it.

HATCH:

Well, thank you so much.

Trade secrets are among the most valuable assets for American companies and currently are protected under federal criminal law by the Economic Espionage Act and by an array of state civil laws. Unlike other forms of intellectual property, however, there's no federal civil remedy for trade secret owners. I will reintroduce the Defend Trade Secrets Act in the coming days with Senator Coons to provide an efficient federal remedy for trade secret owners.

Do you agree that trade secret owners should have the same access to a federal remedy as owners of other forms of intellectual property?

LYNCH:

Senator, I think that the issue of trade secrets, again, particularly as American technology becomes ever more complex and becomes ever more a target from those both in the U.S. and without who would seek to steal it, is an increasingly important issue and I look forward to working with you to consider that statute.

I'm not familiar with the provision that you raised, but it certainly touches on an important issue of making sure that our companies and their technology are protected.

HATCH:

Well, thank you so much. I am today introducing legislation to help victims of child pornography receive the restitution that Congress has already said they deserve. The Supreme Court said last year that the current restriction statute enacted more than 20 years ago does not work for child pornography victims and this legislation will change that.

I am joined by more than 30 senators on both sides of the aisle, including 14 on this committee.

Do I have your commitment that under your leadership the Justice Department will aggressively prosecute child pornography and use tools like this legislation to help victims get the restitution they need to put their lives back together?

LYNCH:

Senator, throughout my career, I have -- I have expressed a commitment to prosecuting those who would seek to harm our children, be it through child pornography or the actual abuse of children, which often go hand in hand.

You certainly raise important issues about how can we make these victims whole and I look forward to working with you and the members of this committee in reviewing that legislation as well.

(CROSSTALK)

HATCH:

Thank you so much. Now I recently led a powerful -- read a powerful book, read it in one day. It's titled "License to Lie: Uncovering Corruption in the Department of Justice."

The author writes about many things, including the debacle that occurred in the misguided prosecution of Senator Ted Stevens, which I thought was out-of-this-world bad. I was one of the people who testified as to his character and he was a person of great character. And as you know, he lost the Senate race because of this type of prosecution.

I know that case. Ted Stevens was a dear friend of mine and I testified on his behalf as I said. Only after he was convicted... did we learn that the Justice Department prosecutors intentionally hid exculpatory evidence that could have helped his case.

Now there were not -- these were not mistakes. They were corrupt acts that violated every prosecutor's duty under the Brady v. Maryland decision to turn over exculpatory evidence so that the trial will be fair.

Now I recommend that you read this book because if you're -- if you -- if even half of it is true and I believe it is true, you have a lot of work to do to clean up the -- that department.

Will you consider doing that for me?

LYNCH:

Thank you, sir, I will.

HATCH:

I appreciate it.

Thanks, Mr. Chairman.

GRASSLEY:

Yes.

Before I call on Senator Feinstein, I'm going to ask just as soon as the Finance Committee convenes, I'm going to offer an amendment. So I would ask the most senior Republican to watch the time and call on the next person in seniority order.

Senator Feinstein?

FEINSTEIN:

Thank you very much, Mr. Chairman.

Ms. Lynch, I sat through six opening statements by potential attorneys general and I just want to tell you yours was the best.

LYNCH:

Thank you.

FEINSTEIN:

I see the combination of steel and velvet. I see your effectiveness before a jury. I see your love for the Constitution and I see the determination which is in your heart and I think your being. And it's very, very impressive.

So I want to thank you for really 30 years of service...

(CROSSTALK)

LYNCH:

Thank you, Senator.

FEINSTEIN:

... and I hope it will be a lot longer.

Mr. Chairman, I'd like to place in the record Los Angeles Police Department's Chief's Charlie Beckett's written testimony on the subject of the president's executive action on immigration.

GRASSLEY:

Without objection, so ordered.

Ms. Lynch, I'm going to ask you three questions. The first is on expiring provisions of the Foreign Intelligence Surveillance Act, which will come to this committee before June of this year and also before the Intelligence Committee, on which I serve.

A question about Office of Legal Counsel Opinions and a question on the State Secrets Act.

Let me begin with FISA. The three provisions that are going to expire on June 1 are first the roving wiretap authority. This provision enables the government to maintain surveillance on a target when he or she switches phone numbers or e-mail addresses without seeking a new court order.

The second is the lone wolf authority, which enables the government to conduct surveillance of a non-United States person engaged in international terrorism without demonstrating that they are affiliated with a particular international terrorist group, such as ISIS or Al Qaeda.

And the third is the business records authority, which carries with it Section 215 of the National Security Administration. This enables the government to obtain a court order directing the production of, quote, "any tangible thing," end quote, that's relevant to an authorized national security investigation.

Can you describe for us the importance of these three provisions and what would be the operational impact if the three were allowed to sunset in June?

LYNCH:

Thank you, Senator. You certainly raise important issues about the need to have a full panoply of investigative tools and techniques to deal with the ever-evolving threat that terrorism presents against us.

With respect to the provisions that you refer to, I think it's -- I have always found it most interesting that the roving wiretap provision is actually a provision that was incorporated into the FISA statute after being utilized extensively for several years in narcotics prosecutions. It was one with which I was familiar as a young prosecutor as many of my colleagues across the country were as well.

And the ability to describe to a court the nature of the offense, the nature of the activity and the use of attempts to shield one's self from electronic surveillance, which is part of what must be set forth in the application, have been invaluable tools.

Of particular importance is the fact that all of this must go to a court -- obviously in the narcotics area it was an Article 3 court; in the FISA area, it goes to the FISA court -- but there is judicial review for this and it has been an important part of the techniques we have used in the war on terror, as have the other two provisions that you mentioned.

I do think, however, that, with respect to FISA, there's always the ability, there's always the need to make sure that we are current not just with technology but with the most effective way to protect privacy as we go forward in this important act. I know that's something that you have spent a great deal of time on as well as many of your colleagues on this committee as well as on the Intelligence Committee. And I look forward to continuing those discussions with you should I be confirmed.

With respect to the lone wolf provision, again, I think we have to obviously examine it carefully. Recent events, however, have underscored the importance of this as an issue in the war on terror. And so I would hope that we could move forward with any proposed changes to FISA with a full and complete understanding of the risks that are -- that we are still facing.

And if any changes need to be made, again, after full and fair consideration with this committee, with the Intelligence Committee and the discussions that we need to have, making sure that we can still provide law enforcement with the tools

Similarly with Section 215, I believe that the court order provision in there is an effective check and certainly a necessary check as we gather data from all types of sources.

As I've always said, I'm certainly open to discussions about how they can be best modified if we need to modify them consistent with the goals of protecting the American people.

And I commit to you, Senator, and indeed to all of this committee that I will always listen to all those concerns, be it about the FISA statute or any of the techniques we are using in the war on terror.

FEINSTEIN:

Thank you very much.

As a member of both Judiciary and Intelligence, we have on both committees sought access to Office of Legal Counsel opinions, called OLC opinions. And these opinions often represent the best and most comprehensive expression of the legal basis for intelligence activities Congress is actually charged with overseeing.

So without these opinions, you don't really know the legal basis upon which an administration has made -- has based certain activities. And it's been very frustrating to us.

In particular, executive branch officials have previously advised the committee of the existence of a seminal OLC opinion written by Ted Olson decades ago governing the conduct of collection activities under Executive Order 12333.

My question is, could we have your commitment that you will make a copy of this OLC opinion available to members of both the Intelligence and the Judiciary Committee? Probably your first tough question.

LYNCH:

Senator, I think that with respect to the OLC opinions, you are correct. They do represent a discussion, an analysis of legal issues on a wide variety of subjects when a variety of agencies come to the department for that -- that independent advice that we must provide them.

Certainly, I'm not aware of the discussions that have been had about this previous opinion in terms of providing it. Certainly, I will commit to you to work with this committee, as well as the Intelligence Committee, to find a way to provide the information that you need, consistent with the department's own law enforcement and investigative priorities.

FEINSTEIN:

Thank you very much. This particular opinion is important. And it would be useful if we can review it. So thank you.

On state secrets, on September 23, 2009, the attorney general issued a memorandum establishing new procedures and standards to govern DOJ's defense of an assertion of the state secrets privilege and litigation. Among other things, the memorandum stated that the DOJ would provide the periodic reports to Congress on the exercise of these state secrets privilege.

Since 2009, only one such report from April 2011 has been provided. That report discussed the two cases in which the privilege had been invoked under the new policy. But those are no longer the only two cases.

So I'd like to ask you if you could provide the appropriate Oversight Committees with the second periodic report on the exercise of state secrets privileges that discusses those cases which the privilege has been invoked on since April of 2011?

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LYNCH:

Senator, you raised the important issue of the need to work with the Oversight Committee. He they this committee or Si0uzs... Intelligence, in reviewing the actions of the Department of Justice, not just so the committees can carry out their work, but so that the American people can be aware of how the department carries out its work.

I'm not familiar with the reports that you refer at this point. I certainly look forward to reviewing this issue, and I certainly commit to you that I will do my best to ensure that the department lives up to its obligations that it has set forth.

FEINSTEIN:

Good. And I will come back. This is an important question to us, so I will come back, and hopefully can get this -- get an answer, yes or no, within the next couple of weeks. So thank you very much.

LYNCH:

Senator, I look forward to learning more about the issue, and I look forward to sharing that with you, should I be confirmed, as well as any issues of concern that this committee or others have.

FEINSTEIN:

Thank you very much. Thank you, Mr. Chairman.

GRASSLEY:

Thank you, Senator Feinstein. Now it's Senator Sessions' turn.

SESSIONS:

Thank you, Mr. Chairman. It is great to have you here. I appreciate the opportunity to have a good discussion, I think, in our office, and having had -- I think I just passed my time in the Senate longer than I spent in the Department of Justice. It was a great honor to serve that. I have high ideals for this department.

And we understand that the attorney general is a premier law enforcement officer, the senior law enforcement officer in America. He or she sets the tone for law in America, the commitment to law, and must resist politicizing law, and do the right thing on a daily basis.

On occasion, you're called upon to issue opinions. OLC works for you, the Office of Legal Counsel, who issues these opinions. And you'll have to tell the president yes or no on something that he may want to do.

Are you able and willing to tell the president of the United States no if he asks permission or a legal opinion that supports an action you believe is wrong?

LYNCH:

Senator, I believe you've touched upon one of the most important responsibilities of the attorney general. And let me say also that I appreciate it very much the opportunity to meet with you and discuss these important issues.

The attorney general's position, as a cabinet member, is perhaps unique from all of the cabinet members; yes, a member of the president's cabinet. But the attorney general has a unique responsibility to provide independent and objective advice to the president, or any agency, when it is sought; and sometimes perhaps even when it is not sought.

With respect to the Office of Legal Counsel...

SESSIONS:

And just -- so you understand that your role us such that on occasion you have to say no to the person who actually appointed you to the job, and who you support?

LYNCH:

Senator, I do understand that that is in fact the role and the responsibility of the attorney general, and in fact, a necessary obligation on their part.

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SESSIONS:

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Well, you know, people have agendas, and attorneys general sometimes do. And they have to guard against that and be objective, as you basically said to me now in committee.

On April 24th of 2013, Attorney General Holder said this -- and I'm raising this fundamentally because I think there's a lot of confusion about the -- how we should think about immigration in America, what are duties and what our responsibilities are.

He said this, quote, "Creating a pathway to earn citizenship for the 11 million unauthorized immigrants in our country is essential. The way we treat our friends and neighbors who are undocumented by creating a mechanism for them to earn citizenship and move out of the shadows transcends the issue of immigration status. This is a matter of civil and human rights."

So let me ask you, do you believe that a person who enters the country unlawfully, that has perhaps used false documents or otherwise entered here, has a civil right to citizenship?

LYNCH:

Well, Senator, I'm not familiar with the context of those comments. I certainly think that you do touch upon the difficult issue of how do we handle the undocumented -- undocumented immigrants who come to our country. I believe for the life that we offer, I believe because of the values that we espouse...

SESSIONS:

I don't want to interrupt you, but just the question is, do you agree with that statement about it's a matter of civil rights, and citizenship, and work authority, right to work in America, for someone who enters the country unlawfully? That's a civil right?

LYNCH:

Senator, I haven't studied the issue enough to come to a legal conclusion on that. I certainly think that people who come to this country in a variety of ways can rehabilitate themselves and apply, but that would have to be something that would be decided on a case-by-case basis.

SESSIONS:

I'd just like to hear you answer that. Is it a civil right for a person who enters the country unlawfully, who would like to work and like to be a citizen, to demand that, contrary to the laws of the United States? And when Congress doesn't pass it, is that a right that they're entitled to demand?

LYNCH:

So I don't think -- I think that citizenship is a privilege. Certainly, it's a right for those of us born here. I think it's a privilege that has to be earned. And within the panoply of civil rights that are recognized by our jurisprudence now, I don't see one that you -- as such that you are describing.

SESSIONS:

I certainly agree. I'm a little surprised it took you that long. But the attorney general statement was breathtaking to me. Now, Peter Kirsanow, who's a member of the U.S. Commission on Civil Rights, responded to that some time ago.

And here's what he said, quote, "To equate amnesty for breaking the nation's immigration laws with civil rights betrays an incoherent and a historical understanding of the Civil Rights movement. Law-abiding black citizens of the United States were not seeking exemption from law; they were seeking application of such laws in the same manner that was applied to whites," closed quote.

Would you agree with Mr. Kirsanow's analysis?

LYNCH:

Well, certainly, I think with respect to the Civil Rights movement, and the role of African Americans in it, it certainly was a

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SESSIONS:

Well, on the 50th anniversary of the Selma March -- it's approaching -- people were denied, systematically, fundamental rights as citizens of United States of America. And that was a historic event. It changed America. I think it's important that that be remembered.

But I will just tell you it's quite different, as I think Mr. Kirsanow points out, to demand your lawful rights as an American, and to ask for -- insist that civil rights apply to those who enter the country unlawfully, to have these benefits.

Well, the president's action would give people who came here unlawfully the right to work, the right to participate in -- in Social Security and Medicare when Congress has not done that, allows them to stay for at least a period lawfully.

Let me ask you this: In the workplace of America today when we have a high number of unemployed, we've had declining wages for many years, we have the lowest of Americans working, who has more right to a job in this country? A lawful immigrant who's here, a green-card holder or a citizen, or a person who entered the country unlawfully?

LYNCH:

Well, Senator, I believe that the right and the obligation to work is one that's shared by everyone in this country regardless of how they came here. And certainly, if someone here, regardless of status, I would prefer that they be participating in the workplace than not participating in the workplace.

With respect to...

SESSIONS:

So you think that a person that's -- anybody that's here lawfully or unlawfully is entitled to work in America?

LYNCH:

Senator, I'm not sure if I know -- if I understand the basis for your question as -- as to whether or not there's a legal basis for them to work or not.

SESSIONS:

I asked you, who had -- we're talking about rights -- who has the most rights? Does a lawful American immigrant or citizen have the right to have the laws of the United States enforced so that they might be able to work, or does a person who came here unlawfully have a right to demand a job?

LYNCH:

Certainly, the benefits of citizenship confer greater rights on those of who are citizens than those -- than those who are not.

SESSIONS:

Well, do you think a person that's here unlawfully is entitled to work in the United States when the law says that employees can't hire somebody unlawfully in America?

LYNCH:

I believe that -- go ahead.

SESSIONS:

Go ahead.

LYNCH:

Sorry, sir.

I think that certainly the provision that you refer to regarding to the role of the employer in ensuring the legal status of those who are here is an important one and that we have to look at in conjunction with this issue in terms of preventing

Again, we want everyone to seek employment, but we have in place at this point in time a legal framework that requests or requires employers to both provide information about citizenship as well as not hire individuals without citizenship.

SESSIONS:

Alright. Do you think that someone given -- I understand that you support the -- the executive order and OLC's opinion. Is that correct?

LYNCH:

I don't believe my role at this point is to support or not support it. My review was to -- to see whether or not it did outline a legal framework for some of the actions that were requested, and as noted, it indicated there was not a legal framework for other actions that were requested.

SESSIONS:

Well, just let me wrap up by asking this: Are you -- if -- if a person comes here and is given a lawful right under the president's executive amnesty to have Social Security and a work authorization card, what if somebody prefers to hire an American citizen first? Would you take action against them?

Do you understand this to mean that those who are given executive amnesty are entitled as much as anybody else in America to compete for a job in America?

LYNCH:

Well, I don't believe that it would give anyone any greater access to the workforce, and certainly an employer would be looking at the issues of citizenship in making those determinations.

SESSIONS:

Would you take action against an employer who says, "No, I prefer to hire someone that came to the country lawfully rather than someone given executive amnesty by the president"? Would Department of Justice take action against them?

GRASSLEY:

When you answer that, I'll move on then.

LYNCH:

Thank you, sir.

With respect to the -- the provision about temporary deferral, I did not read it as providing a legal amnesty, that is, that permanent status there, but a temporary deferral.

With respect to whether or not those individuals would be able to seek redress for employment discrimination, if -- if that is the purpose of your question, again, I haven't studied that legal issue.

I certainly think you raised an important point and would look forward to discussing it with you and using -- and relying upon your thoughts and experience as we consider that point.

GRASSLEY:

Thank you, Senator Sessions. Now Senator Schumer.

SCHUMER:

Well, thank you.

And, you know, I think that even in the short while here, it's clear to my colleagues why you are such a tremendous -- why, you've been such a tremendous U.S. attorney in my home state of New York and home borough of Brooklyn and why you'd

make such a great attorney general. You've just, you know -- you're just knocking them out of the park. AAAAAEvOz0svSi0uzs...

And speaking of...

(LAUGHTER)

... sports analogies, there's another point I'd like my colleagues to know, another testament to your perseverance, to your loyalty in the face of incredible adversity. With all due respect to Mr. Tillis, you're not a Tar Heel or a Blue Devil; you're a Knicks fan.

That takes...

(LAUGHTER)

It's a lot tougher being a Knicks fan than going through these questions here today.

(LAUGHTER)

But anyway, I have a couple of -- I'd like to just go over a couple points some of my colleagues made.

First, on prosecutorial discretion, there's a myth out there that prosecutorial discretion policies are tantamount to an illegal failure to force the law, and we know that you have enforced the law aggressively and will continue to do so, as has the administration.

My friends -- some of my friends across the aisle seem to be suggesting that the president's announcement of the enforcement policies for the Department of Homeland Security is tantamount to an announcement that we won't enforce our immigration laws, but that's absurd.

We know we have 11 million undocumented immigrants living in the United States. Congress, this body, only allocates enough money for DHS to deport 400,000 of them. 11 million illegal immigrants, enough money to deport 400,000.

Obviously, you have to make some choices here. And I'm sure when my dear friend, Jeff Sessions -- and he is a dear friend -- was U.S. attorney in Alabama, he used prosecutorial discretion. I know he did a good job going after violent drug dealers and criminals.

Would we want our -- we want our prosecutors to go after the highest-level crimes if they don't have the resources to do all of them. Doesn't it make sense to have a general rule to prosecute -- in a prosecutorial office with limited resources, to go after bank robbers before you go after shoplifters?

Now, obviously, there can be an occasional exception. As you mentioned, the president's executive order allows for that occasional exception.

But this idea that going after -- having an office go after the higher-level, more dangerous crimes first is part of how law enforcement has gone on for hundreds of years, and it should. So I don't even get this idea that this is a -- an illegal act by the president.

We arm our law enforcement officials with an array of laws but limited resources. They have to make hard choices. And a straightforward allocation of resources is not political activism; it's what prosecutors are doing in every jurisdiction of this land right now.

Immigration is like any other issue. We have limited resources. It makes imminent sense to go after the hardened criminals

before going after low-level offenders.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

So just let me ask you a couple of questions here.

Don't U.S. attorney offices all over the country consistently have to make these general type of prosecutorial decisions on a day- to-day basis, and how do -- how do you?

LYNCH:

Yes, Senator.

With respect to the exercise of discretion and the setting of priorities, one of the privileges that I have had as being the U.S. attorney in the Eastern District of New York and working with my colleagues across the country has been getting to know them and learning about how different every district is, how a crime problem in Brooklyn may not even appear on the West Coast and how a crime problem in the Midwest that has seen an increase in crime due to the happy accident of increased oil reserves may present issues that I would never face in an urban environment.

My colleagues and I work together, and we share our thoughts on the best ways to deploy our limited resources to deal with the crime problems in our districts.

My colleagues that have a large number of Native American reservations in their districts, for example, have a different base of problems than I do, but they are just as committed and just as focused on keeping those citizens safe as well.

So all of us look at the crime problems in our districts. To do that, we work very closely with our law enforcement partners in -- in looking at how they have determined the nature of the threat, be it terrorism, be it narcotics, be it those who target children.

LYNCH:

We also work closely with our state and local counterparts, not just the law enforcement counterparts but our prosecutive counterparts in the district attorneys' offices.

Many times I will have a matter in my office that is subject to both federal and state jurisdiction and it may be more appropriate for the district attorney to prosecute that type of crime because of the nature of the sentence that can be achieved, because of the impact on a particular victim or community or because of a legal issue with -- involving proof and the admissibility thereof.

All of these things go into the consideration of how we manage individual cases, but also how we set priorities and then deploy our limited resources to best protect the people of our district.

SCHUMER:

Exactly. Every prosecutor, whether it's the Justice Department, the U.S. attorney's office sets priorities and has to and that's just what the president did, in my opinion, in the executive order.

Next one, we're hearing a lot about executive action being unconstitutional. And so I'd like to just talk about that. That's another myth that's out there.

Now no federal court has struck down executive action. The most recent federal court to hand down a decision supported it. I've heard it suggested federal courts have declared executive action unconstitutional.

So happens, in fact, dating back to Chief Justice Rehnquist the Supreme Court has repeatedly bolstered executive discretion and refused to review agency decisions that are within the law.

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With respect to this executive action, there have been two federal cases filed, one here in Washington by Sheriff Appaloosa, a notoriously anti-immigration activist; that's been dismissed.

The second suit was filed in Texas and is still pending. Now we're hearing that -- so no courts have struck down executive action.

Now we're hearing that Speaker Boehner and House Republicans will be suing the president on this executive action. I don't think that's a responsible use of taxpayer dollars, but at least Speaker Boehner and I agree on one thing.

If Republicans disagree with the -- with President Obama over the legality of this policy, they can sue him and let the courts decide. The confirmation of America's highest law enforcement officer is not the time or place to vent frustration.

So let me just ask you a couple of questions. You've answered them, but I want to underscore them, because some people are concerned that the, quote, "rogue Obama administration is lawless."

Will you commit to following court decisions and legal process?

LYNCH:

Absolutely, Senator, that's my first point of reference.

SCHUMER:

And specifically if a court happens to strike down executive action, will you respect that court decision?

LYNCH:

I will respect that court decision.

SCHUMER:

And let's imagine Congress -- I don't think this will happen; I would try to prevent it as best I could -- but let's say Congress were to pass a bill explicitly prohibiting President Obama's immigration actions, a bill I find hard to imagine the president would sign. But let's just imagine for the sake of argument happened. If that such a bill passed, will you commit to following the new law?

LYNCH:

I will commit to following the -- all the laws duly executed by this body.

SCHUMER:

Thank you.

OK. Just one other issue, since I have a little more time. Work permits, which my good friend, again, Jeff brought -- Senator Sessions brought up.

Some have suggested it's illegal for the administration to issue work permits for recipients of deferred action. Again, they imply this is unprecedented. That's misleading.

Guess who did it in 1982?

Ronald Reagan. They published INS regulations authorizing work permits for recipients of deferred action -- 1982, the Reagan administration. That's not to say workplace enforcement isn't unnecessary -- isn't necessary; it is.

And in fact, isn't it true, Ms. Lynch, that you have a strong record of enforcing workplace immigration rules?

Just tell us a little about the 7-Eleven Stores case that you brought on Long Island.

LYNCH:

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Thank you, Senator. The case against the 7-Eleven Stores and various franchises was a very important one to my office because it was one in which we saw a corporate entity deliberately flouting the labor laws.

Individuals, mostly of a particular ethnic group who owned franchises at 7-Eleven, were reaching out to their own community members and hiring them to work in the stores. This would have been an opportunity for individuals to earn money for their families and to essentially become part of the American dream.

Instead, however, the workers were systematically victimized. They were forced to work double shifts, triple shifts, yet only paid for working part-time hours. They were only given their money in either a 7-Eleven debit card or cash as deemed appropriate by the manager.

More -- even worse than this was the evidence that we uncovered that the stores were aware that they were violating the labor laws and simply flouting them.

They also requested -- they also required the workers to all live together in company-sanctioned housing. We essentially were creating a modern-day plantation system on Long Island and also throughout the Virginia area with co-conspirators of these franchise -- of these franchise owners.

We spent a long time working on the investigation in conjunction with our law enforcement partners. The matter is still being reviewed with respect to other states and wherever we find workers being victimized and being discriminated against certainly my office has never hesitated to take action.

SCHUMER:

Thank you, my time has expired, Mr. Chairman.

(UNKNOWN)

Thank you. I would offer for the record a consent that the article from "The Atlantic" saying the headline from David Frum of Reagan and Bush offer no precedent for Obama's amnesty order and I think that's crystal clear.

Senator Cornyn -- Justice Cornyn is next.

CORNYN:

Good morning, Ms. Lynch.

LYNCH:

Good morning.

CORNYN:

Congratulations again to you on your nomination and thank you for coming to my office last -- I guess it was last Friday...

LYNCH:

Yes.

CORNYN:

... to visit about this hearing and I should say congratulations to you for an outstanding career as a United States attorney.

The challenge I think that people have when they come to Washington, D.C., and they assume jobs that have political implications is that they sort of forget their basic mooring in the law and they become politicians masquerading as law enforcement officers and that's a real challenge. And I won't claim that it's only a challenge for Democrats. It's a challenge -- has been a challenge for Republicans as well.

But I am concerned -- let me -- let me, for Senator Schumer's benefit, let me just stipulate, you're not Eric Holder, are you?

LYNCH:

(LAUGHTER)

CORNYN:

But no one is suggesting that you are, but of course, Attorney General Holder's record is heavy on our minds now. And I agree with the chairman about his concerns when the attorney general refers to himself as the president's wingman, suggesting that he is not -- does not exercise independent legal judgment as the chief law enforcement officer for the country.

You wouldn't consider yourself to be a political arm of the White House as attorney general, would you?

LYNCH:

No, Senator, that would be a totally inappropriate view of the position of attorney general.

(CROSSTALK)

CORNYN:

I'm sorry, and you're -- and you'd be willing to tell your friends no if in your judgment the law required that?

LYNCH:

Sir, I think that I have to be willing to tell not just my friends and acquaintances but colleagues no if the law requires it.

CORNYN:

And that would be the -- include the President of the United States?

LYNCH:

I think that the obligation of the attorney general is to when presented with matters by the president, to provide a full, thorough, independent, substantive legal analysis and give the president the best independent judgment that there is.

And that may be a judgment that says that there is a legal framework for certain actions and it may be a judgment that says that there is not a legal framework for certain actions.

CORNYN:

And while we have stipulated you're not Eric Holder, Mr. Holder's record is certainly on our minds because I can't think of an attorney general who so misevaluated the independent role of the chief law enforcement officer and taken on that aspect of the president's wingman and operated as a politician using the awesome power conferred by our laws on the attorney general.

The attorney general has been openly contemptuous of the oversight responsibilities of a coequal branch of government. He's stonewalled legitimate investigations by the Congress, including the investigation into the Fast and Furious episode that Senator Grassley referred to earlier, making bogus claims of executive privilege in order to keep Congress and the American people from finding out the facts.

We know that the attorney general has repeatedly made legal arguments that have been rejected as unconstitutional by the United States Supreme Court and he's harassed states like mine.

And I suspect you'll hear from another colleague about his state, on matters like voter ID. When the United States Supreme Court has upheld the validity of voter ID as a means to protect the integrity of the ballot for people who were qualified to vote.

CORNYN:

And at the same time, the attorney general has failed to implement laws that Congress has passed in order to provide -- to

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protect the voting rights of our military deployed overseas. He's also politicized the war on terror. He's declassified top secret legal memos, exposing public officials in the intelligence community to not only ridicule but threats, legal and otherwise, for performing actions that they were told by the highest legal authorities were legal and necessary to save American lives.

And, indeed, he reopened a criminal investigation into those same members of the intelligence community after a previous investigation had not revealed any basis for criminal charges.

So how do we know you're not going to perform your duties of office as attorney general the way Eric Holder has performed his duties? How are you going to be different?

LYNCH:

Senator, if confirmed as attorney general, I will be myself. I will be Loretta Lynch. And I -- and I would refer you to my record as United States attorney on two occasions, as well as a practicing lawyer, to see the independence that I've always brought to every particular matter.

I certainly think that going forward, while I'm not familiar with the particulars of the issues that you raise, they clearly are of concern to you and perhaps to this committee, and I do pledge to this committee that I want to hear your concerns, I want to listen to your concerns, and I will always be open to discussing those issues with you.

Senator, I'm sure that as we go forward, should I be confirmed, while it would be wonderful to think that you would agree with everything that I would do, that may not be the case, but I...

CORNYN:

You may not agree with everything we do.

LYNCH:

And that is -- that is perfectly appropriate. But, Senator, I will always be open to discussing with you why I have done something and the basis for which I have made an action, to the extent that I'm able to do so. I have found that to be the most effective way, of not just for me in terms of learning from people with whom I disagree, but also working effectively with people with whom I may disagree on various points, but with whom, like you, we share a common goal.

CORNYN:

Ms. Lynch, I've been married 35 years, and I can guarantee you that 100 percent agreement is an impossible standard...

(LAUGHTER)

... for anybody to comply with. So we don't expect -- we don't expect that, obviously.

But I want to ask you about your commitment to working with the committee and Congress and respecting our congressional oversight authority. A recent letter sent to Senator Leahy on behalf of Attorney General Holder was dated December the 5th, 2014, and responds to questions for the record that arose in an appearance before this committee on March the 6th, 2013, so obviously about, this looks roughly a year and a half, more than a year and a half later.

Can we expect a more timely response from you and the Department of Justice to the legitimate inquiries of this committee?

LYNCH:

Certainly, Senator. I believe that the oversight responsibility of this committee is important not just for the functioning of the committee but also to the American people in terms of helping them understand the way in which the department operates and the way in which we all work to keep them safe.

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~~I commit to you absolutely that I will work with this committee to ensure that we provide as timely a response as possible...~~
I'm not sure of the particulars of the matter that you raise, so I'm not able to comment on that, but certainly I would hope to be able to provide you with the information that you need in as timely a manner as possible consistent with the department's litigation and enforcement responsibilities.

CORNYN:

I think it would make if possible for you to be a more effective attorney general and it would make it possible for us to be more effective in our respective roles as a member of Congress exercising our responsibilities as well.

I want to just ask you a little bit about prosecutorial discretion, which you've heard something about here. My only regret from this morning's hearing, is that Senator Schumer, the senior senator from New York who introduced you wasn't available for cross-examination by members of the committee, but we'll have a chance to talk later.

But he was -- seemed somewhat dismissive of concerns about this massive what I would consider in essence refusal to enforce existing law that is involved in these executive actions.

There is a difference to your mind, isn't there, between a case-by-case exercise of prosecutorial discretion and a refusal to enforce the laws that are on the books? There is a difference, isn't there?

LYNCH:

Senator, there is a difference. And I do not view the Department of Justice, certainly in my own practice, as refusing to enforce laws but rather attempting to set priorities and then exercising discretion within those priorities.

CORNYN:

Well, let me ask you about that. Isn't it incumbent upon the Department of Justice to ask Congress for the resources to do the job that Congress has said that the department must perform before you can come back and say, well, we're just not gonna pursue those crimes and those offenses because we don't have enough money.

I mean, isn't it your responsibility, won't it be your responsibility as the next attorney general to come to us and ask us for those resources? I can't imagine if Attorney General Holder or the president of the United States or Secretary Johnson or others had come to us and said we don't have the resources to enforce the immigration laws, so we're gonna have to -- we're gonna have to in essence decline to enforce them because we don't have those.

I mean, don't you have that responsibility to ask for those resources before you decline to enforce the law based on lack of resources.

LYNCH:

Certainly, Senator, I'm not aware of the Department of Homeland Security's budget request before this -- this body or Congress in general.

With respect to the Department of Justice, I have been involved in reviewing the budget as part of my work on the attorney general's advisory committee and certainly during sequestration spent a great deal of time looking at the budget to ensure that we did maintain the appropriate resources to carry out our core mission of protecting the American people within the constraints that were placed upon us at that time.

And it's my understanding that with respect to budget requests that the Department of Justice makes, that those requests do include information about goals and priorities across the board as a way of explaining to Congress why specific resources are needed.

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CORNYN:

So you do need more money?

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I would probably join all of my agencies in saying that, sir, but I can't speak for them.

(LAUGHTER)

CORNYN:

That's what I thought. Thank you.

HATCH:

Thank you, Senator.

Now, Senator Durbin. Then the next Republican will be Senator Lindsey Graham.

DURBIN:

Ms. Lynch, thank you for being here. I will be objective, although I am deferential to women named Loretta. I've been married to one for 47 years. And I'm glad that you're here today.

When your father lifted you up on his shoulders at that Greensboro church, you were a young girl at the time, but a witness to a moment in history that changed America forever and literally changed your life. There was no way you could know that.

One of the central issues that was raised during the civil rights movement was the right to vote, a right which Chief Justice Roberts said, sitting in that very same place and in quoting a court decision, is preservative of all rights.

We are now in a unique position, some 50 years later, about to celebrate the 50th anniversary of the Voting Rights Act. The Supreme Court in *Shelby County v. Holder* struck down major provisions of the Voting Rights Act. And Congress, which historically had renewed the Voting Rights Act on a bipartisan basis, is now, with few, rare exceptions, split along partisan lines as to whether or not there will be a renewal of some sections.

We are finding states across the nation, many states, that are changing the requirements for voting. I chaired the Constitution Subcommittee of Judiciary.

I took the subcommittee to public hearings in Ohio and in Florida where there were new restrictions placed on voting by state legislatures. I called the election officials of both political parties in those states and asked them if there was any evidence of voter fraud or voter abuse that led to these legislative changes. And, to a person, they said virtually none.

What has happened is that the Department of Justice has stepped in in some cases that they consider to be extreme and unfair, and worked to stop the implementation of these state laws that restricted the right to vote.

As you embark on the possibility of making that decision as attorney general, how do you view the state of voting rights in America today? And what do you view as your responsibility, should you be our next attorney general?

LYNCH:

Thank you, Senator. Certainly, I believe that the right to vote is the cornerstone of a free democracy, and one that every citizen has the right and, in fact, some would argue the obligation to exercise.

With respect to how voting rights are -- are being handled in the country now, I think we are in a time of great debate over those issues. Those are important issues, and I'm certainly open to hearing all sides of it.

With respect to how -- and I also think that every state does have the responsibility and obligation to regulate the voter rolls and to ensure that the voting is carried out freely and openly and fairly.

LYNCH:

The concerns that are raised, Senator, are when acts that are taken with a goal towards protecting and preserving the integrity of the vote act in a different way and act to suppress the vote or in some way prevent people from exercising the franchise.

I would hope that at the first outset, through the political discourse and discussion, that we could have conversation about that and come to a resolution of practices and procedures that would ensure the right to vote for all citizens while still protecting the integrity of everyone's ballot.

Absent that, I believe that when the laws are passed, the Department of Justice has to look very carefully at their impact in making a decision as to how to proceed.

Certainly, there have been instances when voter ID laws have received approval from the department under what was previously known as pre-clearance, because they sought to simply regulate and protect the ballot as opposed to act in a different way.

But where there is an indication that -- that the vote will somehow be harmed, I believe the Department of Justice certainly has the obligation to review that matter, to look carefully at all of the facts and evidence and then proceed accordingly.

DURBIN:

I couldn't agree with you more, and I find it ironic and painful that at this moment in our history, as we celebrate with the movie "Selma" and talk about 50-year anniversary of the Voting Rights Act, that states -- many states on a systematic basis are making it more difficult for Americans to vote, without any evidence of voter fraud to back up those changes.

In one Southern state, it's estimated that some 600,000 voters were basically precluded from voting in election, because of new voter ID requirements. In that same state, a 93-year-old veteran was turned away, a 73-year-old doctor turned away, people who were proud to vote, wanted to vote turned away by new laws. These were people who had a right to vote.

And it troubles me that amidst all the celebration of the civil rights movement, we are finding a reversal of the most fundamental principle in preserving that right to vote. I appreciate you had to say about it.

I would say a word about the Smarter Sentencing Act, which I introduced with Senator Lee, who may be still here today, from Utah, a bipartisan measure with 32 cosponsors in an effort to take a look at the reality that not only does the United States have more prisoners per capita than any other nation, but in many instances, lengthy prison sentences do not serve the cause of justices and deny us resources we need to keep our community safe.

Attorney General Holder, who is not been held in the highest regard by some members of this committee, has been an outspoken supporter of this bipartisan measure, and I hope that you would consider supporting it too, although I won't put you on the spot to do that without giving you a chance to look at it.

Let me add one other element. As chairman of the Constitution and Human Rights and Civil Rights Committee, which was its name before this new Congress, we also had a hearing on solitary confinement.

It turns out the United States in its prison system has more prisoners in solitary confinement than any other country, and we had testimony from those who had spent 10 years on death row in solitary confinement in Texas, an even longer period of time in solitary confinement on death row in the State of Louisiana, and ultimately exonerated. They were not found to be

The devastating impact that has on the human mind and spirit for so many of these people who served time in solitary confinement, many of whom are going to be ultimately released, is something the Federal Bureau of Prisons is now addressing.

You've been a prosecutor for many years. What is your view when it comes to incarceration and segregation or solitary confinement?

LYNCH:

Senator, you raise important issues about the management of our prison system, which are charged with the ultimate -- being the ultimate repository for those that we have concluded are seeking to harm Americans but are also charged with doing so in a manner that is constitutional, that is effective and that protects the safety of both the inmates and those who are guarding them.

So these are balances that we have to strike. And I take the view that certainly, as we look at the issues, one of the benefits, I believe, of discourse like this and that I hope to have going forward with this committee is continued discussion on those issues.

There are a number of -- of municipalities, for example, that are looking at this very same issue. New York City is looking at it with respect to juvenile detention and -- and -- and -- and looking to remove solitary confinement as an option for juvenile detention as well, based on many of the similar studies that you are talking about.

I believe we have to look at those studies, we have to listen to the evidence that comes before us and make the best determination about how to handle what can be a dangerous prison population, but how to handle that prison population in a way that's both constitutional and effective.

DURBIN:

Thank you very much.

Thank you, Mr. Chairman.

GRASSLEY:

Senator Lindsey -- Senator Graham is next.

GRAHAM:

Thank you.

Thank you very much, Ms. Lynch, and congratulations on being chosen by the president. This is truly an honor, I'm sure.

Do you support the death penalty?

LYNCH:

Senator, I believe that the death penalty is an effective penalty. In fact, my office most recently was able to achieve...

GRAHAM:

How about, "Yes"?

LYNCH:

... a death verdict there.

GRAHAM:

Yes?

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LYNCH:

So we have sought it, yes.

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Yeah, OK. That's good. Well, that's good from my point of view. I don't know about other people.

Sequestration, have you had a chance to look at the impact sequestration will create on your ability to defend this nation as attorney general, or those who work for you?

LYNCH:

Senator, with respect to sequestration, I have had an opportunity to review that matter very closely through my work on the attorney general's advisory committee and also as -- as United States attorney dealing with the budgetary limits that -- that came down with the implementation of sequestration.

As you are familiar with the history probably perhaps far more than I, it did constrain the federal budget greatly about -- about 18 months...

GRAHAM:

Is this a fair statement? If Congress continues to implement sequestration, it will devastate the Department of Justice's ability to effectively defend this country.

LYNCH:

Senator, I believe that that is not only a fair statement, but it is one that warrants serious discussion about how we manage budgets in a responsible manner, which I know is important to this body, but also giving us the tools that we need to protect the American people.

GRAHAM:

In your time in this business, have you seen more threats to our country than are presented today?

LYNCH:

Certainly throughout my career as a prosecutor and U.S. attorney, we are seeing an increased number and probably the highest number of threats that I have seen not just from terrorist activity, but the increased activity in terms of cyber crime is one that has not only increased numerically but -- but qualitatively in the type of threat that we face.

GRAHAM:

So we need to up our game in the cyber-security area fairly quickly. Do you agree with that?

LYNCH:

We do need to make sure we have the resources we need to keep up with cyber crimes and also to get ahead of these criminals in terms of detection, in terms of prevention, even before we get to the apprehension of these criminals.

GRAHAM:

And there's just not criminals; terrorists also are in the cyber business. Is that correct?

LYNCH:

Senator, you've outlined perhaps the greatest fear of any prosecutor, is the combination of a cyber attack being carried out on behalf a terrorist entity, is one that we take great pains to prevent, to detect and to disrupt.

But it is certainly an emerging threat and calls for resources beyond just mere personnel but in terms of our own technology also.

GRAHAM:

Does it also cry out for Congress to take a comprehensive approach to our cyber problems in past legislation that would modernize our ability to deal with this threat?

LYNCH:

Certainly, a comprehensive approach is necessary.

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On my experience both in the Eastern District of New York and in talking to my colleagues, all of us are struck by the prevalence of cyber issues in every type of case that we prosecute now, much more so than even five or 10 years ago.

And so we must have not only a comprehensive approach but one that allows government to work with private industry as well to come up with ways to best protect us against this threat.

GRAHAM:

Could you give us an estimate, if not now, in the future, of what it would cost to deport 11 million people?

LYNCH:

Certainly, Senator, I can -- I can -- I wouldn't be able to give you that estimate now and would probably have to reach out to the Department of Homeland Security, who would be charged with that particular action, to see if they could provide that information to you.

GRAHAM:

OK. Do you have a role in the deportation of people here illegally in the Department of Justice? Do have any role at all there?

LYNCH:

Well, that role is initially -- in terms of deportation, the role is initially handled by the Department of Homeland Security.

There is -- there are the immigration courts through which individuals can seek either asylum or redress from deportation orders that are handled by the Department of Justice, but that would be simply -- actually further along in the process.

GRAHAM:

But that's part of the process?

LYNCH:

Yes, it is.

GRAHAM:

If you could maybe give us an estimate of what it would take to deport 11 million people from your lane, call the Department of Justice and see what they say, I think it'd be instructive to us to see what the bill actually would be.

Now, do you think the national NSA terrorist surveillance program is constitutional as it is today?

LYNCH:

I'm sorry?

GRAHAM:

Do you think the NSA program, terrorist surveillance program, that we have in effect today is constitutional?

LYNCH:

Senator, I believe that it's not only -- it's -- it's constitutional and effective.

I know that there are court challenges to it, and certainly, we will abide by those court regulations.

GRAHAM:

Right.

LYNCH:

But it has been a very effective tool in managing...

GRAHAM:

But you're OK with it being constitutional from your viewpoint?

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LYNCH:

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Certainly Constitutional and effective.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

GRAHAM:

Thank you. Marijuana: There are a lot of states legalizing marijuana for personal consumption. Is it a crime at the federal level to possess marijuana?

LYNCH:

Marijuana is still a criminal substance under federal law. And it is still a crime not only to possess, but to distribute, under federal law.

GRAHAM:

Under the Doctrine of Preemption, would the federal law preempt states who are trying to legalize the substance?

LYNCH:

Senator, I think you raised very important questions about the relation of the federal criminal system with the states and their ability to regulate criminal law that they also have, as there is concurrent jurisdiction, and in terms of matters in which citizens of various states have voted.

With respect to the marijuana enforcement laws, it is still the policy of the administration, and certainly would be my policy, if confirmed as attorney general, to continue enforcing the marijuana laws, particularly with respect to the money-laundering aspect of it, where we see the evidence that marijuana, as I've noticed in cases in my own district, brings with it not only organized crime activity, but great levels of violence.

GRAHAM:

Do you know a Michele Leonhart, the DEA Administrator? I don't know if I said her name right.

LYNCH:

She is the administrator of the Drug Enforcement Administration.

GRAHAM:

Have you ever had a discussion with her about her views of legalizing marijuana?

LYNCH:

Michele and I have not had that discussion; although, we have spoken on any number of other issues.

GRAHAM:

Could you maybe have that discussion and report back to me as to what the results were?

LYNCH:

Certainly, Senator. I look forward to speaking to not just Ms. Leonhart, but with you on this issue.

GRAHAM:

And August 29, 2013, I think Deputy Attorney General James M. Cole advised all U.S. attorneys that enforcing marijuana laws against those that are in compliance with state marijuana laws would not be a priority of the DOJ. Did you get that memo?

LYNCH:

All U.S. attorneys received that memo, as did I.

GRAHAM:

Do you think that is a good policy?

LYNCH:

I believe that the deputy attorney general's policy seeks to try and work with state systems that have chosen to take, admittedly, a different approach from the federal government with respect to marijuana, and determine the most effective

way to still pursue marijuana cases consistent with the states and the choices that they have made. AAAAAAAEvOz0svSi0uzs...

The deputy attorney general's policy, as both -- as I understood it, and has been implemented, still requires federal prosecutors to seek prosecution of marijuana cases, particularly where we have situations where children are at risk, where marijuana is crossing state lines, particularly where you have marijuana being trafficked from a state that has chosen a legal framework, into a state that has not chosen a legal framework, and the intended harms therein, as well as those who are driving under the influence of this.

A great concern, certainly within the department, and those of us who are looking at these issues, is the availability of the edible products, and the risk of those falling into the hands of children, and causing great harm there.

GRAHAM:

If a state is intending to try to legalize personal consumption of a small level of marijuana, what would your advice be to that state?

LYNCH:

Well, certainly, I'm not sure that -- if a state were to reach out to the department for its views, I don't know if that's happened or what advice has been given, but certainly, I believe the department would have an obligation to inform them of the current federal status of narcotics laws, and the department's position that the federal narcotics laws will still be enforced by the Department of Justice.

GRAHAM:

In 2006, you signed an amicus brief supporting Planned Parenthood's opposition of partial-birth abortion ban; is that correct?

LYNCH:

Yes. That was one of a number of former Department of Justice officials; although, the amicus brief we signed was focused on the issue of the facial issues of the law, and how it might impact the perception of law enforcement's discretion and independence.

GRAHAM:

The only reason I mentioned that is that if there's a Republican president in the future, an attorney general nominee takes an opposite view on an issue like abortion, I hope our friends on the other side will acknowledge it's OK to be an advocate for a cause, as their lawyer. That doesn't disqualify you from serving.

Same-sex marriage, the courts are wrestling with this issue. Same-sex marriage, this may go to the Supreme Court very soon. If the Supreme Court rules that same-sex marriage bans are unconstitutional, it violates the U.S. Constitution for a state to try to limit marriage between a man and a woman, that's clearly the law of the land, unless there's a constitutional amendment to change it.

What legal rationale would be in play that would prohibit polygamy? What's the legal difference between a state -- a ban on same-sex marriage being unconstitutional, but a ban on polygamy being constitutional? Could you try to articulate how one could be banned under the Constitution, and the other not?

LYNCH:

Well, Senator, I have not been involved in the argument or analysis of the cases that have gone before the Supreme Court. And I'm not comfortable undertaking legal analysis without having had the ability to undertake a review of the relevant facts and the precedent there.

So I certainly would not be able to provide you with that analysis at this point in time, but I look forward to continuing the discussions with you.

(OFF-MIKE) from Rhode Island ask his questions, this would be my plan. And you tell me if this will give you enough time.

The Rhode Island senator, Senator Lee, and then Senator Klobuchar; that'll take us until about 12:45. Then I was thinking of coming back about 1:30.

LYNCH:

Thank you, Senator.

GRASSLEY:

Is that going to give you enough time?

LYNCH:

Yes, indeed. Thank you, Senator.

GRASSLEY:

Senator from Rhode Island.

WHITEHOUSE:

Thank you, Chairman. Ms. Lynch, welcome to the committee, and congratulations on your nomination. I look forward to working with you on a considerable number of issues as we go forward.

Since there has been a significant amount of commentary about the president's immigration measures, the ranking member has asked me to put into the record letters from law enforcement leaders in Ohio, Utah, Iowa, Indiana and Wisconsin, supporting the president's policies and saying, concluding, "While the executive reforms improve a broken immigration system that can achieve only a fraction of what can be accomplished by broad congressional action, we continue to recognize that what our broken system truly needs is a permanent legislative solution, and urge Congress to enact comprehensive immigration reform legislation."

There is a similar letter from the member organizations of the National Task Force, and Sexual and Domestic Violence, and a similar statement for the record of Stan Marek of Texas, the president and CEO of the Marek Family of Companies. If I may (ph) ask unanimous consent that those be made a part of the record?

(UNKNOWN)

Without objection.

WHITEHOUSE:

There's also been considerable commentary about Attorney General Holder in a hearing at which he does not have the opportunity to defend himself. And it's my view that a significant amount of that commentary would not withstand his ability to defend himself if he were here.

So let me say in response to that, there are legal arguments and policies that fall outside a particular political ideology. That does not make them outside the mainstream. And it does not politicize a department to make those arguments or pursue those policies.

I'd argue, actually, that it's the effort to constrain (ph) the department within that ideology that would be politicizing. I'd further note, as a former United States attorney, that the department that Attorney General Holder inherited was in a very grave state of disarray. And that's not just a matter of opinion.

The Office of Legal Counsel wrote opinions that were so bad, so ill-informed, so ill-cited to the case law that pertained, that when they were finally exposed to peer review, they were widely ridiculed, and ultimately withdrawn by the previous administration.

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We witnessed efforts to manipulate United States attorneys. And I know that you are one, Ms. Lynch. It caused a very public rebellion among sitting U.S. attorneys at the time, and that drew in past U.S. attorneys appointed by both Republican and Democratic presidents.

WHITEHOUSE:

We were exposed to hiring practices within the department that were, on their face, overtly political, and had political litmus tests for hiring, a first in the department's history, haven't gone down that way before. And ultimately, a series of other issues, as well as those, led to the resignation of the attorney general of the United States.

So it's easy to critique Attorney General Holder and blame him for politicizing the department. But I think history's calm and dispassionate judgment will reflect that attorney general actually brought the department back from a place where it had been sadly politicized.

And I can say firsthand that a lot of my U.S. attorney colleagues, both from Republican and Democratic administrations were very, very concerned about what was happening to the department back then.

So I shouldn't waste the time of this hearing on that. But with all the things that have been said about Attorney General Holder without him having the opportunity to defend and rebut, I wanted to say that.

So some of the areas I think we need to work together, Ms. Lynch, when you're confirmed, which as I hope you will be.

Senator Graham raised the issue of cybersecurity. And he has been an extraordinarily helpful and forward-leaning member of the Senate on protecting our country from the dangers of cyber attacks, whether it's ordinary criminal activity or the theft of intellectual property wholesale on behalf of Chinese industries, or the really dangerous threat of laying in the cyber sabotage traps that can be detonated later on in the event of a conflict.

I'm concerned about the structure within the department for handling cybersecurity. At an investigative level it's spread across primarily the FBI, secondarily Secret Service and to a degree Homeland Security. Within the department it falls under the roof of both the criminal division and at the national security division.

And I hope that with the assistance of the Office of Management and Budget, you and I and the Office of Management and Budget and other interested senators can continue a conversation about what the deployment of resources and structure should look like against the cybersecurity threat in the future. Will you agree to participate in such a process?

LYNCH:

Certainly, senator. I think you've outlined an important issue. And if confirmed as attorney general I look forward to working with you and all of the relevant partners on this committee and throughout Congress in making sure that the department is best situated to handle this growing threat.

WHITEHOUSE:

There is considerable bipartisan legislation in the Senate on the subject, and I hope it's one where we can get something serious accomplished in the months ahead.

Another area where there is considerable bipartisan legislation is on sentencing reform. Senator Durbin mentioned his and Senator Lee's legislation that is at the front end of the sentencing end.

Senator Cornyn and I have an almost parallel bill that relates to the end of the sentence and how to encourage incarcerated people to get the type of job training, drug and alcohol rehabilitation, anger management, mental health care, family reconciliation, job training, whatever it is that they need so that when they're put back into society they have a less chance of going back to a life of crime, of recidivating as they say.

I think we've made a lot of progress on that and I think we have very good legislation. And I hope that you and the department will continue to be supportive of our efforts.

LYNCH:

Certainly, senator. You've raised I think the next challenge as we look at how to manage our prison population and the issue of crime, which is how do we help people who are going to be released return to the communities from which they came and become productive citizens, as opposed to returning to the prior behavior, criminal behavior that not only landed them in prison but creates new victims. And that will certainly be an important part of my focus.

Within the Eastern District of New York we are very strong participants in reentry programs that are sponsored by our colleagues at the Brooklyn District Attorney's Office, in one of the most difficult neighborhoods in my district, in Brownsville. We work extensively with those reentry efforts.

And those reentry efforts work exactly as you said, in focusing on job training, in focusing on building skills so that those coming out of prisons can become productive members of society, as opposed to those who will continue to harm others in society. So you certainly have raised very important issues and I look forward to continuing the discussion with you and people on this committee and throughout this body on those issues.

WHITEHOUSE:

Thank you.

Another piece of legislation that we'll be working on, thanks to the courtesy and care of our chairman, Senator Grassley, is a reauthorization of the Juvenile Justice and Delinquency Prevention Act, which has been now 12 years since its last reauthorization. And I appreciate very much that the chairman has been willing to work on this and has made it one of the priorities for this committee.

Obviously the way in which juveniles are treated in our correction system as they're detained has been an important issue for the Justice Department. And I would ask again for your cooperation and active support of our process going forward to reauthorize JJDPA.

LYNCH:

Certainly, senator. I think that the way in which we handle juveniles within the criminal justice system is something that is of great concern to me in terms of both my practice in the Eastern District of New York, and also talking to my colleagues, the other U.S. attorneys across the country who face these issues.

I believe it certainly is incumbent upon all of us to look at the latest research on issues of how juveniles develop and how they manage their -- themselves in certain environments, and always be open to reviewing those. I look forward to working with you and others in discussing that statute.

WHITEHOUSE:

In my last seconds, you and I have both had the experience of being United States attorneys. And I suspect we both had the experience of finding people who were targets of our criminal enforcement efforts who if we looked back into their past might've avoided our attention had they managed their drug or alcohol addiction...

LYNCH:

Certainly.

WHITEHOUSE:

... or gotten the mental health treatment that they needed.

ends up in the criminal justice system. And it's a great burden for the taxpayer. <https://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

We have other legislation, the Comprehensive Addiction Recovery Act, that I hope you will also work with us on to try to make sure that where we can intervene with appropriate addiction treatment and mental health treatment, we can move people to more appropriate setting rather than burden the criminal justice system with what is often an inappropriate response to their conduct and to their condition.

LYNCH:

Certainly, senator. In my own district our court has been very forward-thinking and very effective in setting up diversion programs and a pretrial opportunity program that has provided great support for people and enabled them to provide treatment and learn to become productive members of society. And therefore escape being trapped into a spiral of criminal behavior and the results thereof.

WHITEHOUSE:

Thank you.

Thank you, Chairman.

GRASSLEY:

Yes. Thank you very much.

And now Senator Lee.

LEE:

Thank you, Mr. Chairman.

And thank you, Ms. Lynch, for joining us today. Thanks for your service to our country. I also appreciated our visit recently when you came to my office and am grateful to you for your support for sentencing reform. The bipartisan legislation that I'm working on with Senator Durbin that he referenced a few minutes ago is important. And I appreciate your views on that as well.

I want to speak with you briefly going back to prosecutorial discretion. As a former prosecutor I'd assume you'd agree with me that there are limits to prosecutorial discretion in the sense at least that it's intended to be an exception to the rule and not to swallow the rule itself. Would you agree with me that far, that...

LYNCH:

Certainly, sir. I believe that in every instance every prosecutor has to make the best determination of the problems presented in their own area, in my case in my district, and set priorities, and within those priorities exercise discretion.

LEE:

Right. So prosecutors inevitably have limited resources. And so it's understandable why they would choose when they've got to prioritize to perhaps put more resources into punishing, for example, bank robberies than they do into punishing pickpocketers. And perhaps they might put more resources into going after pickpocketers than they do going after people who exceed the speed limit.

But at some point there are limits to this. And that doesn't mean that it would be OK, that it would be a proper exercise of prosecutorial discretion to issue permits for people to speed, right?

LYNCH:

Certainly, sir. I think that if you -- if a prosecutor were to come to the view that they had to prioritize one crime over another you would always still want to retain the ability, even if it was an area that was not an immediate priority.

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If, for example, it became one because a particular neighborhood was being victimized or again to use your words... speeding, there were deaths resulting from that. You would want to have the ability to still, if you could, take resources and focus on that issue. It might not be the first priority. But you would want to have the ability to go back and deal with that issue.

LEE:

For that reason prosecutorial authorities or law enforcement authorities typically don't go out and say we're only going to punish you for a civil violation involving a traffic offense if you speed and then it results in an accident with injuries. They leave open the very real possibility, indeed the likelihood, that someone can and will be brought to justice in one way or another for any civil violation they commit while speeding.

LYNCH:

Well, certainly, I can't speak to all law enforcement agencies. I know that depending upon the agency, sometimes the priorities are known, sometimes they're expressed. Every office has guidelines. Certainly the law enforcement agencies are aware of certain guidelines in terms of, for example, a dollar amount involving certain types of crimes.

LEE:

But, if someone went out and said I'm going to issue a permit to someone saying that they may speed, saying they may go up to 100 miles an hour without receiving a ticket, that would -- unless that person were also in charge of making the law in that jurisdiction, that would be a usurpation of the system by which our laws are made. Would you agree with that?

LYNCH:

Again, without knowing more about it, I'm not able to respond to the hypothetical. It certainly doesn't sound like something that a law enforcement official would be engaged in, but, again, without knowing more of the facts I'm not able to really respond to your hypothetical.

LEE:

OK. Thank you.

Let's shift gears for a minute. Do you agree that citizens and groups of citizens should not be targeted by government, should not be the recipients of adverse action by the government based on their exercise of their First Amendment rights?

LYNCH:

Certainly, I think that the First Amendment is one of the cornerstones of a free society and I believe that our jurisprudence has set forth great protections for individuals as well as groups in the -- in the exercise of their First Amendment rights to make sure that they are protected and not targeted.

I also would say that certainly, as a -- as a career prosecutor and U.S. attorney, there is really no place for bias or personal view in terms of how we approach the types of crimes that we pursue.

LEE:

And presumably you'd say the same with respect to someone's exercise of their rights under the Fourth Amendment or the Fifth Amendment or the Sixth or the Seventh or the Eighth. Under any of those protections, somebody shouldn't be punished by government for exercising their rights under those provisions of the Constitution.

LYNCH:

Certainly I believe that there are safeguards in place to prevent that. I think we always certainly have to balance that with some -- with the possibility of an extreme situation in which we may have to move quickly, for example, to protect someone or there's an imminent threat therein, but I believe that there are protections set up for that very purpose.

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Second Amendment rights as well, presumably then, right?

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I believe that certainly the Supreme Court has set forth clarity on that issue, and so, therefore that, regardless of the amendment, that -- that certainly that is a protected right.

LEE:

Are you aware that there's a program called Operation Choke Point within the Department of Justice and that through this program, the Department of Justice and some other federal law enforcement agencies have on some occasions put financial pressure on legal businesses, including hard-working Americans who happen to be involved in the business of selling firearms and ammunition, by essentially telling banks not to do business with them?

LYNCH:

I'm generally familiar with the name "Operation Choke Point," and my understanding of it with respect to the Department of Justice current work, again, I haven't been involved in either the implementation or the creation of it, but my general understanding of it is that it looks to target financial institutions that are involved in perpetrating frauds upon consumers and where there might be a financial institution that is facilitating, for example, consumer bank accounts being looted or consumers essentially losing their bank accounts, that that's the target of that.

Again, I'm not familiar enough with the specifics of it to know about the underlying businesses that the transaction might have -- might have originated from, but that's my understanding of the program.

LEE:

OK. I assume it's safe to assume that should you be confirmed you'll work with me to make sure that legitimate, law-abiding Americans aren't targeted for their exercise of their Second Amendment rights.

LYNCH:

On that and any other issue of importance to you, Senator, I look forward to hearing your concerns and working with you on them.

LEE:

Thank you. Thank you.

I want to talk about civil forfeiture for a minute. Do you think it's fundamentally just and fair for the government to be able to seize property from a citizen without having to prove that the citizen was guilty of any crime and based solely on a showing that there was probable cause to believe that that property was in some way used in connection with a crime?

LYNCH:

Senator, I believe that civil forfeiture, civil and criminal forfeiture, are very important tools of the Department of Justice as well as our state and local counterparts through state laws in essentially managing or taking care of the first order of business, which is to take the profit out of criminal activity.

With respect to civil forfeiture, certainly as implemented by the department, it is done pursuant to supervision by a court, it is done pursuant to court order, and I believe that the protections are there. What I will also -- sorry.

LEE:

What if you just asked the average person on the street whether they thought the government could or should be able to do that, should the government be able to take your property absent a showing that you did anything wrong, thereafter requiring you as a condition for getting your property back, whether it's a bank account that's been seized or frozen, whether it's a vehicle that's been seized, that you would have to go back and prove your innocence.

So you're guilty, in essence, until proven innocent. At least guilty in the sense that your property's gone. Do you think your average citizen would be comfortable with that?

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Well, I certainly can't speak in terms of what the average citizen would or would not be aware of there. I certainly understand that there has been a lot of discussion and concern over -- over asset forfeiture as a program, as expressed by a number of people.

LEE:

And particularly at the state level, such that some states have adopted in response to a pretty widespread citizen outcry laws significantly restricting the use of civil forfeiture proceedings for that very reason.

Which leads to why I raise this with you. It's my understanding that the Department of Justice has in many instances been used as a conduit through which law enforcement officials at the state and local level can circumvent state laws restricting the use of civil forfeiture within the state court system.

In other words, where, under the state courts -- state law established system that kind of forfeiture is prohibited, people can go through the Department of Justice. The Department of Justice will take out a fee, maybe 20 percent of the value of the assets seized, and then those can be returned. It's a process known as adoption.

Don't you think most Americans would find that concerning, if the federal government is facilitating efforts to circumvent state laws that are designed to prohibit the very thing that they're doing?

LYNCH:

I think that a number of people would have questions about how the Department of Justice manages its asset forfeiture program. And my understanding is that those questions have been raised about various aspects of it.

My understanding is that the department is undertaking a review of its asset forfeiture program.

And certainly as U.S. attorney I'm aware of the fact that the adoption program that you have just described which did raise significant concerns from a number of parties has actually been discontinued by the department, that's the guidance that we have recently received, with some exceptions for things like items of danger, explosives and the like.

But it is part of an ongoing review of the asset forfeiture program. And, certainly, should I be confirmed, I look forward to continuing that review.

I would also say, Senator, that I look forward to continuing these discussions with you as you express concerns and interests on behalf of constituents or others as an important part of the department being as transparent as possible in explaining how it operates.

Asset forfeiture is a wonderful tool. We return money to victims. We take the profit out of crime. But, as with everything that we do, we want to make sure that we are being as responsive as possible to the people that we are serving.

LEE:

Thank you. I look forward to those additional discussions.

And I see my time's expired. Thank you very much.

GRASSLEY:

Thank you, Senator Lee.

Now, Senator Klobuchar.

KLOBUCHAR:

Well, thank you very much.

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And thank you so much to you. I understand I am the only thing that stands between you and your lunch and this entire room and their lunch. So we will have a good 10 minutes here.

Your dad seemed to enjoy that (inaudible).

I think everyone knows you have an impressive resume. And the one thing that has not been brought up was something I actually read this weekend in the profile about you, as I was thinking about this old saying we have in our household that that obstacles on life's path are not just obstacles, they are the path. And no one represents that better than you, Loretta Lynch.

When I read about the story of you scoring so well on a test in elementary school that they didn't believe that you'd taken that test and then you took it again and scored even higher...

(LAUGHTER)

... the obstacles are the path. Or the time that you became the valedictorian of your class and the school officials said that it would be too controversial if you were the only valedictorian and so they added some other students to be valedictorian.

I was thinking of all the senators in this building. We may have more than a few valedictorians. And I don't think that ever happened to them.

So I thank you for your courage and your perseverance, and your parents' courage and perseverance that brought you to us today.

KLOBUCHAR:

I was going to start with a question. I know you touched with on it with Senator Schumer.

As you know, I'm a former prosecutor (inaudible) office. We had about 400 people. We worked really well with the U.S. Attorney's Office.

Some of the U.S. attorneys you know that I worked with, Todd Jones, who's now the head of our Bureau of Alcohol, Tobacco and Firearms, and then also Tom Heffelfinger, who was the U.S. attorney under Bush. Now we have a guy named Andy Luger, who you're also aware of, and it's been very important, that relationship that we've had with local prosecutors and the U.S. Attorney's Office.

I wondered if you would talk a little bit more about how you would view that as the attorney general in terms of how you would like your U.S. attorneys to work with the local prosecutors.

You know, it can be very inundated with a lot of cases, and sometimes we would view the U.S. Attorney's Office as getting the luxury to spend a lot of time on cases, while we would be handling literally tens of thousands of cases coming in the doors.

LYNCH:

Well, thank you, Senator.

You touch upon an important part of my practice. One of the benefits of being the U.S. attorney, as you noted, is getting to know the other prosecutors, not just my fellow U.S. attorneys but also the numerous state and local prosecutors with whom we work so well.

I'm so privileged in Brooklyn to have a strong relationship with the district attorneys in my district in all five counties but also even outside of my district, into Manhattan, into the Bronx and beyond.

We talk often on issues affecting the community. We talk often on issues affecting the entire District. I was privileged to be able to share starting my prescription drug initiative with the Brooklyn District Attorney's Office and also work closely with district attorneys in Nassau and Suffolk County in handling the problem of prescription drug abuse, which has spiked, unfortunately, and led to violence and, in fact, deaths in Long Island.

KLOBUCHAR:

And I think you know that the -- the stats lately are that four out of five of heroin users started with prescription drugs, and then they turned to heroin. I think people are shocked by that, but you see that connection with the heroin as well.

LYNCH:

We do, indeed, because of the opioid substance of both drugs, and we are, in fact, seeing a resurgence in heroin not just in my district but unfortunately across the country.

This problem, like so many others, is one that must be dealt with in a cooperative and collaborate manner. And I am incredibly proud to say that all of my United States attorneys, colleagues take very seriously the opportunity and -- and the privilege to work with our state and local counterparts in crafting prescription drug initiatives, heroin initiatives along with our violent crime initiatives.

We work closely with our state and local counterparts to determine where is the best place for a case to be brought. We look at things like the type of sentence that can be achieved or the type of evidence that is admissible in the different proceedings. And we cannot have those discussions without building on a positive working relationship, and it has really been a hallmark of this U.S. attorney community.

Should I be confirmed as attorney general, I intend to draw upon that strength of my U.S. attorney colleagues as well as all of my state and local counterparts throughout the country.

People who are at the ground zero of these problems often come up with the best solutions. They pull in the health care community, they pull in parents, they pull in community leaders, and they come up with a solution that works that can often be replicated in other places.

I've seen that happen in my -- with my U.S. attorney colleagues particularly in the area of heroin abuse and some of the initiatives that they are working on as well.

So if confirmed as attorney general, I intend to rely very heavily on my -- my prosecutorial colleagues.

KLOBUCHAR:

Well, thank you very much for that answer.

And at some point, I think we talked about this before, but Senator Cornyn and I did the drug take-back bill, and we've finally gotten the rules out from DEA on that, and we want to -- would look forward to working with you on that.

Something else I -- I think I'll talk to you later about, your work in Rwanda but the fact that you've done some very important international work as well.

But you've also done prosecution of international terrorists here at home. And what lessons have you taken from those cases?

I'll tell you why this is important from a home-state perspective. As you know, we have -- our U.S. Attorney's Office in Minnesota indicted and prosecuted a number of al-Shabaab members who had gone over in Somalia.

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We also had -- the first person killed in Syria fighting with ISIS was actually a Minnesotan, and our U.S. attorney recently

is some incidents against others that have been recruited to fight over in Syria
is some incidents against others that have been recruited to fight over in Syria

There's a pilot program that the Justice Department has, involving three cities -- L.A., Boston and Minneapolis-Saint Paul. There's going to be an extremism conference coming up.

But could you, one, talk about your experience with these kind of cases and, two, how you think that this pilot program should be funded?

We're concerned, because it's coming out of general funds, and if you would support some kind of specific funding for the program.

Thank you.

LYNCH:

Certainly, just -- just -- just talking initially on the subject of combating violent extremism, one of the -- one of the most difficult things to see are young men and increasingly, young women, many of them American citizens, who are turning to this radical brand of terror and being recruited to go overseas and become trained and are being sent back to perpetrate threats against the homeland.

And the sources of this and the reasons for this are debated endlessly, and I think we need further discussion about that. But we must take steps to combat this. We must take steps to understand the level of disaffection that these individuals are feeling with their current society and also help them and their families understand the risks that they are facing.

Some of the most difficult conversations I have had have been when I have visited the mosques in -- in my district and had, frankly, wonderful interaction with the participants there and wonderful interaction with the residents there.

But we've talked about violent extremism, and I've talked to parents who have said to me, "You know, I just don't understand why the government is targeting my youth." And we've had very frank discussions about how it's difficult for any parent to know what their children are seeing on the Internet and how they are responding to what is being put forth on the Internet and the harm it does not just to our society but also to those families, because they lose their children. They absolutely lose them when they are sucked up by this radical extremism and only to come back to be dealt with, as they will, by American justice.

Certainly, with respect to the number of -- the types of cases that my office have seen, we have seen individuals who started off as -- as relatively peaceful individuals from what we could tell but were brought -- were dragged into radical extremism, did travel overseas, were recruited to then return to the U.S. and set -- and perpetrate attacks there. We've seen that on more than one occasion.

KLOBUCHAR:

And the funding, you're aware of the pilot program that we have going in the twin cities?

LYNCH:

Yes, yes. A very important program given the nature of the -- of the problems that have emanated from that community and how -- the devastation that it has -- that it has essentially wrought within those families and within that community. I think those issues are very, very important.

Certainly, I look forward to working with you on finding the most effective way to fund those programs, because they have a lot to teach all of us who are working in this issue.

KLOBUCHAR:

Thank you.

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And the last thing I'm going to ask about is sex trafficking. And I know you've done an impressive job of prioritizing the investigation and the prosecution of trafficking cases.

This is something -- Senator Cornyn and I, again, have a bill on sex trafficking, which -- called the Safe Harbor Bill, which is supported by a lot of the groups, which creates incentives for states to enact laws which treat the victims of sex trafficking, the children, as true victims and not as perpetrators themselves. We think we can build better cases that way so people will come and testify against those that are running the sex rings.

Could you talk about the -- your work in this area and how you view these safe harbor laws.

LYNCH:

Certainly, I think the safe harbor laws are an essential next step in helping the victims of this horrible scourge.

My office has been privileged to lead the -- lead the way in prosecuting numerous individuals who have essentially tricked women through lies, deceit, also coercion and duress, even rape, before they're brought to this country and forced to work here as sexual slaves.

It is a tremendously degrading process to these women and one in which they find it difficult to escape, because of either a language barrier or the fact that, sadly, often their children are being held in their home country to force them to behave and to force them to continue this activity.

And certainly, some of the work that I'm most proud of has been the efforts my office has undertaken with the number of organizations that help victims of human trafficking and also with other governments to reunite these children with their mothers after the cases are over.

KLOBUCHAR:

Thank you. And I also look forward to working with you.

We have a number of domestic victims that -- I think 80 percent of the victims actually are from the U.S. as well...

LYNCH:

Absolutely.

KLOBUCHAR:

... especially when you get to the oil patch of North Dakota and those kinds of places where the U.S. Attorney's Office has played a major role.

So thank you very much. Thank you for your grace under pressure today, and I hope the chairman will let you get some lunch.

Thank you.

LYNCH:

Thank you, Senator.

GRASSLEY:

It's going OK for you?

LYNCH:

Yes, and thank you for inquiring, Mr. Chairman.

GRASSLEY:

We will now adjourn until 1:35.

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List of Panel Members and Witnesses

PANEL MEMBERS:

SEN. CHARLES E. GRASSLEY, R-IOWA CHAIRMAN

SEN. JEFF SESSIONS, R-ALA.

SEN. ORRIN G. HATCH, R-UTAH

SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. MIKE LEE, R-UTAH

SEN. TED CRUZ, R-TEXAS

SEN. JEFF FLAKE, R-ARIZ.

SEN. DAVID VITTER, R-LA.

SEN. DAVID PERDUE, R-GA.

SEN. THOM TILLIS, R-N.C.

SEN. PATRICK J. LEAHY, D-VT. RANKING MEMBER

SEN. DIANNE FEINSTEIN, D-CALIF.

SEN. CHARLES E. SCHUMER, D-N.Y.

SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. AMY KLOBUCHAR, D-MINN.

SEN. AL FRANKEN, D-MINN.

SEN. CHRIS COONS, D-DEL.

SEN. RICHARD BLUMENTHAL, D-CONN.

WITNESSES:

SEN. KIRSTEN GILLIBRAND, D-N.Y.

LORETTA E. LYNCH, U.S. ATTORNEY, EASTERN DISTRICT OF NEW YORK, NOMINATED TO BE U.S. ATTORNEY GENERAL

Senate Judiciary Committee Holds Confirmation Hearing on the Nomination of Loretta Lynch for U.S. Attorney General, Day 1, Panel 1, Afternoon Session

LIST OF PANEL MEMBERS AND WITNESSES

GRASSLEY:

Welcome back, Ms. Lynch. Hope you're ready to continue.

LYNCH:

Thank you, Senator.

GRASSLEY:

OK.

And according to the seniority arrangements that we're doing, Senator Cruz of Texas is next.

CRUZ:

Thank you, Mr. Chairman.

Good afternoon, Ms. Lynch.

LYNCH:

Good afternoon, Senator.

CRUZ:

And congratulations on your nomination. Congratulations to your family, who I know are justifiably proud of you for being nominated to this...

LYNCH:

Thank you, sir.

CRUZ:

You know, I'll note a number of my friends and colleagues who practice law in New York have reached out to me with -- with words of praise for you, describing your tenure as U.S. attorney there as that of a no-nonsense prosecutor and as a U.S. attorney who honored and respected the law. And -- and so for that I congratulate you.

You began your remarks by describing how, with new attorneys in your office, you remind them that they take an oath not to the attorney general but to the Constitution.

That same thing is true for the attorney general of the United States, and I have long expressed my very deep concerns with the conduct of the current attorney general, Eric Holder.

The attorney general has a long and distinguished history, a bipartisan history, of being willing to stand up to the presidents who appointed them.

Attorneys general in both parties have demonstrated fidelity to law and to the Constitution, even when it meant telling the president of their own party, "No." Now, that is never easy to do. But part of what's made the Department of Justice special is that attorneys general, both Democrat and Republican, have honored that commitment, as you noted to your young lawyers, to the Constitution, not to the president who has appointed me.

My single greatest concern with the tenure of Attorney General Eric Holder is that I do not believe he has upheld that tradition. I believe the Department of Justice has behaved more like a partisan operation for the president than an impartial law enforcement agency.

And so I want to ask you at the outset the simple question of, if confirmed, how would your tenure as attorney general differ from that of Eric Holder's?

LYNCH:

Well, Senator, I think you have raised an important issue of the role of the attorney general.

As we discussed, it is an incredibly important cabinet member, but -- but the attorney general is a cabinet member unlike other cabinet members in that the obligation of the attorney general is first and foremost to represent the American people, to protect and defend the Constitution and to faithfully execute the laws as passed by this body.

In interacting with the White House or any agency, if confirmed as attorney general, I would do so in the manner in which I've conducted myself as United States attorney, with the full and fair evaluation of every matter brought before me, with a full and fair review of all of the relevant laws, with discussion, with career prosecutors as well as even the most junior people, whom I have found to often have the best insight into matters, and only then will I make the determination as to the step to be taken.

Going forward, every attorney general creates their own path.

You've asked how I will be different from Eric Holder. I will be Loretta Lynch. I will be the person that I've always been as I've lead my office through two terms as United States attorney, focusing solely on the protection of the people of my district, and if confirmed as attorney general, on the protection of all of the American people.

One thing I do wish to say, Senator, is that with respect to the issues that you raised, I greatly appreciate your sharing them with me both now and during the discussion that we had in your office.

LYNCH:

I look forward to more discussions with you and your colleagues, and I want to pledge to you now that I will always listen to your concerns. I will consult with this body where appropriate, because there's a great collective wisdom here and experience, both prosecutorial and legal, and I look forward to having a dialogue with you and, frankly, crafting a positive relationship not just with this committee but with Congress.

CRUZ:

Ms. Lynch, I thank you for that. That commitment is -- is welcome and -- and would mark a sharp -- sharp break from the practices of the current Department of Justice.

One of the frustrations of a number of members of this committee is that the department has not been responsive to this committee's requests, and indeed that -- were that to change, that would be highly welcome.

Let me focus on one, and if time allows, two specific areas where I believe the department has gone with partisan politics instead of upholding the law. And let's start with immigration, which has been a topic of much discussion already.

You mentioned in your opening statement that you had now taken the opportunity to review carefully the OLC opinion on the president's executive amnesty. Do you agree with the illegal analysis in the OLC opinion on the president's executive amnesty?

Do you agree with the legal analysis in the OLC opinion?

LYNCH:

Senator, I have had occasion to review the OLC opinion that dealt with the Department of Homeland Security's request for a legal framework in how to prioritize removal of certain undocumented immigrants, or really all the undocumented immigrants, under their jurisdiction.

I did not see a grant of amnesty there or a pathway to citizenship. Certainly, as I reviewed the opinion, as well as the letters... from some scholars who -- who wrote in support of it, it seemed to be a way to look for the legal framework based upon case law, precedent, prior action of Congress as well as the discretionary authority of the Department of Homeland Security to prioritize this removal, and certainly, placing those most dangerous of the undocumented immigrants at the top of that list seemed to me to be a very reasonable exercise.

CRUZ:
Ms. Lynch...

LYNCH:
Certainly, I -- I would want to hope -- I would hope that the protection of those communities where undocumented immigrants involved in, for example, violent crime, gang activity, terrorism would be at the top of the list.

CRUZ:
Ms. Lynch, you said now and before in your opening statement that you found the legal analysis reasonable.

OLC operates in the place of the attorney general of the United States, and an OLC opinion operates as the legal judgment of the attorney general as the chief legal officer for the United States.

And so my question is quite simply, do you agree with the legal analysis in that memorandum? Would it have been your legal analysis had you been asked the same question?

LYNCH:
Well, Senator, I certainly am not able to say at this point what my -- if my legal analysis would've taken the same pathway and same steps, because I have not reviewed all of the cases and reviewed all of the memorandum that I'm sure went into that.

But what I can say is that, again, as the opinion seeks to talk about the exercise of executive discretion, it seemed to be looking at precedent, actions of Congress as well as the immigration laws to see if there was a legal framework for the requested actions.

And what I noted was that for some of the actions, the Office of Legal Counsel found that there was a legal framework for some of the actions that the Department of Homeland Security wanted to set in place.

But for some of the requested actions, the Office of Legal Counsel found there was not the appropriate legal framework for some of those actions and instead, in my understanding, has advised the Department of Homeland Security that they -- they should not proceed along certain -- certain ways, and my understanding is that that advice was taken.

So I do believe that the Office of Legal Counsel has the important obligation to look at the law, look at the facts, look at the action that is being brought before it and say where there is an appropriate legal framework as well as there is not an appropriate legal framework.

CRUZ:
Ms. Lynch, I would note that I've twice asked you if you agree with the analysis. And you are a very talented lawyer, and so I -- I suspect it is not an accident that twice, you have not answered that question.

You have described what OLC did but not given a simple answer. Do you agree with that analysis or not?

LYNCH:
Senator, I've told you that I did find the analysis to be reasonable, I did find it to recognize the issues, and it did seem to provide a reasonable basis.

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CRUZ: <http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>
Well, in 2011, before the last election, President Obama said, quote, "With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws in the books that Congress has passed."

Now, do you agree with what President Obama said in 2011?

LYNCH:
Senator, I don't know what legal opinion he was relying on at the time.

Certainly, the subsequent legal opinion talks about the temporary deferral of deportation in a way that does provide a legal framework for it, but I don't know if the president was speaking of this exact same issue or not. I simply couldn't provide a legal opinion about the president's comments at this time.

CRUZ:
Now, the executive action, in my view, the OLC opinion has no legal basis whatsoever. It hinges upon the notion of prosecutorial discretion, and you rightly described how any prosecutor will prioritize some cases over others, for example, focusing on more violent criminals.

In your office as U.S. attorney, you certainly exercised prosecutorial discretion. Was it your practice for any -- any category of crimes to suggest to those who may have violated the criminal laws that they can come into your office and seek a written authorization exonerating them of their past crimes and authorizing them to continue carrying out crimes for a large categorical group of offenders?

LYNCH:
Senator, we would not have that type of direct dealing with offenders; they would come to our attention as part of an investigation or part of an issue where they would already be under suspicion of some sort of wrongdoing.

So we would not -- we would not have that type of discussion with someone who might be represented or might have other rights. We would not have that type of discussion with someone.

CRUZ:
So that's not anything you ever did?

LYNCH:
No.

We do have priorities within my office. We do have guidelines within my office. Those are shared with our law enforcement colleagues. We also share them with many of our state and local colleagues as we -- as we discuss where to best place certain types of cases.

GRASSLEY:
Senator...

CRUZ:
Thank you very much, and -- and we will continue...

GRASSLEY:
Thank you, Senator Cruz.

CRUZ:
...later on in the day.

GRASSLEY:

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FRANKEN:

Thank you, Mr. Chairman, and congratulations on being the chairman.

GRASSLEY:

Thank you. I'm glad to be chairman. I can tell you that.

(LAUGHTER)

FRANKEN:

I -- I know you are.

(LAUGHTER)

Ms. Lynch, congratulations on your nomination.

LYNCH:

Thank you, Senator.

FRANKEN:

It was very -- it was great meeting with you. Your reputation for smart and tough precedes you, and you didn't disappointment in our meeting, and thank you for the wide-ranging conversation -- how was lunch?

(LAUGHTER)

LYNCH:

Excellent. Thank you, sir.

FRANKEN:

Yeah. You enjoyed lunch?

LYNCH:

Yes, sir.

FRANKEN:

Good.

I wanted to -- I -- I discussed a couple things -- number of things when -- when you were in my office, and I want to bring them up again, talk about them.

One is our -- just our prison system. We have...

LYNCH:

I'm sorry, sir? I'm sorry?

FRANKEN:

Our prison system, I want to talk about our prison system.

We have -- the United States has 5 percent of the world's population, 25 percent of the prison population.

I think one of the biggest problems is that we've used our criminal justice system as a substitute for a well-functioning mental health system. We have a lot of people in prison, in jails in this country who shouldn't be -- probably shouldn't be there and who -- it's not serving anybody any purpose.

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We have young people with -- and others with mental illness who are in solitary confinement, and it just makes their -- their

So what I -- what I want to do to address that is something called the Justice and Mental Health Collaboration Act. It's a reauthorization of MIOTRA, which the Mentally Ill Offender Treatment and Rehabilitation Act, which has been very bipartisan in the past and should be -- in fact, it is bipartisan. It's been carried by a Republican in the House.

And I just want to ask you for your support as we go forward in making sure that our criminal justice system isn't -- not just wasting money but wasting lives and that -- that you will work together with me on that.

LYNCH:

Senator, I look forward to working together with you on that as well as other important issues.

I think you've highlighted one of the most important developments in criminal justice research and literature has been the ongoing research that has been done into the root causes of so many -- so much of our criminal activity.

In particular, where the mentally ill are involved, we continue to learn more and more about how that illness impacts them as they make their way through the criminal justice system. And I look forward to taking advantage of that new knowledge with you and working with you on that and other important issues.

FRANKEN:

Yeah. Some of this involves -- I don't know if you heard of crisis intervention training, but crisis intervention training is teaching both police on -- on the ground and corrections officials in prisons to recognize when they're seeing someone with -- with a mental health problem and to deal with it in the correct way.

LYNCH:

Certainly. Certainly, because I think the research has shown -- and certainly, anyone with experience with a family member or a friend who has a mental illness knows that sometimes conditions may manifest themselves in ways that appear to be disruptive but are, in fact, a reflection of the illness.

FRANKEN:

And so what -- what I'll be doing with this is -- is doing mental health courts so that if a prosecutor, an arresting officer and the defense attorney and the judge say, "This person belongs in a mental health court and not" -- so they can be treated and not go to prison where it's going to clog up the prison system and make this person's condition worse, then we'll do that.

And also to do veterans courts, because we have so many veterans that are coming back with invisible wounds.

LYNCH:

Yes.

FRANKEN:

And sometimes those invisible wounds will be medicated by drugs or by alcohol, and instead of going to -- to prison, maybe it's time -- we can go to a veterans court.

LYNCH:

Certainly, Senator. I know that some of my U.S. attorney colleagues have been instrumental in working on the concept of veterans courts in particular as part of the department's strong commitment to protecting all of the rights of veterans.

You are so correct. We ask so much of our men and women in uniform, and they come back to us often different from how they left with wounds that we can see and wounds that we often cannot see, and I believe we have an obligation to provide them the best treatment to thank them for their service to our country.

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FRANKEN:

Fabulous. I look forward to working with you on that, should you be confirmed, which I -- I hope you will.

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Let me move on to something kind of specific.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

I -- I was chair and now will be ranking member of the Privacy Technology and the Law Subcommittee, and there's a lot of technology out there that's new that we're -- we're learning about some unforeseen consequences of it.

There's a thing called stalking apps. I don't know if you know about -- we -- we discussed this.

And incredible -- when I first did Location Privacy Subcommittee hearing, my first hearing, I got some testimony from the Minnesota Coalition for Battered Women, and they told a story of a woman who had an abusive partner, and she went to a county building in -- it was in St. Louis County in northern Minnesota, and while she was there on her phone, she got a text from her abuser, "Why are you in the county building? Are you going to the domestic violence place"?

Well, it scared her so much, they took her to the courthouse to get to -- file an order against him. While she's there, she gets from him saying, "Why are you at the courthouse? Are you getting a restraining order against me"? It's terrified her.

And it turns out -- we've have testimony on this -- this is very common.

Now, DOJ does have the authority under existing wiretap laws to prosecute creator of apps that allow stalkers to listen to their victims' phone calls, intercept text messages or otherwise intercept content from victims' phones, and DOJ has prosecuted one app developer who created an app to do this thing, and I ask that you continue to do that.

But looking ahead, would you work with me? I have a bill to stop these things, to stop the marketing, the manufacture of stalking apps and also would ask that DOJ keep data on this, because the last real data we have on this is, like, from 2006. I don't know how much you keep up with technology, but since then, a lot more people have these smart phones, and this is a real problem.

LYNCH:

Senator, you've outlined a very important issue as it relates to the victims of domestic violence or anyone who fears that someone that they thought was close to them might turn on them instead.

Certainly, I look forward to working with you and keeping you apprised not only of the department's efforts and the continued prosecution of these matters but to look at the statute with you and provide whatever assistance we can.

FRANKEN:

Thank you. Look forward to that as well.

One last thing -- I have about two minutes -- I am very concerned about the telecommunications industry consolidating, and I'm specifically concerned about the telecommunications industry consolidating, and I'm specifically concerned about Comcast's proposed acquisition of Time Warner Cable.

This is the largest cable provider and the -- second largest cable provider. It is the largest Internet -- broadband Internet provider -- the third largest broadband Internet provider. To me, this is just too big, and they would have unprecedented power in the telecommunications industry.

I have -- there's been a lot of comment on this, including my comment on this to the Antitrust Division.

Will you commit to reviewing the serious concerns about the proposed Comcast-Time Warner deal that I and so many others have raised and just do all that you can to ensure that the Antitrust Division is empowered to stand up to telecommunications giants like Comcast if that's deemed necessary?

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LYNCH:

The Antitrust Division plays an extremely important role in keeping our markets competitive and open for everyone. And I look forward to learning more about this case, to reviewing those issues and to working with you to make sure that all the concerns about this are brought to our attention so that they can be dealt with by the Antitrust Division as we move forward.

FRANKEN:

OK, then I'll probably vote for you.

(LAUGHTER)

Thank you. Thank you, Mr. Chairman.

GRASSLEY:

Thank you, senator from Minnesota.

Now Senator we go to Senator Flake.

FLAKE:

Thank you, Mr. Chairman.

Thank you, Ms. Lynch. Appreciated hearing your life story and seeing your family here, and appreciated the meeting we had in -- in my office a few months ago as well.

I -- I brought something up there, and I'll bring it up to you again, with regard to the border situation in Arizona.

We have had, obviously, ongoing problems on the border. We share such a large border with Mexico, but there have been some considerable successes.

And one of the successes over the past several years has been in the so-called Yuma sector, where we've seen apprehensions go from about 140,000 in Fiscal Year 2005 to about 6,000 last year. So considerable success.

That contrasts with the Tucson sector, which has seen a drop. I think because of the economy, we've seen a drop anyway but not nearly as significant. In fact, there were about 87,000 apprehensions in the Tucson sector.

One of the things that I think just about everybody attributes the success in the Yuma sector to is something called Operation Streamline, and it allows the so-called consequences program to be implemented, where first-time crossers are met with consequences.

And it has -- it's -- it's pointed to by certainly law enforcement organizations in Yuma and along that sector, and -- and just about everyone else recognizes it's been successful.

The problem is just last year, it looks like DOJ has said that they're no longer going to implement parts of that and that first-time offenders, unless there's some other circumstance, they will not be prosecuted.

What -- what are the specifics of this new policy as you understand it with Operation Streamline?

LYNCH:

Certainly, Senator, I've had the opportunity to know somewhat about this matter from my discussions with my colleagues, the U.S. attorneys, not just along the Arizona border but also in Texas and California, and they -- they work hard everyday to keep our borders safe and essentially to protect the people in their districts but also to deal with this -- this ever-growing problem.

And I believe that -- Again, I'm not familiar with the current status of Operation Streamline, but as it -- as it -- as it relates to first-time prosecutions of individuals, individuals are still being prosecuted.

And to the extent that a first-time crosser would not be prosecuted, they still would be subject to just pure removal without there being a criminal case involved.

And I believe that the issues in managing the program have had a great deal to do with resources, particularly with the budget constraints that offices have found themselves under in recent years.

But I can assure you, Senator, that the commitment to protect the border is strong, not only among U.S. attorneys who work on the border but throughout the U.S. attorney community and the department, and would be one of my priorities also as attorney general.

FLAKE:

As I mentioned, this is what distinguishes the Yuma sector from the others, is the success with this program.

If you're -- if you're saying now that it's a budget issue, why haven't we seen concern about the budget or those budget aspects? Why hasn't DOJ come to Congress and said, "We are having issues here, and so in order to continue with this program, we're going to need additional funding"?

To your knowledge, has that happened?

LYNCH:

I'm not aware of what's gone into the specifics of the department's budget. I'm generally aware of the budget as it relates to U.S. attorneys generally but not the department as a whole or as it relates to specific programs, so I'm not able to provide that information to you.

I certainly -- it is certainly something that I would be working closely on, should I be confirmed as attorney general.

FLAKE:

I guess I'll put it this way: Barring budget issues, is this a program that you're committed to, or do you have other issues with it?

LYNCH:

Certainly, it's a program that I think has been effective. I think there -- there have been concerns raised about resources and about the way the program has been managed from the judiciary and others. We're always trying to be responsive to all the parties involved in these.

But with respect to the issue itself, I'm certainly committed to work on that issue with you and the members of the committee, be it through Operation Streamline, if it can be maintained, or in an equally effective program.

FLAKE:

Well, for the record, we've not, to my knowledge, received any concerns about budget issues with regard to Operation Streamline. It seems to have been another decision that was made, and -- and I will be following up with you.

We want to make sure that, you know -- let me just step back. I -- I believe we need to do a lot with regard to immigration policy. I'm a sponsor of the comprehensive bill that went through the Congress last -- two years ago through the House -- I'm sorry, through the Senate and didn't get through the House.

So this isn't all we need to do, but it's a significant part of what we need to do, and Arizonans have paid the price, a disproportionate price, for a long time for the federal government's failure to have a secure border.

And so when we have programs like this that work and we -- we see, you know, success in one sector and -- and everybody can point to that, then it's very disturbing when DOJ pulls back on that.

And we fear that -- that Yuma sector, as the economy kicks up again and crossings are -- are more frequent, that we're going to have the same problems that we had a few years ago, and that just -- we can't go on with that.

Secretary Johnson is in Arizona, or just visited Arizona, visited the border. He's -- he's done that a few times, met with the ranchers with some of their concerns, particularly in the Tucson sector. And there's still a lot that needs to be done, and it's going to require a real partnership between a lot of people to make sure that it works.

Switching gears, some of my colleagues have mentioned trade secrets and economic espionage, but just to focus specifically on the theft of trade secrets and foreign governments, last May, the Department of Justice announced indictments of five Chinese military hackers for foreign theft of trade secrets and economic espionage, among other crimes.

When announcing these charge, Attorney General Holder said, "The administration will not tolerate actions by any nation that seeks to illegally sabotage American companies and undermine the integrity of fair competition and free markets. This case will serve as a wakeup call to the seriousness of ongoing cyber threat," he said.

Would you agree with Secretary Holder -- I'm sorry, Attorney General Holder's statement as well as other statements by the executive branch that this is a growing and persistent threat?

LYNCH:

Senator, I -- I would agree with those statements, and I would add that I have seen, through cases in my own district, that this is a growing and increasing threat.

My office has also worked on matters involving foreign nations attempting to obtain technology under false pretenses.

We've worked closely with our colleagues in other agencies to bring these cases to fruition. I'm very proud of the work that we've done.

And it is an ever-growing concern, certainly -- and has been also expressed by the FBI not only under the -- the current director but under former Director Mueller.

So I look forward to working closely with our law enforcement partners and with this body to deal with the numerous ways that we have to fight this problem.

FLAKE:

Last Congress, I introduced the Future of America Innovation and Research Act, or the FAIR Act, that provides companies with a legal remedy to -- when their trade secrets are stolen from abroad.

The -- the -- you know, the concern is that, you know, since the Economic Espionage Act was enacted in 1996, I think there have only been 10 convictions under Section 1831. That's -- that's a lot of time for just a few convictions.

Since the FBI can't investigate and DOJ can't prosecute every single theft of trade secrets, does it make sense that there might be a, you know, federal civil action, cause of action that could help these companies through another remedy? Does that make any sense.

LYNCH:

Well, certainly, Senator, from my experience in advising companies, boards and general counsel, I understand the importance of corporations being empowered to act on their own behalf and protect their intellectual property and their trade secrets.

I haven't had the opportunity to study the bill that you discussed, but I certainly look forward to doing so and having further discussions with you.

FLAKE:
Well, I appreciate that.

Victims' services, another area that has been of some concern. Last year Congress passed the victim of child abuse recognition -- I'm sorry, Victim of Child Abuse Act re-authorization. And I was pleased that the sponsor of the bill agreed to include an important provision that clarified Congress' intent that the money from the crime victims' fund should only be used to assist victims of crime.

Will you commit to follow that new law and direct the victim advocates in the U.S. attorneys' offices that this money only be used for victims? In the past we've seen it used for witness travel and other administrative duties and not actually focus on the victims.

LYNCH:
Certainly, the management of the issue of how to provide not only restitution but support to victims is an important one to the department and to me as United States attorney.

And I think that we'd have to work to implement the law that you have discussed. My understanding is that it is being implemented, certainly the guidance has gone out to ensure that the victim -- victim advocates and offices are being appropriately focused.

I know in my own office, we have victim advocates who work closely with the victims of crimes, families who've suffered incredible loss, and provide a great support to them. And I fully support empowering those professionals.

So, yes, Senator, I believe that you -- that the law that you mention is one that is being implemented. I certainly will commit to ensuring that it is so.

FLAKE:
OK. Thank you. And should you be confirmed, I look forward to working with you.

LYNCH:
Thank you, sir.

GRASSLEY:
Next person is Senator Blumenthal.

And when Senator Coons comes back, obviously we've skipped over him, I'll call on him as the next Democrat.

BLUMENTHAL:
Thank you, Mr. Chairman. And thank you for your courtesy and thoughtfulness in the way that you've conducted this hearing. And I'm proud to serve under you as chairman.

GRASSLEY:
Thank you.

BLUMENTHAL:
And, thank you, U.S. Attorney Lynch for being here today and also for having your family welcomed, your husband, Stephen and your dad, Lorenzo.

The two most common words I think that have been used to describe you are smart and tough, and I can see from your dad and I'm sure it's true of your mom that you come by those qualities honestly.

LYNCH:

Yes.

BLUMENTHAL:

In the best sense of the word, sir. And you should be very proud of your daughter.

Your testimony has been among the most accomplished and impressive that I've seen as a member of this committee and I'm sure you've done yourself a lot of good today, not that you necessarily needed it, but thank you for your very forthright and erudite answers.

I want to begin by focusing on human trafficking. You have a great record on human trafficking. I count 10 major prosecutions that you've done while United States attorney, focusing particularly on targeted sex trafficking while also pursuing labor trafficking.

And in a case that you brought against the 7-Eleven franchisees, you stated publicly that the defendants were running a modern-day plantation system and the system looked a lot like modern-day slavery -- slavery.

You brought the case relying on statutes relating to immigration enforcement and identity theft and wire fraud, not on the statutes that specifically focused on criminalizing human trafficking. I wonder whether you could relate to us whether you think those statutes need to be strengthened.

If you couldn't in a sense rely on them to bring those cases based on human trafficking, whether we should perhaps strengthen them? And, in particular, the Trafficking Victims Protection Act of 2000 provided mandatory restitution for trafficking victims, a provision that is unfortunately more unenforced than enforced. In fact, rarely enforced, I think, to provide for restitution.

A recent study by the Human Trafficking Pro Bono Legal Center took a look at how this requirement works in practice, and they found that only about 36.6 percent of the cases did prosecutors bother to request restitution.

So, my question is really two-fold. Number one, do the statutes need to be strengthened?

And, number two, can you and would you do more to make sure that restitution is provided to the victims of human trafficking?

LYNCH:

Certainly, Senator. The issue of restitution for the victims of human trafficking is an important one, particularly as we do increase the number of cases that we bring. Certainly, sometimes there are situations where a court may not impose restitution because the funds are not there or for other legal reasons, but where we can, we always do seek a restitution order for the victims.

We in particular have worked with other governments to provide them information. Where we have found, for example, that certain small cities in Mexico have been a prime source of those who would traffic women into the United States, into the Eastern District of New York, we have worked with the Mexican government to provide them information so that they could possibly effect seizures that we could not under our particular asset forfeiture laws.

So, it's a very, very important issue to me as United States attorney. And should I be confirmed as attorney general would be one I would look forward to working with you on to make sure that all of the laws involving victim protection are as strong as possible.

With respect to the Ag Eleven case, we did not have the evidence that the workers had been moved across state lines to effectuate the crime. And so, therefore, we would not have been able to use the trafficking laws per se. But as with that case, with every case, we look at the -- at the relevant facts and the laws and bring the strongest case that we can.

And, certainly where we have seen numerous, numerous incidences of children and women being trafficked from within the United States, sometimes even simply just crossing one state border, as well as from overseas, we've never hesitated to act. And should I become attorney general, it will be one of my priorities.

BLUMENTHAL:

I would welcome that priority very much, as the co- chairman of the human trafficking caucus in the Senate. It's a very bipartisan one, the co-chairman is Senator Rob Portman of Ohio. So I look forward to working with you on it.

Let me ask you, and first of all, welcome your comments about the invisible wounds of war. Thank you to your uncles and cousins for their service in Vietnam and to your brother for his service as a Navy SEAL. I say that as a dad of a Marine Corps Reserve veteran who served in Afghanistan and another son who is currently in the Navy.

And I would hope that you will continue to focus on those issues relating to post-traumatic stress and traumatic brain injury as they may be a cause of certain kinds of conduct that may be unwelcome, may even be criminal.

Because what we've found is that a better understanding of those invisible wounds of war and the inner demons that many of our veterans bring back with them can lead to more thoughtful and humane treatment through our criminal justice system.

I want to ask you, finally, in the time that I have, about one of the criticisms that has been made of the Department of Justice in its allegedly too lenient treatment of certain corporate defendants as being too big to jail, so to speak.

In remarks that you made after the Department of Justice entered into a settlement with HSBC for money laundering, I'm sure you recall it, you said that the settlement had deterred that company, but you weren't sure that it would deter other companies.

So my question is whether more can be done to more aggressively prosecute white collar crime, corporate crime, to dispel at least the widespread impression or perception that perhaps the Department of Justice has been too lenient? And, in particular, would you work with me on a bill that I've authored that would make certain corporate officers criminally liable if they are aware of significant potentially deadly risks to workers, workplace safety problems, and fail to act or make it public?

So this bill is called "Hide No Harm." It's a bill that's designed to protect workers on their jobs, and it focuses on that part of the potential wrongdoing that may be committed by corporate officers.

But also -- again, two-part question -- would you consider pursuing more aggressively criminal laws that may be applied to corporate officers who are involved in malfeasance or violations of federal criminal laws generally?

LYNCH:

Certainly, Senator.

When it comes to white-collar crime or any kind of crime, as a career prosecutor and as U.S. attorney, I've been very aggressive in pursuing those types of cases.

With respect to -- should I become confirmed as attorney general, I would continue that and direct that the Department of Justice continue its focus on examining the facts of every case, following the law wherever it took us.

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At the outset, no individual is too big to jail, and no one is above the law. There are certain situations where we may come to

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a different resolution or may decide that a civil resolution is appropriate, but that is only after a full and fair analysis of all of the facts and the law and the relevant burdens under the criminal justice system or the civil system.

But that being said, Senator, I believe if you look at the record of the Eastern District of New York, we have prosecuted a number of corporate officers for -- for insider trading, with respect to the Brooks case, and corporate malfeasance in other cases as well as for violations of the FCPA.

We have struck significant -- wrung significant concessions from corporations and made major changes in the way in which corporations and financial institutions are structured and operate that as act as a deterrent.

And we have been clear with respect to the industries within which we are looking that should a corporation not engage in preventive behavior or should they not take seriously the type of investigation we bring, that criminal charges will be brought.

BLUMENTHAL:

Thank you, and I know of your very aggressive and distinguished record in this area. It's one of the reasons why I strongly support you and I look forward to voting for you and working with you on all these topics.

And also reform of the Foreign Intelligence Surveillance Court...

LYNCH:

Yes.

BLUMENTHAL:

... as you know, I've advocated a public advocate to defend and -- and advocate constitutional liberties in the course of this secret proceeding, the Foreign Intelligence Surveillance Court.

I'm not going to ask you to commit on that issue, but I hope that you will work with me on it as well as these other issues, and I very much appreciate your being here today and your public service and your family's service.

Thank you very much.

Thanks, Mr. Chairman.

LYNCH:

Thank you, Senator.

GRASSLEY:

Thank you, Senator. Now I go to Senator Vitter.

VITTER:

Thank you, Mr. Chairman.

And thank you, Madam U.S. attorney. And thank you for the meeting in my office.

As I told you at the time, I was very disappointed and frustrated,, because you didn't respond directly to any of my big topics, and you said you'd look into these matters and -- and consider them.

And -- and as I promised, I restated the big questions in writing, and -- and I was further disappointed when yesterday, I got a letter saying there would be no response to that.

But -- but maybe the third time is a charm for me asking them, so we'll try here.

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ASQ told you in my office, like many, many citizens and members of the Senate, I have a huge concern regarding what I think is the president's illegal, unconstitutional executive amnesty, and I have a huge concern of the fact that you think it is within the law. And we were talking about that.

So I'm going to put up what is the central statutory argument that the president's lawyers point to in terms of his allegedly having authority for this executive amnesty, and it talks about granting parole only on a case-by-case basis.

So I guess one of my key questions, which we talked about in my office, is, do you really think his granting this amnesty, this new status, to about five million illegal aliens is acting on a case-by-case basis as mandated by the statute?

LYNCH:

Senator, I greatly appreciate the question as well as the opportunity that we had to discuss the matters in your office.

With respect, again, to my review of the opinions supporting the Department of Homeland Security's request for a legal basis for taking certain actions and prioritizing removal, as indicated, I did find it to be reasonable that we would prioritize removal of the most dangerous undocumented immigrants with our limited resources, particularly those who were involved in violent crime, terrorism, recent crossers, those with criminal records. That seemed to me to be acting in the interest of public safety and appropriate.

With respect to other individuals who may not be as high on that priority list, my understanding is that that is a status that they will have for a brief period of time.

And certainly, as you look at the issue of executive discretion or prosecutorial discretion, you always want to have the ability to still look at individuals and make a determination as to whether or not they should be in that lower priority, and I didn't see anything in the...

VITTER:

Ms. Lynch, as we -- as we talked about in my office, though, his action goes well beyond setting prosecutorial priorities, doesn't it?

Apart from that, he goes further in granting this broad category of folks a certain status for three years at a time, and then he takes another affirmative step in giving them a work permit. So those two steps are going beyond setting priorities for prosecution, are they not?

LYNCH:

Well, certainly, Senator, as relates to how the Department of Homeland Security manages the removal process for those in the low-priority category, however they may be determined to be, again, I'm not aware if those regulations have been set forth yet, so I can't comment on how they'll be implemented...

VITTER:

Does his plan go beyond setting priorities for prosecution or not?

Does it -- doesn't it, in fact, go beyond that by granting these folks a parole status and giving them a work permit? Isn't that something additional to simply setting internal priorities for prosecution of these cases?

LYNCH:

Well, Senator, I just -- one minor point at the outset, I believe that the Department of Homeland Security's action refers to removal and not necessarily prosecution.

Certainly, with respect to prosecution, there is still a robust prosecution under the immigration laws, and in my own district, they are a tool I use quite frequently.

With respect also to what would happen to those individuals who would be in a lower priority status for lack of a better word, again, I'm not sure how the department will go about implementing that.

My understanding is that the issue was, was there a legal framework for establishing such a -- a program? And the opinion indicated that there was.

I believe individuals...

VITTER:
Do you agree with that opinion?

LYNCH:
I believe individuals still have to apply, at which point, there would have to be a review of their eligibility and the like.

VITTER:
Fundamentally, do you agree with the legal opinion we're talking about?

LYNCH:
I thought that the opinion was reasonable. I also thought that it made distinctions in terms of...

VITTER:
Again, going back to that legal opinion, this -- put that back up -- this is a key element of it.

So do you think that action that's applying to about 5 million illegal aliens is operating on a case-by-case basis?

LYNCH:
Senator, again, I'm not familiar with how the Department of Homeland Security will be actually implementing the orders that it will be -- that it'll be reviewing and the applications that it will be reviewing, so I'm not able to provide you with specifics on...

VITTER:
But you've read the orders. Do you think that lays out a system that is operated on a case-by-case basis?

LYNCH:
With respect to my review of the Office of Legal Counsel opinion, it did provide a reasonable basis both for the removal and for the prioritization of certain people as it came to removal.

When it came to the issue of whether or not there could be a program for deferral, it seemed to refer to legal precedent, to the statute itself and to actions by this body, among others, so it certainly seemed to provide a legal framework for that.

And I -- I believe also what I thought was -- was noteworthy, was that with respect to the opinion, some of the requested actions by the Department of Homeland Security, the Office of Legal Counsel found did not have the appropriate legal framework that would have made them something that could be carried out under the current legal system, and so the -- the advise was not to go forward.

VITTER:
OK. Well, I'll take it as a yes that this is operating on a case-by-case basis, and I -- and I just think that's really a clear, obvious stretch to say that this action that's going to affect 5 million people is following the law in a case-by-case basis.

The law also says -- in fact, the same specific citation, it says, "This decision on a case-by-case basis has to be made by the attorney general."

Now, is it your understanding under the president's plan that if you're the attorney general, you're going to be in the middle of that process making those decisions?

Well, Senator, I'm not aware of the -- the regulatory framework and the rules that have come out around this statute as to how that authority is either delegated or exercised, so I'm not able to give you an exact answer right now as to how that would specifically be implemented...

VITTER:

Well, I've read the plan, and the plan, as I read it, is for all of that to be done in the Department of Homeland Security. So my question would be, what is the statutory basis to allow that when under the statute, not some order, not some legal opinion, the statute, the law, word by word, it says the attorney general is in the middle of that decision on a case-by-case basis?

LYNCH:

So, again, Senator, as I -- as presented to me by you, today, and thank you for that information, again, I'm not familiar with the ways in which that particular authority has been exercised by the attorney general, whether it has been delegated or how it is shared with the Department of Homeland Security, so I'm not able to provide you with the specifics at this point as to how I would exercise that authority.

VITTER:

Well, again, I'll have to be following up for a fourth time, but that'll be a central question. The plan is not for the attorney general to be in the middle of this at all. The statute says that the attorney general is. Why aren't we following the statute?

Let me go to another case that goes to following the law which Senator Hatch brought up earlier, which is your comments regarding the Department of Justice's initiative, Smart on Crime initiative.

Now, as I read it, and based on what I know, this is just a way to clearly ignore mandatory minimums. And there are crimes that have mandatory minimums, we can have a good debate about whether those should be lowered in some cases or not, but they are what they are. They're in the statute. So why aren't we following the statute with regard to crimes with mandatory minimums?

LYNCH:

Well, Senator, with respect to the enforcement of the narcotics laws that contain those mandatory minimums, laws which I have had occasion to use on numerous occasions as an assistant U.S. attorney, as a career prosecutor and as U.S. attorney, those laws are being followed, not just by my office but throughout the U.S. attorney community.

The issue with Smart on Crime, as well as by a number of offices who have sought to prioritize how to handle those cases in an area -- in an era of limited resources is focused on when is it best to use the mandatory minimums and when do we not necessarily have to use them.

But every office still retains and in fact exercises the discretion to impose a mandatory minimum sentence should someone who may not on the face of the policy fall into that category, but upon review of the case clearly does.

VITTER:

So, when...

LYNCH:

That has and is being done.

VITTER:

When is it best to use the mandatory minimums? So the mandatory minimums aren't mandatory?

GRASSLEY:

When you get done with that answer, then I'll cull on Senator Coons. But go ahead.

LYNCH:

Senator, with respect to the narcotics policy, certainly as we managed it -- as we handled these cases in the Eastern District of New York, we rely heavily on the mandatory minimums statutes when dealing with numerous drug kingpins that we have built significant trafficking cases against, many of whom have been extradited from foreign countries or have been operating within our district.

My fellow U.S. attorneys use the mandatory minimum statutes in a similar way.

We all look, however, at the nature of the crime problem in our district and the nature of the narcotics problem in particular in our district. And a case that may require a mandatory minimum in my district may not occur in another part of the country. Another part of the country may have a different type of narcotics problem and would have a different population of defendants than you would find in Brooklyn subject to the mandatory minimum statutes. But they are still being utilized, Senator.

VITTER:

But, Mr. Chairman, just in closing, I just observe that -- I mean that is taking all meaning out of the word "mandatory" to replacing your and your colleagues' judgment for the judgment of folks who wrote the law, and that's what this whole discussion and debate is about.

Thank you.

GRASSLEY:

And, for the witness, if we, if there's nobody here, and you want to take a break, take a break.

LYNCH:

Thank you.

GRASSLEY:

But just as soon as somebody gets here, I hope you can come back right away.

Senator Coons?

COONS:

Thank you, Chairman Grassley.

Ms. Lynch, congratulations on your historic nomination and your very fine conduct in this hearing today.

The attorney general of the United States, one of the most important offices for which this committee has oversight responsibility and consent responsibility. The current attorney general, Eric Holder, has served in that office with distinction under very trying circumstances.

For better or worse, the attorney general often serves as a lightning rod for those in this body with complaints about the administration, and I think it takes special mettle to deal with that kind of constant incoming fire while remaining composed and focused on a constructive and forward-looking agenda.

I'm interested in hearing from you about how you plan to carry forward progress on some of the issues that the Department of Justice faces, with respect to privacy, collaboration with state and local law enforcement, I.T. protection, and important civil rights issues, such as sentencing reform, voting rights and racial profiling.

As successful as Attorney General Holder has been, there remains important progress to make and just two years in this administration to make it.

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First, if I could, about state and local law enforcement. Given my previous experience, I'm thrilled that someone with your

I serve as co-chair with Senator Roy Blunt of the Senate law enforcement caucus. And the Department of Justice plays a central role in supporting state and local law enforcement.

Can you just comment for me, if confirmed, on the importance you would place on the partnership between federal, state and local law enforcement, including such programs as the bulletproof vest program, the Justice Reinvestment initiative, the Violence Reduction Network, which is particularly important to me, and the information sharing?

And then, second, Senator Flake asked about this previously, but could you just talk about the Victims of Child Abuse Act programs and comment on what experiences you've had with child advocacy centers and how they function as one of the partnership undertakings between federal, state and local law enforcement?

LYNCH:

Certainly, Senator. With respect to the important partnership between the Department of Justice and our state and local law enforcement counterparts, it will be one of my highest priorities to ensure that there is not only collaboration and cooperation, but active and ongoing discussion about the needs that we can help fulfill but also, Senator, what we can learn from our state and local counterparts.

It has been my experience, having had the benefit of, frankly, learning from some of the best law enforcement agents and police officers around, that no one knows the crime problem like the cop on the beat. No one really understands what's going on in a community like the officer who walks those streets every night and knows those residents and understands those issues.

Similarly, our federal law enforcement agency partners have outstanding background effort and ability to manage complex cases. And when we combine those two, we have been -- we have been able to achieve tremendous results for victims of violent crime, of terrorism, of cyber crime, along with the cases you mentioned involving vulnerable victims of child abuse.

So, certainly I feel that there has to be a collaborative relationship, but I want to essentially assure you that in my view it would be one where we would not just provide assistance and training and grants -- that is very, very important -- but we would also listen and learn as well from our local law enforcement partners.

COONS:

Well, thank you. That's both a good answer and a great attitude. And I look forward to working with you on this area going forward.

The U.S. PATRIOT Act, and in particular its Section 215 authority, is often thought of as a spying program, which in some ways it essentially is. But it also is and can be a tool that DOJ and the FBI routinely use in the course of domestic law enforcement and its investigative missions.

Does the DOJ use Section 215 as a bulk collection tool? And could the department continue to make effective use of Section 215 if the enhanced privacy protections, the limitations on bulk collection set forth in the USA FREEDOM Act were to be adopted?

LYNCH:

Well, Senator, Section 215, as I understand it, is not a bulk collection tool in and of itself, but a way in which the government, using court authority, can obtain information already gathered that might be useful in ongoing national security investigations.

But certainly I understand that as we work to protect our country from terrorists who seek to attack us here and abroad, that

we have to be mindful of our civil liberties and the privacy rights of anyone who may be impacted by our collection procedures.

And certainly I look forward to -- as the renewal of Section 215 comes up, I look forward to discussions with you and the other members of this committee about the best way in which to keep that useful tool and also reassure this body and the American people that it is being used in the most effective way.

COONS:

I'm also concerned about I.P., intellectual property protections, as we talked about previously, and trade secrets. My understanding is several other senators have also asked about this issue, so I'll try to be brief.

I'm concerned about the huge transfer of wealth going on through trade secrets theft and the federal crime under the Economic Espionage Act is estimated to be responsible for up to \$500 billion annually in terms of losses to the United States, and yet there's only one or two cases a month, federally, brought by prosecutors.

As the U.S. attorney for the Eastern District, what's been your experience in investigating or prosecuting trade secret theft? And would you be interested in working together to strengthen the resources and strengthen the legal authorities for protecting America and our inventions and innovations and ensuring that we stem the tide of loss through trade secret theft?

LYNCH:

Certainly, Senator, in my experience as the U.S. attorney for the Eastern District of New York, I don't believe we have any specific indictments around the Trade Secrets Act.

We do, however, have a number of cases where we have -- we have intercepted foreign actors trying to obtain U.S. information, and we have prosecuted them under other statutes. So we deal with very, very similar issues.

I will note that these cases tend to be complex and long-term. They do require an investment in resources, the devotion of time on the part of prosecutors but also technological resources on the part of our law enforcement agencies.

So I would look forward to, should I be confirmed, working with you and this committee to ensure that we have the appropriate resources we need to handle these cases.

COONS:

Well, as a member of the Appropriations Subcommittee responsible, I look forward to working with you on that. I think it's vital that we strengthen the protections for America's inventions and inventors.

I want to ask about criminal justice reform, an issue that I think is front and center and -- and important for our country and for our justice system.

We've seen in a number of ways in the last year that our criminal justice system is broken in terms of how it deals with mass incarceration and its impact, in particular, on drug offenders and on the African American population of our country.

It's not just a civil rights problem but also a fiscal problem and social problem, and if you look at the numbers of who's incarcerated, for how long and under what charges, I think there is a significant inequality that needs to be addressed.

I think we need legislation through this committee and in this body that will help rationalize overly mandatory, overly long drug sentences for nonviolent offenders.

Attorney General Holder took an important step forward two years ago when he issued revised guidance to the field directing prosecutors not automatically charge the most serious mandatory minimum triggering levels of drug possession against low-level, nonviolent offenders.

Considered whether you would -- whether it's your intention to keep in place Attorney General Holder's 2013 memorandum, or whether you would look for other or additional ways, within the law, within the Constitution, to promote the equal and just application of our criminal laws to every person, regardless of background, of sex, of gender, of sexual orientation, race, religion or nationality.

LYNCH:

Senator, you touch on the important issue of making sure that our criminal justice system protects the American people but does so in a way that's fair and effective and also protects the individual rights of everyone who has to pass through it. It is the responsibility of a prosecutor not just to win convictions but to bring justice to every case, no matter what the result.

Certainly, with respect to Smart on Crime, I've found it similar to many ways in which my own district has had to manage an ever-increasing problem of narcotics prosecutions of low-level offenders and -- and work with an ever-growing docket of larger narcotics cases also, and I've found it to be a reasonable approach to do so and look forward to continuing that particular initiative.

But I also look forward to further discussions with you and your colleagues on these issues as to how to ensure that our criminal justice system is effective and yet also protects the people who have to go through it.

That is a dual responsibility of the prosecutor. It's one I've taken seriously all of my professional career, and I -- and should I be confirmed as attorney general, I look forward to working with you as we explore that issue together.

COONS:

Thank you, Ms. Lynch.

As -- as he said at the outset, Senator Leahy remarked that nearly a third of the department's budget at this point is dedicated to the Bureau of Prisons.

I think we have a pressing civil rights issue nationally for us in terms of our criminal justice system, but I've also long been a supporter of law enforcement and believe that you are uniquely positioned, qualified and prepared to help us balance these twin obligations of ensuring that our communities are safer and stronger and ensuring that our justice system delivers on justice.

Thank you.

LYNCH:

Thank you, Senator.

PERDUE:

U.S. attorney, this is David Perdue. We met the other day.

LYNCH:

Yes.

PURDUE:

I'm a senator from Georgia.

LYNCH:

Yes. Thank you for your time.

PERDUE:

I want to thank you for your perseverance and patience with us today. I hope it wasn't anything I said that cleared the room for you.

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I hope you're doing well.

LYNCH:
I hope it wasn't anything I said.

(LAUGHTER)

PERDUE:
Well, thank you so much for, again, your perseverance.

I just want to join my colleagues in welcoming you before the Judiciary Committee and also thank you for your years of public service, as we talked the other day. I am very impressed with your career and want to thank you for upholding the law in your career.

I congratulate you on this nomination.

You spoke about, this morning, your oath and the required commitment to the Constitution. I applaud that. You've demonstrated that in your career.

You were just talking about mandatory minimums, if I'm correct. I just have a quick question.

Relative to a case that you had in your jurisdiction recently, I want to ask about a defendant who was convicted by your office in the late 1990s. His name was Frances -- Francois Holloway, I believe. I hope you remember him.

There was a lot of press coverage on this case during your current tenure as U.S. attorney.

In 1995, Mr. Holloway rejected a 10-year plea and was convicted after a trial on three counts of armed carjacking and possessing a gun during a violent crime. Those offenses subjected him to consecutive mandatory minimum sentences, and he received a total of, I think, 57 years.

In 2013, Judge Gleeson, the district judge in Brooklyn, who sentenced Mr. Holloway, began what the New York Times called a "campaign on Mr. Holloway's behalf" and wrote to you asking that you consent to an order vacating two of Mr. Holloway's convictions for armed carjacking.

No one argued that Holloway was innocent or that -- that he was wrongfully convicted or that his sentence was unlawful. No one claimed that there was a problem with the trial. All of Mr. Holloway's appeals were rejected.

The case went to the Supreme Court, which upheld the convictions. In fact, everyone agreed that the sentence he received was lawful under Title 18 of the sentencing guidelines.

Judge Gleeson didn't agree with the sentence the law required him to impose and was asking you to help him do it.

In February 2013, to your credit, you refused to vacate the carjacking convictions. You suggested to Judge Gleeson that Mr. Holloway could contact the Office of the Pardon Attorney and submit a petition for commutation of the sentence.

I personally think that that was the appropriate response. I congratulate you on that. I think every prosecutor would've responded that way.

In May of 2013, however, Judge Gleeson again urged you to vacate two of Mr. Holloway's armed carjacking convictions. He said your suggestion that Mr. Holloway seek clemency was not a realistic avenue of relief, because the fact that Holloway

committed crimes of violence would disqualify him. The judge was definitely a passionate advocate for this defendant.

This time, however, you backed down, and you consented to the judge's order to vacate the carjacking convictions.

I want to note that he was a violent offender, along with an accomplice, stole three cars at gunpoint.

You know, as the top law enforcement officer, I have a couple of questions relative to that case and your perspective tenure as attorney general.

My first question is, what -- what caused you to change your -- your earlier position in that case?

LYNCH:

Senator, with respect to the Holloway case, there was a matter that had been of longstanding -- it was longstanding case from the office. It did predate my tenure my first time as U.S. attorney -- the second time but not first time as U.S. attorney, I should say -- and it was a case in which it was the defendant who had made a motion to -- to allow the judge to revisit his sentence.

So there was, in fact, a judicial proceeding before the court at that time, and the court wanted us to take a second look at it. We did consider it numerous times.

Ultimately, the matter was before the court, and while the judge indicated he would like to have the opportunity to review that, our view was that we had to look at the case consistent with many of the initiatives that were being put in place now by the Department of Justice, certainly with respect to clemency and with respect to how we look at offenders who have served a significant time and whether or not they would be eligible for that.

Of note to me as I reviewed the matter was that Mr. Holloway was the second person in that carjacking incident and, in fact, was not the individual with the gun but was, of course, legally liable for that, and while he received the sentence of 57 years, the -- shall we say, the main actor in that received a sentence shortly under two years. So there was an incredible disparity in the sentence there.

But the real issue for us was, was there a legal proceeding in place -- and there was -- and essentially, if we -- did we have the ability to let the judge review the sentence again by keeping it in the court system, and we felt that we did.

But before we did that, it was important to me to consult with every victim in that case. And certainly, we found all of the victims but one, after extensive research, all the victims who also felt that the judge should have the opportunity to reconsider Mr. Holloway's sentence without a guarantee of what that sentence would be.

Based on that information, based upon Mr. Holloway's record in prison, based upon his role in the offense, we looked at how we would have handled the case under current times. And, again, given that there was a court proceeding, we were able to go to court and tell the judge that we would not stand in the way of him reviewing the sentence again, which Judge Gleason did.

Mr. Holloway was resentenced. He then went into state custody to finish a matter. And so, I do not know his current status. But we did -- we did essentially allow the judge to take another look at that. And through the judicial process, the judge imposed a different sentence. That sentence was still significant, and it was still, I would say, twice as long as what Mr. Holloway would have gotten, had he accepted a plea deal.

PERDUE:

Thank you. You know, as -- as the attorney general, you'll have great discretion, just as you did as district attorney. The question I would have, as illustrated by the case, I think, is, you know, where do you draw the line? How do you see this

LYNCH:

Senator, I don't believe that my personal opinion is the governing factor in a case, be it Mr. Holloway's case or be it any case in which I would review, either as U.S. attorney now, or, should I be confirmed, as attorney general. I will take -- take a look at every case. And I will commit to you that I will review every matter brought to me with a full and fair examination of the facts and an application of the law. But also, with a view towards, as with -- in Mr. Holloway's case, whether or not there is a judicial proceeding there and the current status of that. But we will -- we will take every effort, and I will make every effort, should I be confirmed, to always act consistent with the law.

PERDUE:

Thank you.

There are -- just one last question on this in this vein. There are probably hundreds, if not thousands, of violent offenders in our federal custody who are serving sentences based on consecutive mandatory minimums that you just spoke about, like those imposed on Mr. Holloway. If you're confirmed, and during your tenure as attorney general, it comes to your attention there are cases like Mr. Holloway's, would you consent to early release of those offenders?

LYNCH:

Senator, it would not be my place to consent to an early release, nor was it our place in the Eastern District of New York in the Holloway case. Our posture was to consent to allow the judge to revisit the sentence and impose a sentence that, as a judicial officer, he felt appropriate.

So, as U.S. attorney, I would not be making the decisions as to whether someone should literally be released. Should I be confirmed as attorney general, I would not be making those decisions, either, except as people go through the clemency process or the Pardon Office. And those matters come under review by the Department of Justice. We would then apply our best judgment to the situation. But ultimately, the ultimate decision on release would not be made, I believe, by me.

PERDUE:

Well, since I'm the only one up here, I guess I'm the presiding officer. And...

(LAUGHTER) ... my time is almost up. But I have just one -- one other question for you. I'd like to move on to national security, if I might. And will remind the chairman that I didn't go over on my allotted time, just in case.

The DOJ announced last week that two Yemeni nationals charged with conspiring to murder American citizens abroad, and providing material support to Al Qaida will be prosecuted by your office in the Eastern District of New York. I'd like to ask you about your views on transferring terrorists to U.S. soil who have been captured abroad. Terrorists have been tried successfully in civilian courts before, but I'd like to know your opinion about what role you think military tribunals play in handling terrorism cases.

Is there any role for military tribunals? Or should civilian courts be used exclusively for these prosecutions, in your opinion?

LYNCH:

Senator, thank you for that question. The case that you mentioned is being handled by my office. And at the outset, I would note that throughout the process of reviewing that case and deciding how to best prosecute it and where to -- where to appropriately venue it, we consulted extensively with the Office of Military Commissions, as we do with all of the cases involving national security defendants who may be brought to U.S. shores, and maybe -- maybe brought to the Eastern District of New York.

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Certainly, I would say at the outset that my position is, if terrorists threaten Americans here or abroad, they will face

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American Justice. We have done that successfully in the Eastern District of New York. And I look forward, should I be confirmed as attorney general, to continuing that strong practice, utilizing all of the tools in our arsenal. And that includes the military commission process.

Essentially, Senator, should I be confirmed as attorney general, I look forward to working with the military and the other executive branch divisions in government to make the best determination about where each case should be brought. Should that determination be in Article 3 court, I anticipate that the -- that the receiving U.S. attorney's office would handle it with the skill and dedication that my prosecutors do every day.

Similarly, should it be a military commission, they will also handle it with the skill and dedication that they have also shown. I've been honored to have hosted General Martins (ph) on more than one occasion in my office, and have a positive relationship with him. And should I be confirmed as attorney general, look forward to continuing that relationship with him and all of our partners in the war on terror.

PERDUE:

Well, I'd like to thank you for your patience, perseverance, professionalism, and your graciousness today.

You've run out of senators, almost.

LYNCH:

I seem to have.

PERDUE:

I'm going to -- in the absence of our chair, there's only one other senator, I think, that is potentially available for questioning. I know that they're on the floor right now voting. I ran over to -- to get a few questions in.

So, what I would suggest is that we take a 10-minute recess, if you're amenable. And we'll find from the chairman if Senator Tillis, who's the last remaining, I think, person to ask questions. And we'll see where we'll go from there.

So, I think we'll stand in recess for 10 minutes. And thank you again for your graciousness and perseverance today.

LYNCH:

Thank you, Senator.

PERDUE:

Thank you.

(RECESS)

GRASSLEY:

Just as soon as the room -- just as soon as the room quiets, I'm going to recognize Senator Tillis.

I think it's quiet enough. Senator Tillis, would you proceed?

TILLIS:

Thank you, Mr. Chair.

And, Ms. Lynch, congratulations. It's quite an honor to be in the place that you are today. I want to compliment you on your distinguished career. And I've also noted over the course of your testimony just how much pride is in the eyes of your friends and supporters here. So, congratulations.

I had a question for you, and it stems from -- oh, I also want to thank you for dealing with last week when we had a move of the venue and the time around for the meeting. I appreciate your graciousness in spending some time with me last week.

And I really want to maybe start where we left off with some of the discussions. And I think that Senator Flake and Senator... Lee and Senator Schumer have also echoed the concerns about the limited resources and how you would prioritize things within the -- within your future prospective new responsibilities.

And I guess something that strikes home for me has to do with certain elections laws. And in North Carolina, I'm not -- I'm not familiar -- or how familiar you are with some of the elections laws that have been passed over the past couple of years.

But in the context of at least one case that was brought against the state of North Carolina by Mr. Holder, where the law was -- more or less the foundation of that law was the Indiana law which has been held up -- or upheld by the Supreme Court 6-3, but given the limited resources within the A.G.'s office in the Department of Justice, what are your thoughts on pursuing laws that are likely end to up in the same state, particularly laws like North Carolina, that went much further than the Indiana law that was upheld?

LYNCH:

Certainly, sir. I believe that the right to vote obviously is the cornerstone of our democracy.

TILLIS:

As do I.

LYNCH:

And, certainly, I think that states obviously have an interest in protecting that right to vote also, as well as regulating it and making it safe and free and open for everyone. And I believe that many states are acting with exactly that view in mind.

Certainly with respect to the North Carolina statute and case, I know it's under litigation now. I believe there will be a trial at some point in time. I'm not familiar with the status of the case now, so I can't comment on that specific case or that specific statute.

But what I can say is that with respect to how the department will look at voting rights issues, is with a view towards protecting the right to vote and hopefully working with the states to ensure that all the interests are met.

Certainly all voter I.D. laws are not problematic. As you've noted -- as you've noted, the court has outlined situations in which they are useful and serve a fundamentally important purpose. And the department has, under the previously utilized doctrine that's called free clearance, actually approved voter I.D. laws.

So I don't think that we can at this point, without knowing how a case will be presented, say which way the department will go in viewing it.

But given the fundamental importance of the right to vote, should an issue be raised, it is something that the Department of Justice has an obligation to review and consider whether or not it should get involved.

TILLIS:

In the -- in the example of the law that was passed by North Carolina and the case that was brought against North Carolina, in fact I was named in the case because at the time I was speaker of the house, I'm just curious how, as you go forward and you're dealing with the challenges in this office of, as I believe Senator Schumer said, trying to focus your resources on the bad actors, the hardened criminals, the difficult challenges that the department faces, in a case that has 10 attorneys on it, focused on -- no less than 10, I believe, focused on that, I would hope that there would be some focus on is that the best and highest use?

If, given the merits of the case and other laws that have gone to the Supreme Court, that it's likely to end in a situation where the -- it's gonna rule in favor of the state and at the expense of those resources that could be used for other purposes.

mean, what is your thought on going into -- into this role and taking a look at cases like this and maybe determining priorities based on the likely outcome? Have you given any thought to that?

LYNCH:

Well, certainly, Senator, as we review a case, both throughout my career as a prosecutor and as U.S. attorney, we always look to the possibility of how a court will view a particular matter.

But first and foremost, whether the case involves voting or any other -- any other important right, is the issue of what is the evidence that's presented and what is the relevant law, what is the interest being protected?

And if it relates to a core function of the Department of Justice, such as protecting the rights of citizens, keeping our citizens safe, or protecting the right to vote, it is a matter that we would be obligated to look into.

Whether or not a matter would result in litigation would of course depend upon a variety of factors which are not in front of me today about the nature of the law and how it was written and essentially whether it comported with those laws that were previously approved both by the department and by courts.

Certainly, with respect to the North Carolina case, I believe the matter is in litigation. It's not something that I'm intimately familiar with. I have not been involved in the management of that case to date. I look forward to learning more about it, should I be confirmed. And I believe the matter will proceed to court and we will await the results there.

TILLIS:

Now, Ms. Lynch, I do have a question just based on the final comment that you made there with respect to the case. Because it gives me some sense of whether or not we can look at this objectively and make sure that we're using the resources of DOG -- DOJ in the most effective way.

I think in January of 2014 you said that people try and take over the state house and reverse the goals that have been made in voting in this country. I presume, since I was the person that took over the state house, I would be included by reference. And you go on to say, and in my home state of North Carolina has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens.

So, in my limited time, I know I'll have another opportunity to ask questions, I had some sense that maybe perhaps you were somewhat familiar with what had been done in North Carolina, and, again, with the backdrop of other laws that seem to have disposed of whether or not what North Carolina has done -- I took great care to make sure that we made heroic efforts to preserve everyone's right to vote -- I may come back around and ask you a few more questions to that -- to this effect.

But I want to move on to something that's completely out of there, and it has to do with something that's very important to me. I'm very -- one of the reasons I ran was on veterans issues and on taking care of those who have taken care of us.

And one question that I have, I hope that you will look at and perhaps consider in my follow-up questions, giving me a response if you have time to speak with others, but the Public Safety Officers Benefits program is a problem. We have people who are making claims there who are not getting their claims resolved on a timely basis. And I've heard a number of reports where -- this is in the event of a death -- that I would like to think that we would place a priority on resolving these claims and clearing the backlog.

And if you have an opportunity, and you won't have a lot because you'll be sitting right there, but if I could get some sense of what that will be as a priority if you are confirmed as attorney general, that's something personally important to me. I think it's the most -- the least we can do for the families.

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The one other thing I'll tell you that I think that we're going to find a lot of common ground, should you be confirmed, is on

the issue of cyber security, I consider this to be something that the attorney general, all law enforcement, all prosecutors... districts across this nation need the tools to make sure that we get control of this quickly.

I'd like some idea, based on your knowledge of how we're currently doing, if you have any sense of where you would go as a priority, should you be confirmed.

LYNCH:

Certainly, Senator. With respect to cyber-security, there are a number of areas in which -- which would be my focus should I become confirmed as attorney general.

Within our law enforcement community, I would work to ensure that they had the technological resources needed to stay ahead of this threat, both from a human resource perspective as well as computers and the like.

With respect to the U.S. attorney community and the Department of Justice community, I would make sure that our prosecutors receive the appropriate training to manage this important issue.

As I've seen in my practice as U.S. attorney, cyber issues are now in every area of practice that we have. That will continue to be the case. And I'm sure that should I become confirmed as attorney general I will see that throughout the Department of Justice.

So, I will work to strength the resources in the Criminal Division and the National Security Division that deal with these cases.

But, Senator, another thing that I think is very important as we combat cyber attacks and deal with cyber-security is the relationship between government and private industry. I believe that there's a very, very important collaborative relationship to be built there.

It is being built. I've seen it. I've participated in conferences with both financial sector parties as well as pharmaceutical industry parties on this important issue. And we've had very, very good, positive, collaborative results involving the reporting of cyber attacks as well as law enforcement's ability to work with private industry to gain knowledge of their systems to prevent attacks as well.

So I think we also, should I become attorney general, one of my priorities would be strengthening this connection between government and private industry as well.

TILLIS:

Thank you very much. Senator Schumer mentioned earlier, I meant to mention in my opening comments, that we have a number of very capable basketball teams in North Carolina, beyond the Blue Devils and the Tar Heels, many of whom I think this year could beat the Knicks.

(LAUGHTER)

LYNCH:

Well. Well, Mr. Tillis, Senator, as an early Carolina fan, I have to say that that is -- that is likely true.

(LAUGHTER)

GRASSLEY:

(OFF-MIKE)

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to have the various staff of both Republican and Democrat give us some inventory of the number of people that want a

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Second round. And the second round will be eight minutes. I'm gonna take about five minutes of that eight minutes and then go vote. And I'll have to recess, if nobody else is back here. So you can do what you want to do during that period of time.

LYNCH:
Thank you, Senator.

GRASSLEY:
The first question was going to be a question, now it's just gonna be a statement. So I'd appreciate if you'd listen to my point of view.

You suggested earlier that prosecutorial discretion allows the administration to prioritize removal of criminal aliens from the country. Yet, in fiscal year 2013, the administration released from its custody 36,000 aliens who had been convicted of a crime instead of removing them. According to the Department of Homeland Security, 1,000 of these aliens have already been convicted of another crime since their release.

Just today I received a 38-page document from the Department of Homeland Security that lists each of the offenses underlying those 1,000 post-release convictions, including things like assault with a deadly weapon, terrorist threats, failure to register as a sex offender, lewd acts with child under 14, aggravated assaults, robbery, hit and run, criminal street gang, raped spouse by force, child cruelty, possible injury, death.

And so, I'm going to put this in the record.

But, so my statement is this for you to consider -- you don't have to respond to it now. I could go on, but for the sake of time, that copy's in the record so anybody can review it.

This suggests the administration is not prioritizing the removal of criminal aliens very well, so 1,000 out of 36,000 have committed further crimes. And who knows, maybe others.

So, if confirmed, my statement to you would be simply, you need to take a look at that policy.

I'm going -- I had two points in my second question. But Senator Tillis asked about the Public Safety Officers Benefits. So he has heard the same thing from my constituents -- the same thing that I've heard from my constituents.

In Iowa alone, there are three families who have been waiting for over three years and another that's been waiting since 2013 to receive benefits. Two weeks ago I wrote the department about the delays and requested a reply by this Friday. Obviously, you won't be in a position that you can request that or answer that by Friday.

But I hope to get an answer, because way back in 2004, the attorney general at that time made a decision that these claims should be processed within 90 days of receiving all the necessary information.

So then I would go to the second one, which is just -- well, let me go to it, and then I'll ask you the question. There's a Brandon Ellingson of Iowa, you wouldn't know about this because it's an Iowa person and a college student, who drowned while handcuffed in the custody of Missouri state troopers after they arrested him on the Lake of Ozarks May 2014.

I've discussed the case with Attorney General Holder, had a couple telephone conversations. I'm very satisfied with his personally looking at it. It has gotten his personal attention. He has assured me that the department will look into the unanswered questions in this case carefully to see if there are any federal laws involved.

So all I'm asking you to do, if and when you're approved, and will you be able to talk to Attorney General Holder, and if he doesn't make a decision by then, that you would personally examine Brandon Ellingson's case?

LYNCH:
CQ.com - Document Aggregation
I would certainly continue that resolve, Senator.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

GRASSLEY:
Thank you.

Now, I'm going to go. And I'll recess it for a while, and then I'll come back and finish my second round.

Thank you.

LYNCH:
Thank you, Senator.

(RECESS)

GRASSLEY:
Thank you all. Thank you all.

Sorry that we're in this unfortunate circumstance of having our hearing interrupted rather repeatedly. And it's not the best way to do business, Ms. Lynch. I'm sorry that that's occurred.

We have been working hard in the Senate. Thursday, more votes were cast in one day than the entire year last year, and Senator McConnell promised that members would be able to offer votes, and so there's 18 more, I think, going to be cast today. Maybe that'll bring -- come close to bringing the end to the -- to the legislation that's out there.

But I think it's part of our heritage as Congress to have individual senators be able to offer an amendment and get a vote on it. So I think it's the right thing, but this hearing, I wish could've been conducted more respectfully, so I'm sorry about that.

I have to have a clear answer to this question, Ms. Lynch. Do you believe the executive action announced by President Obama on November 20 is legal and constitutional? Yes or no?

LYNCH:
As I've read the opinion, I do believe it is, Senator.

GRASSLEY:
Well, this is very troubling to me, because it goes way beyond prosecutorial discretion, I think. It goes clearly to allowing someone to work who's unlawfully in America, to take jobs that statutes say they're not entitled to take.

It gives people the right to participate in Social Security and gives them a number as part of their work authorization to participate in other actions like Medicare.

And I believe this is a fundamental question. It's been a part of the national debate, and the American people are very concerned about it.

The polling number is very high. They do not believe -- and in fact, the American people are shocked that we are seeing this action from the president after Congress was asked to pass legislation to this effect and Congress rejected it.

Do you believe that the president has a right to take action in violation of law just because Congress refused to pass a law he asked them to pass?

LYNCH:
I believe, Senator, that the president is as limited by law as every citizen, and it is certainly the responsibility of both the president and the Department of Justice to follow the laws as passed by this body.

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With respect to other actions the president may take, depending upon the action taken, there may be a basis for certain actions, or there may not be a basis for legal actions.

And that is where I believe that the Department of Justice must apply its own independent, thorough legal analysis and, as with this particular opinion, ascertain whether or not there was a legal framework for some action and, as -- as I saw in the opinion, indicate that there was not a legal framework for the action that was requested and declined to provide a legal basis for that.

GRASSLEY:

Well, what it did approve, I think clearly goes beyond the law.

Congress authorized -- has -- has passed certain laws that control entry into the United States. We expect you as a chief law enforcement officer, the president, who takes an oath to see the laws are faithfully executed, to execute those.

And I've read the opinion, and it suggests that -- it suggests that faithfully executing means you use your resources as best you have to carry out the intent of Congress.

Is that fundamentally...

LYNCH:

Certainly, sir.

GRASSLEY:

So it goes beyond just enforcing every single law. If you don't have the resources, you should try to use the resources you have to effectively carry out the law.

LYNCH:

Certainly, sir.

GRASSLEY:

Well, what I would contend is absolutely plain. I would contend that you've gone far beyond that. You've actually created a new system of law, a new system of qualification, a new standard for who can work in America, a new standard for who can have Social Security and Medicare.

And this is a fundamental matter of great importance, and I just got to tell you, I'm worried about it.

In the Wall Street Journal, Mr. Rifken, who served two White House counsels and -- and Professor -- Law Professor Foley concluded their piece this way.

The OLC -- that's the Office of Legal Counsel, who reports to Mr. Holder and would report to you, that you're now affirming rendered a valid opinion, which you associate yourself with -- this is what he says.

"The OLC's memo endorses a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future presidents can unilaterally gut tax, environmental, labor and security laws by enforcing only those portions with which they agree. This is a dangerous precedent and cannot be allowed to stand."

And frankly, the attorney general of the United States should've told President Obama that, urged him and -- to back off -- presidents get headstrong -- and he didn't do, and now you're here defending this. And I believe it's indefensible. So I'm -- I just want to tell you, that's a big, big problem with me.

Now, do you believe and do you support legalization of marijuana?

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GRASSLEY:

I know the head of the DEA is a little bit out of step with some in administration, I think. Agreed with you on that.

The president said this in January of last year, quote, "I smoked pot as a kid, and I view it as a bad habit and a vice, not very difficult from -- different from the cigarettes that I smoked as a young person up through a big chunk of my adult life. I don't think it is more dangerous than alcohol," close quote.

Do you agree with that?

LYNCH:

Well, Senator, I certainly don't hold that view, and don't agree with that view of marijuana as a substance. I certainly think that the president was speaking from his personal experience and personal opinion, neither of which I'm able to share. But I can tell you that I -- not only do I not support legalization of marijuana. It is not the position of the Department of Justice currently to support the legalization. Nor would it be the position, should I become confirmed as attorney general.

SESSIONS:

Well, I do think there's been a lot of silence there. I know the head of the DEA did push back, and testified here pretty aggressive. But I think she felt like she was out of step within the administration. And I hope that you will cease to be so (ph). Because if -- if the law enforcement officers don't do this, I don't know who will. And in the past, attorneys generals and other government officials have spoken out, and I think have kept bad decisions from being made.

It's good to see Senator Leahy here. How many attorney generals have you presided over? More than a few? How about a rough number?

LEAHY:

I'm trying to think who President Ford's -- go back to the...

(LAUGHTER) ... but don't preside (ph), about (inaudible).

SESSIONS:

Well, it's been -- it's been a pleasure to work with you on this Committee over a number of years.

Ms. Lynch, this is a big issue -- this immigration -- because it represents, in my view, a presidential brute (ph) decision that he was rejected in Congress. And I do not believe, and totally reject the idea, that if Congress fails to act, then the president is entitled to act. Any more than I think if Congress fails to act, judges can just act. Because Congress, by not agreeing to pass a certain piece of legislation, has acted. It has made a decision. And that's where we are.

There's still opportunities and still legislation moving that will be considered in the years to come on all questions relating to immigration. There's going to be a lot of debate and -- and that kind of thing. But under our system, it is not justified, in my view.

Just one more thing I would say to you. I do hear a lot of talk, a lot of loss of confidence in the Justice Department. A belief from professionals, prosecutors, and citizens, that there's too much politics and not enough law. And I do think if you achieve this office, you need to know that. I shared that with you, I think, in our meeting. And you need to make it a central part of what you do, to reverse that trend and restore confidence that this attorney general's office serves the law and the people objectively, and not a political agenda.

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Thank you. And I'll recognize Senator Leahy.

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Let me say -- and I'll be brief -- but when I was a young law student, I was invited into the attorney general's office. Was recruiting me to come to the Department of Justice. I asked the attorney general how independent they were. I said, "For example, suppose you had a prosecution that you knew was justified. But the White House you knew might take a different view." He said, "I'd have to prosecute, because that's my job." That attorney general was Robert Kennedy. He later prosecuted a man who was critical to his brother getting elected president.

I contrast that to another attorney general in the last administration, who testified here that, well, he's a member of the president's staff, so, therefore, in effect, took orders from the White House. I kind of exploded in that. I said, "It's not the secretary of Justice. It's the attorney general of the United States. Not for the Republicans, not for the Democrats, but the United States."

I think from what you have told us, you would be that kind of an independent attorney general.

I also heard somebody criticize here this morning on the prosecution of Ted Stevens. Happened to feel he should not have been prosecuted. And neglected to mention that was during the last administration. And it was Attorney General Holder who got a conviction obtained in the last administration -- a removal from Senator Stevens.

I assume, from things you said before -- and we are concerned in Vermont about the increase of opiates and heroin -- that you would continue to work with communities as the Justice Department does now -- I mean, communities not just the federal level, but the state and local level, to combat this problem that's facing so many parts of the United States. Not just my own state of Vermont.

LYNCH:

Senator, should I be confirmed as attorney general, certainly, the issue of the growing numbers and amount of heroin abuse is a grave concern to me. I've seen it happen in my own district. And in talking with my colleagues in the U.S. attorney community across the country, they have expressed similar concerns.

As you point out, however, we are most effective when we work in partnership with our state and local law enforcement partners. And often, when dealing with the issue of opioid addictions and working with our public health community, as well, to find treatment for the offenders, and possibly break the cycle of addiction, many of my colleagues have, in fact, been engaged in efforts of exactly that type, that have been very effective in lowering the addiction rates. And, in fact, lowering the crime rate associated with heroin abuse.

These are efforts that we can study and that we can share. We have to have a strong law enforcement response, also. But we must involve state and local counterparts. We must involve families. WE must involve treatment centers, as well, in dealing with this -- with this seemingly intractable problem.

LEAHY:

Thank you. I would, if there's no objection, reserve the four minutes and 46 seconds left in my round of questions. Because I didn't realize (ph) another roll call was started (ph).

GRASSLEY (?):

Fine, we'll save that four minutes and 46 seconds, whatever. And we'll stand in recess...

LYNCH:

Thank you, Senator.

GRASSLEY (?):

... until somebody returns.

SCHUMER:

The hearing will come to order.

And first, I'd like to thank my Republican colleagues for the courtesy here. We're all going back and forth voting. It would be rare to have the third-ranking Democrat chair the committee, but we're all going and voting and I appreciate that. And I'll try to be as quick as I can because of my need to vote.

So first, Ms. Lynch, I read this morning on the news that you have something special from your late brother who was a Navy SEAL with you today. Tell us a little about that.

LYNCH:

Well, Senator, I have with me my late brother's Trident, the insignia of the Navy SEAL. It is something that I usually have with me in my office, but I often bring with me when I come down to the Department of Justice. And I have it with me here today. And it ensures that I have both of my brothers with me here today.

SCHUMER:

Yeah, well, having read and seen and met the SEALs, it's an amazingly difficult thing to achieve, and then like you, in a different way, he was defending our country in one of the best ways you can. So we really appreciate that and appreciate your thoughts about your brother.

OK. Now, I'd like to go to the next area. This morning, both you and Senator Sessions and I talked about a topic -- it seems like a long time ago, this morning. So I'd like to just talk a little more about that.

Absent appropriate authorization from DHS, I just want to ask, is there any federal right for an immigrant who is not a lawful -- not in lawful status to work?

LYNCH:

No, there is not, to my knowledge.

SCHUMER:

OK. Thanks.

I think earlier you said you had a preference that all individuals here in the United States work regardless of status. I think a lot of us would share that preference. I think this is confusing for people because there literally are nearly 100 categories of statuses or stati -- whatever the right word is; they didn't teach that at James Madison High School -- for people because you've got to count green cards, nonimmigrant visas, spouses of individuals on certain visas, parole, asylum, applicants for green cards, nonimmigrant visas, immigration visas.

Many people who are not U.S. citizens have a legal right to work. For example, green cardholders' work visas. We admit people to work on a work visa.

So let me ask you just what did you mean by -- when you said you think everyone should work regardless of status?

LYNCH:

Well, certainly, Senator, when I made that comment, I was really making more of a personal observation. And I must admit I have to be careful here because my father is here and my mother is watching.

But certainly in my family, as we grew up, we were all expected to try and find employment as part of becoming a responsible adult and as part of becoming a responsible member of society. So I was making a personal observation based on the work ethic that's been passed down to me by my family, not a legal observation.

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Right. So again to reiterate, you don't believe that there's a federal right for an immigrant who is not lawful here to work?

LYNCH:

No, sir, not at all.

SCHUMER:

OK. I just wanted to clarify that because I think -- I wish Senator Sessions were here. I think he wasn't certain about what you said. I think now the record is 100 percent clear.

OK, one final question. This is about a myth -- another of the myths that's out there. A generally deferred action policy eliminates case-by-case consideration is therefore illegal. That's what some people are saying.

Deferred action is actually, like many federal policies, sets eligibility criteria, but then requires case-by-case consideration. So only a limited set of individuals, those with deep ties to this country and without a criminal record, can apply for deferred action under the president's proposal.

But that's not all. After they register, pay a fee, undergo criminal background and national security checks, the president requires DHS officers to scrutinize every single case individually to make absolutely sure the person is not someone we should prioritize for deportation.

So I have two questions in regard to that. Doesn't it make eminent sense for a program to set out guidelines at the front end, and then still require careful individual consideration at the back end before anyone is approved?

LYNCH:

Certainly, sir. That would make eminent sense and would provide for a careful review of every applicant.

SCHUMER:

And I believe that's what the president is intending to do. We haven't seen all the regulations yet, but that seems to me what he said. Couldn't one argue that other discretionary guidelines in programs like federal contract bids take a similar approach? We lay out broad criteria, but then they review each contract -- contract by contract?

LYNCH:

Contract by contract, and with vigorous application and screening.

SCHUMER:

Right. OK. I want to thank again my colleagues for deferring, and I will pass not only the questioning, but the gavel to Senator Graham.

GRAHAM:

A dream come true.

(LAUGHTER)

That will only last for eight minutes, so I'm going to enjoy it while I can.

Your brother was a Navy SEAL. That's got to be -- that's a major accomplishment. It's the -- probably the hardest thing to be in all the military. So I know your family's proud of him and what you've accomplished.

Do you agree with me that one of the worst possible outcomes is for the United States to release somebody from Guantanamo Bay to go back to the fight to kill an American SEAL or anyone else? That we should really make sure we don't do that unless we absolutely have to.

LYNCH:

I certainly think that anyone coming from either Guantanamo Bay or any of our facilities we should take appropriate steps to make certain they do not place Americans in harm's way.

GRAHAM:

I couldn't agree with you more. We've got a 30 percent release rate, and from a SEAL point of view, they're usually the guys capturing these folks. It's got to be bad for morale for one of the guys that you captured wind up killing your buddy down the road, so I really do believe that the policy we have at Guantanamo Bay needs to be reviewed and reviewed closely for not just all SEALs, but for all who have been fighting.

Now about being at war. Do you believe we're at war?

LYNCH:

We are at war, Senator.

GRAHAM:

OK. Now, I've been a military lawyer for 30-something years, you've been a prosecutor for a very long time. I believe in an all-of-the-above approach that military commissions have a place in this war and Article III courts have a place in this war. Do you agree with that?

LYNCH:

I do, Senator. I do agree with that principle.

GRAHAM:

Thank you. Now, under military law, the main objective when you capture an enemy combatant is to gather intelligence, it's not prosecution. Does that make sense to you?

LYNCH:

That is certainly one of the important objectives under military law. I would add, however, though, that with respect to the Article III prosecutions that I've been involved in through my office, a primary goal is also to obtain cooperation and, thereby, valuable intelligence.

GRAHAM:

Thank you. Here's what I would suggest to you, ma'am. This is the Army Field Manual. It's over 300 pages. I helped write the Detainee Treatment Act with Senator McCain to make sure that we did not torture people. I believe waterboarding is torture and is illegal, but in this Army Field Manual, which sets the parameters for detaining people and interrogating them, not one time does it suggest that you should read the enemy combatant their Miranda rights. Do you know why that would be?

LYNCH:

Well, I certainly think the Army Field Manual has proven to be a very effective way of handling high-target detainees.

GRAHAM:

All I would suggest, ma'am, that anybody in the military would reject out of hand that it's a good way to gather intelligence by providing the enemy combatant a lawyer.

In World War II, even though Miranda didn't exist, and all the wars since then, no one's ever suggested to our military that once you capture an enemy combatant that you give them a lawyer as a better way to gather intelligence versus holding them under the Law of War.

So here's my recommendation to you. That we've caught several high-value targets in the last year or two. We've read them their Miranda rights within days or hours of capture. You'll never convince me that criminalizing the war is the best way to gather intelligence. I want to talk to you about this. I want to have more flexibility than we have with the current system. If we

do not hold some of these people under the Law of War for questioning as an enemy combatant, then we're going to lose... the ability to gather intelligence, and the only way you can protect this nation is to -- is to interrupt the next attack because the people we're fighting do not mind being killed.

Can an American citizen be held as an enemy combatant?

LYNCH:

Senator, with respect to an American citizen, I believe there would be a prohibition against holding them -- against us holding them as an enemy combatant.

GRAHAM:

Ma'am, that is not true. We have held several American citizens for a multiple period of years as enemy combatants. Hamdi versus Rumsfeld. Before I vote on your nomination, I want you to read Hamdi versus Rumsfeld, an Ex Parte Quirin, where American citizens collaborating with the Nazis landed at Long Island to try to attack the country. They were tried by a military commission.

Military commission trials are not available to American citizens, they have to go under Article III, but we have under our law in Hamdi versus Rumsfeld the idea there is no bar to this nation holding one of its own citizens as an enemy combatant.

What recommendation -- I want you to read those two cases and get back with me and see if that changes your mind -- what recommendation would you give an American citizen when it comes to joining ISIL or Al-Qaeda? What would you tell them to do?

LYNCH:

Senator, with respect to an American citizen or anyone who seeks my opinion on joining ISIL or Al-Qaeda, my recommendation would be do not do it or you will face American justice.

GRAHAM:

Well, not so much you'll face American justice, you're going to get killed if we can find you.

LYNCH:

You may get killed before we can find you.

GRAHAM:

That's right. But if we find you, we can kill you. Anwar al-Awlaki, you know that guy?

LYNCH:

Yes. He is -- he was --

GRAHAM:

Do you think the president acted within his Constitutional authority to use a drone against him?

LYNCH:

So with respect to Anwar al-Awlaki, I'm familiar with him, as he has figured in the radicalization of some of the defendants who've come before the Eastern District of New York as well as a very active Al-Qaeda leader. I'm not familiar with the -- with the ways in which the decision was made to use the drone against him, but I --

GRAHAM:

Let me say -- let me tell you how it was made. There's an executive process where there are executive agencies that evaluate the threat that every individual presents to the country, and in the case of an American citizen, there are very strict criteria. But if they meet those criteria, the president can order the use of lethal force. I promise you, in every war we've been in, American citizens, for some reason, have decided to side with the enemy, and they've been viewed as an enemy combatant, not a common criminal.

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The president of the United States, I think, correctly authorized a drone attack against Anwar al-Awlaki, who was the head of Al-Qaeda in Yemen. Would you want to look at that before you give me the answer? Are you comfortable with that process? Would you like to look at that process and get back with me?

LYNCH:

Well Senator, I'm comfortable with the process as you describe it. But what I think it illustrates, however, is the need to, as you put so eloquently at the beginning of our discussion, use all of the tools available to combat this war.

GRAHAM:

And I just want to make sure that as the attorney general of the United States, you understand one of the tools to combat this war is to use lethal force against an American citizen who our government has determined to be part of the enemy force. The second tool is to hold an American citizen or a non-citizen under the Law of War for the purposes of intelligence-gathering.

Those are two tools in our toolbox that have been used for decades. I want to make sure as attorney general you recognize those tools are available to us in this war as we go forward. Read these cases and get back with me if you could.

LYNCH:

Absolutely, Senator.

GRAHAM:

Thank you very much.

Online gaming. Are you familiar with the decision by the Office of Legal Counsel in 2011 to basically say that the prohibition in the Wire Act was limited to sporting events and contests?

LYNCH:

I'm generally familiar with the results of that.

GRAHAM:

Do you agree with that decision?

LYNCH:

I haven't read that decision, Senator, so I'm not able to really analyze it for you. Certainly, I think it was one interpretation of the Wire Act that was --

(CROSSTALK)

GRAHAM:

Would you agree with me that one of the best ways for a terrorist organization or criminal enterprise to be able to enrich themselves is to have online gaming that would be very hard to regulate?

LYNCH:

I think certainly that what we've seen with respect to those who provide the material support and financing to terrorist organizations, they will use any means to finance those organizations.

GRAHAM:

I'm going to send you some information from law enforcement officers and other people who have been involved in this fight and their concern about where online gaming is going under this interpretation.

Thank you very much. From my point of view, you've acquitted yourself very well, but I do appreciate if you would look and be able to answer my questions about enemy combatant status for American citizens, the use of lethal force.

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LYNCH:

GRAHAM:

Thank you very, very much. And now, I will turn it over to Senator Lee, who is now chair.

LEE:

Thank you, Mr. Chairman. Thank you for staying with us and even through the hectic vote schedule.

I'd like to go back to civil forfeiture, if that's all right, which is the topic we were discussing earlier before I left for the last vote.

First of all, I want to get back to the question I asked at the outset. Do you think it's fair -- is it fundamentally just that someone can have their property taken from them by the government without any evidence that they've committed wrongdoing, based solely on a showing by the government, based on a probable cause standard, that their property might have been involved in the commission of a crime, perhaps without their own knowledge, their own consent, their own awareness on any level? Do you think that's fair?

LYNCH:

Senator, I think that we have a very robust asset forfeiture program, both criminal and civil. With respect to civil forfeiture, I've looked at the program in general. Again, the Department is conducting a review of the forfeiture program. And with respect to civil forfeiture, there are legal safeguards at every step of the process, certainly as instituted or implemented by my office and my understanding by my U.S. attorney colleagues. So there will be judicial review before there can be attachment or seizure, for example, as well as an opportunity to be heard. And that -- but that standard must be met before the seizure warrant can be issued.

LEE:

I understand. I understand.

A lot of Americans don't believe that that's fundamentally fair, and again, that's why, in many states, there have been laws enacted that restrict the use of civil forfeiture under those circumstances and impose additional requirements, which is why I raised the concern about the process by which the Department of Justice has on occasion in the past used known something as adoption, whereby they will take something that -- that could not be forfeited under state law in state court, and they'll -- they'll utilize the resources of the U.S. Department of Justice to assist in the forfeiture, U.S. Department of Justice retains 20 percent and then yields back 80 percent to the state or local law enforcement agency.

This is troubling, and -- and -- and you appeared to be aware when I asked you about this. You appear to be aware of an order that Attorney General Holder issued just about a week and a half or two weeks ago -- I believe it was January 16th -- restricting that.

So I -- I assume you're familiar with that order.

LYNCH:

There was an order -- or a policy directive from the attorney general to the field, and as U.S. attorney, I did receive that, and it essentially ends the adoption program.

As you point out, Senator, a number of states now do have a robust asset forfeiture program on their own. When the federal program was being instituted, at least the research shows, many states did not have this program, and so a lot of the local law enforcement agencies that have been using the adoption program initially did not have a venue to effectuate legal seizure of property that had been used in a crime. The adoption program began several years ago primarily as a response to that.

~~That has changed. That legal landscape is very different. That certainly was one of the reasons set forth in our discussions...~~
when the policy change was made.

LEE:

OK. So this order that the attorney general issued on January 16th, you refer to it as essentially ending this adoption program, again, the program by which the federal government can assist state and local law enforcement agencies in circumventing their own state law restrictions on civil forfeiture.

But when you read the order, you see it that it's subject to several exceptions.

One exception applies with respect -- I think you -- you referred to this briefly before when you and I spoke a few hours ago -- one exception relates to property that directly relates to public safety concerns. Fair enough?

Then you turn the next page, you look at the -- the second to last paragraph, which contains some additional carve-outs. This order does not apply to, one, seizures by state and local authorities working under -- working together with federal authorities in a joint task, two, seizures by state and local authorities that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations, or three, seizures pursuant to federal seizure warrants obtained from federal courts to take custody of assets originally seized under state law.

So as I see it, Ms. Lynch, this -- this order, while purporting to end this adoption program, as -- as you say, is riddled with loopholes. It's riddled with loopholes that effectively swallow the rule, which seems to be a theme today, which -- which is something that concerns me greatly with this department.

Now, I understand that this order was issued, has been issued prior to your conformation -- after your nomination, prior to any confirmation vote on your nomination. But I would just ask you to -- to take into account these concerns and to work with me moving forward on making sure that our civil forfeiture programs don't get out of control.

But would you agree with me that we really ought to find ways to stop federal law enforcement agencies from helping state governments to circumvent their own state law restrictions on civil forfeiture?

LYNCH:

Senator, I believe that the policy change that ended the adoption program certainly ends that as the problem that -- that had been raised.

As you pointed out, these were situations where local law enforcement made an initial stop or seizure -- so the seizure was not essentially begun by a federal agent or partner -- and then the matter was brought to a federal agent for adoption and processing through the asset forfeiture equitable sharing system therein.

The other situations to which you refer where there is a federal- state task force or a joint investigation really are situations where there's actually a federal case from the outset, and there would not be the issue of -- of having to review the state laws, and there would not be an option in that case, because again, the case would be under federal jurisdiction from the very beginning.

So as you pointed out, the initial adoption program did raise concerns, and I understand that those have been discussed in the public discussion venue as well as in law enforcement circles as well about the issue where the state has a robust system of asset forfeiture, but that system is not being used, and the federal system is being used instead.

The adoption program ends that practice.

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LEE:

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It ends it, but subject to some very large loopholes. And so I just ask you to be aware of that, and I'd like to discuss that with you more moving forward.

Before my time expires, I want to get back to another question I asked earlier. Just indulge me in -- in this hypothetical scenario. We didn't have time to fully explore it previously.

But imagine you're in a state in which there is a 55-mile-an-hour speed limit. There're a lot of people who want that speed limit raised. Imagine that the chief executive of that, the governor, really wants it raised to, say, 75 miles an hour.

There is a lot of support within the legislature and among the public at large that there needs to be some reform to the speed limit law. They can't get to any one proposal that gets enough votes, and so nothing happens.

The governor at that point decides that he will announce that anyone who wants to drive faster than 55 will not be ticketed, and they can apply for certification that they won't be ticketed if they want to drive up to 75 miles an hour. He says, "I can't guarantee it forever, but I can guarantee it for the next three years. I will not be enforcing that."

Would that, under that hypothetical scenario, not be tantamount to a usurpation of the legislative role that belongs to the legislative branch?

LYNCH:

Well, Senator, with respect to your hypothetical, before I could provide a response, I would certainly want to understand not just the factual framework that you've outlined but the relevant laws governing the -- the situation as well as any prior state action, any actions that had been sanctioned, all the types of things that would go into rendering a legal opinion.

And certainly, as I'm sure you can appreciate, I'm a careful lawyer, and I would want to have all of that information before I could really give you a legal opinion as to your hypothetical situation.

LEE:

OK. I understand, and I respect the great care that you devote to answering questions.

And -- but I -- I would respectfully submit that at some point, there is a limit to what a chief executive can do, whether we're talking about a chief executive in the form of a governor at state level or whether we're talking about a chief executive who's the president of the United States.

At some point, I would hope you could agree with me that there are limits to what a chief executive can do.

At some point when saying, "I'm not going to enforce this law" -- let's suppose it's not a speed limit; let's say it's -- it's taxes, a future president of the United States, whether a Republican or Democrat says, "I don't think we ought to have any tax rate above on 25 percent," and at some point, that president can't get Congress to agree, so that president says, "I'm not going to enforce any tax rate above a 25-percent marginal rate."

We can think of lots of examples. At some point, there is a limit. And I'd just -- I -- I hope that you'll recognize that and hope that moving forward, should you be confirmed, that you be one who's willing to point out to the president of the United States that you do have a client. Your client is the United States of America.

The chief spokesperson for that client might be the president himself, but your client is the United States, and embodied within that are the constitutional restraints that -- that fall upon every officer who's sworn to uphold, protect and defend that constitution, including the president himself.

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I see that my time has expired, and I recognize Mr. Blumenthal.

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And as a careful lawyer, which I know you are, I want to try to perhaps set your mind a little bit at ease about a question that you were asked earlier. The question related to a statute that purportedly, according to the questioner, made the attorney general responsible for determining who can take deferred action.

One of my colleagues suggested that the president's executive order is illegal because it's being implemented by the Department of Homeland Security and not the attorney general, as the law he quoted seemed to suggest.

Just to clarify, the statute that was quoted to you actually was amended in 2002. It no longer assigns responsibility for immigration policy to the attorney general. The provision that he quoted and another provision which more directly authorizes what President Obama has done are to be implemented by the secretary of homeland security.

So, good news. The president has done nothing wrong. And you don't have to run home and look up the statute and get ready to implement a whole new area of law. You have enough to do, or will have enough to do already.

I want to personally say that I appreciate that my colleagues are not making immigration policy the kind of turning point for their decision. Or to put it a different way, they're not making this nomination a referendum on the merits of the president's immigration policy and decisions.

And I must say, I agree with the president's action and support him. And so do sheriffs and chiefs of police across the country. And I'm going to ask, if there's no objection, that letters that I have from towns as varied as Marshalltown, Iowa; Salt Lake City, Utah; South Bend, Indiana be made a part of the record, and also a letter from the National Task Force to End Sexual and Domestic Violence Against Women.

Both letters -- all these letters make the case that the president's executive action not only helps immigration officials target their scarce resources, but it also helps state and local law enforcement to secure cooperation with immigrant communities and identify potential criminals within their jurisdiction. So the beneficiaries of the president's policies are not just the immigrants, but also law enforcement officials and people who are better protected by virtue of the activities of those law enforcement officials.

If there's no objection, I ask that these materials be entered into the record.

CRUZ (?):
Without objection.

BLUMENTHAL:
Thank you.

I want to turn briefly to another area where you have some very profoundly valuable experience, in the wake of the events in Ferguson, Missouri and New York City of last year. Many of us on the committee and many around the country who have backgrounds in law enforcement are deeply concerned with making sure the public understands the vital role that our police and our law enforcers in general play, as well as proper training and discipline that should be provided to those police and law enforcers.

And I wonder if you could talk about your experience in addressing the concerns about law enforcement in the wake of the Abner Louima case where you had a professional involvement? And I think how you feel that experience and new policies at the Department of Justice might better help the Department of Justice and state and local police?

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I would mention that I led an effort to pass during the last session a statute relating to death in custody. It's the Death in Custody Reporting Act that requires local and state police to report deaths in custody, along with correction officials. It's actually a reauthorization of a law that expired in 2006, just a modest step toward gaining more facts. But I think there are obviously two sides to this kind of issue, and I would very much appreciate your perspective on it.

LYNCH:

Certainly. Thank you, Senator.

With respect to my work on the Louima case, I was certainly privileged to be a part of the trial team that handled that case. And I think what often is not commented on, and perhaps it is not even widely known, is how essential the support and contributions and the actual work of the NYPD was to both the investigation and the prosecution of that case.

Our investigative team was comprised of both FBI agents and New York City police officers who knew that unless we held each other accountable, that unless law enforcement acted to hold bad actors accountable, all of law enforcement would suffer. And certainly one of the most painful things to watch during that case was, as is often -- as is happening now, the understandable anger and tension over it, but the backlash against larger groups of police officers.

And that is in fact one of the dangers of not addressing police misconduct is that not only are the officers who work hard every day and -- and work to not only follow the rules, but to enhance the relationship between law enforcement and the community, those officers are not rewarded, but they often get painted with the same brush as officers who may cross the line. And that is one of the greatest harms that we see from these types of cases.

I've been privileged to work with dedicated police and agents my entire career. And I think that there are no greater teachers and no greater instructors for a young prosecutor than an experienced police officer.

One of the things that we found most useful after the Louima case was encouraging community policing, which the NYPD was doing on its own. And a number of officers did very, very well. I have seen situations where when I was handing out awards to officers and agents for working on a case in a mostly minority area -- cleaning out a housing project of a violent crack organization -- the residents asked if they could also come and hand out plaques to those same officers and agents. And they did so with plaques that said basically, "thank you for giving us back our safety, our security, and our houses."

Because there was a collaboration there. There was a recognition that this is a joint effort. This is a shared project that we all have between law enforcement and all the communities that we serve to keep all of us safe.

We also have to work more, and certainly if confirmed as attorney general one of my priorities will be to ensure that our police officers have the tools that they need to do their jobs and to do them safely.

Senator, I spent several weekends this past month attending the funerals of Detectives Ramos and Liu in New York City. And to use the word "heartwrenching" is frankly an understatement. The sense of loss and grief with this crime that has really touched the heart of New York City was palpable on every street corner. We cannot allow our law enforcement officers to be targets like this. We must provide them the protections they need to do their jobs as well.

So certainly, it is a priority of mine. I look forward to working with you to address the legislation that you describe as well. Because the more we can get adequate information about these deaths in custody, the more we can put effective regulations and rules and training in place to prevent them.

BLUMENTHAL:

Thank you. Thank you for that excellent answer. And I can tell you that the grief over the loss -- the assassination of those two brave and dedicated police officers was shared in Connecticut. As a former United States attorney as well as state

attorney general, my own experience has been that some of the strongest condemnation of improper conduct or impropriety on the part of police officers comes from the police and other law enforcement themselves. And they have the toughest job -- one of the toughest jobs, in my view, that exists in public service.

And I hope that the public appreciates it, and that as attorney general, you will work with Congress to try to educate and make the public aware about the tremendous challenges they face day in and day out, and the courage and strength that they demonstrate.

So I thank you for that answer, and thank you again for being here today.

Thank you, Mr. Chairman -- whoever the chairman is.

(LAUGHTER)

CRUZ:
It's a flexible answer.

BLUMENTHAL:
Well, I know that the chairman is the senator from Texas.

(LAUGHTER)

CRUZ:
That's a nice answer to that question.

Ms. Lynch, thank you for your endurance in what has been a long, extended hearing. I would ask in this round of questions if you could try to keep your answers brief, because we've got to return to votes on the floor.

In the prior round, you and I had a conversation about the OLC opinion and the president's executive amnesty. And you stated your agreement with the legal reasoning in that OLC opinion. And I would like to explore the limits of that reasoning.

As you know, any legal theory that is being put forth to justify government power naturally raises the question: What are the limits of that power? And one of my greatest concerns about the Holder Justice Department is at every turn when asked what are the limits on government power, the answer has been there are none, there are none, there are none.

So let's talk about the limits of the prosecutorial discretion power. The LLC memorandum justifies the executive amnesty, in part, based on prosecutorial discretion. And initially, that was limited to some 800,000 people in the original DACA. Then in the subsequent amnesty, that expanded to 4 million or 5 million people.

CRUZ:
My first question to you is -- is, in your understanding of prosecutorial discretion, is there anything to prevent that from being expanded from 4 million or 5 million people to all 11 million or 12 million people who are currently here illegally?

LYNCH:
Well, Senator, as I read the legal opinion, it was focusing on how the Department of Homeland Security could best execute its executive discretion in prioritizing removals of the most dangerous of the undocumented immigrants among us. Then with respect to those who would be a low priority, it focused on the legal framework for setting up a deferral program. And as I also read the opinion, it went through a legal analysis that indicated that part of the request did not have the requisite legal framework, and should not be implemented. And my understanding is that that particular part of the request was not implemented.

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So, I think that with respect to any action, certainly, should I become confirmed as attorney general, I would undertake a

very careful legal analysis based on all of the facts presented to me by whether the White House or whatever agency raises the issue, we would look at all of the precedent, congressional action, the relevant statutes, and carefully explore whether or not the requested action did have a legal framework. If there was, in fact, a reasonable basis for it, as was outlined in the opinion that I read, that information would be provided. But, as also was outlined in the opinion that I read, where the legal framework did not exist to support the request for the proposed action, that would have to be told to the requesting department.

CRUZ:

Ms. Lynch, let me try again. Because you described the memorandum. But I asked a pretty straightforward question. Would prosecutorial discretion allow the president to decline to enforce immigration laws against all 11 million to 12 million people here illegally?

LYNCH:

Senator, prosecutorial discretion, as a tool, certainly as I have used it as a career prosecutor and U.S. attorney, would focus on which cases to prosecute and which types of charges to bring. It would not apply to the situation that you have outlined. So, I'm sorry if I'm not able to answer your hypothetical in the way in which you are requesting.

As I have utilized prosecutorial discretion throughout my career, it has been with the presentation of cases before me, and determining the best way to focus limited resources.

CRUZ:

Well, and, of course, this is not simply prosecutorial discretion. Because in addition to stating that federal immigration law would not be enforced with respect to somewhere between 4 million and 5 million people, the president also announced that the administration would be printing work authorizations in direct contravention of federal law.

Now, are you familiar in your practices as U.S. attorney, when you have declined -- when you have used prosecutorial discretion to prioritize prosecuting one crime versus another, have you ever engaged in printing up authorizations for one set of individuals to violate the law -- to affirmatively violate the law, which is what these work authorizations consist of?

LYNCH:

Senator, in my practice as a career prosecutor and U.S. attorney, I have focused on bringing the strongest, most effective cases based on the facts and the law against -- that have been presented to me. Also, when referring those cases to other law enforcement agencies, should my venue not be the most appropriate one there.

CRUZ:

Ms. Lynch, I'm sorry...

LYNCH:

With respect to...

CRUZ:

... I'm sorry to interrupt, but we are on limited time. And what I asked is, if in your practice, you ever issued authorizations to violate the law. And that -- I'm certain the answer is no. And if -- but am I correct in that?

LYNCH:

Certainly, Senator, in my practice, I focus on the -- building the most strongest and most effective cases against the perpetrators who come before me, and referring them to other jurisdictions if I'm not the appropriate venue.

CRUZ:

OK, Ms. Lynch, you're...

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LYNCH:

It would not be part of my responsibility...

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LYNCH:
... to make a determination...

CRUZ:
... Ms. Lynch, you are...

LYNCH:
... in the matter you're referring to.

CRUZ:
... you are a very experienced prosecutor. You have asked questions and had witnesses decline to answer. This is -- this is a simple question. Has your office issued authorizations for individuals to violate federal law?

LYNCH:
Senator, as -- as the U.S. attorney, our office is not involved in issuing authorizations for anyone to work or not work, or to engage in various activities. We're not a licensing authority.

So I'm just not able, unfortunately, to answer the question as put to me.

CRUZ:
So your office has not -- are you aware of a precedent for the federal government doing what the administration is doing right now, which it's hired over a thousand people, it is printing millions of authorizations for individuals to violate federal law? That is a remarkable step, and it is a step that goes much further than simply prosecutorial discretion.

Are you aware of any precedent for hiring over a thousand people to issue authorizations for individuals to violate federal law?

LYNCH:
Senator, I'm not aware of the practices that you are referring to now, nor am I aware of how the particular remaining portions of the executive action are being implemented, so I'm simply not able to comment on the hypothetical as presented to me or the particulars that you've given to me.

So I'm sorry I don't have the information to answer your question.

CRUZ:
Well, then let me understand the limits of the (inaudible) theory you're putting forth, because, in -- in prior questioning, embraced the prosecutorial discretion argument.

And so Senator Lee asked you a minute ago. Let's take the hypothetical Senator Lee asked you about.

If a subsequent president -- let's say President Cornyn is sworn in in January of 2017. And if President Cornyn decided that he was going to instruct the secretary of treasury not to collect any taxes in excess of 25 percent, to exercise prosecutorial discretion and not collect the taxes, in your legal opinion, would that be consistent with the Constitution?

LYNCH:
Senator, before I could render a legal opinion on the hypothetical as presented to me, I would want to know the entire scope of the action but also have the time to -- to gather all of the legal precedent, the cases, congressional actions, any other similar or dissimilar actions where that particular type of action might've been considered.

So I would certainly want to have all of that before I provided a legal opinion in -- in terms of the hypothetical that you've presented to me.

So -- so you're unable to give any legal judgment to this committee today on whether a subsequent president could decline to enforce the tax laws as they're written?

LYNCH:

I think with respect to current or subsequent presidential action, there would have to be, as in every case, a thorough review of the relevant law, the precedent, congressional precedent, the statutes in issue in conjunction with whatever action was being proposed to see if there was, in fact, a legal basis or whether there was not a legal basis for the action being proposed.

CRUZ:

And let me ask -- and this'll be my final question -- your understanding of prosecutorial discretion. Would it allow a subsequent president, President Cornyn, to state that there're other laws that the administration will not enforce -- labor laws, environmental laws. Would it allow a President Cornyn to say, "Every existing federal labor law shall heretofore not apply to the State of Texas, because I'm using my prosecutorial discretion to refuse to enforce those laws."

In -- in your judgment, would that be constitutional?

LYNCH:

Well, I certainly can't imagine President Cornyn taking that step.

But with respect to the hypothetical that you present, again, Senator, I would have to know what legal basis was being proposed for that, and certainly, I would review that law, and if I were the person providing advice to future President Cornyn, advise him as to whether or not there was a legal framework for it or whether there was not a legal framework for it.

If there was not, that would be the advice that I would provide to him.

CRUZ:

I must say, I find it remarkable that you're unable to answer that question. I can answer it straightforward.

It would patently unconstitutional for any subsequent president to refuse to enforce the tax laws or the labor laws and the immigration laws for the very same reason that President Obama's actions refusing to force immigration laws are unconstitutional.

And it is discouraging that -- that a nominee who hopes to serve as attorney general either will not -- will not give a straightforward answer to that question.

My time at this point is expired, so I recognize Senator Franken.

FRANKEN:

Thank you, Senator -- Mr. Chairman.

I'm sorry. I'm just a little shook up about this President Cornyn thing.

(LAUGHTER)

GRASSLEY:

Your worst nightmare.

(LAUGHTER)

FRANKEN:

OK. I just -- I got here, and -- and suddenly, Cornyn was president.

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FRANKEN:

My world had changed.

I'd like to ask you, Ms. Lynch, about something that's been a focus of mine since I first got to the Senate -- and you may -- I got there a little early. I got -- it took me a while to get seated -- and it's about the -- the financial meltdown and how it happened and how it caused the Great Recession. And it's about the credit rating agencies and their business model.

And basically, what happened in the leadup to the -- the meltdown was that banks would put out financial -- structured financial products -- subprime mortgage-backed securities, say -- and then they would pay -- I'm sorry -- yes, they would -- they would choose a rating agency, like Standard & Poors or Moody's or Fitch, to rate it, give them a rating, and they would pay them.

But they would choose them, and it -- it turned out that a lot of junk got AAA ratings. And this is all kinds of -- not just subprime mortgage-backed securities but then bets on those, derivatives, and then bets on the bets and then bets on the bets on the bets.

So when you -- the reason you had a house of cards collapse is because you had all these bets based on the original piece of junk, and there was an incentive, a total conflict of interest, which is the -- the credit rating agencies knew that if they gave a AAA rating, they'd get the next gig. So that's what they did.

And then Chairman Levin of the Permanent Subcommittee on Investigations got -- subpoenaed some emails from within S&P, and they basically were emailing each other, "We've got to give these better -- we got to give these things that aren't good, these financial products, better ratings so we can keep our share of the business.

And I've been fighting to get the -- I had actually a bipartisan piece in -- in the Senate side of -- of -- of what's now called Dodd- Frank, the Wall Street reform bill, to fix this. It hasn't totally fixed, and I'm on the SUC to do it.

But -- this is what I'm getting to -- Department of Justice is -- has a big lawsuit against S&P, and I think it's for about \$5 billion, \$6 billion, and my understanding is it may be being settled.

But I just don't want it to stop with -- with S&P, with the one agency. So what I'm -- I'm -- I'm concerned that -- and actually, SEC just did a settlement also with S&P on the same practice that still exists.

So what I want to know is, will you take an aggressive approach to holding these rating agencies, including but not limited to S&P, accountable for their role in the financial crisis from before and as -- and their current role in what they're doing?

LYNCH:

Senator, certainly, with respect to the financial institutions, including the rating agencies, if I'm fortunate enough to be confirmed as attorney general, I do look forward taking a very aggressive stance in reviewing their conduct, as you indicated, not just past conduct but current and prospective so that we can prevent these types of harms from occurring again.

FRANKEN:

Because Minnesotans lost their homes, they lost their savings, they lost their jobs, and millions of Americans did this because of these guys. And I don't think they've learned their lesson, and I don't think they've been incentivized to learn their lesson.

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OK. I'm told I have to leave in two minutes, so I just want to talk a little bit about transparency in NSA.

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Have one minute. That's what took a minute, what I did.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

(LAUGHTER)

Well, I want to encourage us to work together if you're -- should be attorney general on transparency in government surveillance, because I -- I think Americans that have the right to know, to the extent that it's not harmful, obviously, what the -- what the -- what surveillance is like, for example, how many Americans' data was captured, say, in the metadata, but how much was actually accessed.

And I think that that -- had we done that -- and I had voted against these two programs, 715 and 702, originally because they didn't have enough transparency, and I think it is absolutely essential that Americans know, to the greatest degree possible, without jeopardizing our safety, what is going on.

So, just your commitment to work together on that.

LYNCH:
Absolutely, Senator.

FRANKEN:
OK. Thank you, Ms. Lynch.

LYNCH:
Thank you, sir.

FRANKEN:
Mr. President.

(LAUGHTER)

CORNYN:
How are you holding up?

LYNCH:
I'm fine, sir.

CORNYN:
Hanging in there? Good.

Forgive me for jumping around a little bit. But there are a number -- I know there have been a lot of different areas that you have taken questions on. And I just want to fill in some of the gaps.

First of all, do you recognize the Second Amendment right to keep and bear arms as an individual right?

LYNCH:
Yes, Senator. And I believe that has also been decided by the Supreme Court as well.

CORNYN:
The current attorney general and Department of Justice have been involved in a program known as Operation Chokepoint that you are probably familiar with to some extent.

But this is a collaboration by the Department of Justice and the Federal Deposit Insurance Corporation who have partnered to discourage banks and other financial institutions from doing business with certain types of businesses, including lawful firearms dealers.

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Documents from Operation Chokepoint obtained by the House Oversight Committee showed that the DOJ and FDIC used... intimidation tactics and categorized licensed and law-abiding gun dealers as having been engaged in "high-risk activity," similar to financial scams, prostitution services, pornography, racist materials, gambling, and drug paraphernalia.

I would just like to ask you, do you agree that it was inappropriate for the Department of Justice and the FDIC to associate licensed and law-abiding businesses with these types of other obviously illicit activities?

LYNCH:

Senator, I appreciate your concern over any department initiative. My familiarity with the Chokepoint initiative is based upon my understanding that it focuses on payment processing companies that are involved in defrauding consumers.

And I'm not aware enough of the underlying types of businesses that the consumers themselves may have been patronizing to know about the facts that you raise.

Certainly with respect to any initiative that the Department of Justice engages in, should I be confirmed as attorney general, there is no room for improper bias or even personal views. We must look -- we must follow the law where it leads us.

And I certainly hope that should you have concerns about this program or any other, that you would feel free to share them with me, and that I would look forward to working to provide you with as much information as we could about them.

CORNYN:

I appreciate that. I have heard from constituents back home in Texas from financial institutions that they have been unable to continue longstanding banking relationships with their own lenders because of some of these tactics.

And I will take you up on your offer to visit with you more about those -- the specifics of those cases as well as the topic I mentioned earlier at a later date. I appreciate that.

Senator Leahy, who just has arrived, and I have joined in an unlikely partnership on freedom of information areas. He and I both agree that it is absolutely critical to the functioning of our democratic form of government that the people have access to as much information as they can possibly get so they can make their consent to the laws that are passed by Congress, informed consent.

And so I want to ask you, in the Department of Justice's evaluation of the Eastern District of New York under your management, compliance with the Freedom of Information Act was one of the few areas to receive criticism.

In fairness to you, it is one of the few areas in which there have been critical comments. But do you believe that the government should operate under a presumption of -- that information should be open to the public unless otherwise precluded by law?

LYNCH:

Senator, I share your concern and your view that the Freedom of Information Act is an important tool for the American people to know about the functioning of all of government agencies, including the Department of Justice.

With respect to my tenure as U.S. attorney, during the evaluation system, which I found very, very helpful, I specifically asked the evaluators to look at our management systems and our support staff systems to make sure that we were in compliance and to bring any issues to our attention.

And they raised this issue, which was a great concern to me. We immediately took steps to rectify the issues that we found within our own office functioning. We have added increased personnel to handle Freedom of Information Act requests.

We work closely with the Department of Justice to ensure that they are handled as expeditiously as possible. And so I

actually find it a very helpful evaluation process. And I find that I have learned the most when someone has pointed out to me an area in which I might improve as opposed to...

CORNYN:

And you took corrective action?

LYNCH:

Absolutely. Immediately.

CORNYN:

President Obama, in 2009, mandated that government agencies -- executive branch agencies should operate under this presumption that information should be open unless otherwise prevented by some rule or some other law.

The current Department of Justice has taken the position that -- that information should be withheld if release of the information will cause foreseeable harm. In other words, they articulated a different standard than the president himself called for in 2009, which is this presumption of openness, absent some legal prohibition against disclosure.

Senator Leahy and I have been working on some legislation which would actually codify the president's mandate, the presumption of openness.

Is that a standard that you could support and would you work with us in your administration, if confirmed, to make sure that this presumption of openness applies across government agencies, and that information would only be withheld from the public if some law or other rule or regulation precluded it?

LYNCH:

Senator, I share your view in the importance of the Freedom of Information Act, and in transparency. And certainly I look forward to working with both you and Senator Leahy to review that type of legislation.

And I hope that in the full and fair exchange that I believe we will have, as we have had over the past few weeks, we can discuss ways in which to make as much information available possible while protecting vital interests.

I certainly feel that with respect to the Department of Justice, should I be confirmed as attorney general, one of the areas that we always have to be concerned about are ongoing investigations and witness safety and security.

But I feel that through discussing these issues, it is something that we can work together on.

CORNYN:

And, finally, I know the chairman alluded to the gun- walking program known as Fast and Furious, which was the subject of a lot of oversight efforts by this committee and others in the House.

And then to our surprise, the attorney general, Attorney General Holder claimed executive privilege as to certain communications and documents, even though the documents in question did not involve the president or his staff. And the president himself confirmed that claim of executive privilege.

As you may know, that claim is currently in litigation. And I would ask your commitment to take a look at that with a fresh set of eyes to see whether you believe that the department's defense and continued refusal to deny Congress access to these documents is justified under a claim of executive privilege.

Would you pledge to take a fresh look at that and render your own independent judgment about that?

LYNCH:

Well, certainly, Senator, with respect to that matter, it is the subject of ongoing litigation. And I really do not know when it is

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likely to be resolved. So I don't know what status -- at what stage it will be in should be so fortunate as to be confirmed...

Certainly, however, I look forward to learning more about it once I'm able to, again, should I be confirmed, and reviewing that as well as any other matters.

CORNYN:

But just so we understand each other, and this will be my last question, if you are the next attorney general, you can decide to settle that case, if you decide that the claim of executive privilege was not well taken.

In other words, if you -- if there's no legal impediment based on a claim of executive privilege to disclosing those documents, you, as the next attorney general, could resolve that, couldn't you?

LYNCH:

Certainly I believe that the ability to resolve any number of cases would rest within me, should I be confirmed as the next attorney general.

CORNYN:

Thank you.

LYNCH:

Thank you, Senator.

GRASSLEY:

I hope that when we're done here that you don't get this attitude that the way this chaotic place is run...

(LAUGHTER)

... why should you be working with the Congress of the United States. It doesn't always work this way. So I'm -- a little -- little tongue in cheek, but...

(UNKNOWN)

It doesn't always work this way?

LYNCH:

Well, Senator, it's been a privilege to watch the peaceful transfer of power going on this afternoon.

(LAUGHTER)

GRASSLEY:

Yeah.

(UNKNOWN)

-- I -- I didn't (inaudible).

(LAUGHTER)

GRASSLEY:

Not so peaceful.

OK. Here we go.

Before I read my question, I want to kind of tell you, my view is that there's very legitimate reason for -- between a counsel that's -- that's advising the president, for that to have a very tight counsel- client relationship.

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Then we get into Fast and Furious and then 64,000 pages that I'll go into some detail here that I want you to comment on,

So let me go to where you maybe had not a direct role, but you were chaired -- you chaired the attorney general's advisory committee, so you had a chance to watch your predecessor closely in the job that you're now seeking, and I assume that you learned lessons from that experience.

What's the biggest mistake that Attorney General Holder made in the handling of the Fast and Furious controversy, which involved this privileged information that we're talking about, and what would you have done differently?

LYNCH:

With respect to the privileged litigation, which is ongoing, while -- as -- as the chair of the attorney general's advisory committee and a member before that, I was given information about the nature of the investigation itself and the problems that -- that lay therein.

Simply put, Senator, the focus in terms of providing information to the U.S. attorney community was more on the problems with the actual underlying firearms investigation, and so I was not privy and have not been privy to any of the decisions or discussion or rationale behind the litigation over documents or privilege. That is something that has not been shared with the U.S. attorney.

So I'm not able to really categorically answer one way or the other as to how that's been managed.

I certainly think that the attorney general himself has said that he's made mistakes in general, and he's -- he's been very open and frank about that.

With respect to that litigation, I simply don't have information about that.

You are correct. I did receive general information about the underlying case, because it did represent an investigation that certainly the review -- the inspector general's report indicated was not handled in the best way and was not the way in which those of us in the U.S. attorney community would've wanted to see that case operate at all.

GRASSLEY:

OK. Well, the you have probably answered half -- half of that in this sense. Would have you done anything differently?

LYNCH:

With respect to the firearms investigation?

GRASSLEY:

No, the way that the attorney general handled it?

LYNCH:

Well, with respect -- certainly, I think that having the inspector general review the firearms investigation itself and come up with the issues that occurred within the office and the handling of the case was something that I think will be useful to the Department of Justice as it seeks to prevent similar mistakes being made and improve training and the like.

With respect to the litigation over the documents, again, I simply have not been involved in those decisions, and so I'm not able to say what the options were that the attorney general had that I would've chosen in a different manner.

So I'm sorry for not being able to provide you with a direct response to that question.

GRASSLEY:

Well, let me go back to the privilege -- and you may have answered this, but I want to read my question anyway.

On my opinion, one of the attorney general's biggest mistakes was not following through on the president's promise to be the most transparent administration in history. Instead, he was the first attorney general in the history to be held in contempt of Congress with a bipartisan vote that included 17 Democrats.

Attorney General Holder plainly (ph) delivered 64,000 pages of documents to the House three years after the House subpoenaed, two years after the contempt vote and only after the House went to court. So when push came to shove, he didn't even try to argue to the judge that those 64,000 pages were privileged.

Now, do you think it's appropriate to withhold so many documents for so long, especially even if the Justice Department admits that there was no valid privileged claim, and if so, why? And if not, please explain why you would do it differently.

LYNCH:

With respect to any issue where this body seeks information from the Department of Justice, certainly in documentary form, should I be confirmed as attorney general, I would carefully review the request and work to provide as much information as -- as -- as could be provided consistent with our law enforcement and investigative responsibilities.

That would be my pledge to you going forward, Senator, with respect to every issue of oversight that you would bring to my attention, and I certainly hope that you would bring those issues to my attention.

GRASSLEY:

Can I -- can I ask the same question in my own way, in the sense of the way it might be talked about it at a town meeting?

So people are mad about, you know, a lot of things the president might do that you call executive edicts or in this case, withholding information. In this case, the attorney general decided to withhold it.

OK. If somebody asked me about Fast and Furious at a town meeting, then I get into the fact that as far as I know, the president knew nothing about it and that this is between me and the attorney -- the attorney general and the Congress, I should say. I only say me, because I started this investigation before the House took it over.

Then -- then when they withhold 64,000 pages, as opposed to a few pages, where maybe the president really knows something about something that you can legitimately withhold it, then I say to my town meeting, you know, when 64,000 pages are supposedly privileged, then I wonder. What does a president know about it if they can be protected that way?

Well, now, the attorney general didn't argue that they were privileged. They were just given up.

So you see the problem it causes for me? And how far does executive privilege go? And it surely doesn't go to 64,000 pages, or if it does, can't you assume that the president knew a lot about Fast and Furious when he says he didn't know anything about it?

Do you see the problem that I have?

LYNCH:

I certainly can -- can understand the frustration when any party is seeking discovery or seeking information and another party's not able to provide it based upon the claim of privilege or whatever that claim may be, particularly a body that has oversight responsibility over the Department of Justice and is seeking to fulfill that obligation and that mandate.

Certainly, with respect to the volume of documents, not knowing the documents, I'm not able to comment on how appropriate or not that would be. And certainly fortunately, it was not civil litigation when it might've been a larger number of documents, as my experience as a young attorney.

GRASSLEY:

But I hope you at least understand why it's frustrating to me, the way this whole thing was handled. AAAAAAAEvOz0svSi0uzs...

Let me move on. As Senator Graham mentioned, in 2006, you cosigned a Supreme Court brief on partial-birth abortion. I believe you told him your primary concern was the impact that the law would have on law enforcement more broadly if upheld.

That brief argued the federal Partial Abortion Ban Act was unconstitutional and that partial-birth abortion, quote, "procedures are sometimes the best means to preserve a woman's health," end of quote.

The Supreme Court, along with a majority of Americans, disagreed with any position taken in opposition of that legislation, I assume as well as your position. The Supreme Court held there is, quote, "uncertainty in" -- parentheses -- "in the medical community over whether the barred procedure's ever necessary to preserve a woman's health."

Just one question: Judging by your question here, it doesn't look like you've added your name to a lot of Supreme Court briefs. Of all the cases that you could've become personally involved in, why did you pick this particular case? Was that the only case that raised the concerns you mentioned to Senator Graham?

And I'd like to get this on record, because I assume you read the brief. Otherwise you wouldn't have signed it. Would that be right?

LYNCH:

Yes, Senator. That would be correct.

GRASSLEY:

OK. So then can you -- can say why did you pick this particular case if -- if you haven't done it very often, and was this the only case that raised concerns that you mentioned to Senator Graham?

LYNCH:

Thank you, Senator.

With respect to the amicus brief, I joined a group of former Department of Justice personnel, former United States attorneys as well as former assistant attorneys general, and our focus was on our concern that the way in which the law would be implemented might put prosecutors at variance with doctors and their medical treatment and might raise an issue that prosecutorial discretion had been constrained in some way by the political debate.

We were not focused on the actual issue involving the procedure itself. In fact, it was our concern that as lawyers, we did not have medical information or the medical capability to evaluate that procedure and could be dealing with a situation where a doctor may say something different from what the law might require us to do.

And that was the concern that was being raised in that brief.

GRASSLEY:

OK.

LYNCH:

The Supreme Court did resolve the issue on the part of the statute itself, and certainly that is the law of the land now.

GRASSLEY:

OK.

Senator Leahy.

LEAHY:

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GRASSLEY:

And for your -- since -- for both your benefit and for the nominee's benefit, I have been told that I have two additional members that want to come over to ask a second round.

LEAHY:

They're going to come today?

GRASSLEY:

They're going to come just as soon -- yes, I'm going to make sure they come today. Just as soon as the vote's over, I've been told.

And we'll -- you and I will have to go vote, too.

LEAHY:

Yeah, OK. Why don't we just recess, we'll go vote, and then we'll come back.

GRASSLEY:

OK. We'll recess. Thank you for being patient.

(RECESS)

(UNKNOWN)

(inaudible)

CRUZ:

In the exchange we just had earlier this afternoon, you detailed a very broad understanding of the president's potential authority and that, try as I might, I could not find a hypothetical that you consider to be beyond the power of the president.

I'd like to ask you now a question that I've asked Attorney General Holder and that he repeatedly declined to answer, and it's in a different context. It concerns the civil liberties and privacy rights of Americans and drone policy.

And my question to you is in your legal judgment, is it constitutional for the federal government to utilize a drone strike against an American citizen on U.S. soil if that individual does not pose an imminent threat?

LYNCH:

Well Senator -- Senator, certainly, I'm not aware of legal authority that would -- that would authorize that, nor am I aware of a policy seeking authorization to do that.

If you could share more information with me?

CRUZ:

My question is about the constitutional limits on the federal government's power. Attorney General Holder repeatedly declined to answer the question about whether it is constitutional for a drone to use lethal force against an American citizen on U.S. soil if that individual doesn't pose imminent threat.

Now let me be clear, I think the answer to this is very easy. My question to you is is it constitutional for the federal government to do so?

LYNCH:

Well Senator, I think with respect to the use of lethal force by any means, one would always want to look at the law enforcement issues involved there.

And certainly, if you could provide more context there, I could place it in the view in the scope of either a case or issues that I might have familiarity with.

CRUZ:

Ms. Lynch, it is in the nature of a hypothetical, but you are certainly aware that the federal government is currently using drone strikes overseas.

The federal government also maintains drone surveillance domestically here at home. The Senate had an -- an extended debate on the limits of federal government authority with respect to the privacy and civil rights of American citizens, and I'm asking you, in your view, does the Constitution give any protection to American citizens?

Is -- does the Constitution allow the federal government to do what it has done overseas, utilize lethal force from a drone? Could it do so against an American citizen here at home if that individual did not pose an imminent threat?

LYNCH:

Senator, with respect to the use of -- again, as I said before, with -- of lethal force by any means, be it drone or someone on the street, the -- the use of lethal force is generally regulated by either police guidance or by the nature of the interaction. Based on what you were describing to me, I don't see interaction between the American citizen that you are referring to and anyone to generate the type of lethal force that you are referring to.

CRUZ:

I'm disappointed that like Attorney General Holder, you are declining to give a simple, straight-forward answer, an in fact what I think is the obvious answer of no, the federal government cannot use lethal force from a drone to kill an American citizen on American soil if that individual doesn't pose an imminent threat.

I don't view that as a difficult legal question. And indeed, it demonstrates what I think has been the consistent failing of this administration's approach to constitutional law, is that it always, always, always opts in favor of government power.

Let me ask you a different question. This administration's Department of Justice went before the United States Supreme Court and argued that law enforcement could place a GPS on any American citizen's automobile with no probable cause and no articulable suspicion. In your legal judgment, is placing the GPS on the automobile of the men and women gathered here, with no probable cause or articulable suspicion, is that consistent with the Fourth Amendment's protections of American citizens?

LYNCH:

I believe the Supreme Court has resolved that issue, Senator, and I believe that the -- that law enforcement agencies seeking to use that type of technique would need to obtain a warrant.

CRUZ:

You are correct, the Supreme Court resolved that issue. It resolved it unanimously, 9-0. It rejected the Holder Justice Department's position. My question is, if you were attorney general at the time, would you have agreed with that argument that law enforcement can place GPSes on any American citizen's car?

LYNCH:

Well certainly, Senator, I wasn't involved in a legal analysis or discussion then. Based upon the practice prior to the Supreme Court argument and the fact that law enforcement had used various techniques, this was a new technique that was being evaluated and had been used in a variety of ways.

So, my understanding was that after a careful consideration of precedent and practice, the department made a strong argument, the Supreme Court has reasoned and has ruled that a warrant is required.

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And certainly, that is the law of the land. Should I be confirmed as attorney general, that is certainly the practice that I would follow.

CRUZ:

The Obama Justice Department, 22 times, has gone before the Supreme Court arguing for broader government authority. And 22 times, it has been unanimously rejected. 9-0, the court has rejected those claims.

Another case was a case called Hosanna-Tabor, where the Obama Justice Department argued before the Supreme Court that the First Amendment has no relevance, says nothing about whether a church may select its own ministers or pastors. Do you agree with that position that was put forth by this Justice Department?

LYNCH:

Well Senator, I have not read the briefs on that, so certainly I'm not aware of the full articulation of that position, but I believe the Supreme Court has spoken and has resolved that issue.

Certainly, should I be confirmed as attorney general, I would follow that precedent.

CRUZ:

You are correct again. The Supreme Court resolved that 9- 0, rejecting the opinion. And I would note, Justice Elena Kagan, an appointee of this president, said from the bench in that argument to the Department of Justice's lawyer, "I find your position amazing that the Justice Department would argue the First Amendment does nothing, says nothing, about a church's ability to appoint its own ministers and pastors."

Let me ask you, if you are confirmed as attorney general, will you commit to this committee to provide greater scrutiny to the positions the Justice Department takes before the Supreme Court, and in particular, to stop the practice over and over again of advocating for broad government power, which has resulted in 22 times the Supreme Court unanimously rejecting that -- that argument?

LYNCH:

Senator, should I be so fortunate so as to be confirmed as attorney general, I will take every case that comes before the Department of Justice seriously. I will consult with the career prosecutors there, also within the solicitor general's office on the facts of the case, the relevant law, and in conjunction with them, give -- provide my best judgment as to the approach to take.

CRUZ:

Is it your understanding of the role of the attorney general that the Department of Justice should always advocate greater government power?

LYNCH:

Senator, my view is that the Department of Justice advocates to defend statutes as passed by Congress and that its greatest function is to represent the American people.

With respect to specific cases, again, I will always do as I have done throughout my career as a lawyer. I will carefully examine the facts of the case, the relevant law, precedent, and make the best- reasoned argument that there is to support the position that's being advocated.

CRUZ:

Well, let's shift to another area where this Department of Justice has not been, in my view, faithfully enforcing the law. In May of 2013 the inspector general of the Treasury Department concluded that the IRS had wrongfully targeted citizen groups for their political views.

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When that news broke, President Obama publicly said he was outraged. He said he was angry and he said the American

Ms. Lynch, do you agree with what President Obama said then, that the American people have a right to be angry at the IRS targeting citizens for their political views?

LYNCH:

Senator, my view is that political views or bias have no place in the way in which not only the Department of Justice, but all agencies carry out their duties. And certainly when people hear of something that raises that issue, I can understand their concerns.

CRUZ:

In the nearly two years that have transpired, the individual who led the IRS office in question, Ms. Lois Lerner, has testified twice before Congress and has pleaded the Fifth, which, as you are well aware, means she raised her hand and said, if I answer your questions, it means I may incriminate myself in criminal conduct.

In the nearly two years since that time has transpired, not a single person has been indicted. In the nearly two years since that time has transpired, many of the victims of the illegal targeting have yet to be interviewed by the FBI or the Department of Justice.

And in the nearly two years that have transpired, we've discovered that the Department of Justice appointed to lead the investigation a partisan Democrat who has been a major donor to President Obama and the Democratic Party.

Indeed, she has given over \$6,000 to President Obama and the Democratic Party. In your view, is it consistent with fairly and impartially enforcing the law to have an investigation into the abuse of power by the IRS headed by a major Democratic donor?

LYNCH:

Senator, my understanding of that investigation is really from public records. I'm not familiar with the specifics of it. I can certainly tell you that complex investigations often do take several months if not a year or more to resolve.

And I don't know the status of the witness interviews at this point, so I'm not able to provide you information on that point that you raised.

With respect to how an investigation is staffed, again, I believe that while I'm not familiar with the details of this, certainly my view is that the department has career prosecutors who are devoted to the Constitution and to the fair and effective exercise of their judgment, and that the department has made the decision as to how to best staff the case and manage the case.

I'm just not able to comment on the length or other issues that you raise. Certainly should I be confirmed, I look forward to learning more about the matter. And as I've said before, Senator, I appreciate your raising concerns with me and I hope that you will continue to do so should I have the opportunity to work with you in the future.

CRUZ:

You know, one of the terrific things about the Department of Justice is that it has a long and bipartisan tradition of remaining above the fray from partisan politics, of demonstrating a fidelity to law, so that when serious accusations of abuse of power, and in fact of abusing the IRS, were raised against Richard Nixon, his attorney general, Elliot Richardson, a Republican, appointed an independent counsel to investigate those allegations free of any tainted propriety or partisan bias.

Likewise, when serious allegations of wrongdoing against William Clinton were raised, his attorney general, Janet Reno, a Democrat, made the same determination to appoint an independent counsel, Robert Fisk, to investigate the matter free of
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partisan bias or taint.

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The question I would ask you, if you are confirmed as attorney general, would you commit to this committee to appoint a special prosecutor to investigate the IRS abuse of power who, at a very minimum, is not a major Obama donor and who can be counted on to actually investigate the facts and follow them wherever they may lead?

LYNCH:

Senator, again, I'm not familiar with the investigation in great detail at this point. My understanding is that that matter has been considered and that the matter has been resolved to continue with the investigation as currently set forth.

Should I be confirmed as attorney general, I can commit to you that I will take seriously every allegation of abuse of power brought to my attention. And in conjunction with career prosecutors and this body where appropriate, make the best decision about how to handle that investigation.

CRUZ:

Ms. Lynch, you're correct, the matter has been considered. Indeed, I sent a letter to Attorney General Holder laying out the facts and asking him to follow the bipartisan tradition of his predecessors and uphold the rule of law.

And he responded in writing that he was declining to appoint a special prosecutor. And the basis of his declining to do so was the "discretion of the attorney general." So despite the internal DoJ rules that require recusal if there's even an appearance of bias, the attorney general refused to appoint a special prosecutor.

You've stated you're not familiar with this investigation. I think that's unfortunate because when you and I visited over a month ago in my office, we talked about this investigation.

I told you it was a very serious concern of mine and I asked before your hearing if you would take the time to familiarize yourself with what had occurred.

And yet your answer today is that you're not aware of what's happening. Let me ask a more general question. Would you trust John Mitchell to investigate Richard Nixon?

LYNCH:

You're referring to former Attorney General Mitchell?

CRUZ:

Yes.

LYNCH:

Again, Senator, again, based on that hypothetical, I'd have to know what the issue was and what you were requesting him to do.

CRUZ:

Would you trust John Mitchell to investigate the allegations of wrongdoing in the break-in at Watergate against Richard Nixon? Would you trust John Mitchell, who had run Richard Nixon's campaign, to investigate the allegations that ultimately led to Richard Nixon resigning the presidency?

LYNCH:

Well, I think that matter has been resolved.

CRUZ:

Indeed.

(LAUGHTER)

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LYNCH:

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But certainly with respect to how that matter should have been handled and Attorney General Mitchell's involvement, I... believe his role in it has been resolved as well.

So, I'm sorry, I just not able -- I don't think I'm understanding the basis of your question, sir.

CRUZ:

Ms. Lynch, there are many of us who are alumni of the Department of Justice, who have most respected the department when it demonstrated independence from the president, when the department was willing to stand up to the president, when the attorney general behaved not as if he or she were the personal lawyer for the president who appointed them, but rather when the attorneys general in both parties have behaved as independent, impartial law enforcement officers who owe a fidelity to the Constitution and the laws.

Prior to becoming attorney general, Eric Holder had a reputation as a U.S. attorney of upholding the law. And I was hopeful when he was appointed that he would carry that reputation forward as attorney general.

It has saddened me greatly that he has not done so. And I will say it is disappointing in this hearing that, try as I might, there has been nothing I have been able to ask you that has yielded any answer suggesting any limitations whatsoever on the authority of the president.

That does not augur well for this committee's assessment of your willingness to stand up to the president when the Constitution and the laws so require. Do you agree with that characterization?

LYNCH:

Senator, as I've indicated before, I believe that the role of the attorney general is to provide their most objective, well-researched, independent legal advice to the president or any agency who may come before them with a request for an opinion.

And where there is a legal basis for the request being made, to indicate so. But where there is not, to also tell the president or any other executive agency that what they are asking for is not within the framework of the law.

I believe that that's the role of the attorney general. I believe the attorney general must represent the people of the United States. And should I be so fortunate as to be confirmed, they will be my client and they will be my first thought.

CRUZ:

The "they" that you refer to as your client, I just -- for clarification, to whom did the "they" refer? I'm sorry.

LYNCH:

They refer to the American people.

CRUZ:

And yet, and I'll ask again, can you articulate any limitations on the author of the president that as attorney general you would be prepared to stand up and tell the president, no, there is some modicum of power you do not have?

LYNCH:

Senator, I believe that the role of the attorney general does encompass the role of advising the president of when actions do not have the appropriate legal framework and when they may not be undertaken.

That is something that I believe is an important part of the functions of the attorney general. And certainly should I be so fortunate as to be confirmed, it is something that I would not hesitate to do.

It is part of the function of the attorney general, even of a cabinet member, to be independent of the president, and to provide their best independent legal judgment on any issue presented to them.

Well, I hope that you will very much carry through on that. It is discouraging that in the course of this hearing you have been unwilling to say that the president lacks the authority to refuse to enforce tax laws, labor laws, environmental laws, immigration laws.

That you have declined to say that the president cannot order a drone strike on an American citizen on U.S. soil. And that you have refused to commit to a fair and impartial investigation of the IRS abuse of power by a special prosecutor.

I hope if you are confirmed that your conduct in office differs from the answers you have given at this hearing.

My time has now expired. I see Senator Leahy is here. So I recognize Senator Leahy.

LEAHY:

I see Senator Tillis is here too. I'll withhold my time that I have.

TILLIS:

Thank you, Senator.

Ms. Lynch, I wanted to go back to -- and I do apologize for all this cycling, if you saw the activity over in the Senate Chamber, you know why we're going through it, certainly not for a lack of interest in this important topic.

But I want to go back to the idea of the limited resources within the DoJ and some matters that I'd like to get some sense that, if you should be confirmed, that you would take a look at it and potentially reconsider some of the priorities of the current attorney general.

And I'll give you one example. In North Carolina we did change the election law, early voting. We went from 17 days to 10 days. In that law, though, we made it by law you could never offer fewer hours of early voting than the highest number that you'd ever offered in that particular county.

And what that had the effect of in this last election cycle is historic turnout, even among minorities. And so I've got a -- we've got a lawsuit filed by this Department of Justice where I'm named in it questioning that.

But then we have 12 states that have no early voting whatsoever. And I'm wondering why -- it seems to be inconsistent, when have one state that's preserving the most that it has ever had before, other states that have never offered it, that we would -- in a time of limited prosecutorial resources, that we would actually allocate that way, given all that has been said today about the limits of resources and the need to allocate them to their best and highest use.

Can you give me some sense of your thinking on that?

LYNCH:

Well, Senator, with respect to the current litigation that has been filed, I haven't been involved in it to date. I do know that it is proceeding through the courts and I believe there will be further action this summer. There may be a trial, I'm not sure.

And so I think we will have to wait and see the judicial determination on the impact of the changes in the North Carolina state law.

As I indicated earlier, states obviously have a grave interest and a great interest in both preserving the right to vote and protecting the integrity of the vote. And many of them do so in ways that are effective throughout several states.

The Department of Justice will always have a concern if the matter is raised as to whether or not there is a negative impact, that is to say a foreclosing of their right to vote.

And certainly people can differ on the impact that will be had. And that will always be the issue in a case to be brought along those lines. And certainly nothing -- I don't believe anything would have been personally aimed at you, sir.

TILLIS:
Oh, no.

LYNCH:
But so with respect to that, when the issue is whether or not a change in statutes somehow infringes upon this, our most important right, it is something that the Department of Justice will always review.

But certainly, sir, I look forward to having discussions with you about the nature of, not this case, because it's under litigation, but other matters in which the department is taking an interest and getting views of you and others on this committee on them.

TILLIS:
I think it's very important because should you be confirmed, I think -- again I think we will always be in this state of not enough resources for all the things that we want to do.

And it just seems to me that this may be one example where if you look objectively at the Supreme Court case, states that are doing everything that they can to respect and promote a citizen's right to vote, that to spend our additional time and resources re-prosecuting laws doesn't seem to be the best use of resources in the context of the limited resources that we've discussed and several members on this panel have discussed today.

And I would look forward to -- should you be confirmed, to having a discussion with you about how we can be sure that we are putting it to the best purposes, for the good of the American people that you're trying to serve or that will you try to serve.

LYNCH:
Thank you, sir.

TILLIS:
Thank you.

GRASSLEY:
Senator Sessions.

SESSIONS:
Thank you, Mr. Chairman. I'm honored to serve with you and also to have served with our former chairman. And I appreciate the opportunity today.

I just want to pursue, to me, some legal rights here. It seems to me that if there are two people applying for a job as a truck driver, one of them is a lawful immigrant or a citizen, and another is not, under the president's order, the person unlawfully here magically at this moment becomes eligible to compete against an unemployed American truck driver.

And I think that's bizarre. And the idea that there are rights that might attach to someone here unlawfully, they take jobs from Americans under difficult working conditions, as we are today, is antithetical to common sense.

So I think that we -- somebody needs to be asking themselves, who is protecting the American worker, the people who are paying the salaries of you, the president, and all of us?

And as a matter of law, the people who elect us are the people we are most directly accountable for, and that's the citizens of the United States. So I'm worried about that.

What kind of lawsuit, or what kind of claim, have you thought about this, that might somebody who loses out to a person who claims that they're legal to work now, because of the president's order, and they didn't become a truck driver, and the person that was recently legalized did get the job?

LYNCH:

Well, Senator, at the outset I do want to state that it's my understanding that, and there is no right to work for an undocumented immigrant in the country, so they would not have the right to work, for those people who...

SESSIONS:

Well, they would under the president's order, would they not?

LYNCH:

For those people who can obtain documentation, be it a green card or a visa or other cards, they would have the ability to apply for positions. With respect to...

SESSIONS:

Well, could I ask you about that? The president is going to give work permits to 5 million. They would be, under his theory, entitled to work. He would have created 5 million persons to compete against 5 million Americans for a limited number of jobs, right?

LYNCH:

Senator, I believe that if the process were to be implemented as what I reviewed, there would be criteria set up for people to apply for work permits. They would apply. There would have to be a decision as to whether or not they would receive them. And then I do not know what level of employment they would be able to apply for, but assume that they could apply for positions.

SESSIONS:

Well, the estimates are, I think, from the White House, it would be as many as -- a total of 5 million. And they would be given work authorization, photo IDs, Social Security numbers, and the ability to participate in Social Security and Medicare.

Are you aware -- and to me I find no lawful basis for this. And as the attorney general and the person who supervises the Office of Legal Counsel, whose opinion you have basically affirmed here today, then you become in a sense the point person for this effort.

And some have suggested, well, it's Homeland Security. But Homeland Security asked your department, Attorney General Holder's department, the Office of Legal Counsel, for an opinion that would allow them to do so, so in effect had the Department of Justice said no, that this is not appropriate and cannot be justified, Homeland Security would've been bound by that rejection, would it not?

LYNCH:

Homeland Security would've been bound by that opinion, as I believe they were with respect to the portion of their proposal to which the Office of Legal Counsel did say no, there was not a legal basis for another portion that they sought to implement. And I believe they did not implement that.

With respect to the...

SESSIONS:

I'm only talking about what they did agree to, that apparently with the -- create this new number of workers. Well, are there plans to -- what if there's somebody not in the 5 million is arrested for speeding next week? Would they be deported?

LYNCH:

Well Senator, I don't know how the Department of Homeland Security would manage the removal. Certainly a criminal

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record, if there would be an arrest and a conviction would place someone at jeopardy of losing their federal status if that's what they initially had.

SESSIONS:

Well, the point is that you're not going to deport any of the 7 million either. That's the policy that's become clear in the last few years, and so the administration I would suggest, quite plainly, is nullifying American immigration law to a degree that's breathtaking in effect.

For example, you're saying that we -- not only will we not find the resources, ask for the resources, nobody's asked for more resources to enforce the law if they need them.

The president isn't asking for it because he has no intention, if it were given to him, to use that money for that effect. So that's the problem we've got. That's why the American people are wondering who's going to defend them? Who is going to defend their children who are out trying to find a job? African Americans who have the highest unemployment rate among young people? The data is clear.

This large flow of immigration at this time of low employment is hurting the poor the most. So, I would say to you that I'm not raising this just to make an argument about what kind of immigration policy we need.

I'm raising this as a constitutional and legal question of incredible importance. As I read to you, professors have said this is perhaps the greatest presidential overreach in history. The Congress refused to pass what the president wanted to do.

And I'm not saying that you made that decision. You didn't. But your department gave the legal opinion that justified it, after he, 28 times, said he didn't have authority to do it. Really an amazing event.

So Mr. Chairman, I respect the nominee. She's got a good family, I know she was raised right. And I appreciate that. Maybe you're just in a difficult position that's not necessarily your fault, but I am not satisfied that we at this point in history can just slide by and let this go.

I think we need to confront this issue as a Congress and it needs to use the powers that it has to defend its legitimate rights under the Constitution and that's why I have difficulties with your nomination. I respect you and appreciate your appearance today and your willingness to answer questions.

Thank you.

GRASSLEY:

Before I go back to Senator Tillis for three or four minutes, call on Senator (inaudible)

But let me assure everybody that Senator Tillis, Senator Leahy, I've got a couple requests of you, and then I think we're done.

LEAHY:

Thank you, and another roll call vote has started. And I'll be leaving soon. I am sorry there's been so many questions that really have nothing to do with your qualifications. You were shown a book and told this is terrible what's happening, the implication being that it's something this administration did, the prosecution of Ted Stevens, of course, was the last administration that did that. This administration exonerated him.

Be that as it may, we talk about immigration. We've had millions of people here that every administration known, you can't just remove 10, 12 million people. That's what President Reagan said, both President Bushes said. I've been here since President Ford. They've all taken that same position. As far as jobs are concerned, Chamber of Commerce strongly

Supported the immigration bill that this committee passed two years ago, and the Senate passed by a bipartisan majority...

Grover Norquist, a very conservative economist, said it would add billions of dollars, billions of dollars, hundreds of billions of dollars to our economy, and it would increase jobs, not decrease them, but increase jobs. I wish the speaker of the House had allowed it to come to a vote over in the other body. It would've passed.

But that's not an issue for you. That's an issue: are you qualified to be attorney general? I have -- I have seen a lot of attorneys general in the 40, now going into my 41st year. Some were very good, in both parties. I think of Ed Levi for example, in Gerry Ford's administration. Others, I remember one that I think all my Republican colleagues voted for. When he was here before this committee and asked questions, when you get to 50 or 60 (ph) of the questions in advance, and he answered it 75 times, I don't know the answer, or I'm not sure, I can't answer that, even though it had the questions weeks in advance, they voted for him.

I must say, that I cannot think of anybody in all these years I've been here who has struck me so much as being qualified to be attorney general as yourself. I said earlier, you're a prosecutor's prosecutor. I think of the attorney general as the attorney general of the United States, there for all of us. I just referred to my days as a young law student, being recruited by an Attorney General Robert Kennedy, but I was just too homesick for Vermont, so didn't say.

I am not going to ask further questions because I am satisfied with what you've said so far. You will have my vote. You have my strong support. And I hope in the remaining part of this administration, you will be there to enforce the laws of the United States.

Thank you Mr. Chairman. I have nothing further to say. I'll put the rest of my statement in the record.

LYNCH:

Thank you, Senator.

GRASSLEY:

Senator Tillis.

TILLIS:

Thank you Senator.

And I apologize, I should've taken care of this question. My final question, Ms. Lynch, is really around the philosophy that you may bring to the Department of Justice.

In December of 2014, the Government Accountability Office issued a report that was titled "the Department of Justice could strengthen procedures for disciplining its attorneys." There were a couple of examples going back to even I think the handling of New Orleans police officers related to the Katrina, Hurricane Katrina, where either misconduct or they had perjured themselves.

Would you agree with me that the Department of Justice employees who would engage in this sort of activity, either through prosecutorial misconduct or through perjuring themselves in court, are they the kind of personnel that you would allow to continue to be employed in the DOJ.

LYNCH:

Certainly Senator, with respect to personnel issues, I take very seriously the integrity of every member of my staff. And if confirmed as attorney general, would also take very seriously the professionalism of the members of all the staff of the Department of Justice, all of whom I have found to have been a privilege and a pleasure to work with, and to be dedicated career professionals, and dedicated to not just improving their skills, but the highest standards of professional conduct.

When they cross a line, they are dealt with, and that will continue to happen should he be confirmed as attorney general. 10uzs...

But I will say that with respect to the staff and the attorneys at the Department of Justice, they are some of the most effective and professional individuals that I've had the pleasure to be affiliated with.

TILLIS:
Well, should you be confirmed, since this report was just dated last month, I hope that it's something that you would take into account as you go into the organization and look at the resources that you've inherited responsibility for.

Thank you very much and thanks to the family in particular. This, I know it's a long day, and those seats aren't that comfortable. So thank you all, and again, congratulations on the honor that -- that you have from the president's nomination. Thank you very much.

LYNCH:
Thank you, Senator.

GRASSLEY:
I've changed my mind. I'm not going to ask you two questions. I'm going to submit them for -- along with some other questions for you to answer in writing.

I thank you very much for being patient today. It has been a long day and I suspect some members of the committee were more impressed with your answers than others.

We're going to recess for the day and have our second panel tomorrow. I think you should -- I hope you'll count yourself lucky, let's say, compared to Judge Mukasey. When he testified he was forced to come back for a second day of questions.

Finally, I'd like to note that after tomorrow's panel I'm going to give everyone one week to submit questions for the record. That's standard practice on this committee. And once again thank you for being so patient and putting up with the chaos that I formerly referred to.

Thank you and we are recessed now. Thank you.

LYNCH:
Thank you, Senator.

CQ Transcriptions, Jan. 28, 2015

List of Panel Members and Witnesses

PANEL MEMBERS:

SEN. CHARLES E. GRASSLEY, R-IOWA CHAIRMAN

SEN. JEFF SESSIONS, R-ALA.

SEN. ORRIN G. HATCH, R-UTAH

SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. MIKE LEE, R-UTAH

SEN. TED CRUZ, R-TEXAS

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SEN. DAVID VITTER, R-LA.

SEN. DAVID PERDUE, R-GA.

SEN. THOM TILLIS, R-N.C.

SEN. PATRICK J. LEAHY, D-VT. RANKING MEMBER

SEN. DIANNE FEINSTEIN, D-CALIF.

SEN. CHARLES E. SCHUMER, D-N.Y.

SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. AMY KLOBUCHAR, D-MINN.

SEN. AL FRANKEN, D-MINN.

SEN. CHRIS COONS, D-DEL.

SEN. RICHARD BLUMENTHAL, D-CONN.

WITNESSES:

LORETTA E. LYNCH, U.S. ATTORNEY, EASTERN DISTRICT OF NEW YORK, NOMINATED TO BE U.S. ATTORNEY GENERAL

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CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Jan. 29, 2015 - Final

Senate Judiciary Committee Holds Confirmation Hearing on Nomination of Loretta Lynch for U.S. Attorney General, Day 2

LIST OF PANEL MEMBERS AND WITNESSES

GRASSLEY:

For the members who are present, except for the ones that are here already, it'll be on seniority. And then other people that come in, you'll be called on according to how our respective staff keep track of you in the order of your appearance.

GRASSLEY:

Before Chairman Leahy and I give our opening statements, I'd like to go over some things I said yesterday.

First of all, we welcome everybody back to the second day of hearing on Ms. Lynch's nomination to be attorney general.

As I said yesterday -- and everybody abided by this, and I want to thank everybody that was here yesterday for their courtesy -- I want everyone to be able to watch the hearing without obstruction, and if people stand up and block the view of those behind them or speak out of turn, it's not fair or considerable to the others.

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So officers would remove those individuals, and that's what I want to thank you for because we didn't have any of those incidents yesterday.

Before we begin the opening statements, take care of a couple housekeeping items and explain the process.

First of all, I want to thank everyone for their patience yesterday. Looks like we're going to have more floor votes today, so again, I'm asking for your flexibility.

After opening statements, the plan is to start the first round of questions then recess so members can vote.

We would then return after the first series of stack votes -- and I'm assuming that's going to be around 12:45, but you folks that are answering questions for us, you can't necessarily count on that -- but then we would keep going through the -- there's four votes this afternoon. We'll -- we won't adjourn at that particular time; we'll do like we did yesterday. We will take time to -- or take turns going and voting.

Senator Leahy, then, and I will now give our opening statements, then we'll return -- turn to our witnesses for their opening statements.

Following their statements, we'll begin with the first round of questions, in which each senator will have 10 minutes after the first round, then we'll go to eight minutes of questions.

And so then I will give my opening statement.

Obviously, welcome, everybody, audience as well as witnesses, to our second day of hearings on Ms. Lynch's nomination to be attorney general.

Yesterday, we heard from the nominee. I thought she was very engaging, very competent. There's no question about her competence from what she's done as far as her legal background and her work as U.S. attorney.

We appreciated her willingness to stay here through it all so we could done with her in one day and everybody that wanted to ask questions verbally could do it. Of course, there's going to be a lot of questions in writing for her to answer in time. She's clearly a skilled and competent lawyer. We asked questions yesterday.

But I have to say, at least from my standpoint -- I'm not speaking for any other member -- it seemed like indirect answers. So I suspect that those will be followed up with questions for the record.

Today, we will hear this second panel in front of us right now. Many of these will speak to, many ways -- in many ways, the Department of Justice under its current leadership has failed to fulfill some of the most basic aspects of its mission.

The question for me and a lot of members on this side is whether Ms. Lynch is committed leading the Department of Justice in a new direction. There's obviously people here that are going to speak about the direction the department in a different way, and we'll listen courteously to that as well.

We'll hear from Sharyl Attkisson as one example of a person who was an investigative journalist, who's been bullied, threatened and literally blocked from entering the Department of Justice because she had the guts to report on issues like Fast and Furious and Benghazi. That's one example of something we'd like to have a new attorney general fix.

We'll also hear from Catherine Engelbrecht, who was targeted by the IRS simply because she's a conservative who's had the courage to stand up in the defense of freedom and the Constitution. The department has paid lip service to this investigation that is supposedly leading. So I would like to know how Ms. Lynch will take seriously the targeting of fellow

GRASSLEY:

Then we have Sheriff David Cooke (sic), Milwaukee, who will testify about how thousands of local law enforcement officers across this country feel as though their current leadership doesn't fully appreciate the work that law enforcement does every day.

So, that's important to see how Ms. Lynch might do to mend the broken relationships.

And then we'll hear from Professors Turley and Rosenkranz, who will address how the Department of Justice under Eric Holder has rubber-stamped the president's lawless actions from the unlawful recess appointments and the unlawful executive action, specifically on immigration.

So, those people will bring up points that we have made not quite as directly as they have or personally as they have in hopes that Ms. Lynch will restore the Office of Legal Counsel to the impartial role it used to play as a check on president's authority.

So I look forward to the hearing today.

And, now, it's Senator Leahy's turn to give his opening statement.

LEAHY:

Well, thank you, Mr. Chairman.

This is the second day of the committee's consideration of Loretta Lynch to serve as our nation's attorney general. We had a long day yesterday here.

We're going -- today we'll hear testimony from outside witnesses about Ms. Lynch. I'd especially be interested in testimony from those who actually know her.

Yesterday, we heard directly from her over nearly eight hours of testimony. She testified about the values and independence she'd bring to the Office of the Attorney General. She testified how she would make its priorities national security and public safety, but still preserve the values that we Americans, I hope all of us, hold dear.

I was encouraged when Republican senators on the committee agreed with me that the key question for voting for a nominee to be attorney general is independence. Some of us remember a past attorney general who told us, well, he's a member of the president's staff. And we all had to remind him, no, he's not. He's not like the secretary of justice. He's the attorney general of the United States and is supposed to be independent.

Responding to questions on issue after issue, it is clear that Ms. Lynch is an independent lawyer, a strong character with balanced demeanor and obvious abilities.

I also want to take a moment to thank Chairman Grassley for his handling of yesterday's hearing. It was no easy feat, especially when you had 18 votes, I believe it was, yesterday afternoon, and kept it going. He made sure that every senator who had a question on his side of the aisle, they were given the time to ask the question and be heard. And I commend him for that. I appreciate the tone of this hearing.

GRASSLEY:

LEAHY:

And today, I was not surprised, the fairness. We've been friends for decades, and I know you well.

We're gonna hear from law enforcement officials who actually worked with Ms. Lynch. These are the people who have the best knowledge of her. They strongly support her nomination. Their presence today will speak to the support Ms. Lynch has among both Republicans and Democrats, similar to the letter that one of the finest FBI directors we've ever had has submitted on her behalf, Louis Freeh.

Now, Barack Obama is not the nominee. That may come as a surprise to some who heard some of the questions. Eric Holder is not the nominee.

Loretta Lynch, the daughter of Lorine and the Reverend Lorenzo Lynch, a U.S. attorney twice unanimously confirmed by the United States Senate, one who has been applauded for her law enforcement work, that's who is being called upon to consider.

And I'm confident after hearing her testimony before the committee, and after reviewing her record, no one in good faith could question her integrity or her ability.

She said yesterday she looks forward to working with Congress to confront the many issues facing Americans today. And she's met with over 50 senators in both parties.

So I hope we can come together in the Senate, support this historic confirmation, for an outstanding public servant and to move quickly doing it.

Thank you.

GRASSLEY:

Can I ask you, there's no reason to make these people stand for an oath, is there? Can't they do it sitting down?

LEAHY:

Sure.

GRASSLEY:

Or do they have to stand?

OK. I'd like to...

LEAHY:

(inaudible)

GRASSLEY:

Well, I want to know what's legal.

LEAHY:

(inaudible)

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Do you affirm that the testimony -- would you raise your hand, please. Do you affirm that the testimony you're about to give before the committee will be the whole truth -- no. OK, let me start over again, please.

Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you.

Now, I'm going to introduce everybody at the table all at once instead of separately when one person gets done speaking. So be patient with me.

Sharyl Attkisson is an investigative journalist and author. For over 20 years she worked for CBS News, winning multiple Emmy awards for her investigative journalism pieces, including her reporting on the 2012 Benghazi report and Fast and Furious.

Next, we have David Barlow, we know well. Mr. Barlow served as U.S. attorney for the District of Utah, 2011-2014. Prior to his tenure as U.S. attorney, Mr. Barlow served on this committee as Senator Leahy's chief counsel. He's now a partner of Sidley Austin, Washington, D.C.

Next is Reverend Newsome. Reverend Clarence Newsome is president of the National Underground Railroad Freedom Center in Cincinnati, Ohio.

Next is Janice Fedarcyk. Ms. Fedarcyk served as assistant director in charge of FBI's New York Division, 2010-2012. Ms. Fedarcyk currently runs a Fedarcyk Consulting, Washington, D.C. I know I pronounced it wrong.

Next we have Stephen Legomsky, a professor. He is at John S. Lehman University Professor at Washington University School of Law.

Next, we have Jonathan Turley. He is J.B. and Maurice C. Shapiro professor of public interest law, George Washington University Law School.

David Clarke, sheriff, Milwaukee County -- Milwaukee County and has served for over 36 years as a law enforcement professional.

Next, Nicholas Rosenkranz is a professor of constitutional law and federal jurisdiction, Georgetown University Law Center, and a senior fellow at the Cato Institute.

Finally, we have Catherine Engelbrecht. Ms. Engelbrecht is the founder and chairwoman of True the Vote, an election integrity organization, the founder of King Street Patriots, a citizen-led liberty group, and the co-owner of Engelbrecht Manufacturing, a small business she owns with her husband in her home state of Texas.

Now we will start with Ms. Attkisson.

ATTKISSON:
Thank you.

If I didn't, maybe I should say I think you've all been informed, but we'd like to have five minutes. AAAAAAAAAAAEvOz0svSi0uzs...

ATTKISSON:
Yes.

GRASSLEY:
OK. Go ahead.

ATTKISSON:
I've been a reporter for 30 years at CBS News.

(UNKNOWN)
(OFF-MIKE)

ATTKISSON:
Yes, sir. Get a little closer.

Can you hear me now?

I've been a reporter for 30 years at CBS News, PBS, CNN and in local news. My producers and I have probed countless political, corporate, charitable, financial stories, ranging from Iraq contract waste and fraud under Bush to green energy waste under Obama to consumer stories relating to the drug industry.

Some of these reports have been recognized for excellence in journalism, most recently investigative Emmy nominations and awards for reporting on TARP, Benghazi, green energy spending, Fast and Furious, and a group of stories including an undercover investigation into Republican fund-raising.

The job of getting at the truth has never been more difficult. Facets of federal government have isolated themselves from the public they serve. They covet and withhold public information that we as citizens own. They bully and threaten access of journalists who do their jobs, news organizations that publish stories they don't like and whistle blowers who dare to tell the truth.

When I reported on factual contradictions in the administration's accounts regarding Fast and Furious, pushback included a frenzied campaign, with White House officials trying to chill the reporting by calling and e-mailing my superiors and colleagues, using surrogate bloggers to advance false claims. One White House official got so mad he angrily cussed me out.

ATTKISSON:
The Justice Department used its authority over building security to handpick reporters allowed to attend the Fast and Furious briefing, refusing to clear me into the public Justice Department building.

Advocates had to file a lawsuit to obtain public information about Fast and Furious improperly withheld under executive privilege. Documents recently released show e-mails in which taxpayer-paid White House and Justice Department press officials complained that I was out of control and vowed to call my bosses to stop my reporting.

Let me emphasize my reporting that was factually indisputable. Government officials weren't angry because I was doing my job poorly; they were panicked because I was doing my job well.

Many journalists have provided their own accounts. The White House made good on its threat to punish C-SPAN after C-SPAN dared to defy a White House demand to delay airing a potentially embarrassing interview with the president.

50 news organizations, including CBS and the Washington Post, wrote the White House objecting to unprecedented restrictions on the press that raised constitutional concerns.

A New York times photographer likened the White House practices in some cases to the Soviet news agency, TASS.

Former Washington Post executive editor Len Downie called the Obama war on leaks "by far the most aggressive he's seen since Nixon."

David Sanger of the New York Times called this "the most closed, control-freak administration" he's ever covered.

New York Times public editor Margaret Sullivan said, "It's the administration of unprecedented secrecy and unprecedented attacks on a free press."

Months before we knew that the Justice Department had secretly seized AP phone records and surveiled Fox News' James Rosen, before director of national intelligence -- Director James Clapper incorrectly testified under oath that Americans weren't subject to mass data collection, I was tipped off that the government was likely secretly monitoring me due to my reporting.

Three forensic exams concerned the intrusive, long-term remote surveillance. That included keystroke monitoring, password capture, use of Skype to listen to audio and exfiltrate files, and more.

Getting to the bottom of it hasn't been easy. It's unclear what, if anything, the FBI has done to investigate.

The Justice Department has refused to answer simple, direct written congressional questions about its knowledge of the case. It has stonewalled my Freedom of Information request, first saying it had no responsive documents then admitting to 2,500 of them but never providing any of them.

In 2013, Reporters Without Borders downgraded America's standing in the global free press rankings, rating the Obama administration as worse than Bush's.

It matters not that when caught, the government promises to dial back or that James Rosen gets an apology; the message has already been received. If you cross this administration with perfectly accurate reporting they don't like, you will be attacked and punished. You and your sources may be subjected to the kind of surveillance devised for enemies of the state.

For much of history, the United States has held itself out as a model of freedom, democracy and open, accountable government. Freedoms of expression and association are, of course, protected by the Constitution.

Today, those freedoms are under assault due to government policies of secrecy, leak prevention and officials' contact with the media, combined with large-scale surveillance programs.

The nominee, if confirmed, should chart a new path and reject the damaging policies and practices that have been used by others in the past.

If we aren't grave enough to confront these concerns, it could do serious, long-term damage to a supposedly free press.

Thank you.

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GRASSLEY:

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If I'm accurate, Professor Rosenkrantz, you have recently had a back operation, and you need to stand. We would not object, so whatever you have to do.

Now Mr. Barlow.

LEAHY:

And I -- I would echo that, sitting here with two -- recovering from two fractured vertebrae. I know how important it is to be able to stand.

GRASSLEY:

Yeah. OK.

Mr. Barlow?

BARLOW:

Thank you, Chairman Grassley, Ranking Member Leahy, members of the Judiciary Committee.

It is my privilege to appear before you here today in support of the nomination of my former colleague, Loretta Lynch, to serve as attorney general of the United States.

I would be remiss if I did not first thank this committee for the strong support I received in 2011 when my own nomination to serve as United States attorney was before you. It was a tremendous honor to serve as U.S. attorney in the Department of Justice. I always will be grateful for the trust that you reposed in me when you supported my nomination.

And it's now my privilege to recommend Ms. Lynch to you. You already have heard and read much about her storied 30-year legal career. So instead of elaborating on her many credentials, I want to take just a few minutes to share a couple of personal observations about my former colleague.

I first met Loretta at a conference of United States attorneys several months after I was sworn in, and what I remember most vividly about her was the way she handled the portion of the program where U.S. attorneys were asking questions of the Executive Office of United States Attorneys.

Loretta moderated the session. Some of the discussion regarding budgets, resource allocation, hiring authority and other issues understandably became intense as my colleagues and I argued our various views and articulated the many needs that our districts had during lean budgetary times.

But Loretta was calm and unruffled. She asked hard questions, but she did so in an unflinching dignified and respectful way. Where strong feelings created the risk of bringing more heat than light to the conversation, Loretta brought only light. She was clearly tough but also fair and gracious.

Now, that impression of Loretta was confirmed and deepened as I served with her on the Attorney General's Advisory Committee, the AGAC. As you know, the AGAC is -- is a committee of roughly a dozen United States attorneys who serve as a voice of their colleagues to the Department of Justice and provide counsel to the department leadership on various management, policy and operational issues.

Loretta was the chair of the AGAC during the time that I served as a member of it.

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Now, I know that you already know that United States attorneys are not a timid group. All are accustomed to being in

charge, are used to express their view, and all are, at least in part, the products of very different backgrounds, experiences and places. If you put 12 or so United States attorneys together in a room, as the AGAC does, you will get a wide variety of ideas and perspectives, often very strongly held.

It takes someone very special to lead that kind of group. For the AGAC to work well, to work as it's intended, that someone needs to be smart, insightful, organized, articulate, inclusive and experienced.

Loretta was and is all those things and more. She was always well-prepared. She made sure that all points of view were fairly and fully considered. She listened far more than she talked.

She facilitated consensus wherever possible and made space for dissent when consensus could not be reached, and by her example and her conduct, she elevated the discourse and refined the exchange of ideas in our committee.

Through these experiences, my initial impressions of Loretta Lynch were fully confirmed. She's tough, fair, gracious, smart and independent.

In conclusion, during my time as United States attorney, I had the privilege of serving with a truly outstanding group of U.S. attorneys throughout the nation. I learned much from them. I was inspired by their service and their commitment.

But of all these dedicated and talented public servants, the honorable Loretta Lynch truly stood out. If confirmed by the Senate, I am sure she will make an excellent attorney general of the United States.

Thank you.

GRASSLEY:
(OFF-MIKE) Reverend Newsome.

NEWSOME:
Mr. Chairman and Mr. Ranking Member and members of the Judiciary Committee, it is my pleasure and honor to appear before you to support the nomination of Attorney Loretta Elizabeth Lynch for position of United States attorney general.

I have known Loretta virtually all of her life. Our family relationships cover a period of 40 or more years. Her family has been associated with several branches of my family by way of the Baptist church connection and the network of educators of the great State of North Carolina.

Her grandfather was a highly regarded and respected clergyman. The same can be said of her father and her brother, both of whom have been distinguished leaders at the state and the national level for some time.

For many years, her father was a key leader in the life of the General Baptist State Convention of North Carolina and the National Baptist Convention USA. Her brother continues in that tradition of leadership even now.

Her father and I have been ministerial colleagues -- we have been ministerial colleagues since the 1970s. It was my privilege to teach her brother during the years that I served on the Duke Divinity School faculty.

NEWSOME:
I have been able to maintain a warm personal association with her mother, an esteemed church leader and educator in her own right, for decades.

Through her father, brother and mother and mutual family friends, I have been able to stay abreast of Loretta's impressive

Loretta is the product of one of the most outstanding families in the state of North Carolina. To the -- to the degree that virtue counts in our society, I'm bold to say that she is the product of one of the most outstanding families in the United States of America.

The members of the Lynch family are known for their exemplary character, integrity, excellent achievement, civic-mindedness, commitment to the common good and deep and compelling sensitivity to the wellbeing of all people.

Over the years it has been my privilege to witness the development and emergence of the best of who we are as a nation in the person of Loretta. In the religious, educational and social circles in which our families have moved, she has had a reputation for being stellar in everything she has done.

As a teenager she drew the admiration of adults and more significantly her peers as well. She stood out among them without alienating herself from them. She stood out in many, many ways. She was as approachable then as she is now.

Even then she enjoyed a reputation for being levelheaded, balanced in her thinking and wise in her judgments. She evidenced a level of maturity that was out of the ordinary but only in those ways that garner the respect of young and old alike.

As a teenager, Loretta was the daughter every parent would love to have. Early in life the quality of her character was evident. And this is why the cities of Greensboro, where she was born, and Durham, where she graduated from high school with valedictory honors, claims her as a daughter who has made them proud.

All the more proud we North Carolinians will be if she is appointed the first U.S. attorney general in the state's history. As a student during her precollege years, she performed such a high level that it only seemed natural that she would attend and graduate from Harvard University and Harvard Law School. In fact, her career trajectory is consistent with the extraordinary intellectual ability and prowess, discipline, even courage she demonstrated during her youth.

Early on she dared to dream to become the best of the best and she has accomplished this in the field of law and jurisprudence. As her professional record shows, she has become the best of the best without qualification.

In the way that her career has taken shape, I can discern several attributes that are worth noting at a time such as this.

First of all, she is an informed, independent thinker who listens well and studies hard.

Second, she has the capacity to maintain the strength of her own convictions.

Third, she is morally grounded and principled -- highly principled.

Fourth, she acts decisively and judiciously.

And, fifth, she is a public servant of the highest order, the type that works well with others to bring about good results with positive outcomes.

Thank you very, very much.

GRASSLEY:
Ms. Federcyk.

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Chairman Grassley, Ranking Member Leahy and members of the committee, it's my pleasure to appear before you this morning to speak about my association with the attorney general nominee, Loretta Lynch. I wholeheartedly endorse her confirmation from the vantage point of someone who worked closely alongside Loretta in her role as the United States attorney of the Eastern District of New York during my two years as the assistant director in charge of the FBI's New York office.

I served in that capacity for two years, retiring in 2012 after 25 years of service in the FBI. As the assistant director in charge, I was responsible for the largest field office in the FBI. And inherent to that are the most complex and sensitive investigations in all of this nation's law enforcement.

New York was and will remain the target for the terrorism activities of individuals and groups that espouse their violent agenda. From World Trade Center One in 1993, to the terrorist attacks of 9/11 and beyond, we continue to see this terrorist agenda manifested against New York.

As a result, the FBI's resources and the considerable talents of the United States attorneys in both the Eastern and Southern Districts of New York are almost in a daily undertaking to protect this nation's security.

I think it's also important that the committee appreciate the magnitude of the criminal violations the New York office work. These violations range from the complicated and pervasive financial crimes, the insidious and debilitating effects of organized crime and public corruption and the violence associated with national gangs and other violent offenders.

Given this challenging environment, it was a necessity to establish a substantial and seamless partnership with Loretta and her office. Over the course of the next two years, we formed an effective partnership to address not only the national security in criminal threats, but also to engage in outreach and liaison to make a positive impact in the community.

The basis for my unquestioned support for Loretta's nomination is founded upon the numerous successes her office has achieved, the close professional and personal relationship that provided me extraordinary insight into Loretta both as a United States attorney and as a person.

I was privileged to observe her commitment to mission, her personal involvement in issues that invariably arose in our work as well as those within the broader law enforcement community. In supporting Loretta's nomination as the next attorney of the United States, I would like to comment on three areas that form the foundation of my recommendation: Sound judgment, legal acumen and independence.

In all of my interactions with Loretta, her approach to addressing and resolving issues invariably involved gathering information to understand the issue, obtaining input from affected stakeholders and making a decision based upon the facts and the law.

As you heard Ms. Lynch yesterday commit to a collaborative and deliberative approach, I can assure you, based on my experience, that she will follow through.

While not an attorney, I do recognize that Loretta was nominated and confirmed twice as a United States attorney in the Eastern District of New York, served on the Attorney General's Advisory Committee and was named as a chair of the committee in 2013 and her favorable reviews by the executive office for United States attorney which called her exceptionally well qualified.

Lastly, I have never known Loretta to make a decision based upon politics or outside influences. She consistently demonstrated fairness, respect for others and a deep sense of duty. Under her leadership, her office embraced those

As I previously stated, officers pursued a multiple national security and criminal investigations, including the arrest of approximately 138 Mafia figures that represented the largest single- day operation against the Mafia in history, but other notable accomplishments span the spectrum of the national priorities and are an example of her successes in the Eastern District, including international terrorism, public corruption, gang violations, violent offenders, et cetera.

Ms. Lynch's recognition that task force has brought the best of interagency investigative resources to bear on entrenched crime problems was integral to broader and deeper successes than would have been the case for any one agency or department to achieve alone.

These task forces included the nation's largest joint terrorism task force, the violent gang task forces, the Long Island gang task force, the health care task force and the financial fraud enforcement task force, to name just a few.

In closing, Abraham Lincoln said, "Character is like a tree and reputation like a shadow. The shadow is what we think of it. The tree is the real thing."

Ms. Lynch is the real thing. Thank you.

GRASSLEY:

Thank you very much.

Now Professor Legomsky.

LEGOMSKY:

Thank you, Mr. Chairman.

And honorable members of the committee, thank you for the privilege of testifying this morning. I'm here to focus on the concerns that some have expressed about the president's recent executive actions on immigration. I do sincerely appreciate that reasonable minds can and do differ about the policy decision as to precisely what the enforcement priorities ought to be. But I want to respectfully share my opinion that the president's actions are clearly within his legal authority.

That is not just my opinion; 135 immigration law professors and scholars signed a letter just this past November expressing that same view in strong terms. This is the mainstream view among those of us who have spent our careers teaching and researching immigration law.

The president has not just one but multiple sources of legal authority for these actions and I've submitted a detailed written statement that documents each of these. The written statement also identifies every legal objection I could think of that the president's critics have offered and it explains why, in my view, none of them can withstand scrutiny.

So with limited time I'll hit just a few key points and refer you please to the written statement for all the other points.

LEGOMSKY:

First, I think all now agree that, in a world of limited resources, prosecutorial discretion is unavoidable. You can't go after everyone, so you have to prioritize. In the case of immigration, Congress has made this explicit. It charged the secretary of homeland security with, and I quote, "establishing national immigration enforcement policies and priorities" -- "priorities." That alone would seem to suffice, but in addition, year after year, Congress knowingly gives the administration only a small amount of money to pursue less than 4 percent of the undocumented population. That to me is the clearest evidence possible that

In fact, Congress has specifically required DHS to prioritize three things -- national security, border security and the removal of criminal offenders. And those are exactly the three priorities that these recent executive action memos incorporated.

On top of all that, we have the 2012 Supreme Court decision in Arizona v. U.S. where the court struck down most of Arizona's immigration enforcement statute precisely because it would interfere with the federal government's immigration enforcement discretion, the court went on at some length to emphasize the breadth of.

Now, some critics claim that if the recent executive actions are legal, then that would mean there are no limits at all and therefore some future president could suspend enforcement of some other law.

But DACA and DAPA don't even approach the sort of hypothetical nonenforcement that that argument conjures up.

I think that if the president were to refuse to substantially spend the resources Congress has appropriated, then I believe we would have a serious legal issue. But that's not even close to the present reality, because even after DACA and DAPA are fully operational, the president still will have only enough resources to go after a small percentage.

And so, as long as he continues to use those enforcement resources that Congress has given him, it's hard for me to see how that could be called an abdication.

Now, for deferred action specifically, the program has been around for more than 50 years. Not only has Congress never acted to prohibit it or even restrict it, Congress has affirmatively recognized it, by name, in several provisions. The formal agency regulations also recognize it, by name. A long line of courts, including the Supreme Court, have recognized it, by name.

Not one of these legal authorities, not one, says or even intimates that it's legal if it's a small number of people, but otherwise not.

The same is true for work permits. The statute authorizes DHS to grant permission to work, and the regulations specifically make deferred action recipients eligible for them.

Now, some have said deferred action is OK on an individual basis, but not for a whole class. First of all, nothing in the law actually says that. And, in fact, almost every modern president has granted reprieves from removal and work permits to large, specifically defined classes of undocumented immigrants.

At any rate, the secretary's November memo is filled with clear, careful, repeated instructions to officers that even if the general criteria in the memo are all satisfied, they still have to make individualized, case-by-case, discretionary judgment.

And, in fact, the very form that USCIS officers are required to use when they deny deferred action, and they've denied it more than 32,000 times on the merits, contains a list of the reasons. And one of those specific reasons listed is discretion.

I think this is the way an agency should work. It articulates general criteria and then expects its officers to use some judgment in applying those criteria to individual cases.

Thank you very much for your time.

(UNKNOWN)
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(OFF-PIKE)

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Thank you, Chairman Grassley, Ranking Member Leahy, members of the Senate Judiciary Committee. I thank you for the honor of appearing before you at this historic moment, looking for the confirmation of the 83rd attorney general of the United States.

I want to begin by saying I have great respect for Ms. Lynch. As I've said before, her extraordinary career as a prosecutor pays great credit to her and to her nomination. Indeed, if confirmed, and I hope she is, I believe that she could be a truly great attorney general.

If great leaders are shaped at great moments in history, this could be such a moment for Loretta Lynch. The Justice Department is at the epicenter of a constitutional crisis, a crisis that consumed her predecessor and his department.

My focus, therefore, of my written testimony and my oral testimony today is less on Ms. Lynch than on the department she wishes to lead.

As my academic writings indicate, I have been concerned about the erosion of the lines of separation of powers for many years, and particularly the erosion of the legislative authority of this body and of the House of Representatives.

That concern has grown to alarm in the last few years under President Obama, someone that I voted for, someone with whom I happen to agree on many issues, including some of the issues involved in these controversies.

We are watching a fundamental change in our constitutional system. It's changing in the very way that the framers warned us to avoid. The Justice Department has played a central and troubling role in those changes.

In my view, Attorney General Holder has moved his department outside of the navigational beacons of the First and Second Articles of our Constitution. In that sense, Ms. Lynch could be inheriting a department that is floundering. The question is whether she can or will tap back to calmer constitutional waters.

As discussed in my written testimony, the framers focused on one defining single danger in our system, and that is the aggrandizement of power in any one branch or in anyone's hands. They sought to deny every branch the power to govern alone.

Our system requires consent and compromise. It goes without saying that when we are politically divided as a nation, as we are today, less things get done. But that division is no license to go it alone as the president has suggested.

You have only two choices in the Madisonian system. You can either seek to convince your adversaries or you can seek to replace them. You don't get to go it alone.

And there is nothing noble about circumventing the United States Congress, because it means you're circumventing the United States Constitution.

And any person who claims that they can get the job done alone is giving the very siren's call that the framers warned us against, and one that I hope this body resists.

In my testimony, I've laid out examples of how this change is occurring. I've divided it between obstruction of legislative authority and the usurpation of legislative authority. The obstruction of legislative authority includes the blocking of the contempt citation, the nondefense of federal statutes; usurpation includes many of the legislative changes that we will be talking about today and has been discussed by others.

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The American people in my view have been poorly served in recent years by the Justice Department. The balance that has been sought in recent years has been lost, precisely as the framers have feared -- the rise of a dominant executive within our system, a type of uber presidency.

It is certainly true that the framers expected much from us, but no more than they demanded from themselves. They expected this institution to fight jealously over its own authority. They gave you that authority not to protect your power, the separation of powers is designed to protect liberty from the concentration of power.

It doesn't matter what party we're from, and it doesn't matter if we agree with what the president has done. In my view, he has worthy ends, but he has chosen unworthy means under the Constitution. And the Justice Department has been a catalyst for that.

In exercising the power of confirmation, this body has an undeniable interest in confirming that a nominee will address these relational breaches, these unconstitutional actions.

I can only imagine the pride that Ms. Lynch's family will have when she raises her hand to take the oath of office. When that moment comes, however, there should be a clear understanding as to what she is swearing true faith and allegiance to as the 83rd attorney general of the United States of America.

The department that she leads should be the embodiment, not the enemy, of the separation of powers. It's a covenant of faith that we have with each other. And I sincerely hope that she regains that faith as she takes over, as she may, the Department of Justice.

CLARKE:

Good morning, Chairman Grassley and members of the Senate Judiciary Committee and Ranking Member Leahy.

I'm honored to address you this morning about a frequent news topic, American policing at the local level. These hearings are focusing on the confirmation of possibly the next attorney general of the United States, Ms. Loretta Lynch, and I wish her well.

I want to spend some time critiquing outgoing Attorney General Eric Holder's tenure at the United States Department of Justice and use it as the framework as a way forward.

CLARKE:

The mission statement of the USDOJ says "to enforce the law and defend the interests of the United States according to the law." Let me repeat that, "according to the law." "To ensure public safety against threats foreign and domestic, provide federal leadership in preventing and controlling crime, to seek just punishment for those guilty of unlawful behavior, and to ensure impartial administration of justice for all Americans."

In my 36 years in law enforcement, I view the United States Department of Justice as an ally in pursuit of justice. Local law enforcement has always been on the front lines in preventing and controlling crime and seeking just punishment for those guilty of unlawful behavior as the mission of the DOJ implies.

What I have witnessed from the Department of Justice under the leadership of Attorney General Eric Holder has been almost hostility toward local law enforcement. I've seen this in both public statements made about the profession and some of the policy decisions that treats police officers as adversaries instead of allies in the pursuit of justice.

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Partnering with local law enforcement agencies and ensuring the fair treatment of all Americans in the pursuit of justice are

What we all witnessed in Ferguson, Missouri back in August was a tragedy, an unfortunate incident for Officer Darren Wilson and citizen Mike Brown.

What followed, however, compounded that tragic situation, as people across the United States converged on Ferguson to exploit the situation for self-serving purposes. Suffice it to say, that was not America's finest hour.

In the days and weeks that followed in -- in Ferguson, Missouri, the police-related use of force was forefront in the national news. What was called for at that moment when the U.S. DOJ inserted itself early into the process was an appeal to reasonableness, responsible rhetoric and cautioning against a rush to judgment. Instead, some very powerful people made statements that only heightened rising tensions.

Unfortunately, race is, has been and will always been an explosive issue in America. The incendiary rhetoric used by Eric Holder created a pathway for a false narrative that then became the rallying crying for cop-haters across America. It sparked unjustified hatred toward America's law enforcement agencies and its officers. Without a shred of evidence, a broad brush has been used to unfairly malign the reputation of the profession of policing in the United States.

The accusation has been made that our community's finest systematically engaged in the practice of targeting young black men because of the color over their skin. That claim is patently false, and I reject out of hand the mere suggestion of it. If I'm wrong, then someone needs to show me the evidence.

Officers at the local level put on their uniforms and go out everyday to make their communities better and safer with which to live. Without them, our communities would collapse into utter chaos.

The world that our officers operate is complex, dynamic, uncertain and one where, unfortunately, things can and do go wrong. When that happens, the American law enforcement officer needs to know that after a thorough and transparent investigation, the facts and evidence of a particular case will be applied to the rule-of-law standard for a decision about their actions.

After putting their lives on the line, they do not deserve a standard of false narratives, preconceptions, misconceptions, emotional rhetoric or racial demagoguery.

Author and scholar Thomas Sowell said in a thought-provoking piece on the rule of law, "If police are told -- who are told that they are under arrest and refuse to come with the police cannot be forcibly taken into custody, then we do not have the rule of law when the law itself is downgraded to suggestions that no one has the power to enforce."

So where do we go from here? How do we get beyond this damaged -- frayed relationship between local police and the U.S. DOJ?

My suggestion is for the next U.S. attorney general to articulate clearly a renewed commitment to rebuilding trust with local law enforcement. That involves open lines of communication with an emphasis on listening to the suggestion of law enforcement executives, and for the nation's sake, please stop undermining the character and integrity of the American law enforcement officer.

Next, resist at the federal level to interfere with local police training standards. Are cops perfect? No, in fact, far from it. But they are our community's finest. Every community is unique in what will work and what will not work. We already have state standards for training.

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Any discussion about reform in these areas that does not include a counterview about the consequences of this short-term technical fix and its impact on crime victims will have a catastrophic consequence on an already stressed -- black and Hispanic communities.

The recidivist nature of criminals will cause more minorities to be victimized by violence, similar to what happened this past summer in Milwaukee to Sierra Guyton, a 10-year-old girl shot in the head and killed while on a school playground. The shooters were career criminals.

The black community does not have the support structures in place for an influx of career criminals sent back into the community or to deal with the habitual criminals who currently rain terror in neighborhoods.

Adding more crimes and violence to that mix will only bring more misery to the overwhelming number of decent black law-abiding citizens just trying to get through life against already great odds. Reform that simply lowers the bar is nothing more than normalizing criminal behavior.

Thank you very much.

ROSENKRANZ:

Thank you, Mr. Chairman, Ranking Member Leahy, members of the committee. I thank you for the opportunity to testify at this momentous hearing.

The committee's rightly focused -- decided to explore not just the qualifications of the nominee but also the proper role of the office.

I myself take into position on the ultimate question of whether the nominee should be confirmed. Rather, I offer observations about the proper role of the attorney general and some comments, alas, on the ways in which the current administration has fallen short of its constitutional obligations.

You've explored at length the attorney general's weighty responsibility to supervise the various components of the Department of Justice. But as you know, the most important responsibility of the attorney general is not the supervision of the tens of thousands who work beneath her; it's the solemn counsel that she gives to the one who works above.

Her most important job is giving sound -- sound legal advice to the president of the United States. And perhaps the most important dimension of this function is to advise the president on the scope of his executive powers and duties.

The attorney general should rightly explore all legal options for the president to achieve his goals, but at the end of the day, if no legal options are available, the attorney general must be prepared to say, "No, Mr. President. You have no constitutional power to do that."

The fortitude, the rectitude required to say no to the president is perhaps the single most important job criterion for attorney general of the United States. I'm afraid it's particularly important now in an administration that is inclined to press the outer bounds of executive power and to skirt the obligation to take care that the laws be faithfully executed.

I hope the committee will thoroughly explore the nominee's conception of the faithful excuse of the laws and her resolve to advise the president when he runs afoul of this constitutional obligation.

First, notice that this is not a grant of power; it is the imposition of a duty. "The president shall take care." This is not optional; it's mandatory.

Second, note that it is personal. Execution of the laws may be delegated, but the duty to take care that the laws be faithfully executed is the president's alone.

Third, notice that the president is not required to take care that the laws be completely executed. That would be impossible. But -- so the president does have power to make enforcement choices, but he must make them faithfully.

And finally, it's important to remember the historical context of the clause, "English kings claimed the power to suspend laws unilaterally. The framers rejected this practice."

With these principles in mind, we can turn to three recent examples. Alas, there are many more one could choose.

First, the Obamacare suspension -- so on July 2, 2012, just before the long weekend, the Obama administration announced that the president would unilaterally suspend the employer mandate of Obamacare, notwithstanding the unambiguous command of the law.

The statute is perfectly clear. It provides that these provisions become effective on January 1, 2014. This blog post written under the breezy Orwellian title "Continuing to Implement the ACA in a Careful, Thoughtful Manner" makes no mention of this deadline.

Now, whatever it may mean to take care that the laws be faithfully executed, it simply cannot mean declining to execute a law at all.

Second -- our second example, immigration is almost an exact mirror of the first. In this context, rather than declining to comply with a duly enacted statute, the president has decided to comply meticulously but with a bill that never became law.

ROSENKRANZ:

So Congress repeatedly considered a statute called the DREAM Act, which would've exempted a broad category of aliens from the INA, but Congress declined to pass it. So on June 15, 2012, the president announced he would simply not enforce the INA against the precise category of aliens described in the DREAM Act.

He announced in effect that he would as though the DREAM Act had been enacted into law, though it had not.

Now, this is clearly not an effort to conserve resources. After all the solicitor general went to the Supreme Court to forbid Arizona from helping to enforce the INA. Exempting more than 1.76 million people from the immigration laws goes far beyond any traditional conception of prosecutorial discretion.

Now, Professor Legomsky cited an unsurprising consensus of liberal immigration law professors approving the most recent action.

I'll cite just one authority; the President of the United States just a few years ago, quote, "America is a nation of laws which means I, as the president, am obligated to enforce the law. With respect to the notion that I can just suspend deportations through executive order, that's just not the case because there are laws on the books that Congress has passed.

"There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that, for me to simply through executive order ignore these congressional mandates, would not conform with my appropriate role as president."

Could hope that the nominee would agree with this statement.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

My final example is IRS targeting, but I believe the witness to my left is going to talk about that. I'd be happy to answer constitutional questions on that topic as well.

Thank you.

ENGELBRECHT:

Good morning, Mr. Chairman, members of the committee. I'm the founder of True the Vote, a national nonprofit initiative to protect voters' rights and promote election integrity. I'm here today because I was targeted by this government for daring to speak out.

I'm one of the thousands of Americans who have become, sadly, living examples of this kind of trickle-down tyranny that is actively endorsed by the current administration and rigorously enforced by the Department of Justice.

Over these past few years the Department of Justice has made their presence very well known in both my personal and professional life. Since filing for tax exemption from the IRS in 2010, my private businesses, my nonprofit organizations and I personally have been subjected to more than 15 instances of audit, inquiry or investigation by federal agencies, including the IRS, OSHA, ATF and the FBI.

All of these inquisitions began only after filing applications for tax exemption. There is no other remarkable event or rationale to explain how, for decades, I went unnoticed by the federal government but now find myself on the receiving end of interagency coordination into and against all facets of my life.

I shared that same timeline as a part of testimony given in February of 2014 at a hearing before the House Oversight and Government Reform Subcommittee. Time did not permit then nor does it now to give a full account of the cast of characters and confluence of events that fill a binder with over 800 pages' worth of government subterfuge but in one way or another the Department of Justice has found its way into almost every aspect of my story.

In my attorney's testimony at last year's House hearing, she spelled out for the committee why we believe that the Department of Justice investigation into the IRS targeting scandal was, in fact, a sham. Within hours of her filing, she received a phone call from the Department of Justice, now suddenly wanting to interview me. It was the first time we had been contacted in approximately nine months after the investigation had purportedly commenced.

An arrangement was made with the Department of Justice Public Integrity Division but we were then told that the Civil Rights Division would also be participating in my interview. Now, this is significant because, at the time, that same Civil Rights Division was fighting against True the Vote in a courtroom back in Texas, trying to prevent us from becoming an intervening party for the state in voter ID litigation that the Department of Justice had brought against them.

The DOJ told my attorney that unless I was willing to waive my rights and obligations to involvement -- to the involvement of the Civil Rights Division that they would not interview me at all. And to date they still have not.

A handful of months later, we met the Department of Justice in court again, this time as they represented the Internal Revenue Service in a lawsuit True the Vote filed against the IRS in 2013. The DOJ assured the judge that there was no more evidence that could be recovered from any of the hard drive crashes that had befallen IRS employees named in our suit. All of the contents from all of the hard drives was certainly and irrevocably lost.

This purported dead end in discovery went on to become a factor in the judge's ultimate decision to dismiss our case.

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Yes, just one month later the Treasury inspector general's investigation turned up an additional 12.5 million e-mails, of which... 30,000 were Lois Lerner's.

Is there the will to ever get to the truth behind this nightmare of citizen targeting?

For six years the Department of Justice has operated as an increasingly rogue agency where preservation of personal liberties runs a distant second to preservation of political power.

Will this new leadership be any different?

As a leader of a voter rights organization, I was extremely disappointed to hear Ms. Lynch's comments in a speech she made in Los Angeles last February, when she said that voter ID laws were passed in the Deep South so that, and I quote, "minority voters would be disenfranchised" and, further, that she applauded DOJ's lawsuits filed against those states having ID programs and promised that those lawsuits would continue.

Seventy percent of Americans believe that showing photo identification in order to vote is a common-sense safeguard to our electoral process.

Should we count on continued resistance from the Department of Justice led by Loretta Lynch?

In fact, the most significant voter disenfranchisement threat currently facing our country was made possible by the president's recent order of executive amnesty. States are not prepared to deal with the coming influx of illegal aliens wanting social service programs like Medicaid, welfare and, of course, driver's licenses.

Federal law requires that these programs offer voter registration opportunities, which is a wonderful thing for American citizens, but these programs were not designed to verify citizenship, leaving many states without the necessary firewalls to ensure that noncitizens do not end up as registered voters.

And every vote cast by a noncitizen disenfranchises the vote of a citizen.

We know Mr. Holder is a proponent of amnesty.

Where will Ms. Lynch stand on the issue?

In a 2009 speech, General Holder called America a nation of cowards.

Well, if you remember nothing else from my comments, please remember this. I am not a coward and I am not a victim. I'm a messenger for all of those Americans who love our country, love our fellow countrymen and pray for a better tomorrow. And I'm here to say our country right now is at a tipping point. We have replaced rule of law with moral relativism; we have replaced truth with political correctness and in all of the double-speak and double-think we have become increasingly unsteady about how we, the people, factor into a future left into the hands of our current leaders.

So please be bold, please choose wisely, because America's watching.

Thank you.

GRASSLEY:

Ms. -- and now Ms. Engelbrecht, I'm going to call in just a minute or in just 30 seconds I'm going to call on Professor -- not Professor -- Chairman Leahy to ask the first questions, because he can't come back this afternoon.

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(CROSSTALK)

HATCH:

... I just want to mention to you, Ms. Engelbrecht, that we're thoroughly investigating this. The only reason we have an issue to report so far is that, as you mentioned, there were 30,000 more e- mails finally discovered.

And the investigative arm of IRS has not yet released those to us and we're going to have to go through those before we issue a final report. But you have my total sympathy for what you've gone through.

ENGELBRECHT:

Thank you, Senator.

GRASSLEY:

And he's speaking as chairman of the Finance Committee

Senator Leahy.

LEAHY:

Thank you, Mr. Chairman. I appreciate your courtesy.

I'd ask consent that I put in the record...

GRASSLEY:

Without objection.

LEAHY:

... I'd just basically (inaudible) former FBI Director Louis Freeh, we all know very well, a supporter of Loretta Lynch and Congressman John Lewis, a number of Justice Department officials, both the Bush administrations and various Democratic administrations, the FBI Agents Association.

I won't -- I won't list all of them, but they could all just be part of the record.

GRASSLEY:

They will -- they will -- they will be, Senator Leahy.

LEAHY:

We have nine witnesses here today.

Would those who oppose Loretta Lynch as FBI director, would they please raise their hand?

(UNKNOWN)

Attorney general.

LEAHY 187

I mean as attorney general, I'm sorry. I was thinking of -- I was thinking of Louie Freeh.

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Those who oppose her as FBI -- as attorney general, will they please raise their hand? docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...

Let the record show no hands were raised.

The -- Ms. Fedarcyk, you know, it's amazing, your record. You started off as a beat cop in Nevada, joined the FBI, and 23 years later you're heading up the FBI's largest field office. And like many here, I was briefed during that time of some of the investigations you had under way, especially in the terrorist area. I mean, they were remarkable in their complexities.

You also dealt, as you said, with Loretta Lynch during that time. Do you believe that she has the temperament and the demeanor to be an attorney general?

FEDARCYK:

Senator, my two years exposure working alongside Loretta -- and I say alongside because it was truly a seamless partnership, I think gives me a little bit of background and experience to be able to say that I firmly believe that Loretta Lynch possesses all of the necessary attributes that the nation should demand of an independent attorney general, and I wholeheartedly support her nomination and confirmation.

LEAHY:

You -- I don't want to put words in your mouth, but do you find that she would make independent judgments -- independent judgments?

FEDARCYK:

Yes, sir. And, in fact, that was part of my opening statement, the fact that one of the three attributes that I wanted to touch upon was the fact that she operated independently, did not bow to outside influences, looked at the facts, looked at the issues.

When she was confronted with an issue, she gathered input from stakeholders, solicited their input, took a look at the law, made sure that her decisions were wholly based on the facts and the law and independently arrived at.

LEAHY:

Your career in law enforcement is a lot longer than my career in law enforcement, but I know during my years in law enforcement what we wanted was independence, and I appreciate that.

Mr. Barlow, nice to have you -- have you back here. Usually, we see you in the other committee room.

Do you believe that Loretta Lynch has the independence to stand up to others in the executive branch, including the president, if she feels she is in the right and has to stand up to do her job as attorney general?

BARLOW:

Yes, Senator, I do. I -- in my experience working with her and working through any number of different issues, seeing her in a variety of different circumstances, I have always known her to be thoughtful, well-prepared and someone who is interested in the facts and the law.

I don't believe the president or anyone on this Earth could -- could get her to make a decision that she did not believe was right and had a firm basis in where her duty was at that moment.

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LEAHY:

In Louie Freeh's letter, he talks about she being part of the group that went to Italy for the funeral of one of the top Mafia

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fighters, somebody that both Director Freeh and I had known. And he said that she was tight with him on that because of... her attitude about organized crime.

I -- as I've known her peripherally over the years, and more since the nomination, but Dr. Newsome, you've -- you've known her longer than all the rest of us. Do you believe she'd stand up for what she believes is right, no matter who she might be getting pressure from, the president, me, Senator Grassley or you?

(UNKNOWN)
(OFF-MIKE)

(LAUGHTER)

(UNKNOWN)
(OFF-MIKE)

(UNKNOWN)
Use your mike, please.

LEAHY:
Use your mike.

NEWSOME:
Absolutely, Senator Leahy. She would demonstrate independence in the most constructive of ways.

One of her greatest attributes, as already been noted, is her ability to hold forth with the strength of her own convictions, having prepared herself thoroughly, thought through matters very, very comprehensively, having identified the issues in a way that she could communicate her position in a way that would garner nothing but the highest of respect.

LEAHY:
I talked about yesterday about as a young law student being recruited by the then-attorney general of the United States to come to work for him. And I'd asked him whether he would stand up to the president of the United States if need be. He assured me he would.

Later, he did when he prosecuted a man who was essential to the election of the president as president.

And when I asked him later about that, I said, "Attorney General Robert Kennedy, what was the reaction?"

He said, "I stayed away from family gatherings a little while."

(LAUGHTER)

And, Professor Turley, many of us have seen you many, many times. The House Republicans have hired you to sue the administration in another area, and taxpayers will pay your fee. It was said that this could cost as much as \$3 million. They're not paying you \$3 million, are they?

(LAUGHTER)

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TURLEY:

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I'm certainly open to that. Senator Leahy, but, no, no one's offered me \$3 million. <https://www.fbi.gov/document/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

LEAHY:

What is the hourly rate you do charge?

TURLEY:

I think it's -- the hourly rate's set by the contract, not by me, I think it's a top of \$500. But I -- I seem to recall that.

(CROSSTALK)

TURLEY:

But I want to correct something. I'm actually working not for the House Republicans but for the House of Representatives.

They voted to approve the...

(CROSSTALK)

LEAHY:

It's a Republican vote. It was a partisan vote, as you know. Not to put too -- spin it too closely, but do you get paid for your testimony here today?

TURLEY:

Oh, no, of course not.

LEAHY:

Thank you. I thought I'd ask that out of courtesy to you.

The -- I -- actually, the question I asked first was probably the one that I appreciated the answer the most, when no hands went up. And I -- I hope we can move on.

Many of you have questions about past operations of the Department of Justice. I have some disagreements with that, but I think we're talking about the remaining time of this administration, the Department of Justice.

And, frankly, as one American, and as a former prosecutor and as the -- as the longest serving member of the Senate and one who's voted on a lot of attorneys general, both the Republicans and Democrats, I feel very, very confident in voting for Loretta Lynch as attorney general.

And, again, I thank you, Mr. Chairman, for your courtesy.

GRASSLEY:

You bet.

I'm going to start out with Ms. Attkisson.

In your testimony, you say -- I don't know what's wrong with this microphone. Can somebody fix it?

(UNKNOWN)

(OFF-MIKE)

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In your testimony, you say that you have a long career of the investigative reporting.

(UNKNOWN)
(OFF-MIKE)

GRASSLEY:

I'm sure you've dealt with pushback from powerful people before. But what makes the last few years different?

ATTKISSON:

I defer somewhat to some of my colleagues that I quoted in my opening statement who said this was in their experience, which is longer than mine, the most difficult administration they've dealt with. Ann Compton, another correspondent, said this was the most closed president she's dealt with in seven presidents she's covered.

And I see it as a high point on a trajectory and a continuum, meaning every administration seems to be worse than the last. Although they come in promising openness and transparency, they seem to pick up where the last one left off.

And there hasn't been as much pushback, I think, from Congress and the media in some cases, to keep that balance, because, of course, the government tends to, for whatever reason, covet information, separate itself from the public and treat itself kind of as one and apart.

But we're supposed to help create a balance so it doesn't get out of whack. And I think we haven't done a very good job at that in the last couple of years.

Additionally, this administration has employed very aggressive techniques that are available to it that were not available years ago, such as using social media and surrogate bloggers to put out false information to controversialize any reporters who dare to do the normal oversight reporting that we've done on other administrations, and I think that's been somewhat successful.

GRASSLEY:

You say in your testimony that you were once barred from attending a briefing in Justice Department. What reasons were you given?

ATTKISSON:

A briefing was called on Fast and Furious, and I was sent over to the office, but Tracy Schmalzer, the press officer, called back immediately and said, "Don't bother to come," that she wouldn't clear me in the building, although I have a press pass, I've been cleared, you know, through the FBI to walk up to the president of the United States.

But she was not going to clear me through building security. She didn't give a reason -- reason other than to just say they only wanted the normal beat reporters to attend.

I can't tell you how improper that is, in my view, how improper it is that government officials who control public assets would misuse their authority to, in essence, handpick the reporters who get to cover the story -- I think, in essence, the way they'd rather it be covered -- and keep out, in some cases, more knowledgeable reporters who've been covering that particular issue.

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That had never happened to me before. I never tried to go there afterwards. It didn't happen to me afterwards. But I think

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that was a very important thing that -- that was done, and I think it was very improper. docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...

GRASSLEY:

Do you think any of your colleagues and -- and fellow journalists pulled punches because they thought they might be barred?

ATTKISSON:

I don't personally know.

I think the reporters on the ground do a great job. But I do know there are managers and editors, and I've spoken to executives from three networks who have given instances in which they've been specifically threatened with loss of some sort of access if the news organization takes a particular news course. So that threat of access is definitely felt.

GRASSLEY:

My next question gets to the fact that we aren't here to talk about her qualifications -- I don't think anybody questions that -- but whether she can make changes in the Department of Justice.

What do you think needs to be done to correct the chilling effect on the press over the last few years?

ATTKISSON:

Sometimes I think it's more than just the physical steps that are taken. It's an action that's seen and a message that's perceived.

Right now, regardless of steps that have been taken to mitigate damage that's been done, there's still a large distrust of the Justice Department and in some cases, government in general.

There are members of Congress and staff and whistleblowers and other journalists who commonly talk about the idea that they believe -- whether it's true or not, that they believe they're being monitored on their phones or computers -- and or computers. How you get past that suspicion that's been created by the actions that we've seen, it's going to be difficult.

One very tangible thing that could be done and I think needs to be done -- and I -- I won't belabor it -- but it has to do with Freedom of Information law, which is pretty much pointless and senseless now in its application at the federal level. It does no good.

It's been used instead to facilitate the timely release of public information. It's been used to obstruct and delay the release of public information. It's no good.

You know, if you even do go to court to get your public documents, that's at taxpayer expense. It still serves the purpose of delay that the bureaucracy wishes to serve.

And at the end, even if they have to play the plaintiff's fees, that's done with our tax dollars, and basically, the federal agency gets rewarded for a job well done, because they've been able to obscure and delay the release of these public documents.

So that -- FOIA is extremely broken at the federal level.

GRASSLEY:

You just described my last question, so you won't have to answer it.

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But just to make clear, you felt your computer was hacked, you filed for information on it, and you still don't have an answer,

ATTKISSON:
That's right.

The FBI, I think, something like -- I filed a request just in general for information 540 days ago. Response is due in something like 20 business days, but this is typical of FOIA responses.

I got a very partial, incomplete response last night to a FOIA request that I'd made at the Department of Justice inspector general, which did not include the forensics that supposedly came along with some conclusions and summaries they made, so that will be a process that -- who knows if I'll ever get the documents I've been asking for for months?

But this is very typical, reporters will tell you and citizens and consumers, of their efforts to try to obtain easily accessible public information or information that should be easily accessible.

GRASSLEY:
Ms. Engelbrecht, May 20, 2013, General Holder announced that he ordered the Department of Justice to conduct a criminal investigation into the IRS for targeting conservatives at the time. The attorney general called the IRS practices, quote unquote, "outrageous and unacceptable."

When did the Department of Justice first reach out to you or your lawyer to learn the details of your ordeal?

ENGELBRECHT:
We heard nothing from the Department of Justice right up until the day before we were to testify before the House subcommittee.

My attorney and I were both prepared to testify, my attorney filed her -- her testimony in which we were very critical of what had happened at that point, and it was not hours later that the Department of Justice called for the first time to ask to speak with us.

So nine months, approximately.

GRASSLEY:
So after nine months, General Holder ordered the investigation reach out to you. And what prompted them to do so? Do you have any idea?

ENGELBRECHT:
I think it was -- I think it was that testimony that was filed that left -- left no stone unturned about what we -- what we had already experienced.

GRASSLEY:
So let me get this straight.

Attorney General Holder announces an investigation into the IRS's targeting of tax-exempt groups like yours, and nine months later, it takes a congressional hearing for you to be contacted by the attorneys at the Department of Justice?

You just said to yes.

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GRASSLEY:
That's disgraceful.

Well, to your knowledge, who did they talk to before they reached out to you?

ENGELBRECHT:
Certainly, we saw all over the news that they were talking to Lois Lerner and -- and others inside the department.

I was in very regular contact with lots of other leaders of other organizations that had been targeted. To the best of my knowledge, no one has been contacted, still, by the Department of Justice.

SESSIONS:
Mr. Chairman, I would note that the Alabama Tea Party leader who was victimized has still not been investigated, even been interviewed, even though I directly asked the FBI director to do so a long time ago.

GRASSLEY:
Then -- so to date, you've not been interviewed by the FBI?

ENGELBRECHT:
No, sir.

They did -- they did ask about nine months ago, but it was upon the contention that they would be allowed to have the Civil Rights Division in, and I was not -- I was not willing to do that, because the Civil Rights Division had already been on record opposing my organization.

GRASSLEY:
OK.

Well, I don't blame you for declining to speak to the Department of Justice. If I had been subjected to 15 audits and inquiries from four different federal agencies in less than three years, I would only want to meet with neutral and fair investigators and certainly not a person who had been appointed to do this investigation who also had an outstanding record as a -- as President Obama's campaign donor.

One final question, has the Department of Justice or anyone else, for that matter, advised you why four powerful federal agencies descended on your doorstep?

ENGELBRECHT:
No, sir, but I'd sure like to know.

GRASSLEY:
OK. I'm going to -- you know, I'm at a loss here. Let me check with my staff whether I call on (OFF-MIKE).

OK. Senator Hatch?

HATCH:

Well, thank you, Mr. Chairman.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

I really appreciate what you've gone through. I can't say much about it because of 6103 authority, but -- but we are going to get to the bottom of it.

ENGELBRECHT:
Thank you, sir.

HATCH:
We've already gotten quite a bit to the bottom of it.

I want to come back for at least a few minutes to thank this panel of witnesses for contributing to the confirmation process regarding Ms. Lynch's nomination.

I'm going to be a strong supporter of her nomination. And I believe she's not only qualified but exceptionally well-qualified and a very good person, to boot.

I especially want to recognize David Barlow, who's here today, who served as -- as a U.S. attorney in my home state of Utah for three years and before that, worked on this committee as chief -- chief attorney for my -- my companion here in the Senate, Senator Lee.

Professor Turley, welcome back.

TURLEY:
Thank you, Senator.

HATCH:
(OFF-MIKE) committee.

Yesterday, I asked Ms. Lynch whether the attorney general has the duty to defend the constitutionality of duly enacted laws if there are reasonable arguments to do so.

You discussed this in your prepared statement, and I'd like your comment on one specific issue that I raised.

Attorney General Holder did not decide never to defend the constitutionality of the Defense of Marriage Act but to stop defending its constitutionality. His own Justice Department lawyers had already been making reasonable amendments defending DOMA, or this bill, and Mr. Holder decided to stop making them.

And that is what made me say that he's abandoned his duty. Do you agree?

TURLEY:
I agree. I thought that the decision was wrong.

I -- I happen to agree with the president. I was a critical of DOMA. But I thought that the abandonment of the defense of DOMA was inimicable to the rule of law. I thought it violated a longstanding understanding with this body.

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You know, there's history here, as you know. You're a student of the Constitution, and you know that there's always been

the tension between the Congress and the Justice Department as to who can be in court defending things of this kind...

The Justice Department's always insisted they're the exclusive representative.

(CROSSTALK)

HATCH:

... had you been attorney general, you would not have stopped that.

TURLEY:

Well, absolutely. And I would have defended that law.

HATCH:

Even though -- even though you didn't agree with DOMA.

TURLEY:

That's right. What's really...

HATCH:

... Defense of Marriage Act.

TURLEY:

... and what's also troubling is that there's no definition in the -- in the attorney general's position as to when they will abandon a federal law. I happen to agree with the criticism of the law. But there were plenty of people with good faith arguments that it's constitutional, including people on the Supreme Court.

And if this is the standard for abandoning a federal statute, I could see a president doing this in a host of different statutes.

HATCH:

You're right about that. I appreciate your comments. I'm also glad that your prepared statement discussed the controversy over recess appointments. The idea that a president has the authority to tell the Senate when it is in or out of this or that sort of recess is astounding.

And I'm glad the Supreme Court unanimously rejected the administration's position on that matter.

In yesterday's discussion of prosecutorial discretion, the administration's defenders repeatedly said that this is really only about wisely using limited resources.

You refer in your statement to the, quote, "ill-conceived litigation strategy of the Justice Department," unquote, defending this bizarre position on recess appointments.

I wonder how many resources the department uses pursuing these extreme positions in court that, as I said yesterday, got shot down over and over again, some 20 times.

Do you agree?

TURLEY:

Absolutely. I testified before the litigation after the appointments were made and I said in my view even though I thought very

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Only of the nominee that the appointments were flagrantly unconstitutional. There are close questions in the Constitution, ... in my view. This wasn't one of them.

HATCH:

That's one of the reasons I admire you. I mean, you are wrong on so many things, but you stand up...

(LAUGHTER)

... you write about (inaudible). I've got a lot of respect for you.

Professor Legomsky, your prepared statement refers to a November 2014 letter from immigration law scholars. It states that the president's action establishing the deferred action for parental accountability program is, quote, "within the legal authority of the executive branch of the United States," unquote.

But didn't the Justice Department's own Office of Legal Counsel, in its opinion issued a week earlier, conclude that, quote, "The proposed deferred action program for parents would not be a permissible exercise of enforcement discretion," unquote.

Even OLC, Office of Legal Counsel -- which seems to be into advocacy rather than analysis these days -- disagrees with these scholars on this issue.

LEGOMSKY:

Senator, the OLC memo distinguished between granting deferred action to those children who had arrived at an early age, on the one hand, and, in addition, granting it to the parents of U.S. citizens and lawful permanent residents; while, at the same time, suggesting that it might not be legal to extend deferred action to the parents of the DACA recipients themselves.

And...

(CROSSTALK)

HATCH:

All right.

LEGOMSKY:

... I do personally disagree with that latter suggestion of OLC. But otherwise I thought the memo was very thoroughly and well articulated.

HATCH:

OK.

Sheriff Clarke, I want to personally thank you for your advocacy and leadership for police people all over this country and coming here today and giving your testimony.

As I observed the reactions to the incidents like that in Ferguson, Missouri, I, too, became concerned about this rhetoric and the -- and the broad-brush picture that seemed to be developing about all law enforcement.

We heard elected officials claim that police officers across the country were indiscriminately shooting black men simply out of fear. These -- those incidents happened at the local level and involved local law enforcement.

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How much do you think that the attorney general of the United States can affect the situation negatively or positively?

CLARKE:

Thank you, Senator: a lot.

The attorney general of the United States is a big stage and when he or she talks, people listen all across the country and it gives the impression that that is the policy of the United States Department of Justice and they have to choose their words carefully.

UNIDENTIFIED MALE:

Thank you.

HATCH:

Thank you.

Ms. Attkisson, I don't know what your politics are, but I admire you greatly. You're what an investigative reporter ought to be. And, frankly, your testimony here today has been very profound, very strong and it ought to wake everybody up at the Justice Department and in the administration and in all administrations, both this one and any in the future.

So you're doing a great public service here and having the guts to stand up and take the positions that you have. I have a lot the admiration for you.

Professor Rosenkranz, during the hearing yesterday, I acknowledged that prosecutorial discretion obviously involves enforcement or resource allocation decisions in individual cases but I said, quote, "Applying that discretion across the border to entire categories of individuals has the same effect of changing the law itself," unquote.

Do you agree with that?

ROSENKRANZ:

Yes, I do, Senator. It's not a clear line that one can draw but when you start to talk about exempting millions and millions of people from acts of Congress, this looks a lot more like legislation than like -- just like enforcement discretion.

HATCH:

Well, Professor Legomsky offers the Supreme Court's decision in Arizona v. United States to justify using enforcement discretion in a categorical fashion.

But the court's opinion uses the word "individual" more than a dozen times.

For example, it discusses, quote, "the power to bring criminal charges against individuals," unquote.

And whether, quote, "an officer has probable cause to believe that an individual is removable," unquote.

In fact, one of the quotes from the court's opinion that Professor Legomsky includes in his prepared statement says, quote, "The equities of an individual case may turn on many factors," unquote.

Does that decision support using discretion for individual enforcement decisions in a categorical way, which has the effect of changing the underlying statute itself?

ROSENKRANZ:

I quite agree with you, Senator. I think the traditional conception of prosecutorial discretion has always been case by case...

HATCH:
OK.

Your prepared statement says that the most important dimension of the attorney general's function, quote, "is to advise the president on the scope of his executive powers and duties," unquote.

Did that -- does that function happen on a blank slate?

Or do the essential principles of our system of government actually counsel special attention to the limits of president -- of president's -- of presidential power?

ROSENKRANZ:

Quite right, senator. I think the core of that responsibility is for the Department of Justice and the attorney general, in particular, to think hard about the meaning of a faithful execution of the laws and to counsel the president when he is close to the line of unfaithful execution.

HATCH:

In other words, is the attorney general there to find some plausible, theoretical justification for whatever the president wants to do, or is she there to enforce the real, substantive limits on power that are necessary for all of our liberty?

ROSENKRANZ:

The attorney general should help the president to find legal ways to do what he wants to do but, at the end of the day, it's essential for the attorney general to be able to say, no, Mr. President, that's something you cannot do.

HATCH:

My time is up.

(CROSSTALK)

GRASSLEY:

Senator Feinstein.

FEINSTEIN:

Thanks very much, Mr. Chairman. I'm going to be very brief. This is really a hearing to discuss the qualifications of a nominee, in this case, a very distinguished, very exceptionally well qualified nominee on virtually any area that one can state. I really don't want to see that diminished by a critique by various people of the administration.

And, to me, Loretta Lynch is an outstanding role model not only for women but for all of us in this arena because, as you can see, so much of this arena has become so partisan that here's the use of a hearing on the qualifications of a nominee to be used to criticize the administration and areas that Loretta Lynch had nothing to do with. I guess that's the coin of our realm here.

But, I mean, I remember other nominations where, if the issue was independence, where nominees fully admitted and the ranking member mentioned this, that they were a wing of the staff to the president.

So I think we have a very special nominee in front of us, very skilled, very determined. But most importantly I think she's used her life so well to be that combination of what was said by one newspaper, "a combination of velvet and steel."

And to see the impact of that on the strong support that she has, for all of us in this arena I think is a kind of role model as how you -- there are -- there are a lot of people that know how to separate everybody; there are very few people that know how to bring people together again and really develop a kind of consensus that can lead us forward.

And because this institution is so split, the role of Loretta Lynch in this day and age I don't think can be underestimated.

So the fact that when Senator Leahy asked the question -- I forget how he put it, you know, which of you is in opposition to Loretta Lynch, no one raised their hand. And I think it's that way throughout the nation. I think we should get on with the business. We should see this woman confirmed as quick as possible.

Thank you very much. That's my statement.

Senator Whitehouse?

WHITEHOUSE:

Before I start claiming my time, let me say where we stand in terms of what's going on here, because the chairman has just had to leave for a vote and he has left me instructed that if Senator Lee arrives or if another Republican arrives at the conclusion of my time, then they will be recognized, but if no one else is here, then we will recess at that point until 1:00 p.m. Is that correct?

OK. Good.

Let me take my time to sort of review the bidding, where we are. No witness present today opposes Ms. Lynch as the nominee for attorney general. Ms. Attkisson is here as a litigant against the United States with her lawyer sitting beside her. Her testimony never mentions the nominee. And I would ask, actually, unanimous consent that the redacted version of the I.G. report related to her claims, which she now has, be made a matter of record, which, without objection, it will be.

Mr. -- Mr. Barrow -- Barlow supports the nominee enthusiastically. Reverend Newsome supports the nominee enthusiastically. Ms. Fedarcyk, to use her words, wholeheartedly endorses the nominee.

Professor Legomsky is here mostly to talk about immigration. His testimony does not make clear whether he or does not support the nominee.

May I ask you if you do?

LEGOMSKY:

I certainly do. Thank you for asking, Senator.

WHITEHOUSE:

Very well. That one's now clear.

Mr. Turley says that his interest today is not to discuss Ms. Lynch as much as the department she wishes to lead. But he goes on to say he has no reason to doubt the integrity and intentions of Ms. Lynch who displays obvious leadership and strength of character.

Sheriff Clarke is here and wishes the nominee well. But he goes on in his testimony to say, I want to spend some time

Professor Rosenkranz takes no position on the nominee, but comments on the tenure of Eric Holder.

Is that correct, Professor?

And Ms. Engelbrecht -- have I said that right? Ms. Engelbrecht is an advocate for voter identification laws who would like Ms. Lynch to agree that voter identification laws are not efforts to suppress voting, but took no specific position on the nominee.

Is that correct?

ENGELBRECHT:

No specific position, sir. I have all the hope in the world that it'll work out.

WHITEHOUSE:

Very good.

So, let me say two things. One, some many years ago George Washington set for himself what he called his rules of civility and decent behavior. He wrote 110 rules of civility and decent behavior to help him guide his own conduct in upright and honorable ways.

I think it was rule 89 of those rules of civility and decent behavior that George Washington kept that said the following: speak not evil of the absent, for it is unjust.

There are plenty of forums where the attorney general would have an opportunity to defend himself. This is not one. There is no forum here. There is no opportunity here for Attorney General Holder to answer these various charges that have been made.

I think that is fundamentally unjust, and I think it is frankly beneath the dignity of this committee at a time when we have a very significant and solemn charge before us to determine the fitness of a specific individual to be attorney general of the United States, to launch a series of unanswerable attacks.

I have no problem with the attacks. My problem is the choosing this forum for them where the other -- the individual in question has no chance to answer, I think fails President Washington's test that one speak not evil of the absent, for it is unjust.

With respect to the other issues, I think we will have plenty of time to ventilate those in other forums. I'm sure we'll have plenty of time to address immigration, address voter ID and voter suppression, address surveillance, address all of those things, but once again in this forum, there's no opportunity for another side to be presented.

And I regret that this hearing and this solemn occasion has been co-opted to that extent and turned into what appears for a sound bite factory for Fox News and conspiracy theorists everywhere.

We actually have a nominee in front of us. She appears, by all measures, to be a terrific person. I think we should get about the business of confirming her and get about the business of voting on her.

And if people have this strength of view that Attorney General Holder is not a good leader of the Department of Justice, the very best way to act on that would be to confirm Ms. Lynch as quickly as possible.

I happen to disagree with that view. I am proud of what Attorney General Holder has done. And I would once again reference that he did not inherit a Department of Justice that was in good order. The Office of Legal Counsel had written opinions that were so bad and so discreditable that even that administration was forced to withdraw them once they saw the light of day and received peer criticism.

U.S. attorneys of Republican and Democratic persuasions and appointments alike rose in irritation and anger about the effort to manipulate the United States attorneys that exploded into a scandal.

There was that rather creepy midnight assault on a sick attorney general in the hospital, when White House lawyers came over to try to get his signature on a document and thankfully now FBI Director Comey put a stop to that nonsense. And ultimately the attorney general of the United States was forced to resign from that office.

So, stepping into that mess, and there were plenty of other features I could add, I think that Attorney General Holder is entitled to great credit for putting that department back on its feet.

I understand that he made decisions that people disagree with. I for one believe that those decisions are within the bounds of legitimate debate.

I am not suggesting that my colleagues need to agree with them, but I think to personalize them so much as to say that it shows a moral or personal defect on his part reflects really more the narrowness of a specific ideology than a true judgment about the merit of a man who has served his country as a United States attorney, as the deputy attorney general, as a judge and as attorney general with what I consider to be great distinction.

So, with that, I will conclude my remarks.

I see my friend and former attorney general colleague, Senator Cornyn, here as well, so under the chairman's direction as I yield my time it will go, as I understand it, to Senator Cornyn. OK.

I yield my time.

CORNYN:
Thank you.

I would thank you my colleague and who I work with on a number of important matters; we're working on some important prison reform legislation, demonstrating that dysfunction has not taken over everything here in Washington, that we can actually work on things, even though we have other differences.

But I just have to -- I just have to disagree with him. And I guess he disagrees with himself because while he criticized the criticism of Attorney General Holder, he seemed to recall with great clarity the problems with the Bush Justice Department that he -- or at least the things he disagreed with.

So -- but that's the great thing about the United States Senate and about our great country, where all of us ought to be free to express our views without fear, certainly of government intimidation.

And, Ms. Engelbrecht, I'm glad to see you personally. But I find your testimony once again chilling and I admire your courage. And it can't be easy for a citizen to fight their government with all the vast resources arrayed against you. And I have -- I just want to assure you are not alone.

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And Senator Hatch, who's chairman of the Finance Committee, which has jurisdiction over the Internal Revenue Service,

he's an honorable man and I know you can count on his commitment as well to get to the bottom of some of the matters that you referred to, with particular regard to the Internal Revenue Service.

So thank you again for your courage and your willingness to stand up to and, I would say, also inspire a lot of Americans who feel like government's gotten too big and too intrusive and has crushing the spirit and the voice of a lot of individual citizens. So thank you for being here.

And Ms. Attkisson, I have to tell you how much -- I'm chilled by what you have to say. When I was in college I was a journalism student before I lapsed into the law and became a lawyer.

But the idea that you would be targeted and surveilled, intimidated or attempt to intimidate you from doing your job -- and I know you are a skewer of power on an equal opportunity basis. I can tell from some of your testimony you are not picking sides but you are trying to do your job.

And it's repugnant to me that government should try to array its power against the freedom of the press to intimidate people like you. And I'm -- I appreciate the fact you are not intimidated.

And I told Senator Leahy, who I partnered with on a number of freedom of information reforms -- he and I are the Senate's odd couple when it comes to that, people who ideologically are bookends and -- but who agree in the public's right to know. And certainly we want to work with anybody who's got a good idea how we can make the system better. And so we -- I'd welcome that opportunity.

I just want to say that Ms. Lynch is -- appears to be a -- an outstanding example of the American dream and somebody who's got a distinguished career as a United States attorney. The challenge is for her and for everybody who takes on a job as a member of the president's Cabinet is you are no longer just a prosecutor.

You are somebody who is responsible for implementing policies, implementing policies of this president. And that has been the subject of a lot of discussion here today.

And, as I told Ms. Lynch privately, you got two choices. You can take the job and implement the policies or you can say, Mr. President, I think what you're trying to do is improper, even illegal, unconstitutional, and quit or not take the job in the first place. I don't see any middle ground on any of that.

And while I have the same reaction to Ms. Lynch's testimony that I had to Sara Saldana's (ph) testimony, who was a United States attorney from Dallas, Texas, who Senator Kay Hutchison and I recommended to the president for appointment, who is now the director of Immigration and Customs Enforcement, I told her the same thing.

You're -- you were a prosecutor. You've done an outstanding job. But now you're going to be in a policy position where you're going to be asked to implement policies that I disagree with and you may in fact disagree with. So you'll be left with that Hobson's choice.

So while I hear some of my colleagues talk about the independence of the attorney general, well, it's perhaps some independence but it really is the independence of one's personal conviction not to cross that line and to be able to tell even the -- somebody as powerful as the President of the United States know when you -- when he's gone too far.

Professor Rosenkranz, what -- I would be interested in your views on whether you think the attorney general can truly be independent.

Well, I don't think independence is quite the right word. The executive power is all vested in the president and that's all it should be. But the president's delegated to the attorney general the function of advising him on legal issues. And that's delegated, again, to the Office of Legal Counsel. And it's crucial for that function to be performed with as much integrity and independence as possible.

At the end of the day, the president can disagree with the attorney general, can overrule the attorney general, can even fire the attorney general. But it's essential for the attorney general to say no if necessary, to say, Mr. President, I've explored every legal option and this is something you cannot do; this violates the Constitution.

CORNYN:

Professor Turley, I know that Senator Grassley asked you questions about your representation of the United States House of Representatives in a lawsuit.

As you probably know there's also a lawsuit pending in Brownsville, Texas, brought by 26 different states, challenging the president's executive action that we've been discussing here this morning.

And obviously any lawsuit that's been -- that is brought, the plaintiff has to establish standing to sue, a claim of harm to them and not to the public generally. I remember that much in my law school (inaudible)...

(LAUGHTER)

But the -- but my point is, the policies of the federal government have a direct and very negative impact on state and local governments and on citizens who live, particularly in border states like mine, where, just not that long ago, we had what the president himself called a humanitarian crisis, tens of thousands of unaccompanied children coming from Central America, drawn by the magnet of a promise that if you can make it here, you're going to be able to stay here, something that a lot of people would like to do.

So I'm not going to ask you to opine about the -- about the merits of that particular lawsuit. The judge there will probably make a decision here in the coming weeks.

But do you see anything inappropriate about people who are aggrieved or suffering harm as a result of the actions by the President of the United States going to court and asking the court to make a decision?

TURLEY:

No, I don't. But I've long been a critic of the current standing doctrines that have been developing over the years. I think Walter Dallinger (ph) put it best. We testified in the House recently together. And he said he had spent his career as a standing hawk. And I have spent my career as a standing dove, in that sense.

I actually believe that it's important to give access to the courts, particularly for states. I think it's rather absurd to say that states have effectively no skin in the game, that they have no injury when you have these federal pronouncements essentially coming down and imposing considerable costs upon them.

And I think that you really see in sharp relief when these states have trouble even being heard on the merits. And so when we look at all of these cases in terms of the effort to keep the merits from being heard, I think that has a really dysfunctional effect. I think that's one of the reasons we're seeing so much chaos is the lack of definition in the separation of powers and these constitutional rules.

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That can be rectified if we give greater access in the courts.

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CORNYN:

Well, of course, from my perspective, coming from Texas, I see the policies of the federal government, particularly with regard to immigration, as having a very direct and real impact on taxpayers and citizens, who are forced to pay the price in terms of health care, education, law enforcement, the like. And they really have no recourse because they don't have the ability to do that for ourselves, something that is committed in the Constitution to the federal government's responsibility.

And when the federal government doesn't do its job, the federal government doesn't necessarily feel those negative impacts. It's people who live in those places like Texas, where it's very real.

I want to just maybe ask one last question, and not -- not to get too far down in the legalese, but Ms. Attkisson. as a result of the investigations that have been done here in Congress on the Fast and Furious gunwalking debacle, we were met with a claim of executive privilege by the attorney general that was then embraced by the president of the United States even though there was no indication whatsoever that the president or high level people at the White House were actually involved in this.

But could you just describe the sort of obstacles that you ran into in the course of your investigation of the Fast and Furious scandal?

ATTKISSON:

Well, some of this, which is already sort of in the public record, when I began covering this story, the Justice Department employees put out internal e-mails that said the story was false and the whistleblowers weren't telling the truth, which we now know, it's been proven, they were, and the Justice Department has admitted it.

But they put out a series of false implications and information along the way. They launched a campaign in my view of calling superiors, bosses, colleagues, social media, using the bloggers that cooperate with them and work with them in some cases directly, to disparage the reporting as if it were not true, repeating the false talking points in many cases.

And it was, you know, an all-out effort to try to chill the reporting and to stop other reporters that might be pursuing it.

You can see from internal e-mails that have recently been released after a lawsuit's been filed, that were withheld under executive privilege, the extent of the lengths to which public affairs officials inside the government went to try to stop this line of reporting on a story that they clearly thought was proving to be very damaging for them.

CORNYN:

Thanks.

I'm advised that another roll call vote has been called on a series of votes that we're having in the -- on the floor of the Senate.

CORNYN:

So, at the request of the chairman, the committee will stand in recess until 1:30.

Thank you.

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GRASSLEY:

~~I want to thank everybody for understanding the chaotic way the Senate's run when we have all these votes and we have...~~
this important issue before us of who should be the next attorney general. So thank you all for your flexibility, as well as my members.

Before we turn back to questions, I want to take a moment to comment on some criticism that we heard this morning from one member on the Democratic side about some of the witnesses who are today in this hearing.

I won't speak for any other member of the committee, but I for one find it absolutely disgraceful how our government has treated some of our fellow citizens, and the Department of Justice, under its current leadership, has failed, really failed to meet some of its most basic responsibilities.

Every single one of these witnesses, every one of them, speaks directly to Ms. Lynch's nomination, because the question in my mind is, as I stated yesterday, "Will she take these flaws seriously? Will she fix them"?

And I note that it wasn't too long ago that Democrats agreed that it was perfectly appropriate to call witnesses to address what they viewed as problems at the department.

So I would note to the naysayer on the other side of the aisle, it wasn't beneath the dignity of the committee when they were in charge, so why would it be now?

And I would make reference to Judge Mukasey's hearing before he was approved to be attorney general. The other side called witness after witness who testified regarding issues that occurred at the department while he was serving as a federal judge in the Southern District of New York.

So, for instance, maybe it doesn't bother you that the IRS targeted conservatives and the department doesn't seem to have taken the issues seriously, but it bothers me a great deal, and I want to know if Ms. Lynch is committed to tackling this problem and a range of others.

Senator Sessions?

SESSIONS:

Thank you, Mr. Chairman.

Office of Attorney General is a big deal, and we need people who are able to take questions, the department is entitled to be criticized, and they're not perfect.

And I love the Department of Justice. I served in it 15 years. I was an assistant United States attorney for over two and United States attorney for 12. And I loved that job, and I loved the people in it, and I so admired this department.

And as I told Ms. Lynch in private conversation, you have to understand the reputation of this great department is being eroded. The situation is not good in this country. It's got to be reestablished. We're not going to allow this to become a political body that just conducts its work in haphazard, political, reactive ways.

And I think Senator Hatch raised one of the questions that still galls me, and that is the failure to defend DOMA, the Defensive of Marriage Act. That was a defensible act, and everybody that's ever been an attorney general or in such an office knows you have a duty to defend the laws passed by Congress.

That's the attorney general's duty, Eric Holder and President Obama failed to do so, and it was shameful and disgraceful and an abandonment of the rule of law, and more and more people understand that.

So I'm not happy about what's happened to my Department of Justice and Mr. Engelbrecht. I think they should be investigating these matters. They haven't yet contacted people in Alabama, and I specifically requested it.

Is this politics? Why not? Don't you go to the victims first -- that's my experience -- and get their story?

Well, Professor Turley, I thank you for your comments on what's happening with regard to executive overreach and congressional weakness. I think it's a -- I know we all -- you know, I don't deny that I'm a Republican conservative, but I believe this is not just a partisan matter.

I mean, this is a huge erosion of constitutional powers of the United States Congress when the president of the United States, in contradiction to law, gives lawful status to people who are here unlawfully under the law and not only that, creates a Social Security number for them, a photo ID and an authorization to work and a right to participate in Social Security and Medicare. This is a stunning event, and we are in denial here, a lot of people, about the seriousness of it.

I -- I wanted to ask you about your testimony in the House. You say that, quote, "The center of gravity is shifting, and that makes it unstable" -- and you're talking about the separation of powers -- "and within that system, you have the rise of an uber presidency. There could be there could be no greater danger for individual liberty, and I really think that the framers would be horrified by that shift, because everything they've dedicated themselves to was creating this orbital balance, and we've lost it.

"It's not prosecutorial discretion to go into a law and say an entire category of people will no longer be subject to the law. That's a legislative decision."

And you go on in great -- that's just a portion of -- of your, I think correct, dissection of the fundamental issues at stake.

Would you -- I guess you stand by that? You have any further comments you'd like to make on that subject?

TURLEY:

Well, I certainly do stand by it.

The -- the interesting thing about the Madisonian system that we have is that -- is the three branches are effectively locked in an orbit like three bodies. In fact, the interesting thing about Madison is he was fascinated by -- by Newton and the types of -- of way that -- that bodies would interact. And our system reflects that.

And what happens is if you have a tripartite system that's based on a principle of balance and then you introduce a dominant branch, it doesn't just fall out of kilter; it creates a very dangerous circumstance.

There are many legitimate questions that come out of the constitutional convention, but the one thing that returns over and over again is the collective view of the framers, federalists and anti-federalists, that the thing we have to fear most in this system is the rise of a concentration of power in one individual. And they knew a lot about it, because they had just gotten rid of a person who had that type of concentrated power.

SESSIONS:

King George.

TURLEY:

Exactly.
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SESSIONS:

And I had the Congressional Research Service look at that, as a matter of fact, and they concluded that King George III, by... the time -- at the time of the American Revolution, was unable to enact or repeal any laws without the approval of Parliament. And this was the heritage that we had from the British, and that's what part of the revolution was about.

It's a fundamental principle in the formation of our government, that the executive does not get to make laws.

Well -- now, I appreciate that. Professor Rosenkranz, briefly if -- if you don't mind, do you agree with that, that we are at -- I think Professor Turley once said -- a tipping point in the question of executive and legislative power and it's a matter of grave importance to the republic?

ROSENKRANZ:

I think it's certainly a matter of grave importance, and I think we have seen dramatic examples of executive overreach in the last several years, things that are unprecedented, things we've never seen before.

SESSIONS:

Well -- and do you agree with Professor Turley that one of the most significant overreaches is -- is the president's executive actions with regard to amnesty?

ROSENKRANZ:

Yes, I absolutely do. I think it's inconsistent with his obligation to take care that the laws be faithfully executed, in particular, the Immigration and Nationality Act.

SESSIONS:

Well, it seems to me that they're arguing that "take care that the laws be executed" means you have to do the best you can to enforce the laws under the circumstances, which has some legal basis. But in truth, don't they go well beyond that and create whole new laws that not even are on the books and they're not authorized to do that, are they?

ROSENKRANZ:

You're quite right. This action looks a lot more like a legislative action than like executive discretion.

LEGOMSKY:

Senator, may I jump in and comment on that, please?

SESSIONS:

Yes.

LEGOMSKY:

Thank you. We've heard a lot of very broad general statements to the effect that separation of powers is important, which of course it is; that the president is not above the law and of course he is not.

But I've yet to hear any specific rebuttals to the points that I was making earlier about the specific sources of authority that Congress has provided. We do have this legislation which specifically says it is the responsibility of the Secretary of Homeland Security to establish, quote, "national immigration enforcement policies and priorities," and not only that, but Congress has specifically directed the administration to prioritize three things: border security, national security and the removal of criminal offenders.

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And those are precisely the priorities reflected in the recent executive actions. <https://www.whitehouse.gov/the-press-office/2017/01/25/e-o-13767>

SESSIONS:

Well, I appreciate that. But I don't agree. Congress laid out 500 pages of detailed law involving immigration. Many of them are mandatory. And they're not being followed.

And then we had the -- yesterday, Professor Rosenkranz, I asked Ms. Lynch, who has more right to a job in this country, a lawful immigrant who's here, a citizen or someone who entered the country unlawfully. And her answer, I believe that the right and obligation to work is one that's shared by everyone in the country regardless of how they came here.

And certainly if someone is here regardless of status, I would prefer they would be participating in the workplace.

Do you think that contradicts immigration law of the United States?

ROSENKRANZ:

I do think this work authorization aspect of the president's action is perhaps the most troubling aspect of it. You know, the traditional view of prosecutorial discretion is inaction. It's the president deciding not to do something to someone. But this affirmative action of giving folks permits, that's something that's unheard of to traditional prosecutorial discretion.

SESSIONS:

I agree with that as a prosecutor. I know what prosecutorial discretion is. Everybody that has to deal in the real world uses that on a case-by-case basis.

And I further asked her, I want to have a clear answer to this question, Ms. Lynch, do you believe the executive action announced by the president on November 20th is legal and constitutional, yes or no.

And Ms. Lynch said, as I've read the opinion, I believe it is, Senator.

So we're being asked here to consider her nomination. Mr. Rosenkranz, when we decide who to vote for in the United States Senate, to confirm somebody to the United States Congress, you think it would be improper for the voting body, the United States Senate, to consider whether or not we believe that person will be an advocate for and a supporter of laws we think are unconstitutional and offend the policies Congress has established, should we consider that when we decide who to vote for?

ROSENKRANZ:

I think it's absolutely the sort of thing that you should be considering, yes.

SESSIONS:

Well, I do too. And I don't -- I don't -- I am -- I believe Congress has a duty to defend its legitimate constitutional powers. It has several powers of its own. One of them is the power of the purse and one of them is the power of confirmations.

I don't see any need for this Congress to confirm somebody to be the chief law enforcement officer of this nation who is at that table insisting that she intends to execute a policy that's contrary to law and to what Congress desires and what the American people desires and says that someone here unlawfully is as much entitled to a job in this country as somebody here who is here lawfully.

It's just beyond my comprehension.

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Can't we see the plain fact?

So everybody wants to talk about the politics. Well, the president can do this, he's shutting down Homeland Security, all these complaints. But the real question is fundamental.

What are we going to do to defend our constitutional heritage and what will this Congress be able to say to subsequent Congresses if we acquiesce in these kind of activities?

I think it has permanent ramifications for the relationships of the branches of government.

Mr. Chairman, you've got a meteoric rise there. I'm (INAUDIBLE) --

(LAUGHTER)

(UNKNOWN)

-- I'm impressed.

But I got to say, no one could handle it better. I'm proud of you.

I'm over my time. Thank you very much.

LEE:

Thank you much, Senator Sessions.

And thanks to all of you for joining us today. I deeply enjoyed your testimonies this morning before we had to go and vote. So thank you for being here, thank you for sharing with us your opinions which are helpful and informative.

I want to begin my remarks just by commenting on some concerns that I've heard expressed from my colleagues on the other side of the aisle. Some have suggested that what we really ought to be doing here should be focused almost exclusively on Ms. Lynch's impeccable public service record and on the fact that she has served her country well, has served her clients well, that her resume is not just amazing but that it's extraordinary. And it absolutely is.

But we ought to be focused on those kinds of qualifications and that we ought not be focused on the Department of Justice and on some of the things that are going wrong with it.

I have a somewhat different view of that in that I think both are relevant. For example, if we were running a company, if we were running a business and we were looking for a new CEO, if we were looking perhaps more appropriately for a general counsel, we would probably want to know what someone's view of the organization as it existed might be.

We would probably want to know whether that person acknowledged the problems within the company, whether they were legal problems or other types of problems that the company faced.

So I think we're kidding ourselves if we suggest that we shouldn't ask a nominee, someone who has been nominated to be the attorney general of the United States, about problems existing within the U.S. Department of Justice. I think that's absolutely essential and previous hearings in this committee have borne that out.

Previous hearings in this committee, where, for example, this committee reviewed Michael Mukasey, after he was nominated to be the attorney general of the United States in the last presidential administration, I think those hearings bore that out.

Q Yesterday we heard from Ms. Lynch. I'm very impressed with her legal abilities, with her analytical abilities. Very impressed with her resume and her strong record of public service.

I was, however, very disappointed yesterday in the fact that in response to many hypothetical questions that were asked of her, we didn't get a straightforward response, particularly when it comes to excesses of executive power, particularly when it came to questions about prosecutorial discretion and so forth.

For those of you who may be watching this hearing who weren't burdened with a law degree, hypothetical questions are the bread and butter of the American legal education system. To a very significant degree, especially in appellate litigation, they are the bread and butter of the practice of law.

One thing that I think all of us were taught in law school is that even when you don't want to answer a hypothetical question, even when it doesn't have an easy answer, you need to try to answer the question. If you don't, the judge will be very unhappy.

I was disappointed yesterday that when I asked some questions of Ms. Lynch, she refused to give me a direct answer. In an attempt to try to elicit an answer from her, I made the hypothetical increasingly simpler, increasingly clearer, asking questions like the following. Imagine a hypothetical state in which there is a 55-mile-an-hour speed limit. Imagine that the public is crying out for relief from that law. There's pretty widespread agreement that the speed limit ought to go up at least to 65, maybe to 75. And that within the legislature there is also widespread support for that.

But the legislature can't agree on the exact speed limit to which it ought to be increased. So the governor, seeing an opportunity, then says, well, I'm just going to come out with a new policy. My policy's going to say, if you want to exceed the 55-mile-an-hour speed limit, all you need to do is write to the governor's office and I will send you back a permit, a permit that says, for the next three years, while I'm the governor, I will not give you a ticket if you drive faster than 55 miles an hour, as long as you don't go faster than 75.

And I asked Ms. Lynch, would that be appropriate?

Would that be consistent with the rule of law?

Would that be an appropriate exercise in prosecutorial discretion?

I did not get what I perceived to be a direct one-word answer out of that, nor did I get a five-word answer out of it. I didn't get an answer that I thought was satisfactory.

What I did get was a response that said, "I'd really need to know more about that." But the more facts I added to the hypothetical, the more assumptions I added to it, it didn't seem to make a difference.

So let me start by asking two of our professors that we've got here, Professor Turley and Professor Rosenkranz, is that, in your opinion, a difficult hypothetical question, such that if a student in either of your classes refused to answer that hypothetical or said it was too hard, would that be an appropriate answer that you'd accept in your class?

TURLEY:

I -- no, I wouldn't accept it. I think that it is a straightforward question.

I also think the question of whether I -- what the rule would be for the defense of federal statutes yesterday was also a question that should be able -- that someone should be able to answer.

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Lee commended you, Senator, on your view of confirmation hearings. Too often, people talk about these hearings as sort of... job interviews where you just look at the credentials.

These hearings have a very significant role for separation of powers. As agencies become more independent, this is the moments that Congress tends to get answers to questions, is when you're looking at someone who will head the agency.

And as I've said in my academic writings, it's -- it's not often enough that senators use these hearings to try to rebalance or at least get answers from agencies, particularly one like the Department of Justice that has been so difficult to get material or answers from.

LEE:

I -- I -- I appreciate your thoughtful response to that, and I went to get back to that in a moment.

I have just been informed of an error. No sooner had I taken the temporary gavel in this committee hearing than I discovered that Senator Blumenthal was actually supposed to be next at bat. So my apologies for the error.

We're going to push -- pause on -- on my questioning, and as soon as Senator Blumenthal is -- is ready, we'll turn the -- the floor over to him, then we'll resume with me in a moment.

Senator Blumenthal?

BLUMENTHAL:

I really appreciate that, Mr. Chairman.

LEE:

My apologies for the error.

BLUMENTHAL:

Like our friend, Senator Sessions, I applaud your meteoric rise, within limits.

(LAUGHTER)

LEE:

Thanks for the clarification.

BLUMENTHAL:

But thank you for your -- your courtesy and your deference.

I'd -- I'd like to ask Professor Legomsky to expand or explain a little bit why the examples involving enforcement of the speed limit may not be really a -- an exact or valid comparison to what we have here.

LEGOMSKY:

Thank you, Senator.

I think it's a fair hypothetical to throw out, but I definitely feel that there is no simple answer, mainly because there are two pieces of information we would certainly need.

The big thing is that every statutory structure is different, and so the first thing I would want to know is, what does the state

In the case of the executive actions we're comparing it too, for example, again, as I mentioned earlier, Congress was very specific. It gave the secretary the explicit authority to establish national priorities and policies and in addition, even indicated what those policies and priorities are.

In addition to that, the other point I would make is that it matters what the particular priorities are. They have to be rational in one way or another.

I think most Americans, if asked, would say, "The president's priorities look like pretty much common sense to me."

He's prioritizing national security, border security and removal of criminal offenders over the destruction of American families, the destruction of long-term community ties, people who have otherwise lived peaceful and productive lives in the United States. And since you can't do everything, because the resources are limited, those strike me as reasonable priorities.

Why would you ask the same question with respect to the speed limits, has the governor made a reasonable choice?

BLUMENTHAL:

So maybe the comparison would be more like the governor of Utah deciding that on a flat straightaway in the middle of the state, that going over the 65-mile-an-hour speed limits would not be enforced unless the person was doing something in addition dangerously, like weaving back and forth, but in more congested areas, that the 65 speed limit would be enforced rigorously, in other words, defining other characteristics, not just saying, "We're not enforcing that law."

TURLEY:

I think that's an excellent point, Senator, (inaudible) and that is very analogous to what the president has done with his recent executive actions, because as you know, both the prosecutorial discretion memo and the recent DACA/DAPA memo draw all kinds of fine gradations. That, I think, accommodates the point that you were just making.

BLUMENTHAL:

And just to clarify, there has been a suggestion that the president's exercise of discretion does not permit case-by- case decision making, in other words, that it is a broad, across-the- board exception for all cases.

But in fact, what the president's doing is really an exercise of -- of delegation of discretion, prosecutorial discretion, for case-by- case decision making.

Is that a fair characterization?

TURLEY:

I think that's a very fair characterization.

I'm thrilled to have the opportunity to answer that question, because that's something that has concerned me a great deal about some of the criticisms that have been offered.

The secretary's memo says not once, not twice but over and over again that officers on the ground are instructed to look at the facts of each individual case, to evaluate them on an individualized basis and specifically to exercise their discretion.

Not only that, but as I mentioned this morning, the form that the USCIS adjudicators are required to use when they deny a DACA case lists the possible reasons for denial, and it specifically (inaudible) exercise of discretion.

There was one other thing I was going to mention, and that is that if anybody doubts that these instructions are actually being obeyed, more than 32,000 denials have already occurred on the merits. This doesn't count things that are rejected at the -- at the lock box for a failure to pay a fee; these are actual denials on the merits.

And must say -- I hope this doesn't sound snarky, because I really don't mean it that way -- that I worked at USCIS for two years, and I can assure everyone in this room that the USCIS adjudicators are not a core of open-borders advocates who are looking for ways to systematically disobey the secretary's explicit instructions; they take their job seriously, and they do exercise the discretion the secretary has told them to.

BLUMENTHAL:

I -- I appreciate that clarification.

Of course, I -- I would invite any of the other panel members to disagree if they wish to do so. But before my time expires, I'd just like to clarify a point that was made earlier by my colleague and friend, Senator Sessions.

Loretta Lynch, I think, yesterday, clarified that she does not believe there is a federal right to work for immigrants who are not in a lawful status. I believe that the record will show that she did clarify that point.

And with that, if any of the other panelists want to comment on the question that I raised earlier, I would invite you to do so.

And thank you for your explanation, Professor.

ROSENKRANZ:

Well, Senator, I guess I'd just say I think the proof is going to be in the pudding, but people have looked at this -- the structure of the proposed policy, it appears that the -- the case- by-case discretion that's built into this policy is -- may well prove to be largely illusory.

BLUMENTHAL:

And I think you have just really hit it on the head. You just really hit it on the head, that the proof will be in the pudding as to what actually is done, as it is for every prosecutor.

As a U.S. attorney, as a state attorney general, if I had decided I was not going to enforce any law, rightly, I would've been criticized. And the proof will be in the pudding in the same way as I had to make prosecutorial decisions -- as -- as every former prosecutor is a member of this panel, and at least one is here now -- it will be in what the record shows.

And we don't disagree if, in fact, the result is to make an across-the-board, wholesale, unexceptional rule, that would be wrong. If the president decides as a matter of of his discretion that across the board, this -- these laws will not be enforced, I agree with you.

And when you say it's illusory, it will be -- the proof will be in the pudding.

ROSENKRANZ:

Well, Senator, I do think we can try to evaluate the proposed policy just on the terms of a proposal, and I think there's reason for skepticism, even as the -- as the policy has been proposed.

But you're quite right. The facts will develop on the ground.

Thank you, Mr. Chairman.

LEE:

Thank you very much, Senator Blumenthal.

OK. Let's sort of pick up where we left off.

I want to respond, first of all, to a couple of those points that I think are relevant.

With respect to the straightaway in Utah, I mean, this is somewhat familiar to us. We have these salt flats in Utah where they take cars out that can go hundreds of miles an hour. I assume he means a straightaway on a -- on a -- on a -- an actual state road, but there is a difference between deciding not to post a police officer there and issuing a permit saying you may exceed the speed limit and if you are caught going, you know, up to 75 miles an hour, even though that's in excess of the lawful posted speed limit, you will not get a ticket. There is a distinction there.

There is, moreover, the fact that another hypothetical question that I brought up that I was disappointed that she didn't agree to address head-on was one involving a hypothetical future president, maybe a Republican, maybe a Democrat, I don't know, but somebody who decides, you know what, I don't like our top marginal tax rates and I think it's morally wrong to enforce a marginal tax rate above 25 percent at the top marginal rate. So I'm going to issue a series of letters to people who request them, saying you can pay at the 25 percent rate and no higher and nothing's going to happen to you.

I agree moreover, Professor Legomsky, that something more like the answer that you provided would have been helpful. I didn't have even that and had she provided that answer, we could have then gotten into a deeper discussion about whether or not Congress has in fact done this and whether or not Congress did in fact, based on an analysis of the text, create something that could create an exception to allow many, many millions out of the, I don't know, 11 million or 12 million people who are estimated to be inside the United States illegally. Did Congress really create something that could create an exception that potentially swallows the rule or comes very, very close to it?

Let's turn now to Professor Rosenkranz. You haven't had a chance to chime in on this issue. Tell me what you think about my hypotheticals.

What would you do if somebody in your class refused to answer it?

ROSENKRANZ:

Well, I was just going to say, Senator, I think your tax hypothetical is exactly right and indistinguishable from the current situation. I do not understand a principled way on which to distinguish those two cases. I would think a Republican president would be absolutely within his rights to cite this precedent and do as you suggest if this were constitutional. I think it isn't.

I, Senator, actually clarify, they were more demanding at G.W. than at Georgetown in terms of how our students answer questions. So you have to put that into your consolidation.

LEE:

Good. Good. I hope you make that clear in your applications to law school --

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-- about how demanding you are. Everybody hates, especially in their first year of law school, to get called upon in class.

Another point that I think deserves to be mentioned here is that within this framework, there has been discussion of the fact that there remains some discretion on the part of our immigration enforcement authorities in this country, even after the November memorandum, even after DACA and DAPA and so forth.

It's different than the way prosecutorial discretion normally works and the way prosecutorial discretion normally works is that you say, we've got finite resources. We're not going to prosecute everybody. We're going to sometimes not do it because perhaps we think the circumstances of the case don't trigger any kind of moral outrage and we're just not going to go in that direction.

There's also just a -- the practical reality that, in fact, you're not going to be able to get everybody. But that operates as an exception to the normal rule that, if you break the law, you can expect the prosecution is at least some possibility.

Whereas here, even to the extent you can say that there might be some discretion to decide not to enforce the law, they still make clear these presidential -- these executive decisions still make relatively clear that they intend, as long as these criteria are satisfied, to not enforce the law, that they're not going to enforce the law. And they do issue documents saying you may work.

And so I refuse to accept this as just an act of either ordinary, garden-variety prosecutorial discretion and I also refuse to accept as a -- as an article of faith the fact that Congress would have ever, would ever or did in fact in this circumstance give so much discretion to the President of the United States, to the attorney general, to the Secretary of Homeland Security so as to create a loophole that could swallow a very substantial chunk of the entire rule.

This is -- this is not consistent with the way the Constitution of the United States has historically functioned. And getting back to how I opened, I do think that these are relevant questions.

Yes, they are different in kind than the kinds of questions that deal with someone's resume or someone's professional qualifications, but we're looking here at a very specific kind of job, at someone taking the role as attorney general of the United States.

We have seen -- we've heard testimony from several of you today that this is a department that has some real serious problems right now, problems that really make the hair stand up on the back of my neck sometimes.

And that was reiterated today with some of the testimony that I heard. And so I walked into that hearing yesterday, wanting, hoping, frankly expecting to really like Ms. Lynch -- and I do like her. And she met with me in my office before the hearing and I liked her.

I expected that I might be able to go either way on this, that I might well end up supporting her. I did not feel comfortable at the end of the day yesterday with the idea that I could vote for her because of the fact that I didn't get answers to questions that I find very troubling.

And I found it somewhat cavalier answer, a somewhat cavalier response to suggest that she needed more facts, when some of these were very basic questions.

I see my time has expired.

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And unless -- do we have any Democrats here on...

Just making sure we didn't have anybody in the anteroom.

<http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

I'm told that Senator Cruz is next at bat.

CRUZ:

Thank you, Mr. Chairman.

I want to thank each of the members of this panel, a very distinguished panel to come together and address some very important issues facing this country.

I want to, at the outset, extend my apology that, earlier in the hearing, the senator from Rhode Island characterized the testimony that we have heard from witnesses on this panel as quote, "conspiracy theories and sound bites for FOX News."

I don't think that's an accurate characterization of the learned testimony that this panel of witnesses has given to this panel and I apologize that you are subjected to having your character impugned by that in that manner by a United States senator.

I think this panel has focused on some very important issues, issues that need to be highlighted. I would note that Ms. Engelbrecht is a constituent of mine and a friend; I have long thought highly of your commitment to public engagement, your volunteer efforts to make a difference in our political discourse.

And I wanted to ask you, as a citizen who engaged in the political process, how did it make you feel to be targeted by the government for persecution?

ENGELBRECHT:

It takes your breath away when you don't know quite where true north is.

And it begs the bigger question, what is this country really and where am I raising my children, where is their safe harbor?

And that's why I think that this panel and these questions that we're discussing here today are critical. We have to understand what we have just come through, that we're still in, if we know where we want to head. And I hope we want to head in a decidedly different direction.

CRUZ:

Now it was some decades ago that President Richard Nixon attempted to use the IRS to target his political enemies. He did not succeed in those attempts, but he was nonetheless roundly decried in a bipartisan manner.

In this instance, the attempt sadly bore fruit. And it's been well over a year since the news broke.

Let me ask you, Ms. Engelbrecht, do you feel in the -- over a year that's transpired, do you feel that the truth has been uncovered and that justice has been served?

ENGELBRECHT:

Oh, no. Absolutely not. Just the fact alone that I have still not been interviewed or met with, nor have any of the other groups that I know of that were part of this targeting scandal.

How you can continue on under this ruse that that is ever going to arrive at any kind of conclusion is mystifying to me. And we seem to continue to find more and more evidence and it continues to get further and further buried until I guess they hope people just forget. And that's why I keep showing up. I hope they don't forget.

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CRUZ:

You know, yesterday I asked Ms. Lynch if she thought it was appropriate to have the Department of Justice investigation into the IRS targeting an abuse of power led by a major Obama donor and Democratic donor who's given over \$6,000 to President Obama and the Democratic Party.

And she said she found nothing objectionable about that, and she flat out refused to appoint a special prosecutor, much as Eric Holder has refused to appoint a special prosecutor.

I mean, let me ask you, as a citizen, do you have faith in the impartial administration of justice with an investigation being led by a major Democratic donor?

ENGELBRECHT:

I -- I take so much exception to that appointment and to the -- the -- the way that -- that that division has conducted itself that I quite frankly don't even know where to begin.

Yes, I think that there's an awful lot wrong with it, and it's just sad that they're not held to account to -- to explain their actions.

ROSENKRANZ:

Senator, I might just mention a constitutional dimension of this particular scandal.

Discriminatory enforcement would've horrified the framers, and this kind of discrimination would've fortified them more than any other, discrimination on the basis of politics.

The single most corrosive thing that can happen in a democracy is for incumbents to use the levers of power to stifle their adversaries and -- and to entrench themselves. It casts doubt on everything that follows.

So really, it would've been their deepest, deepest concern constitutionally.

CRUZ:

Well, thank you, Professor Rosencranz, and I -- I certainly agree with that observation. And I would note that discriminatory prosecution is often intended to have the effect and in fact has the effect of stifling further speech.

And -- and Ms. Engelbrecht, have you heard concerns of other citizen activists that perhaps they shouldn't speak out or get involved because they too might be targeted?

ENGELBRECHT:

Absolutely.

I mean, the IRS is arguably the most feared agency in -- in possibly the world, and there're an awful lot of folks that just packed up their tents and stop their community organizations because they -- they didn't want to be a party to what they saw unfolding.

CRUZ:

You know, I have to say, it was disappointing yesterday that Ms. Lynch also expressed no concern about the First Amendment rights of citizens about the effect of the IRS targeting citizens' speech and about the effect of both bias and conflict of interest and the appearance of bias, of conflict of interest on the impartial administration of justice.

Want to shift to a different set of issues, which is the pattern of lawlessness of this administration, and I want to focus on a line of inquiry that we had yesterday with Ms. Lynch concerning prosecutorial discretion.

And I want to address this -- this question to Professor Turley.

Let me say, Professor Turley, I -- I commend you for having the courage to speak out about your concerns about the constitutional dimensions of the conduct of the executive. I -- I recognize that that has not been easy for you to speak out, and I suspect you have heard more than a little grief in the faculty lounge for having done so.

So -- so -- so let me say thank you for having the courage of your convictions. I wish we saw a lot more members of this body with similar courage of convictions.

Yesterday, I asked Ms. Lynch if she agreed with the reasoning of the Office of Legal Counsel that under the theory of prosecutorial discretion, the administration could decline to enforce immigration laws against 4 million to 5 million people in a categorical manner and beyond that, could affirmatively issue work authorizations, print documents that purport to authorize them to violate federal law and work in direct contravention of federal law.

Ms. Lynch said that she found that OLC reasoning persuasive. Do you -- do you agree with that assessment?

TURLEY:

I -- I have serious problems with the reasoning for a couple of -- couple of reasons of my own.

First of all, much of what we do when we look at separation of powers is to look for limiting principles.

We're in a system of government that is shared and limited in its nature, and part of the problem that I have with the administration's position on things like immigration is that it lacks that type of limiting principle.

To respond to my colleague, who I have a great deal of respect for, I -- I don't see the -- this as a matter of -- first of all, I'm not too sure if it really does mean what -- what my friend said, why they bothered even saying it, because that would make it just a standard prosecutorial discretion of people who are boots on the ground. I don't know why you would even issue this if it -- if it meant what my friend has said.

But second, if you look at that letter from immigration faculty, as I did, once again, it -- it raised issue, what's the limiting principle?

The letters seem to suggest that as long as you're deporting one person, everything before that point is a matter of discretion. I can't believe that could possibly be true. If that were true, then virtually any law could be shut down except for one case, and you could claim you're just exercising discretion.

I'm -- you know, I -- I do criminal defense work when I'm not teaching, and I think if I went to a prosecutor and said, "Look, I'd like you to basically give my guy a walk, because this whole category that he's a member of really shouldn't be subject to this type of enforcement," I think most would look at me like I had two heads. They certainly wouldn't give me much help on that.

There is a legitimate question of prosecutorial discretion, but this is not one that I recognize. But my concern really as a constitutional scholar is if this is prosecutorial discretion, I don't know what would not be prosecutorial discretion. And this -- this notion that has developed from prosecutors, is not obviously in the Constitution, would swallow the obligations of the president.

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Any discretion that my friend talked about in terms of setting policies and priorities has to be defined within the context of laws... given to the administration by Congress.

CRUZ:

Well, Professor Turley, I -- I very agree, and my time is expiring, but I want to ask one -- one final question, which is -- which is I agree with you that the question is, where do you draw the line? If the president can, through discretion, simply refuse to enforce a major portion of immigration laws as it concerns millions of individuals, what other laws can the president unilaterally refuse to enforce?

And yesterday, I asked Ms. Lynch about a couple of examples.

Number one, could a subsequent president instruct the secretary of the treasury, "Do not collect taxes in excess of 25 percent"?

And number two, I asked, could a subsequent president instruct the Department of Labor, "You shall not enforce any of the federal labor laws on the books against the State of Texas. The State of Texas is hereby immune from every federal labor law that has ever been passed"?

To both of those hypotheticals, Ms. Lynch refused to answer, refused to say what I think is the obvious constitutional answer, which is, "Of course, a president cannot do that."

And so the question I want to ask Professor Turley and I want to give an opportunity for everyone on this panel, anyone on this panel who wants to engage, does anyone on this panel disagree that it would be unconstitutional for the president to refuse to enforce the tax laws or the labor laws or the environmental laws, and if you think that would be unconstitutional, does that not necessarily lead one to the conclusion that the president's executive amnesty is likewise unconstitutional?

Professor Turley, if we could start with you.

TURLEY:

Well, I believe those examples would be unconstitutional if the president claimed that authority.

LEGOMSKY:

I would agree -- I actually agree with both Senator Cruz and Senator Lee that there is a difference between saying, "We simply will refrain from prosecuting," and saying, "We will give you deferred action and a work permit."

But on the specific question that you've asked just now, I do think that a decision to not enforce the entire immigration laws or not enforce the entire tax laws would clearly exceed the president's legal authority. But that's not even close to what we have here.

As I mentioned a moment ago, even after these new policies are fully operational, there will still remain in this country at least -- and this is a conservative estimate -- 6 million to 7 million undocumented immigrants to whom these policies don't apply, and the president still will have only enough resources to go after fewer than 400,000 of them, which means that nothing in these policies will prevent the president from continuing to enforce the law to the full extent...

(CROSSTALK)

CRUZ:
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Let me briefly ask a clarification on your example.

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The reason you said the executive amnesty is constitutional is because there exists some substantial subset of people against whom the laws are enforced.

Well, let's take the labor law example. If Texas were exempted, there'd be 49 states, a whole bunch of people you could enforce the labor laws against.

So -- so would that satisfy the test you just put forth?

LEGOMSKY:

If I understood the hypothetical correctly...

LEE:

Hang on just one second.

In the interest of time, after he answers this one, we're going to have to turn to Senator Franken. We've got votes coming up, so we got to keep moving.

Thank you.

LEGOMSKY:

Yeah, I'm sorry.

I just want to make sure I understood the hypothetical correctly.

And your hypothetical is the president enforcing the law in one state but not in the other states or vice versa, one of the limitations, I think, is that the particular priorities have to be rational and I think the discrimination against the residents of one state would fail that test.

Along the similar lines, my friend, Mr. Turley, says that the law professor's letter was making the claim that as long as even one person is deported, then it's OK. There was no such claim in the letter, which I know very well.

(CROSSTALK)

(UNKNOWN)

-- suggested that.

LEGOMSKY:

Yes. There was certainly no implication in the letter that all you would have to do is deport one. The point the letter makes is that the president is fully spending all the enforcement resources that Congress has provided. But the president is not a magician. He can't spend resources he doesn't have and that's why that example is very different from the ones that have been hypothesized.

LEE:

Thank you very much.

Mr. Franken?

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FRANKEN:

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I want to thank all the witnesses for being here today and for your testimony and your patience. I just want to talk to some of you who know Ms. Lynch.

Mr. Barlow, thank you for your service to the Justice Department and for coming here today to speak on behalf of Ms. Lynch.

As you know, the attorney general must be both an excellent leader and an open-minded collaborator. The attorney general must develop and coordinate policies among the various components of the Justice Department with other agencies.

Based on your experience serving with Ms. Lynch on the attorney general's advisory committee, how would you characterize her leadership style?

BARLOW:

She's a leader among leaders, Senator. I would describe her style as being inclusive, thoughtful, careful, deliberative and she is someone who is seeking consensus wherever it may be found.

I have also seen her recognize that occasionally that consensus cannot be reached and when it could not be reached, making sure that there was space for dissent so that all parts of the issue could be fully examined.

FRANKEN:

Thank you.

Ms. Fedarcyk, thank you for your service to the FBI and for being here today. You served with the FBI's New York office for 25 years, right? And have worked with many U.S. attorneys. In your testimony you noted a wide range of cases that you worked on with Ms. Lynch and the window that this gave you into her legal acumen, her leadership style, her character -- how would you rate Ms. Lynch's performance as U.S. attorney and could you just elaborate on the skills that you have observed that would speak to her ability to serve in the role of attorney general?

FEDARCYK:

Thank you, Senator. And just by way of clarification, I was in New York for two years before I retired. And during those two years had the opportunity to work with Loretta in her capacity as the United States attorney.

FRANKEN:

Oh, sorry.

FEDARCYK:

We undertook any range of significant and complex investigations ranging from national security to the complex financial frauds all the way through the panoply of the criminal violations that include violent gangs and other types of violent offenders.

I had a very close opportunity to observe Loretta during the course of these investigations, but also beyond the conduct of making decisions about cases and timelines for takedowns and the operational considerations, although those were extraordinarily important, clearly, because the symbiotic relationship is such that the New York office and, I would argue, the FBI, writ large, cannot do its job without that kind of symbiotic relationships with the U.S. attorneys.

So my observation of Loretta in that role was that she led from the front; she instilled qualities within her office, gave them

the resources, the opportunities to take on and grow themselves as leaders within the office, but she was not afraid to become intimately involved because she wanted to know what was going on with the cases and not to micromanage.

And I think that's one quality of a true leader, to empower her people to do a great job by backing off a little bit but still staying involved with the cases and knowing what's going on within her office.

I think one of the other characteristics that I noticed that I don't think I see a lot in executives is her ability to understand vertical organization but at the same time develop horizontal relationships, particularly within the community.

So in a very structured environment, she was very comfortable, whether she was talking with an executive or all the way down to, let's say, a BRIC agent or a line police officer, the ability to talk to individuals, make them feel immediately at ease, make them feel that they are actually contributing and she is listening to what she is talking about and what they are talking about.

Likewise, when we talk about the horizontal view across a community, she was very engaged with not just the law enforcement community from local, state, tribal, federal, but also the communities that we were serving.

And again, that leadership of leading her office to understand the concerns of these communities was integral to supporting the successes of the offices.

So I think she brings a lot of --

(CROSSTALK)

FRANKEN:

I want to ask you about that because that's about in community engagement. So let me ask you about that style. I think that's very important with the U.S. attorney. I see how important it is in Minnesota.

What was her style of engagement in terms of the community?

FEDARCYK:

Very engaged and someone who was not afraid to engage many different community groups and have very frank discussions about concerns and issues, giving everybody an opportunity to provide input. And that, I think, is incredibly important because understanding the community you serve is part and parcel of representing the system of justice and making sure that, if there are disparities in those communities, if there are issues in those communities, that you understand what they are so that you can help drive change to make the system of justice better in addressing those concerns.

With respect to the law enforcement community, she was actively involved in many of the task forces, very supportive of them as a concept that brought departments and agencies large and small together to tackle entrenched crime issues, terrorism, and would personally attend executive briefings.

And her philosophy was that we were all in this together, that it was incumbent on law enforcement across the board to work shoulder to shoulder to really protect this country and to tackle issues that no one agency could do by themselves.

So I personally thought that her leadership skills were outstanding. I viewed her as somebody that I could go to for sound judgment, as a sounding board and receive sage and reasoned advice in return.

FRANKEN:

Reverend Newsome, I'm getting the picture of a very impressive leader with those kinds of impressive skills, but you came

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and testified today, I think, on where that comes from in a moral sense. <http://www.cq.com/docag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

Can you speak to where that comes from in terms --

(CROSSTALK)

NEWSOME:

Well, I think I can, Senator. Thank you, Senator, for the opportunity. Let me try to be as succinct about this as I possibly can.

And, Senator Sessions, glad to be reunited with you. We worked on a church burning project some years ago when I was dean of the Howard School of Divinity, very effectively Thank you.

But the word "impressive" doesn't get it. She is a rare individual. I study people from the standpoint of a religious biographical perspective so that when you begin to look at what I might call at this point in time the genius of character, you try to sense if it has come down through the generations.

I mentioned in my written statement that her grandfather was a Baptist minister, but three grandfathers before then. And they served their congregations and their communities with daring, with distinction and, above all, wisdom.

And that wisdom was born of depth of insight into human nature as to how leaders should best behave and be effective in garnering a following and leading them in a way that works for the good of all.

Loretta -- and I have seen this throughout the years -- is the kind of person who can relate transparently enough to inspire trust and confidence and so that you don't have to work a long time, wondering if what you are seeing is truly honest.

And this plays its way out in the sense that she's a due diligence kind of person. I understand the hypothetical kinds of issues and questions, but my own background as a scholar would say, well, at best, a hypothetical only approximates a real-life situation. And in a real-life situation, character really comes forth when you do the kind of due diligence that puts you in a position to make the quality of judgments that makes for a positive difference.

This is in her bloodline. This is in her spiritual DNA. I don't know if her father is still in the room, but I can tell you that it has played out in the way that he has provided leadership in North Carolina, whether he had to stand alone or stand with 1,000, it was the truth, the truth, the right thing, and the right thing, and character, and character, and character over again.

I don't want to trivialize this process by using a sports metaphor, but I am an old, broken down football player that played at Duke when we were still winning games.

FRANKEN:

And that was quite a while...

NEWSOME:

Quite a while ago.

(LAUGHTER)

But, you know, we tend to think in terms of a franchise kind of player. She is an exceptional human being, and I cannot -- I cannot avoid the sense of passion I feel right now for the good that would come to our nation in having a person who would be good, absolutely superb, in even healing our nation through the responsible discharge of her duties as the U.S. attorney general.

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FRANKEN:

So you would be for her?

NEWSOME:

I will be mildly for her.

FRANKEN:

Obviously. Although, you cheapened it with a sports metaphor, that was very powerful testimony. Thank you.

Thank you, Mr. Chairman.

ACTING CHAIR:

Thank you, Senator Franken.

Senator Sessions?

(OFF-MIKE)

SESSIONS:

Thank you for recalling for us that a lot of people we have disagreements with can be wonderful people. And I do sense that about her. And I told her -- well, while I was talking to her brother, I believe, but she was raised right. I can tell that.

And so, sometimes you just get caught up in things. Issues become big, and an individual becomes the focus of a controversy.

Sheriff Eastman, thank you for your -- not Eastman, Clarke -- Sheriff Clarke, thank you for your leadership.

And I had here, right in front of me -- and I have it now -- a piece put out just some time ago, saying that there were 36,000 convicted criminal aliens in detention that were released, And that group of people convicted were convicted of crimes such as homicide, sexual assault, kidnapping and aggravated assault.

And I noticed one individual was just arrested for murdering a 21-year-old convenience store clerk in Mesa, Arizona, on January 22nd of this year after having been in ICE custody on a drug and gang- related felony burglary conviction, but was released on bond after a few days.

And if you release 36,000 people who've been convicted of crimes, based on your experience in law enforcement, can't we expect that they would -- group is likely to commit the kind of crimes I just mentioned? Isn't that pretty predictable?

CLARKE:

Thank you, Senator.

Yes, if for no other reason because of the recidivist nature of crime regardless of what demographic is involved with that, I would say releasing 3,600 into communities that don't have the support structures is at best dangerous policy. You know, like I said, they don't have the support structures in place.

And then the thing about the -- we start talking about the criminal aliens, the first thing they're going to do is flee. It's the first thing they're going to do.

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My experience in working with ICE. We don't enforce immigration law, but we do cooperate with federal agencies in the

Department of Justice, like we do any other federal agency, but the -- they come with many aliases, difficult, and it takes a long time to identify them, but they realize the individual that's released on bail, they realize that it's in their best interest to flee. And then they turn up in another community.

Or, I'll just speak to Milwaukee county. We've had those same horror type stories, of individuals who have been brought to ICE's attention, and for whatever reason, they decided not to put a detainer on them or had a detainer and released it. Individual is let out on bail and then goes on to, you know, engage in even more heinous acts.

And, sure, the easy ones, Senator, are the ones who are involved with murder, sexual assault. You know, those folks are probably not gonna get out on bail. We don't have to worry too much about them. But...

SESSIONS:

Well, this report indicated a number of them, like 193 of the 36,000 that were released included -- were homicide convictions.

So you're right to assume that serious crimes it would be almost unbelievable that they were being released, but data shows that a lot of them are the most serious crimes that are being released.

CLARKE:

Yeah, I think sometimes some of the reports or some of the rhetoric used in a discussion is on the lenient side. You know, they call them "low-level offenders," but some of the stuff that I see that they've involved with are not literally low-level offenders.

SESSIONS:

Well, Sheriff Clarke, let me just say, you're responsible for protection of people in Milwaukee and that area. And the federal government -- the federal statute says someone convicted of a serious felony "shall be deported." It doesn't say that ICE has an opinion about this. It says they shall be deported.

Does it make your life more difficult. does it place the people of Milwaukee at greater risk if the officials are not following the law and deporting people who have been convicted of serious crimes?

CLARKE:

Sure it does. In my limited knowledge of legal language, "shall" is not discretionary. So, yeah, I find that problematic when that happens.

SESSIONS:

And you -- and so, don't you think it's common sense and just that if a person is in the country illegally and on top of that, they commit a serious crime, they should be deported?

CLARKE:

Yes. I think it's beyond common sense. I think it's -- we have a duty -- a duty to protect people.

SESSIONS:

And the law, of course, requires that. And it's just too often not being followed in an effective way.

LECOMBSKY:

Senator, may I just add...

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SESSIONS:

Yes?

LEGOMSKY:

... that I think Sheriff Clarke has just made one of the strongest arguments in favor of the president's executive actions. The main point of the new prosecutorial priorities is to be able to focus resources on precisely the individuals whom he is describing, and hopefully it will have that effect.

I don't know in this case why the state authorities released a person if it was -- if it was while the person was pending trial. They must have thought that it's safe to release them. So I'm not sure why the onus is shifting to ICE. But that aside, this is what the administration is trying to accomplish.

SESSIONS:

Well, this isn't a matter of discretion, Mr. Legomsky. I know you served with the USCIS. This part of it is mandatory, is the point I'm raising. We're entering into an utterly lawless system here. Nothing Congress passes, apparently, has the ability to be effectuated in reality.

That's the problem. Congress will pass things, and they don't happen. We mandated a fence 700 miles. It didn't happen. We said there should be an exit-entry visa, which the 9/11 Commission has hammered us for not completing as law required, and it still hasn't been completed.

I just -- the -- are you aware that the group that you work with, the Federation of Government Employees, who represent USCIS, has opposed this bill vigorously?

LEGOMSKY:

Yes.

SESSIONS:

And say it will not work, and is not helpful?

LEGOMSKY:

Well, this is the very same group whom some people are suggesting will refuse to obey the secretary's instruction to exercise discretion and will instead rubberstamp these cases. So I think...

SESSIONS:

Well, let me ask you about discretion. That's a Professor Eastman in his testimony before the House on discretion says there is nothing in the present -- in the memo to suggest that immigration officials can do anything other than grant deferred action to those meeting the defined eligibility criteria.

Indeed, the overpowering tone of the memo is one of woe to align immigration officers who do not act as the memo tells them they should, a point that has been admitted by the Department of Homeland Security officials in testimony before the House.

And in the House, the -- Chairman Goodlatte of the House Judiciary Committee said, quote, "DHS has admitted to the Judiciary Committee if an alien applies and meets the DACA eligibility criteria, they will receive deferred action. In reality, the immigration officials do not have discretion to deny DACA applications if the applicants meet these criteria." 7/25/16, 7:21 PM

And I think Professor Rosenkranz, you indicated it might be an illusory thing here. <https://www.fda.gov/ocag/H4sIAAAAAAAAAAEvOz0svSi0uzs...>

Isn't that proof that that really -- it is illusory discretion; in fact, it's mandatory?

ROSENKRANZ:
Absolutely.

LEGOMSKY:
Oh, the memo says precisely the opposite, Senator, with respect. It says that these are cases that, quote, "present no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate."

And then --

(CROSSTALK)

SESSIONS:
Well and there's --

LEGOMSKY:
And that very end, there's even more explicit wording.

"The ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."

So the memo refers explicitly to discretion.

SESSIONS:
Senator, we said we're going to do an exit-entry visa and it's not. The truth is that the officials are going to approve the people if it meets the DACA or meets the memorandum standards.

ROSENKRANZ:
The important thing to notice is that it flips the presumption, right. The presumption is that the law will not be enforced and somebody might have discretion to enforce the law in a particular case, but this is turning prosecutorial discretion on its head. The presumption in general is that law will be enforced and discretion will be used to exempt some to create an exception to the rule. Here the enforcement is clearly going to be exception to the rule if it happens at all.

LEGOMSKY:
Except that the entire deferred action memo is the exception. Right? The norm is that you do get deported if you fall within one of the deportability grounds. This memo lays out an exception. If you meet the following criteria, then USCIS officials would have the discretion on a case-by-case basis to defer --

(CROSSTALK)

SESSIONS:
Well, just briefly, if the people don't meet the standards and somebody does get turned down -- well, the projection is a little less than half the people, 5 million out of 11 million -- what if somebody is turned down?

Are they going to be deported?

7/25/16, 7:21 PM

Generally I would think yes. If they bring their presence to the attention of the enforcement authorities and if it fits within the prosecutorial discretion priorities, I can't think of any reason that I --

SESSIONS:

Well, they're not going to be deported. They're not -- the only ones that are being deported today is, I think you know, are people who commit serious crimes and we find out even they are not being deported.

We reached a lawless stage in immigration. And the American people are not happy about it. They have a right to demand that their laws be enforced and the president's actions are some of the most dramatic steps to violate plain law that I've ever seen in my experience.

Thank you, Mr. Chairman. My time's over. You're kind.

LEE:

Thank you, Senator Sessions.

As we were preparing for yesterday's hearing, I found a quote I would like to talk about in a minute, for a moment, a quote from a speech given by Ms. Lynch about a year ago in which she made the following statement -- it caught my attention, because it raises some alarm bells.

It says, "Fifty years after the march on Washington, 50 years after the civil rights movement, we stand in this country at a time when we see people trying to take back so much of what Dr. King fought for.

"We stand in this country; people try and take over the statehouse and reverse the goals that have been made in voting in this country. But I'm proud to tell you that the Department of Justice has looked at these laws and looked at what's happening in the Deep South and in my home state of North Carolina, has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens," close quote.

When I read this, I -- for obvious reasons, immediately became concerned. I was wondering what it was that she was talking about, what laws that were out there, what legacy of the civil rights era that was trying to be overturned.

Ms. Engelbrecht, can you guess as to what she might have been talking about, referring specifically to her home state of North Carolina?

ENGELBRECHT:

I can't. And I reviewed the same comments that you referred to, which was, I think, taken from a speech in February out in Los Angeles. And what continues to boggle the mind is that the vast majority of Americans want, understand and appreciate the need to try to safeguard our elections. And the thought that asking a voter to prove they are who they say they are is somehow discriminatory just -- it -- you know, it seems to me to be much more about pushing a political agenda than protecting the people.

LEE:

You know, I wondered about this, so I asked one of my colleagues who's on this committee with me, Senator Thom Tillis from North Carolina, who, as it turns out, at the time she gave this speech, was the Speaker of the House in North Carolina. I asked him what this was about, what she was referring to. These are pretty bold statements and if someone is going to propose a state legislative body of moving to undo the legacy of Dr. Martin Luther King, of trying deliberately to diminish voting rights in this country, I feel like we need to know what that is.

He suggested to me that it might have been directed toward a law, a voter ID law that was passed by the State of North Carolina at the time that Senator Tillis was the Speaker of the North Carolina House of Representatives.

I asked him about this law a little bit. And he told me that when it came forward, there was concern about voter fraud, about the risk of voter fraud in North Carolina.

And he said, look, I want to find the most fair statute that there is on the books anywhere in this country and I want to make it that much fairer. I want to put the belt and the suspenders and another belt and another set of suspenders on it, make sure that no one's voter -- voting rights are diminished at all.

So they started with the model of an Indiana statute, a model that was itself quite cautious. It continues to allow no excused absentee voting without an ID. It accommodates individuals with religious objections to photography, providing them with a way, an alternative means of proving their identity, pays for an ID issued by the Department of Motor Vehicles without any charge to the voter.

So they started with that as the model, and then they added a whole bunch of additional protections that neither Indiana nor any other state that's adopted any law like this, it had a two-year ramp- up period, a special North Carolina program designed to allow homebound individuals to get a photo ID, another government program that not only pays for the government-issued ID but also allows for documents for a register of deeds or the Department of Health and Human Services that can be used to verify ID. It establishes a \$1 million trust fund to reach out to those people who might not have IDs. And this list goes on and on and on. This is the most cautious, carefully protective statutory scheme that I can imagine in this area.

If, in fact, this was the target of this description, do you think it's fair to describe this legislation that way, as an attempt to undo the gains of the civil rights movement and the gains of Martin Luther King and those who fought with him valiantly to protect voter rights in America?

ENGELBRECHT:

Absolutely not. I don't think that it's appropriate or fair. And if that's truly the belief that's held, we need to understand what's behind that because it belies anything that you have just read in making sense.

LEE:

With your involvement in efforts to prevent voter fraud, what would you say to those who have made the argument that there is no such thing as voter fraud and therefore we need not be concerned about it and that the only reason somebody could push for it would be because they subjectively want to undermine voting rights?

What would your response to that be?

ENGELBRECHT:

I mean, I think that our history is replete with examples of voter fraud. And I think that it is something that we should take very seriously because you don't need a whole lot of fraud, you just need a little bit in the right places. And the less that you create a system that secures everyone's votes, the more open it is, obviously, to these kinds of manipulations that just further divide our country in ways that serve no purpose.

LEE:

Thank you.

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Sheriff Clarke, I wanted to talk you a minute about the relationship between the Department of Justice and law enforcement

How would you describe the relationship between law enforcement and the Department of Justice?

CLARKE:

Thank you, Senator.

Frayed: I'm not going to engage in hyperbole or exaggerate but we can't have even a frayed relationship. You know, the mission statement that I cited early on, you know, it talks about partnerships. And just from the Milwaukee experience anyway, we need the help of the U.S. attorney's office in the Eastern District of Wisconsin to deal with instances of the violent crime, the repeat offender. We are not talking about the first time offender. We're not talking about people who may deserve some sort of remedy for some transgression they made.

I talked about the 10-year old, Sierra Guyton (ph). Both of those individuals, felons, convicted felons. The prohibition of not being able to be armed or a firearm anyway as a convicted felon means nothing to them. The state has not shown a willingness at the state level. I think it's a legitimate question to ask, what are they doing at the state level with some of these cases? Too much leniency.

And I'll tell you one thing from a deterrent standpoint, Senator, criminals fear the federal system. They just do. And so if we would have, for instances, cases of -- there was a very creative legally case in Milwaukee where the -- Jim Santell (ph), the assistant U.S. attorney, who we do have a great relationship with, used the Hobbs Act to charge a career holdup man who had gone on a robbery spree.

And one of them I believe recently received a 15-year sentence plus they used the firearm in the commission of those crimes. But they don't have to charge all of them. I know they don't have -- heard about the prosecutorial discretion but I think if we take this elephant and try to eat at one spoonful at a time, the elephant being the violent crime that's ravaging all kind of urban centers in America.

But if we take the worst offenders and subject them to federal sanctions, that is going to, first of all, ensure you got a better chance at a conviction, and you got a better chance of a more lengthy sentence.

For the person who just hasn't cared, if you will, at any state sanctions that have been applied so that's the sort of help we need from the federal prosecutor's office in Milwaukee. Straw purchases is another one.

I won't really rap the U.S. attorney's office for straw purchases. Law enforcement's really not bringing in the cases. The ones they are, they are dealing with very well. But the armed violent offenders are the one I would like to see go the federal route.

LEE:

Thank you.

Today we have heard from a number of witnesses who have testified both as to Ms. Lynch's qualifications, which are themselves impressive. It's great, in particular, to see my friend, David Barlow. I know of no finer lawyer or human being anywhere than David. So it's always great to see you and each of you have put a lot of thought into your testimonies. I appreciate both your written testimonies and what you have spoken to us today.

The record for this hearings will remain open for one week for members to submit written questions for the record.

The hearing will be adjourned. Thank you.

7/25/16, 7:21 PM

Thank you.

CQ Transcriptions, Jan. 29, 2015

List of Panel Members and Witnesses

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SEN. JEFF SESSIONS, R-ALA.

SEN. ORRIN G. HATCH, R-UTAH

SEN. LINDSEY GRAHAM, R-S.C.

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SEN. DAVID VITTER, R-LA.

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SEN. THOM TILLIS, R-N.C.

SEN. PATRICK J. LEAHY, D-VT. RANKING MEMBER

SEN. DIANNE FEINSTEIN, D-CALIF.

SEN. CHARLES E. SCHUMER, D-N.Y.

SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. AMY KLOBUCHAR, D-MINN.

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DAVID BARLOW, PARTNER, SIDLEY AUSTIN LLP

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7/25/16, 7:21 PM

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Hamilton, Brandy (OIG)

From: Hamilton, Brandy (OIG)
Sent: Wednesday, September 28, 2016 8:55 PM
To: DOJExecSec (JMD)
Cc: Werner, Sharon (OAG); Axelrod, Matthew (ODAG); Childs, Heather G. (ODAG); Uriarte, Carlos (ODAG)
Subject: RE: Unclassified version of report entitled A Review of the FBI's use of Section 215 Orders for Business Records in 2012 through 2014
Attachments: E2015009 USA Freedom Act - Section 215 Unclassified 09-29-2016 (OAG-ODAG).pdf

Attached is a corrected version of the unclassified report you received earlier this evening. The original attachment contained a mistake on the "NOTE" page.

From: Hamilton, Brandy (OIG) **On Behalf Of** OIG, Oversight&Review (OIG)
Sent: Wednesday, September 28, 2016 7:34 PM
To: DOJExecSec (JMD)
Cc: Werner, Sharon (OAG) (JMD); Axelrod, Matthew (ODAG) (JMD); Childs, Heather G. (ODAG) (JMD); Uriarte, Carlos (ODAG) (JMD)
Subject: Unclassified version of report entitled A Review of the FBI's use of Section 215 Orders for Business Records in 2012 through 2014

In June 2016, the Office of the Inspector General (OIG) issued a classified report on the Federal Bureau of Investigation's (FBI) use of Section 215 Orders in 2012 through 2014, as required by the *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015* (USA Freedom Act), Pub. L. No. 114-23, 129 Stat. 268 (2015). At the time we released the classified report, we indicated our intention to publicly release an unclassified version of this report as soon as the classification review of that version was completed. The review has been completed, and the unclassified report is attached.

We will publicly release the unclassified version on September 29, 2016.

Please contact me or Deputy Inspector General Robert Storch if you have any questions about this report.

Michael E. Horowitz
Inspector General



September 28, 2016

MEMORANDUM FOR THE ATTORNEY GENERAL

THE DEPUTY ATTORNEY GENERAL

A handwritten signature in blue ink, reading "Michael E. Horowitz", is positioned above the printed name.

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Unclassified version of report entitled *A Review of the FBI's use of Section 215 Orders for Business Records in 2012 through 2014*

On June 1, 2016, the Office of the Inspector General (OIG) completed a classified report reviewing the Federal Bureau of Investigation's (FBI) use of Section 215 Orders in 2012 through 2014, as required by the *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015* (USA Freedom Act), Pub. L. No. 114-23, 129 Stat. 268 (2015). As required by the USA Freedom Act, we provided the report to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives. We also provided the report to cleared members of other relevant Congressional oversight committees. In addition, we provided the report to the Department, the FBI, the Office of the Director of National Intelligence, and other agencies within the U.S. Intelligence Community.

At the time we released the classified report, we indicated our intention to publicly release an unclassified version of this report as soon as the classification review of that version was completed. The review has been completed, and the unclassified report is attached. We intend to provide this version of the report today to the same offices that received the classified version of the report on June 1, 2016. We will publicly release the unclassified version on September 29, 2016.

Please contact me or Deputy Inspector General Robert Storch if you have any questions about this report.

Attachment

cc: Sharon Werner
Chief of Staff and Counselor to the Attorney General

Mathew S. Axelrod
Principal Associate Deputy Attorney General

Heather Childs
Chief of Staff to the Deputy Attorney General

Carlos F. Uriarte
Associate Deputy Attorney General

UNCLASSIFIED



Office of the Inspector General
U.S. Department of Justice



A Review of the FBI's Use of Section 215 Orders for Business Records in 2012 through 2014

Oversight & Review Division 16-04

September 2016

NOTE

A classified version of this report was completed in June 2016 and, as required by the USA Freedom Act, was provided to the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives. We also provided the report to cleared members of other relevant Congressional oversight committees. This unclassified version of the report follows the completion of a classification review by the FBI and the Intelligence Community and contains redactions of information that they determined to be classified.

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EXECUTIVE SUMMARY

This Executive Summary provides a brief overview of the results of the Department of Justice (Department or DOJ) Office of the Inspector General's (OIG) review of the Federal Bureau of Investigation's (FBI) use of the investigative authority granted by Section 215 of the Patriot Act between 2012 and 2014. Section 215 is often referred to as the Foreign Intelligence Surveillance Act (FISA) "business records" provision. This is the OIG's fourth review of the FBI's use of FISA business records. Three previous reports issued in March 2007, March 2008, and May 2015 addressed the FBI's use of Section 215 authority between 2002 and 2009.

This current review is mandated by the USA Freedom Act of 2015.¹ The USA Freedom Act, signed into law on June 2, 2015, directs the OIG to issue within 1 year of the date of enactment a report examining the FBI's use of Section 215 authority for calendar years 2012 to 2014, addressing any noteworthy facts or circumstances relating to Section 215 orders, any illegal or improper use of Section 215 authority, the effectiveness of Section 215 as an investigative tool, and the adequacy of procedures used to "minimize" U.S. person information obtained in response to Section 215 orders.

To conduct this review, the OIG reviewed the Standard Minimization Procedures for Tangible Things Obtained Pursuant to Title V of the Foreign Intelligence Surveillance Act adopted by the Attorney General on March 7, 2013 ("Final Procedures"). We also examined over 90,000 documents obtained from the FBI and the Department's National Security Division's (NSD) Office of Intelligence, including files relating to each FISA Court order approving use of Section 215 authority between 2012 and 2014, Department reports to Congress concerning that use during calendar years 2012 through 2014, documents detailing compliance incidents related to the FBI's use of Section 215 authority, reports documenting the results of internal reviews conducted by NSD between 2012 and 2014, e-mails relating to approved and withdrawn business records applications, and FBI and NSD policies and training materials related to the Final Procedures.

We reviewed each of the FISA Court-approved orders for business records between 2012 and 2014 in order to provide an overview of the characteristics of those orders and the underlying investigations in which they were obtained. In addition, we conducted a more in-depth analysis of the FBI's use of this authority in national security investigations by reviewing a sample of Section 215 orders and withdrawn applications selected from two FBI field offices that had relatively large and diverse uses of Section 215 orders, and by conducting field visits in those offices. Over the course of the review, we also interviewed more than 50 individuals from the FBI and the Department, including Section

¹ "USA FREEDOM Act" is an acronym for *United and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015*, Pub. L. No. 114-23, 129 Stat. 268 (2015). We refer to it in this report as the USA Freedom Act.

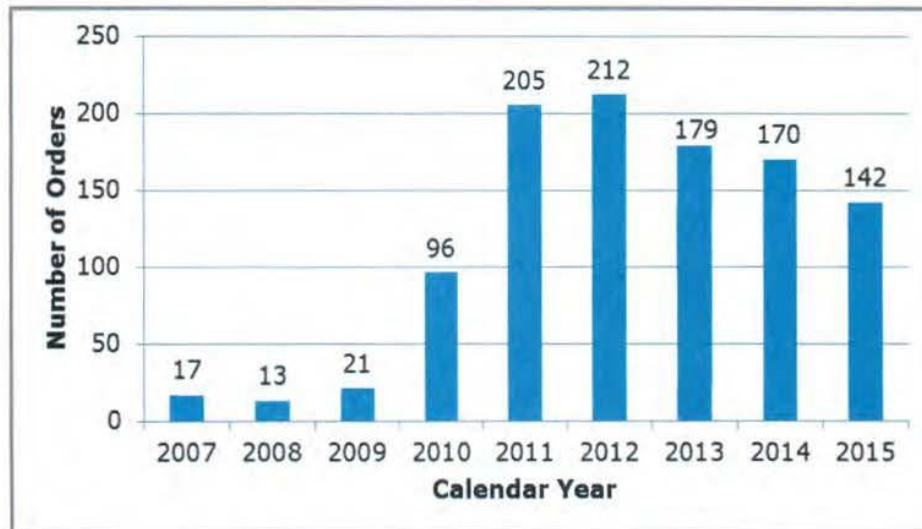
and Unit Chiefs from NSD's Office of Intelligence and the FBI's National Security Law Branch (NSLB), and attorneys, case agents, and supervisors who worked on individual Section 215 orders.

In this report, we provide an overview of the FBI's use of Section 215 authority between 2012 and 2014 that describes the number of Section 215 orders obtained, the type of information requested, the types of FBI cases in which business records orders were used, and the average time between initiation of a business records order request by an FBI field office and issuance of an order by the FISA Court. Our review found that the number of business records orders obtained by the FBI increased significantly between 2007 and 2012, largely driven by the refusal of several communications providers to produce transactional records for e-mail [REDACTED] accounts (known as Electronic Communication Transaction Records, or ECTRs) in response to FBI National Security Letters (NSLs).

Between 2012 and 2014, the FISA Court approved 561 business records orders.² However, as shown in Figure 1, between 2012 and 2014, the number of business records orders dropped from a 9-year high of 212 in 2012 to 170 in 2014 (19.8%). A further decrease occurred in 2015, when the number of orders fell to 142.

² After reviewing a draft of this report, NSD commented that references to the number of business records orders should be changed to the number of approved applications for business records orders. The OIG understands that some business records applications result in more than one order. For example, the FISA Court may issue orders to four separate providers when approving a single application requesting ECTRs for four e-mail addresses. We also recognize that NSD reports the number of applications submitted to the FISA Court in its annual reports to Congress. Nonetheless, we decided to retain the references to the number of business records orders throughout this report as a matter of convenience.

FIGURE 1
Total Number of Approved Business Records Orders,
by Calendar Year, 2007-2015³



Source: FBI.

An NSD Deputy Unit Chief noted the decline after 2012 and told the OIG that the number of ECTRs decreased more than other types of records. He attributed the decline in part to revelations by Edward Snowden about the U.S. government's use of Section 215 to collect bulk telephony metadata, both in terms of the stigma attached to use of Section 215 and increased resistance from providers. In comments provided to the OIG after reviewing a draft of this report, NSD stated that the degree to which the Snowden disclosures affected the number of business records applications was somewhat speculative, and attributed the FBI's increasing use of taskings under Section 702 as likely a "notable cause" in the decrease in business records requests. NSD stated that during the relevant period (and continuing today) it suggested that FBI withdraw business records requests for accounts used by non-U.S. persons located overseas that can instead be tasked under Section 702.⁴ Agents also told the OIG that they increasingly were electing to use criminal legal process instead of FISA authority

³ This table includes the total number of dockets for 2013 (179). This number differs slightly from the number of approved applications for business records the Department reported to Congress for 2013 (178). The OIG recognizes that one submission in 2013 was a copy of the Final Procedures, which did not result in a FISA Court order. As described below, we excluded this docket from our numbers for purposes of analysis.

⁴ Section 702 of the FISA Amendments Act allows the government to acquire foreign intelligence by targeting non-U.S. persons reasonably believed to be outside the United States. Under Section 702, the government is not required to obtain individual surveillance orders from the FISA Court. Instead, the FISA Court approves targeting procedures to ensure that the government targets only non-U.S. persons reasonably believed to be outside the United States, and minimization procedures to guard against the inadvertent collection, retention, and dissemination of U.S. person information.

in counterterrorism and cyber investigations because of their frustrations with the lack of timeliness and the level of oversight in the business records process.

We analyzed data for [REDACTED] of the 561 orders approved during our review period.⁵ Between 2012 and 2014, of the [REDACTED] business records orders analyzed, [REDACTED] business records orders included requests for ECTRs, representing [REDACTED] of all non-bulk orders, compared to [REDACTED] orders in the OIG's previous review period between 2007 and 2009, which constituted [REDACTED] of non-bulk orders.

The median time needed to obtain business records orders during our review period from initiation of a request by a field office until issuance of the order by the FISA Court was 115 days.⁶ While several NSD witnesses said that the volume of requests did not significantly impact their processing of business records orders, others acknowledged that there had been delays in the process "because things get backed up." One NSLB attorney told the OIG that he was "embarrassed" at how long the business records process takes, stating, "We are asking for less [than a full FISA], and it's taking twice as long." According to the witnesses we interviewed, both NSD and NSLB have taken steps to improve the business records process, including streamlining the drafting and review process for ECTRs.

In addition, the OIG found that Section 215 business records orders were used far more frequently in counterintelligence cases than as a counterterrorism or cyber tool. Of the [REDACTED] total orders we analyzed, [REDACTED] were obtained in counterintelligence cases, [REDACTED] in counterterrorism cases, and [REDACTED] in cyber cases. Agents told us that Section 215 orders frequently are [REDACTED]

[REDACTED], while agents handling counterterrorism and cyber cases in some instances can open a parallel criminal case and use the grand jury process to obtain the same information more quickly and with less oversight than a business records order. In particular, agents [REDACTED] explaining that the length of time needed to obtain a business records order [REDACTED]

⁵ We reviewed all 561 orders approved during our review period, but excluded [REDACTED] orders in our analysis for statistical purposes: [REDACTED]

⁶ FISA Court rules provide for submission of a proposed application, an advance copy of an application commonly called a "read" copy, no later than 7 days before the government seeks to have the matter entertained by the FISA Court. Our analysis included the time that applications and proposed orders were with the FISA Court to provide the most accurate measurement of the time needed for the FBI to obtain business records orders. While we do not have complete data regarding the FISA Court's processing of business records applications, we were informed that "read" copies generally are provided the week before, and the orders signed within a day or two of submission of the final application. No witnesses cited delays with the FISA Court as an issue.

[REDACTED]

Our report describes [REDACTED] Section 215 applications and orders between 2012 and 2014 that illustrate the varied uses of Section 215 authority. While the FBI used business records orders most frequently to obtain transactional records for e-mail [REDACTED]

[REDACTED]. We also describe several instances where the FBI wanted to use Section 215 authority to obtain particular materials but ultimately chose not to do so, such as [REDACTED].

Agents expressed concern about the length of the process to obtain a business records order, but also told us that Section 215 authority continued to be a valuable investigative tool when companies would not voluntarily produce material sought by the FBI or produce it in response to other investigative authorities. As with our previous reviews, the majority of agents we interviewed did not identify any major case developments that resulted from use of the records obtained in response to Section 215 orders, but told us that the material produced pursuant to Section 215 orders was valuable as a building block of the investigation, and was used to support other investigative requests, develop investigative leads, and corroborate other information. However, in at least two cases, agents we interviewed told us that the business records obtained in their investigation provided valuable information that they would not otherwise have been able to obtain. In other instances, case agents told us that they used the information obtained under Section 215 to exculpate a subject and close the investigation.

The OIG reviewed three compliance incidents that affected numerous business records orders between 2012 and 2014. The first involved the systemic overproduction of full and partial e-mail subject lines by two providers, [REDACTED], which the OIG determined affected [REDACTED] business records orders. In a second compliance incident, [REDACTED] in response to a single business records order, including some [REDACTED]. The FBI subsequently determined that previous [REDACTED] likely contained similar [REDACTED] and worked with the provider to fix the error. A third compliance incident resulted from a system-wide error in an FBI database that released business records returns from a quarantined area prior to initial review and allowed access to un-minimized data. All of these incidents were reported to the FISA Court.

As noted above, during our review period, there were [REDACTED] FISA Court-approved orders issued in connection with [REDACTED]

[REDACTED]. Our third Section 215 report discussed [REDACTED] at length, including the specialized minimization procedures that applied to [REDACTED] reported compliance incidents, and detailed the status of [REDACTED] through May 2015. The USA Freedom Act's revisions to the business records provisions of FISA [REDACTED]
[REDACTED]
[REDACTED].

As part of this review, we also examined the progress the Department and the FBI made in addressing three relevant recommendations from the OIG's March 2008 and May 2015 reports. In the 2008 report, we recommended that the Department implement final minimization procedures, develop procedures for reviewing materials received in response to business records orders issued by the Foreign Intelligence Surveillance Court (FISA Court) to ensure that they do not contain "overproduced" information outside the scope of orders, and develop procedures for handling overproductions. In our May 2015 report, we found that the Department had adopted Final Procedures implementing the OIG's recommendations, but identified several terms used in the Final Procedures that we believed required clarification, including with regard to the minimization of U.S. person information. Based on the information obtained in our current review, we concluded that the Department and the FBI have made these clarifications. We therefore have closed these remaining recommendations.

However, based on the concerns expressed by agents about the time needed to obtain business records orders, we recommend that the FBI and the Department continue to pursue ways to make the business records process more efficient, particularly for applications related to cyber cases where agents

[REDACTED]. Potential measures include using the FBI's FISA Management System (FISAMS) data to track the timeliness of Section 215 applications, using alerts within FISAMS to identify applications that have lingered past a certain period of time without review, and implementing a streamlined drafting and review process [REDACTED]

I. INTRODUCTION

Section 215 of the Patriot Act, otherwise known as the business records provision, allows the Federal Bureau of Investigation (FBI) to acquire “any tangible things (including books, records, papers, documents, and other items) for an investigation. . .” to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that an underlying investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment.⁷ The FBI may use this investigative method only in Preliminary and Full Investigations, and the information sought must be relevant to an open, predicated national security investigation.

This is the Department of Justice (Department or DOJ) Office of the Inspector General’s (OIG) fourth review of the FBI’s use of investigative authority granted by Section 215. The OIG has issued three previous reports regarding the FBI’s use of the business records provision: in March 2007, covering calendar years 2002 to 2005; in March 2008, covering calendar year 2006; and in May 2015, covering calendar years 2007 to 2009.

This fourth review is mandated by the USA Freedom Act of 2015, signed into law on June 2, 2015. The USA Freedom Act directs the OIG to issue within 1 year of the date of enactment a report examining the FBI’s use of Section 215 authority for calendar years 2012 to 2014. As required by the USA Freedom Act, this report addresses noteworthy facts or circumstances relating to Section 215 orders, any illegal or improper use of Section 215 authority, the effectiveness of Section 215 as an investigative tool, and the adequacy of procedures used to “minimize” U.S. person information obtained in response to Section 215 orders.

A. Methodology of the OIG Review

To conduct this review, the OIG examined over 90,000 pages of material obtained from the FBI and the Department’s National Security Division’s (NSD) Office of Intelligence. These documents included files relating to each FISA Court order approving use of Section 215 authority between 2012 and 2014; Department reports to Congress concerning that use during calendar years 2012 through 2014; documents detailing compliance incidents related to the FBI’s use of Section 215 authority; reports documenting the results of Accuracy and Minimization Reviews conducted by NSD between 2012 and 2014; e-mails relating to approved and withdrawn business records applications; minimization procedures in effect during the review period; and FBI and NSD policies and training materials related to final minimization procedures adopted in 2013.

⁷ The term “USA PATRIOT Act” is an acronym for the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). We refer to it as “the Patriot Act” in this report.

We reviewed each of the 561 Foreign Intelligence Surveillance Act (FISA) Court-approved orders for business records between 2012 and 2014 in order to provide an overview of the characteristics of those orders and the underlying investigations in which they were obtained.⁸ In order to conduct an in-depth analysis of the FBI's use of business records authority, we conducted field visits to two FBI field offices: the [REDACTED]. We identified these field offices based on the overall number and variety of business records orders obtained during the review period. [REDACTED], we reviewed each of the [REDACTED] business records orders obtained during the review period. [REDACTED], we reviewed a sample of [REDACTED] of the [REDACTED] business records orders obtained, which we selected based on various factors, including unique use of Section 215 authority, the type of investigation, or the occurrence of compliance incidents. During these field visits, we examined documents in the FBI's case management system and interviewed agents, supervisors, and counsel about the FISA business records process, the use of Section 215 authority in their individual cases, and the application of the relevant minimization procedures. In several instances, we also examined the materials produced in response to business records orders. We selected [REDACTED] of these applications for more detailed analysis to highlight the varied and evolving uses of Section 215 authority.

In addition to the orders approved by the FISA Court, between 2012 and 2014 there were [REDACTED] pending and [REDACTED] withdrawn applications for Section 215 orders.⁹ We reviewed [REDACTED] withdrawn requests or applications originating from [REDACTED] and questioned agents about [REDACTED] of these. We also reviewed [REDACTED] requests submitted to NSD but not filed with the FISA Court, and [REDACTED] proposed applications filed with the FISA Court as "read" or advance copies that NSD ultimately withdrew prior to formally filing. Where the applications presented novel or unique legal issues, we questioned NSD attorneys about the reasons for these withdrawals.

As noted earlier, during our review period, there were [REDACTED] FISA Court-approved orders related to [REDACTED]. Beginning in 2006, the FBI obtained Section 215 orders [REDACTED]. Our third report discussed [REDACTED] at length, including the specialized minimization procedures that applied to [REDACTED] reported compliance incidents, and the status of [REDACTED] through May 2015. On June 2, 2015, the USA Freedom Act ended bulk collection under Section 215 by requiring that applications for business records identify a person, account, address, or personal

⁸ We reviewed all 561 orders approved during our review period, but excluded [REDACTED] orders in our analysis for statistical purposes, as described in more detail in Section IV.C: [REDACTED] orders concerning [REDACTED], and [REDACTED] order memorializing the Final Procedures.

⁹ Pending applications include applications generated between 2012 and 2014 but not provided to NSD for further processing or submitted to the FISA Court for further approval.

device, or any other specific identifier.¹⁰ See 50 U.S.C. §§ 1861(b)(2), (k)(4) (2015), *as amended by USA Freedom Act of 2015*, §§ 101, 103, 107, 109. Our report provides a brief status update [REDACTED] in light of the changes instituted by the USA Freedom Act.

Over the course of this review, we interviewed more than 50 people from the FBI and the Department, including Section and Unit Chiefs from the FBI's National Security Law Branch (NSLB) and NSD's Office of Intelligence and attorneys, case agents, and supervisors who worked on Section 215 orders. We did not question FBI and NSD personnel about the specifics of every order, nor did we conduct an independent compliance review of each use of Section 215 authority between 2012 and 2014. For purposes of this report, we relied on the Department's reporting to the FISA Court, the FBI's reporting to the Intelligence Oversight Board (IOB), and the reports summarizing Accuracy and Minimization Reviews conducted by NSD in FBI field offices to identify compliance incidents that occurred during the relevant time period.

B. Organization of the Report

This report is divided into six sections. After this introduction, we describe in Section II the legal background related to Section 215 authority, the process for obtaining a Section 215 order, the procedures applicable to the use of business records material, and the procedures for reporting compliance incidents to the FISA Court and the IOB.

In Section III, we discuss the status of recommendations the OIG made in previous reports concerning the FBI's use of Section 215 authority.

In Section IV, we provide an overview of the FBI's use of Section 215 authority between 2012 and 2014. We describe the number of Section 215 orders approved, the type of information requested, the number of FBI offices that used the authority, and the types of investigations in which Section 215 orders were sought.

In Section V, we provide a more detailed discussion of [REDACTED] business records orders obtained between 2012 and 2014. We describe the information requested, the purpose of the requests, the material produced, the manner in which it was used, and any compliance incidents that occurred. We also describe three compliance incidents that affected numerous business records orders during our time period, and briefly discuss the status of [REDACTED] of the USA Freedom Act.

Finally, Section VI contains our conclusions.

¹⁰ As described in more detail below, the effective date of these changes was within 180 days of the date of enactment, which was November 29, 2015. The USA Freedom Act also eliminated bulk collection using pen register/trap and trace authority or various National Security Letter authorities by requiring use of a specific selection term. See USA Freedom Act of 2015, §§ 201, 501.

II. BACKGROUND

This section provides a brief description of the legal background related to Section 215 authority and the process for obtaining Section 215 orders.

A. Legal Background

The Foreign Intelligence Surveillance Act of 1978 (FISA) requires the FBI to obtain an order from the FISA Court to conduct electronic surveillance to collect foreign intelligence information.¹¹ In 1998, Congress amended FISA to authorize the FBI to apply to the FISA Court for orders compelling common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities to “release records in [their] possession” to the FBI. The amendment did not further define “records.” This provision, which was codified at 50 U.S.C. § 1862, became known as the “business records” provision.¹²

The 1998 amendment required the FBI to specify that the business records were sought for an investigation to gather foreign intelligence information or an investigation concerning international terrorism, and that there were “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.” 50 U.S.C. § 1862 (2000). This language meant that the FBI was limited to obtaining information regarding a specific person or entity the FBI was investigating and about whom the FBI had individualized suspicion. The amendment also prohibited the entity complying with the order from disclosing either the existence of the order or any information produced in response to the order.

The authority granted by the 1998 amendment was rarely used. Between enactment of the amendment and passage of the Patriot Act in October 2001, the FBI obtained only one FISA order for business records.

In October 2001, Section 215 of the Patriot Act significantly expanded the business records provision. The pertinent part of Section 215 provides:

[T]he Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special

¹¹ FISA provides two definitions of “foreign intelligence information.” Under 50 U.S.C. § 1801(e)(1), foreign intelligence information means information that relates to, and if concerning a U.S. person is necessary to, the ability of the United States to protect against (1) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (2) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (3) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Under 50 U.S.C. § 1801(e)(2), foreign intelligence information includes information with respect to a foreign power or foreign territory that relates to, and if concerning a U.S. person is necessary to, the national defense or the security of the United States, or the conduct of the foreign affairs of the United States.

¹² 50 U.S.C. § 1862(b)(2)(B) (1998), *as amended*, 50 U.S.C. § 1861 (2001).

Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

50 U.S.C. § 1861(a)(1) (2001). While the 1998 amendment limited the FBI's business records authority to four types of businesses, the 2001 language did not contain any such limitation. Section 215 also expanded the categories of documents obtainable under the business records provision from "records" to "any tangible things (including books, records, papers, documents, and other items)."

In addition, Section 215 lowered the evidentiary threshold to obtain a business records order. Rather than requiring the FBI to show that the requested information pertained to a person under investigation, Section 215 required that the items sought need only be "for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2) (2001). This standard, referred to as the relevance standard, permits the FBI to seek information concerning persons connected in some way to a person or entity under investigation.

Congress twice amended Section 215 in 2006. The first legislative amendment, the USA PATRIOT Improvement and Reauthorization Act of 2005 (Reauthorization Act), was signed into law on March 9, 2006. The Reauthorization Act required that an application for a business records order establish "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation."¹³ 50 U.S.C. § 1861(b)(2)(B) (2006). At the same time, the Reauthorization Act provided a presumption of relevance for tangible things that pertain to foreign powers, agents of foreign powers, suspected agents of foreign powers who are the subjects of authorized investigations, or individuals in contact with, or known to, suspected agents of foreign powers who are the subjects of authorized investigations. If an application demonstrates that the information requested pertains to one of these four entities or individuals, it is presumptively relevant to an authorized investigation.

The Reauthorization Act also authorized the collection of certain sensitive records, including library, medical, educational, and tax return records. However, it required that applications for sensitive records be approved by the FBI Director or his specified designee, and required specific reporting about

¹³ USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 196 to 198 (2006).

these records to Congress.¹⁴ The Reauthorization Act also established a process for recipients of Section 215 orders to challenge their legality before a FISA Court judge.

The second legislative amendment, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, included additional changes to Section 215. For example, these amendments included a provision allowing a recipient of a Section 215 order to petition the FISA Court to modify or set aside the nondisclosure requirement after 1 year from the issuance of the order if certain findings are made.¹⁵

Section 215, along with other provisions of the Patriot Act, originally was scheduled to sunset on December 31, 2005. The Reauthorization Act extended Section 215 for 4 years, until December 31, 2009. Congress subsequently extended Section 215 to June 1, 2015.

In June 2013, information about the NSA's bulk telephony metadata program was publicly disclosed by Edward Snowden.¹⁶ These disclosures revealed, among other things, that the FISA Court had approved Section 215 orders authorizing the bulk collection of call detail records. The telephony metadata collected by the NSA included information from local and long-distance telephone calls, such as the originating and terminating telephone number and the date, time, and duration of each call.¹⁷ The disclosures prompted widespread public discussion about the bulk telephony metadata program and the proper scope of government surveillance, and ultimately led Congress to end bulk collection by the government in the USA Freedom Act.¹⁸

Amid public debate about the bulk telephony metadata program, the sunset provisions of the Reauthorization Act took effect at 12:01 a.m. on June 1, 2015, temporarily reverting the business records provision to the much more limited version in effect between 1998 and October 2001.¹⁹ On June 2, 2015, President Obama signed the USA Freedom Act. While the USA Freedom Act did

¹⁴ As permitted by the Reauthorization Act, the FBI Director delegated approval authority for these records to the Deputy Director and the Executive Assistant Director for the FBI's National Security Branch.

¹⁵ See *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*, Pub. L. No. 109-178, 120 Stat. 278, 280.

¹⁶ See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *The Guardian* (Jun. 6, 2013). As described in more detail below, metadata refers to dialing, routing, addressing, or signaling information associated with a communication, but does not include any information concerning the substance, purport, or meaning of the communications.

¹⁷ As we described in our second and third reports, NSA placed the call detail records in an archive and then ran "queries" against this archive to identify [REDACTED]. The telephone numbers used to query the archive were telephone numbers that met the "reasonable articulable suspicion" standard.

¹⁸ See generally Bart Forsyth, *Banning Bulk: Passage of the USA FREEDOM Act and Ending Bulk Collection*, 72 Wash. & Lee L. Rev. 1307, 1321-22, 1325, 1334 (Summer 2015).

¹⁹ See *id.*

not substantively change the standard for obtaining business records linked to a particular person or identifier, it ended bulk collection under Section 215 by requiring that applications for business records include a "specific selection term," defined as "a term that specifically identifies a person, account, address, or personal device, or any other specific identifier." 50 U.S.C. §§ 1861(b)(2), (k)(4) (2015), *as amended by* USA Freedom Act of 2015, §§ 101, 103, 107. This provision became effective 180 days after the date of enactment, ending bulk collection by the government as of November 29, 2015. See USA Freedom Act of 2015, § 109.

To allow the government to continue to obtain call data, the USA Freedom Act created a new mechanism that allows the government to obtain call detail records from providers within two "hops" of the specific selection term on an ongoing basis for 180 days from the date of the FISA Court order.²⁰ Each application to obtain these records must include (a) a specific selection term to be used as the basis for the production of the call detail records, 50 U.S.C. § 1861(b)(2)(A); (b) a statement of facts showing that there are reasonable grounds to believe that the call detail records being sought are relevant to an authorized investigation and that there is a reasonable, articulable suspicion that the specific selection term is associated with a foreign power, or an agent of a foreign power, engaged in international terrorism or activities in preparation thereof, 50 U.S.C. § 1861(b)(2)(C)(i) and (ii); and (c) an enumeration of the minimization procedures adopted by the Attorney General that are applicable to the handling of call detail records obtained by the government in response to the requested order, 50 U.S.C. § 1861(b)(2)(D).²¹

According to NSD, if the FISA Court finds that the application meets the statutory requirements, it will order the production of a first set of records (the "first hop") using the specific selection term, and a second set of records (the "second hop") using session-identifying information (such as originating or terminating telephone numbers) or telephone calling card numbers identified by the specific selection term. Session-identifying information and telephone calling card numbers may be identified in the first hop productions or from other information already in the government's possession. The FISA Court has

²⁰ The term "call detail record" means session-identifying information (including an originating or terminating telephone number, an International Mobile Subscriber Identity number, or an International Mobile Station Equipment Identity number), a telephone calling card number, or the time or duration of a call. It does not include the contents of any communication; the name, address, or financial information of a subscriber or customer; or cell site location or global positioning system (GPS) information. See 50 U.S.C. § 1861(k)(3). As a result, the FBI may not obtain identifying, financial, or location information on the basis of an individual being in first- or second-degree contact with the original person, account, address, or personal device, or other specific identifier used as a specific selection term.

²¹ The "reasonable, articulable suspicion" (RAS) standard [REDACTED]. The FISA Court orders permitted authorized personnel to search the data collected under those orders when "based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that a particular known identifier is associated with" one or more of the foreign powers identified in the orders. We discuss the evolution of the [REDACTED] RAS standard in our May 2015 report.

concluded that FISA, as amended by the USA Freedom Act, does not require a showing of relevance for second hop records. To guard against overbroad collection, the USA Freedom Act requires “the prompt destruction of all call detail records” collected by the government not determined to be foreign intelligence information. See 50 U.S.C. §§ 1861(b)(2)(C), (c)(2)(F), *as amended by USA Freedom Act of 2015*, § 107.

The USA Freedom Act also added a provision allowing the Attorney General to require the emergency production of business records when certain criteria are met, including applying relevant minimization procedures and obtaining a FISA Court order approving the production within 7 days of the emergency authorization. See 50 U.S.C. § 1861(i), *as amended by USA Freedom Act of 2015*, § 102. Finally, the USA Freedom Act extended the sunset date for Section 215 as amended until December 15, 2019. See USA Freedom Act of 2015, § 705(a).

B. The Process for Seeking Section 215 Orders

As we described in our previous Section 215 reports, the process to obtain and utilize a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, NSD Office of Intelligence review, FISA Court review, and FBI service of the order.

The process to obtain a Section 215 order generally begins when an FBI case agent prepares a business records request form, which requires the agent to provide, among other things, the following information: a brief summary of the investigation, a specific description of the items requested, an explanation of the manner in which the requested items are expected to provide relevant information, and the identity of the custodian or owner of the requested items. The request form must be approved by the agent’s supervisor and the field office’s Chief Division Counsel and Assistant Special Agent in Charge. The approval process is automated through the FBI’s FISA Management System (FISAMS), which sends electronic notifications to each individual responsible for taking the next action in order to process the business records in the field office. After the approvals are completed in the field office, the FISAMS notifies the “substantive desk” (in the Counterterrorism, Counterintelligence, or Cyber Divisions) at FBI Headquarters.

At FBI Headquarters, the business records request form is reviewed and approved by both the substantive desk and NSLB. Once FISAMS delivers the request to the substantive desk, it is assigned to an NSLB attorney who works with the case agent and other FBI personnel to obtain any additional information the NSLB attorney believes is necessary to support the request. The request package then is reviewed by NSLB supervisors and forwarded to NSD, where the request is assigned to an NSD attorney.

The NSD attorney works with the NSLB attorney and case agents to obtain any additional information necessary to include in the draft application and order. NSD uses an internally-created software program called “TurboFISA” that produces a template with standardized language for various types of

business records applications. An NSD supervisor then reviews the draft application package. In most cases, the NSD attorney then sends the draft to the FBI for review, including having agents answer any questions regarding the application. The application is then finalized by NSD. The final application package is returned to the FBI for an accuracy review, and additional edits may be made based on the FBI's review of the final package. Upon completion of the final version of the application, signatures of the designated senior FBI personnel are obtained and an NSD attorney prepares the package for presentation to the FISA Court.

Pursuant to Rule 9 of the FISA Court Rules of Procedure, NSD provides the FISA Court with a proposed application, an advance copy of the application commonly called a "read" copy, no later than 7 days before the government seeks to have the matter entertained by the FISA Court. The FISA Court, through a FISA Court legal advisor, may identify questions or concerns and request changes or additional information to the documents after reviewing the "read" copy. NSD and the FBI then address these questions or concerns and make any necessary revisions to the application and order prior to submitting a formal or final application and order for the Court's approval, or decide to withdraw the application before submission. The FISA Court will either sign the formal submission or request that NSD present the formal application package to the FISA Court at a scheduled hearing. If the FISA Court judge approves the formal application, the judge signs the order.

The order is then entered into FISAMS and served by the FBI field office nearest to the company or provider designated in the order. Among other things, the order sets forth the deadline for producing the items. The FBI can receive business records returns electronically or in hard copy. Hard copies of business records returns typically are sent directly to the case agent. Electronic records, particularly business records returns from certain Internet Service Providers, typically are sent to the FBI's Data Intercept Technology Unit (DITU). DITU then uploads the records into the Data Warehouse System (DWS), the FBI's primary repository for raw FISA-acquired material. Un-minimized business records returns are quarantined in a separate area of DWS that is accessible only to personnel involved in the case. When returns are uploaded, DWS automatically notifies the case agent, who must then review the records in a restricted area of DWS to determine whether the records are responsive to the FISA Court order. If so, DITU releases the records from the quarantined area into DWS, where they are available to FBI personnel with appropriate access. Once the information is in DWS, the case agent must assess its intelligence value. Only information that reasonably appears to be foreign intelligence information, necessary to understand foreign intelligence information or assess its importance, or evidence of a crime may be placed in other FBI electronic storage systems, such as the Automated Case System (ACS) and Sentinel, where the information will be more widely accessible to FBI personnel (discussed in more detail below).²²

²² ACS and its successor, Sentinel, are the FBI's case management systems.

C. Minimization Procedures

FISA requires the FBI to “minimize” U.S. person information it receives in response to business records orders. Under current procedures, this means that the FBI may retain and disseminate nonpublic U.S. person information only if it reasonably appears to be foreign intelligence information, necessary to understand foreign intelligence information or assess its importance, or evidence of a crime, referred to as meeting the “FISA Standard.”

The FBI adopted interim minimization procedures for business records returns following the passage of the Reauthorization Act in March 2006, and revised procedures in 2013.²³ Two sets of minimization procedures thus governed business records orders issued between 2012 and 2014: Interim Procedures between January 1, 2012 and June 30, 2013, and Final Procedures after July 1, 2013. In this section we discuss these minimization procedures and describe the decision by FBI and NSD to implement the Final Procedures retroactively.

1. Interim Minimization Procedures

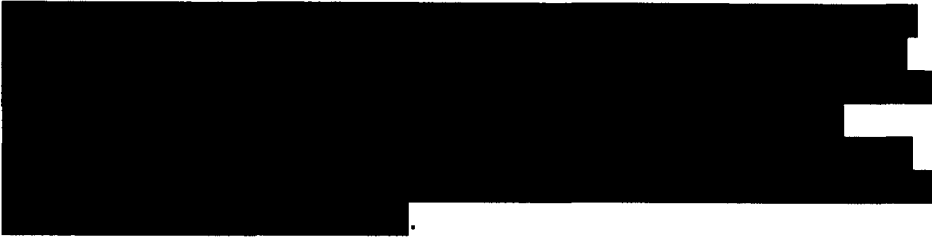
The Reauthorization Act mandated that the Department adopt minimization procedures to govern the retention and dissemination of nonpublic U.S. person information produced in response to a Section 215 order. One critical requirement was that the minimization procedures prohibit the dissemination of nonpublic U.S. person information, unless the identity of the U.S. person was foreign intelligence information, necessary to understand foreign intelligence information or assess its importance, or evidence of a crime (*i.e.*, met the FISA Standard).

The Department adopted Interim Procedures in September 2006. Rather than providing new procedures designed to comply with the requirements of the Reauthorization Act, the Interim Procedures incorporated six existing provisions from the Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines):

- Part I.B.3., which prohibited the FBI from investigating or maintaining information on U.S. persons solely for the purpose of monitoring First Amendment activities or the lawful exercise of Constitutional or statutory rights.
- Part I.C.1., which defined “U.S. person” to include U.S. citizens or lawful permanent residents, unincorporated associations substantially composed of individuals who are U.S. persons, and corporations incorporated in the United States.

- [REDACTED]

²³ See 50 U.S.C. § 1861(g)(2).

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- Part VII.A.1., which required that the FBI retain investigative records in accordance with a plan approved by the National Archives and provided for NSD oversight of information obtained in the course of investigations.
 - Part VII.B., which allowed the FBI to disseminate information within the Department, to the intelligence community and federal law enforcement agencies, to other federal, state, and local authorities, and to foreign authorities when the information related to the recipient's authorized responsibilities and dissemination was consistent with national security interests.
 - Part VIII, which defined certain terms used in the NSI Guidelines, including "foreign intelligence" and "publicly available."

The Interim Procedures stated that these provisions were to be construed to minimize retention and prohibit dissemination of nonpublic U.S. person information, and to prohibit the FBI from disseminating nonpublic U.S. person information that was not foreign intelligence information in a manner that identified a U.S. person, unless the person's identity was "necessary to understand foreign intelligence information or assess its importance" or evidence of a crime. However, the Interim Procedures did not define or explain what "necessary to understand foreign intelligence information or assess its importance" means, nor did they define or provide guidance on what constitutes U.S. person identifying information.

In our March 2008 report, we found that the Interim Procedures did not meet the requirements of the Reauthorization Act because they failed to provide FBI agents with specific guidance regarding the retention and dissemination of nonpublic U.S. person information obtained under Section 215 authority. We recommended that the FBI develop final minimization procedures that provided such guidance, require an initial review of records received in response to business records orders, and provide guidance on handling overproductions (*i.e.*, material outside the scope of the Section 215 order).

Although the FBI stated that it would replace the Interim Procedures with final minimization procedures that addressed the recommendations in the March 2008 report, it had not done so by spring 2009. As a result, in May 2009, a FISA Court judge requested that the FBI voluntarily apply additional minimization procedures to the productions of [REDACTED] related Section 215 orders. The Department agreed to implement these additional minimization procedures and filed reports with the FISA Court describing how the FBI had minimized U.S. person information.

In June 2009, FISA Court judges began to issue Supplemental Orders with most Section 215 orders. These Supplemental Orders required the Department to submit a written report to the FISA Court describing the FBI's minimization of U.S. person information no later than 90 days after the production of materials, with sufficient detail to allow the FISA Court to assess the adequacy of the FBI's implementation of the Interim Procedures. Between January 1, 2012, and June 30, 2013, the FISA Court issued Supplemental Orders for [REDACTED] total business records orders.²⁴

2. Final Minimization Procedures

On March 7, 2013, the Attorney General adopted and the Department filed with the FISA Court final minimization procedures for material received in response to Section 215 orders. These Final Procedures became effective on July 1, 2013.

The Final Procedures are designed to minimize the retention and prohibit the dissemination of "nonpublicly available information concerning unconsenting [U.S.] persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." The Final Procedures do not apply to publicly available U.S. person information, nor do they apply to acquiring, retaining, or disseminating U.S. person information with the person's consent. With the exception of provisions requiring an initial review of business records returns, and dictating the handling and retention of overproduced material and attorney-client communications, the Final Procedures do not apply to non-U.S. person information.

The Final Procedures set forth [REDACTED]

[REDACTED]:

- [REDACTED].
- [REDACTED].
- [REDACTED].

²⁴ Of the [REDACTED] orders for which the FISA Court did not issue Supplemental Orders, [REDACTED] were in counterintelligence investigations, [REDACTED] were in counterterrorism investigations, and [REDACTED] were in cyber investigations. These numbers exclude [REDACTED] business records orders issued under the Interim Procedures [REDACTED] or to restricted counterespionage investigations.

overproduction, he must return it to the producing party or destroy it as soon as practicable, ensure that the information has not been uploaded into any widely-accessible FBI system, and inform NSD of the overproduction to facilitate proper notification of the FISA Court.

27

The Final Procedures allow the FBI to disseminate information obtained using business records orders to [REDACTED]. In general, the FBI must determine that nonpublic U.S. person information meets the FISA Standard before disseminating it [REDACTED]. Key dissemination provisions are summarized below:

- The FBI may disseminate foreign intelligence information [REDACTED], to federal, state, local, or tribal officials and agencies [REDACTED].
- Where the foreign intelligence information relates to a foreign power or foreign territory and reasonably appears to be necessary to the national defense, security, or foreign affairs of the United States, [REDACTED].
- [REDACTED]

28

27

28

(Cont'd.)

• [REDACTED]

[REDACTED] 29 [REDACTED] 30 [REDACTED]

The Final Procedures include oversight provisions requiring NSD to review the FBI's compliance with them, stating that NSD [REDACTED] [REDACTED] In accordance with this provision, NSD includes business records orders in the Minimization and Accuracy reviews it conducts in FBI field offices. During these reviews, NSD attorneys examine information produced in response to business records orders to identify overproductions, confirm that the information has been properly

[REDACTED]

²⁹ As described in more detail below, metadata refers to dialing, routing, addressing, or signaling information associated with communications, such as e-mail addresses, telephone numbers, or IP addresses.

³⁰ [REDACTED]

classified and marked in FBI systems as FISA-derived, evaluate compliance with minimization procedures, and assess retention and dissemination decisions. NSD attorneys also audit the searches conducted by FBI personnel in multiple FBI databases, including two databases that contain business records material, DWS and Data Integrated Visual System (DIVS), which operates as a search engine for a collection of other databases to which the FBI has access, to ensure that the queries comply with the minimization procedures. Between 2012 and 2014, NSD conducted 90 Minimization and Accuracy Reviews, including business records minimization reviews in every FBI field office.

After the Final Procedures became effective, NSD began requiring its attorneys to conduct post-order briefings within 5 days of an order being signed. These briefings are designed to ensure that FBI personnel understand and comply with the requirements of the Final Procedures. NSD attorneys contact FBI personnel to review the Final Procedures, including the definitions of "U.S. person" and "foreign intelligence information," [REDACTED], the requirement that agents conduct an initial review of returns before placing information in widely-accessible FBI systems, the proper handling of overproduced materials, and the standards for retaining and disseminating information. NSD attorneys told us that they typically conduct the briefings with case agents and cover the major requirements of the Final Procedures, the information requested by the order, and any special minimization or reporting requirements imposed by the FISA Court in a Supplemental Order.

The first business records application referencing the Final Procedures was filed with the FISA Court on August 6, 2013. Once the Final Procedures were in place, the FISA Court ceased issuing Supplemental Orders requiring the Department to report on its handling of U.S. person information as a matter of standard practice. However, between August 9, 2013, and January 3, 2014, the FISA Court issued Supplemental Orders for [REDACTED] applications that requested e-mail transactional records from various service providers, requiring the Department to submit written reports stating whether the returns included the contents of any communications. An NSD Deputy Unit Chief told us that the FISA Court began requiring content reporting for business records orders directed at [REDACTED] and other communications providers following a series of overproductions of e-mail subject lines. He characterized Supplemental Orders as "relatively unusual" since resolution of the systemic overproductions, stating that they are only issued if the FISA Court has particular concern about the breadth or potential volume of the material requested. We describe these systemic errors in more detail in Section V.

3. Retroactive Application of the Final Procedures

When the government submitted the Final Procedures to the FISA Court in March 2013, the then-Assistant Attorney General of NSD stated in a letter to the Court that the FBI [REDACTED]

[REDACTED]

The FBI also is required to report activities that may be unlawful or contrary to executive orders or directives to the IOB and Director of National Intelligence (DNI).³¹ The subjects of these reports to the IOB are commonly referred to as "IOB violations." FBI policy requires employees to report potential IOB violations to NSLB within 30 days of discovery. Once an agent reports a potential IOB matter, NSLB reviews the facts to determine whether Executive Order 13462 and the Intelligence Oversight Reporting Criteria require the violation to be reported to the IOB and the DNI.

For business records, there are two types of potential IOB violations. [REDACTED]

[REDACTED]. On August 1, 2011, the IOB mandated that the FBI begin providing information [REDACTED]

[REDACTED]. Agents are required to report third-party overproductions to NSLB within 90 days of the date of discovery.³² The FBI must then submit this information to the IOB in quarterly reports containing the following information:

1. [REDACTED];

2. [REDACTED]; and

3. [REDACTED].

Between 2012 and 2014, the FBI reported [REDACTED] violations related to business records orders to the IOB. Of these, [REDACTED] involved overcollections, including systemic overproductions of e-mail subject lines by [REDACTED]; [REDACTED] involved other issues, such as the production of materials outside the date range specified in a business records order; and [REDACTED] was the result of a typographical error in a business records order. NSLB also deemed [REDACTED] overcollections and [REDACTED] typographical error to be non-reportable.

³¹ See Exec. Order 12333 § 1.6(c), *as amended*; Exec. Order 13462 § 6(b), *as amended*; Criteria on Thresholds for Reporting Intelligence Oversight Matters (Sept. 8, 2010) ("Intelligence Oversight Reporting Criteria").

³² [REDACTED]

III. STATUS OF RECOMMENDATIONS

Previous OIG reports recommended changes to the minimization procedures used by the FBI. Our second report, issued in March 2008, recognized that the FBI had adopted Interim Minimization Procedures but made the following three recommendations:

- The FBI should develop procedures for reviewing materials received from Section 215 orders to ensure that it has not received information that is not authorized by the FISA Court orders;
- The FBI should develop procedures for handling material that is produced in response to, but outside the scope of, a Section 215 order; and
- The FBI should develop final standard minimization procedures for business records that provide specific guidance for the retention and dissemination of U.S. person information.

Our third report, issued in May 2015, analyzed the FBI's compliance with these recommendations. We concluded that the FBI had resolved the first recommendation in adopting the Final Procedures, but that it nonetheless should clarify in policy guidance or training materials that the initial review requirements in the Final Procedures apply to metadata. We determined that the second recommendation was closed, as the Final Procedures include a provision for handling "overproduced" material. Finally, we concluded that the third recommendation was resolved by the Final Procedures, but that the FBI should consider using training materials or policy guidance to clarify several provisions regarding the retention and dissemination of U.S. person information.

Below we describe the FBI's progress in implementing these recommendations.

A. Handling of Metadata Under the Final Procedures

As noted above, metadata refers to dialing, routing, addressing, or signaling information associated with a communication. In the context of wire or electronic communication transaction records, metadata may include e-mail addresses, telephone numbers, IP addresses, and similar information. Metadata *does not* include information concerning the substance, purport, or meaning of the communications.

1. Initial Review of Metadata

In our second report, we recommended that the FBI develop procedures for reviewing materials received from Section 215 orders to ensure that it had not received information outside the scope of the FISA Court orders. In our third report, we observed that the FBI had adopted Final Procedures requiring that agents conduct an initial review of materials produced pursuant to a Section 215 order. We concluded that this provision requires case agents to review materials for overproduced material, but that it does not expressly subject metadata to the initial review requirement. We recommended that the FBI clarify that the initial review requirement applies to metadata.

In the course of our current review, the FBI and NSD produced copies of internal policies and training materials that make clear that the initial review provision applies to all FISA business records materials, including metadata. The FBI Policy Implementation Guide for Business Records Standard Minimization Procedures (SMP PG) states, [REDACTED] and emphasizes that agents must complete the initial review before uploading the information to any widely accessible FBI system. Training materials provided by the FBI also state [REDACTED]

[REDACTED]. Agents we interviewed told us that they had received multiple trainings on the Final Procedures and understood that the requirement to conduct initial reviews applies to all business records returns, including those involving e-mail transactional data or other metadata.

In addition, as described above, NSD attorneys are required to conduct post-order briefings with the case agent within 5 days of a business records order being signed. NSD's Post-Order Briefing Policy provides that the NSD attorneys must remind agents that they are required to conduct an initial review of FISA-acquired business records information to ensure that the production is generally responsive to the order, and that this initial review must take place before placing the information in any widely accessible FBI system. NSD attorneys told us that they make clear in these briefings that the initial review requirement applies to every business records production, including metadata.

Accordingly, we consider this recommendation closed.

2. Other Provisions Relating to Metadata

[REDACTED]

[REDACTED]

In our third report, we identified two potential issues regarding application of these provisions that we believed required attention and oversight.

- We stated that NSD and the FBI should periodically review the application of [REDACTED]

- We encouraged the FBI to pay attention [REDACTED]

In our current review, we assessed whether NSD and the FBI have addressed these issues. Training materials released in early 2016 state that [REDACTED]

The training materials also provide guidance on applying [REDACTED]

³³ [REDACTED]

In 2012 and 2013, the FBI used business records orders to request [REDACTED] by a subject on two occasions.³⁴ The first order requested [REDACTED]. The business records order specifically requested [REDACTED]. In that case, the produced included [REDACTED].

Since issuance of the OIG's third report in May 2015, NSD has revised its policy [REDACTED]

³⁵ [REDACTED]

³³ [REDACTED]

³⁴ Two other business records orders requested different types of [REDACTED]

³⁵ [REDACTED]

Given these steps, we believe that the FBI and NSD have sufficiently addressed the concerns we raised regarding other provisions related to metadata in our third report.

B. Retention and Dissemination of U.S. Person Information

In our second report, we recommended that the FBI develop final minimization procedures providing specific guidance on the retention and dissemination of U.S. person information. In our third report, we recognized that the FBI had resolved this recommendation by adopting Final Procedures providing such guidance, but stated that the FBI should consider clarifying two provisions in policy guidance or training materials: the definition of "necessary to understand foreign intelligence information," and the provision allowing

[REDACTED]. We briefly discuss each in turn below.

1. "Necessary to Understand Foreign Intelligence Information"

We recommended that the FBI define the term "necessary to understand foreign intelligence information" and provide actual examples of its application in training materials or policy guidance. Training materials produced by the FBI and NSD address this issue. One presentation states that when [REDACTED]

[REDACTED] The training provided the following example of this analysis:

[REDACTED]

According to the training slides, [REDACTED], and thus it meets the FISA Standard. Standing alone, however, it may be difficult to articulate why [REDACTED] would be appropriate.

Based on this guidance, we believe the FBI has addressed our concerns.

2. Dissemination of Information Relating to Computer Intrusions or Attacks

We also recommended that the FBI provide further guidance regarding the provision in the Final Procedures that allows the FBI to [REDACTED]

We stated the FBI should consider clarifying that the material must meet the FISA Standard, as well as define the term "U.S. person identifying information" and provide actual examples of its application.

The FBI has made these clarifications. The SMP PG makes clear that agents must first analyze whether the information meets the FISA Standard, stating, [REDACTED]

While the current version of the SMP PG does not further define or illustrate "U.S. person identifying information," an NSLB attorney told the OIG that the FBI is in the process of revising and consolidating its FISA policy guidance, and that the revised guidance will include a definition. In addition, materials used in trainings beginning in March 2016 define "U.S. person identifying information" and provide guidance on its application. Training slides and speaker's notes state that [REDACTED]

[REDACTED]. The training materials list examples that include [REDACTED]

[REDACTED]. The materials emphasize that determining whether information constitutes "U.S. person identifying information" requires a case-by-case assessment, and that agents should consult with NSLB if questions arise.

As a result, we consider this recommendation closed.

IV. OVERVIEW OF BUSINESS RECORDS ORDERS ISSUED FROM 2012 THROUGH 2014

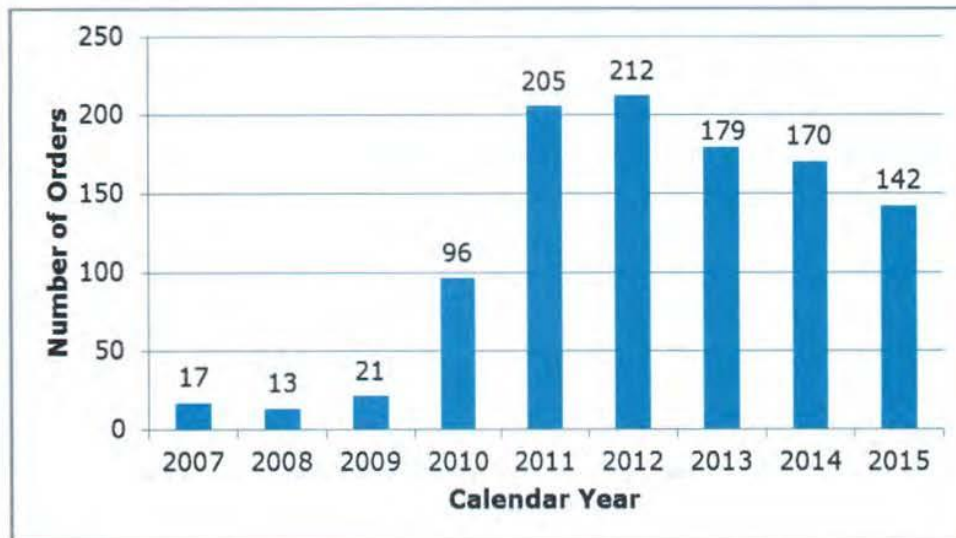
In this section, we provide an overview of the characteristics of business records orders approved in calendar years 2012 through 2014. We describe the number of business records orders approved, the type of information requested, the number of FBI offices that used the authority, and the types of investigations in which business records orders were sought. We provide information about the number of business records orders in which U.S. persons were the subject of the underlying investigations.

Additionally, we examine the timeliness of the business records process. We analyze the length of time that elapsed between the initiation of a business records request and the signing of the business records order by the FISA Court.

A. The Overall Number of Business Records Orders

From 2012 to 2014, the FISA Court approved 561 business records orders.³⁶ This continued a dramatic increase in the use of business records authority compared to the number of orders that we have observed during our prior reviews. For example, the FISA Court approved 51 orders from 2007 through 2009, the 3 year time period that we reviewed in our 2015 report. Figure 1 illustrates the increase in number of approved business records orders by calendar year.

FIGURE 1
Total Number of Approved Business Records Orders,
by Calendar Year, 2007-2015³⁷



Source: FBI.

³⁶ After reviewing a draft of this report, NSD commented that references to the number of business records orders should be changed to the number of approved applications for business records orders. The OIG understands that some business records applications result in more than one order. For example, the FISA Court may issue orders to four separate providers when approving a single application requesting ECTRs for four e-mail addresses. We also recognize that NSD reports the number of applications submitted to the FISA Court in its annual reports to Congress. Nonetheless, we decided to retain the references to the number of business records orders throughout this report as a matter of convenience.

³⁷ This table includes the total number of dockets for 2013 (179). This number differs slightly from the number of approved applications for business records the Department reported to Congress for 2013 (178). The OIG recognizes that one submission in 2013 was a copy of the Final Procedures, which did not result in a FISA Court order. As described below, we excluded this docket from our numbers for purposes of statistical analysis.

As we describe in more detail in Section IV.C.I., a primary factor in the increase between 2010 and 2012 was the refusal of certain communications providers to produce transactional records for e-mail [REDACTED] accounts (Electronic Communication Transaction Records, or ECTRs) in response to National Security Letters (NSL) beginning in late 2009. NSD and FBI personnel attributed the subsequent decline between 2013 and 2015 to several factors, including the stigma attached to the use of Section 215 authority following the Snowden revelations, increased use of Section 702 of the FISA Amendments Act, providers' resistance to business records orders, agents' frustrations with the lack of timeliness and level of oversight in the business records process, and agents' increasing use of criminal legal process instead of FISA authority in counterterrorism and cyber investigations.

In addition, between 2012 and 2014 there were [REDACTED] pending and [REDACTED] withdrawn applications for business records orders.³⁸ While we did not seek to ascertain the basis for each withdrawn request or application, we did review [REDACTED] that originated from the [REDACTED] and questioned agents about [REDACTED] of these. The reasons for the withdrawals varied, but many were withdrawn for administrative reasons, such as inadvertent initiation in FISAMS or a duplicate request, while others were withdrawn because the agents determined that the information was no longer necessary [REDACTED]. As a result, the number of applications withdrawn for substantive reasons is likely significantly lower.

We also reviewed [REDACTED] requests submitted to NSD but not filed with the FISA Court, and [REDACTED] draft applications submitted to the FISA Court as read copies but subsequently withdrawn. The requested information and targets in these applications varied substantially, and witnesses were unable to identify a common factor leading to their withdrawal. The withdrawn applications included several requests that were based on [REDACTED] or statements advocating jihad that raised potential First Amendment concerns.³⁹ [REDACTED] withdrawn application requested toll records [REDACTED]

³⁸ Pending applications include applications generated between 2012 and 2014 but not provided to NSD for further processing or submitted to the FISA Court for further approval.

³⁹ In February 2013, the FISA Court issued a legal opinion that addressed the line between First Amendment-protected activity and information establishing predication for an international terrorism investigation. The opinion was issued in response to the Department's application [REDACTED]

[REDACTED]. The FISA Court considered whether the application established reasonable grounds to believe that the investigation of the target was not being conducted solely upon the basis of activities protected by the First Amendment. The FISA Court concluded [REDACTED]

[REDACTED]. The Department reported and provided copies of this opinion to Congress in April 2013.

[REDACTED]. The agent ultimately re-submitted the business records request, and it was approved in 2015.⁴⁰ [REDACTED]

[REDACTED], which we discuss in more detail in Section V.

The FISA Court did not deny any business records applications between 2012 and 2014. When asked why applications withdrawn after submission of a read copy to the FISA Court were not reported to Congress, potentially creating the inadvertent impression that the FISA Court is a "rubber stamp," NSD supervisors told us that the Department includes only business records applications formally submitted to the FISA Court and denied or withdrawn, not those filed in "read copy" and subsequently withdrawn.⁴¹ The NSD supervisors acknowledged that excluding applications withdrawn after the FISA Court indicates that it will not sign an order might lead to misunderstandings about the FISA Court's willingness to question applications, but the supervisors noted that NSD and the FISA Court have talked about the "read" process publicly to address concerns about this.⁴² In comments provided to the OIG after

⁴⁰ The request for toll records originally was submitted as an NSL [REDACTED]. According to information produced by the FBI, the NSL required FBI Headquarters approval [REDACTED]. The case agent told the OIG that [REDACTED]

[REDACTED]. In September 2013, the agent submitted a business records request for the information, but NSLB asked him to withdraw the request since the information that could be obtained with an NSL. The agent added a request for e-mail transactional data, and the request ultimately went forward as a business records application in early 2015. It received approval from the Deputy Attorney General (DAG) in May 2015. An NSD Section Chief explained that [REDACTED]

⁴¹ As described above, the FISA Court Rules of Procedure require the government to file a propose application, or "read copy," with the FISA Court no later than 7 days before it seeks to have the application considered.

⁴² See, e.g., Letter from the Honorable Reggie B. Walton, Presiding Judge of the FISA Court, to Sen. Charles E. Grassley, Ranking Member of the Sen. Comm. on the Judiciary (Jul. 29, 2013) ("The annual statistics provided to Congress by the Attorney General pursuant to 50 U.S.C. §§ 1807 and 1862(b)—frequently cited to in press reports as a suggestion that the Court's approval rate of applications is over 99%—reflect only the number of *final* applications submitted to and acted on by the Court. These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them."); Remarks of John Carlin, Acting Assistant

(Cont'd.)

reviewing a draft of this report, NSD stated that it is currently considering whether to revise the methodology for counting withdrawn applications.

B. Business Records Orders by FBI Field Office

The OIG analyzed the number of FBI field offices with approved business records orders in 2012 through 2014. We determined that [REDACTED] of the FBI's 56 field offices obtained business records orders during this period.⁴³ The following 3 field offices had the most approved business records orders during our review period: [REDACTED]. Sixteen field offices each had between [REDACTED] and [REDACTED] business records orders approved between 2012 and 2014. The remaining 37 field offices each had fewer than [REDACTED] business records orders approved during our review period.

C. Analysis of Business Records Orders

We also analyzed various characteristics of the business records orders during our review period. Factors we considered included the type of information requested, the type of underlying investigation (*e.g.*, counterterrorism, counterintelligence, or cyber), the status of the subject of the investigation (either a U.S. person or non-U.S. person), and the timeliness of the business records process.

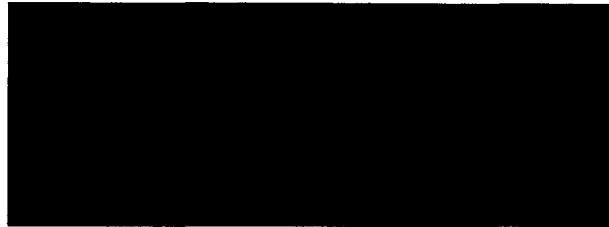
To conduct this analysis, we excluded [REDACTED] of the 561 total business records orders in our dataset based upon the unique characteristics of those orders. [REDACTED] of the excluded business records orders involved the bulk collection of information [REDACTED], which we briefly address in Section V of this report. [REDACTED] business records orders involved restricted counterespionage investigations and were handled outside of FISAMS. Finally, one order was an administrative document memorializing the Final Procedures. Therefore, the dataset in our analysis includes a total of [REDACTED] approved business records from 2012 through 2014.

Figure 2 shows the number of business records orders included in our analysis, by calendar year.

Attorney General for National Security, at the American Bar Assoc. Homeland Security Law Institute (Jun. 20, 2013) ("That the [Foreign Intelligence Surveillance Court (FISC)] ultimately denies very few applications is simply a reflection of the unique nature of *ex parte* FISC proceedings [T]he Department of Justice has 'an independent obligation to determine that every FISA application meets the statutory standard before we submit it' and treats that obligation with the utmost seriousness and care.").

⁴³ The [REDACTED] field offices submitted business records requests during our review period, but those requests were later withdrawn.

FIGURE 2
Total Number of Business Records Orders Included in Analysis,
2012-2014



Source: FBI.

1. Types of Investigations from which Business Records Orders Originated

First, we examined the types of investigations from which business records orders originated. The [REDACTED] business records orders we reviewed originated from counterintelligence (CI), counterterrorism (CT), and cyber investigations. Figure 3 shows the numbers of business records orders approved in each type of investigation.

FIGURE 3
Types of Investigations from which Business Records Orders Originated,
2012-2014

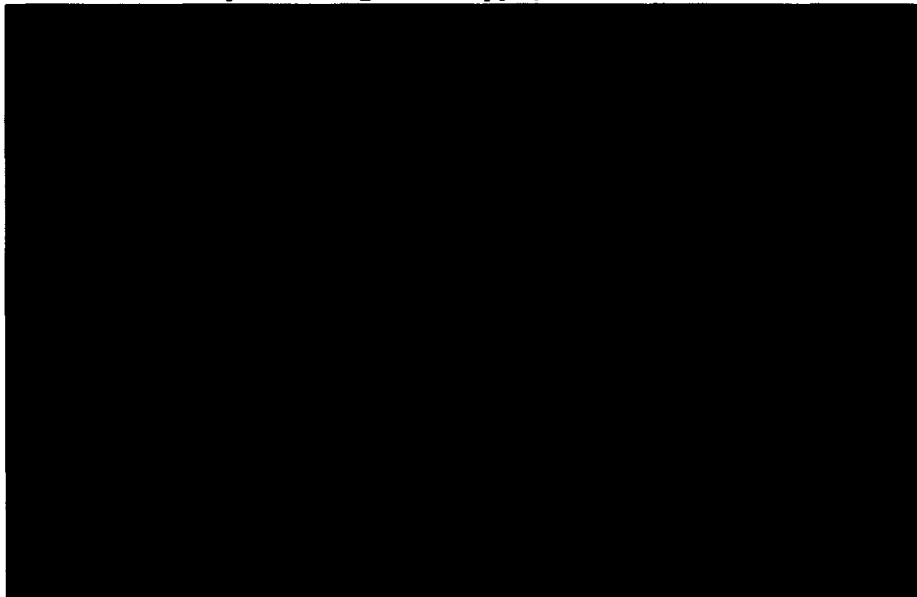


Source: NSD and FBI.

We found that business records orders were used far more frequently in counterintelligence investigations than in counterterrorism or cyber investigations. Of the [REDACTED] total orders we analyzed, [REDACTED] were obtained in counterintelligence investigations ([REDACTED]), [REDACTED] in counterterrorism investigations ([REDACTED]), and [REDACTED] in cyber investigations ([REDACTED]). Figure

4 shows that this gap increased during our review period, during which the usage of business records orders in counterintelligence investigations increased slightly, while the orders' usage decreased more substantially in both counterterrorism and cyber investigations.

FIGURE 4
Usage of Business Records Orders
By Investigation Type, 2012-2014



Source: FBI.

When asked about this disparity, agents told us that business records orders frequently are the only option available in counterintelligence investigations given the nature and classification of the information involved. By contrast, agents handling counterterrorism and cyber investigations can in some instances open a parallel criminal investigation and use the grand jury process to obtain the same information more quickly and with less oversight than a business records order. As described in more detail below, agents told the OIG that the business records process frequently takes several months, versus several weeks to obtain a grand jury subpoena. This was particularly true in cyber cases, [REDACTED] ([REDACTED]), during the reporting period, as discussed below.

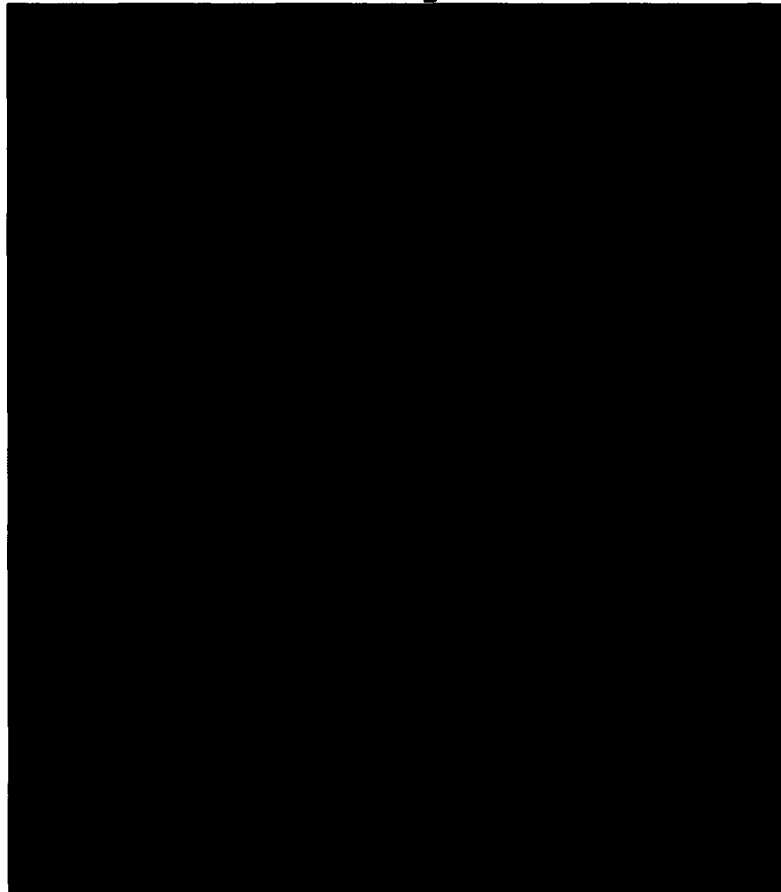
2. Subjects of Business Records Orders

We also analyzed approved business records orders to determine the number of orders that had U.S. persons and non-U.S. persons as subjects of the underlying investigations. We found that U.S. persons were listed as subjects in [REDACTED] orders, while non-U.S. persons were listed as subjects in [REDACTED] orders. [REDACTED] orders identified both a U.S. person and a non-U.S. person as subjects of the underlying investigations.

3. Types of Records Requested in Approved Business Records Orders Filed on Behalf of the FBI

Next, we examined our dataset for the types of business records requested during our review period. Figure 5 shows the types of records requested, as well as the number of orders requesting each type of record.

FIGURE 5
Types of Records Requested in Business Records Orders, 2012 through 2014



⁴⁴

⁴⁵ Records detailing

⁴⁶ Records detailing customer

⁴⁷ For our review period, these included records from

We found that [REDACTED] different types of records were requested during our review period. Transactional records for e-mail [REDACTED] accounts (ECTRs) were the most common type of records requested, accounting for [REDACTED] of the non-bulk business records orders we reviewed ([REDACTED] records).⁴⁸ The [REDACTED] business records orders requesting ECTRs between 2012 and 2014 are a dramatic increase from [REDACTED] approved orders requesting ECTRs in the OIG's previous review period, which constituted only [REDACTED] of the approved non-bulk orders between 2007 and 2009.

We found that the increase in business records orders for ECTRs was primarily due to a significant change in the use of NSLs. In late 2009, Internet providers began refusing to provide transactional information for e-mail [REDACTED] accounts in response to an NSL, requiring the FBI to use business records orders to obtain the same information.⁴⁹ Consequently, the number of business records orders went up "exponentially."

Interviews with FBI and Department personnel supported this conclusion. One NSLB attorney described business records orders as a [REDACTED] used to obtain transactional records that were previously obtained through NSLs. Several agents told us that a business records order was their only option once providers refused to accept NSLs for transactional information. Many agents expressed frustration at having to utilize the business records process instead of NSLs, because an NSL requires only field office approval and takes a few weeks to obtain rather than the several months that can be required for a business records order.

However, the number of non-ECTR business records orders also increased significantly compared to the previous review period. There were [REDACTED] business records orders for non-ECTR information during our current review period, as opposed to [REDACTED] between 2007 and 2009. We asked FBI and NSD personnel about the reasons for the increase in non-ECTR business records orders. Some witnesses attributed the increase to agents' growing awareness of and comfort

⁴⁸ Business records orders requesting ECTRs included requests for [REDACTED] [REDACTED] business records orders ([REDACTED]) requested e-mail account information and [REDACTED].

⁴⁹ As described in the OIG's August 2014 report on the FBI's Use of National Security Letters, Internet providers began refusing to produce ECTRs in response to NSLs around November 2009. The FBI historically had relied on Section 2709(b) of the Electronic Communications Privacy Act (ECPA) for authority to obtain ECTRs using NSLs. In November 2008, however, the Department's Office of Legal Counsel (OLC) issued an opinion interpreting Section 2709(b) as authorizing communications providers to produce four exclusive categories of information in response to an NSL: subscriber name, address, length of service, and local and long distance toll billing records. Although the OLC opinion did not specifically focus on ECTRs, one Internet provider argued that Section 2709(b) did not give the FBI authority to compel e-mail transactional records using an NSL, and several other providers followed suit. [REDACTED]

with the business records process, while others were unable to provide an explanation for it.

An NSD Deputy Unit Chief noted that the number of business records orders reached its peak in 2012 and has declined annually since then, and that the number of ECTR requests has declined more than other types of requests. The Deputy Unit Chief said that the Snowden revelations have played a role in this decline, both in terms of the stigma attached to use of Section 215 and increased resistance from providers. The Deputy Unit Chief stated, "I think that it's possible that folks . . . have decided it's not worth pursuing [business records orders], you know, obviously things haven't been great with providers since Snowden either."

In comments provided to the OIG after reviewing a draft of this report, NSD stated that the degree to which the Snowden disclosures affected the number of business records applications was speculative, and attributed the FBI's increasing use of taskings under Section 702 as likely a "notable cause" in the decrease in business records requests. NSD stated that during the relevant period (and continuing today) it suggested that FBI withdraw business records requests for accounts used by non-U.S. persons located overseas that can instead be tasked under Section 702.⁵⁰

4. Timeliness of the Business Records Process

Lastly, we examined the median length of time it took for business records orders to move through the approval process, including the overall length of time from initiation of a FISAMS request to FISA Court approval and the amount of time spent in each phase of the business records process. As we describe in more detail below, we did not identify a particular phase of the business records approval process that was responsible for delays.⁵¹

Our review also evaluated whether particular characteristics of business records orders affected the time it took for a business records order to move

⁵⁰ Section 702 of the FISA Amendments Act allows the government to acquire foreign intelligence by targeting non-U.S. persons reasonably believed to be outside the United States. Under Section 702, the government is not required to obtain individual surveillance orders from the FISA Court. Instead, the FISA Court approves targeting procedures to ensure that the government targets only non-U.S. persons reasonably believed to be outside the United States, and minimization procedures to guard against the inadvertent collection, retention, and dissemination of U.S. person information.

⁵¹ In comments provided to the OIG after reviewing a draft of this report, NSD highlighted the importance of the expedite process for business records applications. NSD stated that it had worked closely with FBI over the years to establish an expedite process through which FBI management can request that a FISA request, including a business records request, be processed immediately. According to NSD, this has resulted in some applications being processed in a single day. We agree that the expedite process is an important procedure that allows NSD and FBI to move applications quickly when operationally necessary. However, given the infrequency with which the expedite process is used for business records requests, we do not believe it impacts our overall analysis of the timeliness of the business records process. As noted below in footnote 54, only [REDACTED] business records requests we examined followed an expedited or amended approval process.

through the approval process. To do this, we first examined the median amount of time it took for a business records order to be approved from the time the request was initiated in FISAMS, to the time the order was sent to the FISA Court for approval. We then aggregated the business records orders by the following characteristics: type of records requested, type of underlying investigation, whether the subject of the investigation was a U.S. person, and by originating field office. We compared the aggregated median number of days for each of these characteristics to determine whether any orders sharing a similar characteristic took longer to be approved. Based on this analysis, we concluded that these factors had no appreciable effect on timeliness.

a. Overall Length of Time for Business Records Orders Approval, 2012-2014

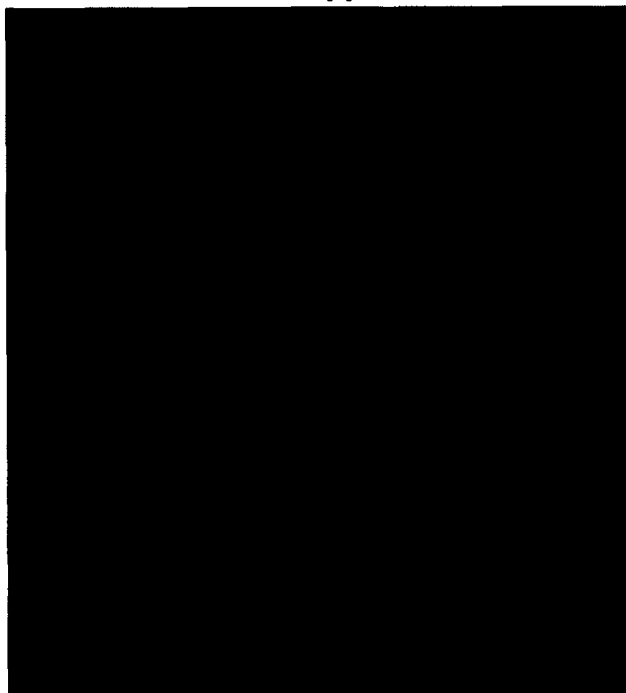
First, we examined the overall length of time it took for business records orders to go from initiation in the Foreign Intelligence Surveillance Act Management System (FISAMS) to approval by the FISA Court.⁵² We found that it took a median of 115 days (almost 4 months) for a business records order to move through the approval process during our review period.⁵³ [REDACTED] of the business records orders ([REDACTED] orders) were processed in 4 months or less during our review period.⁵⁴ Figure 6 illustrates the amount of time business records took to move through the business records orders approval process.

⁵² As discussed in Section II.B, the process to obtain a Section 215 order generally involves FBI field office initiation and review, FBI Headquarters review by NSLB and the Counterterrorism or Counterintelligence substantive desk, NSD review, and review and approval by the FISC.

⁵³ A median was used instead of an average in this case because the datasets had several number outliers artificially inflating the average.

⁵⁴ For purposes of our timeliness analysis, we excluded [REDACTED] records in our dataset because those records followed expedited or amended approval processes. Because these investigations were not entered into FISAMS, we do not have information as to how long they took to process.

FIGURE 6
Business Records Orders Approval Time, 2012-2014



Source: FBI.

b. Length of Time in Each Phase of the Approval Process, 2012-2014

We also examined the length of time business records orders spent in each phase of the approval process (field office, NSLB, NSD, and final approval) during our review period. We found that business records orders spent the least amount of time in the field office phase of the approval process – a median of 16 days.⁵⁵ Despite testimony from witnesses attributing delays in the process to various bottlenecks at FBI Headquarters, in NSD, or in obtaining final signatures, we were unable to identify a particular phase of the process that was responsible for delays. Orders spent a median of 40 days with NSLB and a median of 33 days in the NSD phase of the approval process.⁵⁶ We found that the FBI took a median of 2 weeks to obtain final approval signatures from NSLB and the FBI Deputy General Counsel.

⁵⁵ As described above, the field office phase of the approval process usually includes the initiation of a business records request by case agent in FISAMS, and approval from the following supervisors: Supervisory Special Agent, Chief Division Counsel, and the Assistant Special Agent in Charge.

⁵⁶ In comments provided to the OIG after reviewing a draft of this report, NSD noted that a substantial amount of the time between NSD's receipt of a business records request and the finalization of the application involves a back and forth with FBI personnel who review the draft and provide answers to questions from NSD.

As described above, FISA Court rules provide for submission of a "read" copy no later than 7 days before the government seeks to have the matter entertained by the Court. Our analysis included the time that applications and proposed orders were with the FISA Court to provide the most accurate measurement of the time needed for the FBI to obtain business records orders. While we do not have complete data regarding the FISA Court's processing of business records applications, we were informed that "read" copies generally are provided the week before, and the orders signed within a day or two of submission of the final application. No witnesses cited delays with the FISA Court as an issue.

c. Overall Timeliness

In interviews with the OIG, agents expressed concern with the timeliness of the business records orders approval process. Many agents we interviewed told us that the process for obtaining a business records order was lengthy, citing the amount of detail required, the multiple layers of approval, and the need to work with attorneys to draft the application.

Various agents told the OIG that the process was a deterrent to seeking another business records order. One counterterrorism agent stated, "To be candid with you, I don't think I ever will [seek another business records order]." He explained that he could be "waiting for months" before the order is approved and served, and that "once a case is over, it's not really over," because he has to go through internal FBI inspections, as well as possible inspections from other entities, including the OIG. By contrast, where there is a parallel criminal case, he can consult with the Assistant United States Attorney (AUSA) to confirm that there is enough information to obtain a grand jury subpoena, and receive the records much more quickly.

Agents expressed particular concerns about the impact of these delays in cyber cases. One agent said that the 2 to 3 months it took to obtain his business records order was "ridiculous." He explained that information moves quickly in the cyber realm, stating:

[REDACTED]

Another cyber agent agreed, stating, [REDACTED]

He said [REDACTED]

[REDACTED]. He told the OIG that it has been common practice to use the FISA process and NSLs in cyber cases, but that given providers' resistance to NSLs and delays in obtaining FISA orders,

some cyber squads have begun opening parallel criminal cases on foreign actors and finding ways to develop probable cause to obtain criminal legal process, allowing them to get data more quickly and with less oversight. These views are consistent with the [REDACTED], as discussed above.

NSD and NSLB personnel we interviewed were aware of agents' frustrations and said that their divisions have taken steps to improve the business records process. While several NSD witnesses said that the volume of requests did not significantly impact their processing of business records orders, one NSD attorney acknowledged to us that there had been delays in the process "because things get backed up." An NSD Deputy Unit Chief told the OIG that NSD has implemented "TurboFISA" to provide standardized language and streamline the drafting process for business records requests. NSD also places business records applications on a 14-day schedule, requiring attorneys to attend a meeting with supervisors to explain the reasons for any delays. An NSLB attorney told the OIG that he was "embarrassed" at how long the business records process takes, stating, "We are asking for less [than a full FISA], and it's taking twice as long." He told the OIG that, although NSLB does not measure the timeliness of the business records process, he thought that NSLB has streamlined the way it handles ECTR requests. Another NSLB attorney told the OIG that he thought ECTRs were being drafted and received by the FISA Court in a much more expeditious manner than other types of requests because they were so common.

As described above, we examined whether the type of records requested affected the timeliness of the process and identified no difference between ECTR and non-ECTR applications. We also did not see improvements in the timeliness of ECTR requests over the 3-year period: [REDACTED]. We did not obtain or analyze 2015 data.

Based on agents' concerns about timeliness, we recommend in Section VI that the FBI and the Department continue to pursue ways to make the business records process more efficient, particularly for applications related to cyber cases.

V. SELECTED SECTION 215 ORDERS OBTAINED BETWEEN 2012 AND 2014

In this section we describe selected Section 215 applications and orders obtained by the FBI between 2012 and 2014. We chose these matters to illustrate various uses of Section 215 authority. For each selected use, we summarize the underlying investigation and describe the material requested and any notable issues regarding the application and order. We then describe, where applicable, the material produced in response to the order, how it was used, and any compliance incidents.

In addition, in this section we discuss three compliance incidents that affected numerous business records orders during our review period. These

consisted of overproductions of full and partial subject lines (*i.e.*, content) by [REDACTED], the production of e-mail [REDACTED] by [REDACTED], and the FBI's release of un-minimized data from quarantined areas of DWS before agents conducted their initial review.

Finally, we provide a brief overview [REDACTED] following passage of the USA Freedom Act.

A. Selected Uses of Section 215 Authority

1. Business Records Orders in [REDACTED] Related FBI Counterterrorism Investigations

In 2012 and 2013, an FBI agent obtained [REDACTED] business records orders and submitted one application that was withdrawn after submission to NSLB. These were obtained in [REDACTED] related counterterrorism investigations [REDACTED]

[REDACTED]. As a result of this information, the FBI opened a full investigation [REDACTED].

[REDACTED]. The agent stated that the FBI was concerned that these [REDACTED] individuals wittingly or unwittingly may have been tied to a foreign power, so they initiated preliminary investigations on each of them.⁵⁷

[REDACTED] of the business records orders obtained in these cases were for electronic communication transactional records, while the other [REDACTED] business records orders and the withdrawn application were for [REDACTED]. Below we describe these orders and the withdrawn application, the handling of the information received in response to the approved orders, how the information was used to further the investigation, and any compliance incidents.

⁵⁷ Under the FBI's Domestic Investigation and Operations Guide (DIOG), there are two levels of predicated national security investigations: a preliminary investigation, which requires information or an allegation of a possible threat to national security, and a full investigation, which requires an articulable factual basis of a possible threat to national security.

a. [REDACTED] Requests for Electronic Communications Transactional Records from [REDACTED] (Section 215 Orders Issued December 2012)

Between April and August 2012, the agent initiated [REDACTED] business records requests for electronic communications transactional records from [REDACTED]. The requests sought transactional data for [REDACTED] in an effort to gather information about these individuals and determine whether they had been in contact with a foreign power. NSLB approved the requests in October 2012, and the FISA Court issued [REDACTED] separate orders in December 2012.

Each of these orders requested “[a]ll tangible things, but not the ‘contents’ of any communications as defined by 18 U.S.C. § 2510(8), *e.g.*, electronic mail or subject line, associated with the [targeted account] . . . from the inception of the targeted account to the date of production.” In standardized language used in every request for e-mail transactional records, the orders listed the following items as examples of “tangible things” being sought for the identified e-mail addresses:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- [REDACTED].

For [REDACTED] of the orders, the FISA Court issued standard Supplemental Orders requiring submission of written reports describing the FBI's implementation of the Interim Procedures to U.S. person information received from the providers. For the [REDACTED] order, which included a request for transactional data from [REDACTED], the FISA Court issued a Supplemental Order requiring the Department to report on its minimization of U.S. person information, and on whether the records received from the providers included the "content" of any communications. NSD and the FBI filed the required Supplemental Reports.

For each of these orders, the providers delivered the records in electronic format. The records included [REDACTED]

[REDACTED]. DITU received the records from the providers and uploaded them into DWS, where they were stored as unpublished products. The records were viewable only to relevant FBI personnel until the agent or co-case agent completed his initial review, minimized nonpublic U.S. person information, and "published" the information. Except as described below, the agent or his co-case agent reviewed the records and determined that they were within the scope of the orders.

After receiving these returns, the agent requested analysis of the information by a Staff Operations Specialist (SOS) in the field office. The SOS used the [REDACTED] to search three FBI databases – Clearwater, Sentinel/ACS, and DIVS.⁵⁸ [REDACTED]

[REDACTED], in general they returned no information indicating connections to or support for a foreign terrorist organization. The SOS documented these analyses in ECs widely available to FBI personnel through Sentinel.

The agent told the OIG that he pursued the business records orders only after taking other investigative steps, [REDACTED], coordinating with local law enforcement, obtaining NSLs for financial and e-mail subscriber data, and conducting searches of FBI and other government databases. The agent explained that a number of providers recently had stopped providing e-mail transactional records in response to NSLs, and that a business records order was the only available tool given the classification of the derogatory information in his cases. The agent stated that the business records process took considerably longer than an NSL. Nonetheless, he said that the information he obtained was

58 [REDACTED]

Automated Case System (ACS) and its successor, Sentinel, are the FBI's case management systems. As described above, DIVS operates as a search engine for a collection of FBI and non-FBI databases to which the FBI has access.

critical in allowing him to conclude [REDACTED].

There were compliance incidents related to two of these business records orders. The first order sought transactional records from [REDACTED] for an e-mail address used [REDACTED]. In response to the order, [REDACTED] produced [REDACTED], virtually all of which [REDACTED].

Although the co-case agent reviewed the records in DWS and identified no overproduction, DITU later determined that some of [REDACTED] and were part of a systemic overproduction of content by [REDACTED]. As described in more detail below, DITU purged overproduced records from DWS, and the overproductions were reported to the FISA Court and to the IOB in 2013 and 2014 as part of a larger report about [REDACTED] systemic overproductions.

The [REDACTED] order requested transactional records from [REDACTED] for [REDACTED] e-mail addresses used by another associate, [REDACTED]. In response to this order, [REDACTED] produced responsive records in electronic format, which the FBI uploaded into DWS on two separate dates. On [REDACTED], the FBI uploaded [REDACTED] consisting of transactional information for [REDACTED] and [REDACTED], as well as [REDACTED]. Three days later, on [REDACTED], the FBI uploaded an additional [REDACTED] records, which primarily were e-mail header information. The agent and co-case agent reviewed the returns and determined that the records were within the scope of the FISA Court order and did not include content. However, the agent and co-case agent mistakenly attributed the second batch of [REDACTED] records to [REDACTED]. The co-case agent documented these as separate returns from [REDACTED] in the case file, and the FBI subsequently closed the preliminary investigation for this individual on [REDACTED]. The FBI also disclosed these as [REDACTED] returns to the FISA Court in a Supplemental Report filed on [REDACTED].

[REDACTED] did not complete its production of responsive records until [REDACTED], almost 6 months after the investigation was closed. [REDACTED] produced approximately [REDACTED] records consisting of [REDACTED], which were uploaded electronically into DWS. Upon initial receipt of the records from [REDACTED], DITU identified full or partial e-mail subject lines in the production, sent the entire production back to [REDACTED], deleted the materials from its systems, and asked for the information to be produced without the subject lines. [REDACTED] subsequently re-produced the records, which were then uploaded into DWS.

The agent told the OIG that he did not learn about the [REDACTED] production until several months later, when he logged on to DWS and noticed that he had returns for review. According to e-mails dated [REDACTED], the agent subsequently contacted attorneys in NSLB and NSD, who helped him determine that the [REDACTED] records were within the date range in the order and thus were not an overproduction, even though the investigation had been closed

for several months. During this process, however, the original misattribution of records to [REDACTED] was discovered, and on [REDACTED], the FBI and NSD filed a notice of material misstatement with the FISA Court under Rule 13(a). The report correctly described the [REDACTED] returns and stated that the FBI had deleted the [REDACTED] records without reviewing them. The agent told the OIG that he was satisfied that they had mitigated the threat even without the [REDACTED] records based on the other information developed in the investigation.

NSD reviewed these business records orders in its 2014 Minimization and Accuracy Review of the field office. During this review, NSD examined the information produced in response to the orders to evaluate compliance with the applicable minimization procedures and identify overproductions. NSD identified no additional errors.

b. [REDACTED] (Section 215 Orders Issued February 2013)

In [REDACTED], the agent initiated [REDACTED] business records requests for [REDACTED]. These requests sought the production [REDACTED].⁵⁹ The agent explained that he wanted to obtain as much contact information as possible for these individuals, and that a business records order was necessary because [REDACTED]. He stated that he planned to use the e-mail addresses and telephone numbers he obtained to search FBI and other databases to see if any connections to a foreign power emerged.

The business records requests were submitted to NSD in [REDACTED], where an attorney drafted and finalized the applications. Although these applications requested [REDACTED] and obtained approval from the Executive Assistant Director (EAD) for the FBI's National Security Branch. [REDACTED]

[REDACTED]⁶⁰

Both applications were approved by the FISA Court on [REDACTED]. Because the orders were governed by the Interim Procedures, the FISA Court issued its standard Supplemental Order requiring submission of a written report describing the FBI's minimization of U.S. person information. The FBI served these orders on [REDACTED].

⁵⁹ A [REDACTED] request sought records for [REDACTED], but the agent withdrew this request after submitting it to NSLB because [REDACTED] the records did not exist.

⁶⁰ NSD reported these [REDACTED] business records orders [REDACTED] in the Attorney General's 2013 Annual Report to Congress on the use of the business records provision.

Two weeks later, on [REDACTED], [REDACTED] responsive documents directly to the agent in hard copy. The records contained telephone numbers and e-mail addresses [REDACTED]. According to the Supplemental Reports filed with the FISA Court, the agent reviewed the hard copy documents and determined that the information related exclusively to the targeted individuals. The agent then had an SOS analyze the information by using the identifiers to conduct database checks and create a telephone link chart, which were documented in ECs and uploaded into Sentinel. The agent also uploaded scanned documents of the original returns into the case file in Sentinel. NSD reviewed the returns for these business records orders in its 2014 Minimization and Accuracy Review and identified no errors.

[REDACTED]. Based on this and other information, the FBI found no nexus to terrorism and closed the preliminary investigations in [REDACTED].

The FBI closed the full investigation [REDACTED] in [REDACTED]. According to the closing EC, [REDACTED]. Although he had had contact with a person who was associated with the foreign terrorist organization, there was no evidence that he supported or was a member of the organization himself. The FBI also determined [REDACTED]. As a result, the FBI concluded [REDACTED] posed no threat to national security warranting further investigation.

The FBI disseminated information about these [REDACTED] investigations to members of the [REDACTED] in a briefing at a conference in June 2015.⁶¹ In a joint presentation, the FBI and Defense Intelligence Agency briefed conference attendees on efforts by [REDACTED].

2. Multiple Business Records Orders in an FBI Counterintelligence Investigation

Between 2012 and 2014, an FBI agent obtained [REDACTED] business records orders and submitted [REDACTED] business records application that was withdrawn after submission of a "read copy" to the FISA Court. The business records [REDACTED]

⁶¹ [REDACTED]

[REDACTED]. In a related case, another FBI agent obtained a business records order for information about [REDACTED]. Below we describe the business records orders and the withdrawn application, the FBI's handling of the information received in response to the approved orders, how the information was used to further the investigation, and any compliance incidents that occurred in connection with these matters.

a. Request for [REDACTED] (Section 215 Order Issued February 2012)

In [REDACTED], the FBI agent initiated a business records request for [REDACTED]

⁶² According to the agent, several of the subject's [REDACTED], which revealed [REDACTED]

[REDACTED] to determine whether it had been used to access [REDACTED]. She said that there was no other authority available to obtain this data given the classification and sensitivity of the case.

The business records request was submitted to NSD in early [REDACTED], and subsequently was approved by the FISA Court on [REDACTED]. Because the order pre-dated the Final Procedures, the FISA Court issued a Supplemental Order requiring submission of a written report describing the FBI's minimization of U.S. person information received in response to the order.

According to the Supplemental Report filed with the FISA Court, the [REDACTED] on [REDACTED], and received responsive materials between [REDACTED]. The providers produced [REDACTED]. The agent told us that the records were important because they gave the FBI a window into the subject's communications habits, [REDACTED].

⁶² [REDACTED]

The agent placed the information in the FBI's official case file, which is maintained in a secure area of the FBI field office and restricted to personnel involved in the case, and did not upload it into the FBI's electronic case management database. The OIG reviewed the records and confirmed that they did not include any identifying or account information.

b. Request for [REDACTED] (Section 215 Order Issued February 2012)

In [REDACTED], the agent initiated a business records request for the subject's [REDACTED], including account records for his [REDACTED]. According to the application, [REDACTED]. The application stated that the FBI wanted to obtain this information [REDACTED].

The business records request was sent to NSD in [REDACTED], and the FISA Court signed the order on [REDACTED]. The FISA Court again issued a Supplemental Order requiring submission of a written report describing the FBI's minimization of U.S. person information received in response to the order. The FBI served the FISA Court order on [REDACTED].

According to the Supplemental Report filed with the FISA Court, the FBI [REDACTED]. The case agent reviewed the materials and determined that they were within the scope of the order and contained only information relating to the subject. We reviewed the documents received in response to this business records order and confirmed that they contained only the subject's information. The information remained in hard copy, and was not uploaded into the FBI's electronic case management database or disseminated.

c. Request for [REDACTED] (Section 215 Order Issued March 2012)

In [REDACTED], the agent initiated a business records request for the subject's [REDACTED] information. The draft request sought various information related to the subject, his e-mail addresses, [REDACTED].

⁶³ The request was submitted to NSD on [REDACTED], and subsequently was revised several times. One draft requested "all tangible things" relating to the subject including [REDACTED] for the subject, [REDACTED]. The final application revised this request to "all tangible things including . . . records" for the subject, [REDACTED], but noted for reasons discussed below in a footnote, [REDACTED]

The order was approved by the FISA Court on [REDACTED]. The FISA Court issued its standard Supplemental Order requiring submission of a written report describing the FBI's minimization of U.S. person information received in response to the order. According to the Supplemental Report submitted to the FISA Court, the FBI served the order [REDACTED].⁶⁴ In response, [REDACTED]

[REDACTED]. Although not explicitly addressed in the Supplemental report, [REDACTED], for reasons discussed below.

The agent told the OIG that she reviewed the information and [REDACTED]. According to the agent, the records established [REDACTED], and were not uploaded to the FBI's electronic case management database or otherwise disseminated.

Although the FBI ultimately obtained [REDACTED], the OIG asked why the request included [REDACTED]. Under current FBI policy, [REDACTED]

⁶³ [REDACTED]

⁶⁴ The Supplemental Report for this order and the 2012 orders [REDACTED] were not filed until early 2015. According to contemporaneous e-mails, these Supplemental Reports "got lost in [NSD's] administrative shuffle when the matters were handed off between attorneys," and the delay was not the agent's fault. The NSD attorney who filed the Supplemental Reports in 2015 explained the reason for the delay in his cover letters to the FISA Court.

metadata obtained with a business records order can include [REDACTED]

[REDACTED]. The NSD attorney who drafted the application said [REDACTED]. The agent told the OIG that [REDACTED]. A Deputy Unit Chief in NSD said that they subsequently began limiting business records requests to [REDACTED]

In addition, our review of [REDACTED] revealed that [REDACTED] information included [REDACTED]. This information was within the scope of the order, which authorized the production of all records associated with [REDACTED]. As described in more detail below in connection with the discussion of the FBI's dispute [REDACTED], the FBI and NSD believe that Section 215 authorizes the government to [REDACTED] using business records orders, but nonetheless began excluding [REDACTED].

d. Request for [REDACTED] (Section 215 Order Issued November 2012)

The agent submitted a business records request for [REDACTED] in [REDACTED], seeking "all tangible things" related to the subject, including [REDACTED]. The agent told us that she requested these [REDACTED].

The FISA Court approved the Section 215 order on [REDACTED], and issued a standard Supplemental Order requiring reporting on the minimization of responsive U.S. person information. The FBI served the FISA Court order on [REDACTED], and the recipient company produced responsive records on [REDACTED]. The agent then reviewed the records and determined that they were within the scope of the order. The agent told us [REDACTED]. The agent retained the records in hard copy in the FBI's restricted case file.

The FBI shared the [REDACTED]. The agent told us [REDACTED] went through minimization training

and received only a hard copy of the [REDACTED]. She explained that the process of disseminating records to [REDACTED] to directly view the minimized data.⁶⁵ The FBI disclosed this dissemination to the FISA Court in a Supplemental Report filed on [REDACTED].

As this investigation is ongoing, [REDACTED]. However, the case agent told the OIG [REDACTED].⁶⁶

e. [REDACTED] (Section 215 Order Issued January 2013)

In [REDACTED], the FBI opened a spin-off investigation [REDACTED]. Based on information [REDACTED], the agent leading the spin-off case initiated a business records request for [REDACTED]. The application sought "all tangible things" related to the [REDACTED], including [REDACTED].

The FISA Court approved the application on [REDACTED], and issued its standard Supplemental Order requiring reporting on the amount of U.S. person information received and how it was retained and disseminated. The FBI served the business records orders [REDACTED] on [REDACTED].

According to the Supplemental Report filed with the FISA Court, [REDACTED]. The FBI determined that the printed summary fell within the scope of the order, but that [REDACTED] did not because they either preceded the start date of the order or related to different names than the [REDACTED].

⁶⁵ This business records order was governed by the Interim Procedures, which allowed the FBI to [REDACTED]

[REDACTED] The Final Procedures allow the FBI to [REDACTED]

⁶⁶ As noted above, the FBI told us that [REDACTED].

[REDACTED]. The FBI purged the [REDACTED] overproduced records and retained the remaining [REDACTED] records in its physical investigative file. The [REDACTED] produced [REDACTED], all of which fell within the scope of the order and were retained in the FBI's physical investigative file. The FBI did not disseminate or upload the records into its databases.

The case agent told us [REDACTED]

[REDACTED]. The investigation of the [REDACTED] was ultimately closed in late [REDACTED].

**f. Request for E-mail Transactional Records
(Section 215 Order Issued December 2013)**

In [REDACTED], the agent initiated a business records request for transactional records from [REDACTED] for [REDACTED]. The application stated [REDACTED]

[REDACTED]. According to the agent, [REDACTED]

The FISA Court approved the application on [REDACTED], and issued a Supplemental Order requiring the government to file a report stating whether the items received include the contents of any communication. The FBI served the order on [REDACTED] on [REDACTED]. [REDACTED] produced responsive records the following day. According to the Supplemental Report filed with the FISA Court, [REDACTED] produced [REDACTED], which were uploaded and stored in a restricted area of the FBI's DWS. The Supplemental Report stated [REDACTED]

The agent told the OIG that she marked the records in DWS by whether they met the FISA Standard, and did not release them to the FBI's case management database. The OIG reviewed the records and confirmed that they were visible only to the agent.

The agent told the OIG that the [REDACTED], and there was no other way to obtain this information in a counterintelligence investigation. However, she indicated [REDACTED]

[REDACTED]. According to the agent, the latter information would have been helpful because [REDACTED]

g. Request for Additional [REDACTED] Records (Section 215 Order Issued June 2014)

In [REDACTED], the agent initiated another business records request for transactional records from [REDACTED]. Rather than identifying specific [REDACTED]

_____ . According to the agent, during interviews with the U.S. government,

██████████. The agent obtained emergency authorization for electronic surveillance and physical search ██████████

. The agent said that she sought information from [REDACTED] about [REDACTED]

The agent told us that the [REDACTED]
[REDACTED]. She said that although the information was helpful, she was unable [REDACTED]
[REDACTED]. She said that there were no overproductions in the returns. The OIG reviewed the [REDACTED] production and confirmed that it was stored in the restricted case file.

h. Withdrawn Request for

In [REDACTED], NSD and the FBI began discussing using a business records order [REDACTED]. The agent told the OIG [REDACTED]

The initial draft request sought "all tangible things related to [the subject]

In early [REDACTED], [REDACTED]

NSD subsequently finalized the business records application. The final draft request sought "all tangible things related to [the subject] [REDACTED]

[REDACTED] " In the final application, NSD argued [REDACTED]

[REDACTED]. According to the application, Congress had ratified this interpretation of the business records provision in its 2011 reauthorization.

[REDACTED]

The final application also included the same supplemental minimization procedures as the initial draft, noting that these were used in the [REDACTED].

The EAD signed the final application, and NSD filed a "read copy" with the FISA Court in [REDACTED].

[REDACTED], the FISA court judge informed NSD that he was [REDACTED]. In discussions with NSD in [REDACTED], a legal advisor on the FISA Court staff stated that he thought [REDACTED].

NSD and NSLB then proposed [REDACTED]. In an e-mail dated [REDACTED], an NSLB attorney informed the agent [REDACTED]. The agent said that she became extremely frustrated with the process and [REDACTED] in [REDACTED] - 3 years after she initiated the business records request. The agent told the OIG [REDACTED].

_____. NSD subsequently withdrew the business records request.

3. Request for [REDACTED]
[REDACTED] (Section 215 Order
Issued May 2012)

On [REDACTED], an agent on a cyber squad in an FBI field office initiated a business records request for [REDACTED]

The agent told us that the investigation focused on

The request sought the following information:

- [REDACTED]; and
- [REDACTED]

The agent said that the FBI had

68

According to the agent,

⁶⁸ The FISA Court may authorize a physical search [REDACTED] a finding that there is probable cause to believe that "the target of the physical search is a foreign power or an agent of a foreign power, except that no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States," and that "the premises or property to be searched is or is about to be owned, used, or possessed by, or is in transit to or from an agent of a foreign power or a foreign power." 50 U.S.C. § 1824(a)(2)(A), (B).

[REDACTED]

The FISA Court approved the order on [REDACTED], and issued its standard Supplemental Order under the Interim Procedures. According to the Supplemental Report filed with the FISA Court, [REDACTED]

[REDACTED]. The field office

stored the raw data on a computer system accessible only to cyber squad members. The agent reviewed the records, [REDACTED], minimized the U.S. person information, summarized his analysis in an EC, and uploaded the EC into the FBI's case management system.

Based on the information produced [REDACTED]. After receiving the information [REDACTED].⁷⁰ While some of these searches resolved [REDACTED], requiring the agent to use an NSL [REDACTED].⁷¹ After [REDACTED].

The agent told the OIG [REDACTED] was very important to his investigation and [REDACTED]. However, he expressed concern about how long the business records process took (approximately 106 days from initiation to order in this instance).

[REDACTED]

69

[REDACTED]

70

[REDACTED]

71

[REDACTED]

Instead, the Department and [REDACTED] to negotiate a compromise over the production of [REDACTED]. These negotiations occurred sporadically for nearly three years. During this period, from early [REDACTED] through late [REDACTED], all business records requests to [REDACTED] those not involving a request for [REDACTED], were placed on hold and no new orders were served [REDACTED]. Eventually, in late [REDACTED], the FBI decided to exclude [REDACTED] from all business records requests [REDACTED]. FBI Section Chief told us that the FBI made this decision because business records requests [REDACTED] very infrequent and the FBI concluded that the issue did not warrant further litigation in the FISA Court. Following this decision, all business records orders [REDACTED] we reviewed contained the following limitation:

[REDACTED]

On [REDACTED], an FBI case agent initiated a business records request [REDACTED] in a counterintelligence investigation unrelated to the [REDACTED] business records orders referenced above. This request would become the first business records order issued [REDACTED] since [REDACTED]. The subject in the investigation [REDACTED]

[REDACTED]. The case agent stated that she initially intended to use an NSL to obtain the records, but was informed by others in her office that a business records order would be necessary to get the information she sought.

The business records request was submitted to NSD on [REDACTED], and was subsequently approved by the FISA Court on [REDACTED]. As requested by the government, the FISA Court's order contained the limiting language described above, [REDACTED]. The case agent told the OIG that she became aware during the request process that she would not be able to obtain information on [REDACTED]. The case agent stated that this information could have potentially aided her investigation if, for example, it showed the subject [REDACTED]. Nonetheless, the case agent stated that the inability to get these records did not have an effect on the investigation.

The FBI served the FISA Court order [REDACTED]. The FBI received a [REDACTED]. The case agent conducted an initial review of the records and, after determining that they were within the scope of the order

and contained only information relating to the subject, requested that the records be uploaded into DWS.⁷² We reviewed the records received in response to the business records order and confirmed that they contained only the subject's information. Additionally, we found that [REDACTED] in response to the order. The case agent told the OIG that the records [REDACTED] and were not of investigative value. No analytical products were created using the records obtained. The investigation was closed in [REDACTED] after the subject departed the United States.

5. Request for [REDACTED] (Section 215 Orders Issued October 2013)

On [REDACTED], an FBI agent initiated a business records request for records [REDACTED]

[REDACTED]. According to the primary case agent, the underlying counterintelligence investigation was initiated in [REDACTED] to [REDACTED]

The business records request was submitted to NSD on [REDACTED], and was subsequently approved by the FISA Court on [REDACTED]. The Court ordered [REDACTED]

The case agent described the business records process to be uneventful in this case. He stated that he answered a few factual questions for the NSD attorney assigned to the business records application, but that no concerns or problems were identified with the application. The case agent described the overall business records process positively, but noted that the amount of time it takes to obtain a business records order was "frustrating" and can slow down an investigation.

The FBI served the FISA Court orders [REDACTED] on [REDACTED]. [REDACTED] the FBI with records responsive to the business records order on [REDACTED], and [REDACTED] responsive records on [REDACTED]

⁷² In [REDACTED], the FBI identified an error in DWS that resulted in the [REDACTED]. We describe this compliance issue in more detail below.

[REDACTED]. The case agent conducted an initial review of the records and determined that the records were responsive and contained no overproduced information.

Around this time, in [REDACTED], the FBI decided to transfer management of this case from the [REDACTED]. The case agent told the OIG that this decision was based on resource considerations. Due to this, the case agent forwarded the business records to the new case agent in FBI's [REDACTED]. The new case agent told the OIG that the FBI reached out to an individual identified in the business records and [REDACTED]. According to the new case agent, [REDACTED]

[REDACTED]. The new case agent stated that the FBI would not have identified [REDACTED] if not for these business records. Because of that, the agent described the business records request as "one of the key steps" in the ongoing investigation.

6. Multiple Business Records Orders in an FBI Counterintelligence Investigation

In 2013 and 2014, FBI agents obtained [REDACTED] business records orders in a counterintelligence investigation involving [REDACTED]. The subjects of the investigation [REDACTED]

[REDACTED]. The FBI believed that the subjects, [REDACTED]

[REDACTED]. Below we describe the [REDACTED] business records orders obtained in this investigation.

a. Request for [REDACTED] (Section 215 Order Issued August 2013)

On [REDACTED], an FBI co-case agent initiated a business records request [REDACTED]. First, the agent requested [REDACTED]

Second, the agent requested [REDACTED]

[REDACTED]. The FBI agent told the OIG [REDACTED]

[REDACTED]. The FBI hoped that the results of this business records request would allow the FBI [REDACTED]

The business records request was submitted to NSD on [REDACTED], and was subsequently approved by the FISA Court on [REDACTED]. The Court

ordered [REDACTED] the requested records for the period from inception of service to the date of production of the records.

The FBI served the FISA Court order [REDACTED] on [REDACTED]. The FBI received [REDACTED] on [REDACTED]. The [REDACTED] FBI agents assigned to the investigation conducted an initial review of the records and determined that they were responsive to the request. The FBI agent who requested the records told the OIG that the records confirmed [REDACTED].

**b. Requests for [REDACTED]
(Section 215 Orders Issued August 2013 and
March 2014)**

On [REDACTED], the FBI co-case agent also initiated a business records request [REDACTED] for [REDACTED] relating to the subjects. FBI investigation had determined that [REDACTED].

The business records request was submitted to NSD on [REDACTED], and was subsequently approved by the FISA Court on [REDACTED]. The Court ordered [REDACTED]. At the government's request, the FISA Court's order explicitly stated should not produce [REDACTED].

The FBI attempted to serve the order [REDACTED] informed the FBI [REDACTED] was misidentified in the order and refused to accept service of the order. As a result, no records were obtained in response to this order and, as we discuss below, the FBI obtained a new order for these records.⁷³

On [REDACTED], the FBI case agent initiated a second business records request for these records. In addition to the records previously requested, the second request [REDACTED]

⁷³ NSD told us that [REDACTED].

[REDACTED].

The business records request was submitted to NSD on [REDACTED], and was subsequently approved by the FISA Court on [REDACTED]. The Court's order again contained language [REDACTED] should not produce [REDACTED].

The FBI served the order [REDACTED]. The FBI received [REDACTED] with the responsive records on [REDACTED]. The case agent told us that she conducted an initial review of the materials upon receipt and found the records responsive to the request. The case agent also told us the records were useful to the investigation and that some of the records were disseminated [REDACTED]. The case file indicated [REDACTED]. The investigation into the subjects is ongoing, and the case agent told the OIG [REDACTED].

B. Compliance Incidents

The OIG reviewed three compliance incidents that affected numerous business records orders between 2012 and 2014. The first involved the overproduction of full and partial e-mail subject lines by two providers, [REDACTED], which the OIG determined affected [REDACTED] business records orders. [REDACTED] similarly overproduced [REDACTED]. NSD and FBI witnesses told the OIG that the vast majority of compliance incidents relating to business records orders between 2012 and 2014 were the result of overproductions by providers.

A third compliance incident was the result of a technical problem in an FBI database, rather than provider error. In March 2015, the FBI [REDACTED].

We describe each of these compliance incidents below.

1. Full and Partial Subject Lines from [REDACTED]

On November 16, 2012, DITU notified NSD that it had discovered that [REDACTED] had overproduced full or partial subject lines in response to [REDACTED] business records orders requesting e-mail transactional records. Upon discovery of the overproduction, the FBI contacted [REDACTED] and stopped serving business records orders on it. NSD filed a preliminary notice with the FISA Court on November 21, 2012, disclosing the [REDACTED] overproduction and stating that the FBI was investigating the issue further. On December 19, 2012, [REDACTED] advised the FBI that it had identified the cause of the overproduction and rectified the error, and the FBI then resumed serving business records orders on [REDACTED].

However, DITU's review of subsequent productions revealed that [REDACTED] continued to produce full and partial subject line information in response to business records orders after December 2012. DITU determined that the overproduction was caused by a mistake in [REDACTED] production logic, and that [REDACTED] earlier fix was flawed. DITU then sequestered all business records productions from [REDACTED] so that they were available only to limited technical personnel. When DITU discovered overproduced information, it purged the entire production prior to uploading and requested that the provider reproduce it without the subject line information.

By April 6, 2013, [REDACTED] represented that it had corrected its production methodology to include only authorized e-mail fields. Nonetheless, DITU continued to manually review [REDACTED] business records productions and discovered additional full or partial subject lines in July, August, and October 2013. According to a Rule 13(b) notice filed with the FISA Court on December 26, 2013, DITU did not identify additional overproductions by [REDACTED] after November 8, 2013, and stopped manually reviewing business records productions from [REDACTED] on November 18, 2013.

While investigating [REDACTED] systemic overproduction of subject lines, DITU identified similar overproductions by [REDACTED]. DITU followed the same procedures as it had with [REDACTED], sequestering and purging the [REDACTED] productions to ensure that no information had been transferred to other FBI systems. DITU continued to review all [REDACTED] returns until November 12, 2013, when it determined that [REDACTED] had corrected the problem. In July 2015, however, NSD reported that [REDACTED] had overproduced subject line information in response to two business records orders issued in 2014. A subsequent FBI investigation concluded that these overproductions were an isolated issue and not a systemic problem. The OIG did not identify additional overproductions by [REDACTED] in 2014.

Although NSLB concluded that DITU followed proper procedures by sequestering the overproductions and did not compound the errors by uploading the materials into FBI databases, the FBI reported these as IOB violations based on the systemic nature of the technical problems by the providers and the large number of FISA Court dockets affected. The Department also reported the systemic overproductions to Congress in the Attorney General's 2013 Annual Report on the use of the business records provision and in the Semi-Annual Report for January 1 to June 30, 2013.

2. [REDACTED]

On June 27, 2013, the FISA Court approved an application for transactional records from [REDACTED]

██████████.⁷⁴ The providers produced responsive records in electronic format, which were uploaded into DWS and reviewed by the agent.

During a Minimization and Accuracy Review conducted in a field office in December 2013, an NSD attorney reviewed the records produced in response to this business records order and discovered that ██████████ had produced information pertaining to ██████████.

██████████. However, some of the ██████████ produced by ██████████ included ██████████

██████████. NSD determined ██████████ potentially constitute content and were beyond the scope of a business records order for electronic transactional records.

In subsequent conversations with ██████████, the FBI discovered that ██████████ was regularly providing ██████████ in response to FISA business records and pen register/trap and trace (PR/TT) orders, and thus it was likely that ██████████ ██████████ had been overproduced in response to other orders.⁷⁵ As of February 7, 2014, ██████████ had removed ██████████ from business records and PR/TT productions. ██████████ told the FBI it would provide information only from ██████████ in response to future orders to avoid producing unauthorized information.

NSD provided preliminary notice of the potential compliance issue associated with ██████████ to the FISA Court on February 14, 2014, and final notice on June 12, 2014. According to the final notice filed with the FISA Court, in June 2014, NSLB issued guidance to FBI personnel concerning ██████████ found in business records or PR/TT productions, advising FBI personnel to consult NSLB if they came across ██████████ in FISA-acquired information produced pursuant to a business records or PR/TT order, and the data was not confined to information in the to/from field. FBI e-mails indicate that NSLB did not require agents to re-review ██████████ business records or PR/TT returns received before February 7, 2014, to assess whether they included ██████████ data outside the scope of the orders.

An NSD Deputy Section Chief told the OIG that the ██████████ data was content in the 2013 ██████████ production reported to the FISA Court, but that ██████████ data is not content in all cases. For example, she indicated ██████████

⁷⁴ ██████████
██████████. The FBI disclosed this misstatement to the FISA Court and filed a second application for business records relating to those e-mail addresses. In addition, this business records order was not part of the systemic overproduction of e-mail subject lines by ██████████.

⁷⁵ The OIG identified ██████████ business records orders directed at ██████████ in 2012 and 2013, but did not review the potentially voluminous productions received in response to those orders to determine if these contained ██████████.

██████████. The Deputy Section Chief explained that this distinction was not always readily discernible and required case-by-case analysis. She stated that when the error in this instance was initially discovered, the FBI determined that DITU could not automatically screen ██████████ productions to identify ██████████ data that constituted content. She said that the FISA Court was aware that NSLB issued guidance instructing agents to be on the lookout for ██████████ data in future ██████████ productions.

The Department also reported the production of ██████████ data to Congress in the Attorney General's Semi-Annual Report for January 1 to June 30, 2014.

3. DWS Release of Quarantined Records

As described above, the FBI's typical practice is to store business records returns produced in electronic format in an access-restricted area of DWS. The agent is required to conduct an initial review of the records to identify overproductions and minimize nonpublic U.S. person information before "releasing" the records in DWS.

In March 2015, the FBI identified an error that caused DWS to release some business records returns prior to initial review, making the un-minimized raw data available FBI-wide. The FBI determined that the error potentially affected ██████████ business records orders between January 2014 and March 2015.⁷⁶ The FBI informed the FISA Court of the error on June 30, 2015. According to the Rule 13(b) notice filed with the FISA Court, the FBI corrected the error in DWS and restricted access to the materials produced in response to the affected business records orders. The FBI then notified the agents responsible for those orders to allow them to conduct initial reviews of their returns. An NSD Deputy Section Chief told us that NSD and FBI are still investigating the incident, specifically they are confirming that all initial reviews have been completed and attempting to determine whether any of the un-minimized raw data was exported from DWS prior to the initial review being conducted.

C. Current Status of Bulk Collection under Section 215

Our May 2015 report described in detail the Section 215 applications submitted by the FBI ██████████

⁷⁶ This error affected ██████████ business records orders in 2014, including ██████████ orders selected for review by the OIG.

As noted previously, the USA Freedom Act effectively ended bulk collection by the government under Section 215 by requiring the government to limit the scope of its requests "to the greatest extent reasonably practicable," and by requiring that applications for business records include a "specific selection term," such as a specific individual, telephone number, or e-mail address. This addition to the business records statute was significant because the FISA Court [REDACTED]

[REDACTED] on the theory that all of the data was relevant because it was necessary to create a data archive from which to identify known and unknown terrorists that may be in the United States or in contact with U.S. persons. The new provision of the USA Freedom Act became effective on November 29, 2015, 180 days after the date of the statute's enactment; [REDACTED] bulk collection [REDACTED] expired on November 28, 2015. After that date, [REDACTED].

A Deputy Section Chief from NSD told us that the government no longer collects information in bulk under Section 215.⁷⁷

[REDACTED] authorization from the FISA Court to retain and use data previously produced under the FISA Court orders that authorized the [REDACTED]. According to filings with the FISA Court, the NSA requested authority to retain previously produced data for two reasons. First, the NSA requested 90 days of technical access to previously produced data so that authorized technical personnel could use that data to verify the completeness and accuracy of call detail records produced under the new targeted production orders authorized by the USA Freedom Act. Second, the NSA requested authority to retain previously produced data in order to remain in compliance with civil litigation preservation obligations imposed by federal district courts until the NSA was relieved of those obligations. [REDACTED]

[REDACTED].

The FISA Court appointed amicus curiae under the new provisions of the USA Freedom Act and ordered the amicus and the government to brief the issue [REDACTED]. In memoranda to the FISA Court, the amicus concluded that the USA Freedom Act did not prohibit the government's retention and requested use of the bulk data, and that it was within the discretion of the FISA Court to determine [REDACTED]

⁷⁷ As noted in Section II of this report, the USA Freedom Act created a new mechanism that allows the government to obtain call detail records from providers within two "hops" of the specific selection term on an ongoing basis for 180 days from the date of the FISA Court order. See 50 U.S.C. § 1861(b)(2)(C).

[REDACTED]. The amicus stated that given the significant privacy interests of U.S. persons that were at issue, the FISA Court should exercise its oversight authority to ensure that the government was retaining and using the previously collected information in a manner consistent with applicable minimization procedures. Following a hearing on the matter, the FISA Court granted the [REDACTED]. According to the [REDACTED], the FISA Court found [REDACTED]

[REDACTED] comported with the statutory definition of minimization procedures set forth in the FISA statute. See 50 U.S.C. § 1861(g). [REDACTED]

[REDACTED] the FISA Court found that the government's access to and use of the bulk telephony metadata was appropriately tailored to ensure that the successor program established by the USA Freedom Act was functioning effectively and to ensure compliance with the government's litigation-related obligations.

VI. CONCLUSION

As required by the USA Freedom Act, we examined the FBI's use of Section 215 authority for calendar years 2012 through 2014 in this report. Our review determined that the FISA Court issued 561 business records orders during the review period, including 212 in 2012, 179 in 2013, and 170 in 2014. We found that the Section 215 applications during our review period sought a variety of "tangible things," including transactional records for e-mail [REDACTED]

We found that the number of business records orders obtained by the FBI increased significantly between 2007 and 2014, largely driven by the refusal of several communications providers to produce transactional records for e-mail [REDACTED] (ECTRs) in response to NSLs. Between 2007 and 2009, the FISA Court issued 51 total orders. Of these, [REDACTED] related to [REDACTED], and only [REDACTED] were requests for ECTRs, representing [REDACTED] of all non-bulk business records orders obtained during that period. By contrast, between 2012 and 2014, [REDACTED] of the orders related to [REDACTED], while [REDACTED] involved requests for ECTRs, constituting roughly [REDACTED] of the non-bulk orders obtained during our review period.

Even excepting requests for e-mail [REDACTED] transactional records, the number of business records orders obtained by the FBI between 2012 and 2014 was substantially higher than in the previous review period. There were [REDACTED] business records orders for non-ECTR, non-bulk information during our review period, as compared to [REDACTED] between 2007 and 2009. Some witnesses

attributed this increase to agents' growing awareness of and comfort with the business records process, while others were unable to provide an explanation for it.

We identified changes in the use of business records orders that took place within our review period. The number of business records orders reached its peak in 2012 with 212 orders and has declined annually since then. Witnesses told us that the number of ECTR requests has declined more than other types of requests. According to an NSD Deputy Unit Chief, revelations about the NSA's bulk telephony metadata program played a role in this decline, both in terms of the stigma attached to use of Section 215 and increased resistance from providers. In comments provided to the OIG after reviewing a draft of this report, NSD also attributed the FBI's increasing use of taskings under Section 702 of the FISA Amendments Act as likely a "notable cause" in the decrease in business records requests.

We found that business records orders were used most frequently in counterintelligence cases. Of the [REDACTED] total orders we analyzed, [REDACTED] were obtained in counterintelligence cases, [REDACTED] in counterterrorism cases, and [REDACTED] in cyber cases. Agents told us that business records orders frequently [REDACTED] [REDACTED] cyber cases in some instances can open a parallel criminal case and use the grand jury process to obtain the same information more quickly and with less oversight than a business records order. [REDACTED] [REDACTED], which is consistent with agents' explanations that those cases require particularly timely acquisition of information, as discussed below.

During our review, we analyzed the timeliness of the business records process, both generally and at each phase of the approval process. We determined that the median time needed to obtain business records orders during our review period was 115 days. Business records orders spent the least amount of time in the field office phase of the approval process, a median of 16 days. Orders spent a median of 40 days with NSLB and 33 days in the NSD phase of the approval process. We found that the FBI took a median of 2 weeks to obtain final approval signatures from NSLB and the FBI Deputy General Counsel.

Agents we interviewed described the entire process as lengthy and added that the delay in obtaining business records orders often had a negative impact on their investigations. Agents conducting cyber investigations particularly emphasized this point, [REDACTED]

[REDACTED] Agents told the OIG [REDACTED] [REDACTED]. As a result, timeliness is even more critical in cyber cases. While agents said that [REDACTED] [REDACTED] [REDACTED] NSD and NSLB attorneys

acknowledged the delays in the process and told the OIG that they have taken steps to improve it, including streamlining the drafting and review process for ECTRs.

We also selected [REDACTED] applications to illustrate the various uses of Section 215 authority and to conduct a more detailed review of the types of materials requested, the purposes of the requests, the materials produced, and the manner in which the materials were used. Although agents expressed concern about the length of the process to obtain a business records order, they told us consistently that these orders continued to be a valuable investigative tool. As with our previous reviews, the majority of agents we interviewed did not identify any major case developments that resulted from use of the records obtained in response to business records orders, but told us that the material produced was valuable as a building block of the investigation. However, in at least two cases, agents we interviewed told us that the business records obtained in their investigation provided valuable information that they would not otherwise have been able to obtain. In other instances, case agents told us that they used the information obtained under Section 215 to exculpate a subject and close the investigation.

We also reviewed the [REDACTED] FISA Court orders authorizing the bulk collection of certain data as part of counterterrorism [REDACTED]. Our third report on Section 215 authority described [REDACTED] at length, including the specialized minimization procedures that applied to [REDACTED], reported compliance incidents, and the status of [REDACTED] through May 2015. As described in this report, the USA Freedom Act effectively ended the government's collection of data in bulk under Section 215 by requiring the government to limit the scope of its requests "to the greatest extent reasonably practicable," and by requiring that applications seek records related to a "specific identifier," such as an individual, account, address, or personal device. On November 24, 2015, the FISA Court granted [REDACTED] [REDACTED] the bulk data previously collected under prior FISA Court orders.

Finally, in addition to reviewing the FBI's use of Section 215 authority in calendar years 2012 through 2014, we examined the progress the Department and the FBI made in addressing three recommendations in the OIG's March 2008 and May 2015 reports. In the 2008 report, we recommended that the Department implement final minimization procedures, develop procedures for reviewing materials received in response to business records orders to identify overproduced information, and develop procedures for handling overproductions. In our May 2015 report, we recognized that the Department had adopted Final Procedures implementing the OIG's recommendations, but identified several terms used in the Final Procedures that we believed required clarification. Based on the information obtained in our current review, we concluded that the Department and the FBI have made these clarifications. We therefore have closed the recommendations.

Based on the information developed during our review, we concluded that the process used to obtain non-bulk business records orders between 2012 and

2014 contained safeguards that protected U.S. persons from the unauthorized collection, retention, and dissemination of nonpublic information about them. As described above, the business records process requires multiple layers of approval, including by attorneys in NSLB and NSD, and by the FBI EAD for certain sensitive records. Information we reviewed indicates that NSLB and NSD attorneys routinely question agents about business records applications. Rather than acting as a "rubber stamp," documents that we reviewed reflect that the FISA Court engages in a dialogue with NSD and at times has informed NSD that it will not approve certain business records applications: we identified at least [REDACTED] applications that were withdrawn after submission of a "read copy" to the FISA Court during the period covered by this review.

In addition, since July 2013, the Final Procedures require agents to determine whether nonpublic U.S. person information meets the FISA Standard before retaining or disseminating it to other agencies. We found that the agents we interviewed had received training on the minimization procedures, were knowledgeable about them, and appeared to take them seriously. The steps that the FBI and NSD have taken to implement the OIG's previous recommendations, combined with the level of oversight and reporting to monitor FBI compliance with the Final Procedures, reflect considerable progress in the FBI's use of Section 215 authority.

However, based on the concerns expressed by agents about the time needed to obtain business records orders, we recommend that the FBI and the Department continue to pursue ways to make the business records process more efficient, particularly for applications related to cyber cases where agents

[REDACTED]. Potential measures include using FISAMS data to track the timeliness of Section 215 applications, using alerts within FISAMS to identify applications that have lingered past a certain period of time without review, and implementing a streamlined drafting and review process [REDACTED]

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